THE RUNAWAY PRESIDENTIAL POWER OVER DIPLOMACY

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The President claims exclusive control over diplomacy within our constitutional system. Relying on this claim, executive branch lawyers repeatedly reject congressional mandates regarding international engagement. In their view, Congress cannot specify what the policy of the United States is with respect to foreign corruption, cannot bar a technology-focused agency from communicating with China, cannot impose notice requirements for withdrawal from a treaty with Russia, cannot instruct Treasury officials how to vote in the World Bank, and cannot require the disclosure of a trade-related report. These are just a few of many examples from recent years. The President's assertedly exclusive powers over diplomacy have become a powerful yet rarely critiqued tool for withholding information from Congress and for rebuffing congressional supervision over the content and agents of international engagement.

This Article interrogates the constitutional concept of "diplomacy"—a word that, for all the emphasis the executive branch now puts upon it, was barely an English word at the time of the Framing and was not used during the Constitution's drafting and ratification. Both structural reasoning and historical practice suggest that exclusive presidential powers over diplomacy should have a narrower ambit than executive branch lawyers currently claim. The Article excavates several forgotten limits on these powers. One is the distinction between policy and negotiation. The executive branch asserts exclusive power over both, but Congress has strong counterclaims to a constitutional power to establish policy objectives and to control outputs, such as votes in

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international organizations. Another limit relates to domestic-facing administrative agencies, which increasingly engage in regulatory coordination abroad. Both Congress's traditional role in supervising agencies and the substance of these agencies' work suggest that their international engagement should not necessarily partake of whatever exclusive powers the President holds over diplomacy and instead should be more subject to congressional control. The Article closes by proposing a distribution of power over international engagement that provides more control to Congress and by identifying institutional strategies that Congress could deploy to achieve this distribution.

INTRODUCTION

A core assumption of the executive branch is that the President possesses *exclusive* constitutional powers with respect to diplomacy. The White House and the Department of Justice routinely invoke these asserted powers to rebuff congressional interventions in foreign affairs. In 2020, for example, the Trump administration declared that Congress cannot specify that "[i]t is the policy of the United States" to help foreign allies combat corruption; cannot require the executive branch to give it notice prior from withdrawing from an important arms-monitoring treaty; and cannot require the Secretary of Commerce to provide Congress with a report on its use of statutorily delegated authority with respect to tariffs.[1] For executive branch lawyers, the "President's exclusive prerogatives in conducting the Nation's diplomatic relations are grounded in both the Constitution's system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution, and in the President's acknowledged preeminent role in the realm of foreign relations throughout the Nation's history."[2]

These sweeping claims fit poorly with our broader constitutional framework. As Justice Jackson famously instructed, assertions of exclusive presidential power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[3] Yet the exclusive diplomatic powers claimed by the President have gone largely unexamined. With the exception of one recent decision focused

[1] Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., to Eliot Engel, Chairman of the H. Comm. on Foreign Affs., and Maxine Waters, Chairwoman of the H. Comm. on Fin. Servs. Regarding H.R. 3843, at 1 (May 18, 2020), https://www.justice.gov/ola/page/file/1277331/download [https://perma.cc/J7UP-9LEU]; Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. __, slip op. at 10–12 (2020), https://www.justice.gov/olc/file/1348136/download [https://perma.cc/5HEZ-3V9D] [hereinafter OLC Opinion of Sept. 22, 2020]; Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security, 44 Op. O.L.C. __, slip op. at 1–2 (2020), https://www.justice.gov/olc/opinion/file/1236426/download [https://perma.cc/PQ6K-DY3D] [hereinafter OLC Opinion of Jan. 17, 2020].

[2] Prohibition of Spending for Engagement of the Off. of Sci. & Tech. Pol'y with China, 35 Op. O.L.C. 116, 120 (2011) [hereinafter OLC Opinion of Sept. 19, 2011]; see also, e.g., Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Just., to Jeb Hensarling, Chairman of the H. Comm. on Fin. Servs. Regarding H.R. 4537, at 1 (Mar. 5, 2018) https://www.justice.gov/ola/page/file/1041156/download [https://perma.cc/L3PW-4KYK] [hereinafter DOJ Letter of Mar. 5, 2018] (quoting this language).

[3] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

on the power to recognize foreign nations, the Supreme Court has not confronted these issues.[4] Among scholars as well, the diplomatic powers occupy a distant back seat to two other major constitutional powers in the field of foreign relations law: the war powers and the treaty powers.[5] While countless articles explore these two domains, there is relatively little scholarship on the diplomatic powers.[6] This remains true even as the executive branch has come over time, especially since the late 1980s, to

[4] Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015) (holding that the President has the exclusive constitutional power to recognize foreign nations but emphasizing the limited nature of this holding); see also infra Subsection I.A.2 (discussing the implications of *Zivotofsky* for the allocation of the diplomatic powers more generally).

[5] The approach taken in the two major foreign relations law casebooks is illustrative of the field's neglect of the diplomatic powers. Both casebooks have voluminous chapters devoted to the treaty powers and the war powers, but neither has even a sub-chapter focused on the diplomatic powers. See Curtis A. Bradley, Ashley Deeks & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials, at xi–xviii (7th ed. 2020) (devoting more than 260 pages to treaties, executive agreements, and war powers while not mentioning diplomacy in the table of contents); Sean D. Murphy, Edward T. Swaine & Ingrid Wuerth, U.S. Foreign Relations Law: Cases, Materials, and Practice Exercises, at xi–xix (5th ed. 2018) (devoting more than 330 pages to treaties, executive agreements, and war powers while not mentioning diplomacy in the table of contents). Even where the concept of diplomacy is emphasized in general treatises, as in Michael Glennon's work, there is surprisingly little discussion of the constitutional distribution of the diplomatic powers, as distinct from war powers and treaty powers. See generally Michael J. Glennon, Constitutional Diplomacy (1990). An exception in substantial alignment with the executive branch positions described in this Article is H. Jefferson Powell, The President's Authority over Foreign Affairs: An Essay in Constitutional Interpretation 152–54 (2002) (giving detailed treatment to the President's power over recognition, negotiation, and diplomatic information in addition to considering other areas of foreign relations law).

[6] For a few excellent pieces focused on aspects of the diplomatic powers, see generally Ryan M. Scoville, Ad Hoc Diplomats, 68 Duke L.J. 907 (2019) [hereinafter Scoville, Ad Hoc Diplomats] (discussing executive branch justifications for the use of non-Senate-confirmed diplomats); Kristina Daugirdas, Congress Underestimated: The Case of the World Bank, 107 Am. J. Int'l L. 517, 519–20 (2013) (describing the historic responsiveness of the Department of the Treasury to congressional directives regarding U.S. participation in the World Bank); Robert J. Reinstein, Is the President's Recognition Power Exclusive?, 86 Temple L. Rev. 1 (2013) (analyzing historical practice with respect to executive branch claims of an exclusive power to recognize foreign nations); Ryan M. Scoville, Legislative Diplomacy, 112 Mich. L. Rev. 331 (2012) [hereinafter Scoville, Legislative Diplomacy] (assessing the extent to which members of Congress engage in diplomatic activity). This Article draws on the insights of these scholars in providing an overarching description of the diplomatic powers claimed by the executive branch and showing that most of these claims rest on problematic constitutional foundations. One interesting recent article that grapples briefly but significantly with the scope of the exclusive diplomatic powers is Zachary S. Price, Funding Restrictions and Separation of Powers, 71 Vand. L. Rev. 357 (2018). Price suggests that Congress should be able to control the conduct of diplomacy through the appropriations power in certain resource-dependent contexts. See id. at 449–61.

invoke these assertedly exclusive powers more widely, stridently, and meaningfully.

The first task of this Article, therefore, is to provide a comprehensive account of exclusive diplomatic powers claimed by the President. Simply put, the scope of these asserted powers is breathtaking. When executive branch lawyers speak of exclusive power over "diplomacy," they are actually sweeping together a bundle of five discrete powers. These are: the power to *represent* the United States abroad; the power to *recognize* foreign nations; the power to determine the *content* of diplomatic communications; the power to select the *agents* of diplomacy; and the power to control access to diplomatic *information*. Each of these powers has its own constitutional pedigree and implicates different institutional values. The first two of these powers are well-established but narrow, while the latter three are deeply contested and dangerously broad. The exclusive power asserted over content, for example, is routinely claimed to encompass total control over the "time, scope, and objectives" of negotiations.[7] And it reaches not just talk but also actions, such as the casting of U.S. votes within international organizations. When Congress issues mandates that run counter to these claims of exclusive executive power, the executive branch simply needs to get a legal opinion from the Department of Justice's Office of Legal Counsel ("OLC") to have its way.

Further underlying all claims of the "President's exclusive power to conduct diplomacy"[8] is an exceptionally capacious conception of "diplomacy." Whether the subject is war or science, whether the forum is an international organization or a bilateral meeting, whether the executive branch officials involved are traditional diplomats or insurance regulators—all is "diplomacy" to the executive branch and therefore not subject to congressional control.[9] As OLC has put it in finding that

[7] Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Ronald Reagan Presidential Libr. & Museum (Dec. 22, 1987), https://www.reaganlibrary.gov/archives/speech/statement-signing-foreign-relations-authorization-act-fiscal-years-1988-and-1989 [https://perma.cc/Y33S-2EGX] [hereinafter Reagan 1987 Signing Statement]; see also, e.g., Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., to Ed Royce, Chairman of the H. Comm. on Foreign Affs. Regarding H.R. 5819, at 2 (Oct. 19, 2018), https://www.justice.gov/ola/page/file/1159456/download [https://perma.cc/F2DL-8G3E] (using similar language).

[8] OLC Opinion of Sept. 19, 2011, supra note 2, at 116.

[9] E.g., DOJ Letter of Mar. 5, 2018, supra note 2, at 2 (asserting that exclusive presidential powers over diplomacy rendered unconstitutional almost every section of a proposed congressional bill regarding the participation of Department of Treasury officials at an

Congress cannot prevent a technology-focused agency from negotiating with Chinese counterparts, "We have described the President's authority over international negotiations as extending to any subject that has bearing on the national interest."[10]

This panoramic conception of "diplomacy" greatly expands the already substantial executive branch powers claimed over diplomatic content, agents, and information. Yet as this Article shows in its second overall contribution, this conception is far from constitutionally foreordained. Indeed, the word "diplomacy" itself was barely an English word at the time of the Framing and does not appear to have been used at all during the many debates surrounding the Constitution's drafting and ratification.[11] Rather, at that time, there was at most a sense that the President had certain constitutional prerogatives with respect to the negotiation of treaties, which in turn would ultimately require the advice and consent of the Senate. And as the United States came over time to engage in many forms of international engagement other than treaties, Congress left most management with the executive branch but periodically claimed control over aspects of this engagement.

In particular, I identify four ways in which Congress has asserted control in the past over aspects of U.S. international engagement in ways that undermine the broad view of "diplomacy" adopted by today's executive branch lawyers. These four ways can be thought of as lost limits on exclusive presidential power over diplomacy. These limits are in addition to the very important power of Congress to control the implementation (or non-implementation) of most U.S. commitments as a matter of *domestic* policy—a power which the executive branch continues to acknowledge as belonging to Congress.[12] One limit was structural: to view the President as having exclusive power over the process of negotiation and the specific instructions given to negotiators, but to consider Congress entitled if it wished to form foreign policy objectives on the front end and to control acts with international legal significance at the back end. A second limit was content-based: to define "diplomacy"

international standard-setting organization focused on the regulation of the insurance industry).

[10] OLC Opinion of Sept. 19, 2011, supra note 2, at 121–22 (quotation marks and citations omitted).

[11] See infra note 100 and accompanying text.

[12] For a discussion of the power over implementation, see Jean Galbraith, From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law, 84 U. Chi. L. Rev. 1675, 1707–10 (2017).

as encompassing only issues involving certain subject matters or above certain thresholds of importance. A third limit was institutional: to exclude domestically focused agencies from the ambit of "diplomacy," such that Congress could exercise its usual level of control with respect to their activities abroad and with respect to how they interfaced with other executive branch actors regarding international engagement. A fourth limit developed from the rise of international organizations, as Congress initially claimed and exerted greater control as a price for supporting U.S. entry and participation in these organizations.

This nuanced and complex history has no place in OLC's current approach to the diplomatic powers. Rather, by selectively invoking early sources and reading them out of context, OLC gives the impression that the exclusivity of the whole bundle of the President's diplomatic powers is longstanding, firmly settled, and plainly applicable to all forms of modern foreign relations. The Trump administration took this perspective to its logical extreme, repeatedly invoking diplomatic powers in letters objecting to draft bills and in several important refusals to obey congressional mandates.[13] Yet while the Trump administration was unusually truculent, its understanding of the diplomatic powers flowed from OLC memoranda written during both Democratic and Republican administrations of the prior few decades that overread sources, ignored historical practice at odds with their positions, and failed to grapple with the profound changes in U.S. international engagement from the time of the Framing to the present.

Given the thin foundations of executive branch claims, congressional power over international engagement is ripe for reinvigoration. The final goal of this Article is to consider how such reinvigoration could be accomplished. This is not an easy avenue of inquiry, and it does not lend itself to any very satisfying solution. Doctrinally, I argue in favor of an intermediate approach between the extreme positions staked out by the

[13] See Jean Galbraith and Benjamin Schwartz, The Trump Administration and Executive Power: Evidence from Justice Department Views Letters, Lawfare (Feb. 5, 2019), https://www.lawfareblog.com/trump-administration-and-executive-power-evidence-justice-department-views-letters [https://perma.cc/M2LK-TAB4] (noting that in the first two years of the Trump administration, the Department of Justice sent fifteen letters to Congress raising objections to draft legislation as intruding on the president's diplomatic powers); OLC Opinion of Sept. 22, 2020, supra note 1, at 2 (invoking the diplomatic powers as a basis for refusing to obey a congressional mandate with respect to treaty withdrawal); OLC Opinion of Jan. 17, 2020, supra note 1, at 1–2 (invoking the diplomatic powers as a basis for refusing to obey a congressional reporting requirement).

executive branch and an alternative of complete congressional supremacy. There are a number of possible ways to accomplish this, and I offer some suggestions in the spirit of opening bids. Specifically, I suggest using two of the lost limits on "diplomacy" to achieve a more tempered balance—limits that draw on historical practice, respond to functional changes in U.S. foreign relations since the Framing, and emphasize the core structural concept of checks and balances. The first is to acknowledge congressional power to set policy objectives at the front end and to mandate certain outcomes at the back end (such as votes cast in international organizations) for negotiations whose outcomes will not otherwise be brought to the Senate or Congress for approval. The second is to treat congressional supremacy over domestic-focused agencies as constant with respect to both the domestic and foreign activities of these agencies. The use of these limits would rein in the risks of runaway presidential power over the content, agents, and information associated with U.S. international engagement.

Especially in the last thirty years, the executive branch has used its institutional power to make constitutional fictions about diplomacy into practical realities. For Congress to regain constitutional clout, it must bring its own institutional power to bear. The groundwork has already been laid by Congress's repeated willingness to enact statutory provisions asserting control over diplomacy. The challenge for Congress is in getting the executive branch to recognize these provisions as binding as a matter of constitutional law. Broadly speaking, Congress can pursue three strategies towards this end. First, congressional committees can develop their own accounts of the constitutional allocation of the diplomatic powers through hearings and reports. Second, Congress can raise the stakes of executive branch non-compliance through legislative tactics, such as anti-severability provisions that require the executive branch to obey mandates whose constitutionality it questions if it wishes to continue to receive related appropriations. Third, Congress can seek to involve the courts. This last strategy has both the highest risks and rewards and therefore should be pursued with particular care.

I focus in this Article on the distribution of constitutional power with respect to diplomacy, broadly defined. But the account given here contributes more generally to the literature regarding the separation of powers. One contribution goes to the existing literature on the role of OLC. The findings in this Article support those that view OLC as an enabler of exclusive presidential power—and further suggest that the very

transparency with which OLC expresses its views helps rather than hinders this enabling. Another contribution is to complicate some core assumptions about the role that historical practice plays in separation-of-powers disputes. While historical practice is often thought to be a tool of presidential power, it is notable how much historical practice there is—albeit uncited by OLC—that supports Congress's authority to issue mandates with respect to international engagement. This suggests that, as a structural matter, historical practice may favor findings that Congress and the President have concurrent powers rather than findings that either branch has exclusive powers. Finally, this Article serves as a reminder of how much work needs to be done at the intersection of foreign relations law and administrative law. Tropes like "diplomacy" conceal complex questions about the allocation of powers in a world in which there is no robust divide between what is foreign and what is domestic.

The rest of this Article follows the path described above. Part I categorizes the diplomatic powers into five discrete powers—power over representation, recognition, content, agents, and information. Although Congress disputes the executive branch's claims to exclusive powers over the last three of these powers, the executive branch has institutional advantages that enable it to disregard congressional mandates. Part II shows that OLC has supplemented the breadth that comes with these five powers with depth—by defining "diplomacy" far more broadly than is warranted by evidence from the time of the Framing, historical practice, or structural constitutional principles. It identifies four lost limits on the constitutional concept of "diplomacy," of which one is structural, one is based in subject matter, one is institutional, and one is tied to the special status of international organizations. Part III proposes a doctrinal allocation that provides more control to Congress and identifies institutional strategies that Congress could deploy to achieve this distribution. It also notes several broader implications that this Article holds for the study of the separation of powers.

This Article focuses on the constitutional conflict between Congress and the Presidency with respect to control over diplomacy. With this focus come inevitable limitations, two of which deserve specific mention. First, some of the power struggles described here—particularly regarding control over agents and information—are entwined with broader constitutional questions about the extent to which Congress can control the structure of the executive branch and demand information from it. I do not address these questions, but rather focus on the extent to which

power struggles relating to control over international engagement do or should differ from the broader baseline, whatever it is. The second limitation is that I focus on legal claims rather than on policy outcomes. It is possible and indeed often the case that the executive branch will object on principle to a legislative provision related to diplomacy even where it is either in full agreement with the policy set forth in this provision—or willing to adhere to this policy in practice to placate members of Congress. But while these factors reduce the practical effect of constitutional disagreements, they are not full substitutes for the constitutional allocation of control. One of the many grim lessons left over from the Trump administration is that law rather than norms can be the only boundary between action and constraint.

I. THE PRESIDENT'S CLAIMS TO EXCLUSIVE DIPLOMATIC POWERS

The OLC considers it "well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States."[14] A keyword here is "exclusive." With respect to most matters of international negotiation, no one doubts that, from the beginning, the President has had independent power in the face of congressional silence.[15] But OLC's claims go far further in invoking exclusive authority, empowering presidents to act as they see fit *even if* statutes passed by Congress direct otherwise.

The exclusive executive authority over diplomacy claimed by OLC is both sweeping and contested. As this Part shows, this authority is actually a bundle of five discrete powers, each individually significant and collectively astounding in their scope. And there are good reasons to question OLC's constitutional reasoning with respect to three of these powers. Indeed, our constitutional history is replete with instances where

[14] Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. O.L.C. 123, 124 (1995).

[15] There are a few arguable exceptions. One is the President's power to use special envoys who have not been approved by the Senate as agents in negotiations. See Scoville, Ad Hoc Diplomats, supra note 6, at 917–21. Another—also related to a power partly entrusted to the Senate—is the President's power to instruct U.S. diplomats engaged in treaty negotiations without pre-clearing these instructions with the Senate. Jean Galbraith, Prospective Advice and Consent, 37 Yale J. Int'l L. 247, 256–60 (2012) (noting that this power was initially contested during the Washington administration). The Supreme Court has observed that the President has a "vast share of responsibility for the conduct of our foreign relations," including "the lead role . . . in foreign policy" and "a degree of independent authority to act." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414–15 (2003) (quotation marks and citation omitted).

Congress has legislated regarding these powers in ways that OLC would now call unconstitutional.

Notwithstanding their contested nature, OLC's legal views give the President a powerful upper hand. For if executive branch officials do not want to obey a congressional mandate relating to diplomacy, they can get a legal opinion from OLC excusing them from doing so. Executive branch actors have invoked this work-around in a range of contexts and, most recently, the Trump administration used it for several high-stakes issues.

A. The Bundle of Diplomatic Powers

The struggle for control over diplomacy between the executive branch and Congress is multifaceted. In what follows, I unbundle the diplomatic powers into five categories: the power to *represent* the United States abroad; the power to *recognize* foreign nations; the power to decide the *content* of diplomatic communications; the power to select and control the *agents* of diplomacy; and the power to control access to diplomatic *information*. These five categories differ not only in their functions but also in the institutional values which they advance or constrain.

For each category, I first describe its contours and then discuss the extent to which it is currently the subject of contestation between the executive branch and Congress. As will be seen, OLC claims that the President has exclusive control over *all* these powers (and defines them broadly), often relying on shoddy reasoning to exaggerate the arguments in its favor and overlook historical practice to the contrary. By contrast, Congress continues to legislate in ways that assert authority over aspects of United States international engagement, including with respect to content, agents, and information.

1. Power over Representation

The most intuitive of the diplomatic powers—and the one with the strongest justification for presidential exclusivity—is the power to represent the United States abroad. While a member of the House of Representatives in 1800, John Marshall described the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations," explaining that "any act to be performed by the

force of the nation is to be performed through him."[16] By the mid-twentieth century, the renowned scholar Edward Corwin would remark that "there is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations."[17]

The President's power over representation goes to the *process* by which the United States engages abroad. To channel Corwin once again, this power to serve as the "mouthpiece" of the United States is analytically distinct from the "power of decision" over what is to be said.[18] Indeed, the President's power to represent the United States may have come originally from international rather than constitutional law. The written Constitution does not specifically assign the power to represent the United States abroad to either of the political branches. Reading it, one might think that the right to represent the United States abroad should be *shared* between Congress and the President. Congress is entitled to "declare war," "regulate commerce with foreign nations," and legislate as is "necessary, and proper" to effectuate all vested federal powers, while the President makes treaties and appoints ambassadors "with the advice and consent of the Senate," "receive[s] ambassadors," and faithfully executes the laws.[19] Yet international law at the time of the Framing and since has put a heavy thumb on the President's side of the scale by channeling diplomatic communications through public ministers and giving special privileges to heads of state.[20]

The President's power over representation gives the President the exclusive right to communicate diplomatically *on behalf of the United*

[16] 10 Annals of Cong. 613 (1800) (statement of Rep. Marshall) (arguing that the President therefore had the constitutional authority to carry out an extradition in keeping with the terms of a pre-existing treaty). As one scholar has observed, "[e]arly on, letters addressed to Congress from foreign nations were left unopened and sent to the president," given the President's role as the organ of communications. Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers 189 (2020).

[17] Edward S. Corwin, The President: Office and Powers 1787–1957, at 184 (4th ed. 1957).

[18] Id. at 178.

[19] See U.S. Const. art. I, § 8; id. art. II, §§ 2, 3.

[20] See, e.g., Emer de Vattel, The Law of Nations bk. IV, §§ 56, 59 (1829) (providing that the "only way for nations and sovereigns to communicate and adjust their interest is . . . by means of public ministers" and further observing that those who have "the right . . . of treating with foreign powers . . . incontestably have also that of sending and receiving public ministers"); Vienna Convention on the Law of Treaties art. 7, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (providing that "Heads of State, Heads of Government and Ministers for Foreign Affairs" are "considered as representing their State" without needing to produce credentials to that effect).

States. It is not an exclusive right to control all communication that takes place between governmental officials within the United States and foreign counterparts. U.S. history is replete with communication between foreign governmental actors and independent agencies, members of Congress, governors, and even local leaders.[21] While executive branch actors have occasionally described such communications as unconstitutional,[22] practical reality pushes firmly in the other direction. These other governmental actors can say what they want with great freedom, and they have considerable power to make commitments for whatever governmental units are within their control.[23] But the power to formally speak for the United States—what Ryan Scoville calls sovereign diplomacy[24]— lies with the President.

2. Power over Recognition

A second diplomatic power is the recognition power. Recognition refers to formal acknowledgment for purposes of international law of another's international legal status, including "the recognition of states,

[21] See, e.g., Peter Conti-Brown & David Zaring, The Foreign Affairs of the Federal Reserve, 44 J. Corp. L. 665, 665–67 (2018) (describing how the Federal Reserve Board engages abroad); Scoville, Legislative Diplomacy, supra note 6 (documenting extensive interactions with foreign governmental officials by members of Congress over time); Julian G. Ku, Gubernatorial Foreign Policy, 115 Yale L.J. 2380, 2391–96 (2006) (documenting examples of interactions between governors and other state executives with foreign governmental officials).

[22] By way of example, when Senator Tom Cotton and numerous Republican colleagues sent an open letter to the leaders of Iran that sought to undercut the Obama administration's negotiations with Iran regarding nuclear weapons, Secretary of State John Kerry referred to this letter as "unconstitutional." Reena Flores, John Kerry Slams 'Unconstitutional' GOP Letter to Iran, CBS News (Mar. 15, 2015), https://www.cbsnews.com/news/john-kerry-will-not-apologize-for-unconstitutional-gop-letter/ [https://perma.cc/SJ2F-AK8W]. For a discussion of this issue and an argument that there should be a "converse *Youngstown* framework" for evaluating the constitutionality of such actions, see Kristen E. Eichensehr, Courts, Congress, and the Conduct of Foreign Relations, 85 U. Chi. L. Rev. 609, 629–39, 647–49 (2018).

[23] This is true notwithstanding the Logan Act, ch. 1, 1 Stat. 613 (1799), which authorizes the criminal prosecution of U.S. citizens who communicate with foreign governmental agents in ways aimed at affecting U.S. foreign relations. Although the Logan Act exists on the books, to date it has seen basically no use in practice. Scoville, Legislative Diplomacy, supra note 6, at 352–53 (noting no historic uses against members of Congress and identifying unresolved questions regarding the reach of the Logan Act).

[24] Scoville, Legislative Diplomacy, supra note 6, at 334; see also id. at 364 (noting the robust historical support for "the president as holding exclusive power to engage in sovereign diplomacy").

the recognition of governments, and the recognition of insurgency or belligerency."[25]

The power over recognition is the power to *confer status*. Like the power of representation, it serves as a gatekeeper to the rest of diplomacy on the part of the United States. But where the power of representation is about who speaks for the United States, the power of recognition is about whom the United States views as a legitimate counterpart. Closely associated with this power is the right to determine what foreign powers—or individual representatives of these foreign powers—the United States will engage with diplomatically.[26]

The executive branch has long considered the President to have exclusive power over recognition. There are reasons to debate this view, but it is one on which Congress has offered relatively little resistance over the course of constitutional history.[27] And in 2015, the Supreme Court validated the executive branch's position, holding that the recognition power was indeed exclusive to the President. *Zivotofsky v. Kerry* considered whether Congress could force the State Department to permit U.S. citizens born in Jerusalem to list "Israel" as their country of birth on their passports.[28] Justice Kennedy's opinion for the five-Justice majority observed that the clause in Article II providing that the President may receive ambassadors gave rise to "a logical and proper inference . . . [that this clause] would be understood to acknowledge his power to recognize

[25] 2 Marjorie M. Whiteman, Digest of International Law § 1, at 1 (1963) (also noting its use with respect to acquisition of territory).

[26] See, e.g., Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189, 193–94 (1996) [hereinafter OLC Opinion of May 15, 1996] (asserting that a congressional appropriations statute seeking to limit the U.S. diplomatic footprint in Vietnam unless Vietnam met certain conditions was unconstitutional because the "Executive's recognition power necessarily subsumes within itself the power . . . to define the nature and extent of diplomatic contacts with an as-yet unrecognized government"). A further issue is the extent to which an exclusive recognition power would imply an exclusive power to determine certain immunities. Compare Lewis S. Yelin, Head of State Immunity as Sole Executive Lawmaking, 44 Vand. J. Transnat'l L. 911, 951–61 (2011) (arguing that such an exclusive executive power flows from what the author considers settled exclusive presidential power over diplomacy, including the recognition power), with Ingrid Wuerth, Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department, 51 Va. J. Int'l L. 915, 918–21 (2011) (arguing against an exclusive executive power to make certain immunity decisions).

[27] For a careful account of historical practice as it relates to the recognition power, see generally Reinstein, supra note 6.

[28] Zivotofsky v. Kerry, 576 U.S. 1, 7–9 (2015).

other nations."[29] In finding the recognition power exclusive to the President, the Court emphasized that "[t]he weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency."[30] By contrast, the three dissenting Justices expressed skepticism that the President's recognition power was exclusive and reasoned that the case did not implicate the recognition power in any event.[31]

In finding that the President had exclusive control over recognition, the Court took care to signal the narrowness of its holding. It indicated that the President had some further exclusive diplomatic prerogatives, but it made no broad pronouncements with respect to control over agents, content, or information.[32] To the contrary, the Court included the following caution:

> The Secretary [of State] now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." . . . This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate . . . presents different issues and is unnecessary to the resolution of this case. . . .
>
> In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and

[29] Id. at 12. A sixth Justice—Justice Thomas—concurred in part in the judgment of the majority. Justice Thomas did not rely on claims particular to the recognition power, however, but rather argued that the President had a more general exclusive foreign affairs power. Id. at 35–40 (Thomas, J., concurring in part and dissenting in part).

[30] Id. at 28.

[31] Id. at 64 (Roberts., C.J., dissenting) (acknowledging that the President has at least a concurrent power over recognition, but stating "I am not convinced" that this power is exclusive); Id. at 71 (Scalia, J., dissenting) ("Neither text nor history nor precedent yields a clear answer to these questions [of exclusivity].").

[32] Id. at 21 (observing that the "President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged"). The Court also noted in passing that the "President has the sole power to negotiate treaties" and observed that "Congress may not send an ambassador without his involvement." Id. at 13. The Court did not suggest that a sole power to negotiate treaties—which would later be put to the Senate for advice and consent—amounted to a sole power over the content of all diplomacy, let alone a sweeping understanding of "diplomacy." See id. at 20.

> respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. . . . It is not for the President alone to determine the whole content of the Nation's foreign policy.[33]

3. Power over Content

A third power is the authority to control the content of diplomacy. To what extent can Congress specify U.S. foreign policy objectives and mandate that the executive branch pursue (or not pursue) certain negotiating objectives? Can Congress establish waiting periods or other rules related to the timing of diplomacy? Can Congress direct how the United States votes in international organizations?

Power over the content of diplomatic communications goes to the *substance* of U.S. foreign policy. Unlike the power over representation, which is about the process of communication, the power over content directly implicates the principle of democratic control.

At the time of the Framing, the issue of control over content arose mostly in relation to treaties—which require the advice and consent of two-thirds of the Senate prior to ratification. Practice in the Washington Administration established that the President could develop negotiating instructions against a backdrop of silence from the Senate but did not address whether the President could give instructions that contradicted a mandate from the Senate.[34]

In 1816, the newly formed Senate Foreign Relations Committee noted that the "President is the constitutional representative of the United States with regard to foreign nations," and expressed its view that the President "must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of

[33] Id. at 19–21; see also id. at 67 (Roberts, C.J., dissenting) (describing the Court's decision to "allow[] the President to defy an Act of Congress in the field of foreign affairs" as a "perilous step"). The Court also signaled disapproval of expansive dicta favoring exclusive presidential foreign affairs powers from *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319 (1936). *Zivotofsky*, 576 U.S. at 20–21. For discussion of the ambivalence of *Zivotofsky* with respect to broader exclusive executive power over diplomacy, see Harlan Grant Cohen, Agora: Reflections on *Zivotofsky v. Kerry*: *Zivotofsky II*'s Two Visions for Foreign Relations Law, 109 AJIL Unbound 10, 14–15 (2015).

[34] See Galbraith, supra note 15, at 256–60 (noting how this power was initially contested during the Washington administration).

success."[35] In cautioning the Senate to leave negotiations to the President, however, the Senate Foreign Relations Committee neither said that the Senate was constitutionally obligated to do so nor directly opined on whether the President had the constitutional power to disregard direction from the Senate. The Committee emphasized that the Senate would later have the right to approve or disapprove the ultimate product of negotiations, observing that "the more separate and distinct in practice the negotiating and treaty-ratifying powers are kept, the more safe the national interests."[36]

Questions of control over diplomatic content arose in other settings during the nineteenth century. In one incident in the 1820s, President John Quincy Adams sought an appropriation for a U.S. diplomat to attend an international conference, and Congress debated whether to include negotiation instructions in the appropriation. In a speech on the floor of the House, Daniel Webster resisted this inclusion because he considered that "the giving of instructions to Ministers abroad" was "an exercise of Executive power."[37] He felt that Congress should not instruct specific diplomats, but he also made explicit his view that Congress could exert control over the overall content of U.S. foreign policy. Webster had "[n]o doubt" that the executive branch could maintain a negotiating position with respect to Cuba "only so long as it receives the approbation and support of Congress," adding that "[i]f Congress be of the opinion that [the current] course of policy is wrong, then he agreed it was in the power, and he thought, indeed, the duty of Congress to interfere, and to express its dissent."[38]

Today, the executive branch claims total constitutional control over the content of diplomacy. A commonly used phrase by OLC and in some presidential signing statements is that the President has "exclusive constitutional authority to determine the time, scope, and objectives of international negotiations."[39] Notably, this sweeping phrase dates to the 1980s—about two hundred years *after* the Framing—and was brought

[35] S. Comm. on Foreign Rel., Rep. of Feb. 15, 1816, 14th Cong., 1st Sess. (1816), *reprinted in* 6 Compilation of Reports of Committee on Foreign Relations, U.S. Senate, 1789–1901, at 21 (1901) [hereinafter 1816 SFRC Report].

[36] Id. at 22.

[37] 9 Abridgment of the Debates of Congress, from 1789 to 1856, at 94 (1858) (statement of Rep. Webster in April 1826).

[38] Id.

[39] Statement on Signing the Countering America's Adversaries Through Sanctions Act, 2017 Daily Comp. Pres. Doc. 201700559 (Aug. 2, 2017).

into OLC parlance by William Barr in 1990.[40] In the view of the executive branch, Congress can never mandate that the executive branch initiate negotiations, pursue specified negotiating objectives, adhere to a waiting period prior to finalizing an agreement, absent itself from certain negotiations, or veto a Security Council resolution. Nor can Congress control U.S. diplomacy at a high level of generality by establishing the strategic goals, while leaving tactical decisions to the executive branch. Congress cannot even use the phrase "it is the policy of the United States" with respect to matters of foreign policy.[41]

[40] The first approximate use of this phrase that I have found came in a signing statement by President Ronald Reagan in 1987. Reagan 1987 Signing Statement, supra note 7 ("I construe these [statutory] provisions as being subject to my exclusive authority to determine the time, scope, and objectives of any negotiations."). OLC first incorporated this phrase into a legal memorandum several years later and has used it frequently since. See Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 41 (1990) [hereinafter OLC Opinion of Feb. 16, 1990] (describing President Reagan's signing statement in a parenthetical as "invoking the President's 'exclusive authority to determine the time, scope, and objectives' on any international negotiations"); Legis. Prohibiting Spending for Delegations to U.N. Agencies Chaired By Countries That Support Int'l Terrorism, 33 Op. O.L.C. 221, 231 (2009) [hereinafter OLC Opinion of June 1, 2009] (citing prior uses).

[41] For example, even as the Trump administration emphasized the need to prevent Iran from developing ballistic missiles that could launch nuclear weapons, it objected to language along these lines from Congress as intruding on the President's exclusive diplomatic powers. Compare Remarks by President Trump on Iran Strategy (Oct. 13, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-iran-strategy/ [https://perma.cc/4GC2-GBKD] (noting that it is "totally important" to "prevent Iran from developing . . . an intercontinental ballistic missile," and expressing support for a congressional bill on this issue), with Letter from Stephen E. Boyd, Assistant Att'y Gen., to Rep. Ed Royce, Chairman of the H. Comm. on Foreign Affs. 1 (Nov. 9, 2017) (quoting in part the Iran Ballistic Missiles and International Sanctions Enforcement Act, H.R. 1968, 115th Cong. § 2(b) (2017)), https://www.justice.gov/ola/page/file/1019941/download [https://perma.cc/QR2S-FD3K] (objecting on constitutional grounds to a provision stating that it "is the policy of the United States to prevent Iran from undertaking any activity related to ballistic missiles designed to be capable of delivering nuclear weapons," since this provision "is apparently intended to require the Executive Branch to initiate contact with foreign partners relating to specific topics and to advance specified objectives"). The Department of Justice took a similar position during the Obama administration. See Letter from Ronald Weich, Assistant Att'y Gen., to Rep. Ileana Ros-Lehtinen, Chairman of the House Comm. on Foreign Affs. 1–2 (Nov. 1, 2011), https://www.justice.gov/sites/default/files/ola/legacy/2011/11/08/110111-ltr-re-hr-1905-iran-threat-reduction-act-2011.pdf [https://perma.cc/RQK8-KKLJ] (discussing the Iran Threat Reduction Act of 2011, H.R. 1905, 112th Cong. § 103 (2011)) (objecting to similar language in a proposed bill on the ground that declaring the "policy of the United States" would "purport[] to state a general national policy that would encompass positions taken by the United States in international discussions and negotiations"). It is unclear whether, as a matter of interpretation, language specifying "the policy of the United States" creates legal obligations. Is it more a substantive mandate or more like a preamble?

Instead, under the executive branch's view, Congress has no direct power over diplomacy and can exert only persuasion or indirect power. As to persuasion, Congress can promise carrots to the executive branch if it adheres to congressional preferences—such as by promising to give up-or-down votes to trade agreements whose negotiations track to congressionally determined aims.[42] As to indirect power, Congress can influence the content of diplomacy through legislation that on its face is unrelated to communication between nations. For example, Congress can mandate sanctions on a particular country, and these sanctions will undoubtedly cast a shadow on any negotiating positions taken by the executive branch in relation to that country. Congressional inaction can similarly have indirect effects on negotiations. In the absence of domestic cap-and-trade legislation, for example, the executive branch knows that it should not commit the United States internationally to a cap-and-trade program unless this commitment is made contingent on the later obtainment of implementing legislation. These are important constraints in practice, but they do not serve as direct limits on how the executive branch interacts with foreign counterparts or within international organizations.

In support of its views, OLC largely cites back to its own prior positions. Where it cites to historical precedents—like the 1816 SFRC report and the Daniel Webster remarks—it does so in questionable ways. As to the 1816 SFRC report, OLC treats it as supporting the broader claim that Congress may not "purport[] to impose statutory restrictions" on "the President's authority to determine whether, how, when, and through whom to engage in foreign diplomacy."[43] OLC does not recognize that central to the 1816 report (which involved the Senate rather than Congress) was the recognition that the Senate would have a chance to review the end product of diplomacy—the treaty—through its advice and

But it is clear that the executive branch views this language as constitutionally objectionable in statutes addressing issues of foreign affairs.

[42] For a recent example, see the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114–26, § 103(b)(3), (c)(1), 129 Stat. 320, 335, which President Obama signed into law without making a signing statement.

[43] OLC Opinion of June 1, 2009, supra note 40, at 230; see also OLC Opinion of Feb. 16, 1990, supra note 40, at 41 (quoting the 1816 SFRC Report, supra note 35, at 21) (supporting certain broad presidential powers with respect to diplomacy and then simply stating that these powers "cannot be circumscribed by statute"). For a critique of the conclusion reached in the first of the memos cited in this footnote, see generally Rachel Sussman, Note, The Power of Parlay: Control of the Diplomacy Power Between Congress and the Executive, 8 Geo. J.L. & Pub. Pol'y 537, 554–57 (2010).

consent process. This premise does not hold for most types of international engagement today, as very few negotiations lead to Article II treaties or even to agreements that will be subsequently put to Congress for approval.[44] Similarly, OLC mentions the Webster remarks only as sources of support for claims of exclusive presidential powers over diplomacy and never discusses the way in which they undermine these claims with respect to the content of diplomacy.[45]

Despite claims to exclusive control over the content of diplomacy made by the executive branch, Congress has passed many, many statutes asserting control over the content of U.S. international engagement. Congress has used the phrase "the policy of the United States," in legislation relating to diplomatic objectives long before OLC started objecting to this phrase—indeed since long before OLC even *existed* as an institution.[46] And the pages of the *United States Statutes at Large* have many examples of more granular commands as well. Congress sometimes mandates specifically that "the President shall negotiate" on a particular issue, as in "[t]he President shall negotiate suitable arrangements with the Republic of Panama whereby each nation shall agree to take all measures within its legal authority to assure that members of [a] Board of the

[44] See Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, 134 Harv. L. Rev. 629, 632–33 (2020) (noting that most international agreements made by the United States today are done not as treaties, but rather as executive agreements that do not receive the subsequent consent of Congress).

[45] Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 273 n.66 (1996) [hereinafter OLC Opinion of June 28, 1996]; OLC Opinion of May 15, 1996, supra note 26, at 197 n.18.

[46] For a few early examples, see H.R.J. Res. 48, 46th Cong., 21 Stat. 308 (1880) ("Whereas, it is the policy of the United States to permit its own citizens and the citizens of France, Spain, Italy, and Austria to freely engage" in certain trade.); Defense Production Act of 1950, ch. 932, § 2, 64 Stat. 798 ("It is the policy of the United States to oppose acts of aggression and to promote peace by insuring . . . the peaceful settlement of differences among nations."). For some later examples, see Food for Peace Act of 1966, Pub. L. No. 89–808, § 2, 80 Stat. 1526 ("The Congress hereby declares it to be the policy of the United States to expand international trade . . . ."); Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95–242, § 2, 92 Stat. 120 ("[I]t is the policy of the United States to . . . actively pursue through international initiatives[,] mechanisms for [nuclear] fuel supply assurances."). The executive branch has not always honored congressional pronouncements about U.S. foreign policy. See Eli E. Nobleman, Financial Aspects of Congressional Participation in Foreign Relations, 289 Annals of Am. Acad. Pol. & Soc. Sci. 145, 154–55 (1953) (describing an instance in which the executive branch disregarded a policy pronouncement accompanied by a request to host a conference).

Commission comply with [a specified] code of conduct."[47] Other statutory provisions use slightly different phrasing, such as a 1996 statute stating that "[t]he President shall seek to develop, in coordination with . . . other countries . . . a comprehensive, multilateral strategy to bring democracy to . . . Burma."[48] Neither these examples nor the accompanying ones mentioned below in footnotes, triggered executive branch objections in the form of signing statements. While Congress may be content to leave most decisions about the content of diplomacy to the executive branch, this legislation demonstrates a congressional view that Congress is entitled to pass legislative mandates about the content of international engagement if it so chooses.

[47] Act of Sept. 27, 1979, Pub. L. No. 96–70, § 1112(d), 93 Stat. 460; see also Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–500, § 7, 86 Stat. 816, 898 ("[T]he President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums" seeking certain uniform standards and controls over pollution.). I focus here on statutory provisions that use "shall" or otherwise sound like mandates, as these are the ones in which Congress's assertion of power is most forceful. Congress commonly weighs in using more permissive language (e.g., "The President should," or "The President is requested") and also often uses language that connotates a delegation of authority but not a directive to act (e.g., "The President is authorized"). For an example of both permissive and delegating language, see Act of July 26, 1911, ch. 3, § 3, 37 Stat. 4, 12 ("[T]he President . . . is authorized and requested to negotiate trade agreements with the Dominion of Canada.").

[48] Act of Sept. 30, 1996, Pub. L. No. 104–208, § 570(c), 110 Stat. 3009, 3009–166. In a decision about foreign affairs federalism, the Supreme Court noted this statutory provision in passing without expressing any concerns about its legality. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000) (noting that "Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government, cf. *Youngstown Sheet & Tube Co.*, 343 U.S., at 635, in harmony with the President's own constitutional powers"); see also Lori Fisler Damrosch, Treaties and International Regulation, 98 ASIL Proc. 349, 351 (2004) (noting that the Supreme Court in *Crosby* "cast no doubt whatsoever on [the provision's] constitutionality as between Congress and the president"). For a few other variants, see Act of Nov. 22, 1983, Pub. L. No. 98–164, § 118, 97 Stat. 1022 ("The President shall use every available means at his disposal to ensure that the 1985 Conference to commemorate the conclusion of the United Nations Decade for Women is not dominated by political issues extraneous to the goals of the 1985 Women's Conference."); Act of Aug. 27, 1986, Pub. L. No. 99–399 § 601, 100 Stat. 853, 874–75 ("The Congress hereby directs the President . . . to seek universal adherence to the Convention on the Physical Protection of Nuclear Material [and] to seek agreement in the United Nations Security Council" respecting nuclear terrorism.). For some other directives, largely aimed at members of the executive branch other than the President, see Ryan M. Scoville, Compelled Diplomacy in *Zivotofsky v. Kerry*, 9 N.Y.U. J.L. & Liberty 1, 9–10 (2014).

Voting in international organizations is a special form of diplomatic engagement—not just talk, but also an act of international legal significance. The executive branch now claims that it has exclusive control over how the United States casts its votes.[49] Yet Congress has long asserted control with respect to votes, including on many occasions without objections from the executive branch.[50] As one significant example, Congress specified in a 1947 statute that the United States would "waive[] the exercise of any veto" in the U.N. Security Council on the subject of aid to Greece or Turkey.[51] As President Truman's Secretary of State explained in his memoirs, this provision was deemed "a cheap price for [a leading senator's] patronage and warmly welcomed by . . . our representative at the United Nations."[52] There is no implication that executive branch actors doubted the constitutionality of this provision; rather, the implication is one of acquiescence.[53] Yet this statutory precedent finds no mention in OLC memoranda.

4. Power over Agents

A fourth diplomatic power relates to the agents of diplomacy. The Constitution's Appointments Clause provides that the President "shall

[49] See, e.g., DOJ Letter of Mar. 5, 2018, supra note 2, at 1–2; Daugirdas, supra note 6, at 519–20 ("Every president since George H. W. Bush has issued signing statements objecting that these legislated instructions [including on how U.S. representatives to the World Bank should vote] impinge on the president's exclusive constitutional authority to engage in international negotiations.").

[50] Daugirdas recounts this history with respect to the World Bank. Daugirdas, supra note 6, at 526–33 (listing many examples). In the early days of international organizations, Congress sometimes sought to assert even more control. See Act of July 1, 1916, Pub. L. No. 64–131, 39 Stat. 252, 260 ("The duly appointed representative of the United States on the Permanent Commission of the International Geodetic Association is hereby granted authority to vote with the representatives on the permanent commission from other nations on all matters coming before the association . . . subject to the approval of Congress.").

[51] Act of May 22, 1947, ch. 81, Pub. L. No. 80–75, § 5, 61 Stat. 103, 105.

[52] Dean Acheson, Present at the Creation: My Years in the State Department 223–24 (1969).

[53] See id. at 224. There is also at least a touch of historical practice to support Congress's ability to exercise control over whether the United States signs an international agreement. In appropriating money in 1924 for a conference aimed at renegotiating the Opium Convention, Congress provided that "the representative of the United States shall sign no agreement which does not fulfill [certain] conditions necessary for the suppression of the habit-forming narcotic drug traffic." H.R.J. 195, ch. 155, 43 Stat. 119, 120 (1924). The head of the U.S. negotiating team—who happened to be the same member of Congress who had proposed this limitation—cited this requirement in withdrawing the United States from the conference. See Nobleman, supra note 46, at 156 & n.60 and accompanying text (noting, however, that "no attention appears to have been paid to the instructions" in a subsequent conference seven years later).

nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, [and] other public Ministers and Consuls."[54] This language suggests that the selection of diplomats requires joint acceptance by the President and the Senate. This language does not explicitly address broader organizational questions, like who has the authority to create offices and whether Congress can assign specific tasks to specific offices.

Like the power over representation, the power over the agents of diplomacy is about *process*. But unlike the power over representation, the power over agents is focused inward rather than outward. It is not about which branch communicates with the rest of the world on behalf of the United States, but rather about how the actors within the executive branch are chosen, empowered, and supervised. Executive branch lawyers now claim that presidents can exercise exclusive control over the agents of diplomacy. These claims offer the President ways to bypass both the Senate advice and consent process for appointees and congressional mandates regarding how the executive branch conducts diplomacy.

While many executive branch actors who participate in diplomacy are Senate-approved, presidents consider themselves entitled to conduct diplomacy through agents who have not received Senate approval. Ryan Scoville's work aptly describes how presidents came to claim the right to use special envoys for diplomacy, in large part by aggressively overreading early precedents.[55] This proclaimed right means that, with respect to diplomacy, the President can circumvent the Senate's advice and consent power whenever the President wishes to do so. In the Trump administration, for example, Jared Kushner never received a Senate-confirmed appointment but had a diplomatic portfolio that included the Middle East peace process.[56]

In addition to the power to use special envoys, Presidents claim an exclusive right to decide who participates in negotiations. Early in constitutional history, there was debate over whether Congress could establish diplomatic offices, but by the early twentieth century "Congress ha[d] gained power at the expense of the executive . . . in the matter of

[54] U.S. Const. art. II, § 2.

[55] Scoville, Ad Hoc Diplomats, supra note 6, at 917–21 (describing these claims of authority and arguing they are inconsistent with the Constitution's original meaning).

[56] Id. at 908–11.

appointments."[57] Congress has frequently established particular offices and assigned portfolios to these offices, as with the requirement that the President "shall appoint" an ambassador to the United Nations who "shall represent the United States in the Security Council of the United Nations."[58] Especially since the 1990s, however, the executive branch has resisted congressional efforts to limit who can occupy these offices or to insist that certain negotiations go through certain offices. In 1996, for example, OLC declared unconstitutional a congressional requirement that the U.S. Trade Representative could not have previously advised a foreign government in trade negotiations.[59] And in 2011, OLC stated that Congress could not bar the White House Office of Science and Technology Policy from collaborating with China because of the President's "exclusive constitutional authority to choose the agents who will engage" in diplomatic communications.[60]

Notwithstanding these executive branch claims, past legislation reveals ample instances in which Congress has exercised control in ways that the executive branch now resists. In addition to structuring the bureaucracies of diplomacy, Congress has passed many statutes specifying that certain executive branch actors shall undertake negotiations and at times, also

[57] Henry M. Wriston, American Participation in International Conferences, 20 Am. J. Int'l L. 33, 33–34 (1926) (discussing various nineteenth century statutes and how initial resistance by the executive branch to these statutes gradually dwindled). For an account of the earlier practice in which the Washington administration fended off legislative mandates regarding diplomatic grades, see Powell, supra note 5, at 41–47.

[58] United Nations Participation Act of 1945, ch. 583, Pub. L. No. 79–264, § 2(a), 59 Stat. 619. For a discussion of this practice and, more generally, of constitutional issues related to the establishment of diplomatic offices, see Ryan M. Scoville, Unqualified Ambassadors, 69 Duke L.J. 71, 149–66 (2019).

[59] Constitutionality of Statute Governing Appointment of U.S. Trade Representative, 20 Op. O.L.C. 279, 279–80 (1996) (determining that "the restriction is particularly egregious because the office in question involves representation of the United States to foreign governments—an area constitutionally committed to the President").

[60] OLC Opinion of Sept. 19, 2011, supra note 2, at 125; see also, e.g., Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Just., to Rep. Ed Royce, Chairman of the H. Comm. on Foreign Affs. 3–4 (Feb. 13, 2018), https://www.justice.gov/ola/page/file/1035286/download [https://perma.cc/6NPT-3YQG] ("The President has exclusive authority to identify the agents who will engage in diplomatic activity."); Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just., to Sen. James Inhofe, Chairman of the S. Comm. on Armed Servs. 6 (Nov. 27, 2019), https://www.justice.gov/ola/page/file/1222061/download [https://perma.cc/E6SW-4JS7] (objecting that while a particular statutory provision "would allow the President to enter into a cybersecurity agreement with Russia through the Department of the Defense, it would effectively disallow the President from using other agents, such as the Secretary of State, from doing the same").

specifying that these actors should consult with particular other persons in the process.[61] This practice has antecedents that go back to 1792, when Congress specified by statute that "the Postmaster General may make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets."[62]

5. Power over Information

A final power over diplomacy is power over information. To what extent can Congress mandate that the executive branch provide it with information related to diplomacy?

This power over information is about *oversight*. If Congress has no authority to obtain information from the executive branch about diplomacy, then it cannot ensure that executive branch officials are acting wisely and lawfully. On the other hand, if confidential information is obtained by Congress and then inappropriately released, there may be problematic consequences for the United States on the international stage.

Disputes between Congress and the President over access to diplomacy-related information go back to the beginning of our constitutional history. In 1794, President Washington withheld some

[61] See, e.g., Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102–138, § 301(b), 105 Stat. 647, 707 (1991) ("The Secretary of State shall designate a high level official with responsibility for . . . [developing] a proposal for the prosecution of Persian Gulf War criminals in an international tribunal, including proposing in the United Nations the establishment of such a tribunal, and advising the United States Permanent Representative to the United Nations in any discussion or negotiations concerning such matters."); Compact of Free Association Act of 1985, Pub. L. No. 99–239, § 102, 99 Stat. 1770, 1775–76 (1986) (providing that the President shall negotiate law enforcement assistance agreements with the Marshall Islands and that "[a]ny official, designated by this joint resolution or by the President to negotiate any agreement under this section, shall consult with affected law enforcement agencies prior to entering into such an agreement on behalf of the United States"); Deep Seabed Hard Mineral Resources Act, Pub. L. No. 96–283, § 118, 94 Stat. 553, 575 (1980) (providing that a particular administrative official "in consultation with the Secretary of State . . . shall consult with foreign nations which enact, or are preparing to enact, domestic legislation establishing an interim legal framework" for mineral extraction); Fish and Wildlife Act of 1956, ch. 1036, Pub. L. No. 84–1024, § 8, 70 Stat. 1119, 1123 ("The Secretary of State shall designate the Secretary of the Interior or [a subordinate], . . . as a member of the United States delegation attending [international] . . . meetings" about fish and wildlife and "shall consult" with the Secretary of Interior with regard to all international aid that relates to fish and wildlife.). Congress directed authorizations to specific agency actors for negotiations with Native American tribes as well. E.g., Act of Apr. 23, 1872, ch. 115, 17 Stat. 55 ("That the Secretary of the Interior be, and he is hereby, authorized and empowered to enter into negotiations with the Ute Indians.").

[62] Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.

information regarding diplomatic communications requested by the Senate, with his Attorney General reasoning that the Senate was not entitled to these papers unless its advice and consent was being sought for a relevant appointment or treaty.[63] Again, in 1796, Washington withheld papers related to the negotiation of the Jay Treaty from the House of Representatives, reasoning that the House had no role in treaty-making and thus no purpose for asking for the papers unless it was pursuing an impeachment.[64] He observed that "the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate," and "in fact, all the papers affecting the negotiation . . . were laid before the Senate when the treaty itself was communicated for their consideration and advice."[65]

The Jay Treaty precedent might be thought to be comparatively modest. It involved a resolution passed by only one House of Congress, not a statute.[66] It involved papers given to the Senate but kept from the House based not on claims of presidential power but rather on the House's lack of jurisdiction. And like many other precedents cited by the executive branch, it revealed not constitutional consensus but rather constitutional controversy—after all, the House thought it had a right to see the papers. Yet this precedent has empowered a long line of periodic resistance by the executive branch to sharing diplomatic information with Congress.[67]

[63] Message from George Washington to the U.S. Senate (Feb. 26, 1794), *in* 1 A Compilation of the Messages and Papers of the Presidents, 1789–1897, at 152 (James D. Richardson ed., 1897); Letter from Edmund Randolph to President George Washington (Jan. 26, 1794), https://founders.archives.gov/documents/Washington/05-15-02-0099#print_view [https://perma.cc/5YCN-9JHE] (also suggesting that, in its legislative capacity, the Senate can consider papers but "the President [can] interpose[] his discretion, so as to give them no more, than, in his judgment, is fit to be given").

[64] Message from George Washington to the U.S. House of Representatives (Mar. 30, 1796), *in* 1 A Compilation of the Messages and Papers of the Presidents, supra note 63, at 194–96.

[65] Id. at 195; see also OLC Opinion of June 28, 1996, supra note 45, at 272 n.62 (noting that "Washington relied in part on the exclusion of the House from the treaty power" but claiming that Washington was really asserting a broader power to "withhold documents when the public interest so required").

[66] In an 1854 legal opinion, the Attorney General emphasized the difference between a one-house resolution and a statute with regard to the provision of information. See Resolutions of Congress, 6 Op. Att'y Gen. 680, 683 (1854) (stating that "*except where otherwise provided by law*," a resolution passed by only one house of Congress could not compel a cabinet secretary to provide information without the consent of the President and giving the example of a demand by the House for the Secretary of State to provide information about diplomatic instructions (emphasis added)).

[67] See OLC Opinion of June 28, 1996, supra note 45, at 272–76, 272 n.63, 273 n.64 (discussing these precedents); OLC Opinion of Jan. 17, 2020, supra note 1, at 13–14 (same).

The executive branch now claims that "[i]nterwoven with the President's constitutional authority to conduct diplomatic relations is his constitutional authority to determine whether to disclose the content of international negotiations."[68] In light of this, the "President . . . possesses, as a matter of constitutional law, the authority to exercise independent judgment about whether it is in the public interest to disclose such information to Congress."[69] OLC maintains that "the President's authority over diplomatic information, unlike certain other constitutionally grounded privileges, is not subject to balancing: it is absolute."[70]

The exclusive power to withhold information has long been claimed by the executive branch despite numerous congressional statutes requiring the provision of diplomacy-related information.[71] Reporting requirements are quite common. In supporting U.S. participation in the United Nations, for example, Congress mandated that "[t]he President shall, . . . not less than once each year, make reports to the Congress of the activities of the United Nations and of the participation of the United States therein."[72] Similarly, Congress has sought on occasion to bring administrative law

This claimed privilege has become wrapped up in "executive privilege," a broader concept that derives in part from diplomatic privilege.

[68] OLC Opinion of June 28, 1996, supra note 45, at 267; see also, e.g., DOJ Letter of Mar. 5, 2018, supra note 2, at 4, (objecting to disclosure to congressional staff with proper security clearances); Letter from Samuel R. Ramer, Acting Assistant Att'y Gen., U.S. Dep't of Just., to Sen. Bob Corker, Chairman of the S. Comm. on Foreign Relations 1–2 (June 5, 2017), https://www.justice.gov/ola/page/file/1058581/download [https://perma.cc/PN2D-ZB3F] (citing a "constitutional authority to maintain the confidentiality of diplomatic communications" in objecting to a bill's various reporting requirements related to North Korea).

[69] OLC Opinion of June 28, 1996, supra note 45, at 268.

[70] Id. at 277 (citing for authority to two never-published OLC opinions).

[71] For a few examples of statutory mandates for disclosure, see Compact of Free Association Act of 1985, Pub. L. No. 99–239, § 102(c), 99 Stat. 1770, 1777 (1986) (providing that the President, in consultation with the U.S. Comptroller General, shall negotiate agreements that give the General Accounting Office—which is part of the legislative branch—certain auditing powers with respect to aid programs to Micronesia and that the Comptroller General shall have "access to [the] personnel and . . . records, documents, working papers, automated data and files, and other information relevant to such review"); Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98–164, § 118, 97 Stat. 1017, 1022 (1983) ("Prior to the [international] 1985 Conference, the President shall report to the Congress on the nature of the preparations, the adherence to the original goals of the Conference, and the extent of any continued United States participation and support for the Conference.").

[72] United Nations Participation Act of 1945, ch. 583, Pub. L. No. 79–264, § 4, 59 Stat. 619, 620; see also 22 U.S.C. § 287b (codifying this and numerous other reporting requirements related to the United Nations).

practices relating to notice and comment into the conduct of agencies operating abroad. A 1994 statute, for example, provides that the U.S. agency engaged in international standard-setting for agriculture shall give annual notice and an opportunity to comment with respect to upcoming negotiations and "the agenda for United States participation, if any."[73]

The tension between these two positions has been mitigated historically by the President's willingness to share information related to international engagement in practice. In a 1996 memo determining that Congress could not use its appropriations power to compel the disclosure of negotiations regarding Mexico's currency crisis, for example, OLC nonetheless emphasized that the executive branch had disclosed almost all the requested information.[74] Such an institutional balance is dependent on norms, however, and is vulnerable to disregard by an administration. The Trump administration notably refused to provide Congress with a statutorily mandated copy of a report related to potential automobile tariffs and rejected demands by the House of Representatives for information relating to President Trump's dealings with Russia.[75] More generally, under the Trump administration, the Department of Justice became far more strident in claiming that reporting requirements raise "constitutional concern[s]" without even considering whether the public interests do or do not favor disclosure.[76] One 2019 letter sent by the Department of Justice to Congress complained that numerous reporting-related obligations in a proposed statute aimed at sanctioning Hamas "would unconstitutionally intrude on the President's authority to control

[73] Uruguay Round Agreements Act, Pub. L. No. 103–465, § 491, 108 Stat. 4809, 4970–71 (1994).

[74] OLC Opinion of June 28, 1996, supra note 45, at 256–57, 259–60 (describing substantial disclosure and an eventual negotiated agreement "regarding the small number of White House documents withheld under the public interest exception").

[75] E.g., Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just., to Rep. Eliot L. Engel, Chairman of the H. Comm. on Foreign Affs., U.S. H. of Reps. 1–2 (Feb. 11, 2020), https://www.justice.gov/ola/page/file/1248726/download [https://perma.cc/PS4S-FLTU] [hereinafter DOJ Letter of Feb. 11, 2020]; Letter from Pat A. Cipollone, Coun. to the President, The White House, to Rep. Elijah E. Cummings, Chairman of the H. Comm. on Oversight and Reform 2 (Mar. 21, 2019), https://www.politico.com/f/?id=00000169-a165-d9c1-a7ef-f5effbf10001 [https://perma.cc/4AXM-KG9H]; OLC Opinion of Jan. 17, 2020, supra note 1, at 1–2, 11–14.

[76] E.g., DOJ Letter of Feb. 11, 2020, supra note 75, at 1 (stating, without analyzing the interests at stake, that two reporting requirements in a draft bill "would contravene the diplomatic-communications component of executive privilege").

the dissemination of national security information and diplomatic communications."[77]

B. The President's Practical Control over Contested Diplomatic Powers

In his *Youngstown* concurrence, Justice Jackson explained that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[78] He warned that "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[79]

Underlying this famous language is the assumption of judicial review. Justice Jackson presumed that *courts* would be determining those exclusive presidential powers. Unlike the political branches, the courts are not patently self-interested in the constitutional balance of power between Congress and the President. Their comparative institutional credibility makes it plausible that they can undertake the robust scrutiny envisioned by Justice Jackson.

Yet only rarely have courts considered the constitutional allocation of the diplomatic powers. It was not until 2015, in *Zivotofsky*, that the Supreme Court squarely addressed the exclusivity of one piece of the bundle of diplomatic powers and held that the recognition power was exclusive to the President.[80] While evidence from the time of the Framing and historical practice comfortably support an exclusive presidential power over the representation power (another piece of the bundle),[81] it is judicially unsettled to what extent the President has exclusive power over

[77] Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just., to Rep. Eliot L. Engel, Chairman of the H. Comm. on Foreign Affs. 1–3 (Sept. 9, 2019), https://www.justice.gov/olp/page/file/1203301/download [https://perma.cc/3E39-Z325].

[78] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (Jackson, J., concurring).

[79] Id. at 638.

[80] See Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015). Review of the exclusivity of the diplomatic powers from lower courts has similarly been minimal. An exception is a 1993 case in which a majority of a Ninth Circuit panel held, with minimal reasoning, that a statute requiring the Secretary of State to initiate certain negotiations regarding sea turtles could not be enforced because it "impinge[d] upon power exclusively granted to the Executive Branch under the Constitution." Earth Island Inst. v. Christopher, 6 F.3d 648, 653 (9th Cir. 1993).

[81] United States v. Louisiana, 363 U.S. 1, 35 (1960) ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations.").

the content, agents, and information related to U.S. international engagement. The Court, in *Zivotofsky*, made clear that it was only addressing exclusivity with respect to the recognition power.[82]

Without the courts, it is left to the political branches to sort out their respective powers, and this sorting does *not* lend itself to Justice Jackson's admonition that claims of exclusive presidential power "must be scrutinized with caution."[83] Rather, it creates a dynamic where the executive branch can always win if it really wants to. The executive branch is far better positioned than Congress both to articulate its legal positions and to implement them in practice.

With respect to the articulation of legal positions, the executive branch has enormous institutional capacity to put towards asserting exclusive powers. It has regiments of lawyers at OLC and elsewhere who are committed to protecting its prerogatives.[84] Indeed, an OLC opinion provides that "[w]here the President believes that [a congressional] enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, *unless* he is convinced that the Court would disagree with his assessment."[85] Through letters, signing statements, memoranda, and other tools, the executive branch has built up an arsenal of internal precedents asserting exclusive rights with respect to diplomatic content, agents, and information. Congress, by contrast, has no institutional parallel to OLC, and members of Congress have fewer incentives to defend its institutional prerogatives.[86]

The executive branch also has greater institutional capacity to implement its perceived rights. During the legislative process, executive branch officials can resist perceived congressional overreaching by asking for changes in draft bills, and the President can issue signing statements.[87] And the executive branch has even greater institutional

[82] *Zivotofsky*, 576 U.S. at 20.

[83] *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

[84] Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448, 1459–63 (2010); Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 441–44 (2012) (discussing the institutional advantages of the executive branch).

[85] Presidential Auth. to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994) (emphasis added).

[86] Bradley & Morrison, supra note 84, at 442–43.

[87] The President can also use the veto power, but this is less likely to occur. The President might wish to gain the passage of the legislation if the objectionable portions are only a small piece of it—as is often the case with "must pass" annual bills like the National Defense Authorization Act. The presidential incentives to use the veto are also lessened under the

powers after the legislation has passed. It can construe congressional statutes narrowly to avoid perceived interference with its asserted exclusive powers. Most importantly, it can disregard statutory provisions altogether, even when Congress is exercising its potent power of the purse.[88]

This is not to say that the executive branch will always disregard congressional mandates or preferences relating to diplomacy. Far from it. These interests will often align, and, even when they do not, executive branch actors can face strong, pragmatic incentives to accommodate congressional views. This may be especially true where the actions of agencies rather than the White House are at stake. Kristina Daugirdas's work here is informative. She studied the extent to which the Treasury Department implemented congressional directives regarding how to vote in international financial organizations after the executive branch started raising constitutional objections to these directives during the George H.W. Bush presidency. In an illustration of the daylight between constitutional assertions and practice, she found that "President Bush's constitutional objections had no impact on the Treasury Department's long-standing practice of implementing Congress's negotiating instructions" and that trend generally continued in subsequent years.[89]

Congress can also cast a powerful indirect shadow on the conduct of U.S. international engagement through laws that are fully within its power. Much of U.S. international engagement today involves negotiations with other countries about how the executive branch will use powers that Congress has delegated to it. Will the President impose or waive economic sanctions on a particular country? What standards will the Environmental Protection Agency set under the Clean Air Act with respect to climate emissions? If Congress changes the underlying statutes—or delegates further powers to the President—this will inevitably affect negotiating leverage and outcomes. Similarly, Congress can make funding decisions related to foreign policy that will have

current equilibrium by the fact that the President considers himself or herself empowered to disregard statutory provisions that OLC views as unconstitutional infringements on executive power.

[88] E.g., OLC Opinion of Sept. 19, 2011, supra note 2, at 116–17; OLC Opinion of May 15, 1996, supra note 26, at 194; OLC Opinion of Feb. 16, 1990, supra note 40, at 37–38, 41; see also Price, supra note 6, at 450 ("While Congress routinely conditions appropriations on particular diplomatic constraints, the executive branch just as routinely claims authority to disregard those conditions.").

[89] Daugirdas, supra note 6, at 544–49.

collateral effects on negotiations. If Congress refuses to fund any international organizations that treat Palestine as a state, then the United States may no longer be able to participate as a dues-paying member in these international organizations. Legislation in these spaces will influence how the executive branch engages with counterparts abroad.

Yet at the end of the day, the President or other executive branch officials can now choose to disregard any statutory mandate that conflicts with OLC's sweeping views of the President's exclusive diplomatic powers. And they have done so even in the administrations of President Clinton and President Obama, notwithstanding the general perception that Democratic presidents are less likely to claim exclusive executive powers.[90] As for the Trump administration, it proved especially aggressive in withholding information related to international affairs from Congress, including virtually all documents related to President Trump's first impeachment.[91] In the fall of 2020, the Trump administration also relied in part on the President's supposedly exclusive powers over the content of diplomacy in withdrawing the United States from an important treaty—the Open Skies Treaty—in a manner that conflicted with a statutory mandate.[92] To date, the Biden administration has been less overtly energetic in using the exclusive executive powers over diplomacy claimed by previous administrations. Even if the Biden administration

[90] E.g., OLC Opinion of Sept. 19, 2011, supra note 2, at 116–19; OLC Opinion of June 28, 1996, supra note 45, at 253.

[91] OLC Opinion of Jan. 17, 2020, supra note 1, at 1–2, 11–14 (offering several interrelated reasons, including diplomatic power, in withholding a memorandum related to automobile tariffs); see generally House Committees' Authority to Investigate for Impeachment, 44 Op. O.L.C. __, slip op. at 1–2, 50–51 (2020), https://www.justice.gov/olc/file/1236346/download [https://perma.cc/VMC4-HXA8] (setting out convoluted arguments for withholding impeachment-related documents and asserting, among these arguments, that executive privilege "continues to be available during an impeachment investigation").

[92] OLC Opinion of Sept. 22, 2020, supra note 1, at 17 (quotation marks and citations omitted) (stating that "Congress may not constitutionally dictate the modes and means by which the President engages in international diplomacy" and therefore "may not compel, restrict, or delay the President's diplomatic conduct in the first instance, including in questions of timing"). The statute in question required the President to give early notice to Congress before withdrawing from the Open Skies Treaty. See id. at 1–2. Had the executive branch complied with the statute, then withdrawal would have not been able to be effectuated until the new presidential administration—a prospect that the Trump administration very much wanted to avoid. In addition to an asserted exclusive presidential power over diplomacy, this OLC opinion also rested on an asserted exclusive presidential power to execute treaties. See id. at 2.

does not wield these asserted powers, however, they will likely remain dormant and available for a future administration.

II. THE FORGOTTEN CONSTITUTIONAL STRUGGLES OVER WHAT COUNTS AS DIPLOMACY

Executive branch lawyers not only claim exclusive presidential powers over diplomacy but also characterize "diplomacy" in sweeping terms. They have "treated widely varied subject matters as falling within the President's exclusive authority over diplomacy" and consider the "President's authority over international negotiations as extending to any subject that has bearing on the national interest."[93] They conceptualize diplomacy to cover everything from policy formulation to the casting of votes in international organizations. By defining diplomacy broadly for constitutional purposes, executive branch lawyers vastly enlarge the reach of the President's assertedly exclusive powers over the content of U.S. international engagement, the agents who undertake it, and information related to it.

This broad constitutional conception of "diplomacy" is far from inevitable. As this Part shows, there was no coherent meaning of "diplomacy" at the time of the Framing. Indeed, the word "diplomacy" was barely (if at all) an English word at the time of the Framing and, as best I can tell, it was never used during the discourse over the Constitution's drafting and ratification. Instead, "[j]ust what [the Framers] did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[94] It is far from clear that the Framers wished the President to have exclusive power over treaty negotiations. And it takes many further leaps of logic to conclude, as the executive branch now does, that the Framers entrusted the executive branch with exclusive control over U.S. negotiations that are conducted by U.S. administrators rather than diplomats, involve international regulatory coordination, and will never be brought to the Senate for advice and consent.

This Part sets forth four ways in which our conception of "diplomacy" could be cabined for purposes of any exclusive executive powers that can

[93] OLC Opinion of Sept. 19, 2011, supra note 2, at 121–22 (internal quotation marks omitted).

[94] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring).

be derived from it. Each of these ways is a "road not taken" in executive branch practice, with antecedents in constitutional history that have gone unrealized. One way is structural: to limit presidential exclusivity related to negotiations to the conduct of these negotiations rather than also encompassing the formation of policy objectives on the front end or certain international legal outcomes on the back end. A second way is content-based: to define "diplomacy" as encompassing only particular subject matters. A third way is institutional: to define diplomacy in terms of diplomats rather than allowing exclusive presidential powers over diplomacy to attach to any executive branch official engaged in international discourse. A fourth way would focus on international context and exclude U.S. participation in international organizations from the reach of any exclusive presidential powers over diplomatic content, agents, and information. I offer these four lost limits not as firm prescriptions but rather as possibilities. My purpose in this Part is neither to offer specific calls for rebalancing (a topic that I tentatively turn to in Part III) nor to give an exhaustive historical accounting of these four possible limits. Rather, it is to demonstrate that the executive branch's sweeping definition of "diplomacy" is neither constitutionally predetermined nor conceptually mandated.

A. The Delphic Framing

The Constitution does not use any variant of the word "diplomacy." At the time of the Framing, the term barely existed in the English language. The French terminology of a "*corps diplomatique*"—a cohort of envoys and ministers—was known to and used by some of the Framers,[95] and "diplomat" eventually became an English word, likely after the Founding.[96] The word "diplomatic" referred originally to the authenticity

[95] E.g., Letter from John Adams to Edmund Jenings (Sept. 16, 1782), https://founders.archives.gov/documents/Adams/06-13-02-0200 [https://perma.cc/LR9J-J7DJ] ("The Corps Diplomatique here, all Speak of the Independence of America as decided. . . . I meet now the whole Corps Diplomatique, at Court, at the House of France and that of Spain.").

[96] Dictionaries date its first use to 1813, but I have found one usage in the late 1790s. Compare Diplomat, Oxford English Dictionary Online (2d ed. 1989), https://www.oed.com/oed2/00064601 [https://perma.cc/4ZNS-ZTRJ] (identifying no usage earlier than 1813), and Diplomat, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/diplomat [https://perma.cc/ZP6Y-EDBL] (also identifying 1813 as the year of the first known use), with Letter from William Vans Murray to John Adams (July 1, 1798), https://founders.archives.gov/documents/Adams/99-02-02-2688 [https://perma.cc/

of documents and, by the 1780s, was only beginning to develop a connection to international relations.[97] As for the word "diplomacy" itself, dictionaries date its first uses of "diplomacy" to the mid-to-late eighteenth century.[98] "Diplomacy" is entirely absent from the twenty-nine volume

XRC8-4MP8] (observing challenges in Europe that arise for "a diplomat of strict honour"). I thank the *Virginia Law Review* editors for search suggestions related to this and some other terminology discussed in this paragraph.

[97] Diplomatic, Oxford English Dictionary Online (2d ed. 1989) https://www.oed.com/view/Entry/53206?redirectedFrom=Diplomatic#eid [https://perma.cc/3EMU-ZZPK] (dating the first use of "diplomatic" as it related to international relations to the 1780s). During debates over the Constitution's adoption, none of the scant uses of "diplomatic" included in the multi-volume *Documentary History of the Ratification of the Constitution* involves a claim about powers exclusive to the president. Author's search conducted on https://rotunda.upress.virginia.edu/founders/RNCN.html [https://perma.cc/QE4D-3LLW] (producing only twenty uses of "diplomatic" after omitting those usages added in the editorial notes). Of these twenty uses, many drew an explicit or implicit distinction between the Congress under the Articles of Confederation, which served as a "diplomatic" forum for conversations between states, and the new federal government with its more robust powers. In the New York ratification debates, for example, Robert Livingston specifically contrasted the role of a "mere diplomatic body, making engagements for its respective States," with a body that "was to enjoy legislative, judicial, and executive powers." 22 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: New York 1687 (Kaminski et al. eds., 2008). Of the few usages of "diplomatic" that referred to specific branches of the new government, two referred to one or both branches of Congress, two described the Senate and President in combination, and none referred to the President alone. See 27 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: South Carolina 102 (Kaminski et al. eds., 2008) (in which Charles Cotesworth Pinckney, discussing the treaty-making power during the South Carolina ratification debates, observed that "[t]he president and senate joined were, therefore . . . deemed the most eligible corps in whom we could with safety vest the diplomatic authority of the union"); id. at 119 (in which Pinckney made a similar statement); id. at 340 (in which Pinckney stated "that the senate were a diplomatic body"); 17 Documentary History of the Ratification of the Constitution: Commentaries on the Constitution Public and Private 123 (Kaminski et al. eds., 2008) (in which John Dickinson, writing as Fabius, remarked that the "house of representatives . . . and the senate will actually be not only legislative but also diplomatic bodies, perpetually engaged in the arduous task of reconciling, in their determinations, the interests of several sovereign states . . ."") (emphasis omitted). The word "diplomatic" appears once in *The Federalist*, where Alexander Hamilton used it in passing. The Federalist No. 81, at 601 (Alexander Hamilton) (John C. Hamilton ed., 1864) ("Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong . . . .").

[98] The Merriam-Webster Dictionary puts the first known usage in 1766. Diplomacy, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/diplomacy [https://perma.cc/66BQ-XBHJ] (not identifying this usage). The first usage identified by the *Oxford English Dictionary* occurred in Edmund Burke's 1796 writings on the French Revolution. Diplomacy, Oxford English Dictionary Online (2d ed. 1989), https://www.oed.com/oed2/00064600 [https://perma.cc/33TX-9SDE].

Documentary History of the Ratification of the Constitution,[99] and its first uses in the Corpus of Founding Era American English database occur in the 1790s (mainly in connection to France).[100] In other words, any time we now talk about the constitutional power over "diplomacy," we are using a term that was not in the common lexicon of the Framers at the time of the formation of the Constitution.

To the extent that the Framers had a comparable term, it was "negotiate" and its variants like "negotiation." These words were sometimes used broadly, as when James Madison described the powers of the federal government as "principally on external objects, as war, peace, negotiation, and foreign commerce."[101] Other times these words were used to refer narrowly to bargaining with foreign nations over the terms that would go in treaties. John Jay's *Federalist No. 64*, for example, focuses on the "negotiation of treaties."[102] He observes that the President may need to gather intelligence from those who "would rely on the secrecy of the president, but who would not confide in that of the senate" and notes that, in pursuing negotiating objectives, "should any circumstance occur, which requires the advice and consent of the Senate, [the President] may at any time convene them."[103]

[99] A search for the word "diplomacy" in the twenty-nine volume *Documentary History of the Ratification of the Constitution* returns zero results. Author's search conducted on https://rotunda.upress.virginia.edu/founders/RNCN.html [https://perma.cc/QGC4-CP6E].

[100] A search for "diplomacy" in the Corpus of Founding Era American English database returns eighteen uses (including some false positives and duplicates), of which most relate to U.S. relations with France. Author's search conducted on https://lawcorpus.byu.edu/cofea/concordances/search [https://perma.cc/GTY7-FBNT]. The earliest clear usage among these results comes from 1793, when affiliates of George Washington use this term in translating a letter sent to Washington from the revolutionary government of France. Letter from the Provisional Exec. Council of Fr. to George Washington (Jan. 1793) (subsequent English translation done in the handwriting of Tobias Lear, Washington's personal secretary, with input from Thomas Jefferson), https://founders.archives.gov/documents/Washington/05-12-02-0050 [https://perma.cc/FC8C-G899] (stating that "the Republic [of France] fervently desires to strengthen bands too much neglected by the ancient diplomacy of the royal government"). By contrast, a search for "negotiation" in the same database turns up more than 3,000 results. Author's search conducted on https://lawcorpus.byu.edu/cofea/concordances/search [https://perma.cc/TLM6-86ES].

[101] The Federalist No. 45, at 363 (James Madison) (John C. Hamilton ed., 1864).

[102] The Federalist No. 64, at 485 (John Jay) (John C. Hamilton ed., 1864).

[103] Id. at 486. Dubiously, an OLC memorandum by William Barr reads *Federalist No. 64* as making it an "essential element of the Founders' vision" that "the Constitution mandates Presidential control over the disclosure of negotiations." OLC Opinion of Feb. 16, 1990, supra note 40, at 42. By contrast, a 2009 OLC memorandum (the most restrained in modern times)

Whatever the terminology, the Constitution's text does not establish exclusive presidential power over what OLC now terms diplomacy. It gives Congress extensive foreign affairs powers related to war and commerce, makes the President Commander-in-Chief, provides that the President will obtain the advice and consent of the Senate for treaties and ambassadorial appointments, and authorizes the President to receive ambassadors.[104] Given the lack of specificity about diplomacy, it is no surprise that textual claims by OLC to exclusive presidential diplomatic powers tend to be short on analysis and big on conclusions. One 1990 OLC opinion by William Barr defends the President's "broad authority over the Nation's diplomatic affairs" by citing generally to the first three sections of Article II of the Constitution—without deigning to mention the existence of Article I.[105]

Indeed, the written Constitution does not clearly give the President *any* authority to disobey congressional statutes. Article II vests "[t]he executive power" in the President and obligates the President to "take Care that the Laws be faithfully executed."[106] Recent scholarship argues

that cites to *Federalist No. 64* describes the President only as having "significant discretion" over negotiations. OLC Opinion of June 1, 2009, supra note 40, at 229.

For another example of a narrow use of negotiation from early constitutional practice, see George Washington, Letter of Introduction Conferring Full Powers on John Jay (May 6, 1794), *in* 1 American State Papers: Documents, Legislative and Executive, of the Congress of the United States 471 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) (authorizing Jay to "agree, treat, consult, and negotiate" with British ministers and separately authorizing him "to conclude and sign a treaty or treaties").

[104] See generally U.S. Const. art. I, § 8; id. art. II, § 2.

[105] More specifically, the memorandum states:

> The President possesses broad authority over the Nation's diplomatic affairs. That authority flows from his position as head of the unitary Executive and as Commander in Chief. *E.g.*, U.S. Const. art. II, §§ 1, 2, & 3 . . . Article II, Section 2 of the Constitution also gives the President the specific authority to "appoint Ambassadors, other public Ministers and Consuls." These constitutional provisions authorize the President to determine the form and manner in which the United States will maintain relations with foreign nations, and further to determine the individuals who will conduct these relations.

OLC Opinion of Feb. 16, 1990, supra note 40, at 38 (concluding that therefore the statute at issue is "clearly unconstitutional"). The impressive leaps in reasoning contained in this paragraph are not further explained. In addition to not even mentioning Congress's numerous Article I powers related to foreign affairs, the memorandum neglects to note that the appointment power is shared with the Senate. For another OLC opinion with reasoning that closely tracks this one, see OLC Opinion of June 28, 1996, supra note 45, at 267. Other OLC opinions do make passing mention to Congress's Article I powers. E.g., OLC Opinion of June 1, 2009, supra note 40, at 225–26; OLC Opinion of Sept. 19, 2011, supra note 2, at 120.

[106] U.S. Const. art. II, §§ 1, 3.

that the Vesting Clause only gives the President the power to execute the law[107] and that historical evidence relating to the Take Care Clause puts "a thumb on the scale in favor of the view that the President must carry out federal statutes."[108] These accounts further unsettle any textually grounded claims to exclusive presidential powers over diplomacy.

Early practice from the Framing Era is a similarly thin reed on which to rest current executive branch assertions about exclusive diplomatic powers. As discussed in the prior Part, this practice is not particularly strong in establishing exclusive presidential power with respect to content, agents, and information. Many of these precedents were more about independent presidential powers than exclusive presidential powers, such as early practice that established that the President did not need to receive the advice and consent of the Senate prior to treaty negotiation.[109] And where exclusivity was implicated, its scope was limited. Scattered indications that the President should have exclusive control over treaty negotiations were tied to the knowledge that, prior to ratification, the Senate would have a full opportunity to review the end product of these negotiations in giving or withholding its advice and consent.[110] Early precedents in which the President withheld documents from legislators reflected constitutional controversy rather than consensus, occurred only in respect to one-House requests rather than in

[107] See Julian Davis Mortenson, Article II Vests the Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1169 (2019) (arguing that "executive power" only conveyed the power to execute laws). The Vesting Clause gets fairly light treatment in OLC memoranda related to diplomacy, although it appears to be read capaciously in at least some of them. E.g., OLC Opinion of Jan. 17, 2020, supra note 1, at 7 (asserting that "[e]xecutive privilege is a 'constitutionally based' 'corollary of the executive function vested in the President by Article II of the Constitution,' and it empowers the President to withhold confidential information from the other Branches and the public when necessary to support that function"). Other scholars have read the Vesting Clause as conferring more robust powers, particularly in the foreign affairs context. See Prakash, supra note 16, at 188–89 (claiming that the "executive power" included authority to "decide . . . what to say to" other countries). Others have simply remarked on the indeterminacy of this Vesting Clause. As one scholar wrote long ago, the Vesting Clause "was to prove a 'joker'"—a wild card in the deck of clauses that "admitted an interpretation of executive power which would give to the President a field of action much wider than that outlined by the enumerated powers." Charles C. Thach, The Creation of the Presidency 1775–1789, at 138–39 (1922) (Ph.D. dissertation, Johns Hopkins University) (adding "[w]ith the correctness or incorrectness of this interpretation we are not concerned").

[108] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2186 (2019).

[109] See supra note 34 and accompanying text.

[110] See supra notes 35–36 and accompanying text.

response to legislated obligations, and came with clear recognition that these chambers would be entitled to the documents under particular conditions.[111]

More fundamentally, early practice involved a different vision of international engagement than exists today. It was carried out through treaties rather than ongoing conversations, framed by a sharp distinction between foreign affairs and domestic ones, conducted by diplomats rather than all kinds of governmental officials, and centered around private bilateral negotiations without any formalized international organizations. By taking contested claims of exclusive presidential power from this setting and mapping it onto the wider world of modern "diplomacy," the executive branch has effectuated a vast shift of exclusive power to the presidency.

B. Four Lost Limits on "Diplomacy"

The specific conversations between U.S. Presidents and their Russian counterparts about arms control treaties are obviously within our constitutional conception of diplomacy. But what about the policy objectives pursued by U.S. Department of Treasury officials at an international gathering of insurance regulators? The executive branch thinks that this is also "diplomacy" for U.S. constitutional purposes,[112] apparently on the assumption that any executive branch interactions with foreign counterparts fall into this paradigm.

The executive branch's sweeping view of "diplomacy" is not constitutionally foreordained. In what follows, I suggest four narrower ways that "diplomacy" could be conceptualized for constitutional purposes. Each of these ways has antecedents in constitutional practice, although some have stronger roots and would be more feasible to implement than others.

1. Negotiating Process

In 1939, the British diplomat Harold Nicolson published a treatise titled *Diplomacy*. He felt impelled, in that fateful year, to address the "the mistake . . . in confusing policy with negotiation and in calling [both] by

[111] See supra notes 63–65 and accompanying text.

[112] See generally DOJ Letter of Mar. 5, 2018, supra note 2 (asserting that a congressional bill on this subject intruded on the president's diplomatic powers).

the same ill-favoured name of 'Diplomacy.'"[113] Instead, he explained, policy should be considered the "'legislative' aspect" of diplomacy, while negotiation was "its 'executive' aspect," and different actors should have final authority over each sphere.[114]

Drawing on this insight, one way to limit any exclusive presidential powers over diplomacy would be to confine our constitutional conception of diplomacy to *negotiation* rather than to policy. Under this approach, Congress could, if it chose, establish U.S. foreign policy objectives and review any substantive products of diplomacy before their finalization (such as the signing of international agreements, the finalization of soft law commitments, or the casting of votes in international organizations). Exclusive presidential powers over diplomacy, if any, would be limited to tactical decisions about how best to achieve these objectives in negotiations. The President would retain the independent power to act against a backdrop of congressional silence, but not the power to disregard congressional mandates over policy objectives or ultimate outputs. This approach could apply across the board with the possible exception of the making of Article II treaties, where the President's need for the Senate's advice and consent provides more than adequate legislative oversight.

This approach builds on the Constitution's structural commitment to checks and balances. As noted earlier, it is an anachronism to map the word "diplomacy" back onto the Framing, for "negotiation" is in fact the proper term from that era. And the dominant vision from that time was not unfettered presidential control over foreign policy. Rather it was one of shared control between the President and the Senate. The President would be responsible for "the management of foreign negotiations . . . *according to general principles concerted with the Senate, and subject to their final concurrence*."[115] The Senate was to have both a role in setting negotiating objectives and the power to approve or disapprove the product of negotiations—the treaty—before it took effect. While the Senate's role in setting negotiating objectives has ceased to be an obligatory part of the treaty process, the Senate's advice and consent power continues to provide a major structural check on presidential power for treaties brought to it.

[113] Harold Nicolson, Diplomacy 12 (1939).

[114] Id.

[115] The Federalist No. 84, at 637 (Alexander Hamilton) (John C. Hamilton ed., 1864) (emphasis added).

But most "diplomacy" today is not about the negotiation of treaties that will receive the advice and consent of the Senate—or even about the negotiation of international agreements that will receive subsequent congressional approval. Rather, it is about continuously ongoing exchanges between U.S. executive branch officials and foreign counterparts, sometimes mediated through international organizations and often involving how the executive branch will use powers delegated by Congress (like the power to impose sanctions). It would be unfeasible and unworkable to expect Congress to approve all these exchanges. But, for these exchanges, should Congress be able, if it chooses, to set negotiating objectives or disapprove the making of a particular international commitment or the casting of a particular international vote?

Under the approach now taken by the executive branch, Congress cannot set negotiating objectives and only indirectly has power over substantive results to the extent that these results depend for their implementation on domestic law. These indirect powers are of course significant. The content of existing federal laws (and the possibility of changes to these laws) will inevitably influence the stances taken by executive branch officials, and these officials may also take to heart the views of individual, influential members of the House or Senate. But influence is different from ultimate control, and the approach taken by the executive branch treats ultimate control over both policy and negotiation as squarely with the President. By contrast, recognizing that Congress has the ultimate power to assert control over U.S. foreign policy objectives and over eventual outputs is more consistent with the broader constitutional premise of legislative oversight.

The concept of congressional control over policy objectives has antecedents in historical practice. As mentioned earlier, Daniel Webster took this position in the 1820s in debates over whether to appropriate money to send a U.S. diplomat to an international conference—an event that was a forerunner to modern multilateral engagement.[116] As one Senator put it almost a century later, one can "agree . . . that the President has the exclusive right of the conduct of our foreign relations, conducting diplomatic intercourse, and negotiating treaties; but there is a grave difference . . . between the President's right to conduct our foreign relations and the question of what our foreign policy shall be."[117] And

[116] See supra notes 37–38 and accompanying text.

[117] 64 Cong. Rec. 1219 (1923) (statement of Sen. Brandegee) (adding that "I never have thought, and do not now think, that the President has a right, of his own motion, to decide

especially with trade, but with other matters as well, congressional statutes have long specified the "policy of the United States" with respect to matters of foreign affairs—even if executive branch officials have not always honored these principles.[118] This approach would parallel the boundary that some have drawn between Congress's war powers and any exclusive powers held by the President as the Commander-in-Chief—a boundary in which Congress has overall control but the president has certain exclusive tactical powers on the battleground.[119]

An approach that limited the President's exclusive constitutional power over diplomacy to negotiation rather than to policy formation would continue to leave the President with vast control. The President's role in the legislative process is a powerful tool for resisting the inclusion of congressional mandates into statutes in the first place, and control over the negotiating process would vest the executive branch with considerable discretion. Moreover, the lines between negotiating objectives, the actual negotiations, and the outputs of negotiations are not easy to draw. A statutory requirement that executive branch officials wait several months to finalize an agreement (or to give notice of a withdrawal from an agreement) would seem clearly within Congress's power under this approach, as this provision would be designed to give Congress an opportunity for review substantive outcomes.[120] But what about a congressional statute mandating that particular negotiations begin within a year? Would that be permissible as policy on the part of Congress or impermissible as negotiation? Yet though blurry and limited in its effect,

what the foreign policy of the United States of America shall be and to go ahead and put it in operation in spite of the wish[es] of the Congress or of the people of the country").

[118] See supra note 46 and accompanying text.

[119] For a discussion and critique of the assumption that the President has certain exclusive constitutional powers over tactics on the battleground, see David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 Harv. L. Rev. 941 (2008).

[120] Congress has recognized indirect powers in these areas—for example, if the executive branch negotiates an international commitment in which it agrees to use delegated discretion to waive congressionally-imposed sanctions, Congress can remove the underlying executive branch discretion. Cf. Iran Nuclear Agreement Review Act of 2015, Pub. L. 114–17 at § 2, 129 Stat. 201, 203 (providing that the President could not waive sanctions on Iran during a specified time period (thirty or sixty days, depending on the start date) after the finalized agreement had been provided to Congress). Although this is an important authority, it is different from the power to mandate that the executive branch wait to finalize an international commitment in the first place.

drawing lines between policy, negotiation, and outputs for constitutional purposes would nonetheless empower Congress in comparison to the sweeping vision of exclusive executive control over diplomacy now asserted by the executive branch.

2. Subject Matter

At the time of the Framing, when the word diplomacy did not exist, negotiations between nations centered mainly around war, peace, trade, alliance, and treatment of foreign nationals. Now nations interact not only around these topics, but also around almost everything else: health, crime, individual rights, tax, finance, migration, investment, labor, intellectual property, and the environment.[121]

Executive branch lawyers today consider all these interactions to fall under the umbrella of "diplomacy"—and therefore to fall with exclusive executive control. The overall effect is a vast accrual of structural power for the Presidency, even if we assume (dubiously) that the full bundle of diplomatic powers described earlier did in fact belong exclusively to the President at the time of the Framing. Because diplomacy now encompasses so much more than it once did, the President's control over diplomacy is a far more significant power.

Historical practice holds hints of narrower ways to define "diplomacy" for constitutional purposes. Taking stock of the constitutional separation of powers with respect to diplomacy in a 1926 article in the *American Journal of International Law*, Henry Wriston noted a distinction between international conferences of a "political or diplomatic character" and those of a "technical and scientific character."[122] Wriston focused in particular on a 1913 statute requiring that "the Executive shall not extend or accept any invitation to participate in any international congress,

[121] See Anne-Marie Slaughter, A New World Order 5 (2004) (explaining that nations now "relate to each other not only through the Foreign Office, but also through regulatory . . . channels").

[122] Wriston, supra note 57 at 35, 40, 41, 44 (suggesting that the executive branch has been more willing to ignore congressional restrictions with respect to international conferences "manifestly diplomatic and political in character" but less so with respect to "conferences of less important character"). For a view along these lines expressed by a former Supreme Court Justice, see Abe Fortas, Comments on The Presidency as I Have Seen It, *in* Emmet John Hughes, The Living Presidency 309, 336 (1972) (noting "the distinction between international-political and international-economic affairs" and concluding that "Congress should have and exercise greater direction over international-economic affairs . . . despite the obvious difficulty in separating economic and political affairs").

conference, or like event, without first having specific authority of law to do so."[123] Wriston considered this statute a "legislative trespass on historic executive functions" and approved of the executive branch's approach of largely ignoring this statute, claiming that "there was already ample provision for preventing the President from entering upon binding commitments at conferences."[124] Yet he observed that the executive branch has complied with the statute for some "conferences of less important character" like an international conference on education, although it had "acted with considerable boldness" in disregarding the statute for conferences that were "manifestly diplomatic and political in character" like the Paris Peace Conference.[125]

As suggested by Wriston's reasoning and the practice he describes, we could envision "diplomacy" very differently from how the executive branch treats it today. The early "technical and scientific" conferences mentioned by Wriston can be seen as forerunners for international standard-setting and international regulatory cooperation. Such activity is less about ordering the public relations between nations and more about coordination among nations in order to regulate their own subjects. It is an example of how the distinction between foreign and domestic affairs has faded in our increasingly interconnected world.

It is possible to envision a constitutional concept of "diplomacy" centered around matters that are "political" rather than "technical" in nature. Yet of the four lost limits on diplomacy identified here, this one is the most understandably lost. In the context of what issues can be fit subjects for Article II treaties, historical practice has recognized that subject matter limits are inappropriate. While a treaty cannot "authorize what the Constitution forbids . . . it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[126] The challenge of drawing lines based on subject matter is substantial—harder in many ways than drawing lines based on processes or institutions.

[123] Act of Mar. 4, 1913, Pub. L. No. 62–434, 37 Stat. 912, 913 (codified at 22 U.S.C. § 262).

[124] Wriston, supra note 57, at 45 (stating that Congress could withhold an appropriation if it were needed for a particular conference, that the Senate would have to advise and consent to any treaty arising from this conference, and that for "informal engagements . . . there would be need, not infrequently, for legislation to carry into effect [the] contemplated action"). Notably, these constraints are less applicable under the modern structure of international engagement.

[125] Id. at 40, 44.

[126] Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

3. Agencies

A third way to limit our constitutional concept of "diplomacy" would be to tie it to certain institutional actors within the executive branch. Under this approach, any exclusive presidential powers over diplomatic content, agents, and information could be exercised by the President or agencies devoted primarily to the conduct of foreign affairs, but Congress would retain control over other agencies. In other words, the President's exclusive powers over diplomacy could be tied to their exercise by diplomats.

In 1789, when Congress established the initial Cabinet offices, it used quite different language in setting forth the duties of these offices. For the Treasury Department, Congress provided that "there shall be a Department of Treasury," established the position of Secretary of the Treasury, and set forth a list of specific duties for that Secretary (such as "to prepare and report estimates of the public revenue, and the public expenditures" and "to superintend the collection of the revenue").[127] But for the State Department—initially called the Department of Foreign Affairs—Congress used quite different language, declining to give marching orders and instead emphasizing presidential control. Congress provided that "there shall be an Executive department, to be denominated the Department of Foreign Affairs," that it should have a Secretary, and that this Secretary "shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States . . . relative to . . . matters respecting foreign affairs, as the President of the United States shall assign to the said department."[128] It added for good measure that "the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."[129]

This approach to the State Department was befitting to the era of the *corps diplomatique*. Thomas Jefferson's claim in 1790 that the "transaction of business with foreign nations is Executive altogether"[130]

[127] Act of Sept. 2, 1789, ch. 7, §§ 1–2, 1 Stat. 65, 66; see also id. § 8 (setting limits on who could hold the office, including that the person not be the "owner in whole or in part of any sea-vessel").

[128] Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28–29.

[129] Id. § 1.

[130] Thomas Jefferson, Opinion Given on the Powers of the Senate Respecting Diplomatic Appointments of Apr. 24, 1790, https://founders.archives.gov/documents/Jefferson/01-16-02-0215 [https://perma.cc/MQL7-PPE8] (arguing against legislative determinations of

was with reference to transactions involving encounters between ambassadors and other public ministers who followed a set of formal practices established by international law and custom. The era of domestic regulators talking to foreign regulators was mostly nascent—and to the extent it existed, we have no clear indications that Jefferson's vision of executive power was meant to apply to it. As noted earlier, in 1794, Congress specified that "the Postmaster General may make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets."[131] This language—unobjected to as far as I can tell by the executive branch guardians of executive control over negotiation—seems to recognize the prospect of domestic agencies interacting through regulatory channels rather than the *corps diplomatique* in ways that were appropriate for congressional authorization.

As U.S. domestic agencies beyond the State Department have come more and more to engage abroad, does their engagement partake of any exclusive presidential powers over diplomacy, or is it instead subject to congressional control to the same extent as on domestic matters? Henry Wriston's article from 1926 took it as a given that Congress could exercise more control over agencies (even including the State Department) than over the President. He rooted his objections to the 1913 congressional statute requiring specific authorization for attendance at international conferences in the fact that this law applied to the President rather than to a particular agency. He emphasized that Congress can indeed "giv[e] directions or powers, or limit[] the authority of federal bureaus."[132]

While OLC now takes the position that the president's diplomatic powers apply to agencies as they engage abroad,[133] this claim fits uneasily both with traditional congressional authority over agencies and with aspects of historical practice. Over the years, Congress has legislated in ways aimed at controlling the process by which agencies engage abroad.

diplomatic grades); cf. Wriston, supra note 57, at 33–34 (noting how Congress nonetheless came to determine diplomatic grades over the nineteenth century).

[131] Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.

[132] Wriston, supra note 57, at 39 n.27 (adding that "[s]uch an authorization is proper when directed to a bureau, but to require the President to get such authorization to engage in a discussion, for such is the work of a conference, is an entirely different matter"). OLC cites to the Wriston article as supporting presidential power over diplomacy, understood broadly, without ever mentioning this caveat. OLC Opinion of June 1, 2009, supra note 40, at 230–31.

[133] E.g., DOJ Letter of Mar. 5, 2018, supra note 2, at 2.

One notable example—the 1972 Case-Zablocki Act—requires that "an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State."[134] This statute bars agencies from making international commitments without the sign-off of the State Department, thus structuring the process of international engagement by the agencies of the executive branch. Kristina Daugirdas's work demonstrates the long history of congressional control over Department of Treasury participation in organizations like the World Bank.[135] And in at least one instance, Congress has mandated that a particular agency use notice-and-comment procedures with respect to international negotiations.[136]

OLC has not only failed to grapple with these precedents but also with the logic of its position with respect to independent agencies, which are subject to only light presidential control via appointments. These agencies can engage internationally without being particularly accountable to the President.[137] In a 1984 case—one litigated before the executive branch became hyper-aggressive about asserting exclusive diplomatic powers—the Supreme Court seemed to assume that Congress could exercise control over commissioners of the Federal Communications Commission as they engaged in international exchanges.[138]

It is easier to define "diplomacy" for constitutional purposes in terms of institutional structure than in terms of subject matter. Where it is

[134] 1 U.S.C. § 112b(c) (adding that "[s]uch consultation may encompass a class of agreements rather than a particular agreement"). As far as I know, the executive branch has not publicly challenged the constitutionality of this provision, which was passed at a time when the executive branch was considerably more accepting of Congress's constitutional authority to intervene with respect to international engagement. The logic of recent executive branch reasoning would suggest, however, that OLC would likely view this provision as unconstitutional today, and it is unclear how extensively it is complied with in practice.

[135] See Daugirdas, supra note 6, at 519–20.

[136] See supra note 73 and accompanying text (discussing this example).

[137] See generally Conti-Brown & Zaring, supra note 21 (discussing how the Federal Reserve engages abroad). This circle can maybe be squared by arguing that Congress can control these independent agencies abroad because the agencies are only representing themselves, and not the United States writ large. But that same logic could potentially be applied to executive branch agencies as well.

[138] FCC v. ITT World Communications, 466 U.S. 463 (1984), held as a matter of statutory interpretation that the disclosure requirements of the Sunshine Act did not apply to several commissioners of the Federal Communications Commission ("FCC") while they were attending a transatlantic conference of communications regulators. Nothing in the Court's unanimous opinion suggested that Congress would have lacked the power to apply the Sunshine Act to FCC commissioners abroad. See id. at 472–74.

difficult to distinguish between "political" and "technical" subject matters, it is relatively easy to distinguish between the Department of State and the Department of the Treasury. Under this institutional approach, Congress could keep nondiplomatic agencies from the negotiating table, set the terms under which they participate, or require them to share information with Congress to the same extent that Congress may exercise this control as a matter of domestic administrative law. (What this extent is as a matter of domestic law is a disputed issue, and one that I do not take up in this Article.[139]) Under this approach, Congress would be within its rights to ban the White House Office of Science and Technology Policy from conducting bilateral negotiations with China to the same extent that it could exercise similar control on a matter of domestic administrative law—contrary to OLC's view that such a ban is unconstitutional.[140] As Zachary Price has put it, "Congress should . . . hold broad authority to limit use of nondiplomatic government personnel for diplomatic purposes."[141] Congress might choose to be chary in imposing limits or restrictions on how domestic agencies interact abroad, given the added usefulness of flexibility in international engagement, and it might be appropriate to give heightened deference to agencies with respect to this engagement.[142] But this does not mean that Congress's traditional right of control over domestic-facing agencies must vanish when they look outward.

[139] For the broader debate on the scope of congressional control over administrative agencies as distinct from unitary executive power of the president, see generally Peter L. Strauss, Overseer, or "The Decider"?: The President in Administrative Law, 75 Geo. Wash. L. Rev. 696 (2007); cf. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2235 n.9 (2020) (Kagan, J., dissenting) (suggesting with respect to the removal power that the President's prerogatives should be particularly strong with respect to "close military or diplomatic advisers").

[140] OLC Opinion of Sept. 19, 2011, supra note 2, at 119 (finding this restriction unconstitutional). The Office of Science and Technology Policy is an office established by Congress in 1976; its Director is charged with providing "advice on the scientific, engineering, and technological aspects of issues that require attention at the highest levels of Government." Presidential Science and Technology Advisory Organization Act of 1976, Pub. L. No. 94-282, § 204(a), 90 Stat. 459, 463. While these issues could include matters of "national security" and "foreign relations", the Director's statutory role is to advise the President rather than to serve as a diplomat. See id. at § 204(b).

[141] Price, supra note 6, at 461.

[142] See Jean Galbraith & David Zaring, Soft Law as Foreign Relations Law, 99 Cornell L. Rev. 735, 742 (2014) (arguing that practical needs for increased flexibility support acknowledgment of more independent presidential powers, heightened delegations and deference, and a relaxation of some procedural requirements).

4. International Organizations

Participation in international organizations is a major form of U.S. international engagement today—one that was unforeseen by the Framers. This engagement is typically derivative either of a treaty that received the Senate's advice and consent or of an international agreement that received Congressional authorization. U.S. engagement in the United Nations is an example of the former; U.S. engagement in the World Health Organization is an example of the latter.[143]

For the executive branch today, such engagement is part and parcel of the proclaimed exclusive executive powers over diplomacy. The executive branch asserts the power not only to determine the positions for which the United States advocates within these international organizations, but also how the United States engages in acts with formal international legal significance, like the casting of votes.

This view overlooks past practice that treated U.S. engagement in international organizations as different from traditional bilateral diplomacy for purposes of constitutional law. The United States' joining of the United Nations was originally seen as a transformative commitment that would rework the separation of foreign affairs powers in practice.[144] Edward Corwin described the implementing legislation as setting forth a "controlling theory" that "American participation in [the] United Nations shall rest on the principle of departmental collaboration, and not on an exclusive presidential prerogative in the diplomatic field."[145] Indeed, as

[143] See 91 Cong. Rec. 8189–90 (1945) (containing the Senate's advice and consent to the U.N. Charter); S.J. Res. 98, ch. 469, 62 Stat. 441 (1948) (containing congressional authorization for U.S. entry into the World Health Organization).

[144] This was true not just with respect to international engagement, but with respect to other foreign affairs powers as well. With respect to international agreements and uses of force, the executive branch gained and has since retained independent powers from the post-World War II moment, even as it seeks to walk back any concessions with respect to what it terms "diplomacy." For an account of how the executive branch gained power to bypass the Article II treaty process, see generally Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995) (describing the shift away from Article II treaties to ex post congressional executive agreements in the post-World War II era). For an account of this era's influence on the constitutional distribution of war powers, see Curtis A. Bradley & Jean Galbraith, Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change, 91 N.Y.U. L. Rev. 689, 733–36 (2016) (noting how presidents relied on the U.N. Charter in bolstering claims to their concurrent war powers).

[145] Corwin, supra note 17, at 221–22 (deeming such collaboration a "sound constitutional principle in that it can claim a great deal of support from the history of the conduct of American foreign relations, especially in the period prior to the war with Mexico" and also "the only practicable principle unless we wish to establish outright presidential dictatorship").

noted earlier, in 1947 Congress legislated that the United States should not cast a veto in the Security Council if a particular issue came before it, with the full knowledge and acquiescence of the executive branch.[146]

A few years later, a House committee made a point similar to Corwin's in a report regarding U.S. funding for international organizations. The report stated:

> The field of negotiation involved in the determining of the course and scope of operations in international organizations in which this Nation participates is distinguishable from [other forms of international relations] . . . It should be kept in mind that United States participation in such organizations arises not from inherent Executive powers under the Constitution but is in pursuance to laws enacted by the Congress. The Executive cannot bind the Nation in this field, because contributions to international organizations involve the power of the purse, and that power belongs to Congress.[147]

In now asserting that U.S. participation in international organizations is a manifestation of the president's exclusive powers over diplomacy, executive branch lawyers ignore the ways in which congressional authorization is woven into U.S. participation in international organizations. When the executive branch casts a vote in the World Bank to fund a loan to a particular country, it does so only because Congress has approved U.S. participation in the World Bank and funds U.S. contributions to it. When the executive branch votes in the U.N. Security Council in favor of the imposition of sanctions on a particular country, it does so because the Senate advised and consented to the U.N. Charter and because Congress has given the executive branch the pre-existing authority to impose these sanctions. It would be relatively easy to conclude that the price of these authorizations is acceptance of congressional mandates—especially given the executive branch's extensive suite of tools for keeping such mandates to a minimum. Instead, the executive branch has embraced the enlargement of "diplomacy" while rejecting any direct limits on presidential control thereof.

[146] See supra notes 51–52 and accompanying text.

[147] H. Comm. on Foreign Affs., 81st Cong., Rep. on Amendment of Certain Laws Providing for Membership and Participation by the U.S. in Certain Int'l Orgs. 7 (Confidential Comm. Print 1949).

III. RETHINKING CONSTITUTIONAL CONTROL OVER INTERNATIONAL ENGAGEMENT

The executive branch presently takes an all-or-nothing approach to the allocation of the diplomatic powers—all for the President and nothing for Congress. Up to this point, this Article has critiqued the constitutional foundations of this approach (as it applies to power over content, agents, and information) and challenged how the executive branch defines diplomacy for constitutional purposes. In this Part, I turn from the past to the future and ask how constitutional control over international engagement could best be conceptualized and operationalized going forward.

I begin by setting out three doctrinal options: the complete control now claimed by the executive branch, a converse framework in which Congress would have the ultimate say, and an intermediate approach which would narrow but not entirely abandon exclusive presidential powers with respect to international engagement. I argue in favor of the third option, though recognizing that it has its flaws and will leave much unsettled. I then discuss institutional pathways by which Congress might pursue this option and strengthen its constitutional hand. I close by considering some lessons that my study of the diplomatic powers holds for broader scholarship and practice regarding the separation of powers.

A. Doctrinal Options for the Distribution of Powers

Broadly speaking, three doctrinal approaches are plausible for the distribution of power respecting how the United States engages internationally with its counterparts. The first approach is the one championed by the executive branch, in which the President has exclusive control over diplomacy—and diplomacy is understood capaciously. The second approach is one in which Congress would have ultimate control across the board, obligating the President to carry out any congressional mandates except perhaps those that would remove presidential power over representation. The third approach would draw fine-grained lines, recognizing some space for exclusive executive power but defining this space far more narrowly than OLC does at present.

The first approach—the maximalist OLC approach—does have certain advantages. I have criticized it throughout this Article as based on shoddy constitutional reasoning: it overlooks the Framers' assumption that the products of negotiations would need to receive Senate advice and consent,

it misreads some historical precedents, it ignores other historical precedents, and it fails to grapple with the radically different landscape of foreign policy in the modern era. But this approach is relatively easy to administer and it will produce desirable policy results at times and perhaps on average. The President's policy judgments may often be better than Congress's in the first place. Moreover, the President will have more flexibility to adjust to changing situations if not bound by statutory constraints.

Nonetheless, this approach should be a source of considerable concern, and not only for those who are wary of legal overclaiming. It should alarm those who believe, as a matter of principle, that the President should answer to Congress or, as a matter of experience, that the risks of a horrific President make it valuable for Congress to be able to impose constraints. This is particularly true as claims over exclusive diplomatic powers are being drawn upon to justify not just talk, but also actions with international legal significance. The Trump administration's decision that it could withdraw the United States from the Open Skies Treaty in a manner that conflicted with a congressional mandate is an example of the importance of the distribution of diplomatic powers in practice.[148]

The second approach—ultimate control to Congress—also has much to recommend it. It has strong claims as an originalist matter (power over representation excepted), it is faithful to the broader constitutional presumption in favor of congressional control, and it sets up a clear, bright-line rule. The President's role in the legislative process gives the executive branch a tool for resisting the passage of undesirable legislation. And if we are moving, as we seem to be, to a practice whereby presidents energetically repudiate many major foreign policy decisions of their opposite-party predecessors, then a presidential obligation to obey congressional mandates regarding diplomacy could provide useful ballast.

A regime of pure congressional control would nonetheless rest uneasily with considerable constitutional practice. The history of the diplomatic powers is marked not by unmitigated congressional control, but rather by a longstanding constitutional tussle between the political branches. This Article has emphasized the presence of practice favoring Congress, but there is no shortage of practice favoring the executive branch as well, and some of it dates well before the OLC echo chamber of the last thirty years.

[148] See supra note 92 and accompanying text.

There are legitimate functional concerns about how micro-management by Congress might hinder U.S. foreign policy. To give one example: should the executive branch need a special authorization from Congress to attend any international conference, as required by the 1913 statute that remains on the books?[149]

Moreover, any conclusion that the President has no exclusive diplomatic powers other than representation will have to grapple with the Supreme Court's decision in *Zivotofsky*. Even if the Supreme Court got this decision wrong, it is unlikely to reverse itself in the near future. One could just treat *Zivotofsky* as about recognition and nothing more, and the Court certainly does emphasize the narrowness of its holding.[150] But *Zivotofsky* also suggests that the President has at least some other exclusive diplomatic powers, although clearly indicating that these powers are less than those claimed by the executive branch.[151]

The third approach—an intermediate path—would build upon the complexity described in this Article. Such an approach would give Congress more power than the executive branch considers Congress to have, but it would accept that the President does have certain exclusive powers related to diplomacy. It would treat *Zivotofsky* as established doctrine with respect to the recognition power, acknowledging that the outcome in *Zivotofsky* was defensible (though not foreordained) as a matter of constitutional reasoning and deeming the Court unlikely to revisit this issue. For the rest, it would draw on *Zivotofsky*'s reminder that "[i]n a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected."[152]

What would such an intermediate path look like? There is no single obvious answer and, for whatever path is chosen, implementation will be harder than for either of the other two paths because it eschews their bright line rules of always letting one branch win.

I think the most promising approach would narrow our constitutional concept of "diplomacy" for purposes of exclusive presidential power in two of the four ways identified earlier. First, we could limit our constitutional concept of "diplomacy" to the negotiating process, rather than including the formation of policy objectives and outcomes like the

[149] 22 U.S.C. § 262.
[150] Zivotofsky v. Kerry, 576 U.S. 1, 20 (2015).
[151] Id. at 20–21.
[152] Id. at 21.

casting of votes. Such a limit would give Congress the option of exerting control over inputs and outputs, while shielding the executive branch from the risk of micro-management along the way. This option of congressional control would be available in all situations except where either the President is negotiating a treaty that will be sent to the Senate for advice and consent (in which case, the requirement of subsequent Senate review serves as a powerful check on presidential over-reaching) or where the President is negotiating over issues that lie within presidential exclusive power as a matter of substance (such as recognition or the exercise of whatever slice of authority is exclusively given to the commander-in-chief). Second, we could confine "diplomacy" for purposes of exclusive presidential powers to the President and agencies designed to focus primarily on foreign affairs, allowing Congress to control nondiplomatic agencies as they engage abroad similarly to how Congress can control them as a matter of domestic law. While it is functionally useful for agencies to have extra flexibility when they engage abroad—and potentially to partake in part of the President's concurrent (as distinct from exclusive) authority over foreign affairs—both historical practice and structural constitutional principles support ultimate control being vested with Congress.

As discussed earlier, both these limits have plausible pedigrees.[153] Bringing these limits into our constitutional concept of "diplomacy" would sharply narrow the scope of exclusive presidential power over international engagement by circumscribing the executive branch's definitions of diplomatic content, agents, and information.

With respect to *content*, Congress could assert the same level of control over nondiplomatic agencies engaging internationally as it does over these agencies in other settings. As to the President (and diplomatic agents acting under the President), Congress could exert overall control over policy objectives and over the end products of negotiations, while leaving the President with exclusive power over the bargaining process itself. This would be similar to the exclusive power the President may have as

[153] See supra Section II.B. I propose using only these two limits, and not the other two potential limits identified earlier. Defining "diplomacy" narrowly in terms of subject matter has only light support as a limiting factor as a matter of constitutional history and, perhaps relatedly, seems more challenging to implement in practice than does defining "diplomacy" in terms of institutional actors. As for international organizations, the other two limiting factors proposed would operate in practice to give Congress increased control over U.S. decision making within these organizations.

commander-in-chief to make tactical decisions on the battlefield. This approach would allow Congress to identify "the policy of the United States" without objection (a phrase that has symbolic power even though it may not give rise to binding obligations), instruct the President to pursue certain substantive outcomes through negotiations, mandate how the United States votes in international organizations, and delay or block the executive branch from joining international agreements. The President would have exclusive discretion, within the bounds of good faith, to decide with whom to negotiate, how to time the negotiations, and which words or tactics to employ. Control over the bargaining process would leave the President with considerable practical authority to thwart new developments that the President does not support, even apart from the power to veto legislation setting out policy objectives in the first place.[154] Moreover, this approach would empower Congress to slow or block sharp swings in U.S. foreign policy.

Turning to *agents*, Congress could control how nondiplomatic agencies engage abroad to the same extent that it can control these agencies in domestic settings. For engagement to count as "diplomacy" for constitutional purposes—and thus to trigger exclusive presidential power—it would have to run through the President or agencies that focus primarily on foreign affairs. In other words, the diplomatic powers would run to those who are most clearly the institutional heirs of the *corps diplomatique*. And even with respect to those heirs, we might also acknowledge some increased congressional control. As a seven-Justice majority of the Supreme Court observed in June 2020, the advice-and-consent requirement in the Appointments Clause was designed to "provide an excellent check upon a spirit of favoritism in the President and a guard against the appointment of unfit characters."[155] Yet even as

[154] Control over policy and end products would also suggest that Congress should be able to set spending restrictions on foreign aid, see Price, supra note 6, at 454–55 (discussing this issue), place time limits or bans on the entry into force of executive agreements, and potentially place time limits or bans on unilateral presidential treaty withdrawals. Cf. Iran Nuclear Agreement Review Act of 2015, Pub. L. 114–17, § 2, 129 Stat. 201, 203 (providing that the President could not waive sanctions on Iran during a specified time period—thirty or sixty days, depending on the start date—after the finalized agreement had been provided to Congress). On those limited matters where the issues under negotiation are ones over which the President has exclusive control—such as recognition or whatever exclusive powers come with the commander-in-chief role—the President would necessarily have exclusive control over the policy objectives and outputs of negotiation.

[155] Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv. LLC, 140 S. Ct. 1649, 1657 (2020) (quotation marks and citation omitted).

international engagement has become far more productive of end products that do not require approval from Congress, the executive branch has claimed that the President has exclusive power to conduct it through whomever the President selects, whether confirmed or unconfirmed. Ryan Scoville signals support for a "revitalized Appointments Clause . . . as one useful mechanism" for containing "the executive and restor[ing] the separation of powers."[156] The use of special envoys available to the President could be left in place except to the extent that Congress has mandated otherwise. Similarly, Congress could retain considerable ability to structure the offices even of diplomats, as it did through the U.N. Participation Act.[157]

Control over *information* would follow a similar path. Where administrative agencies are negotiating about their exercises of delegated powers, Congress should be able to mandate oversight through statutory reporting requirements to the same extent that they can mandate oversight on domestic issues.[158] For negotiations conducted by the President or diplomatic proxies, the President could have a narrow privilege to withhold documents related to the negotiations if the President deemed the public interest to require it. This approach would track the reasonable balance that was struck in practice prior to the Trump administration,[159]

[156] Scoville, Ad Hoc Diplomats, supra note 6, at 1002.

[157] See supra note 58 and accompanying text.

[158] Under this reasoning, the Trump administration should not have been able to invoke a privilege over diplomatic information in withholding a memorandum written by the Secretary of Commerce regarding potential tariffs that a statute obligated it to disclose. OLC Opinion of Jan. 17, 2020, supra note 1, at 1–2, 11–14 (also offering several other reasons for withholding the memorandum); cf. Cause Action Inst. v. U.S. Dep't of Com., 513 F. Supp. 116, 130 (D.D.C. 2021) (holding that this memorandum could not be disclosed pursuant to FOIA in light of presidential communicative privilege, notwithstanding the various statutes mandating that it be made public). It might of course be the case that such requirements could damage U.S. negotiating interests. But this seems like an interest that Congress itself can weigh in deciding whether to attach reporting requirements to statutory delegations—especially in light of Congress's strong countervailing interests in oversight. The Biden administration ultimately released this memorandum in the summer of 2021, although apparently without comment as to whether it had a legal obligation to do so. See Doug Palmer, Commerce Releases Trump-Era Report Justifying Auto Tariffs on National Security Grounds, Politico (July 7, 2021), https://www.politico.com/news/2021/07/07/commerce-trump-era-report-auto-tariffs-498531 [https://perma.cc/3V8E-7EJW].

[159] In the 1996 controversy related to Mexico's debt crisis, for example, the Clinton administration disclosed numerous documents and only withheld ones that related specifically to the White House (as distinct from agencies), including "confidential communications between the President and foreign leaders." OLC Opinion of June 28, 1996, supra note 45, at 259 (also noting the withholding of White House documents "revealing White House

consistent with what the Supreme Court has called a "tradition of negotiation and compromise" with respect to congressional subpoenas in general.[160] It should be applicable except in impeachment proceedings, where the House and the Senate should be entitled to whatever information they need to determine whether "Treason, Bribery, or other high Crimes and Misdemeanors" have been committed.[161]

The proposed redistribution of the powers offered here would probably not radically reshape U.S. international engagement in practice. As this Article has shown, Congress often passes statutory provisions with mandates regarding international engagement—but as frequent as these provisions are, they still address only a fraction of what is done by the executive branch. Moreover, if the executive branch came to recognize these provisions as constitutionally valid, it might exert more political effort during the bill-drafting process to keep them from becoming law or to demand the inclusion of sunset clauses in order to preserve future flexibility. Filibuster reform, should it ever occur, would make it easier for the executive branch to seek removal of statutory obligations that it views as too constraining. Finally, treating domestic-facing agencies as controllable by Congress in their international engagement to the same extent that they are controllable by Congress in domestic engagement would still leave significant space for executive branch officials to push back against Congress. These officials could do so through general constitutional argumentation with respect to agents (based on variants of the unitary executive theory) and with respect to information (based on claims of executive privilege). The executive branch could also potentially shift certain negotiations from the hands of domestic-facing agencies to traditionally diplomatic ones to strengthen its constitutional

deliberations" and CIA documents "that constituted daily briefings for the President or records of meetings at the National Security Council or with senior White House staff").

[160] Trump v. Mazars USA, 140 S. Ct. 2019, 2031 (2020). In the parallel national security context, Congress and the executive branch reached a statutory compromise whereby the President ordinarily reports covert actions in advance to key congressional committees or their leaders but can delay this reporting in exceptional situations. 50 U.S.C. § 3093(c)(1)–(3).

[161] U.S. Const. art. II, § 4. Recognition of this principle goes back to George Washington and the Jay Treaty. Jean Galbraith & Michel Paradis, George Washington's Advisors Agreed: Impeachment Did Away with Executive Privilege, Just Security (Oct. 25, 2019), https://www.justsecurity.org/66713/george-washingtons-advisors-agreed-impeachment-did-away-with-executive-privilege/ [https://perma.cc/6MNR-2HM2] (noting agreement among Washington's advisors that the papers related to the Jay Treaty would need to be disclosed if the House of Representatives had been pursuing an impeachment proceeding).

hand, although such gamesmanship would be unlikely to be worth the bureaucratic hassle for many matters of negotiation.

Yet although the total effect of the doctrinal shifts proposed here would likely be modest relative to the total mass of U.S. foreign policy, it would be significant in establishing available checks on presidential power. For unless we draw some lines—even partially unsatisfactory ones—through the morass of U.S. international engagements, presidents are likely over time to define "diplomacy" for purposes of exclusive presidential power in broader and broader terms. With respect to content, the approach proposed here would enable Congress to have ultimate control of certain actions (such as votes in international organizations). This ultimate control is particularly important as the executive branch is increasingly reading the President's asserted exclusive constitutional powers over diplomacy to cover actions like votes or treaty withdrawals. With respect to agents, the approach proposed here would enable Congress to increase executive branch accountability by structuring who within the executive branch carries out various responsibilities, especially with respect to the activities of nondiplomats and the exercise of delegated powers. With respect to information, this approach would ensure Congress's powers of oversight even against a president who rejected traditional norms of cooperation. In other words, the doctrinal shifts proposed here may not have significant implications for an expertise-reliant and norms-abiding president, but they could prove powerful—perhaps crucial—if a different kind of person holds the office.

B. Institutional Paths to More Congressional Control

Congress's power over international engagement is hobbled by the legal views of the executive branch. Ultimate control now lies with the executive branch, because of its legal positions and its ability to make good on these positions in practice. Members of Congress interested in changing this dynamic could pursue one or more of three institutional strategies.

First, Congress and its members could emphasize countervailing views of the diplomatic powers. Congress has already established a strong position of non-acquiescence to the current positions of the executive branch. As described in this Article, it has passed many statutes in the past asserting control over aspects of the content, agents, and information underlying U.S. international engagement. It has continued to pass such statutes in recent years, notwithstanding an increasing barrage of

disapproving letters from the Department of Justice and signing statements from the President. These actions demonstrate Congress's institutional ability to resist executive branch claims to exclusive powers—even despite all of Congress's collective action problems and the risks of a presidential veto.

In addition to continuing this approach, members of Congress should also consider formalizing the legal reasoning that justifies these statutory positions. Congress has no equivalent to OLC, but its committees can hold hearings on the allocation of constitutional power or undertake framework studies. In January 2001, for example, the Senate Foreign Relations Committee commissioned a major study of treaties from the Congressional Research Service.[162] This study has come to serve as a reference point for members of Congress and for the scholarly community. A similar study undertaken with respect to diplomacy and its constitutional meaning could draw on long-neglected sources that bolster congressional claims to control.

Second, Congress and its members could raise the cost for the executive branch of its extreme legal positions on what it calls diplomacy. Members of Congress have soft powers available for use in this regard. Prospective OLC heads could be asked about these positions at their Senate confirmation hearings. Congressional committees could hold hearings on occasions where the executive branch squarely disregards a statutory mandate related to U.S. international engagement.

The back-and-forth that can occur at the policy-formation stage between committees and executive branch actors—particularly agencies—already means that executive branch actors may be much more accommodating to congressional views in practice than OLC thinks they need to be as a matter of law. But Congress could further strengthen the power of its statutory mandates by tying executive non-adherence to meaningful consequences. Ordinarily, the executive branch treats these mandates as severable, allowing it to get the benefits of authorizations for appropriations while ignoring the limits tied to it. In a 1990 memorandum deeming unconstitutional a provision that certain legislative-branch-connected officials be included in a particular set of negotiations, for example, William Barr concluded that the provision was severable from the overall authorization for funding in the absence of "evidence that

[162] Cong. Rsch. Serv., Treaties and Other International Agreements: The Role of the United States Senate (Comm. Print 2001).

Congress would not have enacted the authorization absent the condition."[163] Congress could attach "anti-severability" provisions (also known as "inseverability" provisions) to mandates that it thinks the executive branch might resist—thus raising the stakes considerably for such resistance.[164] Alternatively, Congress could increase the extent to which it ties rewards to obedience to congressional mandates, as it has done in the past with respect to the negotiation of trade agreements that will need ex post congressional approval.[165]

As a third set of institutional strategies, Congress or its members could threaten to involve the courts. This strategy has both the highest risks and rewards. The *Zivotofsky* case came to the Supreme Court because Congress wrote a statute that carved a pathway to litigation, giving U.S. citizens born in Jerusalem the statutory right to list "Israel" as their place of birth on their passports.[166] When one such citizen was denied this right, he had standing to sue, and the Supreme Court held that the case did not present a political question.[167] When the case returned to the Supreme Court on the merits, however, the Court issued a blow against congressional power, as it validated the executive branch claims of exclusive constitutional power over recognition.[168]

To the extent to which Congress wishes to tee up challenges for the courts over control of U.S. international engagement with respect to content, agents, and information, it has some capacity to do so. The path to the courts runs most clear with respect to information. In the national security context, the Trump administration failed to publish a statutorily mandated report on uses of military force, leading several national security experts and a nonprofit to sue for its disclosure.[169] Similar

[163] OLC Opinion of Feb. 16, 1990, supra note 40, at 45.

[164] For a discussion of inseverability clauses as general tactics and an analysis of their likely enforceability, see, e.g., Israel E. Friedman, Note, Inseverability Clauses in Statutes, 64 U. Chi. L. Rev. 903, 903–09 (1997).

[165] See Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114–26, § 103(b)(3), 129 Stat. 319, 335 (providing the President with a pathway to a quick up-or-down vote on trade agreements submitted prior to a certain date and conditional on certain involvement of members of Congress in the negotiating process and adherence to certain substantive objectives).

[166] Zivotofsky v. Kerry, 576 U.S. 1, 7–9 (2015); Pub. L. 107–228, § 214(d), 116 Stat. 1350, 1366 (2002).

[167] Zivotofsky v. Clinton, 566 U.S. 189, 191 (2012).

[168] Zivotofsky v. Kerry, 576 U.S. at 32.

[169] See Scott R. Anderson & Benjamin Wittes, We Filed Suit Over Trump's Missing War Powers Report, Lawfare (June 9, 2020), https://www.lawfareblog.com/we-filed-suit-over-trumps-missing-war-powers-report [https://perma.cc/R5HA-KVF3] (embedding the

lawsuits could be brought should the executive branch withhold information related to international engagement that it is statutorily mandated to make public. Members of Congress or a single House of Congress might similarly be able to sue over information withheld from Congress despite a statutory mandate to provide it or over information subpoenaed by a congressional committee but then withheld.

With respect to control over content and agents, congressional mandates that are disregarded by the executive branch could give rise to lawsuits by injured private parties or—conditional on congressional standing—by members of Congress. As to content, while many issues might not be justiciable, actions with legal and practical significance like votes in the World Bank could have consequences for private actors that would generate standing to sue. As to agents, private actors harmed by international agreements negotiated by non-Senate-confirmed officials or by nondiplomats whom Congress had banned from the negotiations could also give rise to lawsuits, just as a hedge fund recently (if unsuccessfully) brought an Appointments Clause challenge to a congressionally established board with power over aspects of Puerto Rico's bankruptcy.[170] Similarly, interested actors would also likely be able to sue over any violations of notice-and-comment procedures that Congress has established or comes to establish for agencies regarding international negotiations.

To the extent that members of Congress wish to involve the courts as a strategy, as distinct from writing statutes that happen to lead to standing and causes of action for private actors, there are various ways to go about it. *Zivotofsky* involved a matter of international engagement where the executive branch had an unusually strong claim to exclusivity in light of the absence of past statutes mandating recognition decisions and considerable Supreme Court dicta about the executive exclusivity of the recognition power. It also involved an issue that was both classically diplomatic in nature (recognition) and as politically sensitive as it gets (the status of Jerusalem). An alternative approach would be to focus initially on the areas where Congress's claims look the strongest as a

complaint). The executive branch ultimately released the report, thus ending the litigation. Scott R. Anderson & Benjamin Wittes, Trump Administration Releases Overdue War Powers Report in Response to Lawsuit, Lawfare (Oct. 20, 2020), https://www.lawfareblog.com/trump-administration-releases-overdue-war-powers-report-response-lawsuit [https://perma.cc/E2Z6-L3A6].

[170] Fin. Oversight & Mgmt. Bd. For P.R. v. Aurelius Inv., 140 S. Ct. 1649 (2020).

matter of constitutional structure or historical practice. The activity of administrative agencies abroad is one such area, given the substantial arguments that these activities should not be thought of as "diplomacy" for constitutional purposes. For instance, the Supreme Court might not be too sympathetic to executive branch claims to exclusive diplomatic powers where the underlying activities involve the Department of the Treasury's involvement in international standard-setting for insurance regulation.[171]

The institutional path to more congressional control is not an easy one. In his *Youngstown* concurrence, Justice Jackson made the chilling observation that "[i]f not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'the tools belong to the man who can use them.'"[172] While the Trump administration was even more extreme than prior administrations in claiming broad exclusive diplomatic powers, its words and actions have rested on a foundation contributed to by all five administrations that immediately preceded it. If Congress continues its current approach, it will maintain some degree of non-acquiescence to these executive branch positions, but it will not have the ability to mandate their implementation in practice. Only stronger steps, such as the second and third strategies discussed here, will enable that to occur.

Congress's potential success in gaining back control over content, agents, and information in U.S. international engagement would have further implications for practice and policy. Right now, the executive branch can ignore statutory mandates with which it disagrees and that it can classify as going to "diplomacy." But if that changes, then we may see more executive pushback against congressional mandates during the lawmaking process. The executive branch is likely to be particularly resistant to long-term mandates that leave it without substantive flexibility. By contrast, provisions that allow for considerable executive discretion, impose procedural requirements (e.g., notice requirements) rather than substantive ones, or have sunset clauses are more likely to get enacted. These in turn are the kind of provisions that enhance dialogue between the branches.

[171] Cf. DOJ Letter of Mar. 5, 2018, supra note 2, at 2 (asserting that exclusive executive branch powers over diplomacy apply to this domain).

[172] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

C. Broader Implications for Constitutional Law

Constitutional control over diplomacy is a neglected aspect of the broader separation of powers. The account given in this Article is therefore important not only for its treatment of this fascinating and understudied issue but also for what it contributes to more general debates in constitutional theory and practice.

One contribution of this Article relates to executive branch lawyering and its effects. Do executive branch lawyers do more to constrain presidential power or to enable it? Especially since the infamous torture memos in George W. Bush's first term, OLC has come under substantial scholarly scrutiny.[173] OLC has few full-throated proponents, but its partial defenders emphasize the importance of its internal norms, "including a strong norm of adhering to its own precedents even across administrations."[174]

This examination of the diplomatic powers has several implications for the broader literature about OLC. First, it reinforces how one-sided OLC can be in its legal analysis: cherry-picking the constitutional inputs that support a position favorable to presidential power and then overreading these inputs. Second, it demonstrates how transparency can be a tool of power rather than constraint. The stream of OLC memoranda about diplomatic content, agents, and information have not generated outrage or meaningful pushback over the years—perhaps because it is hard to mobilize public attention over a question like whether the head of the White House Office of Science and Technology Policy can or cannot

[173] For a sampling of the extensive literature, see Daphna Renan, The Law Presidents Make, 103 Va. L. Rev. 805, 812 (2017) (arguing that "executive branch legalism has never been an external, or exogenous, constraint on presidential power" but rather "always . . . a tool of presidential administration itself"); Adoree Kim, Note, The Partiality Norm: Systematic Deference in the Office of Legal Counsel, 103 Cornell L. Rev. 757, 760 (2018) (finding in an empirical review that OLC is "deeply deferential to the President and to presidential action, while remaining relatively impartial towards the agencies"); Sudha Setty, No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win, 57 Kan. L. Rev. 579 (2009) (arguing for increased disclosure of OLC opinions); Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688 (2011) (pointing to institutional factors that promote self-restraint within OLC); Bruce Ackerman, The Decline and Fall of the American Republic 143–52 (2010) (arguing for the need of an independent quasi-judicial body within the executive branch). For earlier scholarship on OLC, one interesting resource is a symposium by the Cardozo Law Review entitled *Executive Branch Interpretation of the Law*. See John O. McGinnis, Introduction, 15 Cardozo L. Rev. 21 (1993) (introducing numerous essays, several of which focus on OLC).

[174] Curtis A. Bradley & Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Constraint, 113 Colum. L. Rev. 1097, 1133 (2013).

collaborate with Chinese counterparts. This build-up of low-stakes precedents can provide valuable legitimacy for major moves down the road.[175] Third, this examination of the diplomatic powers shows how OLC's norm of adherence to precedent can itself be a source of concern. OLC now justifies its positions on the diplomatic powers mostly by citations to prior OLC opinions. Heavy reliance on its own precedents makes it more difficult for OLC to change course and acknowledge that sweeping claims of exclusive presidential powers stand on shallow ground.

Another contribution made by this Article relates to historical practice. This source of constitutional meaning is typically thought to favor the President in separation-of-powers disputes. The President has the incentive and the ability to exercise power, while the challenge of collective action makes Congress more likely to acquiesce than to resist (as does the fact that many members will be loyal to the President under the party system).[176] The recognition power addressed in *Zivotofsky* is an example: in finding presidential power over recognition to be exclusive, the Court emphasized that historical practice "strong[ly] support[ed]" this conclusion and that the "weight of historical evidence indicate[d]" congressional acquiescence.[177]

Yet for the other powers relating to international engagement, it is notable how much historical practice exists that supports Congress. Why is this the case? For the diplomatic powers, it is the executive branch claiming exclusive power—unlike the power to initiate uses of force abroad, where the question is whether Congress has exclusive power. This makes Congress's task easier. Because it is the executive branch claiming exclusive powers over diplomacy (defined broadly), any congressional

[175] On another important issue of foreign relations law—whether the President has the power to unilaterally withdraw the United States from treaties entered with the advice and consent of the Senate—Curtis Bradley shows how low-stakes precedents became crucial ammunition in favor of presidential power during President Carter's high-stakes decision to withdraw the United States from its mutual defense treaty with Taiwan. See Curtis A. Bradley, Treaty Termination and Historical Gloss, 92 Tex. L. Rev. 773, 775 (2014) (observing that "[p]ractice then builds up around low-stakes examples" until "a more controversial example arises and the President pushes forward successfully, thereby consolidating the changed understanding").

[176] Bradley & Morrison, supra note 84, at 438–47; see also Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 684–97 (2016) (noting the relevance of other factors to acquiescence).

[177] 576 U.S. 1, 23, 28 (2015); see also Roisman, supra note 176, at 671 (using *Zivotofsky* as an example).

statute that sets forth mandates can be deemed practice that counts against these proclaimed exclusive powers. A law stating "the policy of the United States" or mandating the executive branch to supply information to Congress is highly probative that Congress thinks it has the power to establish foreign policy or require the disclosure of information. In contrast, for the power to initiate uses of force abroad, Congress does not get much mileage as a matter of historical practice out of statutes authorizing the use of military force.

In other words, one lesson from this Article is that historical practice tends to support findings of concurrent rather than exclusive powers. It is relatively easy for a branch to express its view that it has a concurrent power through practice—all it has to do is to exercise this power. By contrast, it is harder for a branch to express its view that it has an exclusive power through practice—it must not only exercise this power but also resist exercises of this power by the other branch. Where Congress is claiming a concurrent rather than exclusive power, as in the present context, it benefits from this trend even as it suffers from the separate ways in which historical practice tends to favor the President as the more energetic branch.

One final contribution of this Article is to highlight the interface between administrative law and foreign relations law. We are far from the days in which there was a firm line between foreign affairs and domestic ones, if indeed those days ever fully existed. Yet the executive branch favors keeping all its proclaimed exclusive prerogatives even as once-domestic issues spread into foreign spaces. Shirin Sinnar has written about "rule of law tropes"—ways in which the executive branch uses "recognizable term[s] from constitutional or international law" to legitimate its actions in contexts very different from the ones in which these terms are ordinarily used.[178] The executive branch's sweeping use of "diplomacy" can similarly be said to be a trope that papers over the vast differences between international negotiation at the time of the Framing and international engagement today. As domestic agencies move into foreign affairs—and as foreign affairs become more involved in the regulation of individual conduct—we need doctrine that takes these shifts

[178] Shirin Sinnar, Rule of Law Tropes in National Security, 129 Harv. L. Rev. 1566, 1573 (2016).

into account. Some scholarship engages with these issues, but there is a long way to go.[179]

CONCLUSION: "THE ILL-FAVOURED NAME OF DIPLOMACY"

Our constitutional system suffers from the "ill-favoured name of diplomacy."[180] As this Article has shown, the executive branch has transformed what was at best a narrow set of presidential prerogatives with respect to the conduct of treaty negotiations into sweeping constitutional justifications for exclusive control over "diplomacy"—understood very broadly. It has done so by overreading sources from the Founding era, disregarding structural reasoning that favors congressional control, and ignoring extensive historical practice in tension with its positions.

It is time for a better structural allocation of power. The executive branch should not have constitutional carte blanche to write off Congress when it identifies policy objectives, oversees U.S. agencies as they engage in overseas negotiations, or seeks the information it needs to decide whether the President has committed an impeachable offense. Future administrations will need to decide whether they wish to make indefensibly broad claims of exclusive executive power or instead pivot towards a more nuanced stance. If the executive branch does not cede ground of its own accord, then Congress has tools at its disposal to bolster its constitutional authority over international engagement.

[179] For scholarship grappling with the interplay between administrative law and foreign relations law, see, e.g., Elena Chachko, Administrative National Security, 108 Geo. L.J. 1063, 1067 (2020) (arguing that administrative law practice is becoming embedded even in "the foreign and security realm" through "individualized measures applied repeatedly and indefinitely through bureaucratic mechanisms"); Galbraith & Zaring, supra note 142, at 742 (arguing that where administrative agencies make non-binding international commitments, foreign relations law doctrines can be used "to put a thumb on the scale in favor of deferring to the judgments of regulators that international cooperation, or the harmonization of our rules and those in foreign countries, represents the best solution to cross-border regulatory problems"); Curtis A. Bradley, *Chevron* Deference and Foreign Affairs, 86 Va. L. Rev. 649, 651–53 (2000) (arguing that *Chevron* has relevance for foreign affairs law); cf. Ganesh Sitaraman & Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 Harv. L. Rev. 1897, 1901–02 (2015) (arguing generally that foreign relations law has "normalized" to resemble domestic law and providing normative arguments for this development).

[180] Nicolson, supra note 113, at 12.