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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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. 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. In 2011, it
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. 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.

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. 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. It argued that the Torture Convention required investigation and possible prosecution of senior Bush administration officials, but the administration declined.

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bate, the administration decided not to. 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 *jus 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

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.” President Obama also “significantly expand[ed]” President Bush’s cyberattacks on Iranian nuclear weapons facilities, engaged in hundreds of “offensive cyber-operations” in 2011 alone, and deployed extensive cyberattacks against the Islamic State.

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. 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. The President’s explanations for his threatened attack in Syria, combined with a statement of legal
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. 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.

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. Whatever the administration’s secret legal position, 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/kosovo-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 (2015).

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.
the basis of its “imminent threat,” which, the administration made plain, rested on a very broad conception of imminence.\textsuperscript{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.\textsuperscript{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 Nations\textsuperscript{35} and the American Society of International law;\textsuperscript{36} its success in getting the Secretary-General of the United Nations to effectively embrace it;\textsuperscript{37} and its overall influence in deepening the acceptance of the principle (or of closely related principles) by other nations in various contexts.\textsuperscript{38}


\textsuperscript{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/606952 (“[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.”).


\textsuperscript{35} Power, supra note 34.

\textsuperscript{36} Egan, supra note 28, at 4, 6–7.

\textsuperscript{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/statement_full.asp?secID=23568&Vx=OT_XvBU (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 the [Syrian] Government.’.”)

\textsuperscript{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-Cameron-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...
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, and the Paris Agreement, the core imperative of which is to reduce greenhouse gas emissions. 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. 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. (Under the Iran Review Act, Congress needed veto-proof

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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).
supermajorities to defeat the deal.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} Less prominent examples are the memoranda of understanding that federal agencies make with their counterparts abroad concerning regulatory cooperation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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).


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. 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. But the President probably could not commit the United States under international law to the agreement’s core imperative to lower greenhouse gas emissions. 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.

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

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53. Those waiver authorities are collected and analyzed in Kenneth Katzman, Cong. Research Serv., RS20871, Iran Sanctions (2016).
55. See David A. Wirth, Cracking the American Climate Negotiators’ Hidden Code: United States Law and the Paris Agreement, 6 CLIMATE L. 152, 158, 163–62 (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.
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 dele-
gated authority from Congress all the time. What was innovative was bring-
ing 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 Agree-
ment would have failed from the start. U.S. participation and leadership at
the international negotiation stage were vital to both deals. In these negoti-
atations 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 inde-
pendent, delegated authority was the only way to accomplish these aims.
Using old tools, the administration forged a powerful new form of interna-
tional 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 sci-
centific and technical information sharing.57 Agency-level political commit-
ments 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, in-
cluding 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

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” impinging 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 \textit{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-


\(^{60}\) Zivotofsky \textit{ex rel.} Zivotofsky v. Kerry \textit{(Zivotofsky II)}, 135 S. Ct. 2076, 2090 (2015).


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

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


66. Hathaway, supra note 61.


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
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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


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 interna-
tional agreements work: the specified terms of cooperation that all parties
deer 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 organiza-
tions, all of which can enhance compliance. 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 commit-
ments are a cautionary tale against fetishizing international law’s importance
to international cooperation.

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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 inter-
national 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 . . . .”

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. 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.
