



Congress Can Curtail Executive Overreach by Codifying Procedures for International Accords

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Submission for the Record

For the hearing “Biden’s Global Tax Surrender Harms American Workers and Our Economy”

Subcommittee on Tax Policy of the House Committee on Ways and Means

July 19, 2023

Dear Chairman Smith, Chairman Kelly, Ranking Member Neal, and Ranking Member Thompson:

Thank you for the opportunity to submit comments for the record related to the hearing of the Subcommittee on Tax Policy of the Committee on Ways and Means entitled “Biden’s Global Tax Surrender Harms American Workers and Our Economy” held on July 19, 2023.

The Biden administration’s coordination with the Organisation for Economic Co-operation and Development (OECD) to increase taxes on U.S.-based enterprises appears to be an attempt to usurp Congress’ revenue-raising powers. The Defending American Jobs and Investment Act by Chairman Smithⁱ and the Unfair Tax Prevention Act by Representative Estesⁱⁱ with strong support from their colleagues are important signals that members of Congress oppose this executive overreach.

Unfortunately, President Biden is unlikely to sign such legislation into law. Nor would a sufficient number of his co-partisans be likely to assist in a veto override, if it came to that, particularly on a now-polarized policy.

Presidential overreach is common in international affairs

President Biden is hardly the first president to encroach on Congress’ proper roles in international affairs.

President Trump, acting through Secretary Pompeo, abrogated the American commitment to the Intermediate-Range Nuclear Forces treaty with Russia over that country’s violations. It was the correct policy, to be sure, but it was a unilateral executive decision. President Trump also leveraged a credible threat to withdraw from NAFTA to force Congress to approve the USMCA despite misgivings among many legislators. Fears that President Trump would withdraw from NATO inspired numerous measures to block withdrawal without the approval of Congress, most recently in July 2023 legislation by a dozen senators led by Senators Kaine and Rubio.ⁱⁱⁱ

Many thought that President Obama's Joint Comprehensive Plan of Action with respect to Iran should have been in the form of a treaty. His administration pretended, however, that it was merely an executive agreement, which empowered his successor to scrap the deal unilaterally as well. As legislative director to a House member at the time, I wrote a messaging bill stating that the JCPOA couldn't go into effect until the Senate approved it as a treaty. It went nowhere.

Unilateral presidential action in foreign affairs has become normal. In part, this reflects Supreme Court doctrine to refrain from inserting itself in such matters. In *Goldwater v. Carter* (1979), the Supreme Court declined to rule on the proper balance of powers. The suit challenged President Carter's withdrawal from a 1954 defense treaty with Taiwan after U.S. diplomatic recognition shifted to the People's Republic of China.

The Federal District Court relied on this precedent when dismissing *Kucinich v. Bush* (2003) over the latter's withdrawal from the Anti-Ballistic Missile Treaty. With only constitutional provisions as their guides, the justices lacked solid ground for a judicial decision, and they properly chose not to usurp legislative powers themselves.

Granted, the Senate often adopts resolutions when ratifying treaties. From a legal perspective, however, these resolutions are equivalent to senses of the Senate. They do not constitute the "supreme Law of the Land" that applies to the Constitution, to statutes, and to Senate-approved treaties.

Outcomes could be different under a proper statutory framework, however.

Systemic problems require systemic solutions

Current congressional efforts to push back on President Biden's overreach with a complicit OECD respond directly to the threatened actions. Nearly every president, however, seems to come out ahead when challenging Congress.

Perhaps a structural reform to the balance of powers is needed. Congress has all the tools it needs.

Among the powers that the Constitution grants Congress in Article I, Section 8, are "To lay and collect Taxes," "To regulate Commerce with foreign Nations," and "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." To convert those principles into rules of governance, clause 18 empowers Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof. Article II, Section 2, constrains the President's power "to make Treaties" with the proviso that "two thirds of the Senators present concur."

In other words, the necessary and proper clause gives Congress the explicit power to develop statutory frameworks to give life to the principles stated in the Constitution.^{iv} As long as implementing legislation doesn't conflict with the Constitution, the Supreme Court would have a foundation to help Congress check executive overreach.

Designing implementing legislation for international accords

The House Committee on Ways and Means and the Senate Committee on Finance would share jurisdiction with the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations for any such legislation. The former committees have already developed requirements for congressional-executive agreements such as trade agreements and therefore have institutional expertise in drafting and overseeing executive branch compliance with those standards. The latter would likely have primary jurisdiction for the overall package.

The first step is definitions. What exactly are treaties, congressional-executive agreements, and executive agreements, and how do they differ from each other?

The next question is how America enters into agreements. Treaties are clear from the Constitution: two-thirds of senators must approve the executive-negotiated treaty. Congressional-executive agreements require majorities in both houses. Executive agreements, properly defined, may not include Congress other than an appropriate level of oversight.^v

Exiting, abrogating, or denouncing international accords is entirely unclear so far in statute. Congress can – and does – enact legislation that is inconsistent with America’s international agreements, but counterparties don’t always have a forum to challenge those actions.

Admittedly, members of Congress often approve legislation without being aware of possible conflicts with treaties and other agreements. Many may value such information, whether it comes from the Congressional Research Service, the committees of jurisdiction, the State Department, or another entity.

A rule-of-law approach would give Congress authority to end U.S. participation in treaties and congressional-executive agreements but perhaps not executive agreements. If a majority of Congress can pass laws that are inconsistent with treaties, a majority of senators is likely appropriate to end participation in a treaty, and a majority of both houses would suffice for a congressional-executive agreement. While a high threshold of senators makes sense before the American people have legal obligations to other countries, a small minority of senators should not be able to maintain bonds that have outlived their value.

It is no objection to observe that treaties and other agreements do not specify the parties’ internal mechanisms for approval or disapproval. Every country is different, and each can change its internal procedures. Implementing legislation would simply clarify by statute which U.S. entities have authority within our political system.

Naturally, executive branch officials who overstep their authorities should face sanctions for attempting to usurp the laws. The legislation would need to include punishments on culpable individuals distinct from the possibility of reversal by the Supreme Court.

Finally, the United States has made extensive commitments on a wide variety of topics with a broad range of counterparties throughout the world. The 2020 edition of the State Departments’ *Treaties in Force* [report](#) simply lists them by counterparty and separately by topic. It is 570 pages long.^{vi} A process for regularly reviewing and making recommendations to executive branch negotiators and to Congress would be valuable.

Implementing legislation for international accords would strengthen Congress

The benefits to Congress and to our democracy from legislation codifying roles and responsibilities in agreements with other sovereigns would be profound. No longer could the executive branch impose or rescind legal obligations on the American people without the consent of their representatives in Congress. Congress would be subject to far less leverage by ambitious presidents seeking to make a mark unilaterally.

Presidents would have to negotiate with Congress. Congress would have more freedom to deliberate how best to serve the American people in this dynamic world.

President Biden's collusion with the OECD is merely the latest iteration of executive overreach in the conduct of foreign affairs. It is, of course, particularly appalling that an American president would conspire to help other countries impose tax hikes on American enterprises. Yet without a statutory basis, Congress cannot hope to challenge such actions in the judicial branch and would remain feckless in the face of repeated offenses.

Congress has the latent power to fix the system, rebalance our constitutional order toward Congress as the federal government's premier policymaking body, and restore our democratic ideals. Congress can do this by developing and enacting legislation to govern interbranch relations for international accords.

ⁱ House Ways and Means Committee, "Ways and Means Republicans Introduce Bill to Combat Biden's Global Tax Surrender," <https://waysandmeans.house.gov/ways-and-means-republicans-introduce-bill-to-combat-bidens-global-tax-surrender/>, May 25, 2023.

ⁱⁱ House Ways and Means Committee, "Rep. Estes Introduces Legislation to Protect Americans from Unfair Taxes in Global Tax Pact," <https://waysandmeans.house.gov/rep-estes-introduces-legislation-to-protect-americans-from-unfair-taxes-in-global-tax-pact/>, July 18, 2023.

ⁱⁱⁱ Sen. Tim Kaine, "Kaine & Rubio Introduce Bipartisan Bill to Prevent Any U.S. President from Leaving NATO," <https://www.kaine.senate.gov/press-releases/kaine-and-rubio-introduce-bipartisan-bill-to-prevent-any-us-president-from-leaving-nato>, July 12, 2023.

^{iv} Kurt Couchman, "No presidential power is beyond Congress," *The Hill*, <https://thehill.com/opinion/white-house/369379-no-presidential-power-is-beyond-congress/>, January 17, 2018.

^v Curtis A. Bradley, Jack Goldsmith, and Oona A. Hathaway, "Congress Mandates Sweeping Transparency Reforms for International Agreements," JustSecurity.org, <https://www.justsecurity.org/84443/congress-mandates-sweeping-transparency-reforms-for-international-agreements/>, December 23, 2022.

^{vi} U.S. Department of State, *Treaties in Force 2020*, <https://www.state.gov/treaties-in-force/>, 2020.