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# Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro

David A. Wirth\*

Until recently, the law surrounding executive agreements has been a subject of attention from a relatively small number of academics concerned with foreign relations law, along with State Department lawyers who have a need to deploy the underlying concepts in concrete determinations. Then, with little advance warning, the Paris Agreement thrust legal doctrines surrounding executive agreements to center stage in public policy debates and in the popular press. President Donald Trump's campaign promise to "cancel" the Paris Agreement has drawn even more attention to the issue.<sup>1</sup> Unfortunately, the result has been a great deal of confusion, often needlessly contributing to turbulent confrontations about the contours of the executive agreement power, when clarity and precision instead are called for.

Daniel Bodansky and Peter Spiro<sup>2</sup> appropriately focus on a subset of executive agreements, namely those whose domestic legal authority is a federal statute that does not expressly authorize the executive branch to conclude international agreements.<sup>3</sup> As they note,

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1. See, e.g., Ashley Parker & Coral Davenport, *Donald Trump's Energy Plan: More Fossil Fuels and Fewer Rules*, N.Y. TIMES (May 26, 2016), [https://www.nytimes.com/2016/05/27/us/politics/donald-trump-global-warming-energy-policy.html?\\_r=0](https://www.nytimes.com/2016/05/27/us/politics/donald-trump-global-warming-energy-policy.html?_r=0) [<https://perma.cc/93RC-YLLL>] (archived Feb. 1, 2017).

2. Daniel Bodansky & Peter Spiro, *Executive Agreements*, 49 VAND. J. TRANSNAT'L L. 885 (2016) [hereinafter Bodansky & Spiro].

3. This Response uses the generic term "international agreement" to identify all instruments binding on the United States under international law. The term "treaty" is limited to those international agreements for which the Senate's advice and consent to ratification is necessary or has been given under U.S. Constitution Article II, Section 2. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW, §§ 301, 303 cmt. a (AM. LAW INST. 1987) [hereinafter RESTATEMENT]. The defining feature of an international agreement binding under international law is an intent by the parties to be bound by its terms. See *id.* § 301; 22 C.F.R. § 181 (2014) (State Department regulations establishing standards for identifying international agreements). This attribute is characteristic of

the Paris Agreement is not the first international agreement to be concluded by the United States in this mode.<sup>4</sup> Also as observed in their Article, this is an approach that has been deployed in the past by the executive branch with respect to a number of international environmental agreements, especially those addressing air pollution.<sup>5</sup>

The tone and approach of their Article, unfortunately, risks exacerbating the already fraught, inflammatory, and combative rhetoric surrounding the conclusion of the Paris Agreement and other instruments done as executive agreements based on this theory.<sup>6</sup> While the authors are more than entitled to share subjective impressions of their individual journeys through the law of executive agreements, the Article makes categorical assertions about the Obama administration's approach to executive agreements that can be tested against prior practice and jurisprudence.

In particular, the Article characterizes the Obama administration's practice concerning executive agreements supported, but not necessarily expressly authorized, by extant legislation as

- “the first to self-consciously deploy the concept”;<sup>7</sup>
- “broadly aggressive” in considering legislative authority as domestic legal support for executive agreements;<sup>8</sup>
- “the first to distinguish . . . executive agreements” supported by legislative authority not specifically authorizing international agreements;<sup>9</sup>
- “a . . . choice . . . to roll out a new theory” of executive agreements consistent with existing legislative authority;<sup>10</sup>

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both executive agreements and Article II, Section 2 treaties subject to Senate advice and consent to ratification. Both are “treaties” governed by international law, including in particular the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

4. Bodansky & Spiro, *supra* note 2, at 929.

5. *Id.* at 910–11.

6. See, e.g., Inhofe Statement (R-Okla.) on Final COP 21 Climate Deal (Dec. 12, 2015), <http://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=59BD6386-E65-4A22-81BE-352770A6FFC> [<https://perma.cc/2U7X-VQ9T>] (archived Feb. 1, 2017); *Examining the International Climate Negotiations: Hearing Before the S. Comm. On Environment and Public Works*, 114th Cong., 1st Sess. (Nov. 18, 2015) (Testimony of Julian Ku); Michael Ramsey, *Is the Paris Climate Change Agreement Constitutional? (Part 2)* ORIGINALISM BLOG (Mar. 4, 2017), <http://originalismblog.typepad.com/the-originalism-blog/2016/03/is-the-paris-climate-change-agreement-constitutional-part-2-michael-ramsey.html> [<https://perma.cc/BQ9F-W2AU>] (archived Feb. 1, 2017).

7. See Bodansky & Spiro, *supra* note 2, at 887; see also Bodansky & Spiro, *supra* note 2, at 908.

8. *Id.* at 888.

9. *Id.* at 898.

10. *Id.* at 909.

- “a conscious effort to break out of existing categories” for executive agreements;<sup>11</sup> and
- “mov[ing] to eliminate [prior] substantive limitations” on executive agreements.<sup>12</sup>

That the Article “christens”<sup>13</sup> this category of instruments with the moniker “executive agreements plus,”<sup>14</sup> supposedly “heretofore undiscovered”<sup>15</sup> and a “new practice,”<sup>16</sup> further exacerbates the misleading nature of the Article’s conclusions and the needlessly tendentious tone of the piece. Indeed, the claims of innovative practice—and the accompanying implications of executive overreach—are belied by the authors’ own analysis, which, in its broad outlines, is well taken.

More plausible—although less dramatic—assertions might be made that the Obama administration has utilized this category of executive agreements more frequently than its predecessors, or in more politically contentious contexts. But the authors’ analysis is not aimed at supporting either of these conclusions. In any event, stripped of the dubious claims of novelty and the questionable insinuations of executive overreach, the authors have performed a useful service in drawing attention to a distinct class of executive agreements which, as they somewhat confusingly assert, “have a pedigree in prior practice.”<sup>17</sup>

The lodestone for post-war discussions of the question of “choice of instrument”—that is, the executive’s decision-making juncture between an Article II, Section 2 treaty, subject to Senate advice and consent, as contrasted with an executive agreement relying exclusively on executive branch action as a precondition to entry into force—is Department of State Circular No. 175 (Circular 175), promulgated on December 13, 1955.<sup>18</sup> One purpose of that instrument is “to . . . insure that the function of making treaties and other international agreements is carried out within *traditional* constitutional limits.”<sup>19</sup>

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11. *Id.* at 914.

12. *Id.* at 929.

13. *Id.* at 885.

14. *Id.*

15. *Id.* at 887.

16. *Id.* at 888.

17. *Id.* at 915.

18. U.S. DEPT. OF STATE, CIRCULAR NO. 175 (1955) *reprinted in* 50 AM. J. INT’L L. 784 (1956) [hereinafter Circular 175].

19. *Id.* § 1 (emphasis added). Similar regulations implement the Case-Zablocki Act, 1 U.S.C. § 112b, and can be found at 22 C.F.R. § 181.

As to the crucial treaty versus executive agreement choice, under the heading “Scope of the Executive Agreement-Making Power,” Circular 175 specifically identifies “[a]greements which are made pursuant to or in accordance with existing legislation,” directly addressing precisely the subject matter of Bodansky and Spiro’s Article more than half a century earlier.<sup>20</sup> The original Circular 175 has since been reproduced and updated in the State Department’s Foreign Affairs manual, with the current version dating from 2006. That version continues to identify “legislation” as providing legal support for an international agreement other than a treaty—that is, an executive agreement.<sup>21</sup>

It goes without saying that all international agreements of the United States must be consistent with the Constitution.<sup>22</sup> In the case of an Article II, Section 2 treaty, the Senate’s resolution of advice and consent provides the necessary domestic legal authority.<sup>23</sup> Consequently, the legal authority for the president to enter into a binding executive agreement must be found elsewhere, other than in the Senate’s resolution of advice and consent. Existing legislation, prior Article II, Section 2 treaties, and the president’s own Plenary Powers, are alternative sources of such authority.<sup>24</sup> Of necessity, every provision of

20. Circular 175, *supra* note 18, § 3.

21. See U.S. DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL (F.A.M.) § 723.2-2 (2006) [hereinafter Foreign Affairs Manual], <https://fam.state.gov/fam/11fam/11fam0720.html> [<https://perma.cc/9KPH-LJTH>] (archived Feb. 15, 2017) provides as follows:

International agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are “international agreements other than treaties.” (The term “sole executive agreement” is appropriately reserved for agreements made solely on the basis of the constitutional authority of the President.) There are three constitutional bases for international agreements other than treaties as set forth below. An international agreement may be concluded pursuant to one or more of these constitutional bases:

- (1) Treaty;
- (2) Legislation;
- (3) Constitutional authority of the President.

See also *id.* § 723.2-2(B) (entitled “Agreements Pursuant to Legislation”):

The President may conclude an international agreement on the basis of existing legislation, or subject to legislation to be adopted by the Congress, or upon the failure of Congress to adopt a disapproving joint or concurrent resolution within designated time periods.

Both the Article and this Response concern strictly the first of these two categories, with executive agreements adopted “upon the failure of Congress to adopt a disapproving joint or concurrent resolution within designated time periods” being extraordinarily rare, if not entirely unknown.

22. See RESTATEMENT, *supra* note 3, §302 cmt. b.

23. See *id.* §303 cmt. d.

24. See *id.*

an international agreement done as an executive agreement must be supported by one of these authorities.<sup>25</sup> The converse, however, is not the case. That is, different provisions of an executive agreement may find support in diverse legal sources, in some cases more than one.

Circular 175 also contains procedural provisions requiring written approval from the State Department before the commencement of negotiations, designed primarily to assure coordination among executive departments in anticipation of the conclusion of an international agreement.<sup>26</sup> An important component of the process is a memorandum prepared by the State Department's Office of the Legal Adviser, identifying the legal authority for the proposed agreement. Among other things, these memoranda of law analyze the conclusion of the proposed agreement as either an Article II, Section 2 treaty or an executive agreement, as the case may be, depending on the presence or absence of the relevant legal authority. The memorandum also identifies the potential need for additional statutory enactments required for domestic implementation.<sup>27</sup>

This doctrinal background produces a ready-made template for analyzing the constitutionality of each provision of an executive agreement. The Paris Agreement is an excellent example because its

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25. See *id.* §302 cmt. a.

26. The Article repeatedly uses the word "join" in describing the process by which a state becomes party to an international instrument. This previously colloquial usage has now become sufficiently commonplace that it has even extended to some official instruments. See, e.g., WHITE HOUSE OFFICE OF THE PRESS SECRETARY, U.S.-CHINA JOINT PRESIDENTIAL STATEMENT ON CLIMATE CHANGE ¶ 2 (Mar. 31, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/31/us-china-joint-presidential-statement-climate-change> [<https://perma.cc/K77N-662M>] (archived Feb. 2, 2017). The distinctions among signature ad referendum, ratification, acceptance, approval, accession, and entry into force are nonetheless worth maintaining, particularly in the case of multilateral agreements, as interim procedural junctures before a state becomes party to an international agreement and therefore legally bound by its terms. See Vienna Convention, *supra* note 3, arts. 11–16, 24. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (1998), is an excellent example of the need for such precision. Signed for the United States by Vice President Albert Gore toward the end of the Bill Clinton presidency and never submitted to the Senate for advice and consent, the Protocol nonetheless gave rise to questions about the legal obligations of the United States under it. See Vienna Convention, *supra* note 3, art. 18 (articulating an obligation not to defeat objects and purposes of signed agreement pending decision to refrain from ratification); EMILY C. BARBOUR, CONG. RESEARCH SERV., R41175 INTERNATIONAL AGREEMENTS ON CLIMATE CHANGE: SELECTED LEGAL QUESTIONS 10–15 (Apr. 12, 2010). A state may appropriately be said to "join" an international organization, after which it becomes a member of it, ordinarily after becoming a party to the organization's constituent treaty.

27. Foreign Affairs Manual, *supra* note 21, § 723.4(b). The Circular 175 process also provides for Congressional consultations in appropriate situations. See, e.g., *id.* §§ 722(4), 723.4, 725.1(5). While perhaps desirable in many if not most situations, executive consultations with Congress are not a necessary component of the domestic legal authority underlying an executive agreement.

content overlaps with a variety of domestic legal authorities. In particular, the task is to identify the domestic legal authority for implementation of each of the obligations in an executive agreement by reference to one or more of the following:

- Prior Article II, Section 2 treaties, for which the most likely source is the 1992 United Nations Framework Convention on Climate Change (1992 Framework Convention);<sup>28</sup>
- The president’s plenary powers under Article II, for which the most likely sources are his or her role as chief executive,<sup>29</sup> the president’s function as diplomat in chief for the Nation, including exclusive responsibility and authority for conducting the foreign affairs of the United States,<sup>30</sup> and the responsibility to “take care that the laws be faithfully executed”;<sup>31</sup> and
- Existing legislation, for which the most likely, although not only, source of implementing authority is the federal Clean Air Act.<sup>32</sup>

Many of the binding obligations in the Paris Agreement are procedural in nature, requiring the reporting of emissions, documenting progress in implementation, accounting for emissions, and the like.<sup>33</sup> And consulting with other states is a constitutional power of the president as chief executive, principal diplomat, and the “sole organ” of the nation in dealing with foreign governments.<sup>34</sup> Even in the absence of express statutory or treaty authority, the president may engage in information exchange and cooperation with foreign governments in the environmental field, as demonstrated by numerous

28. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 1771 U.N.T.S. 164 [hereinafter UNFCCC]. See 138 Cong. Rec. 33527 (Oct. 7, 1992) (resolution of advice and consent to Framework Convention). The operative portion of the Paris Agreement, Dec. 12, 2015, art. 2, ¶ 1, U.N. Doc. No. FCCC/CP/2015/L.9/Rev.1, identifies that instrument as “enhancing the implementation of the [Framework] Convention.” An accompanying decision of the Conference of the Parties to the Convention describes the Agreement as adopted “under” the Convention. Report on the Conference of the Parties on Its Twenty-First Session, Dec. 1/CP.21 at I, para. 1, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) (adoption of the Paris Agreement).

29. U.S. CONST. art. II, § 1.

30. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (President is “sole organ of the nation in its external relations”).

31. U.S. CONST. art II, § 3.

32. Clean Air Act, 42 U.S.C. §§ 7401–7671(q) (2012). See also U.S. FIRST NATIONALLY DETERMINED CONTRIBUTION SUBMISSION (2016), <http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf> [https://perma.cc/R7P2-2JGA] (archived Feb. 3, 2017) (identifying domestic legal authorities supporting U.S. nationally determined emissions reduction contribution under Paris Agreement).

33. See, e.g., Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. & INT’L ENVTL. L. 142, 149–51 (2016) (collecting procedural provisions in Paris Agreement).

34. See *Curtiss-Wright*, 299 U.S. 304.

authorities, including a 1980 executive agreement with Canada on acid rain,<sup>35</sup> which was concluded before the Clean Air Act was amended specifically to address this problem.<sup>36</sup>

Similarly, the 1992 Framework Convention, concluded as an Article II, Section 2 treaty, specifically articulates an analogously extensive range of procedural obligations, including emissions reporting, exchange of information, technology transfer, and cooperation in implementation.<sup>37</sup> The 1992 Framework Convention also lays a legal foundation for substantive matters addressed in a binding mode in the Paris Agreement, most notably financial support for developing countries' programs of mitigation (emissions reductions) and adaptation.<sup>38</sup> Domestic statutory authority, such as the Clean Air Act,<sup>39</sup> buttresses the United States' capacity to implement these commitments.

The Third Restatement of the Foreign Relations Law of the United States (Restatement) appears to be a primary source of uncertainty concerning the appropriateness of prior congressional legislation as domestic legal authority for an international agreement concluded by the president without express congressional authorization.<sup>40</sup> Section 303 of the Restatement identifies three categories of executive agreement: (1) those concluded by the president "with the authorization or approval of Congress"; (2) those concluded pursuant to an existing Article II, Section 2 treaty; and (3) those done "on his own authority . . . dealing with any matter that falls within his independent powers under the Constitution."<sup>41</sup> There is no specific mention in the text of Section 303 of the category of executive agreements addressed by Bodansky and Spiro, namely those consistent with, but not expressly authorized by, existing legislation. Comment *e* refers to "Congressional-Executive agreements," which rely for their

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35. Memorandum of Intent Between the Government of the United States of America and the Government of Canada Concerning Transboundary Air Pollution, U.S.-Can., Aug. 5, 1980, T.I.A.S. No. 9856, 32 U.S.T. 2521.

36. See Clean Air Act Amendments of 1990, tit. IV, Pub. L. No. 101-549, 104 Stat. 2399, 2584-634 (codified at 42 U.S.C. §§ 7651-7651(o) (2012)) (acid deposition).

37. See, e.g., UNFCCC, *supra* note 28, art. 4, paras. 1(a)-(b), 2(b) (reporting); art. 4, para. 1(h), art. 5, para. b, art. 6, para. b(i), art. 7, para. 2(b) (exchange of information); art. 4, paras. 1(e), 3, 5 & 8 (technology transfer); art. 4, para. 2(a) & (d) (joint implementation).

38. See, e.g., *id.* art. 4, paras. 3-4, 7, 11.

39. Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (2012).

40. See RESTATEMENT, *supra* note 3, § 303.

41. *Id.* Publicly available drafts and other information concerning the Fourth Restatement, currently in preparation, does not specifically address executive agreements, as distinct from Article II, Section 2 treaties. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW (AM. L. INST., Proposed Official Draft 2017), <https://www.ali.org/projects/show/foreign-relations-law-united-states/> [<https://perma.cc/C2JK-AC7H>] (archived Feb. 3, 2017).

legal authority on legislation that “requires, or fairly implies, the need for an agreement to execute the legislation.”<sup>42</sup>

Of course, neither Circular 175—a unilateral action of the executive branch—nor the Restatement are themselves the law, but the Supreme Court has opined directly on the subject, most notably in *Japan Whaling Ass’n v. American Cetacean Soc’y*.<sup>43</sup> Despite its central importance to the Supreme Court’s jurisprudence on executive agreements, not to mention its environmental and regulatory subject matter, this case is notably absent from Bodansky and Spiro’s Article.

In that case, the Supreme Court expressly concluded that it had the authority to interpret an executive agreement related to the subject matter of a regulatory statute but not expressly authorized by the legislation, thereby necessarily accepting the executive’s capacity to conclude the executive agreement in the first place.<sup>44</sup> The Court, moreover, gave dispositive effect to the executive agreement as juxtaposed with statutory provisions asserted to be in direct conflict with the agreement. *Japan Whaling* is consequently powerful authority not only for the president’s capacity to conclude executive agreements related to congressionally articulated policy mandates, but also for the courts’ capacity to review the legal adequacy of such executive agreements by reference to the underlying statutory directives.<sup>45</sup>

Executive agreements consistent with existing legislation of the variety encountered in *Japan Whaling* are entirely distinct from what are ordinarily known as “sole” executive agreements. As suggested by the title, sole executive agreements are typically understood to be those that rely exclusively on the president’s inherent constitutional powers, without support in either prior treaty or statute.

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42. See RESTATEMENT, *supra* note 3, § 303 cmt. e (observing, in addition, that “most” executive agreements fall into the category of Congressional-Executive agreements).

43. 478 U.S. 221 (1986).

44. *Id.* at 230. *But cf.* David A. Wirth, *A Matchmaker’s Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT’L L. 377, 395 (1992) (criticizing *Japan Whaling* for “contort[ing]” issue of statutory interpretation to harmonize executive agreement with legislative authority).

45. The logical corollary to these principles is that the courts have the capacity to adjudicate the applicability of the domestic legal authority asserted to support an executive agreement, and to conclude that that authority is lacking or that an agreement conflicts with existing legislative authority. Although implied by Supreme Court’s jurisprudence, there are no cases in the Court that expressly reach this conclusion. The power to conclude that an executive agreement lacks domestic legal authority has been sparingly employed by the lower courts as well, but there have been a number of cases reaching the conclusion that an executive agreement conflicts with legislation adopted by Congress. *See, e.g.*, *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953) (holding an executive agreement dealing with trade lacked legal authority due to express conflict with statute), *aff’d on other grounds*, 348 U.S. 296 (1955); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (finding an executive agreement on double taxation lacked legal authority in “amending internal revenue laws by arrangements with foreign governments”).

Historically, sole executive agreements have attracted a great deal of attention because of the potentially unrestricted reach of the power and questions concerning Congress's authority to regulate it.<sup>46</sup>

The current version of the Circular 175 process explicitly clarifies that “[t]he term ‘sole executive agreement’ is appropriately reserved for agreements made *solely* on the basis of the constitutional authority of the President.”<sup>47</sup> It further directs that sole executive agreements may be concluded only “so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority.”<sup>48</sup> Consequently, provisions of executive agreements that overlap with existing statutory authority or treaty authority, as many provisions of the Paris Agreement do, would not presumptively be based on the president's authority to conclude sole agreements.<sup>49</sup>

The root of the problem identified by Bodansky and Spiro concerns the range of executive agreements that are supported by congressional legislation and identified in the Restatement as “Congressional-Executive agreements.”<sup>50</sup> The range of such instruments is enormous and includes the following:

- Those authorized by prior congressional legislation and which do not enter into force until the adoption of subsequent implementing legislation (the form in which free trade agreements have been concluded by the United States since 1974);<sup>51</sup>
- Those concluded by the executive as a consequence of an express legislative authorization or instruction;<sup>52</sup>

46. See, e.g., RESTATEMENT, *supra* note 3, § 303 cmts. h–j, n. 11–12 (discussing the history of executive agreements).

47. See Foreign Affairs Manual, *supra* note 21, § 723.2-2 (emphasis added).

48. See *id.* § 723.2-2(C).

49. Presumably because of their potentially poorly defined limits and their source directly in the Constitution, along with the commensurately larger potential for abuse, “sole” executive agreements historically have been a source of great concern in authorities such as the Restatement. By contrast, those whose legal authority is either legislation or a prior Article II, Section 2 treaty can, additionally, be measured against those authorities to determine the acceptable limits of their scope. See U.S. CONST. art. II, § 2.

50. See RESTATEMENT, *supra* note 3, § 303 cmt. e (“Congress may enact legislation that requires, or fairly implies, the need for an agreement to execute the legislation.”).

51. See *id.* § 303 reporters’ note 9; see also *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1323 (N.D. Ala. 1999), *vacated on other grounds*, 242 F.3d 1300 (11th Cir. 2001) (upholding constitutionality of the North American Free Trade Agreement as Congressional-Executive agreement).

52. See RESTATEMENT, *supra* note 3, § 303 reporters’ note 8 (noting the Congressional-Executive agreement as alternative to treaty).

- Those concluded as a logical consequence of a legislative delegation;<sup>53</sup> and
- Those concluded as consistent with existing legislative authority, but neither expressly nor impliedly authorized by it (the subject of their Article).

Without defining or explicitly identifying the scope of congressional-executive agreements by reference to this typology, the Restatement nonetheless notes that “most” executive agreements have been concluded as congressional-executive agreements, at least implying that the power is broad.<sup>54</sup>

The traditional way of analyzing executive agreements, of which Bodansky and Spiro’s Article is an example, has been to attempt to pigeonhole a particular instrument as a sole or congressional-executive agreement, or as authorized by an Article II, Section 2 treaty. *Japan Whaling*, by contrast, teaches that the relevant question is the presence or absence of legal authority supporting the agreement, recognizing that, for a complicated instrument such as the Paris Agreement, there may be multiple authorities and that the legal support for each of the international obligations must be identified individually.<sup>55</sup> That case also establishes that the executive agreement power extends to and includes all of these four circumstances, including the last—agreements that are consistent with existing legislation but not expressly authorized by it.<sup>56</sup>

*Japan Whaling* further demonstrates that the identification of the underlying legal authority is the beginning, not the end of the inquiry.<sup>57</sup> The content of an agreement—or, more accurately, each of its provisions—must then be measured against the scope and limits of

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53. For example, section 157 of the Clean Air Act, 42 U.S.C. § 7457, formerly provided the Environmental Protection Agency with express legal authority to regulate chemicals contributing to the global problem of stratospheric ozone depletion, and was the legal authority under which the Montreal Protocol on Substances that Deplete the Ozone Layer was negotiated. *See* Protection of Stratospheric Ozone, 52 Fed. Reg. 47,489 (proposed Dec. 14, 1987) (to be codified at 40 C.F.R. pt. 82) (proposing regulation for implementing Montreal Protocol under former section 157 of Clean Air Act, 42 U.S.C. § 7457). In the Clean Air Act Amendments of 1990, section 157 was repealed and replaced with a new and considerably more detailed statutory directive tracking the Montreal Protocol, which now provides the statutory authority for that instrument. 42 U.S.C. §§ 7671–7671(q).

54. *See* RESTATEMENT, *supra* note 3, § 303, reporters’ note 8 (“As of June 1, 1983, the United States was a party to 906 treaties and 6571 executive agreements, most of them Congressional-Executive agreements.”). From 1939 through 2013 the United States concluded about 17,300 executive agreements, by contrast with approximately 1,100 treaties in the constitutional sense. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 5 (2015).

55. *Japan Whaling*, 478 U.S. at 221.

56. *Id.*

57. *Id.*

the underlying authority. The rather obsessive preoccupation with slotting executive agreements into one or another category in a binary, blinkered, “yes/no” effort has all too frequently been an unfortunate distraction from the often far more nuanced and painstaking comparison required between each provision of an executive agreement and the scope of the underlying domestic authority.

There is consequently a need for practitioners and scholars to match the provisions of executive agreements with corresponding and sometimes complicated domestic regulatory subject matter.<sup>58</sup> Bodansky and Spiro acknowledge as much in their discussion of the Minamata Convention on Mercury (Minamata Convention), a major multilateral environmental instrument concluded by the Obama administration as an executive agreement.<sup>59</sup> The authors lament that “the State Department did not specify the legal basis for concluding the agreement.”<sup>60</sup>

While greater transparency as to the underlying legal authority would be very much welcome, this situation is unfortunately the norm, as the Circular 175 process is not ordinarily public and the associated documentation is not infrequently classified.<sup>61</sup> That, however, does not mean that the underlying legal authority does not exist, or that the president lacks the authority to conclude the agreement. In the case of the Paris Agreement, moreover, the United States expressly disclosed the domestic regulatory authorities on which it relies for implementation of its pledge in its submission to the UN-sponsored process accompanying the conclusion of the instrument.<sup>62</sup> For the Minamata Convention, the Environmental Protection Agency (EPA) has publicly released an analysis relating the Convention’s requirements to domestic regulatory authorities.<sup>63</sup>

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58. This is the sort of inquiry anticipated in principle by such efforts as Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008). See also Ryan Harrington, *Understanding the “Other” International Agreements*, 108 L. LIBR. J. 343 (2016).

59. Minamata Convention on Mercury, Oct. 10, 2013, (not in force) <https://treaties.un.org/doc/Treaties/2013/10/20131010%2011-16%20AM/CTC-XXVII-17.pdf> [<https://perma.cc/EX8P-ANLD>] (archived Feb. 14, 2017) [hereinafter Minamata Convention].

60. Bodansky & Spiro, *supra* note 2, at 910–11.

61. A useful suggestion in this regard might be a voluntary modification of executive branch practice under the Case-Zablocki Act, 1 U.S.C. § 112b, in effect a reporting statute requiring Congressional notification of concluded agreements.

62. U.S. FIRST NATIONALLY DETERMINED CONTRIBUTION SUBMISSION, *supra* note 32.

63. See Minamata Convention, *supra* note 59; see also *What EPA is Doing to Reduce Mercury Pollution, and Exposures to Mercury*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/mercury/what-epa-doing-reduce-mercury-pollution-and-exposures-mercury> [<https://perma.cc/2X9M-UK8K>] (archived Feb. 6, 2017).

Even in the absence of express identification of supporting domestic legal authorities, this task readily yields to the deployment of straightforward research skills routinely taught to law students in the United States. As one might expect from a comprehensive regulatory scheme designed to address environmental and public health threats from this highly toxic element, the Minamata Convention governs emissions to the air,<sup>64</sup> releases to soil and water,<sup>65</sup> management of mercury-containing wastes,<sup>66</sup> contaminated sites,<sup>67</sup> trade in mercury and its alloys,<sup>68</sup> and regulation of mercury-containing products and processes in which it is employed.<sup>69</sup> Most obviously, specific domestic statutory enactments address mercury directly. The Mercury Export Ban Act prohibits exports of elemental mercury from the United States,<sup>70</sup> and the Mercury-Containing and Rechargeable Battery Management Act phases out the use of mercury in batteries and provides for the efficient and cost-effective disposal of nickel-cadmium and other batteries.<sup>71</sup>

Regulations adopted under the delegated authority of under familiar domestic environmental authorities track other portions of the Convention. The Clean Air Act's provision dealing with toxic air pollutants<sup>72</sup> identifies mercury by name and contains an express mandate to the EPA to address mercury from power plants.<sup>73</sup> Notably, although the EPA's major rules with respect to mercury from power plants were successfully challenged in the Supreme Court,<sup>74</sup> there was no noticeable impact of that case on the capacity of the United States to implement the Minamata Convention. The EPA has adopted rules<sup>75</sup>

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64. Minamata Convention, *supra* note 59, art. 8.

65. *Id.* art. 9.

66. *Id.* arts. 10, 11.

67. *Id.* art. 12.

68. *Id.* arts. 3.

69. *Id.* arts. 4, 5.

70. 15 U.S.C. § 2611 (2011).

71. 42 U.S.C. §§ 14301–14336 (2002).

72. 42 U.S.C. § 7412 (2010) (air toxics).

73. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9303 (Feb. 16, 2012).

74. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). After the Supreme Court's decision, the United States Court of Appeals for the District of Columbia Circuit ruled that the rule could remain in place while EPA answered the Court's objections to it, and remanded the rule to EPA. *White Stallion Energy Center L.L.C. v. EPA*, No. 12-1100, 2015 WL 11051103 (D.C. Cir. Dec. 15, 2015), *cert. denied sub nom. Michigan v. EPA*, 136 S. Ct. 2463 (2016).

75. Effluent Limitations Guidelines and Standards for the Dental Category (Dec. 15, 2016), [https://www.epa.gov/sites/production/files/2016-12/documents/dental-office-category\\_final\\_prepub\\_12-15-2016.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/dental-office-category_final_prepub_12-15-2016.pdf) [<https://perma.cc/VM7A-UAZM>] (archived Apr. 11, 2017). See *Dental Effluent Guidelines Documents*, ENVTL. PROT. AGENCY,

on discharges of mercury from dental offices into municipal sewage treatment plants under the Clean Water Act.<sup>76</sup> These regulations were adopted in final form by the Obama administration, but were subsequently “frozen” by one of President Trump’s first actions as President.<sup>77</sup> That action, however, does not of itself call into question the Agency’s capacity to adopt these rules,<sup>78</sup> which is the relevant inquiry for determining the existence of statutory authority in support of an executive agreement relying on this power.

Applying this same rubric to the Paris Agreement, there is no evidence of executive overreach. To the contrary, even the most cursory review of the text of the Paris Agreement discloses a careful, purposeful alternation between the mandatory “shall”—indicating a binding obligation in the form of an executive agreement, governed by international law—and the hortatory “should”—non-binding statements of strictly political intent without legal force.<sup>79</sup> Indeed, the U.S. delegation held up the final moments of the conference that adopted the Paris Agreement over the should/shall distinction in an important provision of the agreement addressing the need for developed-country parties to undertake increasingly ambitious emissions reductions goals over time.<sup>80</sup> If anything, the executive branch may have been excessively cautious in interpreting its legal

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<https://www.epa.gov/eg/dental-effluent-guidelines-documents> (last visited Apr. 11, 2017) [<https://perma.cc/G4PS-EYV4>] (archived Apr. 11, 2017).

76. 33 U.S.C. §§ 1251–1376 (2011). Mercury is specifically referenced in the Toxic Pollutant List in section 307(a)(1) of the Clean Water Act, 33 U.S.C. § 1371(a)(1) (toxic water pollutants). *See* 40 C.F.R. § 401.15 (2016) (“mercury and compounds”). For example, the EPA has promulgated effluent limitations governing releases of mercury to surface waters for any number of categories of point sources under the statute, including manufacturing facilities for zinc anode batteries (40 C.F.R. §§ 461.71 & .72); ore mines and mills (40 C.F.R. §§ 440.42 & .43); commercial hazardous waste combustors (40 C.F.R. §§ 444.13 & .15); facilities producing chlorine and sodium or potassium hydroxide (40 C.F.R. §§ 415.62 & .63); tanker trucks and containers transporting chemical or petroleum cargoes, 40 C.F.R. §§ 442.11 & .13); and barges and tankers transporting chemical or petroleum cargos (40 C.F.R. §§ 442.31 & .33).

77. *See* Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8436 (Jan. 24, 2017).

78. The legality of this action has been challenged. *See* Complaint for Declaratory and Injunctive Relief, NRDC v. EPA, No. 17-cv-751 (S.D.N.Y. Feb. 1, 2017), <http://www.jurist.org/paperchase/NRDC%20complaint.pdf>, [<https://perma.cc/PKL8-VV9H>] (archived Apr. 11, 2017).

79. *See, e.g.,* Bodansky, *supra* note 33. Non-binding undertakings in principle are not international agreements, and hence are not subject to Senate advice and consent. *See, e.g.,* Michael D. Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. REV. 133, 188 (1998).

80. *See* David A. Wirth, *Cracking the American Climate Negotiators’ Hidden Code: United States Law and the Paris Agreement*, 6 CLIMATE L. 152, 153 (2016).

authority by declining to accept binding substantive emissions goals as part of the Paris Agreement.<sup>81</sup>

If this sounds like the stuff of domestic regulation and administrative law, that is because it is. Executive agreements such as the Minamata Convention are frequently the interface between municipal regulatory regimes on the one hand and the high politics of international lawmaking on the other. At least in the United States, traversing these divides requires that international lawyers become skilled in the language of delegation, rulemaking, and administrative law, and symmetrically requires regulatory lawyers to master the complexities of international lawmaking and multilateral agreements. To that extent, the Minamata Convention and the Paris Agreement are harbingers of the future of both administrative and international law, suggesting the need for a significant amplification of the skill set required in both areas, not only from the lawyers of the future but also of the present.<sup>82</sup>

Purple prose aside, Bodansky and Spiro have performed a service in drawing attention to executive agreements concluded under or in accordance with the president's constitutional power and consistent with, but not expressly authorized by, domestic regulatory authority. Leaving aside the question whether the Obama administration has demonstrated a preference for such executive agreements in an era of divided government, as a matter of principle the phenomenon they purport to "christen" as "executive agreements plus" enjoys a long and solid history in both practice and jurisprudence. And, perhaps more to the point, the legality of this category of executive agreement can be tested by measuring the international agreement against the underlying domestic legal authorities. Perhaps the most important message from this exchange would be a plea to the reporters for the Fourth Restatement of the Foreign Relations Law of the United States expressly to identify this sub-category of executive agreements and to describe their appropriate scope, breadth, and limits, consistent with existing jurisprudence.

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81. See David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515 (2015) (analyzing president's authority to adopt binding emissions reduction obligations in Paris Agreement as executive agreement).

82. The debate over the Anti-Counterfeit Trade Agreement (ACTA) discussed in the Article has a similar shape, with the Executive Branch citing existing statutory authority in response to criticism of the anticipated conclusion of the instrument as an executive agreement. Compare Jack Goldsmith, *The Doubtful Constitutionality of ACTA as an Ex Ante Congressional-Executive Agreement*, LAWFARE (May 21, 2012), <https://www.lawfareblog.com/doubtful-constitutionality-acta-ex-ante-congressional-executive-agreement> [<https://perma.cc/J4XN-CUCM>] (archived Feb. 6, 2017) with Letter from Harold Hongju Koh, Legal Adviser, Dep't of State, to Hon. Ron Wyden (D-Oregon) (Mar. 6, 2012), <http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf> [<https://perma.cc/U6UZ-2PD9>] (archived Feb. 6, 2017).

In short, the president has the power to enter into agreements that are consistent with, but not necessarily expressly authorized by, prior statute, that authority was recognized by the Supreme Court at the latest three decades ago, and exercise of that prerogative has a lengthy history in executive branch practice. Regardless of the extent to which the Obama administration has or has not utilized this category of executive agreements, there is little or no basis either in history or law to suggest that the practice is somehow different in kind from that which preceded it. Whether this is desirable as a matter of constitutional doctrine is a subject of legitimate debate. But, to suggest that the Obama administration's application of well-received principles is new and questionable, and that it lacks discernible standards and limits, distracts from rather than enhances the intellectual integrity of that discussion.

That said, the reason that Bodansky, Spiro, practitioners, scholars, and the author of the present Response focus so attentively on executive agreements is the structural potential for abuse, given the unilateral and largely unchecked nature of the power. As Bodansky and Spiro correctly observe, presidents have obvious incentives to stretch the limits of the executive agreement power. Although the view that previous executives have been cautious and sparing in the exercise of the executive agreement authority may be contested, the need for continued vigilance is a proposition as to which there should be a consensus. Fortunately, the same legal tests that allowed the Obama administration constitutionally to adopt the Minamata Convention, the Paris Agreement, and other instruments as executive agreements have concomitantly clear outer limits that, at least in principle, protect against executive overreach in situations in which there is greater cause for doubt.