

# Unratified Treaties and the Constitutionality of Signatory Obligations: A Conceptual Solution

DYLLAN MORENO TAXMAN\*

I. INTRODUCTION .....	138
II. U.S. TREATY LAW AND EXECUTIVE AGREEMENTS .....	140
III. SIGNATORY OBLIGATIONS UNDER DOMESTIC AND INTERNATIONAL LAW: THE VIENNA CONVENTION AND THE LAW OF NATIONS AS OUR LAW .....	143
A. <i>International Law Obligation: The Vienna Convention on         the Law of Treaties</i> .....	144
B. <i>The Obligation Under U.S. Domestic Law: Customary         International Law and The Law of Nations as Our Law</i> .....	145
IV. PROBLEMS WITH SIGNATORY OBLIGATIONS TO UNRATIFIED TREATIES IN THE UNITED STATES AND PROPOSED SOLUTIONS .....	148
A. <i>Scope of the Problem</i> .....	149
B. <i>Evaluating Proposed Solutions</i> .....	152
1. <i>Reclassification as a Sole-Executive Agreement</i> .....	152
2. <i>Limitations on the Article 18 Obligation</i> .....	154
3. <i>A Time Limit on Ratification</i> .....	156
V. A CONCEPTUAL SOLUTION TO THE CONSTITUTIONAL ISSUE .....	158
VI. CONCLUSION .....	166

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\* Law Clerk, United States Court of Appeals for the Eighth Circuit; Ensign, United States Navy Reserve; J.D., Georgetown University Law Center; B.A., University of Wisconsin. Mr. Taxman would like to thank Don Wallace, Jr., C. Dean McGrath, Jr., Kenneth Lazarus, and David Stewart for their advice and guidance, which were invaluable to the authorship of this piece. The views expressed herein are the author's own and do not represent the position or opinion of the United States Courts or United States Navy.

## I. INTRODUCTION

Imagine the year 2090: global temperatures climb to once-unimaginable highs, and water levels are rapidly rising. Islands and coastal nations face existential crises, and the United Nations convenes a series of emergency meetings. The international community necessarily reacts quickly, drafting the United Nations Convention on Zero-Tolerance Environmental Regulation. This multilateral treaty strictly prohibits the use of energy sources believed to contribute most heavily to the global warming crisis. The President of the United States signs the treaty and submits it to the Senate for advice and consent. Article II of the United States Constitution requires a two-thirds majority vote in the Senate to ratify the treaty.<sup>1</sup> Senate doubts over the connection between energy production and the climate crisis, paired with deep concern over the economic impact of the treaty on American industry, results in a failure to acquire the necessary two-thirds vote. The treaty is left unratified. What are the United States' obligations as signatories to an unratified treaty? What actions *can* the President or the legislature take to enforce the provisions of an unratified treaty after signature? What actions *must* those branches of government take under domestic and international law?

In the case of unratified treaties, the President uses the Article II Negotiation Power to bind the nation to signatory obligations after signing a treaty that fails in the Senate.<sup>2</sup> The United States recognizes, as a feature of customary international law, that signatories to an unratified treaty have an obligation to refrain from acts that frustrate the "object and purpose" of the signed treaty.<sup>3</sup> The Supreme Court has also

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1. U.S. CONST. art. II, § 2, cl. 2.

2. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(1), § 303 cmt. a, § 303 reporters' notes 1 (AM. LAW INST. 2018). By definition, the Article II treaty-making process requires the consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. However, it is the President's Negotiation Power, pursuant to the execution of Article II treaties, that implicates the issue subject to this Essay's analysis.

3. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters' notes 8 (AM. LAW INST. 2018).

held that rules of customary international law, like the “object and purpose” obligation, can be binding domestic law.<sup>4</sup> Even under a narrow view of the “object and purpose” requirement, a signatory to the aforementioned hypothetical environmental treaty may frustrate the treaty’s “object and purpose” by continuing to use prohibited pollutants, undermining global efforts to reverse or slow climate change.<sup>5</sup> But Article II requires Senate advice and consent for the treaty to become law, and it appears unlikely that the President could implement the signatory obligations of the unratified environmental treaty using constitutionally enumerated powers alone.<sup>6</sup> How can the United States resolve its obligation under international and domestic law to preserve the “object and purpose” of an unratified treaty when doing so may require acts outside the President’s constitutional authority, and the provisions of Article II have not been satisfied?

This Essay seeks to examine the constitutionality of observing signatory obligations to an unratified treaty. Part II provides a brief background of U.S. treaty law, including executive agreements. This is essential to understanding why the President cannot always reclassify an unratified treaty as a sole-executive agreement to unilaterally create domestic obligations through the treaty-negotiation process. Part III explains signatory obligations to an unratified treaty under the Vienna Convention on the Law of Treaties (“VCLT”), customary international law (“CIL”), and American law. Part IV explains the constitutional issues implicated by observing signatory obligations to unratified treaties in greater detail and provides examples of how some scholars have attempted to resolve them. This Essay argues that each of the proposed solutions falls short of an ultimate resolution. Part V provides a conceptual solution acknowledging presidential power in

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4. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”).

5. For discussion of narrow and broad interpretations of the “object and purpose” signatory requirement, see *infra* Part III.

6. See, e.g., U.S. CONST. art. II, § 2, cl. 2; *United States v. Pink*, 315 U.S. 203, 223, 229–30 (1942); *United States v. Belmont*, 301 U.S. 324, 330–32 (1937).

some situations invoking Article 18 of the VCLT. This conceptual solution considers the obligation to refrain from acts frustrating the “object and purpose” of a treaty as subject to Congress’s enumerated authority over the law of nations. Part V then examines the history of congressional acquiescence to executive authority in light of Supreme Court jurisprudence to determine the constitutionality of presidential acts observing and enforcing signatory obligations to unratified treaties.

## II. U.S. TREATY LAW AND EXECUTIVE AGREEMENTS

The United States enters into international agreements primarily in three ways: through treaties, congressional-executive agreements, and sole- or presidential-executive agreements.<sup>7</sup> Each creates a legally binding obligation and is considered a “treaty” at international law.<sup>8</sup>

The term “treaty” has a distinct meaning in the context of U.S. domestic law. Only those international agreements that receive the advice and consent of the Senate by a two-thirds majority vote prior to ratification by the President are considered “treaties” under American law.<sup>9</sup> Although Article II limits the President’s power to *make* treaties by requiring a two-thirds vote in the Senate,<sup>10</sup> the President, as the “sole organ of the nation in its external relations, and its sole representative with foreign nations,” has unlimited authority in the actual *negotiation* of a treaty, including signing.<sup>11</sup> If the Senate votes by a two-thirds majority to provide advice and consent,<sup>12</sup> it then returns the approved treaty to the President for final ratification.<sup>13</sup> After ratification, the

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7. See, e.g., BARRY E. CARTER & ALLEN S. WEINER, *INTERNATIONAL LAW* 153–58, 202–07 (6th ed. 2011); JOHN NORTON MOORE, GUY B. ROBERTS & ROBERT F. TURNER, *NATIONAL SECURITY LAW & POLICY* 973–78, 980–81 (3d ed. 2015).

8. See, e.g., Vienna Convention on the Law of Treaties art. 2(a), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

9. See, e.g., U.S. CONST. art. II, § 2, cl. 2.

10. *Id.*

11. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (internal quotations omitted) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall)).

12. While the process is named “advice and consent” by Article II, the Senate’s voting role is practically one of sole consent. See U.S. CONST. art. II, § 2, cl. 2.

13. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(3), § 303 cmt. b (AM. LAW INST. 2018).

United States is bound to observe the tenets of the treaty both under international and domestic law.<sup>14</sup> If the Senate withholds advice and consent, the treaty remains with the Senate and can be held for another vote in the next Congress, or the Senate may decide to return the treaty to the President, who cannot then ratify the treaty.<sup>15</sup>

Congressional-executive agreements are legally binding international agreements authorized by an act of Congress.<sup>16</sup> Congress can either prospectively authorize the President to execute an international agreement, or it can retrospectively authorize a finalized agreement, giving it the force of law.<sup>17</sup> Congressional-executive agreements are not considered treaties at domestic law and are not subject to the Article II advice and consent requirement.<sup>18</sup> Congressional-executive agreements require House and Senate majorities and have broad applicability.<sup>19</sup> While certain areas of international deal-making are customarily reserved for Article II treaties,<sup>20</sup> congressional-executive agreements have come to significantly outnumber Article II treaties in usage.<sup>21</sup>

Sole- or presidential-executive agreements are legally binding international agreements executed on the independent constitutional

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14. CARTER & WEINER, *supra* note 7, at 86. However, there are some actions that the United States may not be bound to take pursuant to treaty (e.g., tax, appropriations, declaration of war).

15. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporters' notes 6 (AM. LAW INST. 2018).

16. *See, e.g.*, 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 723.2-2(B) (2006) [hereinafter FAM]; CARTER & WEINER, *supra* note 7, at 204–05.

17. CARTER & WEINER, *supra* note 7, at 204–05. Note that Congress is not required to do this when the agreement falls within the President's enumerated Constitutional powers because the agreement could be executed as a sole-executive agreement. *See id.* at 202–04.

18. *See id.* at 204–05.

19. The decision to enter into a congressional-executive agreement, rather than a treaty, is dictated generally by custom as well as political circumstances. *See, e.g.*, GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 15, 71, 90, 92 (2009). Depending on the composition of the legislature, a proposed agreement may have a better chance of success acquiring a simple majority in the House of Representatives and Senate than a two-thirds vote in the Senate.

20. *See id.* at 72 (describing tendency to use Article II treaties for arms control agreements).

21. *Id.* at 41–42.

authority of the President.<sup>22</sup> These agreements do not require Senate advice and consent or any legislative support or authorization, and their scope is generally narrower than those of treaties or congressional-executive agreements.<sup>23</sup> The President's ability to enter into an executive agreement without legislative participation is limited to agreements executed through his or her independent constitutional powers.<sup>24</sup> Presidential-executive agreements have been used in a variety of instances, stemming from the President's constitutional authority as Commander-in-Chief,<sup>25</sup> Recognition Power,<sup>26</sup> and executive authority.<sup>27</sup> However, these agreements cannot obligate the United States where the Constitution would otherwise require legislative action.<sup>28</sup> While the President requires legislative cooperation to enter into a wide variety of legally binding agreements, his or her power to unilaterally *negotiate* and *sign* any international agreement is protected by Article II.<sup>29</sup>

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22. See FAM, *supra* note 16, § 723.2-2(C); CARTER & WEINER, *supra* note 7, at 206–07.

23. See, e.g., CARTER & WEINER, *supra* note 7, at 206.

24. See FAM, *supra* note 16, § 723.2-2(C); CARTER & WEINER, *supra* note 7, at 206–07; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (explaining that the President's authority to conclude executive agreements, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

25. Examples of this type of sole-executive agreement notably include armistice agreements made pursuant to the Commander-in-Chief powers without legislative delegation of authority. See Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 673–75 (1944) (detailing the sole-executive armistices ending hostilities with Spain in the late 19th century and the Central Powers, in addition to Italy, during World War II).

26. See *United States v. Pink*, 315 U.S. 203, 223, 229–30 (1942); *United States v. Belmont*, 301 U.S. 324, 330–32 (1937).

27. See, e.g., Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 361 (2008) ("It is widely accepted . . . that the Take Care Clause authorizes entering into executive agreements in furtherance of treaties.") (citing Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or President Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 248, 280–81 (1945)).

28. FAM, *supra* note 16, § 723.2-2(C); CARTER & WEINER, *supra* note 7, at 206–07; see also *Curtiss-Wright*, 299 U.S. at 320.

29. See *Curtiss-Wright*, 299 U.S. at 319 ("[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the

Article II treaties and executive agreements create domestic legal obligations. The Supremacy Clause of the U.S. Constitution requires that: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”<sup>30</sup> The Supremacy Clause establishes treaties as supreme domestic law, and its provision for laws of the United States extends to congressional-executive agreements because they are executed through federal legislation. The President’s exercise of enumerated constitutional authority invokes the Supremacy Clause’s provision regarding the Constitution itself, and the Supreme Court has reinforced the binding domestic impact of sole-executive agreements.<sup>31</sup>

### III. SIGNATORY OBLIGATIONS UNDER DOMESTIC AND INTERNATIONAL LAW: THE VIENNA CONVENTION AND THE LAW OF NATIONS AS OUR LAW

This Part introduces Article 18 of the VCLT, which establishes signatory obligations to unratified treaties.<sup>32</sup> It also describes CIL, a category of binding international law. VCLT Article 18 is considered CIL by the United States.<sup>33</sup> Because the United States recognizes domestic obligations stemming from CIL,<sup>34</sup> this Part explains that CIL obligations—including those established by VCLT Article 18—may be domestically binding in the absence of a controlling federal action.

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Senate cannot intrude; and Congress itself is powerless to invade it.”); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(1), § 303 cmt. a., § 303 reporters’ notes 1 (AM. LAW INST. 2018).

30. U.S. CONST. art. VI, § 1, cl. 2.

31. See *Pink*, 315 U.S. at 230; *Belmont*, 301 U.S. at 331–32.

32. See, e.g., VCLT, *supra* note 8, art. 18.

33. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 cmt. e (AM. LAW INST. 2018).

34. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700–01 (1900).

A. *International Law Obligation: The Vienna Convention on the Law of Treaties*

The VCLT is a multilateral treaty establishing the rules for treaty-making in the international community. It contains provisions on formation, interpretation, and the effect of treaties at international law.<sup>35</sup> Article 18(a) of the VCLT places some obligations on treaty signatories prior to ratification by stating:

A State is obliged to refrain from acts which would defeat the *object and purpose* of a treaty when: It has signed the treaty . . . subject to ratification, acceptance or approval, until it shall have made its intentions clear not to become a party to the treaty.<sup>36</sup>

The scope of the “object and purpose” obligation is subject to considerable scholarly debate.<sup>37</sup> While some scholars and experts have argued that the obligation prohibits violations of a treaty’s core provisions,<sup>38</sup> this Essay assumes a more limited view: that the “object and purpose” obligation only prohibits those acts that would significantly impact the ability of other parties to obtain the contemplated benefits of the treaty.<sup>39</sup> Even under this narrow view of the “object and purpose” requirement, some agreements may limit or require certain domestic acts by signatories. Where a multilateral agreement entails a high degree of interconnectivity, domestic acts may implicate other parties’ abilities to recover the contemplated benefit from the treaty. For example, domestic pollution regulation may be required to preserve other parties’ abilities to benefit from the hypothetical environmental treaty from this Essay’s introduction.

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35. See generally VCLT, *supra* note 8, arts. 26–38 (examining the interpretation and application at international law).

36. *Id.* art. 18(a) (emphasis added).

37. See, e.g., David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 569 (2010) (explaining scholars have qualms about “why states comply with their international law obligations despite the lack of strong enforcement mechanisms.”).

38. See *id.* at 596–97; see also Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 327–34 (2007) (rejecting the “core” provisions hypothesis).

39. See, e.g., Bradley, *supra* note 38, at 327–34.



Obligations under international law attach to the United States between signature and ratification of a treaty, even in instances where implementation may be difficult or unconstitutional. Article 46 of the VCLT prohibits a state from using its domestic ratification process to invalidate its consent or competence to conclude treaties under international law,<sup>40</sup> but Article 46 does not apply where the treaty was entered into through a “manifest” violation of a “fundamental” internal law.<sup>41</sup> However, the United States’ practice of acknowledging the “object and purpose” requirement as binding upon it between signature and ratification likely precludes an argument that the obligation constitutes a manifest violation of internal law.<sup>42</sup>

*B. The Obligation Under U.S. Domestic Law: Customary International Law and The Law of Nations as Our Law*

The United States never ratified the VCLT but considers most of its provisions—including VCLT Article 18—to represent CIL.<sup>43</sup> CIL consists of binding legal rules and norms to which the international community universally adheres, whether codified in treaty or not.<sup>44</sup> Rules of CIL are established through (1) general and consistent state practice adhering to the rule and (2) a universal sense of legal obligation not to violate the rule.<sup>45</sup> CIL is more than a generally followed

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40. See, e.g., VCLT, *supra* note 8, art. 46(1).

41. See *id.* art. 46(2). This exception to Article 46 would likely apply in cases where the United States entered into a treaty through unconstitutional process—for example, if a Senator negotiated and signed the treaty rather than the President. To demonstrate that consent to be bound to VCLT Art. 18 obligations constitutes a manifest violation of fundamental internal law would be a difficult fight for the United States, given its acknowledgment of the CIL obligation and general adherence to it. See generally Bradley, *supra* note 38, at 332–33 (“The Committee was concerned that this article might bind the United States to international agreements made by the president without the two-thirds Senate consent required by Article II of the Constitution . . .”).

42. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters’ notes 8 (AM. LAW INST. 2018).

43. See, e.g., *id.* § 304 cmt. e.

44. See, e.g., CARTER & WEINER, *supra* note 7, at 115–18, 122.

45. *Id.*

norm; it must be universally accepted out of a perceived legal obligation.<sup>46</sup>

The United States recognizes the “object and purpose” signatory obligation in the VCLT as CIL.<sup>47</sup> The United States State Department—through Secretaries of State,<sup>48</sup> the legal adviser’s offices,<sup>49</sup> its ambassadors,<sup>50</sup> and statements to the U.N. International Law Commission<sup>51</sup>—has repeatedly affirmed the United States’ conviction that it is bound by VCLT Article 18 as a matter of CIL.<sup>52</sup> The United States has acted on this position in interpreting signatory obligations to specific agreements: the second Strategic Arms Limitations Talks agreement (“SALT II”),<sup>53</sup> the Rome Statute establishing the International Criminal Court (“ICC”),<sup>54</sup> and the Comprehensive Nuclear Test Ban Treaty

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46. *See id.*; *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137 (2d Cir. 2010), *aff’d*, 569 U.S. 108 (2013).

47. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters’ notes 8 (AM. LAW INST. 2018).

48. *Id.* (citing *Obligations of Signatories Prior to Ratification*, 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, §B(1), at 212–13 (citation omitted)).

49. *Id.* (citing *Obligations of Signatories Prior to Ratification*, 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, §B(1), at 212–13 (invoking advice by the Legal Advisor’s office reflecting recognition by the Johnson, Nixon, Carter, Reagan, and Clinton administrations)).

50. *Id.* (citing *Conclusion and Entry into Force*, 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 5, §1, at 692–93 (reprinting statement by Ambassador Richardson endorsing view that the “object and purpose” test of VCLT Article 18 represented CIL)).

51. *Id.* (citing *Observations and Proposals of the Special Rapporteur*, [1965] 2 Y.B. Int’l L. Comm’n 44 (excerpting statement by the United States to the International Law Commission, describing VCLT Article 18 as “reflecting generally accepted norms of international law”)).

52. *Id.* (citing 65 State Dep’t Bull. 684, 685 (Dec. 13, 1971) (acknowledging interim-obligation test of VCLT Article 18 as CIL)).

53. *Id.* (citing *Conclusion and Entry Into Force*, 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 5, §1(A), at 398 (quoting presidential message to the Senate: “The U.S. and the Soviet Union share the view that under international law a state should refrain from taking action which would defeat the object and purpose of a treaty it has signed subject to ratification.”)).

54. *Id.* (citing Letter from John R. Bolton, U.S. Under Sec’y of State for Arms Control & Int’l Sec., to Kofi Annan, U.N. Sec’y Gen. (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>).

(“CTBT”).<sup>55</sup> Thus, overwhelming evidence suggests that the United States considers itself bound by VCLT Article 18 as a matter of CIL.<sup>56</sup>

The Supreme Court’s decision in *The Paquete Habana*,<sup>57</sup> a case involving the capture of fishing vessels as prizes of war, clarified the status of CIL as binding domestic law absent a controlling executive, legislative, or judicial act.<sup>58</sup> Because capture as prize formed a piece of the law of nations, another name for CIL,<sup>59</sup> the Court issued its holding based on principles of CIL, stating:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such

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55. *Id.* (citing Non-Proliferation Treaty, 2013 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 19, §B(1)(a), at 646, 648 (noting that the United States urged states, in a joint statement, to uphold national moratoria on nuclear testing to not violate the object and purpose of the Comprehensive Test Ban Treaty)).

56. Given general and consistent practice by the United States, wrought from a sense of legal obligation, combined with outright statements and actions recognizing VCLT Article 18 as CIL, the author concludes that VCLT Article 18 is considered CIL by the United States. However, in this article some issues do arise in evaluating the doctrine’s place in a constitutional analysis of its potential domestic implications. The United States’ recognition of VCLT Article 18 is purely a product of Executive statements and action. While this has little effect on the international obligation, it can complicate an analysis of using the VCLT Article 18 obligation’s place as CIL to justify unilateral presidential action because that branch of government is also responsible for recognizing Article 18’s place as CIL. The author acknowledges that authorizing unilateral presidential action based on principles of CIL established as such by the Executive is problematic but leaves resolution of the issue for another day.

57. 175 U.S. 677 (1900).

58. The principle was enunciated first in *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

59. *See Paquete Habana*, 175 U.S. at 686, 700.

works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>60</sup>

*The Paquete Habana* Court's proclamation of international law as "part of our law" established the principle that CIL takes on a domestic legal obligation in the absence of a congressional act, a judicial order, or executive action. This obligation has been acknowledged in subsequent Supreme Court decisions<sup>61</sup> and actions of the political branches.<sup>62</sup> The Supreme Court has also stated that *The Paquete Habana*'s decision classifying CIL as domestic law is one of the "narrow areas in which 'federal common law' continues to exist."<sup>63</sup> The domestically binding nature of a CIL obligation triggers the constitutional issue with signatory obligations. The United States' acknowledgement of the "object and purpose" obligation as CIL combined with the Supreme Court jurisprudence establishing the binding nature of CIL indicates that American law is bound to VCLT Article 18 unless there is a controlling act of Congress, a judicial order, or executive action.

#### IV. PROBLEMS WITH SIGNATORY OBLIGATIONS TO UNRATIFIED TREATIES IN THE UNITED STATES AND PROPOSED SOLUTIONS

A constitutional issue arises if the President uses the Article II Negotiation Power to bind the nation to CIL obligations pursuant to an unratified treaty, the scope of which exceeds his or her enumerated authority. Unratified treaties often present no such problem because the "object and purpose" obligation attached to an unratified treaty may be insignificant, but some treaties are different. For example, some multilateral treaties rely on interconnectivity among signatories, possibly requiring or prohibiting certain domestic acts by a signatory to preserve

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60. *Id.* at 700 (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64, 214–15 (1895)).

61. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

62. *See, e.g.,* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters' notes 8 (AM. LAW INST. 2018).

63. *Sosa*, 542 U.S. at 730 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

parties' perceived benefits from the agreement. In these types of treaties, observing the "object and purpose" obligation may require presidential overreach by requiring acts beyond the President's enumerated constitutional authority. At the same time, the United States' incorporation of CIL as domestic law requires that the "object and purpose" obligation be met, unless there is a controlling act of Congress, a judicial order, or other executive action.

#### *A. Scope of the Problem*

As a treaty signatory, the United States takes on a CIL obligation to refrain from acts that would frustrate the "object and purpose" of the treaty. While the "object and purpose" obligation is defined by the treaty's provisions and aims, the source of the obligation is VCLT Article 18 operating as CIL, not a treaty provision. However, the obligation does not attach in a vacuum; it occurs through the President's use of the Article II treaty process without Senate advice and consent. The President, in assuming VCLT Article 18 signatory obligations through the act of signing, is asserting powers enumerated to him or her in the Article II Treaty Clause. The actual obligation assumed, however, is one of CIL. Thus, observing the "object and purpose" of unratified treaties requires reconciling CIL obligations with constitutional restraints on executive power.

This CIL obligation is only triggered by signed unratified treaties, not ratified treaties or executive agreements. If the President concludes a sole-executive agreement based on enumerated constitutional authority, the agreement's obligations are binding on their own terms, rather than on a CIL obligation to refrain from an "object and purpose" violation. If Congress enacts law prospectively or retrospectively authorizing the execution of an agreement, the agreement is binding as federal law under the Supremacy Clause, not VCLT Article 18. If the Senate provides advice and consent to a treaty and the President ratifies, then treaty obligations stem from Article II of the United States Constitution and the Supremacy Clause. All of these are constitutionally acceptable international agreements with domestic implications. But when an Article II treaty fails to secure ratification, CIL signatory

obligations incorporated into domestic law may require presidential action beyond enumerated Article II powers, creating constitutional tension.<sup>64</sup>

The “object and purpose” obligation may require compliance with provisions contained in the treaty beyond the President’s enumerated constitutional authority in Article II. If this is the case, the President would use the Article II treaty process to bind the United States to an international *and* domestic obligation without the constitutionally required participation of the Senate. Consider the earlier hypothetical of the U.N. Convention on Zero-Tolerance Environmental Regulation: The President signs the treaty and submits it to the Senate, which does not provide advice and consent to ratification by a two-thirds vote. The continued use of prohibited pollutants would significantly interfere with other parties’ ability to recoup the environmental benefits contemplated by the treaty. In other words, continuing to manufacture items that require or produce similar pollutants could undermine the treaty’s “object and purpose.” Issuing manufacturing and other environmental prohibitions without an underlying act of Congress would be presidential overreach, as no constitutionally enumerated power allows the President to do so.<sup>65</sup>

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64. There is some question as to whether the Senate declining to provide advice and consent to ratification is a sufficient act demonstrating an intent not to be bound, thus freeing the signatory from the “object and purpose” obligation. On its face, voting to withhold advice and consent appears such an act. But the Senate need not return such a treaty to the President, and it may vote on the treaty again; an initial vote is not final. Indeed, the U.S. considered itself bound by the “object and purpose” of the Comprehensive Nuclear Test Ban Treaty after failure to achieve Senate advice and consent. *See, e.g.*, David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 *UCLA L. REV.* 598, 610–11 (2012) (noting that the Clinton administration cited VCLT Article 18 to require a moratorium on underground nuclear testing after failure to obtain advice and consent). The issues discussed in this Essay remain salient even if a failure to achieve advice and consent on first vote constitutes an act demonstrating intent not to become party to the treaty. The President may well seek to use the VCLT Article 18 obligation to justify unilateral action between signing and ratification *before* any Senate vote. Treaties spend an average of two- and one-half years between signature and ratification, and at least one treaty spent nearly fifty years between signature and eventual ratification. *See id.* at 609.

65. While the President has the authority to issue regulations through the Environmental Protection Agency and enforce environmental laws, prohibiting categories of pollutants is an act of lawmaking, and lawmaking is reserved to Congress. *See* U.S. CONST. art. I; *see, e.g.*, 15 U.S.C. § 2601 (2018) (Toxic Substances Control Act

The CIL obligation to respect the “object and purpose” is a domestic legal obligation when there is no controlling executive, legislative, or judicial act resolving the issue.<sup>66</sup> No act of Congress has addressed signatory obligations, the Supreme Court has not had an opportunity to address VCLT Article 18 obligations, and presidential action in the area has been limited to acknowledgment of the VCLT Article 18 obligation as CIL.<sup>67</sup> Thus, the President is at a crossroads: CIL compels adherence to the “object and purpose” of the treaty, and that CIL obligation is incorporated into American law. It does not appear, however, to be one of the laws that the President is constitutionally expected to execute,<sup>68</sup> as it falls outside the President’s unilateral authority enumerated in Article II of the Constitution.

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providing EPA authority to enforce restrictions on chemical mixtures); 33 U.S.C. § 1251 (2018) (Clean Water Act regulating discharge into United States waters and authorizing the EPA to develop standards of enforcement); 42 U.S.C. § 7401 (2018) (Clean Air Act regulating emissions and authorizing the EPA to establish standards).

66. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

67. *The Paquete Habana*’s rule that CIL is domestically-binding is dependent on the absence of controlling legislative, executive, or judicial action in the area. Whether the applicability of *The Paquete Habana*’s principle is triggered by inaction in the matter of VCLT Article 18 obligations *or* controlling action in the area that will be impacted by the “object and purpose” obligation is unclear. For example, in the hypothetical environmental treaty, environmental laws currently exist which control the substantive area impacted by the “object and purpose” obligation. At the same time, there is no governmental action (other than recognition as CIL) controlling the obligation to refrain from acts frustrating the “object and purpose” of unratified treaties. Since the source of the obligation is VCLT Article 18, and the vacuum of controlling governmental action required for *The Paquete Habana* to apply exists with regard to “object and purpose” obligations, the author concludes that there is a sufficient lack of controlling legislative, judicial, or executive acts. However, this is a difficult question: where does one look? In determining whether controlling governmental action precludes the applicability of CIL as domestic law, is the significant area subject to controlling law or action which will be modified by the signatory obligation, or the signatory obligation itself? The latter appears more appropriate, given that it is the CIL obligation attached to an unratified treaty which is actually looking to be enforced (not substantive treaty provisions), though the answer remains far from definite and may be subject to future scholarship.

68. See U.S. CONST. art. II, § 1, cl. 1; § 3, cl. 5.

### *B. Evaluating Proposed Solutions*

The conflicting obligations inherent in American interpretation and adherence to VCLT Article 18 have not been wholly avoided by constitutional and international law experts. A handful of scholars have noticed potential constitutional issues arising from the “object and purpose” obligation.<sup>69</sup> Previous scholarship has proposed reclassification of signed agreements as sole-executive agreements,<sup>70</sup> adopting a narrow definition of the “object and purpose” obligation,<sup>71</sup> and placing a time limit on Senate consideration of signed treaties.<sup>72</sup> While these proposed solutions attempt to solve the constitutional issue, each falls short of a complete resolution. This section will address each solution and its shortcomings.

#### 1. Reclassification as a Sole-Executive Agreement

The simplest way to resolve Article II and the “object and purpose” signatory obligation would be for the President to reclassify the signed agreement—or a new agreement focused on the “object and purpose” obligation—as a sole- or presidential-executive agreement. Reclassification as a sole-executive agreement would allow the President to enforce “object and purpose” requirements as domestic law without running afoul of Article II.<sup>73</sup> This is a conceivable solution in many cases. If the President has authority to execute such an agreement as a sole-executive agreement, initially presenting the agreement to the Senate as a treaty does not erase that power. Presidents might choose to present such an agreement to the Senate for advice and consent consistent with Article II for political reasons; that a treaty enjoys two-thirds consent from the legislature avoids political costs associated with unilateral presidential action in foreign affairs, even if the agreement falls within unilateral presidential power to execute.

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69. See Bradley, *supra* note 38, at 324; Moore, *supra* note 64, at 643–45; Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2078 (2003).

70. See, e.g., Moore, *supra* note 64, at 634–35.

71. See, e.g., Bradley, *supra* note 38, at 327–30.

72. See, e.g., Swaine, *supra* note 69, at 2086.

73. See, e.g., *United States v. Pink*, 315 U.S. 203, 223, 229–30 (1942) (describing the binding nature of constitutionally valid unilateral presidential actions in foreign affairs).



Generally, there is no constitutional or statutory prohibition on the reclassification of a treaty as an executive agreement. However, even the most expansive reading of presidential powers under the Constitution cannot equate his or her sole-executive, agreement-making authority to treaty powers in Article II.<sup>74</sup> Provisions in some agreements—or accompanying VCLT Article 18 obligations—exist outside the bounds of presidential authority.

International law experts Laurence Tribe and Louis Henkin dismiss the notion that the President's Article II treaty-making powers and his or her authority to execute sole-executive agreements are interchangeable.<sup>75</sup> Tribe and Henkin find this view incompatible with the balance of powers contemplated by the Constitution.<sup>76</sup> Tribe explains that the Framers, in drafting Article II, clearly intended to include a legislative check on executive discretion.<sup>77</sup> Henkin notes that the same legislative check would be subject to “unacceptable” imposition if the sole-executive, agreement-making authority wholly encompassed treaty-making powers.<sup>78</sup>

Professor Curtis Bradley's scholarship specifically examines reclassification of treaties as sole-executive agreements and the constitutional issues arising from domestic observation of VCLT Article 18.<sup>79</sup> Professor Bradley, relying on similar notions of checks and balances, concludes that the scope of sole-executive agreements could not possibly extend to all areas of foreign affairs encompassed by the Article II Treaty Power.<sup>80</sup> By tracking sole-executive agreements that become the subject of Supreme Court cases, Professor Bradley observes that each fits neatly within a constitutionally enumerated presidential power.<sup>81</sup>

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74. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 222 (Oxford Univ. Press 2d ed. 1996); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 649–50 (3d ed. 2000); see also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 303(4) (AM. LAW INST. 1987).

75. See HENKIN, *supra* note 74, at 221–22; TRIBE, *supra* note 74, at 649–50.

76. See HENKIN, *supra* note 74, at 221–22; TRIBE, *supra* note 74, at 649–50.

77. See TRIBE, *supra* note 74, at 650.

78. HENKIN, *supra* note 74, at 221–22.

79. See Bradley, *supra* note 38, at 320–23.

80. See *id.*

81. See *id.* at 323–26.

The *Restatement (Third) of the Foreign Relations Law of the United States* provides perhaps the most impactful support for the assertion that sole-executive agreements are limited to constitutionally enumerated presidential powers.<sup>82</sup> The *Restatement (Third) of the Foreign Relations Law of the United States* provides that “the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”<sup>83</sup> The President has broad but limited authority in foreign affairs. Many agreements negotiated as Article II treaties failing to receive Senate advice and consent could be reclassified as sole-executive agreements. But certain agreements—like the hypothetical environmental treaty discussed in this Essay’s Introduction—would create “object and purpose” agreements that fall outside of the President’s constitutional authority to observe. As discussed in Section A, *supra*, the President may be required in such a case to enforce environmental restrictions in the absence of congressional authorization. While reclassification may resolve tension between VCLT Article 18 and Article II of the United States Constitution, it is not a cure-all.<sup>84</sup>

## 2. Limitations on the Article 18 Obligation

Professor Bradley’s scholarship also suggests that a limited view of the VCLT Article 18 obligation can help to resolve the constitutional issue at hand.<sup>85</sup> Professor Bradley argues that the drafting history of VCLT Article 18 suggests a narrower view than that held by international law scholars who suggest that the obligation precludes

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82. This Essay cites the *Restatement (Third) of the Foreign Relations Law of the United States* as authority for some propositions. The *Restatement (Fourth) of the Foreign Relations Law of the United States* is not cited here because it will be printed later this year and is not wholly available on commercial research platforms. Other portions of this Essay cite to the *Restatement (Fourth) of the Foreign Relations Law of the United States* because some sections of the new *Restatement* are available while others are not.

83. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (AM. LAW INST. 1987).

84. However, there is some overlap between reclassification and the proposed conceptual solution. *See infra* Part V.

85. *See* Bradley, *supra* note 38, at 331–34.

acts violating the “core” or “important” terms of a treaty.<sup>86</sup> Convincingly, the 1935 Harvard codification of international law—an influential predecessor to the VCLT—described signatory obligations as limited to those “which would render performance by any party of the obligations stipulated impossible or more difficult.”<sup>87</sup> Rapporteurs involved in the construction of the VCLT carried similar views regarding the VCLT Article 18 obligation, and thus focused the obligation’s scope on actions “depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration.”<sup>88</sup>

This attempt to resolve the problem can limit its scope, but it cannot ultimately resolve constitutional issues accompanying all unratified treaties. Like reclassification, a narrowly tailored VCLT Article 18 obligation can alleviate constitutional tensions in a variety of agreement types, but not all. Indeed, if the “object and purpose” obligation extended to prohibit all violations of “core” or “important” treaty provisions, the President could unilaterally create domestic legal obligations through unratified treaties more frequently. But that fewer unratified treaties could carry an “object and purpose” obligation falling outside the President’s constitutional authority to act does not resolve the issue entirely. Even where the “object and purpose” obligation is narrowly construed only to those acts frustrating other parties’ abilities to benefit from the treaty, some agreements—like the hypothetical environmental convention—still create a problem. For example, even under a narrow interpretation of “object and purpose” the President’s failure to limit the use of prohibited pollutants in the United States might frustrate the ability of neighboring states to benefit from the signed treaty.

Professor Bradley notes that certain types of treaties may invoke stringent “object and purpose” violations, even under a narrow interpretation.<sup>89</sup> For example, after President Clinton signed the Rome Statute establishing the ICC and failed to secure Senate advice and consent,

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86. *Id.* at 327–30.

87. *Id.* at 328 (emphasis omitted) (quoting *Codification of International Law: Part III—Law of Treaties*, 29 AM. J. INT’L L. 653, 778 (Supp. 1935)).

88. *Id.* at 328–29 (emphasis omitted) (citing *Documents of the 5th Session Including the Report of the Commission to the General Assembly*, [1953] 2 Y.B. INT’L L. COMM’n 110, U.N. Doc. A/CN.4/SER.A/1953/Add.1).

89. *See id.* at 317–18, 333–34.

the Bush administration made a clear statement of American intent not to become a party to the treaty, thereby freeing the United States from the “object and purpose” obligation.<sup>90</sup> Because the treaty required parties to assist and support ICC jurisdiction and requests for arrest and surrender, the United States believed that signatory obligations would require compliance with those provisions to avoid frustrating the ability of other parties to receive the benefits of the treaty.<sup>91</sup> Similar concerns were raised regarding the potential “object and purpose” obligations under the Comprehensive Test Ban Treaty and other treaties.<sup>92</sup>

### 3. A Time Limit on Ratification

Article 18 of the VCLT provides that the “object and purpose” obligation only attaches to a signatory “until it shall have made its intention clear not to become a party to the treaty.”<sup>93</sup> The President may give notification of the nation’s clear intent not to become a party to the treaty. Examples include the Bush administration’s statements regarding the ICC treaty and other Presidents who have sought to undo the obligations imposed on the nation by previous administrations.<sup>94</sup> The situation is drastically different when the President signs a treaty and, while in office, seeks to enforce (perhaps unconstitutionally) VCLT Article 18 obligations extending beyond independent presidential authority. When the treaty remains in the Senate—either pending

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90. *See id.* at 311–12, 317–18, 333–34; Moore, *supra* note 64, at 644–45.

91. *See* Bradley, *supra* note 38, at 317–18 (citing Press Statement, U.S. Dep’t of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), <https://2001-ha2009.state.gov/r/pa/prs/ps/2005/45573.htm>; Rome Statute of the International Criminal Court arts. 86, 89, 89, July 17, 1998, 2187 U.N.T.S. 90).

92. *See id.* at 315–16; Moore *supra* note 64, at 610–12. Had the intent been for the Bush administration to *comply* with the “object and purpose” obligation, rather than avoid it, reclassification could have been an option. The ICC’s applicability to United States servicemembers and the CTBT may fall within the enumerated authority as Commander-in-Chief. The ICC’s application to United States servicemembers abroad was a significant factor in Congress’s opposition to ratification. Ron Synovitz, *Explainer: Why Does the U.S. Have It Out for the International Criminal Court?*, RADIO FREE EUROPE RADIO LIBERTY (Sept. 11, 2018, 7:20 PM), <https://www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court-/29484529.html>.

93. VCLT, *supra* note 8, art. 18(a).

94. *See supra* notes 90–91 and accompanying text.

voting or after an unsuccessful vote—has the United States made its intention clear not to become a party to the treaty?

The imposition of a time limit by which to ratify is an appealing solution to the constitutional issue.<sup>95</sup> Congress could enact law stating that the United States shall express a clear intention not to become party to a treaty when the treaty has been left unratified for a specified amount of time.<sup>96</sup> Once this time limit expires, the United States would be free from any “object and purpose” obligation. A time limit would also encourage the Senate to act quickly in cases where it intends to give advice and consent to ratification.<sup>97</sup> While this solution incentivizes the Senate to act quickly, it presents two significant problems.

Like the other solutions mentioned, a time limit on ratification only curbs the extent to which unconstitutional applications of the “object and purpose” obligation arise. A time limit on ratification would do little, if anything, to address the constitutional tensions that arise before the expiration of the period allotted for ratification. Unconstitutional enforcement of the “object and purpose” requirement would be precluded—or at least would lack domestically binding CIL force—only after the time period elapsed. Minimizing the impact of an unconstitutional procedure or shortening its length does not eliminate its unconstitutionality; a constitutional violation is not eliminated just because its duration is shortened. The President could feasibly still enforce the CIL obligation prior to the expiration of the ratification time limit.

Additionally, imposing a “ratify or die” time imperative on the Senate inhibits the Senate’s ability to exhaustively consider a treaty before deciding whether to provide advice and consent. That a treaty lingers in the Senate does not mean that it will not eventually receive advice and consent. For example, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare spent fifty years in the Senate before eventual ratification.<sup>98</sup> In fact, treaties require an average of two-

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95. See Moore, *supra* note 64, at 653–55; Swaine, *supra* note 69, at 2067–68.

96. This can sometimes be in the form of an act of Congress or a new Senate rule.

97. See, e.g., Swaine *supra* note 69, at 2067–68.

98. See, e.g., Bradley, *supra* note 38, at 309–310 (citing Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacte-

and-one-half years between signature and ratification.<sup>99</sup> While the time limit's impact on Senate consideration of submitted treaties could be mitigated by waiving the limit on a treaty-by-treaty basis, it would be difficult to determine *a priori* whether a treaty requires extended consideration or should be subject to a time limitation. Limiting the Senate's ability to carefully consider treaties would be both unwieldy and may lead to the underinformed grant or denial of advice and consent.

#### V. A CONCEPTUAL SOLUTION TO THE CONSTITUTIONAL ISSUE

One solution may be to understand congressional acquiescence as implicitly authorizing presidential action. Congress's routine failure to define and punish offenses against the law of nations under Article I of the Constitution may empower the President to enforce VCLT Article 18 "object and purpose" obligations. Article I, Section 8 of the Constitution empowers Congress to "define and punish . . . Offences against the Law of Nations."<sup>100</sup> This infrequently cited congressional power has principally been used to authorize anti-piracy laws<sup>101</sup> and the establishment and use of military commissions.<sup>102</sup> However, the Supreme Court has indicated that Congress's law of nations powers extend further than piracy law and military commissions.<sup>103</sup> In *Ex Parte Grossman*, the Court made clear that "offenses" in the law of nations clause are not limited to criminal violations.<sup>104</sup> Rarely is there a need for legislation in this area, but the Constitution explicitly delegates the

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riological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 U.N.T.S. 2138 (entered into force Apr. 10, 1975)). Concerns over the impact on the domestic chemical industry and the use of riot control measures required considerable discussion and consideration. See MOORE, ROBERTS & TURNER, *supra* note 7, at 584–85.

99. See, e.g., Moore, *supra* note 64, at 609.

100. See U.S. CONST. art. I, § 8, cl. 10.

101. See generally *Harmony v. United States*, 43 U.S. (2 How.) 210, 231 (1844) ("[T]he President is authorized and requested to employ the public armed ships of the United States . . . [to combat] piratical aggressions and depredations.").

102. See generally *In re Yamashita*, 327 U.S. 1, 10 (1946) (stating the President can give military commanders the power to create military commissions).

103. See generally *United States v. Arjona*, 120 U.S. 479, 483–85 (1887) (explaining that Congress's law of nations authority concerns "violations by the United States of their international obligations").

104. 267 U.S. 87, 117 (1925).

power to define and punish CIL offenses to Congress. While this logically appears to distance the President further from constitutionally applying VCLT Article 18 obligations, it is necessary to analyze the constitutional foundation on which the President stands when he or she assumes such obligations.

Congress retains authority over CIL obligations. The constitutionality of the President binding the United States to CIL obligations that extend beyond his or her enumerated constitutional authority therefore depends on congressional authorization to do so. Congress has yet to explicitly authorize the President, but the Supreme Court has explained that this authorization need not be explicit.

In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson's concurring opinion laid out three tiers of presidential power.<sup>105</sup> When the President acts with the explicit or *implied* authorization of Congress, presidential power extends to that of the whole federal government subject only to the Constitution.<sup>106</sup> When the President acts in violation of the express or implied direction of the legislature, his or her authority is limited to exclusive presidential powers specifically enumerated in the Constitution.<sup>107</sup> When Congress has not acted on a particular subject, Congress and the Office of the President may share authority and responsibility. Justice Jackson explains:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if

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105. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

106. *See id.* at 635–37 (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.”).

107. *See id.* at 637 (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”).

not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>108</sup>

Presidential enforcement of the “object and purpose” obligation likely falls into this difficult “twilight” territory. If the legislature remains silent—refraining from either authorizing or prohibiting presidential enforcement of VCLT Article 18 commitments—congressional acquiescence may well “enable” or “invite” independent presidential authority.<sup>109</sup> Congress has countless options at its disposal to unequivocally disavow an “object and purpose” obligation that stems from an unratified treaty. The Senate could swiftly withhold advice and consent and return the failed treaty to the President with a rejection of any VCLT Article 18 duties. Congress could enact legislation defining violations of the CIL obligations attached to a particular treaty—limiting or completely refuting the existence of any obligation—consistent with its authority under Article I. Congress could also enact law prospectively declaring any and all domestic actions as consistent with the “object and purpose” of any treaty; such legislation would violate international law but remain valid under domestic law because Congress retains constitutional authority over CIL. Additionally, Congress could preemptively halt Presidential enforcement of an obligation by clarifying that a domestic action does not violate CIL, which would be consistent with Congress’s power to “define” CIL offenses.

The presidential enforcement power, while in *Youngstown’s* “twilight” zone, could be viewed as constitutional in the foreign affairs context because of the President’s authority as the “sole organ of the nation in its external relations.”<sup>110</sup> Congressional acquiescence in failing to preempt presidential enforcement of signatory obligations is consistent with the firmly established precedent of congressional reluctance to interfere with presidential authority in foreign affairs.<sup>111</sup> By contrast, prohibiting the President from enforcing the CIL “object and

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108. *Id.* at 637.

109. *See id.*

110. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (internal quotations omitted) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall)).

111. *See id.*



purpose” obligation would significantly interfere with presidential negotiation of agreements. Given this imperative, the President’s assumption of CIL “object and purpose” obligations appears a constitutional use of “twilight” power when Congress decides not to preempt the President by exercising its enumerated constitutional authority over CIL.

Working in the “twilight” zone due to congressional silence is a possible option, but it might not be necessary. The Court noted in *Youngstown* that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘[E]xecutive Power’ vested in the President by [Section] 1 of [Article] II.”<sup>112</sup> The President’s constitutional powers as the sole organ of foreign affairs,<sup>113</sup> the mandate to faithfully execute the laws,<sup>114</sup> and the Article II treaty-negotiation authority provide a basis of authority empowering unilateral presidential action under *Youngstown* in the midst of congressional acquiescence. Perhaps when Congress refuses to use its law of nations power, such a “gloss” empowers the President to enforce CIL obligations through Article II, Section 1 “Executive Power” and mandates that CIL be faithfully executed under Article II, Section 3 authority (the Take Care Clause).<sup>115</sup>

In *Dames & Moore v. Regan*, the Supreme Court declared that a history of congressional acquiescence can bring presidential action within the first *Youngstown* category, which allows the President to act with the full authority of the national government.<sup>116</sup> *Dames & Moore* involved President Reagan’s order suspending claims against Iran in exchange for the release of American hostages held at the United States Embassy in Tehran.<sup>117</sup> President Reagan relied on the International Emergency Economic Powers Act (“IEEPA”) to authorize the Executive Order, though the language of the IEEPA did not explicitly delegate the power to suspend claims.<sup>118</sup> The Court found that a “history of acquiescence” in the field of executive claims settlement created the kind of “implied authorization” required for the President to act in the

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112. 343 U.S. at 610–11 (Frankfurter, J., concurring).

113. See *Curtiss-Wright*, 299 U.S. at 319–20.

114. U.S. CONST. art. II, § 3, cl. 5.

115. See *id.* art. II, § 1; § 3, cl. 5.

116. See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

117. See *id.* at 662–68.

118. See *id.* at 678–79.

strongest tier of the *Youngstown* analysis.<sup>119</sup> Thus, *Dames & Moore*, with the implied support of Congress through sufficient acquiescence, brought into the strongest tier of presidential action a category of presidential acts that might have previously fallen into the *Youngstown* “twilight” power.

Congressional silence is necessary for the constitutional issue to arise, otherwise the President would be preempted by the congressional exercise of delegated constitutional authority over the law of nations.<sup>120</sup> Therefore, the President’s assumption of an “object and purpose” obligation, and presidential enforcement of such an obligation, can only occur in the midst of legislative “indifference or quiescence.”<sup>121</sup> Actual congressional acquiescence on the “object and purpose” obligation indicates that the President has, in historical practice, been so empowered. Congress has entirely refrained from using its law of nations power to regulate “object and purpose” obligations. Instead, Congress has traditionally deferred to the President for resolution when controversy arises out of VCLT Article 18 obligations. The two most notable controversies implicating “object and purpose” obligations to unratified treaties have involved the Rome Statute establishing the ICC<sup>122</sup> and SALT II.<sup>123</sup>

The Bush administration declared its intention not to be bound by VCLT Article 18 obligations stemming from the Rome Statute.<sup>124</sup>

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119. See *id.* at 686; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

120. Of course, if Congress were to exercise its law of nations authority, the President would either be preempted or, if congressional action was consistent with observing VCLT Article 18 obligations, the President would have the full authority of the federal government in assuming “object and purpose” obligations.

121. See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

122. See *e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

123. See *e.g.*, Treaty on the Limitation of Strategic Arms and Protocol Thereto, U.S.-U.S.S.R., June 18, 1979, S. TREATY DOC. NO. 96-25 [hereinafter SALT II].

124. See Bradley, *supra* note 38, at 318 & n.48 (citing Press Statement, U.S. Dep’t of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), <https://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm>); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters’ notes 8 (AM. LAW INST. 2018) (citing Letter from John R. Bolton, U.S. Under Sec’y of State for Arms Control & Int’l Sec., to Kofi Annan, U.N. Sec’y Gen. (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>).

Congress attempted to neither enforce nor revoke any obligation pursuant to its Article I, Section 8 CIL authority.<sup>125</sup> Moreover, Congress did not formally condemn the President's unilateral disavowal of the CIL obligation.<sup>126</sup> Similarly, President Carter directed the Department of Defense to comply with all provisions of the SALT II treaty, which was signed but unratified,<sup>127</sup> relying in part on VCLT Article 18 obligations as justification.<sup>128</sup> The Reagan administration's treatment of SALT II obligations was explicitly guided by the President's interpretation of a duty not to violate the agreement's "object and purpose."<sup>129</sup> Further, both the unratified United Nations Convention on the Law of the Sea and the Comprehensive Test Ban Treaty also carried VCLT Article 18 obligations, and in neither instance did Congress exercise its Article I, Section 8 power to prospectively restrict the President's ability to obligate the United States to respect the "object and purpose" of the treaties.<sup>130</sup>

Once the conceptual solution is applied, the President could either enforce the CIL obligation through an Executive Order or enter into a sole-executive agreement with the parties to the treaty in order to uphold the "object and purpose" obligation. Negotiating a sole-executive agreement requiring the United States to observe the "object and purpose" obligation may provide a simple nexus between Presidential authority and domestic implementation of the obligation. Given

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125. See Swaine, *supra* note 69, at 2082.

126. See *id.*

127. Moore, *supra* note 64, at 646 (quoting 131 CONG. REC. S2083 (daily ed. Feb. 25, 1985)). The author notes that it is possible the President could have negotiated SALT II as a sole-executive agreement. While arms control agreements are typically executed as Article II treaties due to tradition and significance, it is arguably within the President's powers as Commander-in-Chief to conclude these agreements on his own authority. See Swaine, *supra* note 69, at 2080 n.88.

128. See Moore, *supra* note 64, at 646 & n.282 (citing 131 CONG. REC. S2083 (daily ed. Feb. 25, 1985) ("[U]ndoubtedly the lawyers at the Department of State would argue that such action was required by customary international law for a reasonable time during the pendency of the treaty.")).

129. See *id.* at 646 (quoting 131 CONG. REC. S2801 (daily ed. Feb. 25, 1985)).

130. See Bradley, *supra* note 38, at 315 n.36, 317–18; Moore, *supra* note 64, at 610–12, 643 n.263, 645.

the strong precedent of constitutional application of domestic obligations pursuant to sole-executive agreements,<sup>131</sup> reclassifying the “object and purpose” obligation as a sole-executive agreement—but only *after* applying the conceptual solution—can be donned a “modified reclassification.”<sup>132</sup>

A “modified reclassification” following application of the conceptual solution differs from traditional reclassification in key ways. First, a traditional reclassification does not operate with an understanding of *how* the President comes to gain authority over a CIL obligation. In evaluating the limits of sole-executive agreement-making, the concern is whether the President has authority to bind the nation to the terms of the treaty. But the conceptual solution is directed at instances where the President binds the nation to a CIL obligation accompanying the treaty. In order to reclassify (or enforce VCLT Article 18 obligations without reclassification), the President must find some authority over CIL. The conceptual solution identifies the branch of government responsible for defining and regulating CIL, observes the history of congressional acquiescence, applies relevant Supreme Court precedent, and determines that the area is appropriate for presidential authority. After this application of the conceptual solution, the President has constitutional authority to make an executive agreement to enforce the “object and purpose” obligation of an unratified treaty.

Another functional difference between a traditional and modified reclassification is Congress’s retained authority over its constitutionally enumerated power to define and regulate CIL. The conceptual solution requires congressional acquiescence, which could be revoked at any time through congressional rejection of the VCLT Article 18 obligations under its law of nations powers. Congressional acquiescence imputing Presidential authority becomes a prerequisite to acknowledgment and enforcement of “object and purpose” obligations when reclassification is modified by application of the conceptual solution.

The President could also enforce VCLT Article 18 obligations in an Executive Order via the constitutional mandate to “take Care that

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131. See *United States v. Pink*, 315 U.S. 203, 211 (1942); *United States v. Belmont*, 301 U.S. 324, 326–27 (1937).

132. At the same time, where the conceptual solution provides the requisite presidential power to issue an Executive Order assuming the same CIL obligations, an Order is more time-efficient and straightforward.

the Laws be faithfully Executed.”<sup>133</sup> A party impacted by such an Order may have legal standing to challenge its constitutionality. The President would have to use the conceptual solution to defend his or her authority to conclude an executive agreement, and there may be little difference between defending an Executive Order on the same principles. Executive Orders provide a quicker implementation method than a sole-executive agreement. Especially in large multilateral treaties, the process of executing a sole-executive agreement may consume considerable time and resources. If the President wants or needs to implement signatory obligations quickly, an Executive Order will likely be the best way to do so. Observing VCLT Article 18 obligations through an Executive Order may also eliminate the appearance of an attempt to circumvent constitutional limitations on sole-executive agreement-making. Finally, an Executive Order could be accompanied

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133. U.S. CONST. art. II, § 3, cl. 5. *The Paquete Habana* describes CIL obligations as “our law.” 175 U.S. 677, 700 (1900). Usually, the “laws” which the President must faithfully execute are federal legislation, though the Take Care clause also provides authority for the President to interpret treaties. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 306 cmt. g (AM. LAW INST. 2018). Whether it encompasses signatory obligations to unratified treaties, incorporated into domestic law as CIL, proves more elusive. But taking on CIL obligations through the Take Care clause alone is an alternative avenue to enforce CIL obligations, distinct from the conceptual solution because it is a separate constitutional authority for the President to observe CIL obligations. The author has concerns about the viability of this analysis and leaves it to future scholarship. Rather, the President’s Take Care authority is better seen as providing support for the conceptual solution. In *Hirota v. MacArthur*, 335 U.S. 876 (1948), the Supreme Court declined to resolve any conflict between the President’s enforcement of the law and the enumerated power of Congress over CIL and has yet to revisit the issue. That Congress has enumerated authority over the law of nations leads to the conclusion that the President’s ability to faithfully execute CIL obligations without congressional mandate requires, like the conceptual solution, congressional acquiescence of CIL authority. Because presidential execution of VCLT Article 18 obligations requires congressional acquiescence, it appears to support the conceptual solution rather than provide an alternative avenue of unilateral presidential action. The President’s constitutional mandate to faithfully execute the law supports presidential ability to act on VCLT Article 18 obligations once the conceptual solution is applied to demonstrate congressional acquiescence. Rather than providing an independent route to unilateral CIL enforcement, the Take Care clause is another source of presidential power—along with the President’s foreign affairs and treaty negotiation powers—creating the circumstances *Youngstown* and *Dames & Moore* require to empower the President to act in the absence of an express constitutional or legislative mandate.

by a statement explaining the President's authority found in the conceptual solution.

## VI. CONCLUSION

Constitutional tension arises when the President is guided by Supreme Court jurisprudence on CIL to incorporate domestically binding signatory obligations in areas beyond his or her enumerated constitutional authority. The President's Article II Treaty power provides the President with the exclusive power of treaty negotiation, but the actual ratification of a negotiated treaty requires a two-thirds majority vote on consent in the Senate.<sup>134</sup> Prior to a Senate vote and possibly after a treaty has failed to receive Senate consent,<sup>135</sup> the United States is subject to signatory responsibilities under VCLT Article 18, which states that signatories must refrain from acts frustrating the "object and purpose" of the treaty.<sup>136</sup> In some cases, such as in large multilateral treaties where domestic acts may undermine other parties' ability to benefit from the treaty, the VCLT Article 18 obligation may require domestic regulation. The United States has accepted VCLT Article 18 as CIL,<sup>137</sup> which the Supreme Court interpreted in *The Paquete Habana* to create domestic legal obligations in the absence of controlling legislation or judicial order.<sup>138</sup> Thus, Presidents seeking to compel the nation's adherence to a signatory obligation find themselves torn between jurisprudence requiring adherence to the obligation and constitutional limits on some unilateral presidential acts.

The President, however, might not lack authority to implement VCLT Article 18 obligations. The Constitution delegates to Congress the power to define and punish violations of CIL,<sup>139</sup> but Congress has declined to use this power to address VCLT Article 18 obligations.

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134. U.S. CONST. art. II, § 2, cl. 2.

135. See e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters' notes 8 (AM. LAW INST. 2018).

136. See VCLT, *supra* note 8, art. 18; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters' notes 8 (AM. LAW INST. 2018).

137. See e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters' notes 8 (AM. LAW INST. 2018).

138. See 175 U.S. at 700.

139. See, e.g., U.S. CONST. art. I, § 8, cl. 10.

Most importantly, Congress has declined to define CIL in instances where a President seeks to observe the “object and purpose” obligation of specific unratified treaties,<sup>140</sup> leaving the President to observe or excuse the United States from those obligations.<sup>141</sup> In *Youngstown Sheet & Tube Co. v. Sawyer* and *Dames & Moore v. Regan*,<sup>142</sup> the Supreme Court established criteria for Presidential action in the face of legislative silence.<sup>143</sup> Applying that precedent to presidential observance of VCLT Article 18 obligations, it appears that the President may act with the implied consent of Congress, though Congress could preempt presidential action by using its law of nations authority at any time.

In an increasingly interconnected world, allowing the President to uphold American international commitments at CIL is critically important. Unless Congress makes use of its CIL authority, upholding these international commitments may fall to the President. Applying the conceptual solution to VCLT Article 18 obligations is not simply advocacy for greater presidential power, it is advocacy for the United States to allow its Chief Executive to meet international obligations when necessary and permitted by a lack of legislative preemption.

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140. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 reporters’ notes 8 (AM. LAW INST. 2018).

141. See *Id.*

142. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

143. See *Dames & Moore*, 453 U.S. at 686; *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).