

The Contributions of the Obama Administration to the Practice and Theory of International Law

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My aim in this essay is to give a tour of the horizon of the Obama administration's international law record in order to identify the distinctiveness of its approach and to tie it in to some general themes in international and foreign relations law.

Due to his upbringing and education, Barack Obama came to the Presidency with a cosmopolitan outlook and an informed commitment to international law. This attitude differed sharply from his predecessor, George W. Bush, who was suspicious of international law and generally viewed it as an obstacle to the exercise of American power. By contrast, Obama devoted a chapter of his 2006 book *The Audacity of Hope* to international relations and made plain that he understood international law intimately and viewed it as a constructive force in international relations.¹ He criticized the view that “international law [was] an encroachment on American sovereignty [and] a foolish constraint on America’s ability to impose its will around the world”—a position that Obama associated with Henry Cabot Lodge, but one that might also describe the early Bush administration.² And Obama argued it was “in America’s interest to work with other countries to build up international institutions and promote international norms . . . because the more international norms were reinforced and the more America signaled a willingness to show restraint in the exercise of its power, the fewer the number of conflicts that would arise.”³ On the campaign trail Obama gave voice to this attitude when he criticized the Bush administration for its weak compliance with U.S. commitments under international law on the use of force and human rights.

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1. BARACK OBAMA, *THE AUDACITY OF HOPE* ch. 8 (2006).

2. *Id.* at 283.

3. *Id.* at 285.

How did this optimistic attitude toward international law survive contact with the scary threats and acute responsibilities of the Situation Room, the executive branch appointments process, the roadblocks of interagency approval, and the obstinate Congress of “No”?

My basic answer is that the idealism of the memoir and campaign trail persisted to a surprising degree but in some respects gave way to the realism of the Presidency—a realism, as we shall see, about both ends and means. I do not have a sharp thesis that explains all the major examples I will discuss. But I think I can get at what is interesting and distinctive about the Obama administration’s approach to international law by considering its practices through the lens of the two mechanisms through which a president and his team can influence international law.

First, a president has enormous unilateral authority to alter how the United States sees its international law commitments by merely interpreting those commitments. The practice began in 1793 when George Washington interpreted U.S. treaty and customary international law obligations in a controversial and, some believed, law-breaking way to declare U.S. neutrality in the conflict then raging between Great Britain and France.⁴ The Obama administration, I will argue, practiced “normal science” in exercising its interpretive powers to reshape the U.S. view of its international law commitments in light of its view of U.S. interests. The only lesson we learn from this practice is about how President Obama’s overall commitment to international law aided him in narrowing the U.S. view on international law constraints related to war.

The second mechanism through which the President can influence international law is by using the tools of diplomacy to contribute to the making of new international agreements—often, but not always, with some participation by the legislature. In this context, the Obama team made singular innovations by cobbling together tools that significantly expanded the President’s power to make international agreements without Congress’ consent, and sometimes in the face of clear congressional opposition. These new tools do not add up to a revolution in international law or presidential power. But in the aggregate they are significant advances in both and will mark the Obama administration’s defining contribution in this area.

I.

Let us begin with the first mechanism. In its first week in office the Obama administration ended policies that it believed violated (or once violated) the Torture Convention and the Geneva Conventions.⁵ In 2011, it

4. George Washington, *Proclamation, April 22, 1793*, reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 430–31 (John C. Fitzpatrick ed., 1939).

5. See Exec. Order No. 13,491, 3 C.F.R. 199 (2010) (signed Jan. 22, 2009).

declared that it would follow article 75 of Additional Protocol I to the 1949 Geneva Conventions, including its protections for detainees in international armed conflict, out of a sense of legal obligation under customary international law.⁶ In 2014, it announced that it would interpret articles 2 and 16 of the Convention Against Torture to apply extraterritorially in limited circumstances but would not apply them to U.S. military operations, which remained governed by the more specific laws of war.⁷

None of these interpretations is surprising in an administration committed to firming up U.S. human rights and related commitments. If anything, what is surprising is how little the administration expanded the U.S. view of its international law commitments from the baseline of what the late Bush administration was doing toward what the human rights community wanted.

Only the first of the changed interpretations mentioned above required a material change in U.S. practice, related to the Central Intelligence Agency. The latter two changes, which did not require a material change in practice, were advocated by the State Department in the second term of the Bush administration.⁸ The Obama administration came under pressure from the human rights community to do more. That community argued, for example, that the administration should extend article 75 of the First Protocol as a matter of customary international law to *non-international* armed conflicts, which the administration refused to do.⁹ It argued that the Torture Convention required investigation and possible prosecution of senior Bush administration officials, but the administration declined.¹⁰ The community also pushed the administration to construe the International Covenant on Civil and Political Rights to apply extraterritorially. After a robust internal de-

6. See Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), <https://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

7. See Mary E. McLeod, Acting Legal Adviser, U.S. Dep't of State, Address to the Committee on Torture: U.S. Affirms Torture Is Prohibited at All Times in All Places (Nov. 12–13, 2014), <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>.

8. See John Bellinger, *Further Thoughts on the White House Statement About Article 75*, LAWFARE (Mar. 13, 2011, 7:56 PM), <https://www.lawfareblog.com/further-thoughts-white-house-statement-about-article-75>; John Bellinger, *Obama's Announcements on International Law*, LAWFARE (Mar. 8, 2011, 8:33 PM), <https://www.lawfareblog.com/obamas-announcements-international-law>; John Bellinger, *U.S. Delegation Asserts Article 16 of Convention Against Torture Applies Outside U.S. Territory in Certain Circumstances, but Law of Armed Conflict 'Takes Precedence' in Situations of Armed Conflict*, LAWFARE (Nov. 12, 2014, 2:10 PM), <https://www.lawfareblog.com/us-delegation-asserts-article-16-convention-against-torture-applies-outside-us-territory-certain>.

9. See Julian E. Barnes, *Geneva Protections for al Qaeda Suspects? Read the Fine Print*, WALL ST. J. (Mar. 14, 2011), <http://blogs.wsj.com/washwire/2011/03/14/geneva-protections-for-al-qaeda-suspects-read-the-fine-print/>.

10. See *Aide: Obama Won't Prosecute Bush Officials*, CBSNEWS (Apr. 20, 2009, 12:10 AM), <http://www.cbsnews.com/news/aide-obama-wont-prosecute-bush-officials/>.

bate, the administration decided not to.¹¹ Finally, the community was disappointed when the administration argued in the Supreme Court for a presumption against extraterritoriality for international-law-based causes of action under the Alien Tort Statute (“ATS”) on the facts of *Kiobel v. Royal Dutch Petroleum Co.*, as well as for the ATS-narrowing doctrines of exhaustion, *forum non conveniens*, international comity, the act of state doctrine, the political question doctrine, and “case-specific deference,” when ATS causes of action might otherwise be appropriate.¹²

Perhaps more surprising are the ways that the Obama administration interpreted U.S. international law obligations related to the *ius ad bellum*, which governs the use of force in another country. President Obama has dramatically altered the nature of U.S. warfare in the last seven years. He ended heavy-footprint war in Afghanistan and Iraq, but he replaced it with heavy doses of light-footprint warfare involving airpower (especially by drones), Special Forces, and cyber operations.

Obama deployed these light-footprint tools with much greater frequency and intensity, and in many more countries, than President Bush. As of April 2016, Obama had ordered approximately ten times as many drone strikes as Bush, which killed seven times as many people,¹³ and he did so in seven countries as opposed to Bush’s five.¹⁴ At the end of 2015, the United States deployed 7500 Special Forces in 85 countries, though most were presumably for training and support.¹⁵ The War Powers Resolution report from late 2015 lists ongoing deployments of variable intensity in 14 countries, as well as in unnamed countries “in the central Africa region” to defeat the Lord’s Resistance Army, a rebel group in central Africa.¹⁶ The report also says “the

11. See U.S. Dep’t of State, Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶¶ 502–05 (Dec. 30, 2011), <http://www.state.gov/j/drl/rls/179781.htm>.

12. See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_affirmanceamcuusa.authcheckdam.pdf.

13. These ratios are based on average estimates provided by three nongovernmental organizations and summarized in Micah Zenko, *Obama’s Embrace of Drone Strikes Will Be a Lasting Legacy*, N.Y. TIMES (Jan. 12, 2016), <http://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy>.

14. See Washington Post Staff, *Full Text: Obama Gives a Speech About the Iran Nuclear Deal*, WASH. POST (Aug. 5, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/08/05/text-obama-gives-a-speech-about-the-iran-nuclear-deal/> (Obama claimed, “I’ve ordered military action in seven countries.”); Jon Greenberg, *Lizza Says Obama Has Bombed More Nations Than Bush*, PUNDITFACT (Sept. 25, 2014, 10:47 AM), <http://www.politifact.com/punditfact/statements/2014/sep/25/ryan-lizza/lizza-says-obama-has-bombed-more-nations-bush/> (calculating that Obama and Bush had launched airstrikes in seven and five countries, respectively, not counting the Philippines, a contested case).

15. See Mark Mazzetti & Eric Schmitt, *Obama’s ‘Boots on the Ground’: U.S. Special Forces Are Sent to Tackle Global Threats*, N.Y. TIMES (Dec. 27, 2015), <http://www.nytimes.com/2015/12/28/world/middle-east/more-and-more-special-forces-become-obamas-military-answer.html>.

16. Press Release, The White House, Office of the Press Secretary, Letter from the President—War Powers Resolution (Dec. 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/11/letter-president-war-powers-resolution>.

United States has deployed combat-equipped forces to a number of [unspecified] locations” in support of counterterrorism and “other overseas operations,” and it points to “further information” in a “classified annex.”¹⁷ President Obama also “significantly expand[ed]” President Bush’s cyberattacks on Iranian nuclear weapons facilities,¹⁸ engaged in hundreds of “offensive cyber-operations” in 2011 alone,¹⁹ and deployed extensive cyberattacks against the Islamic State.²⁰

This thumbnail sketch gives a sense of the grand scale of President Obama’s light-footprint warfare. Most of this warfare takes place with the consent of the country where U.S. troops are present. But in many important cases the United States lacks consent, and the use of American force depends on international law justifications concerning the *jus ad bellum* that will outlive President Obama’s term in office. I will mention what I think are the four most important.

First, President Obama’s threat to use force in Syria in the summer of 2013 in response to the Syrian government’s use of chemical weapons against its citizens rested on a construction of the U.N. Charter that narrowed the U.S. view of the Charter’s limits on the use of force. Obama said the threatened attack was justified because the Syrian government had “assault[ed] . . . human dignity,” made “a mockery of the global prohibition on the use of chemical weapons,” and presented a serious danger to U.S. and allied national security.²¹ Obama also made clear that whatever national security threat Syria presented did not rise to an “armed attack” under article 51 or related customary international law that would justify an exercise of self-defense under article 51 of the U.N. Charter.²² The President’s explanations for his threatened attack in Syria, combined with a statement of legal

17. *Id.* For a survey of the arc of the Obama administration’s war powers resolution reports, see Michael Knapp, *The Obama WPR Letters, 2009–2015*, LAWFARE (Jan. 20, 2016, 12:46 PM), <https://www.lawfareblog.com/obama-wpr-letters-2009-2015-0>.

18. See David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>.

19. Barton Gellman & Ellen Nakashima, *U.S. Spy Agencies Mounted 231 Offensive Cyber-operations in 2011, Documents Show*, WASH. POST (Aug. 30, 2013), https://www.washingtonpost.com/world/national-security/us-spy-agencies-mounted-231-offensive-cyber-operations-in-2011-documents-show/2013/08/30/d090a6ae-119e-11e3-b4cb-fd7ce041d814_story.html.

20. See David E. Sanger, *U.S. Cyberattacks Target ISIS in a New Line of Combat*, N.Y. TIMES (Apr. 24, 2016), <http://www.nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html>.

21. Press Release, The White House, Office of the Press Secretary, Statement by the President on Syria (Aug. 31, 2013), <https://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

22. Press Release, The White House, Office of the Press Secretary, Remarks by President Obama and Prime Minister Reinfeldt of Sweden in Joint Press Conference (Sept. 4, 2013), <https://www.whitehouse.gov/the-press-office/2013/09/04/remarks-president-obama-and-prime-minister-reinfeldt-sweden-joint-press> (“We may not be directly, imminently threatened by what’s taking place in a Kosovo or a Syria or a Rwanda in the short term, but our long-term national security will be impacted in a profound way, and our humanity is impacted in a profound way. . . . I’m not talking about circumstances where our national security is directly impacted . . .”).

right by the White House Counsel, marked the first time the United States had claimed that an intervention on humanitarian and related human rights grounds was lawful under the U.N. Charter even absent Security Council authorization or a self-defense rationale.²³ That was at least a small change and perhaps a large one in the U.S. interpretation of the U.N. Charter on the issue, and a big deal in the history of the Charter.²⁴

Second, the administration's cyberattacks in Iran will inform future global understandings of self-defense, even though the actions have not been accompanied by an official legal justification because they remain classified. It is possible, since the cyberattacks were covert actions, that the administration did not believe they complied with the U.N. Charter. It is also possible that it determined that the cyberattacks qualified as anticipatory self-defense because of the threat posed by Iran's nuclear weapons program.²⁵ Whatever the administration's secret legal position,²⁶ the practices are well known and will contribute to global understandings of self-defense under the Charter even if they are not accompanied by an official statement of legality.

Third, the Obama administration embraced a set of principles akin to the Bush administration's theory of preemption, albeit not in nearly as fraught a context as the 2003 invasion of Iraq. The core element of that preemption theory was an expanded conception of "imminence" due to the fact that

23. See *id.*; Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), <http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html> (reporting that White House Counsel said "the president believed a strike would be lawful, both in international law and domestic law, even if neither the Security Council nor Congress approved it," and adding that she stated that while the Syria intervention "may not fit under a traditionally recognized legal basis under international law," the administration believed that given the novel factors and circumstances, such an action would nevertheless be "justified and legitimate under international law"). Charlie Savage later reported the existence of a secret "seventeen-page unsigned paper" prepared by top administration lawyers that acknowledged that an intervention in Syria would exceed prior precedents but would nonetheless be lawful under the Charter on the ground that it would prevent "further indiscriminate use of chemical weapons against civilians and avert a broader humanitarian disaster, and that not taking action would lead to 'unconscionable follow-on consequences.'" CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 628–30 (2015).

24. The United States famously avoided any claim that the NATO-sponsored intervention in Kosovo was lawful under international law or constituted a precedent under international law. See Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000); see also Jack Goldsmith, *The Kosovo Precedent for Syria Isn't Much of a Precedent*, LAWFARE (Aug. 24, 2013, 8:02 AM), <https://www.lawfareblog.com/kuwait-precedent-syria-isnt-much-precedent> (canvassing international and domestic voices that sought to ensure that the Kosovo intervention was not a precedent under international law). And the threatened Syria intervention went further than Kosovo as a legal matter in any event because it lacked any formal international organizational support (by contrast with NATO's support for the Kosovo intervention).

25. The leading source on Olympic Games, an alleged covert campaign of cyber sabotage against Iranian nuclear facilities, suggests this was the rationale but does not take a position on the legal justification. See DAVID SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* ch. 8 (2013).

26. Another possibility, though one I have not found supported in public reports, is that the United States was acting in collective self-defense with Israel, which was responding to attacks or threatened attacks on Israel by Iran-supported Hezbollah forces.

modern technologies can do significant harm with little notice.²⁷ The Legal Adviser to the U.S. Department of State recently explained the Obama's administration's conception of imminence for *jus ad bellum* purposes in almost identical terms to the explanation the Bush administration gave for its conception of imminence.²⁸ Notably, while the Bush administration declined to invoke anticipatory self-defense in its official justification for the invasion of Iraq,²⁹ the Obama administration appears to have relied on the theory in practice. The Iran cyberattacks, if lawful, might have been based on anticipatory self-defense.³⁰ And elements of U.S. uses of force in Syria clearly were. The administration justified the use of force against the Islamic State in Syria in part on the basis of "individual self-defense" even though the Islamic State had not engaged in an armed attack against the United States.³¹ And it justified the attacks against the Khorasan group in Syria on

27. See William H. Taft, IV, Legal Adviser, U.S. Dep't of State, *The Legal Basis for Preemption*, COUNCIL ON FOREIGN RELATIONS (Nov. 18, 2002), <http://www.cfr.org/international-law/legal-basis-preemption/p5250>; Condoleezza Rice, Nat'l Sec. Advisor, *Wriston Lecture to the Manhattan Institute for Policy Research: A Balance of Power That Favors Freedom* (Oct. 1, 2002), <https://www.manhattan-institute.org/html/2002-wriston-lecture-balance-power-favors-freedom-5566.html>.

28. Compare Brian Egan, Legal Adviser, U.S. Dep't of State, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign* (Apr. 1, 2016), <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf> (factors for determining whether an armed attack is "imminent" for the *jus ad bellum* "include the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage") with John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572-75 (2003) (factors for determining whether an armed attack is "imminent" for the *jus ad bellum* include "the probability of the threat," the "threatened magnitude of harm," the "need to take advantage of a limited window of opportunity," and the fact that the threatening actor has demonstrated in the past a "capability and a willingness to use" the threatening weapon) and sources in *supra* note 27. See also Jack Goldsmith, *Obama Has Officially Adopted Bush's Iraq Doctrine*, TIME (Apr. 6, 2016), <http://time.com/4283865/obama-adopted-bushs-iraq-doctrine>; Jack Goldsmith, *Obama's Embrace of Bush's Preemption Doctrine*, LAWFARE (Apr. 6, 2016, 3:30 PM), <https://www.lawfareblog.com/obamas-embrace-bushs-preemption-doctrine>. For disagreement with my view that the Obama administration has effectively adopted the Bush preemption doctrine, see Daniel Bethlehem, *Not by Any Other Name: A Response to Jack Goldsmith on Obama's Imminence*, LAWFARE (Apr. 7, 2016, 1:51 PM), <https://www.lawfareblog.com/not-any-other-name-response-jack-goldsmith-obamas-imminence> and Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and "First Use" in the Jus ad Bellum*, JUST SECURITY (Apr. 11, 2016, 8:47 AM), https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-ad-bellum/#_fn3. For my responses, see, respectively, Jack Goldsmith, *Sometimes a Name Is Only a Name*, LAWFARE (Apr. 8, 2016, 12:57 PM), <https://lawfareblog.com/sometimes-name-only-name> and Jack Goldsmith, *More on Obama v. Bush on Preemption: Response to Lederman*, LAWFARE (Apr. 12, 2016, 11:48 AM), <https://www.lawfareblog.com/more-obama-v-bush-preemption-response-lederman>.

29. See John D. Negroponte, Letter dated 20 Mar. 2003 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003), <http://www.hamamoto.law.kyoto-u.ac.jp/kogii/2003yakan/s-2003-351.pdf>; Lederman, *supra* note 28 (noting that "the United States conspicuously declined to invoke self-defense in justification of . . . use of force" in Iraq).

30. See Sanger, *supra* note 18 and accompanying text.

31. Egan, *supra* note 28, at 5; see also Lederman, *supra* note 28 (noting that "Brian Egan indicated that the [United States] believes its own self-defense would be an apparent alternative justification under

the basis of its “imminent threat,”³² which, the administration made plain, rested on a very broad conception of imminence.³³

Fourth, the administration relied heavily on the theory that it could attack terrorists in another nation in self-defense if the government in that nation was unwilling or unable to suppress the threat. This was not a new theory for the United States, but it was more contested globally in 2009 than today. The Obama administration relied on the theory to conduct attacks in Pakistan and Syria, and probably in other countries as well.³⁴ (It was not clear on some of its justifications.) The administration’s practice was significant because of its frequent invocation of the principle; its clear statement of the principle to the United Nations³⁵ and the American Society of International Law;³⁶ its success in getting the Secretary-General of the United Nations to effectively embrace it;³⁷ and its overall influence in deepening the acceptance of the principle (or of closely related principles) by other nations in various contexts.³⁸

Article 51, even though in recent years [Islamic State] has not yet engaged in an armed attack specifically against the United States”).

32. See e.g., Josh Levs et al., *Source: Al Qaeda Group in Syria Plotted Attack Against U.S. with Explosive Clothes*, CNN (Sept. 23, 2014, 7:14 PM), <http://www.cnn.com/2014/09/22/world/meast/al-qaeda-syria-khorasan/>; Zachary Roth & Jane C. Timm, *Admin: Strikes on Khorasan Group Aimed to Avert Imminent Threat*, MSNBC (Sept. 23, 2014, 11:15 PM), <http://www.msnbc.com/morning-joe/us-arab-partners-air-strikes-syria-isis#54298>.

33. See e.g., Press Release, U.S. Dep’t of Defense, Press Operations, Department of Defense Press Briefing by Rear Adm. Kirby in the Pentagon Briefing Room (Feb. 3, 2015), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/606932> (“[H]ow much [further] in the future was this attack going to happen? . . . I don’t know that we, you know, can pin that down to a day or month or week or six months. It doesn’t matter. Far better to be [to] the left of a boom than to the right of it. And that’s what we’re trying to do, is get to the left of any boom to prevent the planning from going any further, and certainly to prevent them getting into an execution phase, which we don’t believe they were in yet . . .”); Scott Pelley, *FBI Director on Threat of ISIS, Cybercrime*, 60 MINUTES (Oct. 5, 2014), <http://www.cbsnews.com/news/fbi-director-james-comey-on-threat-of-isis-cybercrime/> (quoting FBI Director James Comey as saying, “I can’t sit here and tell you whether [Khorasan’s] plan is tomorrow or three weeks or three months from now. Given our visibility we know they’re serious people, bent on destruction. And so we have to act as if it’s coming tomorrow.”).

34. With regard to the raid on Osama bin Laden’s compound in Abbottabad, Pakistan, see SAVAGE, *supra* note 23, at 263–64. With regard to attacks against the Islamic State within Syria, see Samantha J. Power, Letter dated 23 Sept. 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf.

35. Power, *supra* note 34.

36. Egan, *supra* note 28, at 4, 6–7.

37. Ban Ki-moon, U.N. Sec’y-Gen., Remarks at the Climate Summit Press Conference (Including Comments on Syria) (Sept. 23, 2014), http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=2356#_Vy5fOT_VxBU (noting that “[i]n the case of Syria, there can be no genuine protection” for civilians “if extremist groups are permitted to act with impunity” within Syria and apparently accepting the legitimacy of airstrikes “in areas no longer under the effective control of th[e] [Syrian] Government.”).

38. See e.g., David Cameron, *Full Statement Calling for UK Involvement in Syria Air Strikes*, THE TELEGRAPH (Nov. 26, 2015), <http://www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Cam-erons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html> (Prime Minister Cameron explains “that the Assad regime is unwilling and/or unable to take action necessary to prevent [Islamic State]’s continuing attack on Iraq.”); Heiko Thomas, Letter dated Dec. 10, 2015 from the Chargé

Taken together, these precedents and rationales have changed the U.S. position on the U.N. Charter to narrow its limits on the use of force. The administration has done something analogous with respect to the restraints of the *jus in bello* concerning global non-international armed conflict.³⁹ Some but not all of the Obama administration's practices found precedents in prior U.S. practice to some degree. But part of the administration's legacy is that it engaged in these practices and deployed these rationales in many contexts with effective diplomacy and unusual credibility. Obama came to office with an attitude and a team that signaled deep respect for international law related to war. When he embraced positions that narrowed those restraints to meet national security threats, he had more credibility to make these claims, and attracted fewer skeptics, than a hawkish president who disrespects international law would have. As Robert Goodin taught long ago, "[i]f an action is somehow out of character for a particular politician, then, for that very reason there are fewer external obstacles to that politician's performing it."⁴⁰ The result for international law—just as it was in domestic-law issues like military detention without trial⁴¹—was to enhance acceptance of war-supportive practices that were once more controversial.

II.

I now turn to the second mechanism of presidential influence, and to what I think is the Obama administration's defining legacy—a legacy that

d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Sec. Council, U.N. Doc. S/2015/946 (Dec. 10, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BF9C9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_946.pdf (German government asserts the right to collective self-defense against attacks from Islamic State originating from areas within Syria but outside the Syrian Arab Republic's effective control); see also Ashley Deeks, *The UK's Article 51 Letter on Use of Force in Syria*, LAWFARE (Dec. 12, 2014, 9:53 AM), <https://www.lawfareblog.com/uks-article-51-letter-use-force-syria> (noting that the United Kingdom "implicitly adopt[ed] the 'unwilling or unable' test").

39. To make a long story short, the Obama administration has forcefully advocated for the view that non-international armed conflict can cross national borders; that targeting and related principles in such conflicts are governed by the *jus in bello* rather than international human rights law; and that a fairly expansive notion of "direct participation in hostilities" is appropriate. See Egan, *supra* note 28, at 8–10; Press Release, The White House, Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>; Charlie Savage, *U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad*, N.Y. TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/world/us-affirms-stance-that-rights-treaty-doesnt-apply-abroad.html?_r=0. But see INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 18–19 (2015), <https://www.justsecurity.org/wp-content/uploads/2015/11/2015-ICRC-Report-IHL-and-Challenges-of-Armed-Conflicts.pdf> (disagreeing with U.S. position); see also U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), at 2–3 (Section C.4), 4–5 (Section C.9), <http://www.state.gov/documents/organization/235641.pdf> (criticizing U.S. legal theory).

40. Robert Goodin, *Voting Through the Looking Glass*, 77 AM. POL. SCI. REV. 420, 421 (1983).

41. See JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 23–48 (2012).

is as much about domestic power as it is about international relations. I speak here of new international agreements, the two most important of which are the Joint Comprehensive Plan of Action with Iran to reduce its nuclear weapons capabilities,⁴² and the Paris Agreement, the core imperative of which is to reduce greenhouse gas emissions.⁴³ These agreements mark historic accomplishments that will stand alongside the Affordable Care Act at the center of President Obama's legacy in terms of the daring and leadership that made them possible and the historic changes that they sought to achieve. What is important about these agreements for my purposes is not their substance, but how they were made.

Agreements of this significance and scope would typically require approval by two-thirds of the Senate through the domestic treaty process prescribed in Article II of the U.S. Constitution. President Obama knew from the outset that two-thirds of the Senators would not consent to either the Iran Deal or the Paris Agreement. He has submitted many fewer treaties to the Senate for consent than any modern president.⁴⁴ And his success rate in garnering Senate consent is an all-time low for modern presidents. The historical success rate among modern presidents for treaties they transmitted to the Senate is 87%, and President Bush's success rate was 88%. By contrast, President Obama's success rate for submitted treaties is just 27%. The Senate in the 112th Congress (2011–12) consented to just two treaties (apparently an all-time low in American history), and the Senate in the 113th Congress (2013–14) consented to just four treaties. As of June 2016, the current Senate has yet to consent to a treaty. Clearly the Republican-controlled Senate was not a forum that would give supermajority approval to either the Iran Deal or the Paris Agreement.

President Obama also might have sought approval for his deals from the Congress by statute. This is called an *ex post* congressional-executive agreement to signify that Congress approves the agreement after it is negotiated. *Ex post* congressional-executive agreements are even rarer these days than treaties. We have some evidence that Congress would not have approved the Iran Deal, since majorities in both houses actually voted against its approval.⁴⁵ (Under the Iran Review Act, Congress needed veto-proof

42. Joint Comprehensive Plan of Action, July 14, 2015, <http://www.state.gov/documents/organization/245317.pdf>.

43. Framework Convention on Climate Change, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), <https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>.

44. The figures in this paragraph are drawn from Jeffrey S. Peake, *International Agreements in an Age of Presidential Unilateralism* (Jan. 8, 2016) (unpublished manuscript) (on file with author).

45. See Cristina Marcos, *House Rejects Obama's Iran Bill*, THE HILL (Sept. 11, 2015, 12:34 PM), <http://thehill.com/blogs/floor-action/house/253370-house-rejects-iran-deal>; Jennifer Steinhauser, *Democrats Hand Victory to Obama on Iran Nuclear Deal*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html>.

supermajorities to defeat the deal.⁴⁶) A similar fate surely would have greeted the Paris Agreement in the Republican-controlled Congress.

Anticipating non-approval in Congress for both agreements that he deemed vital to the fate of the world, the President had to find another way. That other way was supplied by his power to make what are called political commitments. A political commitment is an international agreement that is the functional equivalent of a handshake. It imposes no obligation under international law and a nation incurs no state responsibility for its violation.⁴⁷ Political commitments have been around as long as diplomacy. Prominent 20th century examples of political commitments include the Atlantic Charter announced by Roosevelt and Churchill in 1941 and the Helsinki Accords of 1975.⁴⁸ Less prominent examples are the memoranda of understanding that federal agencies make with their counterparts abroad concerning regulatory cooperation.⁴⁹ A president can make a political commitment on practically any topic, including very important ones. The second President Bush proposed to Vladimir Putin to limit strategic nuclear warheads with a political commitment, and that would have been fine had Putin not insisted on a treaty with Senate consent.⁵⁰ The constitutional basis for political commitments is uncertain, but they are closely tied to the President's power over diplomacy, since at the margins they blur into diplomatic discourse.⁵¹

The great thing about political commitments from a president's perspective is that the President can make them under the U.S. Constitution without any approval from Congress or the Senate. But they come with at least two potential downsides, which have generally limited their use for international agreements that demand deep cooperation. First, political commitments carry no international law obligation and thus lack what some see as "compliance pull."⁵² I will return to this concern later. Second, and related, since a president's political commitment is just a fancy handshake, the President has no guarantee that domestic law will permit the United States to

46. See Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (codified as amended at 42 U.S.C. § 2160e (2015)). With simple majorities, the House and Senate could have passed a joint resolution of disapproval impeding the President's ability to lift statutory sanctions. See *id.* § 2160e(c)(2)(B). But overcoming a presidential veto of any joint resolution would require supermajorities in both houses.

47. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* ch. 3 (3d ed. 2013) (discussing how political commitments, which Aust calls memoranda of understanding, are distinct from treaties).

48. Atlantic Charter, Joint Declaration by the President and the Prime Minister, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603; Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292, reprinted in 73 DEP'T STATE BULL. 323 (1975).

49. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-13-588, *INTERNATIONAL REGULATORY COOPERATION* 10 (2013) (categorizing international regulatory cooperation activities engaged in by U.S. agencies).

50. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 91-92 (2005).

51. See generally Duncan B. Hollis & Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VA. J. INT'L L. 507 (2009).

52. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 193 (1990).

fulfill the pledges made in the political commitments—a problem that Senate or congressional approval helps overcome because the Senate, through self-executing treaties, or Congress, through statutes, can change domestic law at the same time it approves an international agreement.

We can now understand the challenges President Obama faced in trying to conclude both the Iran Deal and the Paris Agreement. He lacked the authority under the Constitution to make the core pledges in these agreements legally binding under international law without securing the consent of the legislature that he knew was impossible. He could agree to the pledges in the nonbinding political commitments without going to Congress, but then he faced the problem of following through on those pledges, and making them credible, without the cooperation of the legislature.

The Obama team's imaginative answer to this conundrum was to locate the authority to fulfill the political commitments in independent domestic law authorities that were not designed to effectuate or approve international agreements. With the Iran Deal, Obama pledged in a political commitment to lift U.S. sanctions, and then followed through on that pledge by exercising an independent, pre-existing congressionally conferred authority to waive the sanctions in the national interest.⁵³ The Paris Agreement was more complicated. It was a binding international obligation elements of which the President could probably commit the nation to pursuant to a 1992 framework treaty consented to by the Senate.⁵⁴ But the President probably could *not* commit the United States under international law to the agreement's core imperative to lower greenhouse gas emissions.⁵⁵ So instead the Obama team insisted that the greenhouse-gas-reduction provision be a political commitment, and then the President exercised an independent, pre-existing domestic authority under the Clean Air Act to make a regulation that required emission reduction consonant with the political commitment.⁵⁶

To summarize and simplify, the President in both examples made political commitments that did not require legislative approval and then exercised

53. Those waiver authorities are collected and analyzed in KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS (2016).

54. See Daniel Bodansky, *Legally Binding Versus Non-legally Binding Instruments*, in TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME 155, 157 n.1 (Scott Barrett et al. eds, 2015); see also DANIEL BODANSKY, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, LEGAL OPTIONS FOR U.S. ACCEPTANCE OF A NEW CLIMATE CHANGE AGREEMENT 14 (2015).

55. See David A. Wirth, *Cracking the American Climate Negotiators' Hidden Code: United States Law and the Paris Agreement*, 6 CLIMATE L. 152, 158, 161–62 (2016). One reason that the President could not do this is that the substantive obligation to lower greenhouse gas emissions would be hard to ground in the Framework Convention. Another reason is that the "Senate Foreign Relations Committee, in its report on the resolution of ratification for the [Framework Convention], expressed the expectation that future actions that would require legally binding emission reductions would require the Senate's advice and consent." *Id.* at 162.

56. The regulation was known as the Clean Power Plan. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

independent domestic authorities to effectuate the changes in domestic law that were needed to make the pledges in the two commitments credible and efficacious. There is nothing innovative about either prong of this approach. Presidents make political commitments all the time, and they exercise delegated authority from Congress all the time. What was innovative was bringing the two prongs together in one initiative to forge deep international cooperation supported by significant changes in U.S. domestic law without recourse to a congressional vote. In both cases the administration secured pledges of coordinated change from foreign countries through a political commitment and then delivered the U.S. side of the bargain by exercising extant delegated authority from Congress that Congress had no idea would lead to such international cooperation.

Without this innovative strategy, both the Iran Deal and the Paris Agreement would have failed from the start. U.S. participation and leadership at the international negotiation stage were vital to both deals. In these negotiations the United States needed to commit to deep changes in U.S. domestic law in order to meet its international pledges and induce others to do so also. The combination of a political commitment and the exercise of independent, delegated authority was the only way to accomplish these aims. Using old tools, the administration forged a powerful new form of international agreement for the United States.

The Iran Deal and the Paris Agreement were not the only cases in which the Obama administration used political commitments creatively. Such commitments flourish lower down in the executive branch bureaucracy to effectuate cross-border regulatory cooperation on issues ranging from antitrust enforcement to financial and consumer protection regulation to scientific and technical information sharing.⁵⁷ Agency-level political commitments with foreign partners that are consonant with domestic law authorities are legally uncontroversial and increasingly consequential. Here is where the Obama innovation comes in. In 2012, the administration issued Executive Order 13,609, which through various mechanisms incentivizes regulators to seek opportunities for international regulatory cooperation, including through political commitments.⁵⁸ These lower-level commitments are nowhere near as important as the Iran and Paris deals, but Executive Order 13,609 will encourage their growth and thus enhance the executive branch's ability to foster international cooperation without congressional involvement.

A third innovation concerns the development of executive power theories to blunt congressional efforts to control political commitments. In 2011, Congress banned the White House Office of Science and Technology Policy from developing a policy or program to collaborate or coordinate bilaterally

57. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 49, at 4–5.

58. Exec. Order No. 13,609, 3 C.F.R. 255 (2013) (signed May 1, 2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 819–20 (2012).

with China or any Chinese-owned company. This was an effort to stymie communications that might lead to a political commitment, as well as any resulting political commitment. The Office of Legal Counsel (“OLC”) declared that Congress’ effort to stop the President from negotiating on any topic concerning “cooperative undertakings” impinged on the President’s exclusive power to conduct foreign relations and diplomacy and should be disregarded.⁵⁹ It acknowledged that Congress could block “implementation” of past agreements and their domestic effects, but the opinion left unclear how far Congress could go in barring the Executive from making political commitments in the first place. The government will deploy this esoteric OLC opinion—which was written before the Supreme Court in *Zivotofsky II* reaffirmed the President’s “unique role in communicating with foreign governments”⁶⁰—to fend off or disregard congressional restrictions on any element of a political commitment that can be deemed to relate to a diplomatic communication.

A fourth innovation in circumventing Congress concerns not political commitments, but rather an apparently new mechanism for making *ex ante* congressional-executive agreements. These are agreements binding under international law that are authorized in advance by Congress. They are by far the United States’ most prevalent method for making binding international law—about 80% of binding U.S. agreements are made in this way.⁶¹ In the past, presidents have made such agreements with the lightest hint of congressional authorization. But the Obama administration has gone further and claimed the authority to make these agreements binding as long as they are consistent with and further the policies evident in a domestic congressional scheme.⁶² The administration first suggested this theory during its negotiations of the Anti-Counterfeit Trade Agreement.⁶³ And it appeared to apply the theory when it signed the Minamata Convention on Mercury, which establishes a comprehensive global regime to produce, use, and dispose of the chemical.⁶⁴ The President made the United States a party to the mercury agreement without seeking approval from the first branch. The State Department said that the Convention “complements domestic measures by addressing the transnational nature of the problem” and noted sim-

59. Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-year Continuing Appropriations Act, 2011, 35 Op. O.L.C. 1 (2011).

60. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2090 (2015).

61. Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 145 (2009).

62. See generally David Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT’L L. (forthcoming 2016).

63. Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, 50 I.L.M. 243 (2011); see Letter from Ambassador Ron Kirk, U.S. Trade Representative, to Ron Wyden, U.S. Senator (Dec. 7, 2011), <http://www.state.gov/documents/organization/194012.pdf>; Harold Hongju Koh, *Twenty-first Century International Lawmaking*, 101 GEO. L.J. 725, 733–34 (2013).

64. Minamata Convention on Mercury, Oct. 10, 2013, http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata%20Convention%20on%20Mercury_booklet_English.pdf.

ply that the United States “can implement Convention obligations under existing legislative and regulatory authority.”⁶⁵

So what are we to make of these four developments, which might be described as the tools of unilateral international agreement-making in an era of domestic gridlock?

The first point is simply to note how extensively the President now makes international agreements for the United States without returning to the Senate or Congress for consent. Professor Hathaway wrote seven years ago about these issues in the context of *ex post* congressional-executive agreements, but the four developments outlined above have exacerbated the trend significantly.⁶⁶ These days trade agreements are the only international agreements of significance that Congress approves regularly after presidential negotiations.⁶⁷ This is a remarkable transformation of constitutional practice.

Moreover, all four of the Congress-skirting innovations I outlined have enormous generative possibilities. With regard to the models established by the Iran and Paris agreements, the President is empowered to make and deliver upon international agreements that are consonant with whatever he can accomplish via the scope of his super-broad delegated powers from Congress. And with regard to expanded *ex ante* agreements, the President appears limited only by the constraint of avoiding contradiction with domestic law.⁶⁸ While the Obama innovations leave these powerful tools for any future president to use, they will be most useful to presidents with ambitious multilateralist agendas, and in that sense will likely systematically favor one party.

Turning to normative concerns, one obviously might worry about the absence of democratic accountability for a president with *carte blanche* power to make deeply consequential international agreements for the nation. The Iran Deal—which, recall, majorities in both houses of Congress opposed—is a large gamble. Perhaps it delayed or eliminated Iran’s nuclear threat, and maybe it will lead to a broader opening with Iran. But perhaps it will empower Iran unduly and further destabilize the Middle East in ways that over the medium term disserve U.S. interests, or worse. The basic case for legislative approval is that decisions of this significance demand broader public approval to ensure that the second-term President properly gauges

65. Press Release, U.S. Dep’t. of State, Office of the Spokesperson, United States Joins Minamata Convention on Mercury (Nov. 6, 2013), <http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm>.

66. Hathaway, *supra* note 61.

67. *See, e.g.*, United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, 125 Stat. 428 (2011) (codified at 19 U.S.C. § 3805 note (2006)); United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, 125 Stat. 462 (2011) (codified at 19 U.S.C. § 3805 note (2006)); United States-Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112-43, 125 Stat. 497 (2011) (codified at 19 U.S.C. § 3805 note (2006)).

68. Congress could, of course, try to constrain the President from relying on its statutes as a basis for international agreements, but as matters now stand, the President possesses enormous and varied delegated power from Congress, as well as the veto pen.

the nation's interests when he makes large diplomatic changes that will affect the United States for years and possibly decades.

This is a good case as far as it goes, though from first principles one could argue that the President too is elected and that insistence on the approval of the legislature in an era of seeming gridlock might have led to a nuclear confrontation, which is in effect what President Obama argued. The point is that a very bad outcome might have resulted from both unilateral international action and from inaction.

More broadly, we have traveled a long way from the Founders' vision of a watchdog Senate ensuring that the President makes international agreements that undoubtedly serve the national interest. The novel agreements of the Obama administration are but the latest phase of a steady 230-year rise in presidential power over foreign (and domestic) relations that responds to massive changes in the U.S. role in a much more dangerous and complex world, and that rests on broad delegations by the poorly-organized and responsibility-eschewing Congress. Viewed from 40,000 feet, the Obama team has simply taken full advantage of the massive power Congress delegated to it—power that Congress can, in theory, though perhaps not in reality, retract. Whether the modern foreign relations Presidency can be justified and legitimized is a question that I and many others have written about and that is far too large to address here. So I will settle for simply pointing out that the legitimacy concerns in the contexts I have discussed here are attenuated compared to other issues like the unilateral deployment of war powers.

The most striking characteristic of the Obama innovations is that they purport to conform to and be consistent with domestic law. The Iran Deal was grounded in express waiver authority delegated by Congress. The President could have waived the sanctions without legal controversy even absent his coordination with other countries via political commitment. The Paris Agreement pledge depended upon Clean Air Act regulations that the administration issued before it reached the Paris Agreement. The political commitments fostered by Executive Order 13,609 are legally uncontroversial—but the Executive Order will increase their number and scope. The legally most controversial element of the Obama innovations is the claimed power to make a binding international agreement on a topic that touches on but does not contradict a congressional policy. But these agreements effect no change in U.S. behavior and simply seek to coordinate other nations on a U.S. position arrived at by Congress. They also find support in cases like *Loving v. United States*, *Dames & Moore*, *Haig v. Agee*, and *Curtiss-Wright*, which hold that congressional delegations need not be explicit, or should be

construed generously, when they touch on the President's independent foreign relations powers.⁶⁹

Another reason to worry less about the Obama innovations is that many rest on exercises of domestic authority that, unlike many assertions of presidential foreign relations power, can be reviewed by domestic federal courts. The Clean Air Act regulations supporting the Paris Agreement are currently under review by the D.C. Circuit and have been stayed by the Supreme Court—a stay that many viewed, before Justice Scalia died, as a signal that the Court might strike them down.⁷⁰ In other words, the core of the President's pledge in Paris is subject to judicial review pursuant to the Administrative Procedure Act.⁷¹ That is significantly more accountability than the vast majority of presidential actions in foreign relations.

The delay in the Clean Air Act regulations as a result of the stay, and the possibility of a federal court squelching the Paris Agreement years after it was made, raise another problem with Obama's innovations: fragility. Political commitments that skirt Congress can be reversed by a subsequent president and lack the deep national support that is often crucial to compliance. But the significance of this truth should not be overstated. If the regulations survive the presidential election and Supreme Court review—and right now the betting money says they will—the United States can satisfy the pledge it made in Paris for at least four years, at which point the deal will be hard to unwind. This mechanism gives U.S. treaty partners less certainty about the credibility of the U.S. pledge than would congressional consent. But those partners grabbed their probabilistic opportunity, which they preferred to the only alternative, which was no agreement at all.

Moreover, when political commitments rest on less contested assertions of executive power than the Clean Air Act regulations, the President can effectively change reliance interests through his delegated authorities in ways that are credible and sticky because they are hard for a future president to unwind. Senator Ted Cruz said on the presidential campaign trail that he would “rip to shreds” the Iran agreement on his first day as president, and he certainly would have had the legal authority to do so had he become president.⁷² But that agreement has already induced deep global cooperation to reintegrate Iran into the global economy. Any re-imposition of U.S. sanctions against Iran on January 20, 2017, would largely fail to change Iran's

69. *Loving v. United States*, 517 U.S. 748 (1996); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Haig v. Agee*, 453 U.S. 280 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see also Bodansky & Spiro, *supra* note 62.

70. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015), *stay order granted*, 577 U.S. ___ (U.S. Feb. 9, 2016) (No. 15A787); see also Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html>.

71. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2012)).

72. Julian Hatttem, *Cruz: 'I Will Rip to Shreds' the Iran Deal*, THE HILL (Sept. 16, 2015, 8:53 PM), <http://thehill.com/policy/national-security/253962-cruz-promises-to-rip-to-shreds-iran-deal>.

behavior and would primarily hurt U.S. firms. I do not think Ted Cruz would have followed through on his pledge had he been elected.

The mechanisms of cooperation and compliance that inhere in Obama's innovations also raise important questions for international law theory that I have only a minute to touch on. Political commitments by definition lack the fairy dust of international law obligation. The Iran Deal has shown that nations can effect deep cooperation on the most complex and controversial of topics without the "gravitational compliance pull" of international law. This example highlights what is important in making cooperative international agreements work: the specified terms of cooperation that all parties deem to improve their welfare, combined with credible mechanisms of trust and enforcement. Making an agreement binding under international law can be one way to establish credible mechanisms of trust and enforcement—for example, by signaling the seriousness of a nation's commitment to the agreement, by effectuating various forms of domestic enforcement in courts or bureaucracies, or by generating information in international organizations, all of which can enhance compliance.⁷³ But the Iran example shows clearly that there is nothing unique or special about international law in this regard. No one will ever prove or disprove whether making an agreement legally binding under international law induces compliance beyond what these instrumental factors can explain. But I do think the Iran Deal, and the Obama administration's many innovations concerning political commitments are a cautionary tale against fetishizing international law's importance to international cooperation.

I began this essay with excerpts from *The Audacity of Hope* that suggested that Barack Obama came to the Presidency with an optimistic view of international law. I want to close with a different passage that captures well his actions as president. In examining the history of U.S. foreign relations, Obama expressed his greatest admiration for "the postwar leadership of President Truman, Dean Acheson, George Marshall, and George Kennan" who "crafted the architecture of a new, postwar order that *married Wilson's idealism to hardheaded realism*"⁷⁴

Idealism married to hardheaded realism is a pretty good description of the international law innovations I have described in this essay. The greatest tension between Obama's ideals and the demands of the Presidency has no doubt come in the war powers context. He has been a surprising warrior president even as he has proclaimed a desire to retrench, and he has helped narrow the very constraints of international law that he once proclaimed were so important. One can be cynical about this development. But one can also see Obama as trying to adjust the international law framework he ad-

73. GOLDSMITH & POSNER, *supra* note 50, ch. 3.

74. OBAMA, *supra* note 1, at 284 (emphasis added).

mires, and still believes constrains and legitimates, to a significantly changed threat environment.⁷⁵ And in this light, one might admire his moderately successful efforts to get more countries than before to accept the U.S. view on Unwilling/Unable and on a more flexible conception of imminence. As for the Iran and Paris deals, both were hugely consequential international achievements that Obama deems vital for the future of the planet. The realism there came in means, not ends, in securing these agreements while avoiding what would have been a certain rejection in Congress.

It is easy to question the substance of these endeavors, many of which are controversial. But whatever one's view of the substance, the administration and its creative lawyers deserve credit for persistence, innovation, and leadership. Whether they left the world a better place as a result, only time and counterfactual speculation will tell.

75. *Cf.* PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* (2009) (advocating marriage of strategy and law).

