

Unratified Treaties, Domestic Politics, and the U.S. Constitution

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INTRODUCTION

Many commentators who favor expansions in international law also favor restrictions on executive authority. What these commentators often fail to recognize is the potential for conflict between these two commitments. In this Article, I consider one example of this potential conflict: the effect under international law of signed but unratified treaties.

Under contemporary treaty practice, a nation's signature of a treaty, especially a multilateral treaty, typically does not make the nation a party to the treaty. Rather, nations become parties to treaties by an act of ratification or accession, either by depositing an instrument of ratification or accession with a depositary (for multilateral treaties) or exchanging instruments of ratification (for bilateral treaties). The signing of treaties under this practice is at most an indication that the terms of the treaty are satisfactory to the executive institution in that nation charged with negotiating and signing treaties and does not constitute a promise that the nation will become a party to the treaty.

Despite the modern separation between signature and ratification, many international lawyers and academics contend that when a nation signs a treaty, it is bound to refrain from actions that would defeat the object and purpose of the treaty until such time as it makes clear its intention not to become a party to the treaty. This obligation is reflected in Article 18 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), a treaty that itself governs the formation, interpretation, and termination of treaties. Although the United States is not a party to the Vienna Convention, many commentators claim that Article 18 reflects customary international law that is binding on nations that have not joined the Convention, a claim that

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the United States has not denied.¹ In addition, some commentators have made broad claims about the content of the object and purpose obligation, arguing that it either binds signatory nations not to violate a treaty at all or that it binds them not to violate any of the “core” or “important” provisions in the treaty.² These claims are frequently made, for example, in connection with the U.S. signature of human rights treaties, such as the Convention on the Rights of the Child.³

Treaties are signed for the United States by the president and his agents. As a result, any international obligations that the United States would incur as a result of signing a treaty would be triggered by unilateral executive action. This sort of unilateral executive authority, however, appears to be in tension with the process specified in Article II of the Constitution for making treaties, which requires the advice and consent of two-thirds of the Senate.⁴ As I will explain, this tension is not eliminated by the existence of the president’s power to enter into “sole executive agreements.” Whatever its precise scope, the sole executive agreement power must be significantly narrower than the power to enter into Article II treaties.

The extent of this constitutional tension, however, depends on the breadth of the signing obligation. The drafting history of Article 18 suggests that the signing obligation was intended to be narrower than some commentators have assumed. This obligation is best construed as precluding only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification. Considered in these terms, the obligation has little relevance to many types of treaties, such as human rights treaties, where pre-ratification conduct inconsistent with the treaty is not likely to undo the bargain reflected in the treaty. Adopting this narrow interpretation of the object and purpose obligation helps reduce the gap between presidential authority under the Constitution and international law. Nevertheless, because there is still some potential for constitutional conflict, and because the object and purpose obligation is undefined in the text of the Vienna Convention, the Senate should be attentive to this issue if it is to preserve its already diminished role in the treaty process.

Part I of this Article describes the phenomenon of signed but unratified treaties and discusses some of the reasons for this phenomenon. Part II discusses the effect under modern international law of signing a treaty and explains how some commentators have claimed that signing a treaty obli-

1. See *infra* text accompanying notes 34–36. Customary international law is the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

2. See *infra* text accompanying notes 37–42.

3. See *infra* text accompanying note 38.

4. See U.S. CONST. art. II, § 2 (stating that the president has the power to make treaties “by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur”).

gates the United States either to comply with the treaty in its entirety or to comply with the “core” or “important” terms of the treaty. Part III argues that broad obligations arising from signature are in tension with the U.S. constitutional process for making treaties, and that this tension is not eliminated by the president’s power to conclude sole executive agreements. Part IV explains how the drafting history of Article 18 of the Vienna Convention suggests that the scope of the object and purpose obligation is narrower than is sometimes assumed, thus resolving some of the constitutional tension posed by signing obligations.

I. THE PHENOMENON OF SIGNED BUT UNRATIFIED TREATIES

Throughout its history, the United States has signed numerous treaties that it has not subsequently ratified.⁵ This phenomenon has been especially evident in the last several decades, during which time the United States has signed, but has not yet ratified, a variety of important multilateral treaties. These treaties include significant human rights agreements such as the International Covenant on Economic, Social, and Cultural Rights (signed in 1977); the American Convention on Human Rights (signed in 1977); the Convention on the Elimination of All Forms of Discrimination Against Women (signed in 1980); and the Convention on the Rights of the Child (signed in 1995). They also include important environmental treaties such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed in 1998); the Rio Convention on Biological Diversity (signed in 1993); and an agreement revising the seabed mining provisions of the Law of the Sea Convention (signed in 1994). Another set of treaties that have been signed but not ratified, much discussed in connection with the post-September 11 war on terrorism, are the First and Second Additional Protocols to the Geneva Conventions (signed in 1977). Finally, the United States has signed but not ratified a number of private international law treaties.⁶

That the United States has not ratified these treaties to date does not necessarily mean that the United States will not become a party to them. At least since World War I, it has not been uncommon for a significant period of time to elapse between the United States’ signature and ratification of a treaty. Two particularly dramatic examples are the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, which the United States signed

5. See UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA, 1776-1976 (Christian L. Wiktor ed., 1979) (documenting over 400 treaties that the United States signed but did not ratify between 1776 and 1976); see also U.S. Senate Committee on Foreign Relations, Pending Treaties, <http://foreign.senate.gov/treaties.pdf> (last updated Jan. 31, 2007) (listing treaties currently pending in the Senate); U.S. DEPT. OF STATE, LIST OF TREATIES SUBMITTED TO THE SENATE, 1789-1934 (1935).

6. See U.S. Department of State, Private International Law, <http://www.state.gov/s/l/c3452.htm> (last visited Mar. 18, 2007).

in 1925 but did not ratify until 1975, fifty years later,⁷ and the Convention on the Prevention and Punishment of the Crime of Genocide, which the United States signed in 1948 but did not ratify until 1989, forty-one years later.⁸ The Convention on the Elimination of All Forms of Discrimination Against Women, which the United States signed in 1980, is an example of a signed treaty that may eventually be ratified. In 2002, despite objections from the Bush Administration, the Democratic-controlled Senate Foreign Relations Committee voted to send the Convention to the full Senate for advice and consent.⁹ Although no vote was held at that time in the Senate, many supporters of the Convention continue to be hopeful of U.S. ratification.¹⁰

There are a number of reasons why the United States may sign but not ratify a treaty. The president might submit a treaty to the Senate and have it defeated there, although this happens only rarely. Two prominent examples are the Versailles Treaty, which established the League of Nations, and the Comprehensive Nuclear Test Ban Treaty.¹¹ More likely, a president might withhold submission of the treaty to the Senate because of perceived opposition in that body, perhaps with the hope that the Senate's position — and perhaps its composition — would change. This appears to have been the case, for example, with the Convention on the Rights of the Child, which the Clinton Administration signed in 1995 but did not submit to the Senate. In addition, a president may submit a treaty to the Senate and have it languish there, once its supporters in the Senate realize that they do not have sufficient votes for advice and consent. One apparent example of this phenomenon is the Convention on the Elimination of All Forms of Discrimination Against Women, which was approved by the Senate Foreign Relations Committee in 1994 and sent to the full Senate for consideration, but which the full Senate ultimately sent back to the Committee. As noted above, the Committee sent this treaty back to the full Senate in 2002, but the Senate once again declined to act on it. A president might also sign a treaty without being committed to ratification, perhaps in an effort to stay involved in subsequent negotiations related to the treaty or in the institutions established by the treaty, or for symbolic political benefits.

7. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into force Feb. 8, 1928; for the United States Oct. 4, 1975).

8. See Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; for the United States Feb. 23, 1989).

9. See James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2002, at A1.

10. See, e.g., Ellen Chesler, *International Holdout: Around the World, Empowering Women Is Considered Essential. So Why Isn't America on Board?*, AM. PROSPECT, Oct. 2004, at A27.

11. See U.S. Senate, *Treaties*, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5> (last visited Mar. 18, 2007) (listing twenty-one treaties that have been rejected by the Senate over the course of U.S. history).

Yet another reason why a treaty might be signed by the United States but remain unratified is a change in policy that occurs as a result of a new presidential administration. Such a change of policy has occurred on a number of occasions. For example, President Carter signed the SALT II nuclear reduction treaty in 1979, but the Reagan Administration announced in 1982 that the United States had no intention of ratifying that treaty. Secretary of State Alexander Haig explained to the Senate Foreign Relations Committee that “[t]his proposal has been abandoned by this administration,” and that “we consider SALT II dead and have so informed the Soviets.”¹² Similarly, the Reagan Administration announced in 1987 that it would not ratify the First Additional Protocol to the Geneva Conventions on the laws of war, which President Carter had signed in 1977. President Reagan explained in a message to the Senate that the Protocol was “fundamentally and irreconcilably flawed,” that the problems with the Protocol were “so fundamental in character that they cannot be remedied through reservations,” and that he therefore had “decided not to submit the Protocol to the Senate in any form.”¹³

The treaty establishing the International Criminal Court provides a more recent and much discussed example of how a change in policy can affect the United States’ position with respect to a signed but unratified treaty. This treaty was adopted in 1998 and, after receiving the requisite number of ratifications, entered into force in 2002.¹⁴ Under that treaty, an international court, based in The Hague, Netherlands, was given jurisdiction to try the offenses of genocide, crimes against humanity, and war crimes. Despite expressing a number of concerns about what he called “significant flaws” in the treaty, President Clinton had the United States sign it shortly before leaving office.¹⁵ The Bush Administration subsequently sent a letter to the Secretary-General of the United Nations, however, announcing that the

12. See *Nuclear Arms Reduction Proposals: Hearings Before the S. Comm. on Foreign Relations*, 97th Cong. 121 (1982).

13. See Letter of Transmittal from President Ronald Reagan to the U.S. Senate (Jan. 29, 1987), reprinted in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT’L L. 910 (1987). Among other things, President Reagan expressed concern that the First Additional Protocol would “grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.” *Id.* at 911. Some commentators have perceived a conflict between that concern and the Bush Administration’s post-September 11 treatment of terrorists as enemy combatants.

14. See Rome Statute of the International Criminal Court art. 120, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. As of September 2006, 102 nations were parties to this treaty. See United Nations Treaty Collection, Rome Statute of the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (last visited Mar. 18, 2007).

15. See President William J. Clinton, Statement on Signature of the International Criminal Court Treaty (Dec. 31, 2000), available at http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html. President Clinton expressed the view that, with signature, the United States would “be in a position to influence the evolution of the Court,” whereas “[w]ithout signature, we will not.” *Id.* Senator Jesse Helms complained that “President Clinton’s decision to sign the Rome treaty establishing an International Criminal Court in his final days in office is as outrageous as it is inexplicable Today’s action is a blatant attempt by a lame-duck President to tie the hands of his successor.” Press Release, Jesse Helms, Senate Foreign Relations Comm. Chairman, Helms Press Release on Clinton’s Signature (Dec. 31, 2000), available at http://www.amicc.org/docs/Helms_Sign.pdf.

United States had no intention of ratifying that treaty.¹⁶ The Bush Administration's action has been colloquially referred to as "unsigned," although there was no attempt to physically remove the Clinton Administration's earlier signature.

The Bush Administration's disavowal of the International Criminal Court treaty was more formal than disavowals of other signed but unratified treaties. The variation in how administrations have handled unratified treaties relates in part to the fact that the executive branch has multiple audiences. In signaling its intent not to be bound by a treaty, the executive branch must consider both an international audience consisting of, in particular, the other treaty parties, and a domestic audience consisting of interest groups and their supporters in Congress who favor or oppose the treaty.¹⁷ At times, the executive branch may attempt to suggest to the other treaty parties that it has no intention of ratifying, while leaving the matter somewhat ambiguous in order to avoid the domestic fallout associated with clear disavowal of the treaty. This fallout can emanate from both supporters of the particular treaty and opponents of other treaties who may demand similar disavowals.

The Bush Administration's statements concerning the Kyoto Protocol are a good example of this ambiguity. The Administration has repeatedly expressed opposition to the treaty, but it has never sent a formal notice to the Secretary-General disavowing the treaty, notwithstanding requests from critics of the treaty that it do so.¹⁸ Shortly after the Administration sent its notice concerning the International Criminal Court treaty, the Under Secretary of State for Global Affairs, Paula Dobriansky, responded to a letter from the Competitive Enterprise Institute requesting that the United States take steps to make clear that it had no intention of ratifying the Kyoto Protocol.¹⁹ Ms. Dobriansky noted that "President Bush and this administration have made clear on numerous occasions that the Kyoto Protocol is fatally flawed and that the United States will not participate in it," and she stated that "[w]e have gone to considerable lengths, internationally, over the past year to make our position with respect to the Kyoto Protocol clear and unambiguous."²⁰ Ms. Dobriansky did not make "clear and unambiguous,"

16. See Letter from John R. Bolton, Under Sec'y for Arms Control & Int'l Sec., U.S. Dep't of State, to Kofi Annan, Sec'y General, United Nations (May 6, 2002), available at www.state.gov/r/pa/prs/ps/2002/9968.htm [hereinafter Bolton Letter]; see also Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS, May 2002, <http://www.asil.org/insights/insigh87.htm> (discussing the U.S. announcement).

17. In other words, there is what the political scientist Robert Putnam has referred to as a "two-level game." See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); see also LOCATING THE PROPER AUTHORITIES: The Interaction of Domestic and International Institutions (Daniel W. Drezner ed., 2003).

18. See, e.g., Christopher C. Horner & Iain Murray, *Why the United States Should Remove Its Signature from the Kyoto Protocol*, MONTHLY PLANET, Sept. 2004, available at <http://www.cei.org/pdf/4254.pdf>.

19. See Letter from Paula Dobriansky, Under Sec'y for Global Affairs, U.S. Dep't of State, to Christopher C. Horner, Counsel, Cooler Heads Coalition (May 14, 2002), available at http://www.cei.org/gencon/003_03044.cfm.

20. *Id.*

however, why the Administration would not send a letter to the Secretary-General concerning the Protocol, as it had done for the International Criminal Court treaty.²¹

II. LEGAL EFFECT OF SIGNING A TREATY

Under international law, a nation does not become a party to a treaty until it expresses its “consent to be bound.”²² Traditionally, this consent could be expressed in a variety of ways, including through a nation’s signature of the treaty.²³ Under modern practice, however, signature is not typically regarded as a manifestation of consent to be bound, especially for multilateral treaties. Instead, consent is manifested through a subsequent act of ratification — the deposit of an instrument of ratification or accession with a treaty depository in the case of multilateral treaties, and the exchange of instruments of ratification in the case of bilateral treaties.²⁴ It has also long been settled that the act of signing a treaty does not obligate a nation to ratify the treaty.²⁵ The separation between signature and ratification for modern treaties reflects the domestic law of many countries, which requires that the executive obtain legislative approval before concluding treaties.

When the Western world was composed primarily of monarchies, signature was typically viewed as consent to be bound, since monarchs (and thus their agents) had the authority to unilaterally bind their nations to treaties.²⁶ The central issue under that regime was one of agency, that is, whether the purported representative of the monarch actually had the authority to make the commitment.²⁷ “Ratification” under that regime referred simply to the monarch’s confirmation that the agent had acted with

21. A somewhat similar example is the State Department’s failure to answer a 2003 letter from Senator Jon Kyl asking for clarification of the status of the Comprehensive Nuclear Test Ban Treaty. See Al Kamen, *A Nomination on Hold*, WASH. POST, Aug. 9, 2004, at A13 (referring to an unanswered 2003 letter from Senator Kyl to Secretary of State Colin Powell). *But cf.* Response of Sec’y of State Condoleezza Rice to a Question for the Record Submitted by Sen. Joseph Biden (No. 12), Comm. on Foreign Relations, Feb. 16, 2005, reprinted in 151 CONG. REC. S8532 (daily ed. July 20, 2005) (noting that “the U.S. does not support the CTBT and will not become a party to it”). For concerns expressed by Senator Kyl about obligations that may be entailed by the signature of treaties, see U.S. SENATE REPUBLICAN POLICY COMM., UNRATIFIED AND UNSIGNED TREATIES STILL CONSTRAIN U.S. ACTION (2006), <http://rpc.senate.gov/files/May1605UnsignedTreatiesMS.pdf>.

22. Vienna Convention on the Law of Treaties arts. 2(1)(b), 11–17, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 75 (2000).

23. See Vienna Convention, *supra* note 22, art. 11.

24. See CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 113 (Comm. Print 2001) [hereinafter CRS Study].

25. See, e.g., AUST, *supra* note 22, at 83; J. MERVYN JONES, FULL POWERS AND RATIFICATION 79 (1946); ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 87–88 (1938).

26. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 582 (6th ed. 2003); FRANCIS O. WILCOX, THE RATIFICATION OF INTERNATIONAL CONVENTIONS 21–22 (1935).

27. See, e.g., JOSE SETTE CAMARA, THE RATIFICATION OF INTERNATIONAL TREATIES 23–28 (1949).

authority in signing the treaty.²⁸ The modern separation of signature and ratification can be traced back to the period of the U.S. and French revolutions, when those two countries added a clause that reserved ratification in the Full Powers they gave to their negotiators.²⁹ The United States repeatedly had to remind other countries during the nineteenth century that its signature did not constitute a promise of ratification.³⁰ Eventually, “European governments ceased to protest against the American practice; and unratified treaties became a common feature of international relations.”³¹ Even as the United States maintained that position, however, there was a holdover of the older notion of ratification, whereby some U.S. courts, consistent with the international presumption at that time, deemed treaties that were ratified by the United States to be retroactive to the time of the U.S. signature.³² This view was eventually abandoned both in the United States and abroad, and the modern presumption under international law is that treaties do not operate retroactively.³³

Today, although signing is not typically viewed as a manifestation of consent to be bound to a treaty, many international law academics and lawyers contend that signing does impose certain obligations on the signatory country. This contention is based on a provision in the Vienna Convention, a treaty that regulates the formation, interpretation, and termination of treaties. Article 18 of the Vienna Convention states that a nation that signs a treaty is “obliged to refrain from acts which would defeat the object and purpose” of the treaty “until it shall have made its intention clear not to become a party to the treaty.”³⁴ Although the United States has not ratified the Vienna Convention, executive branch officials have stated on a number of occasions that they view much of the Convention as reflecting binding customary international law.³⁵ Moreover, when the executive branch ini-

28. See Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 *ME. L. REV.* 263, 268 n.12 (1980).

29. See JONES, *supra* note 25, at 74. Treaties concluded by the United States prior to the Constitution, such as trade and alliance treaties with France during the Revolutionary War and the peace treaty with Great Britain that ended the war, specifically called for an exchange of ratifications after signature, and the Articles of Confederation provided that treaties had to be approved by a supermajority of the Continental Congress.

30. See JONES, *supra* note 25, at 76–77; see also, e.g., 5 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 189 (1906) (describing a treaty negotiation with Spain in 1819 in which Secretary of State John Quincy Adams explained to the Spanish minister that “by the nature of our Constitution, the full powers of our ministers never are or can be unlimited”).

31. JONES, *supra* note 25, at 77.

32. See J. Mervyn Jones, *The Retroactive Effect of the Ratification of Treaties*, 29 *AM. J. INT’L L.* 51 (1935); see also Edward T. Swaine, *Unsigning*, 55 *STAN. L. REV.* 2061, 2069 n.38 (2003).

33. See Vienna Convention, *supra* note 22, art. 28.

34. *Id.* art. 18.

35. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, at 145, 145 n.2 (documenting executive branch statements). The United States has signed the Vienna Convention. There is thus a further question of whether the Article 18 object and purpose obligation applies, as a matter of customary international law, to the U.S. signature of the Vienna Convention itself and, if so, what that obligation entails. For example, as a signatory to the Vienna Convention, is the

tially sought Senate ratification of the Vienna Convention, State Department officials specifically described the Article 18 object and purpose obligation as a codification of customary international law, and State Department officials have since repeated this description.³⁶

If the United States is bound by international law not to defeat the object and purpose of treaties that it has signed but not ratified, then the unilateral signature of the president or his agent can bind the United States to certain international legal obligations. Commentators have made a variety of claims in recent years concerning U.S. obligations under signed but unratified treaties. For example, Article 37(a) of the Convention on the Rights of the Child prohibits the use of the death penalty for anyone who committed their offense under the age of eighteen, and some commentators have claimed that U.S. execution of such juvenile offenders — something permitted in a number of U.S. states before the Supreme Court's decision in *Roper v. Simmons*³⁷ — violated the object and purpose of the Convention.³⁸ Another example concerns the Comprehensive Nuclear Test Ban Treaty. Despite the Senate's rejection of that treaty in 1999 by a vote of fifty-one to forty-eight, which meant that the treaty lacked majority, let alone two-thirds, support, the

United States perhaps bound not to violate Article 18 because doing so would defeat the object and purpose of *that* treaty? For reasons discussed below in Part IV, the answer should be no.

36. The Nixon Administration signed the Vienna Convention in 1970 and transmitted it to the Senate in 1971. In its Letter of Submittal to the President, the State Department described the Convention as "set[ting] forth a generally agreed body of rules to govern all aspects of treaty making and treaty observance." Letter of Submittal from William P. Rogers, U.S. Sec'y of State, to President Richard M. Nixon (Oct. 18, 1971), in Message from the President of the United States Transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. at 1 (Nov. 22, 1971). In commenting on Article 18's object and purpose rule, the State Department observed that "[t]his rule is widely recognized in customary international law." *Id.* at 2. In response to a 1979 letter from fourteen Senators expressing concern about possible legal obligations that might be entailed by U.S. signature of the Law of the Sea Convention, Ambassador Elliot Richardson stated that signature "imposes no obligation other than refraining from acts which would defeat the object and purpose of the treaty," and that "[t]he Vienna Convention provisions, including Article 18, are for the most part codifications of customary international law." *The Law of Treaties and Other International Agreements, 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* § 1, at 692. In 2001, in an answer to a question for the record posed by Senator Jesse Helms, Secretary of State Colin Powell reaffirmed the State Department's view that Article 18 reflects customary international law. *See Treaties and Other International Agreements, 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 212–13.

37. 543 U.S. 551 (2005). In *Roper*, the Supreme Court held that the execution of juvenile offenders (i.e., those people who commit capital offenses while under the age of 18) constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. Although the Court did not rely on the U.S. signature of the Convention on the Rights of the Child, it did note that every nation in the world except for the United States and Somalia had ratified the Convention. *Id.* at 576. In his dissent, Justice Scalia argued, in reference to the U.S. failure to ratify the Convention, that "[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position." *Id.* at 605 (Scalia, J., dissenting).

38. *See, e.g.*, Panel Discussion, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 *FORDHAM L. REV.* 2793, 2812 (1999) (comments of Professor William Schabas); Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 *WHITTIER L. REV.* 215, 224 (1999). *But see* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 *DUKE L.J.* 485, 512–13 (2002) (disputing this claim).

Clinton Administration and some commentators maintained that the United States still had an obligation under the treaty to avoid testing nuclear weapons by virtue of its earlier signature.³⁹ Still another example is the First Additional Protocol to the Geneva Conventions. Commentators have claimed that, notwithstanding the Reagan Administration's disavowal of that Protocol, the Carter Administration's signature continues to bind the United States to various obligations, such as limitations on the use of weaponry.⁴⁰

These commentators assume that signing a treaty obligates a nation to comply either with the treaty as a whole or with its "important" or "core" provisions. Professors Goodman and Jinks have expressly asserted the latter position, contending that "[a]s a matter of international law, core treaty obligations attach earlier in the incorporation process — that is, upon signature of the treaty."⁴¹ These arguments are similar to arguments that have been made with respect to a different "object and purpose" restriction in the Vienna Convention — the preclusion of reservations to a treaty that are "incompatible with the object and purpose of the treaty."⁴²

39. See, e.g., Bill Gertz, *Albright Says U.S. Bound by Nuke Pact*, WASH. TIMES, Nov. 2, 1999, at A1 (quoting letter from Secretary of State Madeleine Albright to foreign ministers referring to the United States' "obligations as a signatory under international law"); President William J. Clinton, Remarks at Press Conference on the Comprehensive Test Ban Treaty (Oct. 14, 1999) ("I signed that treaty, it still binds us unless I go, in effect, and erase our name — unless the President does that and takes our name off, we are bound by it."), <http://www.fas.org/nuke/control/ctbt/text/101499clintonstatement.htm> (last visited Mar. 18, 2007); see also Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 463–64 (2003) (arguing that "resumption of U.S. testing by means of nuclear explosion would defeat the object" of the CTBT); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 137, 139, n.15 (2000) (stating that "the United States presumably remains bound under customary international law (as evidenced by Article 18 of the Vienna Convention on the Law of Treaties) to refrain from acts that would defeat the object and purpose of the CTBT," but noting that "[w]hether that obligation requires that the United States refrain from nuclear testing is unclear"). Senator Trent Lott responded that "the Senate vote serves to release the United States from any possible obligations as a signatory of the negotiated text of the treaty." Bill Gertz, *Lott Hits Clinton's Stance on Nuke Pact*, WASH. TIMES, Nov. 3, 1999, at A1. In arguing that there continues to be an object and purpose obligation under this treaty, some commentators have noted that the treaty remained on the Senate's Executive Calendar despite that body's rejection of the treaty. See, e.g., Murphy, *supra*. For a discussion of the president's power to withdraw a treaty from Senate consideration, see David C. Scott, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447 (2002).

40. See, e.g., Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 107 (2002); see also Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 94 (2001) ("Although the United States has not yet ratified Protocol I, it has signed the Protocol (during the Carter Administration), and therefore it has an international obligation 'to refrain from acts which would defeat the object and purpose of the treaty' pending ratification or Senate defeat.").

41. Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 173 (2003); see also Barbara Crossette, *U.N. Endorses a Treaty to Halt All Nuclear Testing*, N.Y. TIMES, Sept. 11, 1996, at A3 (quoting Professor Thomas Franck for the proposition that "[t]he Vienna Convention provides that between the time of signing and ratifying, a state has a legal obligation *not to act in a manner inconsistent with the agreement*") (emphasis added).

42. See Vienna Convention, *supra* note 22, art. 19. This broad "object and purpose" argument concerning permissible reservations has been made by the Human Rights Committee that monitors compliance with the International Covenant on Civil and Political Rights. See Human Rights Committee,

The practical significance of these purported signing obligations is illustrated by the U.S. decision to “unsign” the International Criminal Court treaty. In making its announcement, the Bush Administration expressly sought to preclude arguments that it was bound to assist the Court as a result of the signature. The letter sent by the United States to the Secretary-General stated that “the United States does not intend to become a party to the treaty,” and that “[a]ccordingly, the United States has no legal obligations arising from its signature [of the treaty],” an apparent reference to Article 18 of the Vienna Convention.⁴³ That same day, in defending the Bush Administration’s action before the Center for Strategic and International Studies, an Administration official stated that the Administration’s actions were “consistent with the Vienna Convention on the Law of Treaties.”⁴⁴ In an even more direct reference to Article 18 of the Convention, the U.S. Ambassador for War Crimes Issues explained in a press conference that the Administration’s announcement would help the United States preserve its flexibility because “when one is a signatory . . . the state commits to not taking actions that would be designed to defeat the object and the purpose of the treaty.”⁴⁵

One can only speculate about the Administration’s specific concerns relating to obligations that might have been associated with the U.S. signature. We do know, however, that the International Criminal Court treaty requires parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court,” and to “comply with

General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994). For a critique of this claim based on the text and drafting history of Article 19, see Bradley, *supra* note 38, at 503–05. The “object and purpose” obligation under Article 18 may be narrower than the one under Article 19. Article 18 refers to actions that “would defeat” the object and purpose of a treaty, whereas Article 19 refers to reservations that are “incompatible with” the object and purpose of a treaty. Moreover, Article 18 is focused on the interim period between signature and ratification, whereas Article 19 is focused on the ongoing relationship between a party and a treaty it has ratified.

43. Bolton Letter, *supra* note 16. Before being appointed to that position, Mr. Bolton had expressed concern that President Clinton’s signature of the International Criminal Court treaty would bind the United States not to defeat the object and purpose of the treaty. See John R. Bolton, Editorial, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21; see also John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 TRANSNAT’L L. & CONTEMP. PROBS. 1, 47–48 (2000) (expressing concern about the Clinton Administration’s claim that the United States was still bound by the object and purpose of the Comprehensive Test Ban Treaty despite the Senate’s rejection of it); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 211–12 (2000) (criticizing the Clinton Administration’s reliance on the object and purpose of the treaty after it had been rejected by the Senate).

44. Marc Grossman, Under Sec’y for Political Affairs, U.S. Dep’t of State, Remarks to the Center for Strategic and International Studies (May 6, 2002), available at <http://www.state.gov/p/us/rm/9949.htm>. In a separate statement, Secretary of Defense Donald Rumsfeld explained several concerns that the Administration had about the treaty: “the lack of adequate checks and balances on powers of the ICC prosecutors and judges; the dilution of the U.N. Security Council’s authority over international criminal prosecutions; and the lack of an effective mechanism to prevent politicized prosecutions of American servicemembers and officials.” Press Release, U.S. Dep’t of Def., Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=3337>.

45. Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, Foreign Press Center Briefing (May 6, 2002), available at <http://fpc.state.gov/9965.htm>.

requests for arrest and surrender.”⁴⁶ It is conceivable that, as a signatory, the United States would have been called on to assist the court by, for example, extraditing a suspect who was within U.S. jurisdiction or by providing evidence within U.S. control. The Administration may well have had this sort of obligation in mind, since the same day that the Administration announced that it would not become a party to the treaty, the State Department’s ambassador for war crimes stated that the court “should not expect any support or cooperation from the United States government. If the prosecutor of the [court] seeks to build a case against an individual, the prosecutor should build the case on his or her own effort and not be dependent or reliant upon U.S. information or cooperation.”⁴⁷

The Bush Administration might also have been concerned that its plan to conclude non-surrender agreements with individual nations, whereby nations promise not to deliver U.S. personnel to the International Criminal Court, would be viewed as an effort to defeat the object and purpose of the treaty. The United States has now concluded non-surrender agreements with approximately 100 countries.⁴⁸ In doing so, the United States has sought to obtain the benefit of Article 98(2) of the International Criminal Court treaty, which provides that the Court:

may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁴⁹

Some commentators have suggested, however, that the non-surrender agreements violate the object and purpose of the treaty.⁵⁰

46. See Rome Statute, *supra* note 14, arts. 86, 89.

47. Prosper, *supra* note 45. Congress subsequently enacted the American Servicemembers’ Protection Act of 2002, which broadly precludes federal, state, and local government assistance to the ICC. See Pub. L. No. 107-206, 116 Stat. 899 (2002). The Act also authorizes the president to use “all means necessary and appropriate” to obtain the release of U.S. and allied soldiers and government employees detained or imprisoned by or on behalf of the court. *Id.* § 2008.

48. See Press Statement, U.S. Dep’t of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), available at <http://www.state.gov/t/pa/prs/ps/2005/45573.htm>; U.S. Department of State, Article 98 Agreements and the International Criminal Court, <http://www.state.gov/t/pm/art98/> (last visited Mar. 18, 2007). The American Servicemembers’ Protection Act, 116 Stat. 899, prohibits certain types of assistance to countries that refuse to conclude Article 98 agreements with the United States. The president has the authority under the Act, however, to waive the prohibition, and he has done so for some countries. See, e.g., Memorandum from President George W. Bush to the U.S. Sec’y of State, Waiving Prohibition on United States Military Assistance with Respect to Various Parties to the Rome Statute Establishing the International Criminal Court (Oct. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/print/20061002-7.html>.

49. Rome Statute, *supra* note 14, art. 98.

50. See, e.g., Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT’L L. REV. 1115 (2004); James Crawford, Philippe Sands & Ralph Wilde, Joint Opinion, In the Matter of the Statute of the Interna-

III. THE TREATY CLAUSE AND THE EXECUTIVE AGREEMENT POWER

The imposition of international obligations based on the signature of a treaty poses a constitutional issue for the United States. Article II of the Constitution specifies a process that requires the president to obtain the advice and consent of two-thirds of the Senate in order to make treaty commitments.⁵¹ Like the bicameralism and presentment requirements for federal legislation, the procedural requirements for making treaties are part of the Constitution's checks and balances.⁵² Moreover, under current case law, treaties are not subject to the same federalism limitations that apply to federal legislation,⁵³ making the process requirements particularly significant.⁵⁴

The Founders had a number of reasons for requiring the advice and consent of the Senate for treaty-making, including their desires to protect state interests, check executive power, and limit the number of international commitments into which the country entered.⁵⁵ As Alexander Hamilton explained in *Federalist No. 75*, it was thought essential at the Founding that both the president and a portion of the legislature participate in the treaty process:

The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the

tional Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute (June 5, 2003), available at http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf. Because of its notification that it does not intend to become a party to the treaty, the United States is not bound to the object and purpose obligation for that treaty. Commentators have argued, however, that nations that are parties or signatories to the treaty are violating international law if they sign these agreements with the United States.

51. U.S. CONST. art. II, § 2.

52. See Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 918 (2004); cf. *Clinton v. New York*, 524 U.S. 417 (1998) (invalidating Line Item Veto Act based on failure to comply with procedural requirements for legislation); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto provision based on failure to comply with procedural requirements for legislation).

53. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920). For academic discussion of the relationship between the treaty power and U.S. federalism, compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley (1998)], Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000), and Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000), and Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

54. See, e.g., David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003).

55. See generally Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-Making Clause as a Case Study*, 1 PERSP. AM. HIST. 233 (1984); Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271 (1934).

whole or a portion of the legislative body in the office of making them.⁵⁶

Hamilton further contended that, “[h]owever proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust [the treaty] power to an elective magistrate of four years’ duration.”⁵⁷ The object and purpose obligation embodied in Article 18 of the Vienna Convention, however, appears to contemplate the imposition of binding international commitments through the “elective magistrate’s” unilateral act of signature. Moreover, because Article 18 imposes no time limitation on ratification, these commitments may continue for many years.⁵⁸

To be sure, it is difficult to argue that the Article II treaty process is the *only* way in which the United States can constitutionally enter into binding international agreements. The Constitution, in limiting state involvement in foreign affairs, refers not only to “Treaties” — the term used in Article II — but also to “Agreements” and “Compacts,” thus suggesting that there may be some international agreements that are not subject to the Article II process.⁵⁹ In fact, the United States has entered into many binding international agreements during its history without going through the Article II process. This practice has been especially prevalent in the period since World War II, during which time the vast majority of international agreements entered into by the United States have not gone through the two-thirds senatorial consent process. Indeed, in the fifty-year period between 1939 and 1989, the United States entered into 11,698 “executive agreements” (agreements concluded outside of the Article II process) and only 702 Article II treaties.⁶⁰ This sort of longstanding historical practice is often

56. THE FEDERALIST NO. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 557 (1833) (“The president is the immediate author and finisher of all treaties But no treaty, so formed, becomes binding upon the country, unless it receives the deliberate assent of two thirds of the senate.”); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 187 (1836) (“In some republics, as in that of the United States of America, the advice and consent of the senate is essential to enable the chief executive magistrate to pledge the national faith in this form.”).

57. THE FEDERALIST NO. 75, *supra* note 56, at 451; *see also* THE FEDERALIST NO. 69, 419 (Alexander Hamilton) (distinguishing the proposed president from the British monarch and noting that the president, unlike the British monarch, could not make treaties on his own).

58. The president’s role in triggering signing obligations is distinguishable from his role in the formation of general rules of customary international law. Although the president can take actions along with other nations that may affect the development of customary international law, he cannot unilaterally create customary international law obligations for the United States.

59. *See* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). The Constitution completely prohibits states from entering into any “Treaty, Alliance, or Confederation,” and requires them to obtain congressional consent before entering into any “Agreement or Compact.” U.S. CONST. art. I, § 10.

60. *See* CRS Study, *supra* note 24, at 39.

given significant weight in constitutional interpretation, especially in the area of foreign affairs.⁶¹

A large majority of U.S. executive agreements have been congressional-executive agreements, that is, agreements made with the *ex ante* or *ex post* approval of a majority of Congress.⁶² Nevertheless, there are a number of examples of what are called “sole executive agreements,” that is, international agreements concluded solely by the president. Although many sole executive agreements have concerned relatively minor or routine matters, some of them have had significant effect, and several Supreme Court decisions have held that these agreements (primarily involving settlement of claims and recognition of foreign governments) are not only binding on the United States internationally but also operate domestically as preemptive federal law.⁶³ It is arguable that the obligations associated with the executive signature of a treaty are analogous to those created by sole executive agreements.

There has been significant academic debate over the legitimacy of congressional-executive agreements.⁶⁴ Although most commentators accept that these agreements are at least sometimes constitutionally valid, many commentators believe that the congressional-executive agreement power is narrower than the Article II treaty power. These commentators note, for example, that despite the frequent use of congressional-executive agreements, presidents generally have not attempted to use them for subjects such as human rights or arms control, and the Senate has indicated that it would resist such an attempt.⁶⁵ Rather, congressional-executive agreements

61. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–28 (1936).

62. See CONG. RESEARCH SERV., 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES (Comm. Print 1977) (finding that in the period 1946–1972, 88.3% of executive agreements were based at least in part on statutory authority, 6.2% were based on treaties, and 5.5% were based solely on executive authority); C.H. McLaughlin, *The Scope of the Treaty Power in the United States II*, 43 MINN. L. REV. 651, 721 (1959) (concluding that only 5.9% of executive agreements entered into between 1938 and 1957 were based exclusively on the president’s constitutional authority).

63. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (settlement of war-related claims); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (settlement of claims against foreign nation as part of resolution of hostage crisis); *United States v. Pink*, 315 U.S. 203 (1942) (agreement giving effect to Soviet property claims as part of recognition of Soviet Union); *United States v. Belmont*, 301 U.S. 324 (1937) (same as *Pink*).

64. Compare, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995), and David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

65. See, e.g., Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001); see also CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 473–74, 477 (2d ed. 2006) (documenting Senate insistence that significant arms control agreements be concluded pursuant to the Article II process). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, at § 303 cmt. e (1987) (suggesting that treaties and congressional-executive agreements are completely interchangeable).

are most commonly used for agreements relating to international trade and commerce, areas in which Congress has particularly broad authority.⁶⁶ Moreover, there are a number of examples in which presidents have used the Article II senatorial consent process, rather than congressional-executive agreements, even though that process reduced the likelihood of legislative approval of the treaty — for example, with respect to the Comprehensive Nuclear Test Ban Treaty.⁶⁷

Regardless of how one comes out on the proper scope of congressional-executive agreements, there are much stronger reasons for concluding that the sole executive agreement power is narrower than the Article II treaty power. Sole executive agreements are not subject to the process requirements for congressional-executive agreements, namely congressional approval. Nor do they benefit from the same historical gloss, since they have been used much less often than congressional-executive agreements. Because sole executive agreements are not authorized by Congress, they fall into a lower category of presidential power under Justice Jackson's influential framework from the *Youngstown* steel seizure case. Under that framework, presidential power is at its highest when the president acts with the approval of Congress, as is the case with congressional-executive agreements, but is in a lower, intermediate category when the president acts without such approval, as is the case with sole executive agreements.⁶⁸

For these reasons, although there is much academic debate about executive agreements, almost all commentators agree that the president's power to enter into sole executive agreements is narrower than the United States' power to enter into Article II treaties. Professor Louis Henkin, who is otherwise supportive of executive agreements, especially congressional-executive agreements, describes the proposition that sole executive agreements are completely interchangeable with Article II treaties as "unacceptable, for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution."⁶⁹ Many commenta-

In 1999, the full Congress passed legislation that prohibits the United States from becoming a party to the ICC by any means other than by an Article II treaty. See 22 U.S.C. § 7401 (2000).

66. See, e.g., *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1319–22 (N.D. Ala. 1999), vacated by 242 F.3d 1300 (11th Cir. 2001).

67. It seems unlikely, therefore, that presidents have complete freedom of discretion in choosing whether to conclude an agreement as an Article II treaty or an executive agreement, as some commentators have assumed. See Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRES. STUD. Q. 440 (2005); John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 85 (2002).

68. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (Jackson, J., concurring); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (citing Justice Jackson's concurrence).

69. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 222 (2d ed. 1996); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 649 (3d ed. 2000) ("That the power to conclude executive agreements coincides perfectly with the treaty power is untenable . . . since such a conclusion would emasculate the structurally crucial senatorial check on executive discretion that the Framers so carefully embodied in the Constitution.").

tors assume, therefore, that sole executive agreements are valid only if they are related to an independent constitutional power of the president, such as the president's implied power to determine which governments the United States recognizes, the president's powers as Commander-in-Chief, or the president's power to receive ambassadors.⁷⁰ Others claim that such agreements are valid only if they involve one-time or short-term commitments.⁷¹

These limitations are at least roughly consistent with the Supreme Court's decisions that have approved sole executive agreements.⁷² The agreement at issue in the *Belmont* and *Pink* cases related to U.S. recognition of the Soviet Union and thus concerned the president's recognition power.⁷³ The agreement at issue in *Dames & Moore* concerned the resolution of the Iranian hostage crisis and thus was arguably related to the Commander-in-Chief power. In addition, the agreements in each of these three cases involved the one-time settlement of claims against a foreign government.⁷⁴

The Supreme Court's recent decision in *American Insurance Association v. Garamendi* does not change this conclusion about the limitations of sole ex-

70. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, at § 303(4) (1987); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 121 (1965); CRS Study, *supra* note 24, at 26. An early sole executive agreement relating to the Commander-in-Chief power was an agreement made by President Madison with Great Britain during the War of 1812 concerning treatment of prisoners of war. See *Cartel for the Exchange of Prisoners of War, U.S.-Gr. Brit.*, May 12, 1813, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776-1818, at 557 (Hunter Miller ed., 1931). For debate over whether the Article II "vesting clause" (which provides that "the executive Power shall be vested in a President of the United States of America") is also a source of presidential power, compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (arguing that it is), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (arguing that it is not).

71. See, e.g., Ramsey, *supra* note 59. In *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), the Supreme Court held that Vermont could not extradite a criminal suspect to Canada because, even though the extradition arrangement did not constitute a formal "treaty," it did constitute an "agreement" and thus was precluded by Article I, Section 10 of the Constitution because of the absence of congressional authorization. A plurality of the Court quoted Vattel's description of "treaties" as compacts made "either for perpetuity, or for a considerable time" and his statement that "[t]he compacts which have temporary matters for their object, are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts." *Id.* at 572; see also 3 E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 160 (Charles G. Fenwick trans., Carnegie Inst. Wash. 1916) (1758). A classic example of a one-time agreement is a claims settlement. For documentation of the longstanding practice of settlement of claims through executive agreement, see, for example, SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 85-87 (1904); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003). A common short-term agreement is a *modus vivendi*, which is "an instrument recording an international agreement of temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character." U.N. TREATY COLLECTION, *TREATY REFERENCE GUIDE* (1999), available at <http://untreaty.un.org/English/guide.pdf>. For examples of *modi vivendi* accomplished through executive agreement, see CRANDALL, *supra*, at 87-88.

72. See cases cited *supra* note 63.

73. See *United States v. Belmont*, 301 U.S. 324, 330 (1937); *United States v. Pink*, 315 U.S. 203, 229; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

74. It is also worth noting that Congress appears to have acquiesced in the longstanding practice of presidential settlement of claims. See *Dames & Moore v. Regan*, 453 U.S. 654, 680-81 (1981).

executive agreements. In *Garamendi*, the Supreme Court held that a California statute was preempted because it posed an obstacle to the achievement of executive branch policy that was embodied in certain executive agreements relating to the settlement of Holocaust-era claims.⁷⁵ Although the case involved binding international agreements, there is language in the Court's opinion that could be read as suggesting that the executive might have the unilateral power to preempt state law in foreign affairs. In particular, the Court noted that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy" and that "there is executive authority to decide what that policy should be."⁷⁶ Despite this broad language, the Court did not suggest that the executive had unlimited authority, even through executive agreements, to preempt state law. Indeed, in observing that "*valid* executive agreements are fit to preempt state law, just as treaties are,"⁷⁷ the Court can be read as suggesting that there are limits on the circumstances in which sole executive agreements will be found valid.⁷⁸ More importantly, the Court emphasized that the executive agreements at issue concerned the settlement of claims, and that the use of "executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice" which "has received congressional acquiescence throughout its history."⁷⁹ If the sole executive agreement power were plenary, the Court would not have needed to emphasize the historical support for, and congressional acceptance of, this type of agreement.

In sum, it seems likely that there are significant limitations on the president's unilateral ability to bind the United States to international obligations. For example, even if the United States could constitutionally enter into a treaty to abolish the death penalty,⁸⁰ the president presumably would lack the power on his own, as a matter of domestic law, to obligate the United States to abolish the death penalty. Such a commitment would not fall within his independent constitutional powers, especially with respect to the use of the death penalty at the state level. Nor is there historical practice supporting the use of sole executive agreements, or even congressional-executive agreements, for such human rights obligations. Assuming this argu-

75. 539 U.S. 396 (2003).

76. *Id.* at 415.

77. *Id.* at 416.

78. See also *Dames & Moore*, 453 U.S. at 682 (noting that "the President does have *some* measure of power to enter into executive agreements") (emphasis added).

79. *Garamendi*, 539 U.S. at 415. The dissenters further noted that the Court's "cases do not catalog the subject matter meet for executive agreement, but we have repeatedly acknowledged the President's authority to make such agreements to settle international claims." *Id.* at 436 (Ginsburg, J., dissenting).

80. It is possible that Congress lacks the power to abolish the death penalty at the state level. *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress exceeded its authority under the Commerce Clause in criminalizing the possession of firearms near schools). The Supreme Court has held, however, that the treaty power is not limited to the scope of Congress's legislative powers. See *Missouri v. Holland*, 252 U.S. 416 (1920). It is uncertain whether there are any subject matter limitations on the treaty power. See *Bradley* (1998), *supra* note 53, at 429–33.

ment is correct, the president similarly should not have the authority to bind the United States to these sorts of obligations as a result of the purported object and purpose obligation associated with signing a treaty. This problem does not go away simply because the president may be able to “unsign” an unratified treaty, since that possibility simply gives more authority to the executive and thus does not address the lack of senatorial consent.

For these reasons, Professor Michael Glennon’s claim that “[t]he President clearly possesses the authority to sign treaties and in view of the effect accorded signature by international law . . . may constitutionally infer from that signature the further authority to act so as not to defeat the object or purpose of a signed treaty”⁸¹ is questionable. Although Professor Glennon proceeds to qualify his claim by stating that the president “cannot exceed his own independent powers,”⁸² the effect of this qualification is unclear, since he also states that “these powers are again properly viewed as encompassing the authority to carry out obligations incurred by the United States by virtue of its status as a treaty signatory.”⁸³ In other words, it is doubtful that Article 18 of the Vienna Convention, by virtue of its purported status as customary international law, has increased the president’s constitutional authority. By analogy, if customary international law started treating signature as constituting consent to be fully bound by a treaty, that treatment would not give the president the domestic authority to start ratifying treaties unilaterally through his signature. Instead, he presumably would need to obtain the Senate’s advice and consent before engaging in signature. It might be different if the signing obligation had existed under customary international law when the Constitution was drafted and ratified, because it could be argued that the Constitution was implicitly granting the president this background authority by virtue of his role in the treaty process. As discussed below, however, the drafting history of the Vienna Convention on the Law of Treaties shows that the signing obligation is of more modern origin.

Nevertheless, there are some obligations to which the president could presumably commit unilaterally by his signature. As the Court noted in *Garamendi*, “the President has a degree of independent authority to act” in the area of foreign affairs.⁸⁴ Thus, for example, as Commander-in-Chief, the president might be able to make a binding commitment not to test or use certain weapons, at least in the absence of a contrary directive from Congress, and at least for the duration of his administration. President Reagan made such a commitment in the context of the SALT II Treaty. Although President Reagan announced that the United States would not ratify that

81. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 173 (1990).

82. *Id.*

83. *Id.*

84. 539 U.S. at 415.

treaty,⁸⁵ he also stated that the United States would voluntarily “refrain from actions which undercut [the treaty] so long as the Soviet Union shows equal restraint”⁸⁶ — a decision that may have been within his independent powers as Commander-in-Chief. An analogous issue is the power of the president to direct *provisional* application of at least some treaties prior to their ratification. With respect to that issue, the State Department has stated that such provisional application is proper so long as the obligations undertaken are “obligations within the President’s competence under U.S. law.”⁸⁷

To return to the example of the International Criminal Court treaty, it seems unlikely, under the above analysis, that President Clinton could have constitutionally bound the United States to extradite suspects to the court. Unlike the command of troops or the recognition of foreign governments, it is difficult to argue that the president has an independent power of extradition. Indeed, the Supreme Court has expressly held that extradition can be accomplished only by means of a treaty or statute.⁸⁸ As the Court has explained, “there is no executive prerogative to dispose of the liberty of the individual.”⁸⁹ President Clinton might have had the independent power to commit the United States to other obligations, however, such as providing evidence within the federal government’s control — perhaps pursuant to his Article II authority to “take Care that the Laws be faithfully executed” (since the evidence would facilitate the enforcement of international criminal law). The principal point, however, is that he would not have had unlimited constitutional authority to bind the United States to assist the International Criminal Court merely by his act of signature.⁹⁰

85. See *supra* text accompanying note 12.

86. President Ronald Reagan, Remarks at Memorial Day Ceremonies at Arlington National Cemetery (May 31, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/53182A.htm>.

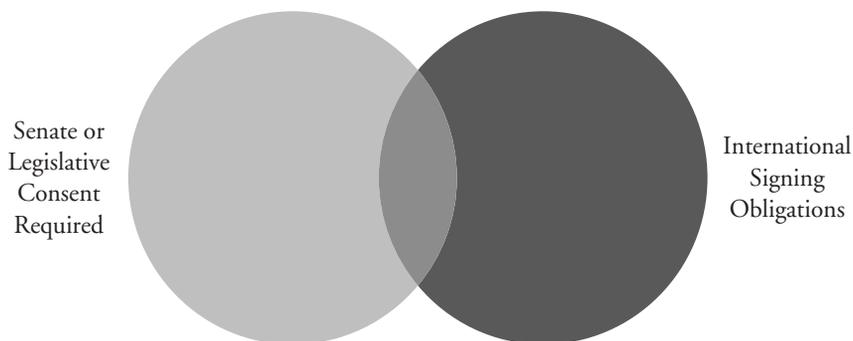
87. Written Reply of Mark B. Feldman, Deputy Legal Adviser, U.S. Dep’t of State, to Questions Presented by Senator Jacob K. Javits, in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT’L L. 917, 932 (1980); see also CRS Study, *supra* note 24 at 113–16; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, at § 312 reporters’ note 7 (1987) (“Provisional commitment . . . reflects an understanding that the President has some implied authority to commit the United States on a provisional basis. How far that authority extends is not clear . . .”).

88. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936) (stating that extradition “is not confided to the Executive in the absence of treaty or legislative provision”). But see QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 237 (1922) (noting two controversial examples of unilateral executive extraditions).

89. *Valentine*, 299 U.S. at 9. In the Jonathan Robbins case, in which John Marshall famously defended the authority of President Adams to extradite a suspect to Great Britain, the president was relying on the U.S.-British extradition treaty. See John Marshall, Address Before the House of Representatives (Mar. 7, 1800), in 10 ANNALS OF CONG. 596, 613–14 (1851); see also Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

90. Customary international law might impose obligations on the United States even when the president acts beyond his domestic constitutional authority. Cf. Vienna Convention, *supra* note 22, art. 46 (allowing for only a narrow *ultra vires* defense to treaty obligations). But these obligations would not be effective domestically in the United States, since, whatever its status in the U.S. legal system, customary international law does not trump the Constitution. For a description of the academic debates over the domestic status of customary international law, see Curtis A. Bradley, Jack L. Goldsmith & David H.

The following diagram illustrates the potential for conflict between the constitutional requirements for making international agreements and possible international obligations that attach upon signature of a treaty. The left circle represents agreements that require either two-thirds senatorial consent (the Article II treaty process) or legislative consent (congressional-executive agreements), the right circle represents international obligations associated with signing a treaty, and the overlap between the two circles represents the potential constitutional conflict.



IV. DRAFTING HISTORY OF ARTICLE 18

The extent to which there is a potential conflict between international law and the U.S. constitutional process for making treaty commitments depends on the breadth of the Article 18 object and purpose obligation. The less significant the object and purpose obligation, the less likely it is that the signing obligation will exceed the president's unilateral authority. The drafting history of Article 18 of the Vienna Convention suggests that this obligation is narrower than some commentators assume.⁹¹ Instead of imposing an obligation to comply with either the treaty as a whole or its "core" or "important" terms, the drafters of Article 18 appear to have intended to preclude only actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification. For

Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

91. Because the meaning of Article 18 is ambiguous, it is appropriate, even under the terms of the Vienna Convention itself, to look to supplementary evidence of its meaning, including drafting history. See Vienna Convention, *supra* note 22, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion . . . to determine the meaning when the interpretation according to [textual and related sources] leaves the meaning ambiguous or obscure . . ."); see also AUST, *supra* note 22, at 197 ("The preparatory work . . . of a treaty is not a primary means of interpretation, but it is an important supplementary means."). Courts in the United States regularly look to drafting history when interpreting treaties. See, e.g., *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 225–28 (1996).

many treaties, it is difficult to conceive of actions that would have this effect.

A 1935 Harvard research project that attempted to codify international law, the treaty portions of which were an early precursor to the Vienna Convention, stated that a signatory nation was “under no duty to perform the obligations stipulated” in the treaty until the nation ratified the treaty, but that “under some circumstances” the nation would be obligated as a matter of “good faith” to “refrain from taking action which *would render performance by any party of the obligations stipulated impossible or more difficult.*”⁹² Subsequently, the International Law Commission of the United Nations, led by a series of four prominent Rapporteurs, spent two decades drafting the Vienna Convention building on the work of the Harvard research project.⁹³

The first Rapporteur, J.L. Brierly, concluded that even the modest obligation referred to in the Harvard research project was moral rather than legal in nature.⁹⁴ He subsequently explained that, while “[a] certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between the signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless,” the material supporting even this narrow obligation was “of too fragmentary and inconclusive a nature to form the basis of codification.”⁹⁵ Perhaps not surprisingly, in light of the position of the Rapporteur, the possibility of including such an obligation in the proposed treaty was initially rejected.⁹⁶ Even the leading supporter during the discussion of including such an obligation emphasized that it would simply prohibit nations from taking actions “calculated to make the ratification of the treaty *impossible.*”⁹⁷

A subsequent Rapporteur, Hersch Lauterpacht, believed that the obligation did have legal status, but described the obligation narrowly as “prohibit[ing] action in bad faith deliberately aimed at *depriving the other party of*

92. *Codification of International Law: Part III – Law of Treaties*, 29 AM. J. INT’L L. 653, 778 (Supp. 1935) (emphasis added); see also SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 344 (2d ed. 1916) (stating that a treaty “is in good faith provisionally binding from the date of signing in the sense that neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it *cannot comply* with the conditions as they existed at the time the treaty was signed.”) (emphasis added); JONES, *supra* note 25, at 81 (“It has also been suggested that a State must not do anything between signature and ratification that would render ratification superfluous or useless. . . . There is no evidence in the practice of States to prove the existence of any such rule.”).

93. See Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 289–91 (1988).

94. See *Summary Records of the 3rd Session*, [1951] 1 Y.B. INT’L L. COMM’n 34, U.N. Doc. A/CN.4/SER.A/1951; *Documents of the 3rd Session Including the Report of the Commission to the General Assembly*, [1951] 2 Y.B. INT’L L. COMM’n 73, U.N. Doc. A/CN.4/SER.A/1951/Add. 1; see also CAMARA, *supra* note 27, at 63 (“[T]he rule laid down by the Harvard Research Group embodies no principle of International Law. It belongs to the vague and dubious field of international morals.”).

95. *Documents of the 4th Session Including the Report of the Commission to the General Assembly*, [1952] 2 Y.B. INT’L L. COMM’n 54, U.N. Doc. A/CN.4/SER.A/1952/Add. 1.

96. See *Summary Records of the 3rd Session*, [1951] 1 Y.B. INT’L L. COMM’n 39-42, U.N. Doc. A/CN.4/SER.A/1951.

97. *Id.* at 42 (comments of Jesús M. Yepes from Columbia) (emphasis added).

the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration.”⁹⁸ The subsequent Rapporteurs, Gerald Fitzmaurice and Humphrey Waldock, continued to focus on actions that would impair the ability of the parties to comply with or obtain the benefits of the treaty.⁹⁹ Waldock, for example, referred to an obligation to “refrain during at least some period from acts *calculated to frustrate the objects* of the treaty.”¹⁰⁰

This drafting history suggests that the object and purpose obligation is designed to ensure that one of the signatory parties, typically in a bilateral arrangement, does not change the status quo in a way that eliminates or substantially undermines the reasons for entering into the treaty.¹⁰¹ A paradigmatic example would be a situation in which a treaty called for the return of certain objects, and a signatory destroyed the objects before ratification.¹⁰² A similar example would be a situation in which a treaty called for ceding certain territory to another state, but a signatory nation ceded the territory to some other state in the meantime.¹⁰³ A less certain example, but one potentially encompassed by this view of the object and purpose obligation, would be a situation in which a treaty called for the parties to reduce their armaments (such as nuclear weapons) by a certain percentage, and one of the signatories secretly and substantially increased its overall armaments prior to ratification. Whatever its precise implications, the object and purpose obligation under this view does not suggest either a general obligation to comply with a signed treaty, or an obligation to comply with its “important” or “core” provisions.¹⁰⁴

98. *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 (emphasis added). As this statement suggests, the drafters of the object and purpose obligation may have had in mind primarily bilateral rather than multilateral treaties. See also, e.g., *Summary Records of the 1st Part of the 17th Session*, [1965] 1 Y.B. Int'l L. Comm'n 92, U.N. Doc. A/CN.4/SER.A/1965 (comments of Roberto Ago, delegate from Italy) (“When drafting [what became Article 18] the Commission had been thinking mainly of bilateral treaties.”).

99. See Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 308–13 (2001).

100. *Documents of the 14th Session Including the Report of the Commission to the General Assembly*, [1962] 2 Y.B. Int'l L. Comm'n 110, U.N. Doc. A/CN.4/SER.A/1962/Add.1 (emphasis added).

101. See also, e.g., AUST, *supra* note 22, at 94 (“The signatory state must therefore not do anything which would affect its *ability* fully to comply with the treaty once it has entered into force.”); Written Reply of Mark B. Feldman, *supra* note 87, at 733 (“In the majority of cases the obligation not to defeat the object and purposes of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified.”).

102. See AUST, *supra* note 22, at 94.

103. See *id.* at 94–95.

104. There is no analogue to even the narrow version of the Article 18 obligation under domestic principles of agency law. Under that law, when an agent signs a contract but lacks the authority to bind the principal, the principal has no interim legal obligation as a result of the signature. See generally RESTATEMENT (THIRD) OF AGENCY § 4 (2006). Although there are circumstances under which “precontractual liability” will be imposed under contract law, “[i]n the absence of sufficient evidence that the parties intended to be legally bound in some way, courts generally conclude that the parties have engaged merely in preliminary negotiations and do not impose liability for inducing reliance absent mis-

The narrow construction of the signing obligation suggested by the drafting history is consistent with the text of Article 18. The text does not provide that nations must comply with a treaty they have signed, or even that they must comply with some of its terms. Instead, it simply provides that signing nations must not take actions that would “defeat” the “object and purpose” of the treaty. Furthermore, the Vienna Convention provides separately for provisional application of treaties that are not yet in force, suggesting that Article 18 was not intended to mandate such application.¹⁰⁵

A broader construction of Article 18 would undermine the significance of ratification, which today represents the usual manifestation of consent to be bound. As one commentator explains:

It is sometimes argued that a state which has not yet ratified a treaty must, in accordance with Article 18, nevertheless comply with it, or, at least, do nothing inconsistent with its provisions. The argument is clearly wrong, since the act of ratification would then have no purpose because the obligations to perform the treaty would not then be dependent on ratification.¹⁰⁶

The tension between a broad Article 18 obligation and constitutional systems like the United States that divide the treaty power is another reason for construing it narrowly.¹⁰⁷

Furthermore, it is far from clear that, even from the perspective of the international system, a broad signing obligation would be desirable. Among other things, a broad obligation might cause states to be less willing to sign treaties in the first instance or to more readily disavow signatures. Indeed, broad claims about the signing obligation might have contributed to the Bush Administration’s controversial decision to “unsign” the International Criminal Court treaty.¹⁰⁸ The usefulness of a broad signing obligation in addressing strategic bargaining problems is also unclear, given the vague nature of the “object and purpose” test, the difficulty of enforcing the obligation, the ability of states to terminate the effect of a signature, and the lack of a duty to ratify.¹⁰⁹ Moreover, the purported bargaining problems concern reliance by other states on the act of signing, but the extent of such

representation, express promise, or similar inducement.” Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 664 n.4 (2007).

105. See Vienna Convention, *supra* note 22, art. 25.

106. AUST, *supra* note 22, at 94; see also Klabbbers, *supra* note 99, at 293–94 (“[T]o hold that a violation of a provision of a treaty prior to its entry into force would defeat the treaty’s object and purpose is tantamount to saying that the treaty actually assumes legal force upon signature rather than upon ratification.”).

107. Cf. W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNAT’L L. 729, 743 (2002) (“Ratification of treaties in republican systems such as that found in the United States is a critical bulwark of separation of powers and checks and balances. If the international system henceforth assigns legal validity to unratified treaties, that bulwark will be breached.”).

108. See *supra* text accompanying notes 43–50.

109. See Swaine, *supra* note 32, at 2078–83.

reliance would be affected by the background legal rule; if signing does not carry significant obligations, there would be less reliance on signature. While it is conceivable that states could obtain concessions in multilateral treaty negotiations even though they had no good faith expectation of ratifying the treaty, states are repeat players in treaty negotiations and would presumably face reputational costs (and less ability to obtain concessions in the future) if they were perceived as acting in bad faith.¹¹⁰ Furthermore, a broad signing obligation would not prevent this sort of strategic behavior, since a state could wait until negotiations were concluded and then decide not to sign, or sign and then disavow the signature.¹¹¹

There may not be many object and purpose obligations, viewed in the narrow terms discussed above, that fall outside of the president's independent powers to act. For example, if the United States were acting contrary to a provision in a human rights treaty by continuing to employ the death penalty, its actions would not undermine either its own or other nations' future compliance with the treaty, since the United States could always stop the death penalty after ratifying the treaty.¹¹² To return again to the International Criminal Court treaty, the United States may not have had *any* significant obligations to the Court by virtue of its mere signature of the treaty.¹¹³ If so, there may be an irony here whereby exaggerated claims about the object and purpose obligation helped push the United States to publicly disassociate itself from the treaty (although there were of course other reasons for the U.S. action).¹¹⁴

110. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006) (discussing somewhat analogous reputational issues between the president and Congress associated with presidential signing statements).

111. A better way of addressing strategic concerns like this one would be to include a clause in the treaty stating that it will not take effect unless and until certain states ratify it. There is a provision like this, for example, in the Nuclear Non-Proliferation Treaty. See Treaty on the Non-Proliferation of Nuclear Weapons art. IX, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (requiring ratification by Great Britain, the Soviet Union, and the United States, along with forty other nations, before the treaty would take effect).

112. It could be argued that a continued use of the death penalty by the United States after its signature of a treaty banning the death penalty would involve a form of irreversibility, since the punishment is obviously irreversible for the individuals executed. The executed individuals, however, would not be covered by the treaty (since the United States would not be a party to the treaty until ratification), and the United States' ability to comply with the treaty *after* ratification would not have been impaired by the pre-ratification executions, just as its ability to comply with the treaty would not have been impaired by executions carried out prior to its signature of the treaty. This argument assumes, as would normally be the case, that the treaty addresses itself only to a class of individuals and not to particular individuals.

113. For the ICC treaty, however, it is arguable that the U.S. practice of concluding non-surrender agreements would impair the ability of the parties to obtain the benefits of the treaty, if those benefits include equal exposure to possible prosecution. See *supra* text accompanying notes 48–50.

114. The effort to increase the obligations on signatory nations can be seen as part of a more general effort by advocacy groups, international institutions, and some scholars to relax formal and consent-based requirements for the imposition of international obligations. Other examples might include a less practice-based conception of customary international law, restrictions on the ability of nations to opt out of customary international law, concepts of *jus cogens* norms that are binding without regard to state consent, and severability of purportedly invalid treaty reservations. See Bradley, *supra* note 38, at 540–41.

More generally, the object and purpose obligation appears to have little relevance to certain types of treaties, such as human rights treaties. Human rights treaties are not reciprocal in the traditional sense, since nations do not receive direct benefits from other nations' compliance, and noncompliance by other nations has little effect on a nation's ability to comply. As a result, for these treaties, it is difficult to envision pre-ratification conduct that would substantially undermine the ability of the treaty parties to comply with, or benefit from, the treaty. Even if a nation enacted new human rights restrictions after signature, this would not prevent it from repealing those restrictions once it ratifies the treaty.

Nevertheless, there is probably still some potential for conflict between the Constitution and the object and purpose obligation, since the drafters of Article 18 were not specifically focused on U.S. constitutional requirements. As a result, if the United States does eventually ratify the Vienna Convention, the Senate may wish to include an understanding with its advice and consent that clarifies the obligation imposed by Article 18.¹¹⁵ Although Article 18 was not historically the focus of the Senate Foreign Relations Committee's concerns about the Vienna Convention, the concerns that the Committee did have are relevant to this issue. Article 46 of the Convention precludes a nation from invoking a violation of its internal law as a basis for invalidating a treaty unless the violation was "manifest and concerned a rule of its internal law of fundamental importance." 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 (because that requirement might not be considered "manifest" given the extensive U.S. practice of concluding agreements outside of this process).¹¹⁶ The Committee proposed that the Senate give its advice and consent to the Convention subject to an understanding and interpretation providing that the two-thirds Senate consent requirement is an internal law of the United States of fundamental importance and that no treaty as defined by the Vienna Convention would be valid in the absence of either such Senate consent or approval by Congress.¹¹⁷ The State Department found the understanding and interpretation to be unacceptable, presumably because it wanted to preserve the executive branch's historic ability to enter into executive agreements, and efforts to work out a compromise were not successful.¹¹⁸ The Article 18 object and purpose obli-

115. For a discussion of the validity of reservations, understandings, and declarations, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

116. See CRS Study, *supra* note 24, at 46–47; Frankowska, *supra* note 93, at 295–98.

117. See CRS Study, *supra* note 24, at 46.

118. See *id.* at 43–49; see also CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, at 1236-37; *The Law of Treaties and Other International Agreements*, 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 1, at 195–98.

gation, as we have seen, implicates a related concern, by legitimizing international obligations created through executive action.

Of course, if Article 18 reflects customary international law, then it may not matter for this purpose whether the United States ratifies the Vienna Convention.¹¹⁹ There is substantial debate and uncertainty, however, about whether and to what extent Article 18 does reflect customary international law.¹²⁰ Here there may be a further irony. The Bush Administration's statements regarding the International Criminal Court treaty, which have been heavily criticized as antithetical to international law, could be read as an acceptance of a potentially broad object and purpose obligation. In these statements, the Administration explained that it was acting consistently with the Vienna Convention and suggested that, by declaring its intent not to ratify, it was *ending* its object and purpose obligations.¹²¹ As discussed above, however, it is not clear what obligations there would be under the narrow conception of Article 18 suggested by the drafting history. Moreover, the Bush Administration did not deny the binding effect of Article 18, and, as noted above, statements by State Department officials in both the Bush Administration and earlier administrations have suggested that Article 18 is binding as a matter of customary international law.¹²²

The Bush Administration's failure to oppose object and purpose obligations in this context might have been inadvertent, but it also might reflect the different institutional perspectives of the executive branch and the Sen-

119. The relationship between signed but unratified treaties and the creation of customary international law — an issue relevant, for example, to Alien Tort Statute litigation — is beyond the scope of this Article. See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 162 (2d Cir. 2003) (stating, in Alien Tort Statute case, that “only States that have ratified a treaty are legally obligated to uphold the principles embodied in that treaty, and the treaty only evidences the customs and practices of those States”). Also beyond the scope of this Article is the relevance of unratified treaties to the interpretation of provisions of the Constitution. See *supra* note 37 (discussing Supreme Court's reference to an unratified treaty in *Roper v. Simmons*).

120. See, e.g., AUST, *supra* note 22, at 94 (“There is not only uncertainty as to whether [Article 18] reflects customary law, but also the extent of the obligation.”); LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 476 (4th ed. 2001) (“Whether Article 18 as it now stands is declaratory of prior customary law is uncertain.”); PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 135 (7th ed. 1997) (“There is some authority for this rule in customary law, but the matter is controversial.”); SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES, 1945-1986*, at 149 (1989) (noting that “article 18 . . . is in many circles regarded as highly controversial, at least with regard to the question of whether it is declaratory of customary international law or is innovative”); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 43 (2d ed. 1984) (noting that Article 18 “in all probability constitutes at least a measure of progressive development”); Konstantinos Magliveras & Dimitris Bourantonis, *Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court*, *DIPL. & STATECRAFT*, Dec. 2003, at 21, 27 (“[T]here is no uniform approach as to whether [Article 18] has the force of customary international law or not.”).

121. See *supra* text accompanying notes 43–45.

122. Furthermore, the Bush Administration's action of sending a formal letter to the United Nations terminating the effect of its signature of the International Criminal Court treaty may make it difficult for the Administration to argue that it has no object and purpose obligation with respect to other treaties — such as the Kyoto Protocol and the Comprehensive Nuclear Test Ban Treaty — that it has denounced through less formal means.

ate. The Bush Administration, although usually worried about similar efforts by international lawyers to expand the binding effect of international law, may not be overly troubled by the object and purpose obligation because that obligation tends to enhance the executive branch's powers. After all, it allows the executive branch the authority, under international law at least, to create — and, by a subsequent declaration of intent not to ratify, repeal — binding obligations purely by unilateral action. Simply because this sort of flexibility may serve the executive's interests, however, does not mean that it is not of constitutional concern, especially with respect to its effect on the Senate's already diminished authority over treaties.¹²³

CONCLUSION

It is widely believed that modern international law imposes object and purpose obligations on nations by virtue of their signing of a treaty, and some commentators have construed these obligations broadly. These purported signing obligations raise constitutional concerns for the United States because the obligations are in tension with the division of the treaty power between the president and Senate. These concerns are not eliminated by the phenomenon of sole executive agreements. They are reduced, however, if one adopts a narrow construction of Article 18 of the Vienna Convention, something that is supported by the drafting history of that Article.

Even under the narrow construction of Article 18, there is likely to be some gap between the president's independent constitutional authority and the international law of signing obligations, since Article 18 was not drafted with U.S. constitutional concerns specifically in mind. As a result, it may be desirable for the United States, when signing some treaties, to make clear that it will not consider itself bound by the obligations in the treaty unless and until it completes the ratification process, or for the president to seek the Senate's advice and consent prior to signing some treaties. In addition, if the United States eventually ratifies the Vienna Convention, the Senate may wish to attach an understanding to its advice and consent clarifying the effect of Article 18.

In this light, the Bush Administration's public act of "unsigned" the International Criminal Court treaty also looks more defensible. As a matter of international law, there seems to be little question that a nation is entitled to declare its intention not to become a party to a treaty after signing it. In fact, Article 18 of the Vienna Convention appears to contemplate exactly this possibility when it states that a nation's object and purpose obligation continues until the nation "shall have made its intention clear not to be-

123. Whether the Senate (or at least the Senate Foreign Relations Committee) will make a serious effort to preserve its institutional interests, as opposed to party or individual reelection interests, is a difficult question, especially when the Senate is controlled by members of the president's party. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

come a party to the treaty.”¹²⁴ Nor could this action have violated the familiar *pacta sunt servanda* rule for treaties — that is, that nations are obligated to comply with their treaty obligations in good faith — because that principle applies only to treaties that a nation has ratified.¹²⁵ In addition, there does not seem to be any question that the executive branch is a proper institution for making this intention clear, since it is the institution exclusively responsible for signing treaties, and no treaty can be ratified without the president’s agreement.¹²⁶

Some commentators have suggested that the Bush Administration, by publicly opposing the treaty instead of simply withholding ratification, displayed a lack of good faith,¹²⁷ but this lack of good faith is far from clear. In a sense, all the Administration did was openly reveal to the other treaty parties the United States’ true intentions so that the other parties could act accordingly.¹²⁸ Viewed this way, the Bush Administration’s actions may actually reflect greater good faith than the Clinton Administration’s decision to sign the treaty knowing that it was not likely to be accepted by either the Senate or the incoming presidential administration.¹²⁹ Moreover, in order for a nation to terminate its obligations under Article 18, it is arguable that a nation must give formal international notice of its intention not to ratify a treaty. If so, the Bush Administration’s decision to send a letter to the U.N. Secretary-General appears to be more faithful to Article 18 than other U.S. efforts to disassociate itself with treaty signatures, such as with the Kyoto Protocol and First Additional Protocol to the Geneva Conventions.

124. Vienna Convention, *supra* note 22, art. 18; see, e.g., Hans Blix, *Developing International Law and Inducing Compliance*, 41 COLUM. J. TRANSNAT’L L. 1, 5 (2002) (“Clearly, in the cases where signature does not signal the state’s consent to be bound, a simple but formal announcement by a government clarifying that it will not proceed with ratification or any other form of confirmation will be enough to terminate the limited legal effects that flowed from the signature.”).

125. See Vienna Convention, *supra* note 22, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed in good faith.”) (emphasis added).

126. In this sense, “unsigned” is a more straightforward issue of executive power than termination of treaties that have already been ratified, since, unlike the signing power, the president shares the ratification power with the Senate. Nevertheless, presidents have unilaterally terminated ratified treaties. For example, President Bush announced the U.S. termination of the Anti-Ballistic Missile Treaty with Russia in 2002, and President Carter announced the termination of a defense treaty with Taiwan in 1979. In 2005, Secretary of State Condoleezza Rice sent a letter to the Secretary-General of the United Nations announcing that the United States was withdrawing from the Optional Protocol to the Vienna Convention on Consular Relations, which the United States had ratified in 1969, and which gave the International Court of Justice jurisdiction to decide certain disputes. For discussion of whether and to what extent the president has authority to terminate treaties, see DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* (1986); Raoul Berger, *The President’s Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980); Louis Henkin, Editorial Comment, *Litigating the President’s Power to Terminate Treaties*, 73 AM. J. INT’L L. 647 (1979).

127. See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1508 (2003).

128. See Swaine, *supra* note 32, at 2062 (“Unsigned, on this view, was simply being forthright, and by providing more accurate information about the U.S. position, better enabled other signatories and non-parties to promote their own interests.”).

129. The Supreme Court had decided *Bush v. Gore* prior to President Clinton’s signing of the treaty. 531 U.S. 98 (2000).

Although beyond the scope of this Article, there may be additional policy prescriptions worth considering, both at the domestic and the international level. The United States is not obligated to sign treaties prior to ratification, and it may be that it should withhold its ratification more often, particularly where quick ratification does not seem likely. The Senate may also consider ways that it might reduce the number of signed but unratified treaties.¹³⁰ At the international level, it may make sense for nations to adopt a statute of limitations for signing — such as three years — after which time a state would no longer be regarded as a signatory. Such a limitations period would not prevent states from joining later through accession, but it would eliminate the uncertain limbo status that currently exists with respect to signing, and it might even encourage more timely ratifications.

130. For suggestions of how the Senate might accomplish this, see Baker Spring & Brett D. Schaefer, *Clearing Out the Bulging Treaty In-Box*, THE HERITAGE FOUNDATION, Jan. 8, 1999, <http://www.heritage.org/Research/GovernmentReform/bg1241.cfm>.