

## Notes

### International Dealmaking at the White House: Toward a Viable Test of Allowable Sole Executive Agreements

*The Constitution's Treaty Clause states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." This clause represents the only instance in which the Constitution describes a process by which the United States can conclude agreements with foreign governments. However, the President regularly enters international agreements on his own authority and without the assent of a supermajority of the Senate. This Note explores when the President may lawfully enter such agreements, known as "sole executive agreements."*

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*[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .*<sup>1</sup>

## INTRODUCTION

On November 17, 2008, Ryan Crocker, the U.S. Ambassador to Iraq, signed the “Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq,”<sup>2</sup> which allowed U.S. military forces to remain in Iraq for three years and authorized them to conduct military operations within Iraq with the Iraqi government’s approval.<sup>3</sup> Although any agreement that contemplated a multi-year presence of U.S. troops in hostile territory would be noteworthy in itself, this agreement was most remarkable because Executive Branch officials negotiated and concluded it without any meaningful congressional input,<sup>4</sup> and neither house of Congress ever voted on the agreement.<sup>5</sup> This may seem incongruous with the Constitution’s Treaty Clause, which states that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>6</sup> Nonetheless, the United States regularly enters international agreements without fulfilling the strictures of Article II, Section 2.<sup>7</sup>

Scholars have recognized that the U.S. government utilizes at least two other categories of international agreements besides Article II “treaties.” In colloquial terms, the word “treaty” is often used to

1. U.S. CONST. art. II, § 2, cl. 2.

2. MATTHEW C. WEED, CONG. RESEARCH SERV. RL34568, U.S.-IRAQ AGREEMENTS: CONGRESSIONAL OVERSIGHT ACTIVITIES AND LEGISLATIVE RESPONSE 1 (2009).

3. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq arts. 4, 24, 30, Nov. 17, 2008, 2008 U.S.T. LEXIS 115 [hereinafter Iraq Security Agreement].

4. See, e.g., WEED, *supra* note 2 (noting that a military officer told Congress “that the Bush Administration . . . did not foresee the need for ‘formal inputs’ from Congress”).

5. *Id.* at 4 (“[T]he Obama Administration has indicated its intention to abide by the terms of both the Security Agreement and the Strategic Framework.”).

6. U.S. CONST. art. II, § 2, cl. 2.

7. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 219 (2d ed. 1996) (“Without the consent of the Senate . . . Presidents from Washington to Clinton have made many thousands of agreements . . .”).

refer to any international agreement. But under U.S. law, a treaty technically only refers to an accord passed pursuant to the Treaty Clause.<sup>8</sup> In contrast to treaties, a “congressional-executive agreement” is an international agreement passed by majorities of both the House and Senate.<sup>9</sup> Another type of international agreement is the “sole executive agreement”—an agreement negotiated and concluded by the Executive Branch alone.<sup>10</sup> The Iraq Security Agreement is an example of a sole executive agreement.<sup>11</sup>

Given their lack of congressional approval, sole executive agreements are the types of agreements furthest removed from the Treaty Clause,<sup>12</sup> which provides the only international agreement-making procedure enshrined in the Constitution.<sup>13</sup> Nonetheless, the Executive Branch regularly concludes sole executive agreements on a wide range of subject matters, including topics of great importance to the nation.<sup>14</sup> Although sole executive agreements are common, there is no commonly accepted rule that determines when a particular international agreement can be made by the President alone, or when it

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8. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. a (AM. LAW INST. 1987) [hereinafter RESTATEMENT] (stating that the use of the term “treaty” in the Treaty Clause requires the “use [of] a term other than ‘treaty’ to refer to agreements made by other processes”). Note that the Restatement identifies a category—“executive agreements pursuant to treaty”—that is not used as one of the main sets of international treaties in this Note. These are agreements that are authorized by a prior treaty. *Id.*

9. See, e.g., Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 143 n.5 (2009) (differentiating between ex ante congressional-executive agreements, which are “made by the President using authority granted to him in advance by Congress, usually by statute,” and ex post congressional-executive agreements, which are “agreements made by the President and then approved by both houses of Congress through the normal legislative process”).

10. *Id.*

11. WEED, *supra* note 2, at 2 (“[T]he Bush Administration executed the Agreements as sole executive agreements.”).

12. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 980–81 (2001) (“[Sole executive agreements] would appear in an important respect more offensive to a core protection of the Treaty Clause and indeed of foreign relations law in general; the congressional-executive agreement precludes unchecked presidential unilateralism where the sole executive agreement does not.”).

13. John Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 759 (2001) (“[T]he constitutional text includes a specific Treaty Clause but no other means to enter into international agreements . . .”).

14. See, e.g., HENKIN, *supra* note 7, at 219 (“Presidents from Washington to Clinton have made many thousands of [sole executive] agreements, differing in formality and importance, on matters running the gamut of U.S. foreign relations.”).

must be approved by Congress.<sup>15</sup>

This Note seeks to advance the debate on finding a proper boundary for the President’s allowable use of sole executive agreements. To maintain a reasonable scope, this Note only considers the appropriate legal limit of sole executive agreements that deal with national security matters. The Note proceeds in three Parts. Part I discusses the background law relevant to sole executive agreements. Part II introduces a wide range of possible frameworks that could supply different legal boundaries between sole executive agreements and other types of international agreements, and then applies two of these tests to various international agreements implicating national security. Finally, Part III argues that one of those tests—a “significance” framework—provides the best approach because it affords flexibility in meeting new national security challenges.

## I. THE LACK OF CLEAR LEGAL STANDARDS REGARDING THE SCOPE OF SOLE EXECUTIVE AGREEMENTS

This Part will discuss the various legal sources that affect the types of agreements that the President can lawfully conclude as sole executive agreements. Because this question implicates issues of constitutional authorization and allocation of powers, Part I.A begins with a discussion of the relevant constitutional provisions. Part I.B considers the limited number of cases that address the scope of sole executive agreements. Part I.C examines the State Department’s seemingly ineffectual effort to provide legal guidance for the Executive Branch when choosing the particular form in which to conclude an international agreement. Part I.D briefly discusses how the historical practice of the political branches can illuminate otherwise opaque constitutional rules.

### A. *Sole Executive Agreements and Constitutional Text*

Because sole executive agreements lack statutory authorization by definition, the President’s authority to conclude a sole executive agreement must come from the Constitution itself.<sup>16</sup> Therefore,

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15. *Id.* at 222 (“One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland nor any one else has told us which are which.”).

16. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952) (“The President’s power, if any, to issue the order must stem either from an act of

this Part will begin by looking at potential grants of authority for sole executive agreements within the Constitution. In short, although the Constitution provides some textual support for the proposition that sole executive agreements are valid in certain circumstances, it is largely silent on how to determine those circumstances.

Before continuing, it is important to recognize different uses of the word “treaty.” In colloquial language, “treaty” is often used to describe any binding agreement between governments. However, the term “treaty” denotes different sets of agreements under international law and U.S. domestic law.<sup>17</sup> In international law, “the term ‘treaty’ is . . . used generally to cover the binding agreements between subjects of international law that are governed by international law.”<sup>18</sup> A sole executive agreement is one such binding international agreement.<sup>19</sup> In U.S. domestic law, the term “treaty” has the narrower meaning of an international agreement passed pursuant to the Treaty Clause in Article II of the Constitution.<sup>20</sup> Therefore, a sole executive agreement is considered a binding agreement in international law but is not an Article II treaty under U.S. domestic law.

Turning to the constitutional text, the Treaty Clause is the *only* constitutional provision that specifically describes a method by which the federal government can create an international agreement,<sup>21</sup> and the procedure it describes does not allow the President to make agreements without congressional acquiescence.<sup>22</sup> Nor does any other clause specifically mention sole executive agreements;<sup>23</sup>

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Congress or from the Constitution itself.”).

17. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982) (“‘[T]reaty’ has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word ‘treaty’ has a far more restrictive meaning.”) (internal citations omitted).

18. LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 117 (6th ed. 2014).

19. See, e.g., *Weinberger*, 456 U.S. at 30 n.6 (citing cases involving sole executive agreements and then stating “[w]e have recognized, however, that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution”).

20. *Id.* at 29 (quoting the Treaty Clause after noting that “[u]nder the United States Constitution, of course, the word ‘treaty’ has a far more restrictive meaning”).

21. Yoo, *supra* note 13, at 759 (“[T]he constitutional text includes a specific Treaty Clause but no other means to enter into international agreements.”).

22. U.S. CONST. art. II, § 2, cl. 2.

23. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1268 (1995) (“[T]he Constitution nowhere specifies a procedure by which the United States may enter

hence, at a minimum, the Constitution does not *explicitly* endorse sole executive agreements. It is worth asking then whether a sole executive agreement can *ever* be authorized.<sup>24</sup> This question will be considered before turning to the main substance of this Note—determining the situations in which a sole executive agreement can be lawfully created.

Because the power to create a sole executive agreement must come from the Constitution, but the Treaty Clause does not mention sole executive agreements,<sup>25</sup> their authorization must come from another clause. One potential source is Article I, Section 10, which many authors point out contemplates non-treaty forms of international agreement.<sup>26</sup> In that section, Clause 1 proclaims that “[n]o State shall enter into any Treaty, Alliance, or Confederation”<sup>27</sup> and Clause 3 (the Compact Clause) declares, “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”<sup>28</sup> Though this clause recognizes non-treaty agreements, it does not identify what counts as an “Agreement or Compact” as opposed to a treaty. Nor does it state whether a procedure separate from that laid out in the Treaty Clause can be used to conclude international agreements such as the “Agreement[s] or Compact[s]” described in the Compact Clause.<sup>29</sup> This lack of textual clarity has led to ongoing academic debate: “exclusivity” scholars argue that the Article II treaty process represents the only means by which the government can execute an agreement with another country, while commentators that favor “interchangea-

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non-treaty international agreements.”).

24. See generally HENKIN, *supra* note 7, at 222 (discussing and belittling a Senate resolution that suggested the Senate believed sole executive agreements were never appropriate vehicles to make international agreements).

25. U.S. CONST. art. II, § 2, cl. 2.

26. See, e.g., John R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 735 (1998) (“Although the Constitution prohibits States from entering into ‘any Treaty,’ it allows States to enter into an ‘Agreement or Compact with another State, or with a foreign Power . . . .’”); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 162 (1998) (citing the Compact Clause and stating “[a]s several commentators have noted, this language suggests an understanding of ‘treaty’ as a subclass of all possible international agreements”).

27. U.S. CONST. art. I, § 10, cl. 1.

28. U.S. CONST. art. I, § 10, cl. 3.

29. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 227 (1945) (“[T]he language of the Constitution itself . . . makes no clear distinction between treaties and other agreements. The only distinction it expressly makes is that the states cannot make the one but can, with the consent of the Congress, make the other.”).

bility” argue that the government has broad latitude in choosing the procedure by which it concludes an international agreement.<sup>30</sup>

In debating this question, scholars have primarily focused on when it is appropriate for the President to rely on a *congressional-executive* agreement, rather than an Article II treaty, to conclude an international agreement.<sup>31</sup> That question is not identical to the issue of the scope of the authorization of *sole executive* agreements,<sup>32</sup> but some of the arguments raised against the propriety of congressional-executive agreements also apply to sole executive agreements. For example, neither congressional-executive agreements nor sole executive agreements are explicitly mentioned in the Constitution.<sup>33</sup> If a court were to hold that the Treaty Clause provides the exclusive means by which the federal government can create international agreements, then both sole executive agreements and congressional-executive agreements would presumably be invalid. Thus, a brief overview of this debate between interchangeability and exclusivity is useful to understanding key questions regarding the use of sole executive agreements.

Although the debate between treaty exclusivity and interchangeability dates back to at least the 1940s,<sup>34</sup> Professor Tribe’s defense of treaty exclusivity and the resulting antitheses represent its most recent incarnation. Tribe’s argument begins with a comparison of the Treaty Clause and the Appointments Clause, which immediate-

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30. Compare Tribe, *supra* note 23 (reflecting the “treaty exclusivity” camp), with Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008) (reflecting the “interchangeability” camp).

31. See generally Tribe, *supra* note 23; Hathaway, *supra* note 30.

32. See, e.g., Ramsey, *supra* note 26, at 143 (“[T]here are considerable differences between the two types of agreements, as defenders of the congressional-executive agreements ultimately acknowledge. Acceptance of one plainly does not compel acceptance of the other.”); Spiro, *supra* note 12, at 981 (“[Sole executive agreements] would appear in an important respect more offensive to a core protection of the Treaty Clause and indeed of foreign relations law in general; the congressional-executive agreement precludes unchecked presidential unilateralism where the sole executive agreement does not.”). But see Paul, *supra* note 26, at 724 (“The problem is that there is no principled distinction between congressional-executive and sole executive agreements. Neither were expressly authorized by the Constitution, but there is a long history of precedents for both. . . . If one is permitted, then so is the other.”).

33. See Yoo, *supra* note 13, at 759.

34. See generally Edwin Borchar, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944) (expressing hostility toward increased use of congressional-executive agreements); McDougal & Lans, *supra* note 29 (arguing for the legality of congressional-executive agreements).

ly follows the Treaty Clause.<sup>35</sup> First, he notes that Article II, Section 2, Clause 2 requires the President to obtain the Senate’s “Advice and Consent” before making either treaties or certain presidential appointments.<sup>36</sup> Next, Tribe points out that the Appointments Clause allows Congress to remove this requirement for appointment of “inferior Officers,” while the Treaty Clause makes no allowance for alternative procedures.<sup>37</sup> Ultimately, Tribe argues that the option for alternative procedures in the Appointments Clause and a lack of such alternative procedures in the Treaty Clause suggests that the Treaty Clause should be read as the *exclusive* mechanism for the federal government to create international agreements.<sup>38</sup>

Although Tribe’s article focuses on congressional-executive agreements rather than sole executive agreements,<sup>39</sup> his basic textual argument could be similarly applied to sole executive agreements. Neither agreement is contemplated by the Treaty Clause;<sup>40</sup> hence, if the Treaty Clause is exclusive, one could argue that sole executive agreements should be similarly barred. Despite that reasoning, even Tribe himself suggests that sole executive agreements are valid when those agreements “do not rise to the level of treaties,”<sup>41</sup> because a contrary rule “would radically limit the power of the federal government over foreign affairs.”<sup>42</sup> However, the question remains how to determine when agreements “rise to the level of treaties.”<sup>43</sup> To summarize, Tribe’s exclusivity thesis poses similar problems for both sole executive agreements and congressional-executive agreements. Nonetheless, scholars concur that—despite their lack of explicit constitutional authorization—sole executive agreements are valid in at

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35. Both the Treaty and Appointments Clauses fall within the same sentence in U.S. CONST. art. II, § 2, cl. 2.

36. U.S. CONST. art. II, § 2, cl. 2.

37. U.S. CONST. art. II, § 2, cl. 2.

38. See Tribe, *supra* note 23, at 1272–74; see also Yoo, *supra* note 13, at 789 (discussing Tribe’s *expressio unius est exclusio alterius* argument).

39. See Tribe, *supra* note 23, at 1225–26 (discussing an article that supports congressional-executive agreements that Tribe subsequently critiques).

40. U.S. CONST. art. II, § 2, cl. 2.

41. See Tribe, *supra* note 23, at 1268–69 (“If this unenumerated power to enter non-treaty agreements exists within the federal government, it seems clear that it is the President, not Congress, who has the authority to exercise this power on behalf of the nation. . . . The authority to make international agreements that do not rise to the level of treaties has long been correctly recognized as one such inherent executive power.”).

42. *Id.* at 1268.

43. *Id.* at 1269.

least some circumstances.<sup>44</sup> But determining what constitutes such allowable circumstances remains elusive.

Because the Compact Clause at most recognizes the existence of non-treaty international agreements but does not appear to authorize the President to make such agreements,<sup>45</sup> that authorization must be found in other provisions.<sup>46</sup> Tribe and other commentators suggest that authorization for sole executive agreements is implied by some of the specific Article II grants of power to the President.<sup>47</sup> For example, authors have cited the Vesting Clause,<sup>48</sup> the Commander-in-Chief Clause,<sup>49</sup> the Reception Clause,<sup>50</sup> and the Take Care Clause<sup>51</sup> as providing authority for different types of sole executive agreements.<sup>52</sup> Given the implicit nature of such authorization, none of these clauses provide clear guidance on determining the bounda-

44. See, e.g., RESTATEMENT, *supra* note 8, § 303(4) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”); Ramsey, *supra* note 26, at 139 (“Modern consensus lodges with the President the independent power, at least in some circumstances, to enter into international agreements . . .”).

45. See U.S. CONST. art I, § 10, cl. 3.

46. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952) (“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”).

47. See, e.g., Tribe, *supra* note 23, at 1269 (“[T]here is an unmistakable—though not uncontroversial—textual basis for such an allocation of authority. . . . Article II delegates full executive authority to the President—‘[t]he executive Power shall be vested in a President.’”) (second set of brackets in original); Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1097 (1990) (“[T]he executive’s unilateral authority to conclude these agreements must draw upon the President’s enumerated powers found in article II of the Constitution.”); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1575 (2007) (“Our constitutional history suggests that the President has incidental power to make nontreaty agreements as a means of implementing his independent constitutional and statutory authority . . .”); see also RESTATEMENT, *supra* note 8, § 303(4) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”).

48. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

49. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”).

50. U.S. CONST. art. II, § 3 (“[The President] shall receive Ambassadors and other public Ministers . . .”).

51. U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

52. See, e.g., McDougal & Lans, *supra* note 29, at 246–50 (discussing potential sole executive agreements under the Commander-in-Chief, Reception, Take Care, and Vesting Clauses).

ries of lawful sole executive agreements.<sup>53</sup> Although some authors suggest that the President's ability to enter sole executive agreements is coterminous with the grants of authority within Article II,<sup>54</sup> the outer limits of Article II powers are far from clear.<sup>55</sup>

Whether an analysis of the Article II grants of power presents a solution to the question of the scope of the President's authority to create sole executive agreement will be discussed in Part II, but for now the key point is that the Constitution provides no clear rule to determine which categories of sole executive agreements are valid. More specifically, various Article II provisions authorize certain types of sole executive agreements, but none of these provisions provides a clear limiting principle that indicates when Congress must approve an international agreement. Therefore, given the paucity of guidance from constitutional text, the next section will consider whether case law provides more meaningful direction.

### B. *The Case Law Regarding the Scope of Sole Executive Agreements*

Relatively few cases directly discuss sole executive agreements, and the opinions that do provide little guidance regarding how to differentiate agreements that can be concluded as sole executive agreements from those that Congress must approve.<sup>56</sup> Courts reach the merits of so few cases regarding sole executive agreements because they often hold that the government's choice of what form of an international agreement to utilize is a political question.<sup>57</sup> For example, in *Goldwater v. Carter*—a case regarding President Carter's

53. Sharon G. Hyman, Note, *Executive Agreements: Beyond Constitutional Limits?*, 11 HOFSTRA L. REV. 805, 823 (1983) ("Since there is no consensus with regard to the extent of the President's foreign affairs powers under the Constitution, there is necessarily no consensus with regard to the corollary agreement-making power.").

54. See *infra* Part II.

55. See Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 371 (1955) ("Attempt is sometimes made to determine the proper scope of the President's independent power to conclude international agreements by reference to the specific provisions of the Constitution. But the Constitution, as has been seen, is hopelessly vague as to the allocation of the foreign affairs power among the various branches of the Federal Government.").

56. See Ramsey, *supra* note 26, at 140 ("The modern consensus [regarding sole executive agreements] rests largely upon three Supreme Court cases. . . . Other judicial discussion of the subject are limited.").

57. See Clark, *supra* note 47, at 1594 ("[T]raditional limitations on judicial competence . . . may lead courts to conclude that they are simply unable to ascertain precisely where 'Treaties' end and other agreements begin without unduly interfering with the political branches' conduct of foreign relations.").

decision to unilaterally terminate a defense treaty with Taiwan<sup>58</sup>—then-Associate Justice William Rehnquist argued that the Court should decline to adjudicate the relative rights of the President and Congress because, to do so, the Court would have “to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.”<sup>59</sup> Justice Rehnquist approvingly cited a concurring opinion from the court below, which noted that Congress could exercise a variety of Article I powers to influence the executive’s choice of the form used to pursue an international agreement.<sup>60</sup> It would be improper, therefore, for the Court to become involved. Although that case dealt specifically with the President’s ability to nullify an agreement that the Senate had previously approved pursuant to the Article II process,<sup>61</sup> Justice Rehnquist’s political question argument equally applies to a lawsuit challenging the executive’s decision to use a sole executive agreement rather than a different form of agreement. Indeed, the Eleventh Circuit subsequently held that whether international agreements required a senatorial supermajority is a “nonjusticiable political question,” citing *Goldwater*.<sup>62</sup>

Determining the proper form of an international agreement is a very different question than deciding whether non-treaty agreements are per se unconstitutional. On this latter question, the Supreme Court has long held that the federal government can lawfully create binding international covenants in ways other than the Treaty Clause process, including by sole executive agreement.<sup>63</sup> In those

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58. *Goldwater v. Carter*, 617 F.2d 697, 699 (D.C. Cir. 1979) (en banc) (per curiam), *vacated*, 444 U.S. 996 (1979).

59. *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in order vacating judgment).

60. *Id.* at 1004 n.1 (“Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters . . . . [I]t can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulate.”) (quoting *Goldwater v. Carter*, 617 F.2d 697, 716 (D.C. Cir. 1979) (en banc) (per curiam) (Wright, C.J., concurring), *vacated*, 444 U.S. 996 (1979)).

61. *Goldwater*, 617 F.2d at 699.

62. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001) (“We nonetheless decline to reach the merits of this particular case, finding that with respect to international commercial agreements such as NAFTA, the question of just what constitutes a ‘treaty’ requiring Senate ratification presents a nonjusticiable political question.”).

63. *See, e.g., American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003) (“[O]ur cases have recognized that the President has authority to make ‘executive agreements’ with

cases, courts have hinted at different analytic approaches to determine when sole executive agreements are invalid. Although no court has drawn a definitive line,<sup>64</sup> these cases nonetheless suggest potential ways to discover the outer limits of allowable sole executive agreements.

The most important cases dealing with sole executive agreements are *United States v. Belmont*, *United States v. Pink*, and *Dames & Moore v. Regan*.<sup>65</sup> These cases deal primarily with the issue of whether sole executive agreements can preempt state law.<sup>66</sup> However, to reach that question, the Court had to consider the source of the agreements' constitutional authorization and incidentally discussed the problem of determining the permissible scope of sole executive agreements.<sup>67</sup> Each case will be discussed in turn.

The agreement at issue in *Belmont* was part of an overall claims-settlement process between the United States and the Soviet Union, which allowed the United States to seize property previously claimed by the Soviet Union but currently held by U.S. individuals, even though state law would have prevented this seizure.<sup>68</sup> Ultimate-

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other countries, requiring no ratification by the Senate or approval by Congress . . . ."); *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) ("[P]rior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (upholding a sole executive agreement); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460–63 (1978) (holding that the Compact Clause suggests the Constitution authorizes some non-treaty agreements, even if the Constitution gives no clear guidance on what types of agreements need not be passed pursuant to the Treaty Clause); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (recognizing a congressional-executive agreement as valid); *Holmes v. Jennison*, 39 U.S. 540, 571–72 (1840) (suggesting that a comparison of the Compact Clause and Treaty Clause implies the Framers considered there were valid non-treaty agreements).

64. See HENKIN, *supra* note 7, at 222 ("One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland nor any one else has told us which are which.").

65. *Belmont*, 301 U.S. 324; *United States v. Pink*, 315 U.S. 203 (1937); *Dames & Moore*, 453 U.S. at 654; see Ramsey, *supra* note 26, at 143 ("[T]he modern consensus concerning on executive agreements rests, largely unadorned, upon the triad of *Belmont*, *Pink*, and *Dames & Moore*.").

66. See Ramsey, *supra* note 26, at 140 ("[*Belmont*, *Pink*, and *Dames & Moore*] held that, at least under the particular circumstances presented, an international agreement concluded solely upon the authority of the President was a constitutional exercise of power that altered domestic legal rights.").

67. The remainder of Part I.B discusses this question.

68. See *Belmont*, 301 U.S. at 325–27; see also Ramsey, *supra* note 26, at 145–47 (discussing the facts of *Belmont* in more detail).

ly, the Court held that the sole executive agreement preempted the state law.<sup>69</sup> However, the Court's discussion of the authorization for the sole executive agreement is more germane to this Note. The Court stated:

That the negotiations, acceptance of the assignment and agreements and understandings [concerning the claims-settlement agreement] were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the [Treaty] clause of the Constitution, . . . require the advice and consent of the Senate.<sup>70</sup>

Professor Ramsey states that this “discussion is almost wholly *ipse dixit*.”<sup>71</sup> He points out that Justice Sutherland, the opinion's author, provides no citation to his assertion that the President's power in this area “may not be doubted,” and that he provides essentially no discussion regarding why the President can forego senatorial “advice and consent.”<sup>72</sup>

Moreover, Ramsey notes that later sections of the opinion provide no other useful guidance.<sup>73</sup> The only other authorities that Sutherland provides are citations to *B. Altman & Co. v. United States*, a treatise from 1906, and, by implication, *United States v. Curtiss-Wright Export Corporation*<sup>74</sup>—a case in which the Court espoused an expansive view of presidential power over foreign affairs.<sup>75</sup> The first

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69. *Belmont*, 301 U.S. at 332–33.

70. *Id.* at 330 (citation to the Treaty Clause omitted).

71. Ramsey, *supra* note 26, at 148.

72. *Id.*

73. *Id.* at 147–48 (noting that Sutherland “devoted only three paragraphs to the presidential power to enter into the [sole executive] [a]greement” and “[t]hat discussion is almost wholly *ipse dixit*”).

74. *Id.* at 148–49.

75. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). However, Ramsey states that *Curtiss-Wright* has been “widely criticized.” Ramsey, *supra* note 26, at 150. An in-depth discussion of controversies surrounding *Curtiss-Wright* is beyond the scope of this Note.

case lent support to the proposition that some non-treaty agreements were valid, but it dealt with a congressional-executive agreement rather than a sole executive agreement.<sup>76</sup> Ramsey critiques the treatise's authority because it merely discusses the fact that the President sometimes "enter[ed] into various minor agreements without Senate approval," but does not provide "constitutional commentary."<sup>77</sup> Given these weak authorities, Ramsey suggests that Justice Sutherland based the President's authority to enter into sole executive agreements on *Curtiss-Wright*,<sup>78</sup> in which the Court stated that the President is the "sole organ" of the government with regard to the international agreement at issue.<sup>79</sup> In a later work, Ramsey and Professor Prakash summarize *Belmont* by stating that Justice Sutherland relied on the notion that there was an "inherent presidential power" to make sole executive agreements.<sup>80</sup> If that is the case,<sup>81</sup> given the expansive language regarding presidential power in *Belmont*, it is unclear how one would draw meaningful boundaries around that authority.

Indeed, Professor Henkin confirms that some have argued that *Belmont* supports the view "that the President is constitutionally free to make any agreement on any matter involving our relations with another country."<sup>82</sup> However, he continued, "As a matter of constitutional construction . . . that view is unacceptable, for it would wholly remove the 'check' of Senate consent which the Framers struggled and compromised to write into the Constitution."<sup>83</sup> Nonetheless, Henkin suggests that *Belmont* could be read in more than one way. First, it could be interpreted as providing authorization only for sole executive agreements that fall within "the President's specific and exclusive powers[,] principally his power to recognize govern-

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76. Ramsey, *supra* note 26, at 148.

77. *Id.* at 148–49.

78. *Id.* at 150, 152.

79. *Curtiss-Wright*, 299 U.S. at 319.

80. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 249 (2001) (identifying "an inherent presidential power, derived from *Curtiss-Wright* and explicitly embraced by the Court in the *Pink* and *Belmont* cases shortly afterward").

81. Of course, Ramsey does not suggest this is the only interpretation of the case or that later cases endorsed this view. He mostly discusses the case in order to criticize its lack of consideration "of the text, history, and structure of the Constitution." Ramsey, *supra* note 26, at 145. This discussion highlights this potential "inherent presidential power" because it serves as another possible source of authorization for sole executive agreements that could be difficult to bound.

82. HENKIN, *supra* note 7, at 221.

83. *Id.* at 222.

ments and his authority as Commander in Chief.”<sup>84</sup> Alternatively, *Belmont* could be read much more broadly. Given Justice Sutherland’s suggestion that the President has a near-monopoly of foreign relations power, authorization for sole executive agreements could be read as springing from a general “executive power” in the Vesting Clause rather than from more specific grants of authority such as the Commander-in-Chief Clause.<sup>85</sup> Although the former interpretation would presumably lead to a broader range of authorized sole executive agreements, it would be difficult to circumscribe any clear limits on lawful sole executive agreements under either reading. Such a question would collapse into the extent of the President’s powers under Article II, which has not been resolved.<sup>86</sup> In sum, regardless of the constitutional basis on which *Belmont* relies to justify the sole executive agreement at issue, Justice Sutherland’s opinion provides no useful guiding principle to determine the legal limits of sole executive agreements.

The second major opinion regarding sole executive agreements is *United States v. Pink*,<sup>87</sup> which involved similar facts to *Belmont* and dealt with the same international agreement.<sup>88</sup> This section will not discuss *Pink* in detail because, as Ramsey points out, “Although [Justice] Douglas added a number of citations, his argument is not materially distinct from Justice Sutherland’s, and each time he confronted the critical issue—the President’s power to enter into and implement international agreements—he returned to a direct appeal to *Belmont*.”<sup>89</sup> Hence, “on the issue under consideration, *Pink* reaffirmed *Belmont*, but essentially added nothing to it.”<sup>90</sup>

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84. *Id.* at 220 (internal parentheses omitted).

85. *Id.* at 221 (“The whole conduct of our foreign relations, we have seen, is the President’s, and that authority, too, has been claimed to be expressly ‘enumerated’ in the clause vesting the ‘Executive power.’”).

86. *See, e.g.*, Hyman, *supra* note 53, at 823 (“Since there is no consensus with regard to the extent of the President’s foreign affairs powers under the Constitution, there is necessarily no consensus with regard to the corollary agreement-making power.”); Mathews, *supra* note 55, at 371 (“Attempt is sometimes made to determine the proper scope of the President’s independent power to conclude international agreements by reference to the specific provisions of the Constitution. But the Constitution, as has been seen, is hopelessly vague as to the allocation of the foreign affairs power among the various branches . . .”).

87. *See* *United States v. Pink*, 315 U.S. 203 (1937).

88. *See* Ramsey, *supra* note 26, at 154–55 (“The only substantive differences between *Belmont* on one hand and *Pink* and *Moscow Fire* on the other were that in the latter cases the property in question was tangible rather than money and the claimants were the original owners (or their successors) rather than a custodian.”).

89. *Id.* at 155.

90. *Id.* at 156.

The last “core” case involving sole executive agreements is *Dames & Moore v. Regan*.<sup>91</sup> This case is factually analogous to *Belmont* and *Pink* insofar as a sole executive agreement regarding claims settlement procedures (this time in order to end the Iranian hostage crisis) destroyed the property rights of private parties.<sup>92</sup> Despite this factual overlap, the case notably suggested a different approach to upholding the legality of sole executive agreements.

Notwithstanding the similarities to *Pink* and *Belmont*, the Court in *Dames & Moore* “declined to place much weight upon” these cases.<sup>93</sup> Instead, the Court upheld the preemptive effects of the sole executive agreement by relying in part on “a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.”<sup>94</sup> *Dames & Moore* thus suggests a potentially useful method of determining the proper scope of sole executive agreements: a sole executive agreement is valid if Congress has regularly acquiesced to the President concluding similar agreements on his or her own.<sup>95</sup>

In conclusion, although the three core cases suggest some potential ways to determine the proper scope of sole executive agreements, the suggested methods do not lend themselves to easy application (with the exception of the political practice thesis in *Dames & Moore*, discussed in detail in Part II). Other sources have considered alternative tests. For example, a district court suggested that the “significance” of an agreement could play a role in determining whether the agreement could be passed as a sole executive agreement.<sup>96</sup> Part II also considers this issue. Nonetheless, case law provides no clear and broadly accepted rule regarding how to find a reasonable limit on sole executive agreements. Indeed, courts have approvingly cited Henkin’s assertion that “there are agreements

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91. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

92. See Ramsey, *supra* note 26, at 156–58 (discussing the factual background of *Dames & Moore*).

93. *Id.* at 158.

94. *Id.* (citing *Dames & Moore*, 453 U.S. at 657); see HENKIN, *supra* note 7, at 221 (“The Supreme Court upheld the settlement as within the President’s extensive powers in foreign affairs, noting that Presidents had settled international claims by sole executive agreement throughout our history, and that Congress had acquiesced in that practice and had implemented many such agreements.”).

95. This approach will be discussed in greater detail in Part II.

96. *Dole v. Carter*, 444 F. Supp. 1065, 1070 (D. Kan. 1977) (“[T]reaties have customarily exhibited such fundamental characteristics as substantial ongoing defense or political commitments on the part of the United States and substantial ongoing reciprocal commitments by co-signers.”).

which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland nor any one else has told us which are which.”<sup>97</sup>

C. *The State Department’s Likely Failed Attempt to Delimit the Boundaries of Sole Executive Agreements: The Circular 175 Procedure*

Given that neither the text of the Constitution nor the case law interpreting it provide significant guidance on how to determine the outer limits of sole executive agreement authorization, it is important to consider other sources of legal guidelines. Perhaps the closest attempt to provide useful guidance comes from the State Department’s “Circular 175” procedures, codified in the State Department’s Foreign Affairs Manual.<sup>98</sup> Although Circular 175 purportedly provides various factors that guide the Executive Branch in choosing between treaties, congressional-executive agreements, and sole executive agreements, the procedure rarely provides meaningful guidance in practice.<sup>99</sup> Nonetheless, this sub-Part briefly discusses the guidelines for completeness.

Circular 175 states that:

In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors . . .

- (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- (2) Whether the agreement is intended to affect state laws;
- (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- (4) Past U.S. practice as to similar agreements;

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97. See, e.g., *id.* at 1069–70 (citing Louis Henkin); *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 436 n.3 (2003) (Ginsburg, J., dissenting) (also citing Louis Henkin).

98. See DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL §§ 720–27 (2006), [www.state.gov/documents/organization/88317.pdf](http://www.state.gov/documents/organization/88317.pdf); see also DEP’T OF STATE, OFFICE OF THE LEGAL ADVISER, TREATY AFFAIRS, *Circular 175 Procedure*, <http://www.state.gov/s/l/treaty/c175/> (last visited Mar. 6, 2016).

99. See *infra* notes 103–07 and accompanying text.

- (5) The preference of the Congress as to a particular type of agreement;
- (6) The degree of formality desired for an agreement;
- (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- (8) The general international practice as to similar agreements.<sup>100</sup>

In addition to these eight factors, the executive must give “due consideration” to concerns laid out in Section 723.2.<sup>101</sup> Section 723.2-2(C) is most pertinent to sole executive agreements: it (nearly tautologically) states that “The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by Congress in the exercise of its constitutional authority.”<sup>102</sup>

How useful are these guidelines in determining the proper scope of sole executive agreements? Professor Hathaway states that Circular 175 “at first appears comprehensive, [but] leaves a great deal of room for the exercise of executive discretion.”<sup>103</sup> She also notes that several commentators have questioned the efficacy of the procedures.<sup>104</sup> For example, she cites Trimble and Weiss, who state that “The Circular 175 factors are rather general and may sometimes suggest inconsistent choices, and probably do not have much impact on actual Executive branch decisions. Rather, the choice of constitutional procedure is basically a political choice.”<sup>105</sup> Moreover, despite

100. FOREIGN AFFAIRS MANUAL, *supra* note 98, § 723.3.

101. *Id.*

102. *Id.* § 723.2-2(C).

103. Hathaway, *supra* note 30, at 1250.

104. *Id.* at 1251 n.36 (“Other scholars have noted that the Circular 175 factors are ambiguous and do not actually play a significant role in the President’s decision-making process.”).

105. *Id.* (quoting Phillip R. Trimble & Jack S. Weiss, *The Role of the President, the Senate, and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 CHI.-KENT L. REV. 645, 648 (1991)); see Eric M. Fersht, Note, *Litigating for Nuclear Nonproliferation: Legal Claims in U.S. Federal Courts to Seek Suspension, Modification or Termination of the United States-Japan Nuclear Cooperation Agreement*, 6 GEO. INT’L ENVTL. L. REV. 503, 513 (1994) (“[Circular 175] provide[s] no definitive guidance as to when an international agreement should be concluded as a treaty or as a congressional-executive agreement. The malleability of the guidelines suggest that the choice of agreement form may be a purely political decision by the executive branch.”); Randall, *supra* note 47, at 1115 (“Circular 175 has not resolved the executive-agreement

Circular 175 first being promulgated in 1955,<sup>106</sup> courts and commentators have not adopted its guidelines as the appropriate means to determine whether a particular agreement can be concluded as a sole executive agreement.<sup>107</sup> Hence, Circular 175 does little to answer the question left open by constitutional text and case law regarding the allowable scope of sole executive agreements.

#### *D. Political Practice as a Potential Source to Fill the Legal Gap*

Although constitutional text, case law, and State Department protocols provide little guidance regarding the allowable scope of sole executive agreements, there remains another potential source of a viable legal test: the historical practices of the political branches. The Office of Legal Counsel (OLC) in the Department of Justice provided a useful summary of the use of “political practice” in constitutional analysis: when constitutional text and case law fail to provide useful rules, “a significant guide to the interpretation of the Constitution’s requirements is the practical construction placed on it by the executive and legislative branches acting together.”<sup>108</sup> This principle enjoys considerable judicial support<sup>109</sup> and is especially promising in the area of sole executive agreements, because “the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions that involve foreign relations.”<sup>110</sup> The use of “political practice” as a source

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debate.”).

106. Hathaway, *supra* note 30, at 1249 n.32.

107. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 30 (1982) (“Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements.”); HENKIN, *supra* note 7, at 222 (“One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland nor any one else has told us which are which.”).

108. *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 233 (1994) [hereinafter OLC Opinion].

109. See, e.g., *The Pocket Veto Case*, 279 U.S. 655, 689–90 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature.”). The foregoing authorities were cited, with others, in the OLC Opinion, *supra* note 108, at 233–34.

110. OLC Opinion, *supra* note 108, at 234 (citing, *inter alia*, HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 70–71 (1990) (“[H]istorical precedent serves as ‘quasi-constitutional custom’ in foreign affairs . . .”).

of legal rules is considered in more detail in Part II, which analyzes political practice as one of two potential avenues to define the outer limits of sole executive agreements.

## II. POTENTIAL APPROACHES TO DETERMINE THE LAWFUL BOUNDARIES OF SOLE EXECUTIVE AGREEMENTS

Because the Constitution, statutes, and case law fail to provide a clear mechanism with which to define the legal boundaries of sole executive agreements,<sup>111</sup> commentators have proposed a variety of frameworks to delineate the allowable scope of sole executive agreements.<sup>112</sup> This Part will analyze several of those theories. First, it provides a brief introduction to various approaches that will not be covered in detail in this Note, either because they are not widely accepted among commentators or because analyzing them would go beyond the scope of this Note.<sup>113</sup> Next, this Part considers in greater detail two theories that offer promising approaches to identifying the legal limits of sole executive agreements—a “political practice” approach<sup>114</sup> and a “significance” approach.<sup>115</sup> Finally, this Part considers various security-related international agreements<sup>116</sup> and whether a sole executive agreement would be allowable for each type of agreement under the political practice and significance frameworks.<sup>117</sup>

### *A. Brief Summary of Potential Approaches*

This sub-Part identifies four potential theories that could provide a test for the allowable scope of sole executive agreements. They are included for completeness, but are not analyzed in detail. These theories posit that the allowable scope of sole executive agreements depends on (1) the formality of the agreement, (2)

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111. *See supra* Part I.

112. *See infra* Part II.A–C.

113. *See infra* Part II.A.

114. *See infra* Part II.B.1.

115. *See infra* Part II.B.2.

116. This Note focuses on security-related agreements for two reasons. First, doing so helps avoid comparing “apples and oranges” by considering only relatively similar international agreements. Second, security agreements are a particularly interesting area to study because of the President’s traditionally broader scope of powers in matters relating to national security affairs.

117. *See infra* Part II.C.

whether the agreement would fall within the President's Article II powers, (3) an analysis of "constitutional moments," or (4) originalist understandings of the Constitution.

### 1. The "Formality" of the Agreement

First, some argue that the level of formality used in negotiating and concluding an agreement could determine the procedure required to finalize it, with more formal agreements needing to be executed as treaties, whereas relatively informal accords can be concluded as sole executive agreements.<sup>118</sup> Such an approach would hold that agreements which are "accompanied by elaborate formalities," such as "formal instruments, signing ceremonies, etc.," would need to be passed as Article II treaties, whereas less elaborate agreements could be concluded outside the Article II treaty process.<sup>119</sup>

However, Ramsey easily discredits such an approach. If formality alone determined whether an international agreement needed to be executed as an Article II treaty, then the President could eliminate the need to seek Senate approval merely by ensuring that the conclusion of the agreement was sufficiently informal.<sup>120</sup> This result "would render the treaty clause essentially meaningless"<sup>121</sup> and would probably also lead to interpretive difficulties with other constitutional provisions.<sup>122</sup> Because of these shortcomings, this Note will not pursue the "formality" approach as a viable means to determine the outer limits of the President's ability to conclude sole executive agreements.

### 2. Whether an Agreement Is Within the President's Article II Powers

A more plausible framework holds that the allowable scope of sole executive agreements is co-extensive with the reach of the Presi-

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118. See, e.g., Ramsey, *supra* note 26, at 185; Hyman, *supra* note 53, at 832.

119. Ramsey, *supra* note 26, at 185.

120. *Id.* at 185–86.

121. *Id.* at 185.

122. *Id.* at 186–87 ("If treaties are distinguished only by form, then states may (with congressional approval) enter into any understanding with foreign governments so long as those understandings remain informal . . . . [T]here is no reason to think that the drafters would have employed the elaborate scheme of Article I, Section 10 (no state treaties; state agreements only with congressional approval) merely to force states to adopt informal, rather than formal, diplomacy.") (internal quotation marks omitted).

dent's Article II powers.<sup>123</sup> This approach focuses on the substance of a potential international agreement and asks whether the topic of the agreement falls within an Article II power. For example, the Commander-in-Chief Clause could authorize a sole executive agreement that called for joint military training exercises between the U.S. Navy and a foreign country because that clause gives the President broad power to oversee the training of U.S. military forces. That is, the sole executive agreement is authorized because it is supported by an independent Article II power.

Although many commentators endorse such an approach,<sup>124</sup> this "test" has limited utility. The point of this Note is to find a rule that clarifies the outer limits of sole executive agreements. To be legally valid, a sole executive agreement must be supported by some constitutional provision, probably located within Article II, but a test that asks whether a sole executive agreement is supported by an independent Article II clause is useful only if one can easily determine the extent to which that clause grants power to the President. The scope of the Commander-in-Chief, Vesting, and other Article II clauses are separate, unresolved, and much larger questions than the allowable scope of sole executive agreements.<sup>125</sup> Hence, this Note

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123. See *infra* note 124.

124. See, e.g., RESTATEMENT, *supra* note 8, § 303(4) ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."); HENKIN, *supra* note 7, at 229 ("The President can also make many agreements on his own authority, including, surely, those related to establishing and maintaining diplomatic relations, agreements settling international claims, and military agreements within the Presidential authority as Commander in Chief."); RANDALL, *supra* note 47, at 1091 ("[T]his Author recommends a topical analysis of the treaty power. The key is to determine whether the legislative or executive branch has authority over the specific topic at issue in a particular international agreement."); see also FOREIGN AFFAIRS MANUAL, *supra* note 98 ("The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation.").

125. See, e.g., Mathews, *supra* note 55, at 371 ("Attempt is sometimes made to determine the proper scope of the President's independent power to conclude international agreements by reference to the specific provisions of the Constitution. But the Constitution, as has been seen, is hopelessly vague as to the allocation of the foreign affairs power among the various branches . . ."); Hyman, *supra* note 53, at 822 ("The President's powers are governed by article II of the Constitution, yet the extent of these powers is far from settled."); EDWARD S. CORWIN, THE PRESIDENT: OFFICES AND POWERS 1787-1957, at 171 (4th ed. 1957) ("[T]he Constitution, considered only for its affirmative grants of power capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."). Note that Mathews does suggest that the President's ability to make international agreements has "been regarded as co-extensive with his powers generally in the field of foreign affairs," Mathews, *supra* note 55, at 346, and his quote from page 371 is thus limited to determining the extent of powers given to the President via *individual*

does not endorse a purely Article II-focused test.

### 3. The “Constitutional Moments” or “Constitutional Increments” Approach

Several academics—notably Professors Ackerman, Golove, and Spiro—have suggested that a different approach be used to explore how much discretion the President enjoys in choosing the form of an international agreement.<sup>126</sup> In very broad brushstrokes, Ackerman and Golove argued that during and after World War II, a dramatic shift in the populace’s views of how the government should make international agreements created a “constitutional moment” in which the constitutional provisions related to international agreement making went through a de facto amendment, even though constitutional text remained unchanged.<sup>127</sup>

According to this view, the public believed that U.S. isolationism had facilitated Hitler’s rise and led to World War II, and that the Treaty Clause’s supermajority provision had proven to be a dangerous provision allowing a minority to impose continued isolationism upon an unwilling nation.<sup>128</sup> The authors cited newspaper editorials, public polling, and other data to demonstrate that various segments of society were conscious of the deleterious effects of the Treaty Clause, and that there existed widespread support for a formal constitutional amendment to free international agreement making from the supermajority requirement.<sup>129</sup> However, proponents of constitutional change stopped pursuing a formal amendment when it became clear there had been a “constitutional moment” in which political actors understood that looser rules would henceforth apply to the making of international agreements (such as the allowance of con-

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constitutional provisions. However, determining the extent of an amorphous “foreign affairs” power of the President is similarly outside the scope of this Note.

126. See *infra* notes 127, 131 and accompanying text.

127. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 907–09 (1995) (“The story we have told suggests the importance of a third form of constitutional transformation . . . . Rather than codifying the new change in a classical amendment, the Senate cooperated in the creation of a series of precedents that stabilized a new interpretation of old texts. Henceforth, Congress’s enumerated powers would be read generously . . . to include the power to approve binding international obligations negotiated by the President.”). *But see* Yoo, *supra* note 13, at 781–84 (criticizing Ackerman & Golove’s theory).

128. See Ackerman & Golove, *supra* note 127, at 861–66.

129. *Id.* at 861–65.

gressional-executive agreements).<sup>130</sup> Spiro advocated a similar approach that also gave “constitutional significance” to a larger number of “historical episodes” than did Ackerman and Golove.<sup>131</sup>

Such a theory is a radically different way to consider the scope of constitutional authority.<sup>132</sup> Although the Ackerman and Golove theory dealt primarily with the emergence of legitimate congressional-executive agreements,<sup>133</sup> a similar theory could be applied to consider the lawfulness of sole executive agreements. However, even if such a “constitutional moments” theory were generally accepted,<sup>134</sup> this Note would reject this approach because it would require in-depth analysis of public opinion regarding various security agreements. Under such a test, neither courts nor government officials would be able to easily determine whether a particular agreement could be lawfully made as a sole executive agreement.

#### 4. The Originalist Approach

Considering the Framers’ original understanding of international agreement making could present another plausible method to determine the outer limits of the President’s ability to conclude sole executive agreements.<sup>135</sup> If it were possible to determine how the Founders differentiated between agreements requiring the full Article II process and those that could lawfully be concluded under different procedures, then that determination could provide a valid mechanism to delimit the boundaries of allowable sole executive agreements today.<sup>136</sup> However, this Note will not consider an originalist approach

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130. *Id.* at 907–08.

131. *See* Spiro, *supra* note 12, at 964.

132. *See, e.g.,* Yoo, *supra* note 13, at 781–84 (criticizing Ackerman & Golove’s theory).

133. *See* Ackerman & Golove, *supra* note 127, at 802.

134. *See* Yoo, *supra* note 13, at 780 (describing the Ackerman & Golove theory as “controversial”).

135. *See, e.g.,* Ramsey, *supra* note 26, at 136 (seeking to determine the bounds of sole executive agreements by considering “the original understanding of the Constitution”).

136. *See id.* at 136–37 (“I conclude that the original understanding did include an independent presidential power to undertake international obligations . . . . First, it extended only to minor, short term agreements. Second, unlike treaties, international obligations undertaken by the President alone lacked the status of law in the domestic legal system, and thus required legislative enactment for domestic implementation.”); Yoo, *supra* note 13, at 769 (“An examination of the original understanding shows no support for the idea that the Framers believed that the federal government possessed some free-floating, non-textual power to make international agreements.”); *see also* Prakash & Ramsey, *supra* note 80, at 233–34, 295–96 (arguing that constitutional text holds “complete” answers to foreign affairs

in detail because this test would require extensive historical knowledge and training to make the required historical judgments, and thus would not provide a convenient test that could readily be applied to a wide range of current national security-related agreements.

*B. Two Potential Approaches: “Political Practice” and “Significance”*

Unlike the approaches described in the above section, this sub-Part describes two promising tests that could provide a useful guide for determining whether a particular international agreement can be concluded as a sole executive agreement. First, the political practice test looks to the past practices of the political branches to illuminate potential solutions to the textual ambiguities relating to international agreement making.<sup>137</sup> Second, the significance test holds that only agreements below a certain level of “significance” can be concluded via a sole executive agreement.<sup>138</sup>

1. The “Political Practice” Approach

Considering how the President and Congress have dealt with sole executive agreements in the past may provide one of the truest guides in determining the proper legal scope of sole executive agreements today.<sup>139</sup> The OLC has stated that in circumstances in which constitutional text, statutory law, and judicial opinions all fail to give clear legal direction, “a significant guide to the interpretation of the Constitution’s requirements is the practical construction placed on it by the executive and legislative branches acting together.”<sup>140</sup> This interpretive technique enjoys significant judicial support, and thus could serve as a highly legitimate means for determining whether a particular agreement can be concluded as a sole executive agreement.<sup>141</sup> Indeed, many commentators have suggested such an

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questions and looking at Washington’s Administration to derive original understandings of constitutional foreign affairs powers).

137. See *infra* Part II.B.1.

138. See *infra* Part II.B.2.

139. OLC Opinion, *supra* note 108, at 233.

140. *Id.* (citing *The Pocket Veto Case*, 279 U.S. 655, 689–90 (1929)).

141. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (citing a congressional “history of acquiescence in executive claims settlement” in holding that a sole executive agreement related to the Iranian hostage crisis was valid); *Youngstown Sheet &*

approach.<sup>142</sup>

For example, Professor Yoo's theory of international agreements relied in part on a survey of the types of agreements that had been consistently concluded as treaties compared to other categories that had been formalized via other means.<sup>143</sup> He concluded that political practice demonstrated that certain sets of agreements—such as mutual defense and security agreements, arms control agreements, human rights accords, extradition agreements, and environmental understandings—must take the “treaty form” because they had consistently been concluded via the Treaty Clause process.<sup>144</sup> Other authors

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Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President . . .”); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–73 (1915) (“[O]fficers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.”); *Stuart v. Laird*, 5 U.S. 299, 309 (1803) (“[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years . . . affords an irresistible answer, and has indeed fixed the construction . . . . This practical exposition is too strong and obstinate to be shaken or controlled.”); *Weinberger v. Rossi*, 456 U.S. 25, 30 (1982) (looking to congressional practice to determine that Congress has not considered all international agreements to require approval from a Senate supermajority).

142. See, e.g., McDougal & Lans, *supra* note 29, at 187 (“The practices of successive administrations, supported by the Congress and the numerous court decisions, have for all practical purposes made the Congressional-Executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate.”); Mathews, *supra* note 55, at 346 (“Any study of [the President’s authority to conclude international agreements] must be largely a history of our practice in the making of international agreements . . . .”); HENKIN, *supra* note 7, at 221 (noting that the Supreme Court upheld the sole executive agreement at issue in *Dames & Moore* because “Presidents had settled international claims by sole executive agreement throughout our history, and that Congress had acquiesced in that practice . . . .”); Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT’L L.J. 45, 59 (1995) (“United States law and practice recognize two international agreement instruments, the treaty and the executive agreement.”); Ramsey, *supra* note 26, at 138 (suggesting that early political practice demonstrated that the Founders recognized non-treaty international agreements); Paul, *supra* note 26, at 738–39 (discussing the early political practice regarding executive agreements). See generally Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

143. Yoo, *supra* note 13, at 811 (“Examination of postwar practice by the political branches thus reveals a manageable line between treaties and congressional-executive agreements.”); see Ramsey, *supra* note 26, at 200 (classifying various types of agreements by their subject matter and noting that only particular categories of early international agreements had been concluded outside of the Treaty Clause procedure).

144. Yoo, *supra* note 13, at 799–810.

adopted a similar rule by grouping various types of agreements with analogous constitutional provisions (e.g., troop-basing agreements may be associated with the Commander-in-Chief Clause) and considering whether those categories of agreements had been concluded by the Article II process or other means.<sup>145</sup>

The Supreme Court has followed a similar approach in some cases. In *Dames & Moore v. Regan*, the Court upheld a sole executive agreement in large part because the Court believed that historical practice of the President and Congress suggested that the political branches agreed that claims settlement procedures—the type of agreement at issue in the case—could be validly concluded via sole executive agreement.<sup>146</sup> The Court returned to this theme in *American Insurance Ass'n v. Garamendi*. There, after noting that the President had executed sole executive agreements “since the early years of the Republic” and that the Supreme Court had validated their use,<sup>147</sup> Justice Souter stated that claims settlement procedures had a particularly long pedigree that proved the conclusion that “the President’s control of foreign relations includes the settlement of claims is indisputable.”<sup>148</sup>

In sum, commentators and courts both suggest that a political practice framework could provide a means to determine the outer bounds of legitimate sole executive agreements. Following the above examples, such a test would ask (1) whether a potential agreement could be validly concluded as a sole executive agreement by first

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145. See, e.g., Mathews, *supra* note 55, at 351–70 (considering, after noting that the line separating agreements which do or do not require the Article II process “can be found by charting the areas to which the power of the President has consistently been recognized to extend in the past,” which agreements concluded under various presidential powers—e.g., the power as commander-in-chief and the power to receive ambassadors—had been reserved for the treaty process); McDougal & Lans, *supra* note 29, at 244–52 (examining agreements made under the Commander-in-Chief Clause, the Reception Clause, etc.).

146. *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (“Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.”). Note, however, that this holding may only apply in cases in which Congress did not actively contest the sole executive agreement at issue. *Id.* at 688 (“[W]e re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities . . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.”).

147. *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003).

148. *Id.* (Frankfurter, J. concurring) (citing *United States v. Pink*, 315 U.S. 203 (1942)).

identifying the “category” that an agreement falls within based on its subject matter (e.g., a claims settlement agreement, an arms control protocol, or a human rights agreement) and (2) whether the President has concluded that specific category of agreements as sole executive agreements in the past and whether Congress has acquiesced.

## 2. The “Significance” Approach

As an alternative to a political practice approach, another possible framework posits that only those international agreements that reach a certain threshold of “significance” ought to be concluded via the Article II treaty process. This idea has at least a modicum of judicial support.<sup>149</sup> However, many commentators critique such an approach by noting that many important international agreements—such as the “destroyers-for-bases” and Yalta Agreements in World War II and the armistice ending the Mexican-American War—have taken non-treaty forms.<sup>150</sup>

Nonetheless, Ramsey provides a more refined test to consider when an international agreement can escape the strictures of Article II.<sup>151</sup> Proceeding from an originalist perspective, Ramsey suggests the President can legally enter sole executive agreements so long as those agreements deal with “minor, short term agreements.”<sup>152</sup> Both of those elements are critical: it would be a standardless test to say that an international agreement must be concluded as an Article II

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149. See, e.g., *Dole v. Carter*, 444 F. Supp. 1065, 1070 (D. Kan. 1977) (stating that an agreement to return “coronation regalia” to Hungary is not “trivial,” but that “the court is yet convinced that the President’s agreement in this regard lacks the magnitude of agreements customarily concluded in treaty form”).

150. See, e.g., Ramsey, *supra* note 26, at 135–36, 205 (citing numerous “[i]mportant international commitments [that] have been established on the independent authority of the President”); HENKIN, *supra* note 7, at 222 (“[E]xecutive agreements have been used for some very important agreements when either or both parties desired that the agreement remain confidential . . . .”); Clark, *supra* note 47, at 1580 (“In recent years . . . the political branches have increasingly relied on nontreaty agreements to make important agreements . . .”).

151. Ramsey sometimes discusses the dividing line between “treaties” and “nontreaty agreements” rather than this Note’s subject of the boundary line between “sole executive agreements” and agreements that require some form of congressional approval. See Ramsey, *supra* note 26, at 205. This Note will apply his basic framework to the outer limits of sole executive agreements.

152. Ramsey, *supra* note 26, at 136. Ramsey suggests such agreements “required legislative enactment for domestic implementation.” *Id.* at 136–37. This, however, is immaterial to this Note because it does not deal with preemption or the domestic effect of international agreements.

treaty if it is sufficiently “significant.”<sup>153</sup> To create a more viable rule, Ramsey focuses on two factors: (1) the overall importance of the agreement and (2) the length of time over which the agreement is expected to endure.<sup>154</sup> As an example, Ramsey cites the armistice that ended hostilities in the Mexican-American War—concluded outside the Article II process—as an example of an “important” agreement that could nonetheless be lawfully concluded as a non-treaty agreement since it was expected to have only *temporary* effect (the parties expected a final Article II treaty to be negotiated, which would supersede the armistice).<sup>155</sup>

Although Ramsey sometimes couched his debate in terms of “treaty” and “non-treaty” agreements,<sup>156</sup> the same basic framework could potentially be applied to police the boundaries of allowable sole executive agreements. That is, one could determine whether a particular accord could be passed as a sole executive agreement by considering the two axes identified by Ramsey—importance and length of commitment—and analyze whether that agreement is sufficiently “significant” to require some form of congressional approval.<sup>157</sup> Of course, such a requirement standing alone is still somewhat amorphous: how does one measure the level of “importance” that triggers the need to pass an agreement via the Treaty Clause? What length of time is sufficient?

When comparing a range of agreements, some will presumably appear to be very clearly “important,” whereas agreements at the other end of the spectrum could obviously be classified as “unimportant.”<sup>158</sup> However, for agreements that do not fall at either extreme, it may be more difficult to judge whether they are sufficiently “important” to trigger the first prong of Ramsey’s significance test. Therefore, a potential way to deal with this ambiguity would be to follow Ramsey’s example and consider past political practice.<sup>159</sup>

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153. *Id.* at 195–96 (“[T]he important/unimportant distinction is not fully satisfactory. Many ‘important’ results that can be accomplished by international agreement can be accomplished equally well by presidential action or inaction without an international agreement . . . . The critical difference, however, between a treaty and a presidential action, even though affecting the same substance, is the former’s prospective effect.”).

154. *Id.* at 184–85.

155. *Id.* at 205–06 (supplying several other examples).

156. *See supra* note 151.

157. *See Ramsey, supra* note 26, at 184–85.

158. *See infra* Part II.C.2.

159. *See Ramsey, supra* note 26, at 200 (“Post-constitutional practice is also consistent with the substantive distinction [between ‘important’ treaty agreements and ‘less important’ non-treaty agreements] proposed above. [Of] the entire universe of pre-Civil War

Examining historical practice in the context of the significance test does not collapse Ramsey's framework into the first, pure political practice test. The pure political practice test looks to past political practice to see if the agreement in question fits within a certain *subject-matter category*, and then asks whether Congress had acquiesced to the President passing such types of agreements as sole executive agreements.<sup>160</sup> By contrast, the significance test looks to historical practice to ask whether agreements of a similar *level of importance* and *length of commitment* were concluded via sole executive agreements or other means. That is, rather than looking to similar subject matter, this test looks to similar levels of significance. Inquiries as to political practice simply help supply meaningful benchmarks to answer the fundamental question whether a particular agreement is so significant that Congress must endorse it in some way.

### *C. Comparing the Application of a Political Practice Approach and a Significance Approach to a Range of Security Agreements*

This sub-Part will apply both the political practice and significance tests to a range of security accords to compare what types of agreements would be allowed under each framework, and thereby determine the practical effects of choosing one test over the other. First, the tests will be applied to an “average” “Status of Forces Agreement” (SOFA), which is an international agreement that sets the rules governing the presence of U.S. military forces in foreign countries.<sup>161</sup> Next, the section will consider covenants similar to the 2008 agreements with Iraq, which also dealt with U.S. military forces in that country but also included much more far-reaching provisions than are normally found in an “average” SOFA.<sup>162</sup> The section will then consider arms control agreements and conclude by considering

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international agreements concluded outside Article II, Section 2 . . . [n]one [were] of long-term importance to U.S. interests.”). The test presented in this Note may not be identical to Ramsey's, as Ramsey proceeded from an originalist approach. *Id.* at 136. Nonetheless, the relevant inquiries in the “significance” test are meant to be very similar.

160. See *supra* Part II.B.1.

161. See, e.g., R. CHUCK MASON, CONG. RESEARCH SERV., STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? *ii* (2008) (“These agreements . . . generally establish the framework under which U.S. military personnel operate in a foreign country.”).

162. See, e.g., WEED, *supra* note 2, at 3 (“The [agreement] . . . also contains a number of articles that are not typical of a SOFA and seem to expand the scope of the Security Agreement.”).

large-scale defense alliances such as the North Atlantic Treaty Organization (NATO).

### 1. How the Two Tests Are Applied

Before considering specific types of international agreements under the significance and political practice tests, this section summarizes how each rule should be applied. Under the political practice framework, one would determine the allowable means of concluding a particular agreement by identifying the subject matter “category” of the agreement at issue and then determining the particular form the President (and potentially Congress) chose for that category.<sup>163</sup> If the President has concluded a particular category of agreements as sole executive agreements and Congress has acquiesced to that practice, then a new agreement that falls into that category would similarly be allowed to be determined via a sole executive agreement.<sup>164</sup> By contrast, if certain agreements have consistently followed the Treaty Clause proceedings, it would be inappropriate to conclude a similar agreement as a sole executive agreement.<sup>165</sup>

Under the significance test, only agreements that are both sufficiently important and also bind the nation for a considerable length of time need some form of congressional sanction.<sup>166</sup> Determining whether agreements at the extreme ends of the spectrum are sufficiently significant should be fairly intuitive. For example, an agreement to conduct a single, joint military training exercise would be on the less significant end, whereas a mutual defense pact like NATO would be on the more significant end. However, agreements that fall between those poles present less clear cases. In these ambiguous instances, this Note will compare the agreement at issue to past agreements of similar importance and length of commitment to determine the allowable forms of the agreement. These two frameworks will now be applied to four different types of security-related agreements.

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163. *See supra* Part II.B.1.

164. *See supra* Part II.B.1.

165. *See supra* Part II.B.1.

166. *See supra* Part II.B.2 (laying out Ramsey’s test regarding treaty agreements versus non-treaty agreements, which will be applied in this Note to sole executive agreements versus treaties and congressional-executive agreements).

## 2. Application of the Frameworks to Various Security Agreements

### a. *Standard SOFAs*

In general, a SOFA is a bilateral agreement<sup>167</sup> that “establishes the framework under which armed forces operate within a foreign country.”<sup>168</sup> SOFAs are peacetime agreements that do not require any specific form, and they are “not a mutual defense agreement or security agreement.”<sup>169</sup> SOFAs are flexible documents and can cover a wide variety of issues.<sup>170</sup> They regularly address jurisdiction over U.S. troops in both civil and criminal matters<sup>171</sup> and often discuss topics such as “the wearing of uniforms, taxes and fees, carrying of weapons, use of radio frequencies, license requirements, and customs regulations,”<sup>172</sup> among other topics. This section will consider a “standard” or “average” SOFA,<sup>173</sup> that is, an agreement that covers similar topics as those listed above, but would not entitle the United States to undertake any military operations.<sup>174</sup>

Under a political practice test, such agreements almost certainly could be concluded as sole executive agreements. The Congressional Research Service notes that SOFAs generally take the form of executive agreements<sup>175</sup> and the Senate has approved only one SOFA—a multilateral agreement with NATO countries—under the Article II Treaty Clause process.<sup>176</sup> Thus, under a political prac-

167. The United States is party to only one multilateral SOFA, which governs U.S. forces stationed in NATO countries. MASON, *supra* note 161, at 1–2.

168. *Id.* at 1.

169. *Id.*

170. *Id.* at 3 (discussing the range of provisions that have been included in U.S. SOFAs).

171. *Id.* at 4–6.

172. *Id.* at 3.

173. *See id.* at 7–14, 17–25 (providing a survey, a history, and tables of various U.S. SOFAs).

174. *See id.* at 6 (“SOFAs do not generally authorize specific military operations or missions by U.S. forces. While SOFAs do not generally provide authority to fight, the inherent right of self-defense is not affected or diminished.”).

175. *Id.* at 1, 15–16 (“[A SOFA] is generally a stand-alone document concluded as an executive agreement.”) (quotation on summary page of document (after title page), not paginated along with rest of work); *id.* at 20 (discussing two broad-ranging categories of SOFAs that are concluded as sole executive agreements).

176. *Id.* at 2. Of course, this fact itself does not mean that all of the other agreements were sole executive agreements: they could have been concluded as congressional-executive agreements. Nonetheless, it is very common for SOFAs containing standard provisions to be passed as sole executive agreements. *See id.* at 2 and the summary page.

tice framework, it would be permissible for the President to conclude a SOFA that governs routine matters, such as legal jurisdiction over U.S. forces abroad, how taxes are to be assessed, and where soldiers may wear uniforms and carry weapons, as a sole executive agreement.

A significance test would reach the same result. Although SOFAs may often lack a specific end date,<sup>177</sup> thereby triggering the “length” prong of the test described by Ramsey,<sup>178</sup> the agreements would lack the “importance” necessary for mandatory congressional buy-in. Regulations governing shared civil and criminal jurisdiction of U.S. forces stationed abroad in peacetime, the entry and exit requirements of military personnel transiting the country, taxing issues, and when those troops can wear uniforms<sup>179</sup> are so routine and logistical in nature that there should be no need for congressional approval based on a significance test. Moreover, the political branches appear to have concurred that agreements reaching the level of significance of standard SOFAs do not need congressional validation, given that Congress has regularly acquiesced to the President’s decision to conclude them as sole executive agreements.<sup>180</sup>

#### *b. Covenants Similar to the 2008 Iraq Agreements*

In November 2008, the U.S. Ambassador to Iraq and the Iraqi Foreign Minister executed two covenants governing the countries’ diplomatic and security relations during the latter stages of the U.S. military presence in Iraq and the post-withdrawal period.<sup>181</sup> The first accord (the Strategic Framework) provides a general structure to govern U.S.-Iraq relations.<sup>182</sup> Under the Strategic Framework, “the parties pledge to work cooperatively in a number of fields, including on diplomatic, security, economic, cultural, and law enforcement matters.”<sup>183</sup> The second covenant (the Security Agreement)<sup>184</sup> is of

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177. *Id.* at 4 (“There are no formal requirements governing the content, detail, and length of a SOFA.”) (emphasis added).

178. *See supra* Part II.B.2.

179. *See supra* notes 168–73 and accompanying text.

180. *See supra* notes 175–76 and accompanying text.

181. WEED, *supra* note 2, at 1.

182. Strategic Framework Agreement for a Relationship of Friendship and Cooperation, U.S.-Iraq, Nov. 17, 2008, T.I.A.S. No. 09–101.1, <http://www.state.gov/documents/organization/199162.pdf>.

183. MICHAEL JOHN GARCIA & R. CHUCK MASON, CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT AND RELATED ISSUES CONCERNING INTERNATIONAL SECURITY AGREEMENTS CONCLUDED BY THE UNITED STATES 20 (2012).

greater interest for this Note and will be considered more closely. The Security Agreement is often referred to as a “SOFA,”<sup>185</sup> because it contains several provisions common to “standard” SOFAs, such as issues related to “civil and criminal jurisdiction over U.S. forces, . . . the carrying of weapons, the wearing of uniforms, entry and exit into Iraq, taxes, customs, and claims.”<sup>186</sup> However, the Security Agreement includes numerous provisions that go beyond standard SOFA topics discussed in the previous section.<sup>187</sup> Most significantly,<sup>188</sup> the Security Agreement—which had a lifespan of three years<sup>189</sup>—authorizes the United States to conduct military operations in Iraq when, for example, the Iraqi Government has agreed to the operations.<sup>189</sup>

These accords were initially quite contentious. After the Bush Administration announced that it intended to conclude both agreements as sole executive agreements, numerous legislators demanded that Congress have some role in the approval of the covenants.<sup>190</sup> However, neither the Bush Administration nor the Obama Administration formally sent the agreements to Congress for approval, thereby maintaining their status as sole executive agreements.<sup>191</sup> It appears that congressional demands for input “dissipated” when Congress determined that “neither [agreement] . . . provided for a long-term security commitment by the United States.”<sup>192</sup>

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184. Iraq Security Agreement, *supra* note 3.

185. WEED, *supra* note 2, at 1 n.5.

186. GARCIA & MASON, *supra* note 183, at 21.

187. WEED, *supra* note 2, at 3.

188. Iraq Security Agreement, *supra* note 3, at art. 30. However, both the United States and Iraq could cancel the agreement upon one year’s notice. *Id.*

189. *Id.* at art. 4; *see also* R. CHUCK MASON, CONG. RESEARCH SERV., U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT 9 (2009).

190. WEED, *supra* note 2, at 1, 5–6.

191. *Id.* at 4 (“[T]he Obama Administration has indicated its intention to abide by the terms of both the Security Agreement and the Strategic Framework.”); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 475 (2011) (discussing how President Obama and Secretary of State Clinton’s “silent acceptance” of the agreements “effectively ratif[ied]” them).

192. GARCIA & MASON, *supra* note 183, at 20. Giving a potentially different answer, Ackerman and Hathaway suggest that both parties in Congress had little political incentive to demand that the Obama Administration resubmit the accords for congressional approval: Democrats cared more about domestic initiatives and did not want to challenge the new Democratic President, while Republicans did not want to “implicitly suggest that President Obama had the constitutional prerogative to repudiate the Bush Agreement.” Ackerman &

### i. Applying the Political Practice Framework

Under a political practice framework, the first step is to consider the type of category under which the relevant agreement would fall.<sup>193</sup> This initial determination is somewhat difficult for the Security Agreement. On the one hand, it does contain numerous provisions that are common to standard SOFAs, which can legally be concluded as sole executive agreements.<sup>194</sup> However, the Security Agreement's provisions authorizing the United States to use military force in Iraq significantly distinguish it from other SOFAs.<sup>195</sup> Such an important provision must supersede the salience of other clauses relating to taxes and uniforms. Therefore, in categorizing this agreement, the most germane part of the accord is the fact that it allows the United States to conduct military operations in Iraq for a significant period of time.

Although no past agreement appears to be completely analogous to the Security Agreement, the *most* similar agreements have not been passed as sole executive agreements. The most analogous agreements include several international accords that give the United States the right (but not the duty) to intervene militarily in another country, and these agreements have normally been concluded as Article II treaties.<sup>196</sup> Similarly, Article 4 of the Iraq Security Agreement states that "Iraq requests the temporary assistance of the United States Forces . . . to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime."<sup>197</sup> Given that agreements that allow the United States the right to intervene militarily in a country have generally been concluded as treaties,<sup>198</sup> and the Security Agreement allows such a qualified right as well as a conditional authority for the United States to maintain U.S. forces in the country for several years,<sup>199</sup> a political practice framework most likely would disallow the President from

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Hathaway, *supra* note 191, at 475 (internal parentheses omitted).

193. *See supra* Part II.B.1.

194. *See supra* Part II.C.2.a.

195. *See supra* notes 187–89 and accompanying text.

196. GARCIA & MASON, *supra* note 183, at 13; *see also id.* at 9–16 (discussing various types of security agreements and the forms in which they are traditionally concluded).

197. Iraq Security Agreement, *supra* note 3, at art. 4(1). Article 4 then describes various requirements of military operations, including the need to coordinate with the Iraqi government. *Id.* at art. 4(1)–(5).

198. *See supra* note 196 and accompanying text.

199. Iraq Security Agreement, *supra* note 3, at arts. 4, 24.

concluding this accord as a sole executive agreement. Although some agreements concluded outside the Article II process gave the United States the right to conduct military operations in another country, those agreements generally appear to be congressional-executive agreements rather than sole executive agreements.<sup>200</sup>

To summarize, given the lack of clear precedent of similar types of agreements being passed as sole executive agreements and the fact that the most analogous agreements have tended to be concluded under the Article II treaty process, a political practice framework generally would not allow an accord similar to the Security Agreement to stand as a sole executive agreement. Of course, now that the Bush Administration has concluded the agreement as a sole executive agreement and the Obama Administration has implicitly acquiesced,<sup>201</sup> there is now at least one precedent that could support similar *future* agreements being concluded as sole executive agreements. But given that there is only one such example and that Congress strenuously objected to that form of agreement for a significant amount of time,<sup>202</sup> it is unlikely that the Iraq Security Agreement would provide sufficient precedent to justify concluding future similar agreements as sole executive agreements.<sup>203</sup>

## ii. Applying the Significance Framework

An accord such as the 2008 Security Agreement with Iraq presents a close question under a significance test. Unlike a “standard” SOFA, the Security Agreement authorized U.S. forces to conduct military operations in Iraq and implied that large numbers of troops would remain in an active war zone for several years.<sup>204</sup> Any agreement that would place large numbers of U.S. soldiers in harm’s way would likely be at the highest end of Ramsey’s “importance” axis. However, the other element of the test—length of commitment—probably cuts the other way since the Security Agreement was only in effect for three years, at the end of which all U.S. forces must have

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200. See GARCIA & MASON, *supra* note 183, at 14 & n.72.

201. See *supra* notes 191–92 and accompanying text.

202. See, e.g., WEED, *supra* note 2, at 5; Ackerman & Hathaway, *supra* note 191, at 467–75.

203. See *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2605 (2014) (Scalia, J., concurring) (arguing that a practice that only occurred in “significant numbers . . . after World War II” and that was “repeatedly criticized as unconstitutional by Senators of both parties” did not provide constitutionally sufficient evidence of a legal rule).

204. See *supra* notes 187–89 and accompanying text; see also Iraq Security Agreement, *supra* note 3, at arts. 24, 30.

been withdrawn from Iraq.<sup>205</sup>

Therefore, a significance test does not provide a clear answer to whether an accord such as the Security Agreement could be lawfully concluded as a sole executive agreement. Given that its subject matter is of the highest importance, but its effect is limited in time, both the President and Congress would be able to advance strong arguments that such an agreement should or should not be allowed as a sole executive agreement under a significance framework. Moreover, looking to past political practice does not provide a dispositive answer: there does not appear to be a previous agreement that can clearly be described as having the same significance in terms of importance and length of commitment. On one hand, Congress could argue that such an accord cannot be passed as a sole executive agreement under a significance framework because the previous agreements most similar in importance were mutual defense agreements (passed as treaties).<sup>206</sup> However, the President could distinguish those agreements by noting that the mutual defense treaties are decades-old, open-ended commitments,<sup>207</sup> whereas the Iraq Security Agreement had a lifespan of only three years.<sup>208</sup>

Thus, a significance test does not provide a clear answer on whether an agreement similar to the Iraq Security Agreement could be concluded as a sole executive agreement. Rather, both the President and Congress could marshal strong arguments to try to demonstrate which form would be most appropriate. By contrast, the political practice framework would likely require the Security Agreement to be concluded as a treaty or congressional-executive agreement. Part III discusses whether the relatively greater uncertainty present in the significance test makes it a more or less attractive test than the political practice framework.

### *c. Arms Control Agreements*

Arms control agreements would almost certainly be disallowed under both frameworks. As relevant to a political practice framework, Yoo notes that “Since the end of World War II, Presidents submitted almost every significant arms control agreement . . .

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205. Iraq Security Agreement, *supra* note 3, at arts. 24, 30.

206. See *supra* note 196 and accompanying text.

207. See GARCIA & MASON, *supra* note 183, at 10 & n.51 (listing many long-lasting mutual defense agreements).

208. Iraq Security Agreement, *supra* note 3, at arts. 24, 30.

to the Senate as treaties.”<sup>209</sup> The only potential counterexample is the first Strategic Arms Limitation Talks (SALT I), which was concluded as a congressional-executive agreement.<sup>210</sup> However, the relevant actors understood SALT I to be a temporary arrangement that would later be replaced by SALT II, which President Carter submitted to the Senate via the Treaty Clause approval process.<sup>211</sup> Given this near-uniform practice of submitting such arms control agreements to the Senate per Article II, there would be little support under a political practice framework to allow arms control agreements as sole executive agreements.

The significance approach would reach the same result. Most arms control agreements are either perpetual or decades-long commitments and thus implicate Ramsey’s “length of commitment” factor.<sup>212</sup> Furthermore, an arms control agreement triggers the “importance” factor of Ramsey’s test because it limits the means by which the United States can defend its security interests. Hence, an arms control agreement almost certainly would not be allowed as a sole executive agreement under a “significance” test. Given the long

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209. Yoo, *supra* note 13, at 804 (giving examples, such as the Limited Nuclear Test Ban Treaty, the Threshold Test Ban Treaty, the Anti-Ballistic Missile Treaty, the Nuclear Non-Proliferation Treaty, the Intermediate-Range Nuclear Forces Treaty, and the Treaty on Conventional Armed Forces in Europe); see Spiro, *supra* note 12, at 996–97 (“Every arms control agreement since 1972 has been approved as a treaty . . . . Since at least 1991, the Senate has formally expressed its institutional opinion that arms control agreements must be submitted as treaties.”).

210. Yoo, *supra* note 13, at 805.

211. *Id.* Yoo also notes that Carter “did not press for [SALT II’s] approval in the wake of the Soviet invasion of Afghanistan,” and that “Presidents Reagan and Bush never asked the Senate to approve the agreement.” *Id.*

212. See, e.g., Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water art. IV, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 45 (“This Treaty shall be of unlimited duration.”); Treaty on the Non-Proliferation of Nuclear Weapons art. X, ¶ 2, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169 (“Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods.”); Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, ¶ 1, May 26, 1972, 23 U.S.T. 3435 (“This Treaty shall be of unlimited duration.”). Note that with respect to the Treaty on the Limitation of Anti-Ballistic Missile Systems, the United States issued a unilateral statement declaring, “If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years . . . it would constitute a basis for withdrawal . . . .” Agreed Statements, Common Understandings, And Unilateral Statements Regarding The Treaty Between The United States Of America And The Union Of Soviet Socialist Republics On The Limitation Of Anti-Ballistic Missiles, at 3.A (May 9, 1972), <http://www.state.gov/t/avc/trty/101888.htm> (statement of U.S. Ambassador Smith).

political practice of arms control agreements being passed as treaties,<sup>213</sup> it appears that Congress and the President have come to the same conclusion.

#### *d. Mutual Defense Alliances*

Similar to arms control agreements, both the political practice and significance frameworks would prohibit the President from concluding mutual defense alliances as sole executive agreements. Historical practice shows that such agreements almost uniformly occurred via the Article II treaty process. For example, NATO, numerous bilateral mutual defense agreements, “and multilateral security arrangements, such as the Southeast Asian Treaty Organization, the Australian-New Zealand-U.S. agreement, and the Rio Treaty,” were all created by treaty.<sup>214</sup> Although there are some (often distinguishable) examples, there appears to be a clear history of political practice that such mutual defense agreements should be concluded by treaty.<sup>215</sup> Hence, under a political practice framework, a mutual defense agreement is not within the allowable legal bounds of sole executive agreements.

A significance framework would reach the same conclusion. A commitment to militarily defend another country implicates the most important security concerns of a nation, and these agreements also tend to be open-ended commitments.<sup>216</sup> If the significance framework would disallow any type of agreement from being passed as sole executive agreements, it would certainly exclude mutual defense alliances.

#### *D. Conclusion*

This Part introduces various possible frameworks to determine the outer limit of allowable sole executive agreements, and applies two of those mechanisms to a range of security agreements. The two frameworks often produce consistent results.<sup>217</sup> However, they differ for agreements that lack clear historical analogues or that are of middling significance. The next Part will discuss the pros and

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213. See *supra* notes 209–12 and accompanying text.

214. Yoo, *supra* note 13, at 803; see also GARCIA & MASON, *supra* note 183, at 10.

215. Yoo, *supra* note 13, at 803 & n.165.

216. See *supra* note 207 and accompanying text.

217. See *supra* Part II.C.

cons of these two approaches and argues in favor of the significance test for national security-related sole executive agreements.

### III. COMPARING THE ADVANTAGES AND DISADVANTAGES OF THE POLITICAL PRACTICE AND SIGNIFICANCE FRAMEWORKS

Ultimately, the significance test is a better framework than a political practice test for determining the outer limits of allowable sole executive agreements. Although the political practice framework has strong arguments in its favor—most notably that it leads to more predictable results—the significance test is preferable because it allows for greater flexibility in meeting new national security challenges.<sup>218</sup> This Part discusses the advantages and disadvantages of both tests before expanding in more detail upon why a significance test is superior to a political practice test for policing the bounds of sole executive agreements for security-related agreements.

#### *A. Advantages of the Political Practice Approach*

The political practice approach has several virtues, but probably the most compelling argument is that it offers a relatively clear and predictable test in deciding whether a particular covenant can be concluded as a sole executive agreement. As Judge Posner has suggested, “Simplification is desirable in law.”<sup>219</sup> Under this framework, one need only make the relatively simple determination of whether a particular agreement’s subject matter is sufficiently similar to prior agreements that have been concluded as sole executive agreements. To say that the test is relatively clear does not mean there are never any analytic difficulties under this approach: for example, the substance of the Iraq Security Agreement had to be analyzed in detail before concluding it could not be concluded as a sole

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218. This Note only considers the significance and political practice tests in depth, and thus it takes no position on whether a different framework would be superior to both. Moreover, a different approach may be more appropriate for non-security agreements, where executive flexibility and expediency are less important concerns.

219. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013); see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–82 (1989) (giving various arguments for pursuing clarity in legal rules). See generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (comparing judicial approaches that favor relatively bright-line “rules” compared to more flexible “standards”).

executive agreement under this approach.<sup>220</sup>

Nonetheless, there is no doubt that the political practice test provides clearer lines than a significance test. Fundamentally, a significance approach will lead to greater uncertainty because it depends on arguments that revolve around whether an agreement reaches a somewhat nebulous standard of importance. By contrast, the political practice test will be relatively more predictable because arguments will be limited to whether a particular accord is similar enough to a discrete set of prior international agreements. As an example, consider an international covenant that would forever ban a certain type of cluster bomb from use in national militaries, and assume further that the U.S. military has already rejected the use of this weapon because it often malfunctions. It is unclear whether the President could pass this agreement on his or her own authority under a significance test. The President could argue that joining such an agreement would be relatively insignificant because the U.S. military has already rejected the weapon, whereas Congress could argue that the agreement is significant because it prevents the military from changing its mind about whether to employ a powerful weapon. By contrast, a political practice approach would provide a clear answer: this agreement would almost certainly count as an “arms control” agreement, and thus a sole executive agreement would be inappropriate.

A second advantage of the political practice test is that it arguably leads to more democratic buy-in. This conclusion stems from the fact that the President will almost certainly be able to conclude more international covenants as sole executive agreements under a significance test rather than a political practice test. This is true because any agreement allowable as a sole executive agreement under the political practice test would presumably also pass the significance test—Congress would not have acquiesced to such agreements being made as sole executive agreements if they thought they were too significant.<sup>221</sup> Therefore, a political practice test will ensure that legislators,<sup>222</sup> who are closer to their constituents than is the President, will have greater influence on more international conventions.<sup>223</sup>

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220. See *supra* Part II.C.

221. This conclusion is supported by the application of both frameworks to “standard” SOFAs, the Iraq Security Agreement, arms control agreements, and mutual defense treaties. See *supra* Part II.C.

222. Of course, both houses of Congress would be able to vote on a congressional-executive agreement, but only the Senate would have direct influence on a treaty.

223. Cf. Hathaway, *supra* note 30, at 1308–12 (arguing that congressional-executive agreements have greater democratic legitimacy than treaties).

Given these advantages,<sup>224</sup> a pure political practice test clearly should not be dismissed out of hand. Nevertheless, the significance test possesses even more valuable attributes.

### *B. Advantages of the Significance Approach*

The primary advantage of the significance approach is its relative flexibility, which is especially important in national security matters.<sup>225</sup> Throughout U.S. constitutional history, commentators have noted that national security threats cannot always be predicted in advance, and this unpredictability may require greater flexibility in the law dealing with national defense than in other legal fields.<sup>226</sup> A significance approach recognizes and advances this goal. The nation's view of the types of agreements that are so significant that they must have some form of congressional sanction may change over time, thereby allowing for a legal framework that can evolve alongside shifting national security challenges.<sup>227</sup> By contrast, a political practice framework is relatively ossified. Unlike the significance approach, which references a dynamic standard (i.e., importance<sup>228</sup>), the political practice framework depends on a relatively enduring set of previously negotiated agreements and hence contains far less internal

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224. Two other possible advantages of the political practice test bear mentioning. First, there appears to be greater judicial support for a political practice test compared to a significance test. Compare *supra* note 141 and accompanying text, with *supra* note 149 and accompanying text. However, no court has enumerated any single test to police the limits of sole executive agreements. HENKIN, *supra* note 7, at 222. Also, if a political practice approach leads to fewer sole executive agreements, this could be beneficial to the country because congressional-executive agreements and treaties may appear more credible to foreign governments. Cf. John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 3–4 (2011) (discussing prudential pros and cons of choosing between treaties and congressional-executive agreements). However, this benefit is mitigated by the President's ability to choose to pass an agreement as a congressional-executive agreement or treaty, even if it were qualified to be a sole executive agreement.

225. See *infra* note 226.

226. See, e.g., THE FEDERALIST NO. 23 (Alexander Hamilton) (“[I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.”) (original version used all caps); Mathews, *supra* note 55, at 375 (“[T]he extent of the President's power in foreign affairs must vary with the context of events in which it must be exercised.”).

227. Cf. Mathews, *supra* note 55, at 375 (“[T]he method of democracy [is] one of adjustment and compromise, guided always by the indispensable consideration that the power of the President to conduct our foreign relations must keep pace with the necessities of national survival.”).

228. See *supra* Part II.B.2.

dynamism.<sup>229</sup>

The significance approach also leads to greater flexibility because the President could marshal a greater number of plausible arguments that a particular accord could be passed as a sole executive agreement under a significance framework as compared to a political practice approach.<sup>230</sup> Thus, a wider range of agreements could be concluded as sole executive agreements under a significance approach. This is especially true when considered in light of the fact that there are probably no agreements that would be valid under a political practice framework but invalid under a significance framework. That is, a significance framework will include all of the agreements under a political practice framework and probably other accords that would not be valid under a political practice approach.<sup>231</sup> Hence, a significance framework is superior to a political practice framework to the extent it is desirable to give greater international agreement-making power to the President, as various commentators have argued.<sup>232</sup>

For example, Mathews argues that the unitary nature of the executive allows the President to “act more swiftly than a legislature divided in opinion” and “to keep negotiations and decisions secret[,]” unlike a 535-member Congress.<sup>233</sup> Moreover, the President “possesses generally more adequate sources of information than does Congress in foreign matters” and is also always ready to act on a matter, unlike Congress, “which may be in recess or incapacitated by the parliamentary complications of other business.”<sup>234</sup> Since the Founding, commentators have considered these traits to be desirable in institutions that deal with foreign powers.<sup>235</sup> If the President is a generally better steward of the nation’s foreign policy than Congress, and the ability to conclude international agreements is an important tool in foreign policy,<sup>236</sup> then the significance framework may be fa-

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229. See *supra* Part II.B.1.

230. See *supra* Part III.A.

231. See *supra* Part III.A.

232. See *infra* notes 233–37 and accompanying text.

233. See Mathews, *supra* note 55, at 349.

234. *Id.*

235. See, e.g., THE FEDERALIST NO. 70 (Alexander Hamilton) (citing “[d]ecision, activity, secrecy, and dispatch” as beneficial traits in an executive). Note that Mathews also suggests that these structural advantages allowed the President to establish the executive as the dominant branch in foreign affairs. Mathews, *supra* note 55, at 349 (“It is not surprising, therefore, that the President has become recognized as the leader of the nation in the conduct of its foreign affairs.”).

236. Cf. Mathews, *supra* note 55, at 375 (arguing that both “the scope of the President’s

vored over political practice because it allocates greater agreement-making power to the President.<sup>237</sup>

Of course, Congress has a significant role to play in many international agreements despite the President's structural advantages, as the Framers clearly intended.<sup>238</sup> Therefore, any rule that determines the scope of lawful sole executive agreements cannot allow the President to arrogate the right to conclude agreements that properly require congressional approval. To that end, the degree of flexibility in the significance approach is appropriately limited: the President can only create sole executive agreements that pass Ramsey's two-part test of importance and length of commitment, and thus he or she cannot completely ignore Congress.<sup>239</sup>

Nonetheless, critics may suggest that the relatively amorphous "importance" standard could allow the President to speciously argue that a particular agreement is not so significant that it requires congressional sanction even when it clearly should be concluded as a congressional-executive agreement or treaty. Although the "importance" prong of the Ramsey test is admittedly indeterminate,<sup>240</sup> Congress has numerous political tools by which it could discipline a President that abuses his or her discretion under a significance framework. For example, after President Bush announced that he would conclude the Iraq Security Agreement as a sole executive agreement, Congress threatened legislation that prohibited the provision of funds for any sole executive agreement reached with Iraq and purported to require the President to submit the agreements for congressional approval.<sup>241</sup> Indeed, "[then-Senators] Obama, Biden, and Clinton had endorsed a resolution demanding the submission of any

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substantive powers in the field of foreign affairs[] and . . . the scope of his authority to implement these powers" varies with necessity).

237. The Founders generally considered the traits associated with a unitary executive to be beneficial in international negotiations. *See, e.g.*, THE FEDERALIST NO. 64 (John Jay) ("It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite.").

238. U.S. CONST. art. II, § 2, cl. 2.

239. *See supra* Part II.B.2.

240. *See supra* Part III.A.

241. *See WEED, supra* note 2, at 6 ("The enacted and proposed legislation, designed to ensure a congressional role in the Iraq Agreements, contains combinations of four main types of provisions requiring (1) reports to Congress, (2) consultations with Congress, (3) formal Congressional approval, or (4) funding prohibitions."); *see also* HENKIN, *supra* note 7, at 223–24 (discussing how Congress could refuse to appropriate funds necessary to fulfill sole executive agreements, but also stating that "Senates and Congresses[] [are] theoretically free to disown such commitments, [but they] cannot do so lightly").

new Iraq agreement to Congress for approval.”<sup>242</sup> In short, the significance test has both internal checks (the President can only use the sole executive agreement form for relatively unimportant agreements) and external checks (congressional legislative and political means) to ensure that the framework is more than a mere fig leaf for presidents intending to aggrandize too much agreement-making power from Congress.

*C. The Superiority of the Significance Approach over the Political Practice Approach for National Security-Related Agreements*

The significance framework provides a better means to determine the outer limits of sole executive agreements than does the political practice framework, at least with respect to agreements that implicate national security. This conclusion, however, depends largely on the choice of background goals one hopes to advance by choosing one test over another. Because this Note focuses entirely on national-security related agreements, goals of flexibility and executive discretion take on relatively greater importance than they would in other contexts. Given the large degree of deference given to the President in defense affairs,<sup>243</sup> it is appropriate to give greater weight to these goals when considering how to draw a reasonable limit on national security-related sole executive agreements. However, other valuable legal objectives, such as predictability and popular buy-in, may outweigh the benefits of flexibility for other subject matters. Thus, a political practice test promising greater predictability and more participation by Congress may be more appropriate for agreements relating to the environment, international trade, or other areas.

Nonetheless, this Note considered only defense-related

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242. Ackerman & Hathaway, *supra* note 191, at 473; see Congressional Oversight of Iraq Agreements Act of 2007, S. 2426, 110th Cong. (2007).

243. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) (noting that the Court gives special deference to the Executive in national security matters in part because of the Executive’s greater knowledge and experience in making informed judgments regarding security threats); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (“[T]he executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance . . .”).

agreements, in which requirements of flexibility can be paramount and hidebound predictability may be a liability.<sup>244</sup> Given the considerations associated with national security threats, the significance approach provides a better rule than the political practice framework because it provides greater flexibility and shifts more agreement-making power to the President.<sup>245</sup>

On top of the benefits provided by the significance test, the potential downsides of the framework are fairly circumscribed. The test does not allow the President to create sole executive agreements that are both very “important” to the national interest and that bind the nation for a significant length of time.<sup>246</sup> Moreover, even if a President were to try to conclude significant accords as sole executive agreements by inappropriately arguing that they are “insignificant,” Congress would be able to discipline that abuse via various political and legislative means.<sup>247</sup> In summary, since the significance approach leads to a more flexible test while simultaneously ensuring that such flexibility is not abused, the significance approach is superior with respect to national security-related agreements.

## CONCLUSION

This Note advances the debate on how to draw a meaningful legal boundary on the President’s ability to conclude sole executive agreements. It does so by first reviewing various frameworks that could be used to identify the outer reaches of allowable sole executive agreements, examining two of these approaches in detail, and ultimately arguing that a significance approach is the best test to determine when a security-related agreement may be concluded as a sole executive agreement. Though, like all other commentaries, this Note cannot completely answer the question of when a sole executive agreement is constitutionally permissible, it nonetheless provides a viable solution for national-security agreements. In doing so, this Note suggests that the importance of different background objectives—such as legal clarity, executive flexibility, and others—will

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244. See Mathews, *supra* note 55, at 375 (“[T]he extent of the President’s power in foreign affairs must vary with the context of events in which it must be exercised.”).

245. Of course, it is entirely possible that a test besides the political practice or significance frameworks—the only two considered in depth in this Note—would be superior to both. See *supra* Part II.A (highlighting other potential approaches not fully discussed in this Note).

246. See *supra* Part II.B.2.

247. See *supra* Part III.B.

vary based on the category of the agreement at issue, and should influence the final choice of a rule. Therefore, any complete delineation of a limit of the President's ability to conclude sole executive agreements would need to consider whether other categories of agreements are so different from national security-related accords that they should be governed by a different rule, or whether the goal of uniformity would outweigh the substantive differences among the different sets of agreements.

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