THE IMPORTANCE OF THE LEGISLATURE: INTERNATIONAL LAW, FOREIGN POLICY, AND ARTICLE ONE POWERS

SENATOR MIKE LEE*

Inviting me to speak at a symposium on international law is kind of like inviting an atheist to preach at your church—and that might be understating the matter. I have not been a big fan of the concept of international law, in part because the term is so widely misused. Specifically, I think the term "international law" fails to capture how law actually works. More on that later.

To be clear, I do not purport to be an expert on international law. But I do know a thing or two about the Constitution and our Founding Fathers' vision of government. And I know something about United Nations (UN) conventions and the difference between public and customary international law. These things are best understood against the backdrop of the U.S. Constitution. As with so many other things, the Framers—and what they wrote in the Constitution—offer us some wisdom and insights in this area, too.

There is a common thread that runs through our Constitution, in what our systems of government and law should look like when they are properly functioning—that is, in how our government is structured to keep its power close to and accountable to the people. That is the context in which I would like to speak to you today.

---

* This essay has been adapted from a keynote address delivered at the 2021 Federalist Society National Student Symposium. The original remarks can be viewed at The Federalist Society, *Presentation of the Joseph Story Award & Keynote Address by Sen. Mike Lee*, YOUTUBE (Mar. 20, 2021), https://www.youtube.com/watch?v=SJKthOp2pM4 [https://perma.cc/XM77-U4H4].

So let's talk about international law—what it means and what it does not mean. First, we must define our terms. What are laws to begin with? I think they are best understood as norms. A norm becomes a law when it is backed up by a government actor with the physical wherewithal to enforce it and the legitimacy of a sovereign government.[1] This is one way we distinguish cartels—or, for that matter, self–proclaimed "sovereign citizens"—from states.

In the international realm, this principle—that laws are backed up by the legitimate use of collective, coercive force—is why people like me tend to get worried when we start talking about international law.[2] Because this framework begs all sorts of questions—chiefly, *who* can legitimately enforce an *international* law? There is no worldwide government, thankfully and mercifully. And the UN—the only body that would want to lay claim to that—is a non-starter. China and Russia sit on the "Security Council," and Pakistan sits on the "Human Rights Council."[3]

Nevertheless, the term "international law" can be useful in some areas. In the realm of trade, there are countless instances where we have agreed to enforce certain laws according to a set of international standards. For example, as a member state of the World Trade Organization (WTO), we have signed on to the General Agreement on Tariffs and Trade, in which we have committed to eliminating or reducing tariffs and quotas on certain goods in exchange for similar commitments from other countries.[4] So too with bilateral investment treaties—we get protection in a certain country

1. *See* Roscoe Pound, *What Is Law?*, 47 W. VA. L.Q. 1, 3 (1940) (explaining that law can be defined as "the regime of adjusting relations and ordering conduct by the systematic and orderly application of the force of a politically organized society").

2 *See* 1 LASSA FRANCIS OPPENHEIM, INTERNATIONAL LAW 8 (2d ed. 1912) ("We may say that law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.").

3. *Current Members*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/current-members [https://perma.cc/FE3Z-8CMP] (last visited Aug. 8, 2021); *Current Membership of the Human Rights Council*, UNITED NATIONS HUM. RTS. COUNCIL, https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx [https://perma.cc/L4G6-LYLK] (last visited Aug. 8, 2021).

4. General Agreement on Tariffs and Trade art. 8, 11, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

for our investors in exchange for offering protection to investors from that country.[5]

The North Atlantic Treaty Organization (NATO) is another good example. As part of that treaty, we have committed to a common defense strategy with member nations by providing funds, technology, and troops.[6] And Congress maintains a firm hand in the governance of our obligations under NATO, including congressional oversight of burden–sharing requirements,[7] congressional authority to declare war in the event that the Article 5 mutual defense requirement is invoked,[8] and the requirement of Senate ratification to add a new member state.[9] Most importantly, the NATO treaty preserves each member nation's sovereignty and relies on the domestic laws of each member nation to implement the treaty's common defense commitments.[10]

In this respect, our commitment to international law—as manifested in agreements like NATO—is reminiscent of something that we learned back in the 1740s. While attending a conference in Albany, Benjamin Franklin and an Iroquois Indian chief of the Onondaga Tribe named Canasatego discussed how the Iroquois Confederacy had become so successful by maintaining its strength while allowing each member nation to retain its distinctiveness within the Confederacy.[11] He explained it by comparing the Confederacy to a

---

5. *Trade Guide: Bilateral Investment Treaties*, INT'L TRADE ADMIN., https://www.trade.gov/trade-guide-bilateral-investment-treaties [https://perma.cc/4ASX-79JJ] (last visited Aug. 8, 2021).

6. *Funding NATO*, N. ATL. TREATY ORG. (June 22, 2021, 4:29 PM), https://www.nato.int/cps/en/natohq/topics_67655.htm [https://perma.cc/S77R-V6H3].

7. Paul Belkin, Cong. Rsch. Serv., RL30150, NATO Common Funds Burdensharing: Background and Current Issues 8 (2012).

8. North Atlantic Treaty art. 5, 11, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; *see also* U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war).

9. S. EXEC. DOC. NO. 81-8, at 18 (1949).

10. North Atlantic Treaty art. 11, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

11. *See* William A. Starna & George R. Hamell, *History and the Burden of Proof: The Case of Iroquois Influence on the U.S. Constitution*, 77 N.Y. HIST. 427, 430–31, 437, 439 (1996). Historical evidence indicates that Benjamin Franklin may have found inspiration to unite the American colonies from the Iroquois model. Note, however, that recent scholarship suggests that anecdotes of Benjamin Franklin and Canasatego's conversations may be overstated. *See id.* at 427, 427–28, 451.

bundle of arrows.[12] It is very easy for someone to break one arrow, but when you bind them together, the bundle is very difficult for any one person to break.

Now, we do not want our NATO obligations to resemble a country. We want each individual nation that is a member to retain its own sovereignty. While not a unified nation, we join together for certain broader purposes.[13] And the U.S. can do that appropriately under our Constitution, so long as those treaty obligations are backed up—that is, made legitimate—by something within our domestic legal system.

In many instances, however, we use the term "international law" to refer to a host of things that really are not—or should not be considered to be—"law."

Take "international agreements." The Paris Climate Agreement is a great example. It was signed with great fanfare by many nations, including such "environmental luminaries" as China and Iran, and signed by President Obama—ostensibly on behalf of the United States.[14]

But here is the secret about the Paris Agreement: *it does not mean anything.* At least not insofar as our laws are concerned. It has some language about being a "legally binding international treaty on climate change," but as far as we are concerned, it does not have the force of law.[15] Even before President Trump got us out of it, it was not really *law*. It would be an insult to law to call it that. If a party—say, China—signed the Agreement and carried on emitting CO2 as

12. *Id.* at 447–49.

13. *See* North Atlantic Treaty art. 2–5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

14. *See* Paris Agreement, Dec. 12, 2015, in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, volume XXVII, chapter 7D; Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, THE WHITE HOUSE (Sept. 3, 2016, 10:41 AM), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement [https://perma.cc/W457-KKWC].

15. *The Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Aug. 8, 2021), https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement [https://perma.cc/HY9A-4M9W].

if nothing ever happened, there would be *no consequences whatsoever*.[16] Which is exactly what China has done, by the way.[17]

Here is another one: the UN Convention on the Law of the Sea. This is the kind of international law that I *loathe*. It creates an International Seabed Authority—headquartered in Kingston, Jamaica—that purports to mandate that royalties, primarily from oil and gas extraction, be paid to the authority and "equitably distributed" among member states but with special priority given to developing and landlocked nations.[18] If you are thinking this sounds a lot like a tax, you would be correct. If you are thinking this sounds like a socialistic model for forcing redistribution of wealth from one group of countries to another, you would also be correct. And if you are guessing that this will increase consumer prices, inuring specifically to the detriment of poor and middle–class people in the U.S. and elsewhere, you would be correct in that too.

Participation in the UN Convention on the Law of the Sea would also require the U.S. to request permission from the International Seabed Authority before engaging in deep–seabed mining activities in our *own* continental seabed.[19]

---

16. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2, 4, 6, Dec. 12, 2015, T.I.A.S. No. 16-1104.

17. *See* Steven Mufson & Brady Dennis, *Chinese Greenhouse Gas Emissions Now Larger than Those of Developed Countries Combined*, WASH. POST (May 6, 2021, 6:00 AM), https://www.washingtonpost.com/climate-environment/2021/05/06/china-greenhouse-emissions/ [https://perma.cc/36JM-UA2P] ("China's greenhouse gas emissions in 2019 surpassed those of the United States and the developed world combined."); *China*, CLIMATE ACTION TRACKER (Sept. 21, 2020), https://climateactiontracker.org/countries/china/ [https://perma.cc/G69G-9PTU] (showing that China's emission levels surpass those prescribed by the Paris Climate Agreement).

18. *The United Nations Convention on the Law of the Sea*, UNITED NATIONS: OCEANS & LAW OF THE SEA, https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm [https://perma.cc/J55Z-686J] (last visited Aug. 20, 2021) ("[C]oastal States must also contribute to a system of sharing the revenue derived from the exploitation of mineral resources beyond 200 miles. These payments or contributions . . . are to be *equitably distributed* among States parties to the Convention through the International Seabed Authority.") (emphasis added); Convention on the Law of the Sea art. 82, 156, Dec. 10, 1982, 1833 U.N.T.S. 397.

19. Convention on the Law of the Sea, *supra* note 18, at art. 76, 157, 9 (Annex III).

While you ponder *that* strange protocol, recall that China is a member of the Convention—and regularly ignores it.[20] Back in 2016, the "International Court of Justice" (a misnomer as far as titles go, by the way) ruled against China's seabed claims in the South China Sea.[21] China did not even show up to the trial and continued on as if nothing had ever happened.[22]

Moreover, ratification of the UN Convention on the Law of the Sea would require a massive delegation of U.S. sovereignty and the imposition of a new tax on the American people.[23] And because I took an oath to uphold and defend the Constitution from all enemies, and I was (and still am) convinced that committing the United States to the UN Convention on the Law of the Sea would be a vio-

---

20. Sarah Lohschelder, *Chinese Domestic Law in the South China Sea*, 13 CTR. FOR STRATEGIC & INT'L STUD. 33, 34–35 (2017); Mark J. Valencia, *Might China Withdraw from the UN Law of the Sea Treaty?*, THE DIPLOMAT: THE DEBATE (May 3, 2019), https://thediplomat.com/2019/05/might-china-withdraw-from-the-un-law-of-the-sea-treaty/ [https://perma.cc/CEW3-BF7V]; Isaac B. Kardon, *China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration*, 13 U. PA. ASIAN L. REV. 1, 3, 5–6, 10, 36 (2018).

21. Bernard H. Oxman, *The South China Sea Arbitration Award*, 24 U. MIA. INT'L & COMP. L. REV. 235, 237 (2017).

22. *See id.* at 240; *Five Years After South China Sea Ruling, China's Presence in Philippines' Waters Is Only Growing*, CNBC (July 9, 2021, 12:57 AM), https://www.cnbc.com/2021/07/09/5-years-after-hague-ruling-chinas-presence-in-south-china-sea-grows.html [https://perma.cc/9BBJ-3H2B].

23. *See* Steven Groves, *The Law of the Sea: Costs of U.S. Accession to UNCLOS*, HERITAGE FOUND. (July 14, 2012), https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos [https://perma.cc/SDD4-A5GQ] (arguing in testimony before the United States Senate Committee on Foreign Relations that "UNCLOS is a controversial and fatally flawed treaty" and that "[a]ccession to the convention would result in a dangerous loss of American sovereignty"); Ted R. Bromund et al., *7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea*, HERITAGE FOUND. (June 4. 2018), https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea [https://perma.cc/UNM7-4QBZ] ("U.S. accession would penalize U.S. companies by subjecting them to the whims of an unelected and unaccountable bureaucracy . . . . If the U.S. accedes to the convention, it will be required to transfer a large portion of royalties generated on the U.S. extended continental shelf to the International Seabed Authority, and, through the authority, to corrupt and undemocratic nations.").

lation of my oath, I opposed it. It is that bad. Mercifully, the Convention's proponents have not brought it back up again recently for Senate ratification.[24]

One final aside on these types of international agreements. The primary argument I hear for why the United States should join these kinds of conventions is to get a "seat at the table."[25] I think this argument is completely indefensible. What actually occurs is that U.S. sovereignty deteriorates for no legitimate gain.

And here is possibly the worst offender of all: "customary international law." First, we should contrast "customary international law" with a similar concept: "public international law." The latter is based in treaties, which involve a legal document that a sovereign state has agreed to abide by.[26] At least, that is the theory respecting treaties.

Customary international law is different. Scholars define it as "[g]eneral principles common to the major legal systems, *even if not incorporated or reflected in customary law or international agreement*."[27] General principles? There are so many problems here. To begin with, *which* legal systems are in view? And who gets to define these general principles? This kind of language sets off emanation – and–penumbra[28] alarm bells for me.

---

24. *See* Raul Pedrozo, *The U.S Position on the U.N. Convention on the Law of the Sea (UNCLOS)*, 97 INT'L L. STUD. 81, 86 (2021) ("Despite . . . overwhelming support [for UNCLOS], Republican opposition doomed U.S. accession and ratification, as thirty-four Republican Senators signed a letter to the Chairman of the SFRC indicating that they would vote against U.S. accession, effectively killing Senate action on the Convention in the 112th Congress.").

25. *See* S. EXEC. REP. NO. 110-9, at 3 (2007) (quoting President George W. Bush's statement to Congress in which he argued that joining UNCLOS would give the U.S. a seat at the table where decisions implicating U.S. interests are made).

26. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (Am. L. Inst. 1987) (explaining that "[i]nternational agreements create law for the states parties thereto").

27. *Id.* § 102(4) (emphasis added).

28. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

What is the through–line here? What distinguishes the Paris Agreement from NATO? Sovereignty.

The United States Congress never ratified the Paris Agreement or the UN Convention on the Law of the Sea.[29] For our purposes, they are dead letters. That is, they are no more legally binding than speeches given by advocates of international regulations on any subject. NATO and the General Agreement on Tariffs and Trade, by contrast, have been ratified by the Senate and embedded into U.S. law through enabling legislation.[30] These are the critical steps to making them law for our purposes. So, as American lawyers, if we are talking about international law that is, in fact, *law*, we are really talking about *domestic* law.

Let me reiterate. For something to be international law that affects our country, it must be backed up by some legitimate force within our domestic legal system. Again, there is no global government in place to enforce international norms.

Now, it is the case that certain policy principles undergirding international agreements—even if not ratified by the Senate—could become part of U.S. domestic law if legislation is introduced, debated, and passed by both houses of Congress. Nonetheless, Congress could not pass legislation that submits the United States to the

---

29. *See* Jessica Durney, Note, *Defining the Paris Agreement: A Study of Executive Power and Political Commitments*, 11 CCLR 234, 234 (2017) ("President Obama did not obtain two-thirds consent from the Senate, and instead, declared the Paris Agreement as a non-binding political agreement, distinct from a treaty, for which he had the power to unilaterally sign."); Will Schrepferman, *Hypocri-sea: The United States' Failure to Join the UN Convention on the Law of the Sea*, HARV. INT'L REV. (Oct. 31, 2019, 9:00 AM), https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/ [https://perma.cc/KH4C-F6RQ] (explaining that the U.S. has not signed the UNCLOS).

30. *See The United States and NATO*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/declassified_162350.htm [https://perma.cc/7LN7-RYGB] (last visited Aug. 7, 2021) ("The Senate ratified the treaty on 21 July 1949 by a vote of 83-13. On 25 July 1949, President Truman and Secretary Acheson signed the Instrument of Accession, making the United States a founding member of NATO."); Elaine S. Povich, *New Era In World Trade Begins As Senate Approves GATT Treaty*, CHI. TRIB. (Dec. 2, 1994), https://www.chicagotribune.com/news/ct-xpm-1994-12-02-9412020142-story.html [https://perma.cc/BQG2-SGJP] ("The Senate on Thursday approved the GATT treaty, the most sweeping expansion of world trade ever.").

whims and powers of a decision–making or dispute resolution body without the ratification of a treaty by two–thirds of the Senate.[31] The reason for this distinction is sovereignty. Binding the U.S. to following the rules and subsequent consequences of an international authority is an explicit surrender of a portion of our sovereignty.[32] The benefits and costs of this must be weighed, and that is why the Senate is the body vested with the power to ratify or reject treaties.[33]

The American people have consented to be bound by these agreements through the decisions of their elected representatives.[34] That is why the "International Seabed Authority" does not—and should not—have the right to make laws for us. Under our Constitution, only Congress has that right, vesting "[a]ll legislative Powers . . . in a Congress of the United States, which shall consist of a Senate and

---

31. U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, *provided two thirds of the Senators present concur*.") (emphasis added); *see also* Rachel S. Brass, Made in the USA Foundation v. United States*: NAFTA, the Treaty Clause, and Constitutional Obsolescence*, 9 MINN. J. GLOB. TRADE 663, 680–83 (2000) (tracing the origin of the treaty clause and its status as the exclusive method for binding the United States to international law); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 115 (1998) ("[C]oncerns are exacerbated when Congress attempts to delegate authority to individuals or entities that lie outside the national government. Congress cannot enforce its standards through the usual legal or political methods when the recipient of the delegated power is not responsible to Congress, the President, or any other federal authority.").

32. *See* Brass, *supra* note 31, at 678 (describing the surrender of certain domestic sovereignty as the defining feature of a treaty as understood by the framers).

33. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1139 (2000) (noting that because the Framers recognized that treaties concern the country's relationship with the rest of the world, "the Senate was to be conjoined with [the President] in the treaty-making process"). *See generally* David Auerswald & Forrest Maltzman, *Policymaking Through Advice and Consent: Treaty Consideration by the United States Senate*, 65 J. POL. 1097 (2003) (detailing the process of Senate advice and consent and its importance to treaty ratification).

34. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the consent of the governed.").

a House of Representatives."[35] It is not an accident that this clarification was included right at the beginning of the Constitution in Article I, section 1. The Framers knew that the most dangerous power within the federal government—that of establishing laws of general applicability backed by the force of the federal government—should be entrusted to the branch of government most accountable to the people at the most regular intervals.[36]

So one of the reasons I am opposed to the lazy, haphazard way people often talk about international law is because we repeat the same mistakes we make in the nondelegation realm.[37] It is just another realm in which Congress delegates its rightful—and nondelegable—lawmaking authority to the President, ambassadors, or, worse, international institutions. This tendency shows up all over the place in the foreign policy context.

Consider how this plays out in the war powers realm. Now, the Framers set very careful parameters around the nation's war powers. After the tyranny of King George III—which the founding generation suffered under both as subjects and as soldiers—the Framers were keen to avoid a dangerous and kingly concentration of power in the hands of one (or a few) people in this arena.[38]

---

35. U.S. CONST. art. I, § 1.

36. *See* THE FEDERALIST NOS. 47–58, 62–63 (James Madison), NOS. 59–61 (Alexander Hamilton) (explaining the power of the legislature, controls over that power, and reasons for vesting the power in a frequently elected House of Representatives that is close to the voting public and a Senate differently selected to attain more consideration and more congruence with state interests, urging that this composition gains the benefits of democracy while checking its deficiencies). *See generally* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006) (stating that treaty power does not serve as a free-standing grant of power to the executive, but rather falls under Congress's necessary and proper clause authority).

37. *See* Brass, *supra* note 31, at 683–84 (describing how the North American Free Trade Agreement violates the nondelegation principle of the Constitution).

38. The Federalist Society, *How Did the Framers Define Executive Power? [No. 86]*, YOUTUBE (Mar. 27, 2019), https://www.youtube.com/watch?v=X04uJV0IfOo&ab_channel=TheFederalistSociety [https://perma.cc/A5VN-HJTQ] ("The Framers looked at all the prerogative powers that historically belonged to the British king, and gave them to multiple branches, to multiple Constitutional actors.").

As James Madison wrote to Thomas Jefferson in 1798, "[t]he constitution supposes, what the History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care vested the question of war in the [Legislature]."[39] So, in Article I, Section 8, the Framers placed the power to declare war in Congress,[40] the branch where open and public debate would happen and the branch most easily held accountable to the people.

Likewise, in Federalist No. 69, Alexander Hamilton pointed to the legislature's power over treaties as one of the key distinctions between our constitutional system and that of England.[41] Under the English system, he wrote, the monarch had the power to take the country to war, which ended—frequently and tragically—in the loss of tears, treasure, and blood.[42] Meanwhile, Parliament had the unenviable task of figuring out how to pay for it.[43] Worse, the King could never be voted out of office, leading to a constant expansion of the executive's (that is, the monarch's) power at the expense of the legislature.[44]

We can also see how this dangerous delegation tendency affects the treaty power. The Framers entrusted the Senate with treaty ratification and the duty to provide "advice and consent" on the President's ambassadorial and other nominees.[45] These responsibilities

---

39. Letter from James Madison to Thomas Jefferson, *in* 6 The Writings of James Madison: Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed 1, 312 (Gaillard Hunt ed., 1906).

40. U.S. CONST. art. I, § 8, cl. 11.

41. THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description.").

42. *Id.* at 416.

43. *Id.* at 418.

44. *Id.* at 414.

45. U.S. CONST. art. II, § 2, cl. 2

were intentionally crafted as "shared powers" by the Framers because they saw the dangers of vesting the full power of foreign relations in the hands of one powerful individual.[46]

Alexander Hamilton understood that the unique status of treaties as both international agreement *and* domestic law made the legislature's involvement crucial. In Federalist Paper No. 75, he wrote:

The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions [making treaties]; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[47]

The powers of treaty–making, selecting who represents the U.S. abroad, committing the United States to obligations and alliances with other nations, and waging war have enormous impacts on our Republic's wellbeing. Use or abuse of these powers can expand the nation's prosperity, security, and influence abroad—or trigger its decline. That is exactly why it is so important that the Senate provides vigorous debate on those decisions, which can serve as a check on those impulses.

Yet, in the modern era, Congress—and specifically the Senate—shies away from exerting its full authority, choosing simply to delegate this responsibility to the executive branch.[48]

---

46. *See* THE FEDERALIST NO. 66, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The security essentially intended by the Constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them.").

47. THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

48. *See, e.g.*, Editorial Board, *Congress Gave the President Too Many Powers. Now It Must Scale Them Back*, WASH. POST (Jan. 10, 2019), https://www.washingtonpost.com/opinions/congress-gave-the-president-too-many-powers-now-it-must-scale-them-back/2019/01/10/ac128504-1508-11e9-803c-4ef28312c8b9_story.html [https://perma.cc/89BD-LQ4M] (explaining that Congress has delegated a significant number of powers to the executive branch); Julian Davis Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, THE ATLANTIC (May 26, 2020), https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/ [https://perma.cc/GL28-QRFD] ("Most government activity in the United States rests on a simple idea: that it's okay for the legislature

And what is the result of this delegation of powers? Consider the treaty power. Now, the Constitution requires that the President submit the treaty to the Senate for ratification, and the Senate must debate and choose to ratify or reject based on a two–thirds threshold.[49] Yet today, the Senate rarely receives treaties for consideration.[50]

A few years ago, when President Obama signed the Joint Comprehensive Plan of Action (JCPOA, also known as the "Iran Nuclear Deal"), I asked then–Secretary of State John Kerry why the President had not submitted the agreement to Congress. His answer struck me as very strange; he said that because there were multiple nations involved, plus some organizations that were not sovereign entities, Senate ratification would not be appropriate. Fortunately, I happened to have the State Department's own definition of "treaty" handy at the time, which expressly included agreements between multiple nations involving nongovernmental organizations.[51] Secretary Kerry then fell back on less persuasive defenses, including, predictably: after "quite a few years trying to get a lot of treaties through the United States Senate," Secretary Kerry claimed, "it has become physically impossible." But that is exactly the point of requiring Senate ratification. If you do not have the votes to submit the treaty for ratification, you should not try to ram it through.

---

to authorize the executive branch to regulate basically anything the legislature itself could reach.").

49. U.S. CONST. art. II, § 2, cl. 2

50. *See U.S. Senate Consideration of Treaty Documents*, U.S. CONG., https://www.congress.gov/search?q=%7B%22source%22%3A%5B%22treaties%22%5D%7D [https://perma.cc/EN8E-R57J] (last visited Aug. 8, 2021). The U.S. Senate received three treaties in 2020, one treaty in 2019, one treaty in 2018, and two treaties in 2017 for consideration from the President.

51. *Treaties and International Agreements*, U.S. DEP'T OF STATE, https://www.state.gov/policy-issues/treaties-and-international-agreements/ [https://perma.cc/9TKC-49EC] (last visited Aug. 6, 2021).

Meanwhile, the President continues to commit the United States to a smorgasbord of international commitments—like the Paris Climate Agreement,[52] the "Iran Nuclear Deal,"[53] and agreements to join the UN Human Rights Council[54] and the World Health Organization[55]—without submitting those agreements to the Senate for ratification. Despite these abuses, and despite the Senate's constitutional obligation, there is little appetite in Congress to restrain the executive from foisting broad international commitments on the American people.

The result? De facto rule by foreign powers. Here, it is worth remembering Washington's warning in his farewell address: "[a]gainst the insidious wiles of foreign influence (I conjure you to believe me, fellow–citizens) the jealousy of a free people ought to be *constantly* awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government."[56]

These twin harms—undercutting American sovereignty and delegating lawmaking power away to the executive or foreign entities—are best remedied by reviving the Constitution's structural

---

52. *Paris Climate Agreement*, THE WHITE HOUSE, (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/ [https://perma.cc/X9N2-ZNF9].

53. Anne Gearan & Karen DeYoung, *Biden Team Exploring How U.S. Might Rejoin Iran Nuclear Deal*, WASH. POST (Feb. 5, 2021, 7:46 PM), https://www.washingtonpost.com/politics/biden-iran-deal/2021/02/05/b968154c-67d7-11eb-886d-5264d4ceb46d_story.html [https://perma.cc/JU6E-A9SS].

54. John Hudson, *U.S. Rejoins U.N. Human Rights Council, Reversing Trump-era Policy*, WASH. POST (Feb. 8, 2021, 10:40 AM), https://www.washingtonpost.com/national-security/us-rejoins-un-human-rights-council-reversing-trump-era-policy/2021/02/08/91694b3e-6a1a-11eb-9ed1-73d434b5147f_story.html [https://perma.cc/ZRW7-8RYL].

55. Emily Rauhala, *Biden to Reengage with World Health Organization, Will Join Global Vaccine Effort*, WASH. POST (Jan. 20, 2021, 7:48 PM), https://www.washingtonpost.com/world/biden-administration-who-covax/2021/01/20/3ddc25ce-5a8c-11eb-aaad-93988621dd28_story.html [https://perma.cc/U4XZ-MAZT].

56. 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 233 (John C. Fitzpatrick ed., 1940). I thank President Washington for accurately characterizing our government as a "republic[]."

protections envisioned by the Framers. These structural protections, as Justice Scalia used to say, form the crucial difference between our Constitution and that of any "tinhorn" dictatorship.[57]

To protect our liberty, the Founding Fathers created horizontal—congressional, judicial, and executive branches—and vertical—states versus federal—protections in our Constitution.[58] These protections are designed to limit the power of government and to expand and protect the space in which "We the People" pursue our happiness together.

The Founding Fathers understood something that has been lost among many in Washington in recent years: government power only expands at the expense of individual liberty. Accordingly, if the purpose of government was the happiness of the people, then success would depend on diffusing power, so that no individual or faction could misuse too much of it.

This logic is no less valid in the foreign policy realm. The case for congressional control over American *war*–making is roughly the same as the case for congressional control over federal *policy*–making writ large. That is, it is a case for *dispersing* political power and placing it in the most diverse, representative, and regularly accountable branch of government suited to the task.

It is not a coincidence that the history of Congress's slow–motion surrender of its constitutional role in the foreign policy realm mirrors its surrender of *domestic* policymaking authority. They both stem from Congress's self–serving, bipartisan, and shameful retreat from constitutional responsibility. The real reason Congress defers to the executive branch on questions of foreign relations and do-

57. Sadly, Justice Scalia never explained the distinction between a "tinhorn" dictator and a regular dictator. *Justices Scalia and Ginsburg on the First Amendment and Freedom*, C-SPAN (Apr. 17, 2014), https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014 [https://perma.cc/7LRP-JQA8].

58. *See* Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991) (quoting U.S. CONST. amend. X) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . The Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'").

mestic policy has nothing to do with the exigencies of modern political or military technocracy—it is just easier to engage in rank punditry than it is to make hard decisions for which you will be held accountable by the people.

This is the problem that James Madison did not entirely foresee. To be sure, he correctly predicted that "[a]mbition must be made to counteract ambition," as the legislature, executive, courts, and state governments all vied for power, achieving balance.[59] But what he did not anticipate was that there would be a concurrent retreat from both federalism *and* the separation of powers, resulting in the cession of powers from the States to the federal government and, within the federal government, from Congress to the executive and the judiciary. This has ultimately resulted in the exact inverse of the Constitutional design: the powers of the federal government are numerous and indefinite, while those of the States are few and strictly defined.

But this is the beauty of Article I: when Congress is "in charge of" making laws, ultimately, the American people are "in charge of" Washington. If you put the power in the right branch, no one person or small group will become too powerful. And that is why it is so important for Congress to reclaim its Article I powers and not delegate its authority to the executive branch, to ambassadors, or to international bodies. We do not want to live under the tyranny of a king—or an international oligarchy in Brussels, or Vienna, or Kingston.

The restoration of constitutional balance through Congress's reclamation of its rightful role in domestic and foreign policymaking is not just one choice among many paths towards stability. It is the only way forward. If you agree, please join me in this noble cause. Let us "re–constitutionalize" the federal government to put the American people back in charge of foreign and domestic policy alike.

59. THE FEDERALIST NO. 51 (James Madison).