

International Agreements (Part II): Examining Tools for Congressional Influence Over International Instruments

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This Legal Sidebar examines options for Congress to influence international instruments. It is the second in a three-part series on international agreements in the U.S. legal system. [Part I](#) introduces the primary of forms of international instruments and the process for making them. [Part III](#) addresses legislative measures that increase transparency into the United States' international obligations. For more information on these topics, see [International Law and Agreements: Their Effect upon U.S. Law](#).

Congressional Influence Over International Instruments

Based on its constitutional powers, the legislative branch has a unique set of tools to influence international agreements, and the level of influence exercised varies depending on the type of instrument. As discussed in [Part I](#) of this series, international agreement-making has evolved since the Founding era, and the President now concludes [executive agreements](#) and [non-binding instruments](#) more often than treaties, which are submitted to the Senate for advice and consent. A different suite of congressional tools may be available to influence non-treaty instruments. Congress's authority may also vary depending on whether an instrument addresses an authority assigned to Congress in [Article I](#) of the Constitution, an exclusive presidential power outlined in [Article II](#), or a blend of issues. For example, Congress has broad authority to shape trade agreements based on its [power over foreign commerce](#), but its ability to influence agreements related to recognition of foreign governments may be limited because [recognition is an exclusive presidential prerogative](#).

“Advice and Consent” and the Senate’s Role in Treaty-Making

When the United States seeks to conclude an international agreement as a treaty, the Senate plays an essential part based on its [constitutional role](#) to provide advice and consent. In this process, the Senate can shape treaties' [interpretation](#) and [effect](#) by conditioning its consent on reservations, understandings, declarations (RUDs), and other conditions, discussed in this [In Focus](#).

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Authorizing Congressional-Executive Agreements

Apart from treaties, Congress has the power to grant or revoke statutory authorizations for congressional-executive agreements, and there are several methods available to Congress. Congress can enact [legislation](#) that gives the executive branch advance (also called *ex ante*) permission to conclude agreements. It can pass [legislation](#) that gives after-the-fact (or *ex post*) [approval](#) to agreements that the executive branch has already [negotiated](#) and signed. Congress can also incorporate [elements of both methods](#) by giving the executive branch *ex ante* authority to negotiate and sign agreements while requiring *ex post* congressional approval before the agreement enters into force.

Some [statutes](#) give the executive branch [broad](#) agreement-making authority. The [Foreign Assistance Act](#), for example, authorizes the President to “furnish military assistance, on such terms and conditions as he may determine . . . will strengthen the security of the United States and promote world peace.” Other laws are more [prescriptive](#) and only authorize agreements that meet defined criteria. For example, data-sharing agreements authorized under the [CLOUD Act](#) must meet a [detailed set](#) of requirements and are only available to countries that “[afford robust substantive and procedural protections for privacy and civil liberties](#).”

“Report-and-Wait” Frameworks

Laws establishing “[report-and-wait](#)” frameworks create mechanisms for increased congressional control over non-treaty instruments. This model of legislation requires the executive branch to submit a proposed instrument to Congress within a specified time before it can take effect. After receiving the text, Congress can use expedited (also known as “[fast track](#)”) legislative procedures to act on the instrument. Some [laws](#) provide that an instrument will enter into force unless Congress enacts a joint resolution of disapproval within a defined time. [Others](#) require Congress to enact new legislation that gives *ex post* approval before the instrument can take effect. The report-and-wait model is common for trade agreements, but Congress has used it for other [executive agreements](#) and [non-binding instruments](#).

Congressional Objective-Setting

Congress may wish to encourage the pursuit of certain objectives in U.S. negotiations with foreign countries and international organizations. The Supreme Court has [stated](#) in [dicta](#) that the President has exclusive power to conduct international negotiations, but historical practice shows there are avenues for Congress to set initiatives on the international stage. For example, Congress can enact non-binding [recommendations](#) and “[sense of](#)” provisions [encouraging](#) the executive branch to [pursue](#) certain objectives. Non-binding recommendations and resolutions helped [catalyze](#) several major international agreements, including the [North Atlantic Treaty](#) and the World Bank’s [Articles of Agreement](#).

Congress can also encourage the executive branch to pursue defined goals by [authorizing](#) executive agreements within parameters that align with congressional aims. Some laws authorizing congressional-executive agreements [set](#) negotiating [objectives](#) for agreements to be pursued under the statutory authority. In the [trade agreements context](#), Congress frequently uses report-and-wait frameworks that facilitate fast-track approval if the President follows statutorily defined negotiating requirements.

Legislation that *requires*—rather than authorizes or encourages—the President to pursue international instruments may raise constitutional objections. The Office of Legal Counsel (OLC) in the Department of Justice contends that legislation dictating the “[‘time, scope, or objectives’ of international negotiations](#)” can unconstitutionally intrude on the President’s [foreign affairs power](#). According to OLC, Congress can [offer](#) the President fast-track procedures in return for the President following congressional objectives, but Congress cannot restrict the President’s independent authority to forgo expedited procedures and pursue an instrument with different aims.

In line with OLC's view, one U.S. court of appeals [held](#) that a [statute](#) requiring the Secretary of State to negotiate a sea turtle conservation convention violated separation of powers principles. Despite this opinion, Congress has continued to enact laws that [require](#) the President to [pursue](#) some international agreements. A similar set of laws [directs](#) the executive branch to [use](#) the “voice and vote” of the United States in international organizations to advance congressional goals. On a few occasions, Presidents [have raised](#) constitutional concerns with these mandates in [signing statements](#), which occasionally state that the President will treat them as [non-binding](#). Other times, Presidents have [signed](#) the laws [without objection](#).

Oversight and Accountability Mechanisms

Congress has used the following legislative mechanisms to facilitate oversight and accountability in the executive branch's international-agreement-making practice.

- **Certification requirements:** Making authorizations for congressional-executive agreements [contingent](#) on certification that statutory requirements are satisfied, requiring [periodic renewal](#) of certifications, and applying certification requirements to [changes and amendments](#) to agreements
- **Interagency deliberation:** Mandating [interagency deliberation](#) and [requiring concurrence](#) of multiple agencies in international instrument-related certifications
- **Information-sharing:** [Requiring](#) congressional [reporting](#), briefings, and [consultations](#) on international-instrument-related issues with [regular audits](#) on statutory compliance provided to Congress
- **Power of the purse:** [Withholding](#) funding [related](#) to agreements using the [appropriations power](#)
- **Prohibiting action without agreement:** [Prohibiting](#) the President from taking unilateral actions on the international stage without first concluding an international agreement
- **Monitoring implementation:** Mandating information-sharing and certifications related to ongoing [compliance](#) with and [implementation](#) of agreements
- **Sunset:** [Terminating authorizations](#) for executive agreements at a defined time unless renewed

Administrative Agreement-Making Procedures

The Administrative Procedure Act ([APA](#)) subjects some executive branch agency actions to transparency and public participation requirements, but the law [exempts](#) actions involving “[military or foreign affairs functions](#)” from key requirements, and it [does not cover](#) the President's actions. Because some procedural provisions of the APA [do not apply](#) to actions [related to](#) international instruments, Congress has sometimes enacted legislation that defines the internal processes through which the executive branch negotiates and concludes international agreements.

Some requirements are [context-specific](#). The legislation [authorizing](#) international postal agreements, for example, mandates several procedural steps. The Secretary of State must coordinate with executive branch agencies; meet with public sector advisory groups; consider the Postal Regulatory Commission's views; and maintain a liaison with congressional committees, the Postal Service, and other stakeholders. In addition, [legislation](#) authorizing congressional-executive agreements sometimes directs the executive branch to consider congressional views and public input as a condition to using fast-track authority.

Other statutes apply to broad groups of instruments. For instance, a statute commonly called the [Case-Zablocki Act](#) requires executive branch officials to consult with the Secretary of State before concluding binding international agreements. As discussed in [Part III](#) of this series, provisions in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, which went into effect on September 19, 2023, build on the Case-Zablocki Act and require executive branch agencies to follow interagency coordination processes and transparency mandates when concluding binding agreements and some non-binding instruments.

Although many statutory agreement-making procedures [have not garnered](#) constitutional objections, President Biden issued a [signing statement](#) in August 2023 in connection with the United States-Taiwan

Initiative on 21st-Century Trade First Agreement Implementation Act that raised constitutional concerns. The Act gave *ex post* approval to a U.S.-Taiwan trade agreement and set forth transparency and consultation requirements for future agreements between the two partners. The Act does not authorize future agreements or create a fast-track process to approve them, but it imposes procedural mandates if the President independently pursues future agreements. Specifically, the Act requires the executive branch, among other things, to provide daily briefings to congressional committees and leaders during negotiations, share and allow time for review of negotiating texts, and include a congressional advisory group as members of the U.S. delegation. President Biden's signing statement argued that, to the extent these requirements would infringe upon his constitutional authority to negotiate with a foreign partner, the executive branch will treat them as non-binding.

Controlling Implementation

When a change in domestic law is necessary to implement an international instrument, the task of providing that legislation falls to Congress. This constitutional power allows Congress to shape international instruments' role in the U.S. legal system, but most instruments do not require new legislation. International agreements and non-binding instruments are often silent on how they should be implemented, and the executive branch frequently decides how implementation will occur in the United States. Executive branch agencies sometimes implement instruments through administrative rulemaking procedures or by applying them directly without additional implementing processes. Congress could consider exerting greater control over international instruments through legislation dictating how they are implemented domestically.

In some legislative models, such as the trade promotion authority discussed below, Congress has used a comprehensive set of legislative requirements to increase congressional influence at all stages of the agreement-making process—from objective-setting to implementation.

Tools in the Trade Promotion Authority Framework

The legislative model known as trade promotion authority (TPA), the latest version of which expired in 2021, provides an illustrative example of legislation that authorizes international agreements while combining tools for congressional control and oversight at each stage of the agreement-making process. TPA created a framework to negotiate, conclude, and implement trade agreements using the following requirements and features over the course of the agreement-making process.

- **Objective-setting:** Statutorily defined [objectives and policy goals](#) to pursue in negotiations
- **Pre-negotiation:** Congressional [notification and consultation](#) requirements before the executive branch begins negotiations
- **During negotiations:** Mandatory congressional [oversight and consultation](#) with public and congressional engagement during negotiations
- **Before signature:** Additional congressional [consultation prior to signing an agreement](#); mandatory pre-signature [reporting](#) with a fast-track [resolution of disapproval](#) process if the executive branch's report does not align with statutory objectives
- **Before entry-into-force:** Requirement for the President to [submit](#) an agreement's text, draft implementing legislation, proposed administrative action, and other supporting information to Congress before an agreement enters into force
- **Entry-into-force and implementation:** Fast-track [process](#) for Congress to simultaneously approve an agreement and enact implementing legislation; agreement does not enter into force [unless](#) implementing legislation is enacted
- **Other features:** creation of a [congressional advisory group](#); development of information-sharing [guidelines](#); fast-track [resolution of disapproval](#) process if executive branch does not consult with or notify Congress

Withdrawal from International Instruments

Congress could consider efforts to counter the [increasing presidential control](#) over withdrawal from international instruments. One method for congressional influence is for the legislative branch to [prescribe a withdrawal process](#) when it authorizes or gives advice and consent to international instruments. OLC [opined](#) in 2018 that, when the authorizing act does not specify a withdrawal method, Congress has little ability to control the withdrawal process through legislation. In a 2020 opinion, OLC [took the position](#) that treaty withdrawal is an exclusive presidential power and that Congress cannot constitutionally restrict the President's discretion to withdraw by imposing a 120-day notice-and-waiting period on a previously ratified treaty.

Courts to date have not described the President's withdrawal power as broadly as OLC. The [weight of judicial authority suggests](#) that the interbranch debate over withdrawal power presents a political question that is more appropriately resolved through political processes than through judicially determined legal principles. To the extent that withdrawal is a political question, Congress can use its traditional authorities, such as its legislative authority and [oversight powers](#), to guide the resolution of disagreement with the executive branch. A [provision](#) in the Senate-passed version of the National Defense Authorization Act for Fiscal Year 2024 could test Congress's power to regulate withdrawal by prohibiting the President from withdrawing from the North Atlantic Treaty without the advice and consent of the Senate.

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