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JCP-NO-WAY: A CRITIQUE OF THE IRAN NUCLEAR DEAL AS A NON-LEGALLY-BINDING POLITICAL COMMITMENT

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"Since it costs a lot to win, and even more to lose, you and me bound to spend some time wonderin' what to choose…Wait until that deal come 'round. Don't you let that deal go down."[1]

Introduction

The 2015 Joint Comprehensive Plan of Action – commonly and hereafter referred to as the JCPOA or Iran Nuclear Deal is a paradigm-shifting agreement in contemporary international politics. The deal was met by significant praise in the arms control community, but has also come under heavy criticism from arms control, nuclear nonproliferation, and public international law scholars and experts.[2] The message of the agreement has been scrutinized as permitting

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[1] JERRY GARCIA, GARCIA (Warner Bros. 1972).

[2] *See, e.g.*, David Jonas, *Five Reasons Why the Iran Nuclear Deal is Still a Really Bad Idea*, WAR ON THE ROCKS (Oct. 14, 2015), https://warontherocks.com/2015/10/five-reasons-why-the-iran-nuclear-deal-is-still-a-really-bad-idea/; Mark Dubowitz, *How to Get a Better Deal With Iran*, FOREIGN POL'Y (Aug. 17, 2015), http://foreignpolicy.com/2015/08/17/how-to-get-a-better-deal-with-iran-congress-reject-nuclear-treaty/; Eric Edelman & Ray Takeyh, *On Iran, Congress should just say no*, WASH. POST (Jul. 17, 2015), https://www.washingtonpost.com/opinions/on-iran-congress-should-just-say-no/2015/07/17/56e366ae-2b30-11e5-bd33-395c05608059_story.html?utm_term=.083181678a71; John Bolton, *A U.N. Vote is Irrelevant to the Iran Deal*,

unprecedented enrichment and reprocessing to an antagonistic and non-compliant state, seemingly as a reward for violating its IAEA Safeguards Agreement and a string of United Nations Security Council resolutions.[3] It has been criticized for lack of U.S. participation in ongoing verification measures and for a frontloaded benefit to Iran, among other issues.[4] Others have applauded the deal as implementing an unprecedented verification scheme in response to an emerging crisis.[5] The purpose of this article, however, is not to analyze the content of the agreement or its merits, but rather to place its structure and nature as a non-legally-binding political commitment within the historical context of American treaty-making, legislative, and international political norms. Reviewed in this light, the Iran Nuclear Deal is a true anomaly: it is the only highly significant nonproliferation agreement to be negotiated as an unsigned non-binding political commitment in modern American history. Even among political statements, the Iran Nuclear Deal is unique not only in its importance, but in being concluded without even a signature from any state party to the agreement. [6]

WALL ST. J. (Mar. 16, 2015), https://www.wsj.com/articles/john-bolton-a-u-n-vote-is-irrelevant-to-the-iran-deal-1426547690.

[3] *See, e.g.*, Bolton, *supra* note 2; Jonas, *supra* note 2; John Bolton, *The consequences of a bad deal with Iran*, L.A. TIMES (July 26, 2015), http://www.latimes.com/opinion/op-ed/la-oe-bolton-iran-military-option-20150726-story.html.

[4] *See, e.g.*, Michael R. Gordon, *Verification Process in Iran Deal is Questioned by Some Experts*, N.Y. TIMES (July 22, 2015), https://www.nytimes.com/2015/07/23/world/middleeast/provision-in-iran-accord-is-challenged-by-some-nuclear-experts.html; *See also* Interview by Wolf Blitzer with Susan Rice, National Security Advisor to President Barack Obama, in Washington, D.C. (July 15, 2015); Wolf Blitzer and Susan Rice, *Does the deal restrict Iran's ability to buy weapons?*, CNN: THE SITUATION ROOM (July 15, 2015) http://cnnpressroom.blogs.cnn.com/2015/07/15/does-the-deal-restrict-irans-ability-to-buy-weapons/ (providing transcript of interview, including Rice's comment: "No Americans will be part of the IAEA inspection teams.").

[5] *See, e.g.*, William J. Broad, *29 U.S. Scientists Praise Iran Nuclear Deal in Letter to Obama*, N.Y. TIMES (Aug. 8, 2015), https://www.nytimes.com/2015/08/09/world/29-us-scientists-praise-iran-nuclear-deal-in-letter-to-obama.html; Alex Eremenko, Ali Arouzi, & Brinley Bruton, *Iran Nuclear Deal: World Reacts with Praise, Caution and Criticism*, NBC NEWS (Apr. 3, 2015), https://www.nbcnews.com/storyline/iran-nuclear-talks/iran-nuclear-deal-world-reacts-praise-caution-criticism-n335106.

[6] This article focuses mainly on the form of international agreements, not the inclusion of signatures. However, the authors believe that a lack of signature makes an agreement like the Iran Nuclear Deal appear less formal or worthy of commitment.

To clarify, the authors do not argue that the Iran Nuclear Deal was unconstitutional or illegal, but rather that it was novel and inappropriate as it substituted a nonbinding political document for what would normally have been handled in a legally binding document, which is nearly always the initial goal of such negotiations.

Treaties, Executive Agreements, and the United States

It would be difficult to discuss the Iran Nuclear Deal's place in the context of American treaty-making practice and doctrine without first presenting a general discussion of the international agreement in United States domestic law and policy. In international law, any international agreement concluded between parties in written form and governed by international law amounts to a treaty. [7] Such treaties may be bilateral – between two states – or multilateral – between many states. Article II of the United States Constitution, however, considers only those international agreements entered into with the advice and consent of the Senate (requiring a two-thirds majority) to be treaties.[8] Many other agreements between the United States and another state or states are considered treaties in international law, but not under U.S. domestic law. Agreements that the Vienna Convention on the Law of Treaties (VCLT) would designate as "treaties" are, as a matter of domestic U.S. law, of two different categories: Article II treaties and agreements other than Article II treaties – also known as executive agreements. Even though Article II treaties and executive agreements are created through different domestic procedures, they are both treaties at international law.

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

Legally binding agreements that are not Article II treaties generally fall into two categories: congressional-executive agreements and presidential-executive agreements (sometimes called sole-executive agreements).[9] Congressional-executive agreements are international agreements predicated on the authority of legislative action; a law is passed authorizing or initiating a new international agreement.[10] Congressional-executive agreements come in two forms: Congress can prospectively pass a statute authorizing negotiation and conclusion of an agreement or it may retrospectively legislate support after negotiation and execution of an agreement. Presidential-executive agreements are conducted on the President's authority alone, without a legislative grant, and stem from powers designated by the Constitution to the Executive.[11] They tend to involve lower-priority matters that neither require nor merit congressional attention.[12] Each of these agreements under U.S. law – treaties, congressional-executive agreements, and presidential-executive agreements – are legally binding and are considered international agreements governed by international law.[13]

But not every interaction in foreign affairs is predicated on the strength of international law. The United States and foreign governments have a long-recognized practice of drafting joint statements of policy or intent.[14] Such statements are politically (but not legally) binding on the states participating in the agreement.[15] These political statements, which used to be referred to as

[9] A third type of agreement, treaty executive agreements, exists but is not relevant to a discussion of the Iran Nuclear Deal.
[10] U.S. DEP'T OF STATE, FOREIGN AFF. MANUAL, 11 FAM § 723.2-2(B) (2006); BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 204-205 (6th ed. 2011).
[11] 11 FAM § 723.2-2(C); CARTER & WEINER, *supra* note 10, at 206-207.
[12] CARTER & WEINER, *supra* note 10, at 206-207.
[13] JOHN NORTON MOORE, GUY B. ROBERTS & ROBERT F. TURNER, NATIONAL SECURITY LAW & POLICY 974-977 (3d ed. 2015).
[14] *Id.* at 976-977.
[15] *Id.*

"gentlemen's agreement[s]," incur no obligation under international law.[16] Essentially, violating the terms of a political commitment or withdrawing without notice involves no legal liability; the parties are bound by nothing but the political consequences of going back on their word. If a state party to a political commitment determines that its interests are better served by abruptly abandoning the agreement established by the political commitment without notice, it may do so unilaterally without legal repercussion, although there may be political consequences. As one might assume, when parties are bound by their word and not the law, a great deal of trust must – or at least *should* – exist between the parties negotiating such a statement if adherence to its terms is important. Because they are not legally binding, political statements are not usually the appropriate format for high-stakes international agreements, particularly if the parties do not have significant and long-standing trust between them.

For example, the multilateral export control regime rests upon non-legally binding agreements, and works rather well. But these agreements – the Nuclear Suppliers Group, Australia Group, Missile Technology Control Regime, and Wassenaar – while they are indeed arms control agreements of a sort, are easily distinguishable from the JCPOA.

The Iran Nuclear Deal

The Iran Nuclear Deal has been well-documented in American media and politics, but requires a thorough analysis of effect and structure in order for us to examine its place in American international affairs. As a non-nuclear-weapon state (NNWS) party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), [17] Iran has a right to peaceful uses of nuclear energy, but is prohibited from manufacturing, seeking to manufacture, or receiving transfer or

[16] GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 71 (2009).
[17] Treaty on the Non-Proliferation of Nuclear Weapons, art. II & IV, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) (ratified by Iran Feb. 2, 1970) [hereinafter NPT].

control of nuclear weapons or other nuclear explosives. Pursuant to its duties under Article III of the NPT, Iran ratified a Safeguards Agreement and signed the Additional Protocol thereto with the International Atomic Energy Agency (IAEA).[18] The comprehensive Safeguards Agreement and its Additional Protocol were meant to ensure IAEA verification that Iran has a purely peaceful nuclear energy program and is not pursuing nuclear weapons.[19]

While the NPT explicitly prohibits NNWS from developing nuclear weapons, it is silent on uranium enrichment and reprocessing, which are the key steps that a state must master to produce nuclear weapons. But these technologies need not be mastered to have a civil nuclear power program, since low enriched fuels are widely available on the commercial market. The fact that Iran refused to consider this option is further indication of its intent. This is a policy dilemma, because a state cannot begin a fully independent nuclear energy program without control over the full nuclear fuel cycle, including the ability to enrich uranium or reprocess spent fuel. However, the ability to independently enrich and reprocess is a clear path to a nuclear weapons program. In many cases of NNWS seeking to develop peaceful nuclear energy programs, this lack of clarity on enrichment and reprocessing represents a foreign relations quagmire. However, in the case of Iran, the international community was quite clear: on July 31, 2006 after Iran's undeclared nuclear activities and materials violated its Safeguards Agreement and Additional Protocol, a U.N. Security Council Resolution (UNSCR)[20] ordered the suspension of all enrichment and reprocessing by Iran. So, while the right for NNWS to enrich and reprocess may be an open question under the NPT, it was unequivocally illegal per international law for

[18] Agreement Between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, June 19, 1973, 954 U.N.T.S. 91 (ratified by Iran May 15, 1974). Iran has not ratified the Additional Protocol, but it has signed and provisionally agreed to follow its terms.

[19] INT'L ATOMIC ENERGY AGENCY, SAFEGUARDS LEGAL FRAMEWORK, https://www.iaea.org/topics/safeguards-legal-framework.

[20] S.C. Res. 1696 (July 31, 2006) [hereinafter 1696].

Iran to enrich or reprocess after 2006.[21] This is a vitally important point, since if Iran wished to show the world its peaceful intentions, the path was wide open to do that by simply importing fuel rods to burn in its reactors, rather than producing them indigenously. Iran's argument that they require nuclear power is patently ridiculous on its face, given that the country is sitting on a sea of oil, and oil provides much cheaper energy than nuclear power does.

The July 2006 UNSCR endorsed a U.S., U.K., German, French, Russian, and Chinese proposal (referred to as the E3/EU+3) to form an agreement with Iran related to its nuclear program.[22] A subsequent UNSCR in 2006[23] imposed sanctions on Iran for its continued failure to adhere to the Security Council's mandate that Iran cease enrichment and reprocessing. A series of later UNSCRs[24] tightened and expanded these sanctions significantly, including prohibitions on enrichment and centrifuge research. The prospect of lifting those sanctions became the basis for the negotiation of the Iran Nuclear Deal – the actualized agreement proposed by the E3/EU+3 in the July UNSCR.

The U.S. State Department describes the Iran Nuclear Deal as follows:

> *On July 14, 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union (EU), and Iran reached a Joint Comprehensive Plan of Action (JCPOA) to ensure that Iran's nuclear program will be exclusively peaceful. October 18, 2015 marked Adoption Day of the JCPOA, the date on which the JCPOA came into effect and participants began taking steps necessary to implement their JCPOA commitments. January 16, 2016, marks Implementation Day of the JCPOA. The International Atomic Energy Agency (IAEA) has verified that Iran has implemented its key nuclear-related measures described in the JCPOA, and the Secretary of State has confirmed the IAEA's verification. As a result of Iran verifiably meeting its nuclear*

[21] *Id.*; *see also* U.N. Charter art. 40, June 26, 1945.
[22] 1696, *supra* note 20.
[23] S.C. Res. 1737 (Dec. 23, 2006).
[24] S.C. Res. 1929 (June 9, 2010); S.C. Res. 1835 (Sept. 27, 2008); S.C. Res. 1803 (Mar. 3, 2008).

> *commitments, the United States and the EU have lifted nuclear-related sanctions on Iran, as described in the JCPOA.*[25]

While this article is focused on the form of the agreement, some detail on what is included in its terms will be important in establishing the deal's significance in international law and U.S. arms control and nonproliferation interests. The deal requires Iran to dispose of or phase out most of its enriched uranium and centrifuges, but authorizes Iranian enrichment of up to 300 kilograms of uranium enriched up to 3.67 percent at its Natanz plant.[26] The deal also permits Iran to rebuild and redesign a modern heavy water research center at Arak.[27] In exchange for the authorization of nuclear enrichment and lifting nuclear sanctions against Iran, the Iranian nuclear program is subject to relatively strict limitations and verification procedures.[28] The JCPOA has repercussions beyond Iran, as Section IV of the agreement's preamble appears to treat enrichment as a right reserved to all NPT NNWS.[29] This means that other NNWS may potentially rely on the Iran Nuclear Deal as political precedent for their own enrichment and reprocessing programs. After all, how can the United States now request that NPT-compliant NNWS not enrich once Iran has negotiated its way into enrichment after committing significant violations of international law?

Arms Control Agreements—An Introduction

[25] *Joint Comprehensive Plan of Action*, U.S. DEP'T OF STATE, July 14, 2015, http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/ (treaty text at https://www.state.gov/documents/organization/245317.pdf) [hereinafter JCPOA or Iran Nuclear Deal]. The authors note that the current State Department description of the Iran Nuclear deal is a carry-over from the Obama administration. The current administration would, without doubt, describe the agreement far less positively.
[26] JCPOA, *supra* note 25, at 6.
[27] *Id.* at 6-7.
[28] *See* ARMS CONTROL ASSOCIATION, SOLVING THE IRANIAN NUCLEAR PUZZLE: THE JOINT COMPREHENSIVE PLAN OF ACTION, SECTION 3: UNDERSTANDING THE JCPOA (2015), https://www.armscontrol.org/reports/Solving-the-Iranian-Nuclear-Puzzle-The-Joint-Comprehensive-Plan-of-Action/2015/08/Section-3-Understanding-the-JCPOA.
[29] *Id.* at 3.

In examining nearly a century's-worth of important international agreement-making, some relevant trends emerge. Of note, history and practice suggest that consequential and salient multilateral arms control and nonproliferation agreements like the Iran Nuclear Deal have consistently been negotiated as formal Article II treaties.[30] Less significant agreements that are still important have at times been conducted as congressional-executive agreements. While arms control agreements have been conducted as executive agreements instead of Article II treaties at times, arguably none have altered the nonproliferation regime to the same extent as the Iran Nuclear Deal, and significant agreements have long been executed pursuant to either legislative or treaty authority.[31] Those agreements that have been negotiated as presidential-executive agreements have generally reiterated previous treaty commitments, emphasized or repeated confidence-building measures, or have explicitly referenced Congressional approval or allocation of funding.[32] Non-binding political commitments in arms control and nonproliferation are scarce, and significant landscape-altering political commitments in the nonproliferation and arms control arenas are almost non-existent outside of the Iran Nuclear Deal.[33]

[30] KRUTZ & PEAKE, *supra* note 16, at 15, 90, 92.
[31] 22 U.S.C. §§ 2551-2595c (2012) [hereinafter the Arms Control and Disarmament Act]; U.S. CONG. RESEARCH SERVICE, S. COMM. ON FOREIGN RELATIONS, 106TH CONG., STUDY ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 41, 246 (S. Print 2001) [hereinafter Senate Study].
[32] Memorandum of Understanding on Notifications of Missile Launches (Dec. 16, 2000), http://www.state.gov/t/isn/4954.htm [hereinafter PLNS MOU]; Memorandum of Agreement Between the United States of America and the Russian Federation on the Establishment of a Joint Center for the Exchange of Data from Early Warning Systems and Notifications of Missile Launches, (June 4, 2000), http://www.state.gov/t/avc/trty/187151.htm; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Notification of Launches of Intercontinental Ballistic Missiles and Submarine-Launched Ballistic Missiles, May 31, 1988, 27 I.L.M. 1200; Memorandum of Agreement on the Establishment of Nuclear Risk Reduction Centers, Sept. 15, 1987, 1530 U.N.T.S. 26557 [hereinafter Nuclear Risk Reduction Centers]; Agreement on the Prevention of Nuclear War, U.S.-U.S.S.R., June 22, 1973, 24 U.S.T. 1478; Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R., May 25, 1972, 23 U.S.T. 1168; Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, U.S.-U.S.S.R., Sept. 30, 1971, 22 U.S.T. 1590.
[33] The authors note that a series of moratoria on nuclear weapons testing and U.S.-U.S.S.R. agreements concerning strategic nuclear agreements – to extend the application of a treaty that was expiring, not to undercut a treaty, or to act in accordance with the terms of a treaty that had not yet come into force—are omitted from analysis in this

Arms Control Agreements Executed as Treaties

While the twentieth and twenty-first centuries have seen a burgeoning of executive agreements in place of Article II treaty-making, arms control agreements are still primarily conducted by treaty.[34] In fact, Congress made its intent explicit to remain an active participant in arms control with the Arms Control and Disarmament Act, [35] which prohibited the executive from reducing armaments except pursuant to an Article II treaty or legislative act. And, while the existence of congressional-executive arms control agreements will be discussed *infra*, it is clear that the most consequential arms control and nonproliferation agreements have been, and still are, submitted as Article II treaties. This is the case even when it is unclear that the Senate will grant advice and consent.[36] But the Senate has actually been a friend to the President in international agreement-making: it has rarely denied advice and consent; its amendments have proved valuable without unreasonably modifying treaties; and its partisan identity has not been indicative of its ability to pass important arms control and nonproliferation agreements.[37]

Negotiating arms control agreements as treaties is established practice in American international relations.[38] The authors have compiled, in an Appendix to this article, a

article. The 1991 Presidential Nuclear Initiatives under which President George H.W. Bush and President Mikhail Gorbachev substantially reduced their naval nuclear weapons, is also omitted. These are non-legally-binding policy declarations, but are omitted because—unlike the Iran Nuclear Deal—they are not based on any document. The moratoria against nuclear testing were also unilateral, which readily distinguishes them from the Iran Nuclear Deal. Some other significant executive agreements, such as the Paris Climate Agreement, are omitted from discussion in this article because they are not relevant to arms control or nuclear nonproliferation.

[34] Senate Study, *supra* note 31, at 246; KRUTZ & PEAKE, *supra* note 16, at 82; *see generally* Appendix.

[35] Arms Control and Disarmament Act, *supra* note 31, at § 2573(b) ("No action shall be taken pursuant to this chapter or any other Act that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause 2 of the Constitution or unless authorized by the enactment of further affirmative legislation by the Congress of the United States.").

[36] KRUTZ & PEAKE, *supra* note 16, at 5.

[37] *Id.* at 33-35, 91; Senate Study, *supra* note 31, at 246.

[38] KRUTZ & PEAKE, *supra* note 16, at 82.

comprehensive list of the most significant arms control and nuclear nonproliferation agreements to which the United States has been party or participant.[39] The Appendix spans nearly 100 years of U.S. treaty history and includes fifty-eight national security agreements, fifty-seven of which deal directly and specifically with arms control or nuclear nonproliferation. Of the fifty-seven most significant nuclear- or arms control-specific agreements into which the United States has entered, forty-five have been Article II treaties (seventy-nine percent) – these agreements are listed in the first segment of the Appendix; fifty-four have been legally binding international law treaties (ninety-five percent) – these agreements comprise the first and second sections of the Appendix; of the fifty-eight agreements, all but the Iran Nuclear Deal are signed.[40] The Appendix notes that twelve of these agreements (twenty-seven percent) received advice and consent by a *unanimous* Senate resolution.[41] To understand the history and establishment of treaty-making in arms control and nonproliferation, it is important to ask what general types of agreements are consistently conducted as Article II treaties, and why arms control and nonproliferation rank within that category. Once we have a framework for determining exactly what kind of agreements should or must be conducted as Article II treaties, we will be able to hold the Iran Nuclear Deal up to that framework for measurement.

The United States does have a process for handling such matters, under the cognizance of the State Department, given its overall responsibility within the executive branch for the conduct of foreign affairs. This is known as the Circular 175 process, which is based on the Case-Zablocki Act (1 USC 112b). It involves a process for coordination and approval of treaties and international agreements. The process ensures that appropriate agencies are involved in the

[39] Note that the 23 Section 123 Agreements, discussed *infra* are not included in the Appendix.
[40] *See* Appendix (including list of most significant arms control agreements and the type of agreement negotiated).
[41] *See id.* (noting unanimous senate advice and consent).

negotiations and that adequate legal authority exists for the agreement contemplated. That process, however, is not applicable to non-legally binding agreements.

A Framework: When Should Agreements Be Treaties?

The American process for international deal-making has adapted and expanded significantly since the Continental Congress. Early American writing such as the Federalist papers highlight the Senate's role in giving advice and consent to agreements as well as taking part in treaty negotiations at times.[42] Since World War Two, however, the legislative mandate for international agreement-making in the form of congressional-executive agreements has dominated international affairs.[43] Quite simply, treaties are significantly outnumbered by congressional-executive agreements in twentieth and twenty-first century American foreign relations.[44] Some explanation for the increasing prevalence of congressional-executive agreements will be discussed in the next section. Certain kinds of agreements, however, have resisted this trend and are still almost exclusively conducted as Article II treaties.[45] In asking whether the Iran Nuclear Deal is one of these kinds of agreements, we must first ask: what kind of agreements are primarily conducted as Article II treaties?[46]

Agreements of great significance, benefit, and risk are still consistently negotiated as Article II treaties.[47] This is standard practice for several reasons. The Article II treaty-making process demonstrates deep public support for a particular policy or agreement because of the

[42] THE FEDERALIST NO. 64 (John Jay) (cited by Senate Study, *supra* note 31, at 30).
[43] KRUTZ & PEAKE, *supra* note 16, at 41-42.
[44] *Id.*
[45] *Id.* at 5, 15, 22, 85, 90.
[46] Aside from the importance of agreements effecting form, certain types of agreements are, in tradition and practice, negotiated as Art. II treaties: agreements on human rights, tax, and arms control. Agreements on trade and status of forces, for example, are often negotiated as executive agreements. A significant discussion of arms control agreements typically being negotiated as Art. II treaties appears *infra*.
[47] KRUTZ & PEAKE, *supra* note 16, at 5, 15, 22, 85, 90.

two-thirds majority requirement in the Senate.[48] Formal treaties in international law also contain notification requirements or other conditions that must be met before withdrawal, precluding sudden, unexpected, or instantaneous unilateral termination in most cases.[49] Article II treaties are like aircraft carriers: they take great power to put into motion, and once they attain significant momentum, require extraordinary effort to turn around. If an issue is important enough, it deserves the sober and long-term-focused treatment that a treaty provides. For matters of immense significance and impact, there is serious value in the surety that comes with an agreement approved by a two-thirds Senate majority and supported by Article II of the Constitution.[50]

Highly significant agreements are conducted as treaties to demonstrate not just reliability but commitment, to subsequent administrations, legislators, and – most importantly – foreign governments.[51] Scholars have noted that foreign leaders prefer Article II treaties and are aware that the political capital required of a U.S. President to acquire a two-thirds Senate majority makes it highly unlikely that the United States will renege on an agreement.[52] That two-thirds of the Senate approves of the treaty signals deep support for the agreement by both the American people and their government.[53] The widespread support for an agreement demonstrated by the

[48] Some may posit that a majority vote in each House shows equivalent support to a two-thirds Senate majority. The authors believe that a two-thirds Senate vote shows deeper public support, especially in the context of the political representation in American legislature.
[49] CARTER & WEINER, *supra* note 10, at 109-110; *see also* VLCT, *supra* note 7, at art. 56. Executive agreements may contain the same withdrawal provisions as Article II treaties, but the authors note that the Iran Nuclear Deal contains no regimented withdrawal provisions whatsoever.
[50] While an executive agreement may have the same withdrawal provisions as an Art. II treaty, the authors believe that the requisite political capital involved in executing an Art. II treaty provides greater assurances of commitment. The Iran Nuclear Deal, not being a treaty at international law, has no binding withdrawal procedure.
[51] KRUTZ & PEAKE, *supra* note 16, at 38, 71-78, 82, 85, 93.
[52] *Id.* at 78. It is unclear whether presidents hold to agreements *because* they are executed as Art. II treaties, but the authors believe a treaty is less likely to be reneged with the support of the legislature (which is most strongly manifest in an Art. II treaty). The authors will note, however, that the most significant arms control treaty withdrawal in U.S. history is the Anti-Ballistic Missiles Treaty, an Art. II treaty.
[53] *Id.* at 79.

Article II process has a spiraling effect on its perceived longevity: the President's predecessors are less likely to back out when support is high; legislators are less likely to pass laws inconsistent with the treaty, putting the United States in breach; and foreign heads of state are less likely to resist execution or withdraw knowing that the President, the legislature, their predecessors, and the American people stand behind the agreement.[54]

In addition to highly significant agreements, multilateral agreements are *considerably* more likely to be conducted as Article II treaties in American history. Of course, the Iran Nuclear Deal would be deemed a multilateral or plurilateral instrument. Krutz and Peake's study in *Treaty Politics and the Rise of Executive Agreements* found that sixty-three percent of all important multilateral agreements are executed as Article II treaties.[55] Among important multilateral agreements that were salient in the media, determined by New York Times coverage, seventy-three percent were executed as Article II treaties.[56] This study was not limited to arms control treaties – which are more likely to be consistently subject to the Article II process. In fact, this article's Appendix demonstrates that seventy-nine percent of all significant arms control and nonproliferation agreements are negotiated as Article II treaties. When these agreements are multilateral, we find that only the Iran Nuclear Deal and one other significant nonproliferation agreement have been negotiated outside of the Article II process.[57]

Why Arms Control?

Arms control and nonproliferation negotiations are extremely high-stakes, significant areas of international affairs due to the obvious national security implications. It is hard to fathom an agreement relating to the deadliest weapons our world has ever known that is not

[54] *Id.* at 38, 72-78, 82, 85, 93.
[55] *Id.* at 90.
[56] *Id.* at 91.
[57] *See Appendix*.

immensely significant, requiring as serious a show of commitment and reliability as possible. But a logical argument about why arms control agreements are so important as to warrant Article II treatment is not enough: we need to review presidential and legislative views on arms control agreements as well as the history of the treaties themselves. And, specifically, in order to determine if the Iran Nuclear Deal should have been a treaty, it will be essential to consider determining factors leading to the submission of international agreements to the Senate as treaties from multiple perspectives. The discussion that follows tracks and analyzes the presidential and legislative attitudes toward some of the arms control and nonproliferation agreements outlined in the comprehensive Appendix.

Presidents

Treaties, when compared to other forms of agreements, involve less independent Presidential authority and autonomy. In presidential-executive agreements and non-binding commitments, the President owes no deference to Congress or the Senate; in a congressional-executive agreement, the President only requires a simple majority, although acquiring a majority vote in each House can pose its own political problems. So, does it not follow that the Commander in Chief and head of state should be resistant to surrendering authority to the Senate in arms control agreements? The answer is a resounding "no." What about in cases where the President cannot bank on actually obtaining advice and consent? Article II treaties are still preferred. Presidents have historically – in action and word – promoted the Senate's role and importance through negotiating arms control agreements almost exclusively as Article II treaties,

even when faced with a threat of rejection. This practice has held true even when rejection is certain, as in the cases of the Treaty of Versailles or the Comprehensive Test Ban Treaty.[58]

Presidential preference for Article II treaty-making in arms control has been readily apparent for nearly one hundred years, and the Treaty of Versailles[59] stands as an early example. Woodrow Wilson was one of the earliest and harshest critics of Senate involvement in international affairs, believing that the President should not consult with the Senate or treat it as an equal.[60] Yet, Wilson submitted the Treaty of Versailles to the Senate for advice and consent as an Article II treaty *twice*, once after it had already been rejected, and did not attempt to circumvent the Senate after either rejection.[61] Despite his general disinclination to cede power to the Senate in international affairs, Wilson's treatment of the Treaty of Versailles demonstrates his acknowledgment of the importance of the Senate's role in arms control agreements.

The Cold War period marks a historic uptick in both arms control treaties and congressional-executive agreement-making.[62] While congressional-executive agreements were beginning to outnumber Article II treaties in general at this time, important arms control agreements were still almost exclusively conducted by treaty; we see more significant arms control treaties than ever, and presidential initiative and consistency in submitting these agreements to the Senate.[63]

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[58] Comprehensive Nuclear Test-Ban Treaty, *opened for signature* Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997) [hereinafter CTBT].
[59] Treaty of Versailles, June 28, 1919, 225 Parry 188, 2 Bevans 235, 13 AM. J. INT'L L. Supp. 151, 385 [hereinafter Versailles].
[60] KRUTZ & PEAKE, *supra* note 16, at 33-34, 37; Versailles, *supra* note 59; *see also*, Woodrow Wilson, Constitutional Government in the United States 77-79, 140 (1908) (describing Wilson's view on presidential autonomy in negotiating international agreements).
[61] KRUTZ & PEAKE, *supra* note 16, at 33-34, 37; Versailles, *supra* note 59
[62] *See* Appendix; *see also* KRUTZ & PEAKE, *supra* note 16, at 41-42.
[63] MOORE ET AL., *supra* note 13, at 584-585; U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS, 6-7 (1996).

The Biological Weapons Convention (BWC)[64] and Chemical Weapons Convention (CWC)[65] are perfect examples of presidential insistence on the practice of submitting Cold War arms control treaties to the Senate, despite concern over whether the Senate would reject the treaties, add reservations, or decline to provide advice and consent unless the treaties were to be renegotiated. Nixon submitted the BWC to the Senate, despite an obvious dissonance between his unilateral disavowal of an offensive biological weapons program and the Senate's insistence on limiting the Convention to first use and retaining exceptions for riot control.[66] After the Senate Foreign Relations Committee withheld action on the BWC, no President attempted to circumvent the Article II process. Eventually, Ford worked *with* the Senate, and the treaty was approved with Senate amendments regarding herbicide and riot control use.[67] The CWC faced similar hurdles to advice and consent, due to small business concern with invasive enforcement and financial restrictions and – once again – Senate concerns over riot control limitations.[68] While ratification was delayed, again no President sought to conclude the agreement as anything but an Article II treaty. Clinton – the beneficiary of Ford's aforementioned work on the BWC – was able to elicit Senate advice and consent and passed a more narrow version of the convention as an Article II treaty.[69]

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[64] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S.14860 [hereinafter BWC].

[65] The Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Sept. 3, 1992, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 33757 (entered into force Apr. 29, 1997) [hereinafter CWC].

[66] MOORE ET AL., *supra* note 13, at 584-585.

[67] *Id.* at 584. *But see* Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 U.N.T.S. 2138. In the case of the 1925 Geneva Protocol, the Senate took 50 years to ratify the signed agreement.

[68] MOORE ET AL., *supra* note 13, at 588 (noting that while the Chemical Manufacturers Association, and large chemical manufacturers associated with it, were proponents of the treaty and actively aware of its negotiation, small businesses and their representatives were troubled by the treaty's potential operational and financial ramifications); Senate Study, *supra* note 31, at 261-262.

[69] Senate Study, *supra* note 31, at 262.

Cold War and later arms control agreements dealing specifically with nonproliferation were primarily conducted as Article II treaties by a significant margin – at least when they significantly impacted the nonproliferation regime. Of the thirty-three most significant nonproliferation agreements negotiated during or after the Cold War, twenty-five were negotiated as Article II treaties: other than the Interim Strategic Arms Limitation Treaty (SALT I),[70] the Plutonium Management and Disposition Agreement (PMDA),[71] and a handful of sole-executive confidence-building measures,[72] the agreements that came to define the nonproliferation landscape have been Article II treaties.[73]

Cold War-era and modern presidents appear to have been highly motivated to negotiate these agreements as treaties. The sheer percentage of significant agreements conducted as treaties implies that it was common procedure – indeed, sources explicitly say as much.[74] We also see in the Cold War, late-twentieth, and twenty-first century an adherence to the Article II process in the face of potential Senate resistance. In some cases – such as the Comprehensive Test Ban Treaty (CTBT)[75] and second Strategic Arms Limitation Treaty (SALT II)[76] – presidents were unable to obtain Senate advice and consent, but still adhered to the Article II structure, understanding and maintaining common practice for arms control and nonproliferation.

[70] Interim Agreement on the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3462 (Sept. 30, 1972) [hereinafter SALT I].
[71] Agreement Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation, U.S.-Russ., Aug. 29, 2000, T.I.A.S. NO. 11-713.1.
[72] *See, e.g.*, Nuclear Risk Reduction Centers, *supra* note 32.
[73] *See* Appendix.
[74] KRUTZ & PEAKE, *supra* note 16, at 15-16, 66, 71-72, 82, 85.
[75] CTBT, *supra* note 58.
[76] Treaty on the Limitation of Strategic Arms and Protocol Thereto, U.S.-U.S.S.R., June 18, 1979, S. TREATY DOC. NO. 96-25 [hereinafter SALT II].

In other cases – such as the Intermediate Nuclear Forces Treaty (INF)[77] and others[78] – treaties faced significant reservations, declarations, and statements of understanding in the Senate, but still, presidents did not attempt to circumvent Article II treaty procedures. And, of course, many other nonproliferation agreements – such as the Strategic Offensive Reductions Treaty (SORT),[79] the Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency,[80] the Convention on Physical Protection of Nuclear Materials,[81] The Outer Space Treaty,[82] and more[83] – obtained Senate advice and consent by unanimous vote. History shows that presidents understand the importance of submitting nonproliferation agreements as Article II treaties (see Appendix). They understand the value of a strong, binding, and reliable agreement in the field of arms control and nonproliferation. George W. Bush epitomized this when, in determining to execute SORT as an Article II treaty instead of an executive agreement, he explained to Colin Powell: "There needs to be a document that outlives both of us."[84]

Most significantly, presidents understand that an Article II treaty assures foreign leaders of enduring American commitment to an agreement.[85] Even if all legally binding agreements are considered treaties in international law, foreign partners take into account the status of

[77] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, 1657 U.N.T.S. 28521 [hereinafter INF Treaty].
[78] *See*, *e.g.*, Treaty with the Union of Soviet Socialist Republics On Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 1714 U.N.T.S. 29638 [hereinafter PNE Treaty].
[79] The Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, 2350 U.N.T.S. 42195 [hereinafter SORT].
[80] Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, Sept. 26, 1986, S. TREATY DOC. NO. 100-4(B), 1457 U.N.T.S. 24643 [hereinafter NARE Treaty].
[81] Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. NO. 1180, 1456 U.N.T.S. 24631(entered into force Feb. 8, 1987) [hereinafter PPNM].
[82] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T 2410, 610 U.N.T.S. 8843 [hereinafter Outer Space Treaty].
[83] *See*, *e.g.*, PNE Treaty, *supra* note 78.
[84] KRUTZ & PEAKE, *supra* note 16, at 71-72. This may appear a curious comment to make pertaining to a treaty that would expire, pursuant to its terms, but of course it was made prior to negotiations.
[85] While Art. II treaties do not ensure longevity, they demonstrate the highest degree of widespread support among international agreements, which the authors believe indicate reliability.

agreements under U.S. domestic law.[86] They adjudge not only the commitment of the President conducting the agreement, but whether successor administrations will adhere to the terms of an agreement.[87] The two-thirds requirement and political cost to the President to ratify an Article II treaty send a credible and unambiguous signal of commitment and support for the agreement.[88] This is especially true in the case of highly significant agreements, such as those dealing with arms control.[89] When there is less trust between the United States and another party to the agreement, a treaty's signal of mutual adherence is particularly valuable; such was the case in U.S. arms control agreements with the Soviet Union and Russia.[90] For instance, the Soviet Union urged Carter to submit SALT II as an Article II treaty, insisting that any other kind of agreement would have "inferior status."[91] This highlights the understanding that other states have of the American system. Later, when President George W. Bush was concluding SORT with Russia, President Putin objected to the use of a non-Article II procedure, fearing that even if an agreement were a treaty under international law, it would not be sufficiently "legally binding" if it were not a treaty under U.S. domestic law.[92] Both agreements were subsequently submitted to the Senate for advice and consent.[93]

The Legislature

[86] KRUTZ & PEAKE, *supra* note 16, at 78-79. Of course, Treaties and executive agreements are both the "supreme law of the land" under the U.S. Constitution, if they are international law treaties, according to Article VI of the Constitution.
[87] *Id.* at 82.
[88] *Id.* at 75-76, 85.
[89] *Id.* at 85, 92.
[90] *Id.* at 71-2; SORT, *supra* note 79.
[91] KRUTZ & PEAKE, *supra* note 16, at 78.
[92] *Id.* at 71.
[93] SORT, *supra* note 79; SALT II, *supra* note 76; *see* Appendix (including results for Senate advice and consent vote).

The Senate and, to a lesser degree, Congress as a whole, have made equally clear its adherence to an established history of Article II treaty-making in arms control agreements. Legislative insistence on Article II arms control treaties has been manifest through use of both the carrot and the stick: the Senate has rewarded presidents who submit arms control treaties by consistently granting advice and consent, and rebuked presidents threatening to break the tradition of negotiating arms control agreements as treaties. The legislature's primary carrots have been a near-perfect rate of advice and consent and a willingness to allow congressional-executive agreements in less significant areas of international relations in exchange for submission of the most significant agreements.[94] The stick has been legislation aimed at curbing presidential autonomy in international agreement-making, in some respects directly addressing arms control.[95]

To begin with, the Senate very rarely rejects treaties. In the history of its treaty-making role, it has granted advice and consent to ratification of over 1,500 treaties and rejected only twenty-one.[96] That is lower than a 1.4 percent rate of rejection. The odds of a treaty being formally rejected by the Senate over the course of American history are more than twice as unlikely as the odds of hitting a double zero on the first spin at a roulette wheel. Of those twenty-one rejections, there have only been six since 1920.[97] Only three treaties have been formally rejected by the Senate since 1945.[98] Formal rejection is only one way for an agreement to fail: the Senate can procedurally block agreements, let them linger indefinitely, or add significant reservations. However, only 7.4 percent of treaties sent to the Senate between 1949 and 2000

[94] KRUTZ & PEAKE, *supra* note 16, at 5, 15-16.
[95] *See* Phillip A. Grant, *The Bricker Amendment Controversy*, 15 PRESIDENTIAL STUD. Q. 572, 572-77 (1985) [hereinafter *Bricker Amendment*].; 1 U.S.C. § 112b (2012) [hereinafter Case-Zablocki Act]; Arms Control and Disarmament Act, *supra* note 31.
[96] KRUTZ & PEAKE, *supra* note 16, at 8
[97] *Id.*
[98] *Id.* at 34.

failed to receive advice and consent.[99] This stunning success rate has led many scholars to refer to the Senate as "a most compliant partner" in international deal-making; this compliance is one carrot persuading presidents to submit agreements as treaties.[100] And, while Senate advice and consent often includes additional delay and potentially new requirements, the Senate "has a long-established pattern of approving most treaties without crippling conditions."[101]

So the Senate encourages treaty-making in general by consistently consenting to ratification, but what about particularly significant agreements? Senate treatment of the congressional-executive agreement is indicative of an insistence that the most significant agreements be submitted as treaties;[102] the Senate's acquiescence to the use of congressional-executive agreements – generally for less significant agreements – acts as a carrot meant to convince presidents to submit more significant agreements as Article II treaties.[103] Scholars have categorized the Senate's willingness to forego its Article II powers in less significant agreements as a bargain with the President in exchange for the submission of the most significant agreements.[104]

This carrot, however, is closely related to an important Senatorial stick: restrictions on the President's ability to conduct executive agreements. If presidents refuse the carrot of increased leeway in bypassing Article II for lower-significance agreements, the legislature has demonstrated a willingness to respond by enacting law curtailing executive agreement-making. The Bricker Amendment[105] represents the most radical version of Senatorial backlash: a

[99] *Id.* at 34-35.
[100] *Id.* at 34.
[101] Senate Study, *supra* note 31, at 246.
[102] The authors note that the House of Representatives, by contrast, might be content with pervasive use of congressional-executive agreements, which allow the House a role in international agreement-making.
[103] KRUTZ & PEAKE, *supra* note 16, at 16.
[104] *Id.*
[105] Grant, *Bricker Amendment*, *supra* note 95, at 572-573, 576.

proposed constitutional amendment to curtail the power of treaty-making and requiring Congressional enactment of any international agreement.[106] Specifically, the final version of the Bricker Amendment after Senate amendments provided in relevant part to eliminate the possibility of presidential-executive agreements, giving internal effect only to Article II treaties and international agreements effectuated by an act of Congress.[107] The Bricker Amendment failed to obtain the two-thirds majority to pass a constitutional amendment to the states by one vote.[108] It serves as a reminder of just how extreme the legislature's reaction might be to what it views as overreaching in international deal-making; presidential overreaching nearly led to a constitutional amendment eliminating the presidential-executive agreement in most, if not all, foreseeable circumstances.[109]

The Case-Zablocki Act[110] and Arms Control and Disarmament Act[111] are further examples of legislation restricting executive autonomy in treaty-making:[112] the former was a direct response to presidential overreaching and the latter deals directly with distinct treatment of arms control agreements. The Case-Zablocki Act, which requires that any international agreement other than a treaty be submitted to Congress within sixty days of entry, was the product of congressional backlash after Kennedy, Johnson, and Nixon entered into secret executive agreements relating to the Vietnam War.[113] The Arms Control and Disarmament Act, as noted earlier, is an example of the legislature's insistence on its involvement in areas of arms

[106] The authors acknowledge that the Bricker Amendment is a singular instance of very extreme legislative pushback that occurred over a half century ago. However, in the context of the Iran Nuclear Deal, the Bricker Amendment is relevant to a discussion of historical Congressional responses to Executive overreach in international agreement-making.
[107] Grant, *Bricker Amendment*, *supra* note 95, at 576.
[108] *Id*.
[109] *Id*.
[110] Case-Zablocki Act, *supra* note 95.
[111] Arms Control and Disarmament Act, *supra* note 31.
[112] These examples are similar to the Bricker Amendment in their significance to our analysis (*see* n. 106).
[113] Case-Zablocki Act, *supra* note 95; KRUTZ & PEAKE, *supra* note 16, at 77.

control. By demonstrating an ability and willingness to curb the role and prevalence of the executive agreement, the Senate has – like the President – reinforced the role of Article II treaty-making for the most significant agreements.

The Senate is willing to allow the President to bypass Article II for the sake of expediency, efficiency, and reservation of political capital, but the price is consistent submission of significant agreements as treaties.[114] And by overreaching, presidents risk the legislature reacting by curbing their ability to conduct important international agreements efficiently in the future. While we have yet to see a legislative response to the Iran Nuclear Deal, history suggests that this type of end-run around the Article II treaty-making process for significant agreements risks legislative action that curbs presidential authority to make certain agreements.[115]

While the increase of congressional-executive agreements in American foreign relations marks the decline of the treaty in general, the legislature's approach to this shift signals its insistence on continued submission of significant agreements as treaties. If the legislature wanted to force more agreements to be handled through Article II, it could enact law to do so or refuse to fund executive agreements. Instead, American lawmakers recognize the efficiency of allowing less significant agreements to proceed with a simple majority.[116] But this arrangement is based on the assumption that more significant agreements will be submitted to the Senate for advice and consent.[117] This is especially true in the area of arms control, where history and practice have consistently favored Article II treaty-making.[118]

[114] KRUTZ & PEAKE, *supra* note 16, at 75-76.
[115] Readers may speculate as to whether the lack of legislative response to the deal is indicative of the political, rather than legal, significance of the Iran Nuclear Deal and its negotiation process to American government. The authors note, however, that we have yet to see what the future holds, and the legal impact of the deal's form and legislative push-back on executive agreement-making is not precluded simply because it has not happened yet.
[116] KRUTZ & PEAKE, *supra* note 16, at 75-76.
[117] *Id.* at 16.
[118] *Id.* at 82, 85.

How Significant is Significant?

While this section has focused considerably up to this point on explaining the tendency to submit significant agreements to the Senate, one might be left to wonder: what types of agreements are significant? What must an international agreement accomplish or stand for to belong to the class typically reserved for Article II treaties? Establishing that significant agreements must be treaties is important, but not conclusive, in determining whether the Iran Nuclear Deal should have been a treaty.

The most important treaties might be classified as *regime-creating* agreements. Examples of *regime-creating* agreements could be the NPT,[119] U.N. Charter[120] and Treaty of Versailles,[121] North Atlantic Treaty (NATO or NATO Treaty),[122] the Arms Trade Treaty,[123] the U.N. Convention on the Law of the Sea (UNCLOS),[124] and the Rome Statute for the International Criminal Court.[125] Each of these agreements created a new piece of the international legal world order: the NPT created the nuclear nonproliferation regime as we know it today; the UN Charter and Treaty of Versailles created an international system of justice, security, and peace-keeping; NATO became the first major peacetime alliance in post-World War Two history and would go on to shape international security; UNCLOS created the entire body of the law of the sea as we know it today; the Rome Statute created the first formal international criminal court with worldwide broad jurisdiction.[126] This category of agreement has never been, and almost certainly will never be, conducted as anything but an Article II treaty by

[119] NPT, *supra* note 17.
[120] U.N. Charter.
[121] Versailles, *supra* note 59.
[122] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 541 [hereinafter NATO Treaty].
[123] Arms Trade Treaty, Apr. 2, 2013, U.N.T.S. 52373.
[124] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833-1835 U.N.T.S. 31363 [hereinafter UNCLOS].
[125] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544.
[126] UNCLOS, *supra* note 124; NPT, *supra* note 17; Versailles, *supra* note 59; NATO Treaty, *supra* note 122.

the United States. These agreements define the international community and the rules it lives by, and are simply too important not to receive the most serious possible show of commitment. Even when the United States finds itself unable to ratify these treaties, such as in the case of Versailles, UNCLOS, and the Rome Statute, it has never attempted to complete them as anything but a treaty.[127]

Two types of arms control agreements might be considered second in significance after *regime-creating* agreements: treaties that directly and significantly impact the arsenals of nuclear weapons states (NWS) or the ability of NNWS to acquire a weapons program; and treaties that prohibit an entire class of conventional weapons.[128] These treaties did not create a new arena of international law, but significantly expanded, restricted, or otherwise modified important existing sub-regimes in arms control. They might be referred to as *regime-altering* agreements. These agreements, nearly without exception, end up being pushed through the Senate for advice and consent, even when opposition is extremely strong. For example, the BWC, CWC, and 1925 Geneva Protocol, as noted earlier in this article, faced delay and opposition in the Senate requiring cooperation and modification to pass as treaties.[129] While those are probably the most famous agreements outlawing an entire class of conventional weapon, they are not the only ones: the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons[130] and its Protocols on Blinding Laser Weapons,[131] Explosive Remnants of War,[132] the Use of

[127] Library of Congress on Versailles, *supra* note 60; UNCLOS, *supra* note 124.
[128] The authors acknowledge that what is emphasized in the last two categories is not precisely what they do to affect or alter *any* regime, but specifically how they what they do to limit or abolish the weaponry that states can hold under the arms control regime. For the purposes of *regime-altering* and *regime-affecting* agreements, this section is only concerned with regimes that alter and affect the regime of arms control.
[129] MOORE ET AL., *supra* note 13, at 584-585; U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *supra* note 63, at 6-7.
[130] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Oct. 10, 1980, S. TREATY DOC. NO. 103-25, 1342 U.N.T.S. 22495 [hereinafter CCW Treaty).
[131] Protocol on Blinding Laser Weapons, Oct. 13, 1995, T.I.A.S. No. 09-721.2, 2024 U.N.T.S. 22495.

Mines, Booby-Traps, and Other Devices,[133] the Incendiary Weapons Protocol,[134] the Conventional Armed Forces in Europe Treaty[135] and its Flank Agreement,[136] and the Environmental Modification Convention[137] were all submitted as Article II treaties. The elimination of classes of weaponry is a significant alteration to the arms control regime.

Biological and chemical weapons are frightening. We may shudder at the horrific effects of an Ebola outbreak or sarin gas attack, but the existential threat, infrastructural, environmental, and economic impact, threat of catastrophic loss of life, and geopolitical significance of nuclear weapons on our world is unparalleled. Agreements that significantly impact the arsenals of NWS or deal with NNWS' access to a weapons program are *regime-altering* in their impact on the nonproliferation regime and expansion or restriction of the NPT. Because of the centrality of nuclear weapons on arms control generally, agreements modifying nuclear arsenals or paths to weapons development are of the highest significance to the arms control regime as a whole. These agreements are significant and are consistently conducted as Article II treaties.

The first category of *regime-altering* nuclear agreements limit or affect the nuclear arsenals of nuclear weapons states. In the world of nonproliferation, "nuclear weapons states" commonly refers to those states classified as such under the NPT: states that have manufactured and exploded a nuclear weapon/explosive device prior to January 1, 1967.[138] However, for the purposes of discussing the impact of an agreement on the nonproliferation regime, we might

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[132] Protocol on Explosive Remnants of War, Nov. 28, 2003, T.I.A.S. NO. 09-721.3, 2399 U.N.T.S. 22495.
[133] Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices, May 3, 1996, S. TREATY DOC. NO. 105-1(A), 2048 U.N.T.S. 22495.
[134] Incendiary Weapons Protocol, Oct. 10, 1980, T.I.A.S. NO. 09-721.1, 1342 U.N.T.S. 22495.
[135] Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, S. Treaty Doc. No. 102-8, 2441-2443 U.N.T.S. 44001 [hereinafter CFE Treaty].
[136] Flank Document Agreement to the CFE Treaty, May 31, 1996, S. TREATY DOC. NO. 105-5, 2443 U.N.T.S. 44001.
[137] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 12, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 17119 [hereinafter Environmental Weapons Convention].
[138] NPT, *supra* note 17, at art. 9 para. 3.

conceive of *regime-altering* nuclear agreements as including those that affect burgeoning nuclear weapons programs or states that have developed or sought to develop a nuclear weapons program after 1967. For instance, an agreement restricting Israel's nuclear program would alter the nonproliferation regime, even though Israel is not a party to the NPT and does not openly acknowledge a nuclear weapons program.

Regime-altering agreements include the headline-grabbing, arms race-defining, acronym-laden agreements between the United States and the Soviet Union and Russia in the twentieth and early-twenty-first centuries. Agreements that limit U.S. and foreign nuclear weapons stockpiles – such as the three Strategic Arms Reduction Treaties (START I, START II, and New START, respectively),[139] the INF,[140] SALT II,[141] and SORT[142] – are (with the single significant exception of SALT I)[143] always completed as treaties. These treaties were consistently submitted for Article II advice and consent, despite frequent and considerable pushback from the Senate.[144] This category of agreement also includes establishing geographic restrictions on the location of nuclear arms. In the Cold War era, the United States and the U.S.S.R. concluded agreements as treaties restricting armament of the Antarctic,[145] outer space,[146] and seabed beyond territorial seas.[147] *Regime-altering* agreements also restrict testing nuclear weapons. Beginning with the

[139] Treaty with the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, U.S.S.R.-U.S., July 31, 1991, S. TREATY DOC. NO. 102-20 [hereinafter START].
[140] Treaty with the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, Russ. – U.S., Jan. 3, 1993, S. TREATY DOC. NO. 103-1 [hereinafter START II].
[141] Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, T.I.A.S. NO. 11-205 [hereinafter New START].
[142] SORT, *supra* note 79.
[143] SALT I, *supra* note 70.
[144] *See, e.g.*, INF Treaty, *supra* note 77; PNE Treaty, *supra* note 78.
[145] The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961).
[146] Outer Space Treaty, *supra* note 82.
[147] Seabed Arms Control Treaty, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 13678; Outer Space Treaty, *supra* note 82.

1963 Partial Test Ban Treaty (PTBT or LTBT),[148] through the 1974 Threshold Test Ban Treaty (TTBT)[149] and 1976 Peaceful Nuclear Explosions Treaty (PNE Treaty)[150] and culminating with the 1996 CTBT,[151] agreements restricting the testing of nuclear weapons have been consistently executed as Article II treaties. In the case of the CTBT, no administration attempted to side-step the Article II process even after it failed to receive a resolution of advice and consent in the Senate.

Agreements limiting development of nuclear weapons for states without a fully-developed nuclear weapons program are *regime-altering* in their significance to the nonproliferation regime. While the NPT is a *regime-creating* agreement, its primary purpose is to control the spread of nuclear weapons and it is the archetype for an agreement limiting the path to nuclear weapons for states without weapons programs. We might consider the NPT as a dual-hat *regime-creating* and *regime-altering* agreement limiting weapons program development in NNWS. Other *regime-altering* agreements limiting the path to weapons programs include Nuclear-Weapons-Free Zone (NWFZ) treaty Protocols, [152] which are always submitted as Article II treaties in the United States. These agreements establish a legal responsibility to refrain from developing nuclear weapons programs in multi-state geographic regions. IAEA Safeguards Agreements and Additional Protocols also fit squarely within this category, and the United States

[148] Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 6964 [hereinafter PTBT].
[149] Treaty with the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, U.S.S.R.-U.S., Jul. 3, 1974, 1714 U.N.T.S. 29637 [hereinafter TTBT].
[150] PNE Treaty, *supra* note 78.
[151] CTBT, *supra* note 58.
[152] *See, e.g.*, Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, May 6, 2014, S. TREATY DOC. NO. 114-2 [hereinafter Central Asian NWFZ and Protocol]; Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty, Apr. 11, 1996, S. TREATY DOC. NO. 112-3 [hereinafter African NWFZ and Protocols]; Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, May 26, 1977, 33 U.S.T. 1792, 634 U.N.T.S. 362 (entered into force Nov. 23, 1981) [hereinafter Latin America NWFZ Treaty and Protocol].

executed the Safeguards Agreement and Additional Protocol[153] via the Article II process. There is one notable exception to the preference for Article II treaty-making in U.S. conclusion of *regime-altering* agreements limiting paths to weapons programs: Section 123 Agreements. These agreements, and their distinctive nature when compared to the agreements mentioned in this section, will be discussed at length in the section on congressional-executive agreements *infra*.

Finally, we might conceive of a third group of agreements that impact regimes but do not shift the paradigm to the extent that *regime-altering* agreements might. These might be referred to as *regime-affecting* agreements. Because of the importance of nuclear nonproliferation to the arms control regime, nuclear agreements that create real rules beyond mere confidence-building measures generally fall into this category. For instance, the agreements dealing with safety procedures and the physical protection of nuclear materials impact the nonproliferation regime without directly affecting the existence, capabilities, or size of a state's nuclear weapons program.[154] Treaties like the Open Skies Treaty,[155] which does not deal directly with nuclear weapons arsenals but established aerial observation between the United States and the U.S.S.R. in the hopes of establishing transparency and slowing the nuclear arms race, would also fall under this category.

How Does the Iran Nuclear Deal Fit Within This Framework?

The Iran Nuclear Deal is a multilateral, controversial, and highly significant nonproliferation agreement entered into with a partner that has proven to be unreliable. The

[153] Agreement with the International Atomic Energy Agency for the Application of Safeguards on the United States of America, with Protocol, Nov. 18, 1977, T.I.A.S. NO. 09889 (entered into force Dec. 9, 1980) [hereinafter U.S.-IAEA Safeguards Agreement and Additional Protocol].
[154] *See, e.g.*, International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, S. TREATY DOC. NO. 110-4, 2445 U.N.T.S. 4404; Convention on Nuclear Safety, Sept. 20, 1994, S. TREATY DOC. NO. 104-6, 1963 U.N.T.S. 33545; NARE Treaty, *supra* note 80; Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, S. TREATY DOC. NO. 100-4(A), 1439 U.N.T.S. 24404; PPNM, *supra* note 81.
[155] Treaty on Open Skies, Mar. 24, 1992, S. TREATY DOC. NO. 102-37.

previous discussion of treaty history, arms control agreements, and international politics plainly and strongly indicate that the Iran Nuclear Deal should have been negotiated as an Article II Treaty. It is almost certainly a *regime-altering* agreement, a corrective measure in response to one of the most serious threats to the nonproliferation regime since the birth of North Korea's surreptitious nuclear weapons program and its subsequent withdrawal from the NPT. Arms control agreements are traditionally submitted nearly exclusively as Article II treaties, and given nuclear agreements' standing as the most consequential genre of arms control agreements, it is a wonder that the most significant nuclear nonproliferation agreement of a generation was not conducted as an Article II treaty.

Obama administration officials noted the impossibility of submitting the Iran Nuclear Deal to the Senate and acquiring a two-thirds majority.[156] As currently negotiated, it would have faced considerable opposition from the Senate Foreign Relations Committee and, if it had been referred, the Senate. However, as we have seen in the past hundred years, appropriate practice is not to negotiate agreements of this importance as nonbinding political commitments because advice and consent would have been difficult to obtain. Was it more important to conduct this agreement according to its current terms than it was to adopt the Treaty of Versailles, CTBT, UNCLOS, or other important agreements that could not obtain advice and consent in the Senate?

The BWC and CWC are analogous as well. Despite initial obstacles, the executive and legislature were able to work together to narrow their differences and, over time, ratify these agreements as Article II treaties. In those examples, the Senate expressed its prerogatives in the

[156] *Iran Nuclear Agreement: The Administration's Case: Hearing Before the H. Comm. on Foreign Affairs*, 114th Cong. 83 (2015) (response by John Kerry to question by Mr. Ribble) [hereinafter Kerry Hearing]; *see also* Dan Roberts, *John Kerry warns Congress: back Iran nuclear deal or face dire consequences*, THE GUARDIAN (Jul. 28, 2015), https://www.theguardian.com/world/2015/jul/28/john-kerry-iran-nuclear-deal-congress-hearing. [hereinafter Kerry Hearing Coverage].

form of amendments and the treaties were ultimately ratified. In sharp contrast to American historical practice, there was no attempt to submit the Iran Nuclear Deal to the Senate to cooperate toward an amended agreement representing a compromise between the aims of the President and the legislature. Opponents of this view might cite the pressing need to finalize an agreement quickly and the inability to postpone conducting an agreement in order to reach a compromise with the Senate.

However, if an agreement had been signed between the United States and Iran with the object and purpose of prohibiting Iranian development of nuclear weapons, then the obligation to refrain from developing a weapons program would be binding on Iran pre-ratification.[157] The Vienna Convention on the Law of Treaties mandates that when a state has signed, but not ratified, an international agreement, that state still has an obligation to refrain from acts that would defeat the object and purpose of the agreement.[158] Even if ratification of a treaty with Iran took years, we would be left with a stronger restriction on Iranian nuclear weaponry than we have in the current agreement; some force of law behind an unratified treaty is preferable to no legal obligation behind a completed political statement if the goal is to restrict Iranian nuclear weapons.[159] Of course, some might argue that Iran already has a legally binding obligation not to

[157] VCLT, *supra* note 7, at art. 18.
[158] *Id.*
[159] The reader might ask, if Iran is untrustworthy, why does the structure of the deal matter? Are they not wont to cheat on the deal whether it is legally binding or not? After all, binding IAEA treaties and UNSCR's did not effectively hold Iran to its word on the issue of its nuclear energy program. This point is well taken, but the authors find it intuitively ineffective to respond to Iran's behavior by diminishing the legal force behind its commitments to refrain from developing nuclear weapons. Iran's non-compliance with its legal obligations under the nonproliferation regime should not be reason for the international community and the United States to give up on legally binding international agreements as a tool for promoting the non-proliferation regime in the context of the Iranian nuclear issue.

obtain nuclear weapons per the NPT. But, if Iranian commitment to the NPT were clear, there would be no need for this agreement at all.[160]

The greatest issue with failing to negotiate the Iran Nuclear Deal as an Article II treaty is the probability that Iran will not take the deal or American commitment to it seriously. The Iran Nuclear Deal was a response to Iran's blatant disregard for legally binding UNSCRs. Iranian leadership was apparently willing to disregard binding international law to pursue its interests and, in seeking to correct that misbehavior, the United States will hold them accountable only to the terms of a "gentlemen's agreement."

The purpose of this article is not to shame the Iranian government for spurning the UNSC, but it is important – in considering the efficacy of a non-binding political statement – to note Iran's history of seeking to undermine the nonproliferation regime by secretly exceeding limitations imposed on its nuclear program. So, if Iran did not take the legally binding UNSCRs against it seriously, or its legally binding Safeguards Agreement, which it blatantly violated, why would the United States expect Iran to adhere to the restrictions of the JCPOA once Iran determines its best interests dictate violating the terms of the deal? And, in a deal frontloaded to Iran's benefit, where billions of dollars in the form of sanctions relief have already been delivered to Iran, this concern might already be a reality; there is simply not much reason for Iran to adhere to a "gentlemen's agreement" restricting enrichment and reprocessing if Iran perceives that it has already received most of the benefits from the deal. In fairness, Iran was required to complete a number of steps prior to obtaining sanctions relief, such as shipping spent fuel outside of Iran, removing all nuclear material from its Fordow nuclear site, limiting its enriched uranium stockpile to under 300 kilograms, and limiting all enrichment to 3.67 percent. Equally

[160] Admittedly, the JCPOA includes many provisions beyond what the NPT requires, but if Iran were truly committed to the NPT, there would be no need for this deal.

concerning is the fact that the Iran Nuclear Deal serves as political precedent for future administrations to unilaterally determine which international agreements should be a treaty or simply non-binding statements of policy. After all, if a multilateral nonproliferation agreement of generational significance can be negotiated as an unsigned and non-binding political statement, what is off limits for the next administration seeking to bypass the Senate?

By negotiating the Iran Nuclear Deal as a non-binding political agreement, the United States is putting its trust in a nation that not only flouts international law on the issue, but with which America has no diplomatic relations. In U.S.-U.S.S.R. relations, distrust between the two nations demanded that nearly every significant agreement relating to nuclear programs and arms control be conducted as an Article II treaty.[161] The authors will avoid direct comparison between U.S.-Iranian and Cold War-era U.S.-U.S.S.R. relations, but Iran has not proven itself to be trustworthy in the nuclear realm, and – like the U.S.S.R. – requires a legally enforceable, verifiable regime to promote reliability in the execution of significant agreements on nonproliferation and arms control.[162]

Arms Control Agreements Negotiated as Executive Agreements

While the most significant agreements have been negotiated as treaties, there are still some arms control and nonproliferation agreements of note that have been executed through legislative initiative or through the President's constitutional authority. However, most arms control executive agreements are not as significant as those conducted by treaty. Although legally binding, executive agreements do not necessarily show the same degree of commitment

[161] KRUTZ & PEAKE, *supra* note 16, at 38, 78, 82; *see also* Appendix (including U.S.-U.S.S.R. Cold War arms control agreements).
[162] While enforcement is always difficult in international law, greater degrees of verifiability promote enforceability in an agreement like the JCPOA.

to foreign leaders as Article II treaties.[163] Nonetheless, the U.S.-India Civil Nuclear Agreement and other Section 123 Agreements provide an example of congressional-executive agreements with similarities to the Iran Nuclear Deal. However, as will be discussed, several significant differences distinguish the Iran Nuclear Deal as more deserving of Article II treatment.

Arms Control Agreements as Congressional-Executive Agreements

As executive agreements have become prominent in the landscape of international relations, congressional-executive agreements have enjoyed significant importance in foreign affairs. Congressional-executive agreements dominate presidential-executive agreements in both quantity and significance, representing a large majority of all executive agreements to this day.[164] From 1946 to 1972, eighty-seven percent of executive agreements were made pursuant to legislation.[165] Flexible yet binding, congressional-executive agreements have been used to conduct a wide variety of significant international agreements, surpassing Article II treaties in general use.[166]

Arms control is one category exempt from the dominance of congressional-executive agreement-making, and arms control agreements are still conducted primarily by Article II treaty. But a small number of significant arms control and nonproliferation agreements have been conducted as congressional-executive agreements and merit closer study. By looking at the kind of arms control and nonproliferation agreements conducted as executive agreements, we may ask ourselves: would it have been appropriate to enter into the Iran Nuclear Deal pursuant to legislation? After all, it would have avoided what Secretary Kerry described as the

[163] KRUTZ & PEAKE, *supra* note 16, at 38, 71-72, 75-6, 78-79, 82.
[164] *Id.* at 41-42.
[165] *Id.*
[166] *Id.*

"impossibility" of obtaining a two-thirds Senate majority.[167] The apparent answer is that a congressional-executive agreement would have been less appropriate a form for the Iran Nuclear Deal than an Article II treaty, but it would have been more appropriate than a non-binding political commitment.

There are two notable nonproliferation and arms control congressional-executive agreements that deserve closer examination. The first is the most significant treaty in this area to be conducted as an executive agreement, SALT I.[168] SALT I was an interim agreement concluded on the same day as, and in conjunction with, the Anti-Ballistic Missile Treaty (ABM).[169] SALT I capped U.S. and U.S.S.R. Intercontinental and Submarine-Launched Ballistic Missiles (ICBM and SLBM) by halting construction of ICBM silos and SLBM launch tubes; it also included a definition of "strategic offensive arms," which would become important in later U.S.-U.S.S.R. arms control treaties.[170] SALT I is an example of a *regime-altering* agreement[171] concluded as a congressional-executive agreement – perhaps the only significant example. A series of Unilateral Statements[172] by the United States demonstrate dissatisfaction with aspects of the interim agreement, which might help explain why it did not receive Article II treatment: the United States expected a better deal in the near future, which it would obtain in the form of SALT II later in the decade; verification concerns; and differing aims between the two parties.

[167] Kerry Hearing, *supra* note 156; Kerry Hearing Coverage, *supra* note 156.
[168] SALT I, *supra* note 70.
[169] MOORE ET AL., *supra* note 13, at 603-604.
[170] *Id.*; SALT I, *supra* note 70.
[171] Some might consider SALT I a *regime-creating* agreement, being the first of its kind and creating precedent for arms reduction agreements to come. However, the authors do not view this agreement as creating a new regime at international law in the same fashion as, for example, the UN Charter. More likely, SALT I significantly impacted the existing arms control regime.
[172] U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *supra* note 63, at 122 (including texts of Unilateral Statement documents accompanying interim SALT agreement); MOORE ET AL., *supra* note 13, at 605-606.

Anticipation that SALT I would be replaced by a more substantial SALT II soon led the United States to conclude it as a congressional-executive agreement of limited duration.

Next, there is an entire class of agreement, Section 123 Agreements, that the United States has executed with countries to govern the peaceful exchange of nuclear material, equipment, and other components. The Atomic Energy Act provides statutory authority for the Secretary of Energy to conclude legally binding congressional-executive agreements with states regarding peaceful nuclear cooperation. The United States has concluded Section 123 Agreements with twenty-three different nations.[173] The International Trade Administration of the U.S. Department of Commerce describes Section 123 Agreements as follows:

> *For significant nuclear exports, the country must have a 123 Agreement for peaceful nuclear cooperation pursuant to Section 123 of the U.S. Atomic Energy Act of 1954, as amended. In order for a country to enter into such an Agreement with the United States, that country must commit itself to adhering to U.S.-mandated nuclear nonproliferation norms. Significant nuclear exports include power reactors, research reactors, source and special nuclear materials (for use as reactor fuel), and four major components of reactors (pressure vessels, fuel charging and discharging machines, complete control rod drive units, and primary coolant pumps). A 123 Agreement typically does not commit the United States to any specific exports or other cooperative activities, but rather establishes a framework of conditions and controls to govern subsequent commercial transactions, if any.*[174]

Section 123 Agreements are readily distinguishable from the Iran Nuclear Deal because they simply provide requirements that a state must meet before it can participate in the trade of nuclear material with the United States.[175] Section 123 Agreements are not executed in response

[173] *U.S. Bilateral Agreements For Peaceful Nuclear Cooperation Pursuant to Section 123 of the U.S. Atomic Energy Act, As Amended*, U.S. Dep't of State, Jan. 20, 2017, https://www.state.gov/t/isn/rls/fs/2017/266975.htm [hereinafter Section 123].

[174] *123 Agreements*, U.S. Dep't of Commerce, (accessed Jun. 29, 2018), https://www.export.gov/industries/civil-nuclear/exporting-guide/123-agreements.

[175] In distinguishing Section 123 Agreements from the Iran Nuclear Deal, the authors do not intend to disregard the significance of these agreements. Under Section 123, the U.S. supplies nuclear material and technology to other states, an act that poses its own proliferation dangers.

to an international security threat, like the Iran Nuclear Deal was; they are a formal acceptance of certain criteria to gain access to U.S. nuclear trade. Indeed, states party to Section 123 – with one notable exception – are in good standing regarding their NPT responsibilities[176] and are either NPT NWS or NNWS that have terminated, or never pursued, a nuclear weapons program.[177] The notable exception is India, a state that has not signed the NPT and has a nuclear weapons program. So, if the United States was comfortable concluding its Section 123 Agreement with India as a congressional-executive agreement, would a congressional-executive agreement have been an appropriate form for the Iran Nuclear Deal? The answer is "probably not."

While it is true that India is not a signatory to the NPT, a state's decision to remain outside the NPT regime is significantly different from frustrating that regime from within by operating a secret enrichment and reprocessing program in direct violation of the Security Council. India is also a strong democracy with whom the United States maintains a viable and healthy diplomatic relationship. The trust issues rampant in U.S.-Iranian relations are simply nonexistent in the relationship with India, and may have made it feasible to conduct a nuclear sharing agreement pursuant to legislation instead of Article II.[178]

So, do Section 123 Agreements and SALT provide support for the viability of having executed the Iran Nuclear Deal as an executive agreement, requiring only a simple majority in Congress? Unlikely, given the noted distinctions between even the India Section 123 Agreement and the Iran Nuclear Deal, and considering the exceptional circumstances under which SALT I was concluded – most importantly, the fact that it was an agreement that contemplated its own short duration, was created in concert with the ABM Treaty, and was followed by SALT II, an

[176] While there is no roster of states in good standing, it is fairly evident which states are *not* in good standing.
[177] Section 123, *supra* note 173.
[178] However, it is fair to note that India, unlike Iran, has actually built, tested, and possessed nuclear weapons. The decision to expand nuclear collaboration with India was also very controversial.

Article II treaty. However, a congressional-executive agreement would still be a binding international agreement reflecting both legislative and executive input, and appears to be the *lowest* appropriate threshold for agreement form that the Iran Nuclear Deal could plausibly have taken.

Presidential-Executive Agreements

Presidential-executive agreements require no legislative grant. They are entered into pursuant to authority granted to the President alone by the Constitution.[179] Presidential-executive agreements have a wider degree of defining case law: foundational constitutional law cases like *Youngstown Sheet & Tube* and *Dames & Moore* help define the boundaries of the presidential-executive agreement.[180] As *Youngstown* in particular highlights, those boundaries are narrow when the President acts in dissonance with the legislature.[181] In addition to the narrow scope of presidential-executive agreements, they have not typically been used to conduct agreements of significance.[182] In President Obama's defense, though, he was merely exercising powers that Congress had given him to suspend sanctions.

Presidential-executive agreements are typically used for "housekeeping" matters, not consequential issues that alter the arms control or nonproliferation regime.[183] This article does not seek to examine whether constitutional authority could have justified the President entering

[179] CARTER & WEINER, *supra* note 10, at 202.
[180] *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 680-81 (1981) (finding, while Congress had not explicitly approved, it had implicitly consented to settlement of U.S. citizens' claims by executive agreement.);*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.") (Jackson, J., concurring); *United States v. Pink*, 315 U.S. 203, 229 (1942) (determining President's recognition powers extend to the policy relating to recognition, including settlement of national's claims against foreign state.); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) ("President alone has the power to speak or listen as a representative of the nation…a power which…must be exercised in subordination to the applicable provisions of the Constitution.").
[181] *Youngstown*, 343 U.S. at 367.
[182] CARTER & WEINER, *supra* note 10, at 206-207.
[183] *Id.*

into the Iran Nuclear Deal as a presidential-executive agreement. If it is assumed – however unlikely this may be – that such constitutional authority did exist, it becomes apparent that a presidential-executive agreement would have been a wholly politically inappropriate form for the Iran Nuclear Deal to take. The deal is simply too significant, complex and multi-faceted, and totally shifts the landscape of the nonproliferation regime and the American approach to NNWS responsibility under the NPT. However, as inappropriate as a presidential-executive agreement may have been, it *still* would have been more appropriate than the non-binding form the Iran Nuclear Deal ultimately took.

Arms Control Agreements Conducted as Political Statements—The Iran Nuclear Deal

While we do not yet know the ultimate fate of the Iran Nuclear Deal, there has almost certainly never been an international agreement in the field of nuclear nonproliferation of such significance to be completed as a non-binding political statement. In fact, it appears that only two truly significant arms control agreements have been negotiated as political statements prior to the Iran Nuclear Deal. Additionally, one extremely important peace and security agreement, not dealing directly with arms control, was negotiated as a political commitment. The authors would note that the distinction between peace and security agreements in general, and those that specifically deal with arms control and nuclear nonproliferation is important. The existence of significant peace and security political commitments do not serve as precedent for negotiating arms control or nonproliferation agreements as political commitments. While a single treaty might address both functions, the authors have noted the increased importance of agreements that involve nuclear nonproliferation and arms control specifically. However, joint peace and security statements warrant review as a general background on the use of political commitments for agreements that some might find relevant to a discussion of the Iran Nuclear Deal.

The State Department describes political statements as follows:

> *An undertaking or commitment that is understood to-be legally binding carries with it both the obligation of each party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A "political" undertaking is not governed by international law and there are no applicable rules pertaining to compliance, modification, or withdrawal. Until and unless a Party extricates itself from its "political" undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.*[184]

A politically binding document requires states party to uphold their commitments until such a time as they no longer wish to abide by them. These agreements may be extremely useful, providing states the ability to arrive at joint conclusions while reserving the ability to withdraw as circumstances develop. This has a twofold advantage: states both preserve flexibility and promote willingness to engage in beneficial agreements to which parties would otherwise reserve acceptance. This flexibility is not always advantageous. In high-stakes agreements involving arms control, there is serious value in fixing a state to the terms of an agreement and the confidence that accompanies legal enforceability. There are two agreements similar in kind and significance to the Iran Nuclear Deal to be negotiated as non-binding political commitments: the 1994 Budapest Memorandum[185] and the 1994 U.S.-D.P.R.K Agreed Framework (Agreed Framework).[186] Like the Iran Nuclear Deal, both of these agreements significantly impacted the

[184] Treaty with the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (The START Treaty), July 31, 1991, S. DOC. NO. 102-20 (START).
[185] *See* Appendix at C II [hereinafter Budapest].
[186] Int'l Atomic Energy Agency [IAEA], *Agreed Framework of 21 October 1994 Between the United States of America and the Democratic People's Republic of Korea*, IAEA Doc. INFCIR/457 (Oct. 21, 1994).

nonproliferation regime and, like the Iran Deal, neither were legally binding on participants to the agreements.

The Budapest Memorandum (the Memorandum) actually comprises three separate but identical agreements with Ukraine, Kazakhstan, and Belarus, signed in conjunction, on the same day, and including identical language and obligations. In the Memorandum, the United States, United Kingdom, and Russia agree to refrain from the threat or use of force or economic coercion against Ukraine, Kazakhstan, and Belarus.[187] The U.S., U.K. and Russia also reaffirm their obligation not to use nuclear weapons against NNWS, except under certain circumstances, and to seek UNSC assistance on behalf of Ukraine, Kazakhstan, and Belarus if those nations are faced with a nuclear threat.[188] Most significantly, these security assurances came in exchange for Ukraine, Kazakhstan, and Belarus giving up their nuclear capabilities, inherited from the U.S.S.R. at succession.[189] To be sure, this was a multilateral, significant arms control and nonproliferation agreement: former-Soviet states, having had nuclear weapons capabilities as part of the Soviet Union, giving nuclear weapons programs in exchange for security assurances. Some important points, however, distinguish the Budapest Memorandum from the Iran Nuclear Deal. First, the Memorandum did not create significant new obligations, rather it restated the rights already allotted to participating states under the Helsinki Final Act (discussed *infra*) and the NPT, combining them into state-specific documents that reiterated the rights promised under each agreement in the context of accession to the NPT. The obligation for Ukraine, Kazakhstan, and Belarus to give up their nuclear

[187] *See* Budapest, *supra* note 185.
[188] *Id.*
[189] *Id.*

weapons came from their accession to the NPT as NNWS, a legally binding treaty, not the Memorandum. Second, these states were newly independent. While formerly members of the Soviet Union, a nation with which the United States did not enjoy much trust in the preceding years, Ukraine, Kazakhstan, and Belarus were emerging states that did not break trust with the United States or operate nuclear programs through subterfuge, in violation of international law. The Memorandum provided them with assurances in exchange for joining the NPT regime; it was not aimed at remedying direct and repeated violations of that regime, as is the case with Iran. Finally, although the authors cannot say whether a binding agreement might have prevented any violation, Russia did violate the terms of the Memorandum when it annexed Crimea in 2014.[190]

Most similar to the Iran Nuclear Deal, however, is the Agreed Framework. In 1992-1993, a series of IAEA inspections found North Korea's nuclear program – particularly its graphite-moderated reactors – in violation of its IAEA Safeguards Agreement, and referred the issue to the UNSC.[191] Later that year, North Korea threatened to withdraw from the NPT.[192] The UNSC issued a special inspections request to investigate North Korean nuclear activity, but North Korea did not allow IAEA inspectors to conduct the full range of required verification activities.[193] In 1994, North Korea withdrew its IAEA membership.[194] This budding nuclear crisis led the United

[190] *Id.*; *see, e.g.*, David S. Yost, *The Budapest Memorandum and the Russia-Ukraine Crisis*, WAR ON THE ROCKS (June 10, 2015), https://warontherocks.com/2015/06/the-budapest-memorandum-and-the-russia-ukraine-crisis/; Ron Synovitz, *The Budapest Memorandum and Crimea*, VOICE OF AMERICA (Mar. 2, 2014), https://www.voanews.com/a/the-budapest-memorandum-and-crimea/1862439.html.
[191] Fact Sheet on DPRK Nuclear Safeguards, INT'L ATOMIC ENERGY AGENCY, https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards [hereinafter Agreed Framework Fact Sheet].
[192] *Id.*
[193] *Id.*
[194] *Id.*

States to enter into the Agreed Framework with North Korea, wherein the United States agreed to provide a light-water reactor in exchange for North Korea dismantling its graphite-moderated reactors, the source of IAEA concern.[195] This is extremely similar to the Iran Nuclear Deal: a non-legally-binding agreement about critical nuclear proliferation restraints with a country that violates its international law obligations. Instead of being easily distinguishable from the Iran Nuclear Deal, the Agreed Framework is important to a discussion of the use of political commitments for significant nonproliferation agreements because it *has not worked*. Communication broke down between North Korea and the international community on the issue of its nuclear program in the decade following the negotiation of the Agreed Framework: reports of a clandestine enrichment program surfaced in 2002;[196] in 2003, North Korea withdrew from the NPT;[197] and on October 9, 2006, North Korea conducted its first nuclear weapons test.[198] It has since conducted numerous nuclear weapons tests, including testing a hydrogen bomb.[199] The Agreed Framework shows that the Iran Nuclear Deal is not one of a kind, but it also serves as a cautionary example. If the goal of the Iran Nuclear Deal is to eliminate the threat of Iranian nuclear weapons, it would be unwise to look to the precedent of the Agreed Framework's attempt to eliminate the threat of North Korean nuclear weapons – a threat that was not prevented and now looms large in American national security.

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[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *A Timeline of North Korea's Nuclear Tests*, CBS NEWS (Sep. 3, 2017) https://www.cbsnews.com/news/north-koreas-nuclear-tests-timeline/.

While it does not deal directly with arms control, one political commitment involving general peace and security agreement is sufficiently significant to be relevant to a discussion of the Iran Nuclear Deal: The 1975 Helsinki Final Act, the written culmination of dialogue in the Conference on Security and Cooperation in Europe.[200] The Helsinki Final Act aimed to strike a balance between the U.S.S.R.'s desire for recognition of the firm boundaries of its hegemony and the United States and its allies' rights to free travel, free flow of information, and respect for human rights across those borders.[201] The Final Act was just one piece of a "Helsinki Process," which included the Stockholm Conference Document and Vienna Concluding Document.[202] These pieces of the "Helsinki Process" created various confidence- and security-building measures—notably, obligations by participating states to refrain from the threat or use of force and give prior notification of certain military activities.[203] While the Stockholm and Vienna Documents contain some numerical constraints on military exercises, the thrust of the agreements is not arms control. While Helsinki was a success in many ways, the U.S.S.R. failed to adhere to many of the human rights provisions imposed by this non-binding agreement.[204] Perhaps, in hindsight, a legally binding agreement may have been preferable to avoid this outcome.[205] Finally, Helsinki was likely too broad in scope to be conducted as a legally-binding

[200] U.S. Dep't of State, Opinion Letter on International Documents of a Non-Legally Binding Character (Mar. 18, 1994).
[201] Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter CSCE]; *Helsinki Accords*, ENCYC. BRITANNICA, https://www.britannica.com/event/Helsinki-Accords [hereinafter Helsinki Final Act].
[202] *The Helsinki Process and the OSCE*, ORG. SEC. & COOPERATION EUR., https://www.csce.gov/about-csce/helsinki-process-and-osce.
[203] *Id.*
[204] CSCE, *supra* note 201; Helsinki Final Act, *supra* note 201.
[205] The authors are not claiming with any certainty whether a legally binding agreement would have resulted in greater USSR compliance. The point, rather, is that untrustworthy nations are more likely to breach an agreement that does not have the force of law behind it. This is especially true with a state, like Iran, that has been described by multiple presidents as a rogue nation.

agreement.[206] Unlike the Iran Nuclear Deal, which sets out specific provisions for the future of a state's nuclear program, Helsinki was a broad and aspirational agreement seeking stabilization across myriad prominent issues in U.S.-U.S.S.R. relations, and not dealing directly with arms control or nonproliferation. Helsinki illustrates an example of a very powerful non-legally-binding agreement in the national security realm. Even if not visible in the United States, Helsinki – both the Final Act and the Process – was extremely important in shaping European geopolitics, even though the effects may not have been so evident in the United States.

While historically significant, Helsinki is readily distinguishable from the Iran Nuclear Deal because it did not seek to establish specific and enforceable arms control standards on any state. The Iran Nuclear Deal, in sharp contrast to Helsinki, was meant to provide precise limitations and verification procedures on a state's nuclear energy program and a potential path to nuclear weapons. The concerns extant in broad policy agreements aimed at balancing the polarizing geopolitical conflicts in Europe, and the inability to pin down legally enforceable standards in those agreements, are not sufficiently similar to the Iran nuclear issue. It would be unwieldy, if not impossible, to provide legally-binding measures to strike a balance between Soviet and American expectations in Europe.[207] The Iran Nuclear Deal, however, contains extremely specific limitations on enrichment limits and verification procedures.[208] There is simply nothing in the text of the Iran Nuclear Deal that could not have been made enforceable at

[206] Legally binding agreements may, and often do, have as broad of a scope as non-legally-binding agreements. This analysis is focused specifically on Helsinki, and is not meant to indicate that the authors believe legally-binding treaties are meant to be of a limited scope.

[207] Some may argue that the similarities between Helsinki and the CFE Treaty render them indistinguishable and that, since the CFE Treaty was an Art. II treaty and Helsinki was a political agreement, political agreements and treaties may be interchangeable for similar purposes. The authors strongly disagree with such an assertion. While the goals of Helsinki were similar to those in the CFE Treaty, the CFE Treaty's most significant provisions apply precise numerical limits on conventional weaponry in Europe. The CFE Treaty, like the Iran Deal, was an arms control agreement creating specific arms limitations enforceable at international law.

[208] JCPOA, *supra* note 25, at 8-9.

international law, and the deal explicitly contemplates its place as a state-specific complement to the NPT and IAEA Safeguards Agreements.[209]

Most importantly, the Iran Nuclear Deal was an attempt by the international community to make Iran comply with its nonproliferation commitments at international law.[210] When the international community looks back at its response to the Iranian nuclear issue, it will have to ask: if Iran was willing to neglect legally binding UNSCRs and a legally binding IAEA Safeguards Agreement, why would the instrument that seeks to resolve that issue be a non-binding statement of intent? Iran flouted multiple legally binding UNSCRs for a period of years and was willing to lose billions of dollars in sanctions to continue pursuing nuclear weapons in secret, contrary to the most significant aims of the NPT and the nonproliferation regime as a whole. On its face, this appears to be one of the least appropriate settings for the use of a "gentlemen's agreement:" a historical lack of trust between the United States and Iran, exemplified by lack of diplomatic relations; Iran's disregard for binding UNSCRs, its Safeguards Agreement, and its NPT responsibilities; the extreme significance of Iran's developing nuclear weapons program and its impact on the nonproliferation regime; and the deal's specificity, which lends itself to legal enforcement. The appropriate response to Iran's secret nuclear activity was an agreement that created a higher degree of accountability and specific legal responsibility, not a handshake agreement asking for Iran's word that it would not violate the rules of international law that it has been violating for years. With the failure to negotiate the Iran Nuclear Deal as a legally binding agreement, an opportunity to strengthen the nonproliferation regime's response to Iran has instead created uncertainty about the threat of Iranian nuclear weapons.

Conclusion

[209] *Id.* at 3-5.
[210] The JCPOA also added additional commitments, while relaxing some of Iran's pre-existing limitations.

The Iran Nuclear Deal is a nonproliferation agreement of generational significance. It is a multilateral and salient agreement in response to Iran's disregard for a series of legally binding agreements and UNSCRs. It is one of the only agreements of its type and significance to be conducted as a political statement without the force of law. Given Iran's disregard for legally binding agreements and resolutions, it appears facially inappropriate that the solution to the Iranian nuclear crisis could be a handshake agreement. Additionally, U.S. treaty history indicates remarkably consistent practice and precedent for negotiating nearly *all* arms control and nonproliferation agreements as Article II treaties. The Senate has been an *extremely* compliant partner to the executive in treaty-making, casting doubt on Obama administration statements that a treaty was impossible to push through the Senate. Even assuming that a treaty could not have been negotiated in time,[211] other legally binding agreement options – congressional-executive agreements, presidential-executive agreements, or an unratified treaty with the object and purpose of preventing Iranian nuclear weapons – were available to the Obama administration in negotiating the Iran Nuclear Deal and would have been entirely more appropriate than a political agreement.

In negotiating the Iran Nuclear Deal, the Obama administration could have benefited from Jerry Garcia's sage advice. *It costs a lot to win*: of course, the political currency and time investment required to negotiate the Iran Nuclear Deal as an Article II treaty would have been steep. *But even more to lose*: the stakes were, and are, too high to leave this agreement without the force of law; whatever political cost would have been required to give the deal the force of law, it will pale in comparison to the cost if or when Iran cheats or withdraws. *You and me bound*

[211] Generally, treaties take longer to negotiate than a politically-binding agreement. However, some arms control and nonproliferation agreements, like SORT, were negotiated very quickly, even when compared to non-binding political commitments.

to spend some time, wonderin' what to choose: a careful examination of appropriateness in agreement form indicates both inherent and situational disadvantages in dealing with an unreliable partner through a political commitment regarding a threat to the nuclear nonproliferation regime. *Wait until that deal come 'round. Don't you let that deal go down*: the administration's decision to negotiate a deal without the force of law indicates a desperate need to get a deal done, and not to wait for the *right* deal. The authors hope that the Iran Nuclear Deal is effective as a political commitment, so long as it remains in force, but doubt the viability of the deal in lieu of legal enforceability.

APPENDIX

A. LEGALLY BINDING ARTICLE II TREATIES

I. Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, May 6, 2014, S. TREATY DOC. NO. 114-2 (Central Asian NWFZ and Protocol).

Prohibits manufacture, acquisition, possession, or control of nuclear weapons devices. Submitted for advice and consent August 27, 2016. Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan are parties to the NWFZ. Protocol signed after states party to NWFZ met the seven conditions of U.S. support (hereinafter "7 NWFZ Conditions"): created by state initiative; participation by all states whose participation is deemed important; adequate verification of compliance with provisions; should not detrimentally disturb existing security arrangements; must prohibit parties from developing or possessing nuclear devices for whatever purpose; should not affect other rights available to parties under international law regarding internal waters, land territory, and airspace; and should not affect other rights available to parties under international law regarding the law of the sea.

II. Arms Trade Treaty, Apr. 2, 2013, U.N.T.S. 52373.

Regulates international trade in conventional arms. Restricts sale of arms to prevent supplying human rights abusers. Still in Senate.

III. Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, T.I.A.S. NO. 11-205 (New START).

Implementing further mutual reduction and limitation of strategic offensive arms to aggregated limits of: 700 deployed ICBMs, deployed SLBMs, and deployed heavy; 1,550 warheads on deployed ICBM's, SLBMs, and heavy bombers; 800 deployed and non-deployed IBM launchers, SLBM launchers, and heavy bombers equipped for nuclear armaments. Resolution of advice and consent received December 22, 2010.

IV. International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, S. TREATY DOC. NO. 110-4, 2445 U.N.T.S. 4404.

Establishes criminal offenses for international nuclear terrorism and requires states party to the agreement to establish domestic legislation outlawing prohibited offenses as defined in the agreement. Resolution of advice and consent received September 25, 2008.

V. Protocol on Explosive Remnants of War, Nov. 28, 2003, T.I.A.S. NO. 09-721.3, 2399 U.N.T.S. 22495.

Protocol to the CCW Treaty protecting civilian populations from the unexploded, but explosive, remnants of war and assigning responsibility to states party to the agreement to retain information on the location of explosive remnants of war, mark locations, and take precautions

to protect civilians, humanitarian missions, and others from being harmed by such explosives. Resolution of advice and consent received September 26, 2008

VI. The Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, 2350 U.N.T.S. 42195 (SORT).

U.S. and U.S.S.R. treaty to reduce strategic nuclear warhead stockpiles so that they do not exceed an aggregate number of 1700-2200 for each party. Unanimous resolution of advice and consent received March 6, 2003.

VII. Comprehensive Nuclear Test-Ban Treaty, *opened for signature* Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997) (CTBT).

Legally binding prohibition on all nuclear testing. U.S. signed but did not ratify.

VIII. Flank Document Agreement to the CFE Treaty, May 31, 1996, S. TREATY DOC. NO. 105-5, U.N.T.S. 44001.

Applies original CFE reduction on Russian and Ukrainian flank zone to a smaller area and subjects the regions removed from the original zone to new constraints and transparency measures. Unanimous resolution of advice and consent received May 14, 1977.

IX. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices, May 3, 1996, S. TREATY DOC. NO. 105-1(A), 2048 U.N.T.S. 22495.

Protocol to the CCW Treaty providing strict limitations and restrictions to the use of land mines, remote mines, and booby traps in order to protect civilian populations from excessive harm. Resolution of advice and consent received May 20, 1999.

X. Protocols I and II to the African Nuclear-Weapon-Free Zone Treaty, Apr. 11, 1996, S. TREATY DOC. NO. 112-3 (African NWFZ and Protocols).

Prohibits manufacture, acquisition, possession, or control of nuclear weapons devices. Adheres to 7 NWFZ conditions. Resolution of advice and consent received May 2, 2011. Entered into force July 15, 2009.

XI. Protocols 1, 2, and 3 to the South Pacific Nuclear Free Zone Treaty, Mar. 25, 1996, 1971 U.N.T.S. 24592.

Prohibits manufacture, acquisition, possession, or control of nuclear weapons devices. Adheres to 7 NWFZ conditions. Received by Senate and referred to Foreign Relations Committee May 2, 2011.

XII. Protocol on Blinding Laser Weapons, Oct. 13, 1995, T.I.A.S. NO. 09-721.2, 2024 U.N.T.S. 22495.

Protocol to CCW Treaty banning the use of laser weapons whose sole combat function is to cause blindness. Resolution of advice and consent received September 23, 2008.

XIII. Convention on Nuclear Safety, Sept. 20, 1994, S. TREATY DOC. NO. 104-6, 1963 U.N.T.S. 33545.

Enhanced levels of nuclear safety worldwide through national measures and international cooperation, established defenses in nuclear installations against radiological hazards, and sought to mitigate effects of radiological hazards, should they occur. Resolution of advice and consent received March 25, 1999.

XIV. The Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Sept. 3, 1992, S. TREATY DOC. NO. 103-21,1974 U.N.T.S. 33757 (entered into force Apr. 29, 1997) (CWC).

Prohibits: development, production, acquisition, stockpiling, retaining, or transfer of chemical weapons; use of chemical weapons, preparation to use chemical weapons; assistance, encouragement, inducement of anyone to use chemical weapons. Requires states party to the agreement to destroy chemical weapons production facilities they own or possess. Resolution of advice and consent received April 24, 1997.

XV. Treaty with the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, Russ. –U.S., Jan. 3, 1993, S. TREATY DOC. NO. 103-1 (START II).

Reduced deployed strategic arsenals to 3,500 warheads; banned development of destabilizing multi-warhead land-based missiles. Resolution of advice and consent received January 26, 1996.

XVI. Treaty on Open Skies, Mar. 24, 1992, S. TREATY DOC. NO. 102-37.

Between NATO and Warsaw Pact states. Establishes regime of information-gathering unarmed aerial observation flights over territories of signatories. Resolution of advice and consent received August 6, 1993.

XVII. Treaty with the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, U.S.S.R.-U.S., July 31, 1991, S. TREATY DOC. NO. 102-20 (START).

Reduced deployed strategic arsenals to: 1,600 ICMBs, SLBMs, and heavy bombers; 6,000 warheads – including no more than 4,900 ICBM and SLBM warheads and no more than 1,540 warheads on no more than 154 heavy ICBMs. Resolution of advice and consent received October 1, 1992.

XVIII. Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, S. TREATY DOC. NO. 102-8, 2441-2443 U.N.T.S. 44001 (CFE).

Set numerical limitations and other restrictions on battle tanks, armored combat vehicles, artillery, combat aircraft, and attack helicopters in the entire land territory of European states party to the agreement (from Atlantic Ocean to Ural Mountains). Limits: 20,000 battle tanks, no more than 16,500 active; 30,000 armored combat vehicles, no more than 27,300 active; no more than 18,000 armored infantry fighting and heavy armament combat vehicles (with 1,500 cap on heavy armament combat vehicles); 20,000 pieces of artillery, no more than 17,000 active; 6,800 combat aircraft; and 2,000 attack helicopters. Resolution of advice and consent received November 25, 991.

XIX. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, 1657 U.N.T.S. 28521 (INF Treaty).

Required elimination of ground-launched ballistic and cruise missiles with ranges between 500-5,500km and implemented verification/inspection regime. Resolution of advice and consent received May 27, 1988.

XX. Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, Sept. 26, 1986, S. TREATY DOC. NO. 100-4(B), 1457 U.N.T.S. 24643.

Bound states party to agreement to work together to facilitate prompt assistance, minimize consequences, and to protect life, property, and the environment from the effects of radioactive releases in the case of a nuclear accident. Unanimous resolution of advice and consent received September 7, 1988.

XXI. Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, S. TREATY DOC. NO. 100-4(A), 1439 U.N.T.S. 24404.

Created notification system and requirements following nuclear accidents with international implications. Resolution of advice and consent received September 7, 1988.

XXII. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Oct. 10, S. TREATY DOC. NO. 103-25, 1342 U.N.T.S. 22495 (CCW Treaty).

Prohibits the use of means of armed conflict that cause superfluous injury, unnecessary suffering, or cause wide-spread, long-term, severe damage to the natural environment. Resolution of advice and consent March 24, 1995.

XXIII. Incendiary Weapons Protocol, Oct. 10, 1980, T.I.A.S. NO. 09-721.1, 1342 U.N.T.S. 22495.

Prohibits subjecting civilians, military objectives located within concentrated civilian populations, or forests subject to attack by incendiary weapons. Resolution of advice and consent September 23, 2008.

XXIV. Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. NO. 1180, 1456 U.N.T.S. 24631(entered into force Feb. 8, 1987).

Concerned with physically protecting nuclear material during international transport. Also provides a framework for cooperation among states in protection, recovery, and return of stolen material. Lists offenses that states party to agreement are to make punishable, and includes an extradition framework. Unanimous resolution of advice and consent received July 30, 1981.

XXV. Treaty on the Limitation of Strategic Arms and Protocol Thereto, June 18, 1979, S. TREATY DOC. NO. 96-25 (SALT II).

Treaty between the U.S. and U.S.S.R. reducing and limiting strategic arms to aggregate levels of 2,400 ICBM launchers, SLBM launchers, heavy bombers, and anti-ship ballistic missiles (ASBM). The agreement also prohibited certain tests and construction of ICBMs and ICBM launchers. Left unratified after submission to Senate June 22, 1979.

XXVI. Agreement with the International Atomic Energy Agency for the Application of Safeguards on the United States of America, with Protocol, Nov. 18, 1977, T.I.A.S. No. 09889 (entered into force Dec. 9, 1980) (U.S.-IAEA Safeguards Agreement and Additional Protocol).

Agreement implementing safeguards framework for U.S. nuclear activity subject to IAEA observation and oversight. Resolution of advice and consent received March 31, 2004.

XXVII. Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, May 26, 1977, 33 U.S.T. 1792, 634 U.N.T.S. 362 (entered into force Nov. 23, 1981) (Latin America NWFZ Treaty and Protocol).

Treaty binding the United States to the terms of the original NWFZ Treaty between Antigua and Barbuda, Argentina, Bahamas, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname Trinidad and Tobago, Uruguay, and Venezuela prohibiting manufacture, acquisition, possession, or control of nuclear weapons devices. Adheres to 7 NWFZ conditions. Unanimous resolution of advice and consent received November 13, 1981.

XXVIII. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 12, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 17119 (Environmental Modification Convention).

Prohibits deliberate manipulations of natural environment effecting dynamics, composition, or structure of Earth and its biota, lithosphere, hydrosphere, atmosphere, or outer space. Unanimous resolution of advice and consent received November 28, 1979.

XXIX. Treaty with the Union of Soviet Socialist Republics On Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 1714 U.N.T.S. 29638 (PNE Treaty).

Built on TTBT, prohibiting non-peaceful explosions or peaceful explosions exceeding a 150 kiloton yield. Unanimous resolution of advice and consent received September 25, 1990.

XXX. Treaty with the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, U.S.S.R.-U.S., Jul. 3, 1974, 1714 U.N.T.S. 29637 (TTBT).

Created 150 kiloton threshold limit for underground explosive tests. Unanimous resolution of advice and consent September 25, 1990.

XXXI. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S.14860 (BWC).

Multilateral treaty banning development, possession, production, and stockpiling of biological weapons. Unanimous resolution of advice and consent received December 16, 1974.

XXXII. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435 (ABM Treaty).

Limited ABM systems in the U.S. and USSR to two ABM systems with no more than a 150km radius and no more than 100 ABM interceptor missiles. Resolution of advice and consent received August 3, 1972. U.S. unilaterally withdrew in June 2002.

XXXIII. Seabed Arms Control Treaty, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 13678.

Prohibits states party to agreement from placing weapons of mass destruction and nuclear weapons on seabed beyond 12-mile coastal zone. Unanimous resolution of advice and consent received February 15, 1971.

XXXIV. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) (The NPT).

Creates framework for regime of international nonproliferation of nuclear weapons. Creates classes of nuclear-weapons states (NWS) and NNWS, prohibited the sharing of nuclear weapons between the two, prohibited NNWS from developing nuclear weapons, prohibited NWS from expanding nuclear arsenals, and affirmed the universal right to the peaceful use of nuclear energy. The cornerstone of the nuclear nonproliferation regime. Resolution of advice and consent received March 13, 1969.

XXXV. Treaty on Principles Governing the Activities of States in the Exploration and Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T 2410, 610 U.N.T.S. 8843. (Outer Space Treaty).

Establishes the non-armament of outer space. Unanimous resolution of advice and consent received April 25, 1967.

XXXVI. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, May 8, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 6964 (PTBT).

Prohibits all test detonations of nuclear devices except for underground tests. Resolution of advice and consent received September 24, 1963.

XXXVII. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961).

Prohibits nuclear explosions in Antarctica. Resolution of advice and consent received August 10, 1960.

XXXVIII. Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 U.N.T.S. 2138.

Prohibits use of biological weapons. Unanimous resolution of advice and consent received December 16, 1974—the same day as BWC. Other states party to the agreement had ratified as early as 1925. U.S., U.K., and Japan held exceptions for riot control agents—a major source of delay in ratification.

XXXIX. Limitation of Naval Armament (Five-Power Treaty or Washington Treaty), Feb. 6, 1922, 43 Stat. 1655.

Treaty between the United States, United Kingdom, France, Italy, and Japan limiting numbers of battleships, battlecruisers, and aircraft carriers. Resolution of advice and consent received March 29, 1922.

XL. Versailles Peace Treaty, June 28, 1919, 225 Parry 188, 2 Bevans 235, 13 AM. J. INT'L L. Supp. 151, 385.

Treaty officially ending World War I. Formalized armistice with Germany, requiring Germany to accept full responsibility and pay reparation to allies. Created League of Nations, a predecessor to the United Nations meant to settle international disputes without the use of force. The treaty did not receive the advice and consent of the U.S. Senate.

B. LEGALLY BINDING EXECUTIVE AGREEMENTS[212]

I. Memorandum of Understanding on Notifications of Missile Launches (Dec. 16, 2000), http://www.state.gov/t/isn/4954.htm (PLNS MOU).

Establishes Pre- and Post-Launch Notification System (PLNS) for launches of ballistic missiles and space launches. Builds upon JDEC MOA, and includes JDEC MOA's Congressional funding requirement. Signed by Secretary of State.

II. Agreement Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation, U.S.-Russ., Aug. 29, 2000, T.I.A.S. NO. 11-713.1 (PMDA).

Agreement between the U.S. and Russia on the mutual disposition of weapons-grade plutonium. Legally binding as a congressional-executive agreement based on delegated authority from Congress under 50 U.S.C. § 2561-2575. Stems from The Agreement between the Government of the United States of America and the Government of the Russian Federation on Scientific and Technical Cooperation in the Management of Plutonium That Has Been Withdrawn from Nuclear Military Programs, signed on July 24, 1998.

III. Memorandum of Agreement Between the United States of America and the Russian Federation on the Establishment of a Joint Center for the Exchange of Data from Early Warning Systems and Notifications of Missile Launches, June 4, 2000, http://www.state.gov/t/avc/trty/187151.htm (JDEC MOA).

Created JDEC, an early warning system for missile launches in order to efficiently resolve ambiguous situations relating to ICBM and SLBM launches. Also includes other ballistic missile launches of either state party to the agreement or third states, whose launches pose a direct threat to the parties causing detrimental misinterpretation of intent or purpose. Agreement expressly acknowledges that Congress would have to approve of any funding

IV. Agreement Between the United States of America and the Union of Soviet Socialist Republics on Notification of Launches of Intercontinental Ballistic Missiles and Submarine-Launched Ballistic Missiles, May 31, 1988, 27 I.L.M. 1200.

Confidence-building measure concluding separate agreement for notification of ICBM and SLBM launches, reinforcing the pre-existing obligations under START, SALT II Art. XVI, and Accidents Measures agreement. Signed by Secretary of State.

V. Agreement on the Establishment of Nuclear Risk Reduction Centers, Sept. 15, 1987, 1530 U.N.T.S. 26557.

[212] Note that the 23 Section 123 Agreements are not included in this Appendix. Nor is the United States-India Agreement for Cooperation on Peaceful Uses of Nuclear Energy, or the act authorizing the agreement, included. United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, 22 U.S.C. § 8001 (2012) http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title22-section8001&num=0&edition=prelim.

A confidence-building measure initiated by Senators Sam Nunn and John Warner, the agreement required the U.S. and USSR to exchange notification for ballistic missile launches, emphasizing requirements from the Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War (Art. 4). Signed by Secretary of State. Updated in 2013 to reflect new technology and incorporate better computer usage, signed again by Secretary of state.

VI. Agreement on the Prevention of Nuclear War, June 22, 1973, U.S.-U.S.S.R., June 22, 1973, 24 U.S.T. 1478.

Confidence-building measure occurring parallel to SALT negotiations, signed by President Nixon, agreeing to make removal of danger of nuclear war the objective of future policies. Outlines general conduct of both countries toward each other and toward third countries, including consultation with UN.

VII. Interim Agreement on the Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3462 (Sept. 30, 1972) (SALT I).

First agreement limiting SLBM and ICBM arsenals. Froze strategic ballistic missile launcher levels at existing sizes. Limited U.S. to 1,054 ICBM silos and 656 SLBM launch tubes; limited USSR to 1,618 ICBM silos and 740 SLBM launch tubes. Recognized after signature by Congress in "Jackson Amendment" Pub L. No. 92-448, 86 Stat. 746, 747 (1972).

VIII. Agreement Between the Government of The United States of America and the Government of The Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R., May 25, 1972, 23 U.S.T. 1168 (Incidents at Sea Agreement).

Requires Notices to Airmen and Mariners for hazards to navigation or aircraft flight, including ballistic missile launches. Signed by U.S. Secretary of the Navy and USSR Commander-in-Chief of the Navy.

IX. Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, U.S.-U.S.S.R., Sept. 30, 1971, 22 U.S.T. 1590 (Accidents Measures Agreement).

Pledge to maintain safeguards against accidental or unauthorized use of nuclear weapons; arrangement for immediate notification; and advance notification of any planned missile launches beyond territory and in direction of the other party. Parallel to SALT negotiations. Signed by Secretary of State. Principally the same commitments are codified in the Convention on the Physical Protection of Nuclear Material, Convention on Early Notification of Nuclear Accident, Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, and Convention on Nuclear Safety.

C. NON-BINDING POLITICAL COMMITMENTS IN ARMS CONTROL

I. Joint Comprehensive Plan of Action, July 14, 2015, http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/ (non-legally binding) (JCPOA or Iran Nuclear Deal).

See article text for further description. Permits Iranian enrichment and reprocessing while establishing limitations and verification procedures for Iranian nuclear energy program. Unsigned.

II. Budapest Memorandum on Security Assurances
   a. Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, U.N.T.S. 52241.
   b. Memorandum of Security Assurances in connection with Accession of the Republic of Belarus to the Treaty on Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, 2866 U.N.T.S. 50069.
   c. Memorandum of Security Assurances in Connection with Kazakhstan's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994.

See article for further description. Series of security assurances to Ukraine, Belarus, and Kazakhstan in exchange for their accession to the NPT as NNWS. Security assurances were not legally binding, but Ukraine, Belarus, and Kazakhstan's commitments under the NPT were.

III. Int'l Atomic Energy Agency [IAEA], *Agreed Framework of 21 October 1994 Between the United States of America and the Democratic People's Republic of Korea*, IAEA Doc. INFCIR/457 (Oct. 21, 1994).

D. OTHER NON-BINDING NATIONAL SECURITY POLITICAL COMMITMENTS

I. Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Final Act).

See article text for further description. Agreement acknowledging USSR hegemony in Eastern Europe but requiring USSR to recognizing certain human rights across those borders.