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## Legislative Diplomacy

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# LEGISLATIVE DIPLOMACY

Ryan M. Scoville\*

*A traditional view in legal scholarship holds that the U.S. Constitution assigns the president exclusive power to carry on official diplomatic communications with foreign governments. But in fact, Congress and its members routinely engage in communications of their own. Congress, for example, receives heads of state and maintains official contacts with foreign parliaments. And individual members of the House and Senate frequently travel overseas on congressional delegations (“CODELS”) to confer with foreign leaders, investigate problems that arise, promote the interests of the United States and constituents, and even represent the president. Moreover, many of these activities have occurred ever since the Founding. Together, they comprise an understudied field of legislative diplomacy. This Article has two purposes: The first is to use State Department cables from WikiLeaks, a recent compilation of public reports, and original historical sources to provide a uniquely detailed, descriptive account of legislative diplomacy. The second is to develop theories about the practice’s constitutionality. Text, original meaning, and customary practice suggest that the separation of diplomacy powers is more complicated than commonly assumed and that those powers do not belong exclusively to the president. The analysis undermines the “sole organ” metaphor, serves as a counterpoint to the widely held view that authority over foreign affairs belongs overwhelmingly to the executive, and carries practical implications for the execution of U.S. foreign relations.*

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#### INTRODUCTION

In the midst of various disagreements over the allocation of foreign affairs powers between the president and Congress, there is unanimous agreement on at least one point: the president holds an exclusive power to carry on official diplomatic communications with foreign governments. As Louis Henkin explained, “From the beginning, the President has been the organ of communication with foreign governments and has had control of the principal channels of information—making the President the voice as well as the eyes and ears of the United States.”<sup>1</sup> The extent of the academic consensus on this point is impressive. It is longstanding.<sup>2</sup> It reflects the conclusions of a significant number of scholars.<sup>3</sup> And it draws support even from those who generally oppose claims of broad executive power in foreign affairs.<sup>4</sup> To put it simply, “Everyone agrees that the President has the exclusive power of official communication with foreign governments.”<sup>5</sup> Indeed, according to Edward Corwin, “[T]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation’s intermediary in its dealings with other nations.”<sup>6</sup> The literature thus

1. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 32 (2d ed. 1996).

2. Compare MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 51–52, 210 (2007), with ELMER PLISCHKE, *CONDUCT OF AMERICAN DIPLOMACY* 100 (1950), and QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 360 (1922).

3. See, e.g., H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS* 145 (2002); RAMSEY, *supra* note 2, at 245; KENNETH W. THOMPSON, *AMERICAN DIPLOMACY AND EMERGENT PATTERNS* 120 (1962); Donald L. Robinson, *Presidential Prerogative and the Spirit of American Constitutionalism*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 114, 118 (David Gray Adler & Larry N. George eds., 1996); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 59–60 (1979); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 206–07 (2009).

4. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 624 (2004); Louis Fisher, *Commentary, Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1517–18 (1989).

5. Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 755 (1989).

6. EDWARD S. CORWIN ET AL., *THE PRESIDENT* 214 (5th rev. ed. 1984).

creates the impression of an unassailable constitutional principle. I call this the diplomacy power orthodoxy.

Expressions of the orthodoxy locate the president's power in any of several clauses of Article II<sup>7</sup> and claim the support of original meaning.<sup>8</sup> The accepted understanding is that the Founders viewed an exclusively executive diplomacy power as necessary for the United States to respond quickly to international events, preserve secrecy, speak with a single voice, and negotiate from a position of strength.<sup>9</sup> Underlying this view is a concern that nonexecutive diplomacy powers, much like an independent foreign policy power for states, would introduce multifarious and even conflicting voices into the conduct of foreign affairs.

The orthodoxy, however, is both imprecise and incomplete—imprecise in that it tends to overstate the breadth of executive power, and incomplete in that it neglects the possibility of legislative power. Far from absent, international diplomacy by Congress is longstanding, frequent, and widespread. In most cases, federal statutes facilitate the practice.<sup>10</sup> Legislators travel abroad to investigate conditions in other countries, lobby foreign governments, negotiate agreements, speak on behalf of the president and the U.S. government, and even oppose executive policies.<sup>11</sup> For its part, Congress receives foreign delegations, maintains official contacts with foreign parliaments, and supports the international travel of its members.<sup>12</sup> Together, these practices comprise an understudied domain of legislative diplomacy.

Details about legislative diplomacy have long evaded scrutiny. The State Department and members of Congress keep most of the communications nonpublic.<sup>13</sup> Statutory reporting requirements are minimal.<sup>14</sup> News coverage is sporadic. Legislators, moreover, may have political incentives to be less than candid about the substance or even occurrence of their contacts with foreign leaders. As a result, the practice is a poorly understood mode of U.S. engagement with the world.

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7. U.S. CONST. art. II.

8. See, e.g., DAVID C. HENDRICKSON, *PEACE PACT* 242–43 (2003); JACK N. RAKOVE, *ORIGINAL MEANINGS* 267 (1996); GRAHAM H. STUART, *AMERICAN DIPLOMATIC AND CONSULAR PRACTICE* 1, 4 (2d ed. 1952).

9. HENKIN, *supra* note 1, at 32.

10. See *infra* notes 129–136 and accompanying text (identifying federal statutes that provide for legislative diplomacy).

11. *Infra* notes 32, 46, 49–65 and accompanying text.

12. *Infra* notes 90–100, 126–136 and accompanying text.

13. See, e.g., *Asad Discusses Iran and Gaza with CODEL Specter*, WIKILEAKS (Jan. 4, 2009), <http://wikileaks.org/cable/2009/01/09DAMASCUS3.html>.

14. See 22 U.S.C. § 1754(b)(2) (2006) (requiring public reports on the costs and destinations of publicly funded foreign travel by members of Congress). In March 2011, Senator Claire McCaskill introduced a bill designed in part to enhance these reporting requirements. The bill was referred to the Senate Committee on Homeland Security and Government Affairs, but nothing has happened since. See *Cleaning up Congress by Providing Accountability for Congressional Foreign Travel Act*, S. 429, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bills/112/s429/text>.

WikiLeaks, however, has presented an unprecedented opportunity to evaluate this practice. In 2010 and 2011, the organization released to the public approximately 250,000 State Department cables, many of which provide extensive and often verbatim descriptions of communications between U.S. legislators and foreign officials.<sup>15</sup> These cables make it possible to examine the practice of legislative diplomacy in more detail than ever before. Together with other sources, such as federal travel reports, they help illuminate the total volume of the practice, its purposes, the destination countries, the senators and representatives involved, and the leaders with whom they meet.<sup>16</sup>

These details challenge the prevailing sense that diplomacy is an executive prerogative and call for a more nuanced account of the separation of powers. Under the orthodoxy's influence, most legal analyses have treated the president's monopoly over official communication as a given, rather than as a point of criticism or elaboration, and the diplomacy power itself as doctrinally untextured. Few scholars have acknowledged that legislative diplomacy occurs, and none have addressed the extent of its constitutionality. One resulting problem is theoretical: the gap between theory and practice means either that Congress systematically violates the separation of powers or that the orthodoxy is incorrect—or, at the very least, incomplete. A second problem is practical: lacking a theoretical foundation, legislative diplomacy occurs in a constitutional void that imposes no principled limits on the conduct of members of the House and Senate and offers no guidance on the extent to which planned communications are permissible. A theory about the diplomacy powers of Congress would help alleviate these problems.

In developing this theory, I rely on several key terms. "Diplomacy" denotes any act of communication with a foreign government by a U.S. government institution or official.<sup>17</sup> Under this general definition are categories that differ based on the branch of the federal government that is involved, the capacity in which the communicator speaks, and the communicative purpose: "Legislative diplomacy" is diplomacy by Congress or one of its members, while "executive diplomacy" is diplomacy by an executive agency or official; "sovereign diplomacy" is diplomacy on behalf of the United States, while "subsovereign diplomacy" is on behalf of any component of the

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15. See Christian Stöcker, *Leak at WikiLeaks: A Dispatch Disaster in Six Acts*, DER SPIEGEL (Sept. 1, 2011), <http://www.spiegel.de/international/world/leak-at-wikileaks-a-dispatch-disaster-in-six-acts-a-783778.html> (recounting the process by which the State Department cables became available to the public).

16. *Infra* notes 32–65 and accompanying text.

17. Cf. G.R. BERRIDGE & ALAN JAMES, A DICTIONARY OF DIPLOMACY 70 (2d ed. 2003) ("Diplomacy is . . . the principal means by which states communicate with each other, enabling them to have regular and complex relations. It is the communications system of the international society."); Elmer Plischke, *Diplomacy—Search for Its Meaning*, in MODERN DIPLOMACY 27, 31–32 (Elmer Plischke ed., 1979) (explaining that one comparatively narrow definition of "diplomacy" embraces "official communications among governments and nations").

U.S. government, such as Congress; and “investigatory diplomacy” is diplomacy carried out for the purpose of collecting information, while “noninvestigatory diplomacy” is for any other purpose, such as lobbying foreign governments. Permutations of these categories yield a matrix of practices. For example, a member of Congress who speaks with a foreign official on behalf of Congress for an investigatory purpose engages in investigatory, subsovereign, legislative diplomacy. This categorization scheme will facilitate the constitutional analysis that follows.

This Article proceeds in three parts. Part I reveals the results of a thorough investigation into the nature and extent of modern legislative diplomacy. A comprehensive review of WikiLeaks cables describing diplomacy conducted by members of the 111th Congress in 2009 shows that individual legislators participate for a variety of reasons—ranging from fact-finding to representing constituents—and that the practice is a systemic feature of U.S. engagement with other countries. For example, in 2009 alone, members of the House and Senate took over 2,000 official trips abroad and, in doing so, visited at least 117 foreign countries and met with numerous foreign leaders. Lobbyist reports and other primary sources also show extensive contact between foreign governments and Congress.

Part II theorizes about the constitutionality of legislative diplomacy by evaluating the orthodoxy’s foundations in the text and original meaning of Article II. The claim here is simple: the contours of the executive diplomacy power leave room for a legislative counterpart in at least one sense, and possibly a second as well. First, in granting the president the power to communicate on behalf of the United States, Article II leaves open the possibility that individual legislators and Congress can communicate with foreign officials in a subsovereign capacity. Canonical indicia of original meaning confirm as much. For example, members of the first Congress frequently conferred with foreign diplomats about official business, Congress itself corresponded with foreign governments through executive channels,<sup>18</sup> and the Washington Administration did not object to these practices.<sup>19</sup> Second, legislative diplomacy raises the novel question of whether there is an executive power of horizontal delegation, whereby the president can deputize officers from another branch to carry out executive power. Although the delegation power’s textual provenance is questionable, customary practice suggests that it exists: presidents have used both federal legislators and judges to carry out the Article II power to represent the United States in international fora on a number of occasions throughout U.S. history.

Part III concludes by developing positive theories of constitutionality under Article I. Here, the argument is that the orthodoxy oversimplifies the separation of powers by neglecting ways in which the Constitution empowers Congress independently to conduct official diplomacy. The specific theory of empowerment depends primarily on one’s view about the applicability of the doctrine of enumerated powers, which holds that the

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18. *Infra* Sections II.B.2–3.

19. *Infra* Section II.B.2.

words and implications of the Constitution's written text are the exclusive foundation for federal power. Section III.A argues that, if the doctrine applies, Congress has power only to declare war and to engage in other international communications for the limited purpose of investigating extraterritorial facts. Under this analysis, noninvestigatory communications by Congress are mostly unconstitutional. Section III.B then questions on three grounds whether the enumerated powers doctrine applies: First, Article I is generally agnostic to the conduct of individual members of the House and Senate. Second, Justice Frankfurter's *Youngstown* concurrence and a series of more recent cases establish that customary executive practice and legislative acquiescence can form a nontextual gloss on executive power in foreign affairs.<sup>20</sup> While legislative diplomacy raises the converse question of whether legislative custom and executive support can adjust the scope of legislative power, custom-based functionalism can work in both directions. And third, the Supreme Court's decision in *Curtiss-Wright* suggests that the fundamental source of foreign affairs powers is an extraconstitutional concept of national sovereignty.<sup>21</sup> The first point means that the enumerated powers doctrine does not apply, even on its own terms, to individual diplomacy that lacks an institutional signature. The second and third are subjects of varying levels of criticism but provide reason at least to question whether any legislative diplomacy requires an affirmative foundation in Article I. Section III.C in turn operates on the premise that the enumerated powers doctrine does not apply. In this analysis, no Article I justification is needed, and the only task is to explain why legislative diplomacy is constitutional under a nontextual framework. Due to the frequent, widespread, and longstanding nature of the practice and executive acquiescence, communications that do not intrude on Article II power are likely entitled to the status of constitutional custom under a converted Frankfurter analysis. Similarly, customary practice helps explain how, under *Curtiss-Wright*, any portion of an extraconstitutional diplomacy power could belong to Congress rather than to the president. The result under these analyses is that subsovereign diplomacy by Congress is constitutional regardless of whether the communications have an investigatory purpose. I conclude with a brief discussion of implications.

### I. MODERN PRACTICE

In reading the literature on U.S. foreign relations law, one gets the impression that the executive alone holds constitutional authority to carry on international diplomatic communications, but in fact Congress and its membership have communicated with foreign governments since the Founding.<sup>22</sup> Today, this practice has a variety of manifestations. Groups of

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20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring); see also *id.* at 635–38 (Jackson, J., concurring).

21. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

22. *Infra* Section II.B.2–3.

legislators form official and unofficial congressional delegations (“CODELS” and “NODELS,” respectively) and travel overseas to confer with foreign leaders.<sup>23</sup> Conversely, members of the House and Senate receive representatives of foreign governments in the United States.<sup>24</sup> And legislators communicate with foreign officials by telephone, fax, letter, and email.<sup>25</sup> These practices are widespread.<sup>26</sup> They are also, however, difficult to document. Many of the contacts are simply not in the public record, and even the available documentation is both voluminous and scattered among several sources.<sup>27</sup> As a result, it is impossible to capture the full extent of the modern practice, particularly over the course of years. This Part, therefore, takes on the more manageable task of aggregating the existing evidence of legislative diplomacy that occurred in 2009, which corresponds with the first session of the 111th Congress and is the most recent year for which the available evidence is the most complete.<sup>28</sup> Section I.A focuses on the contemporary practice. Section I.B places the contemporary evidence into historical context by revealing some of the antecedent practices of the nineteenth and twentieth centuries. The goal is to provide the most detailed account of modern legislative diplomacy to date and, in turn, the empirical foundation for a new constitutional analysis.

#### A. Contemporary Evidence

The contemporary evidence comes from several sources. The Congressional Record contains reports on the countries to which members of the House and Senate travel on public funds,<sup>29</sup> while the Office of the Clerk of

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23. See *infra* Section I.A.1.a. The distinction is that U.S. government funds pay for CODELS, while funds from private entities such as nonprofit organizations pay for NODELS. Telephone Interview with Matthew A. Reynolds, Former Assistant Secretary of State for Legislative Affairs (Oct. 24, 2012). As assistant secretary of state for legislative affairs, Reynolds and his predecessor, Jeffrey Bergner, were in charge of the Bureau of Legislative Affairs, which is responsible for facilitating congressional foreign travel. See *infra* note 25.

24. *Infra* Section I.A.2.

25. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, Former Assistant Secretary of State for Legislative Affairs (June 13, 2012).

26. See discussion *infra* Section I.A.1.

27. E.g., sources cited *infra* notes 29–31.

28. See Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in Wikileaks Video Probe*, WIRED (June 6, 2010, 9:31 PM), <http://www.wired.com/threatlevel/2010/06/leak/>.

29. See, e.g., 156 CONG. REC. H2495–96 (daily ed. Apr. 13, 2010); 156 CONG. REC. H1394–95 (daily ed. Mar. 12, 2010); 156 CONG. REC. H963–70 (daily ed. Feb. 26, 2010); 156 CONG. REC. S665–73 (daily ed. Feb. 22, 2010); 156 CONG. REC. H466–68 (daily ed. Feb. 2, 2010); 156 CONG. REC. H382–83 (daily ed. Jan. 26, 2010); 156 CONG. REC. H30 (daily ed. Jan. 12, 2010); 155 CONG. REC. H15,495–96 (daily ed. Dec. 16, 2009); 155 CONG. REC. H13,341–50 (daily ed. Nov. 19, 2009); 155 CONG. REC. H12,583–84 (daily ed. Nov. 6, 2009); 155 CONG. REC. S11,121–29 (daily ed. Nov. 4, 2009); 155 CONG. REC. H12,041–42 (daily ed. Oct. 28, 2009); 155 CONG. REC. H11,455 (daily ed. Oct. 15, 2009); 155 CONG. REC. H11,169–72 (daily ed. Oct. 9, 2009); 155 CONG. REC. H9996–97 (daily ed. Sept. 25, 2009); 155 CONG. REC. H9653–67 (daily ed. Sept. 16, 2009); 155 CONG. REC. H9333–34 (daily ed. Sept. 8, 2009); 155 CONG. REC. S9048–58 (daily ed. Aug. 6, 2009); 155 CONG. REC. H8022–23 (daily ed. July 13,



the House of Representatives and the Senate Office of Public Records publish reports on privately financed travel.<sup>30</sup> Interviews with former senior officials in the State Department illuminate the process of interbranch collaboration. Approximately 700 State Department cables from WikiLeaks in turn offer detailed accounts of travel purposes and the types of communications that federal legislators had with foreign officials in 2009.<sup>31</sup> This Section assembles and analyzes these sources.

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2009); 155 CONG. REC. H7141–42 (daily ed. June 23, 2009); 155 CONG. REC. H6070–72 (daily ed. June 2, 2009); 155 CONG. REC. H6006–07 (daily ed. May 21, 2009); 155 CONG. REC. H5577–79 (May 13, 2009); 155 CONG. REC. S5449–55 (daily ed. May 13, 2009); 155 CONG. REC. H5473–81 (daily ed. May 12, 2009); 155 CONG. REC. H4996 (daily ed. Apr. 29, 2009); 155 CONG. REC. H4576–77 (daily ed. Apr. 21, 2009); 155 CONG. REC. H4515–16 (daily ed. Apr. 2, 2009); 155 CONG. REC. H3434–35 (daily ed. Mar. 16, 2009). These reports are made pursuant to the Mutual Security Act of 1954 and the International Security Assistance Act of 1978 and are available online. 22 U.S.C. § 1754(b)(2) (2006); *Foreign Travel Reports*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/public\\_disc/foreign/index.aspx](http://clerk.house.gov/public_disc/foreign/index.aspx) (last visited Aug. 28, 2013).

30. *Gift and Travel Filings*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/public\\_disc/giftTravel.aspx](http://clerk.house.gov/public_disc/giftTravel.aspx) (last visited Aug. 28, 2013); *Gift Rule/Outside Paid Travel Database*, U.S. SENATE, [http://www.senate.gov/pagelayout/legislative/g\\_three\\_sections\\_with\\_teasers/lobbyingdisc.htm#lobbyingdisc=grt](http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm#lobbyingdisc=grt) (last visited Aug. 28, 2013). These reports are available online pursuant to the Honest Leadership and Open Government Act of 2007. 2 U.S.C. §§ 104e, 104g (2012). House and Senate rules also regulate privately financed travel. *See, e.g.*, 113TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES 43–44 (2013) [hereinafter HOUSE RULES], available at <http://clerk.house.gov/legislative/house-rules.pdf> (Rule 25.5(b)–(d)); Comm. on Rules & Admin., *Rules of the Senate: Gifts*, U.S. SENATE, <http://www.rules.senate.gov/public/index.cfm?p=RuleXXXV> (last visited Aug. 28, 2013) (Rule 35.2(c)); *see also* COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., 2D SESS., HOUSE ETHICS MANUAL 87–105 (2008 ed.) [hereinafter HOUSE ETHICS MANUAL], available at [http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf) (explaining limits on privately financed official travel under the House Ethics Rules); *Privately Sponsored Travel Review Process and Public Filings*, U.S. SENATE SELECT COMM. ON ETHICS, <http://www.ethics.senate.gov/public/index.cfm?p=Travel> (last visited Aug. 28, 2013) (discussing reporting requirements). I obtained aggregated data on this kind of travel from LegiStorm, an organization that collects and disseminates information on congressional travel and other matters. LEGISTORM, <http://www.legistorm.com/> (last visited Aug. 28, 2013).

31. Database of WikiLeaks Documents for 2009 (on file with the author). The cables are only a small percentage of the approximately 250,000 that WikiLeaks released. I obtained them by performing keyword searches for each member of the 111th Congress in a WikiLeaks search engine. CABLESEARCH, <http://www.cablesearch.org> (last visited Dec. 1, 2012) (defunct); *see also Reporters Group Launches Full-Text Search Engine of WikiLeaks Cables*, COMPUTERWORLD (Dec. 3, 2010, 3:43 PM), [http://www.computerworld.com/s/article/9199558/Reporters\\_group\\_launches\\_full\\_text\\_search\\_engine\\_of\\_WikiLeaks\\_cables](http://www.computerworld.com/s/article/9199558/Reporters_group_launches_full_text_search_engine_of_WikiLeaks_cables). For members of the House, the searches were, “[First Name Last Name],” “Representative [Last Name],” “Rep. [Last Name],” and “Congress[man/woman Last Name].” For members of the Senate, the searches were, “[First Name Last Name],” “Senator [Last Name],” and “Sen. [Last Name].” The resulting cables are reports to the State Department from scores of U.S. embassies, consulates, and diplomatic missions around the world; cover all manner of foreign affairs; and have classification levels ranging from sensitive to secret. Bradley Manning allegedly downloaded the cables sometime between late 2009 and early 2010 and was arrested in May 2010. Poulsen & Zetter, *supra* note 28. Due to the timing of Manning’s arrest, the WikiLeaks disclosure likely does not capture even half of the 2010 cable traffic. This makes the 2009 cables a more complete, if slightly less recent, source for research.

## 1. Foreign Travel

### a. Anecdotal Evidence

CODEL travel reflects a process of close cooperation between legislative and executive officials. Most trips occur at the initiative of the legislators themselves, with the executive playing the role of facilitator.<sup>32</sup> The Department of Defense reserves available military aircraft for transportation,<sup>33</sup> while the State Department's Bureau of Legislative Affairs works with local embassy staff to arrange accommodations and other logistical assistance.<sup>34</sup> State Department officials in Washington at times confer with CODEL members in advance to coordinate the content of the members' planned communications with the host government.<sup>35</sup> Local embassy staff also play an important supporting role by sending reports to brief CODEL members on local conditions,<sup>36</sup> offering suggestions about foreign leaders with whom CODELs should meet, providing briefings on political and economic conditions on arrival,<sup>37</sup> and joining CODELs in meetings with foreign leaders.<sup>38</sup>

Ultimately, however, delegations themselves decide where to go, whom to visit, and what to say.<sup>39</sup> The State Department does not claim power to

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32. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25.

33. Telephone Interview with Matthew A. Reynolds, *supra* note 23. The Defense Department limits the extent to which military aircraft are available for CODEL travel: To use a large, commercial-type aircraft, such as a 737, a CODEL must comprise at least five members of the House or at least three members of the Senate. *Id.* To use a small, corporate-type aircraft, such as a Gulfstream, a CODEL must have at least three House members or at least one Senator. *Id.* Due to the limited availability of military aircraft, some CODELs travel on commercial airlines. *Id.*

34. *Id.*

35. *Id.*

36. See, e.g., *Scenesetter for CODEL McCain/Lieberman to Munich*, WIKILEAKS (Feb. 4, 2009), <http://wikileaks.org/cable/2009/02/09BERLIN142.html>; *Scenesetter for CODEL Rogers Visit to Warsaw*, WIKILEAKS (Apr. 1, 2009), <http://wikileaks.org/cable/2009/04/09WARSAW351.html>.

37. See, e.g., *CODEL Payne–Tanzania Visit (Nov 13–15)*, WIKILEAKS (Nov. 13, 2009), <http://wikileaks.org/cable/2009/11/09DARESSALAAM780.html>; *Three Congressional Chairman [sic] Bring Message of Support to President Calderon*, WIKILEAKS (Apr. 8, 2009), <http://wikileaks.org/cable/2009/04/09MEXICO1020.html>.

38. See, e.g., *CODEL Biden's Meeting with President Zardari*, WIKILEAKS (Feb. 6, 2009), <http://wikileaks.org/cable/2009/02/09ISLAMABAD266.html>; *CODEL Bishop Meeting with Iraqi Council of Representatives Speaker Ayad Al-Samarraie*, WIKILEAKS (Aug. 8, 2009), <http://wikileaks.org/cable/2009/08/09BAGHDAD2134.html>.

39. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25; see also, e.g., *Representative Faleomavaega's Visit Highlights Compact Issues*, WIKILEAKS (Mar. 11, 2009), <http://wikileaks.org/cable/2009/03/09KOLONIA29.html> ("Rep. Faleomavaega followed most of the extensive schedule prepared by post, but he and the Micronesians apparently preferred to meet on their own, perhaps to encourage a more open dialogue."); *TFHO1: Honduras Coup Sitrep #69*, WIKILEAKS (Oct. 2, 2009), <http://wikileaks.org/cable/2009/10/09TEGUCIGALPA1007.html> ("The CODEL . . . arranged its own

prohibit CODELs from traveling abroad.<sup>40</sup> The WikiLeaks cables document a practice of local embassies “granting” country clearance<sup>41</sup> and thus seemingly possessing authority to decide whether a CODEL can visit, but legislators and State Department officials understand this practice as a formality rather than a reflection of constitutional prerogative.<sup>42</sup> In the rare event that the State Department disapproves of a proposed CODEL due to poor security in the host country or anticipated diplomatic complications, executive officials attempt simply to dissuade the legislators from traveling abroad or, if that does not work, withdraw logistical support.<sup>43</sup> Legislators generally cooperate.<sup>44</sup> In the past, however, some have traveled to places such as Syria, Cuba, and Gaza, notwithstanding opposition from the executive branch.<sup>45</sup> And although this behavior appears to be exceptional,<sup>46</sup> some have questioned executive policies during meetings with foreign governments.<sup>47</sup> Still

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meetings at the Presidential Palace with de facto regime President Micheletti, the Supreme Court, the Elections Tribunal (TSE), and representatives of civil society.”).

40. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25.

41. See, e.g., *Country Clearance Granted for CODEL Webb*, WIKILEAKS (Aug. 5, 2009), <http://wikileaks.org/cable/2009/08/09PHNOMPENH554.html>.

42. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25.

43. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25; see also Emily Heil, *Rohrabacher Says Clinton Made “Reasonable Request”*, Posting to *In the Loop*, WASH. POST (Apr. 23, 2012, 12:45 PM), [http://www.washingtonpost.com/blogs/in-the-loop/post/rohrabacher-says-clinton-made-reasonable-request/2012/04/23/gIQAGG0HcT\\_blog.html](http://www.washingtonpost.com/blogs/in-the-loop/post/rohrabacher-says-clinton-made-reasonable-request/2012/04/23/gIQAGG0HcT_blog.html) (discussing how Secretary Hillary Clinton ordered a military jet not to leave for Afghanistan with Congressman Dana Rohrabacher aboard).

44. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25.

45. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25; see also David Binder, *Javits and Pell Fly to Cuba Despite Objections of U.S.*, N.Y. TIMES, Sept. 28, 1974, at 1 (reporting on such a trip to Cuba by Senators Jacob Javits and Claiborne Pell); Ben Fox, *DeMint Honduras Trip Planned in Defiance of U.S. Policy*, HUFFINGTON POST (Oct. 3, 2009, 12:50 AM), [http://www.huffingtonpost.com/2009/10/02/demint-honduras-trip-plan\\_n\\_307632.html](http://www.huffingtonpost.com/2009/10/02/demint-honduras-trip-plan_n_307632.html) (reporting on a planned trip by Senator DeMint to meet with the interim government of Honduras, which the Obama Administration has refused to recognize); *CODEL Kerry’s Meeting with Sudanese Presidential Advisor Nafie*, WIKILEAKS (Apr. 21, 2009), <http://wikileaks.org/cable/2009/04/09KHARTOUM539.html> (“[Senator Kerry] noted that, over Bush Administration objections, he had traveled to Syria twice and met with President Assad.”).

46. CODEL members generally maintain a united front with the executive on matters of policy. See, e.g., *CODEL Lynch Meets Asad, Muallim*, WIKILEAKS (Apr. 6, 2009), <http://wikileaks.org/cable/2009/04/09DAMASCUS252.html> (reporting a CODEL’s expression of support for President Obama’s stated preference for engagement as a means of resolving foreign policy problems); *CODEL McConnell*, WIKILEAKS (Apr. 20, 2009), <http://wikileaks.org/cable/2009/04/09KABUL987.html> (“Senator McConnell affirmed the Administration’s position that the United States seeks a level playing field for candidates competing in the August election.”).

47. See, e.g., *CODEL Kyl’s Meeting with Prime Minister Netanyahu: What Will the U.S. Do About Iran?*, WIKILEAKS (Apr. 28, 2009), <http://wikileaks.org/cable/2009/04/09TELA-VIV936.html> (“President Obama will pursue engagement, but Kyl said he doubted it would be successful. We should consider what to do in the mean time.”); *Congressmen Kirk and Larsen’s*

others have refused to pursue diplomatic contacts with particular countries, notwithstanding executive encouragement.<sup>48</sup>

More substantively, CODEL communications cover a vast geographic and policy terrain. Legislators raise issues ranging from terrorism to free trade agreements to human rights and environmental concerns.<sup>49</sup> They also converse with all manner of foreign officials. In 2009, CODEL members met with heads of state such as Bashar al-Assad, Hosni Mubarak, Ehud Olmert, Taro Aso, Alvaro Uribe, Alyaksandr Lukashenka, and Robert Mugabe, plus a wide range of ministers, legislators, judges, nongovernmental organizations (“NGOs”), and religious and business figures.<sup>50</sup> The majority of these contacts, however, were with what we would deem “executive” officials, such as ministers and bureaucrats; interparliamentary contacts were less common,<sup>51</sup>

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*Meeting with Minister of Commerce Chen Deming*, WIKILEAKS (June 5, 2009), <http://wikileaks.org/cable/2009/06/09BEIJING1500.html> (“[Congressman Mark Kirk] stated that the Administration’s projection of the U.S. budget deficit is well below what it will really be . . . .”); *Senator Webb’s August 19–20 Meetings in Hanoi*, WIKILEAKS (Aug. 27, 2009), <http://wikileaks.org/cable/2009/08/09HANOI803.html> (reporting that Senator James Webb criticized U.S. policy regarding competing territorial claims in the South China Sea as “not sufficient” and “overly tactical”).

48. Telephone Interview with Rachael Leman, Deputy Staff Dir., Rules Comm., U.S. House of Representatives (Nov. 5, 2012). During the Bush Administration, Vice President Dick Cheney encouraged members of Congress to establish an interparliamentary training program with Morocco under the House Democracy Partnership, but legislators declined to do so on the ground that the Moroccan Parliament failed to satisfy certain legislatively established criteria for participation. *Id.* For an overview of the House Democracy Partnership’s practice of encouraging collaboration in the development of foreign legislative institutions, see *infra* note 134 and accompanying text.

49. *Infra* notes 56–58, 60–65.

50. See, e.g., *Belarus: CODEL Cardin Secures AMCIT’s Release, Advances Dialogue*, WIKILEAKS (July 3, 2009), <http://wikileaks.org/cable/2009/07/09MINSK217.html> (reporting on a meeting between CODEL members and President Lukashenka); *CODEL Hoyer Focuses on FTA and Plan Colombia in Cartagena and Medellin (April 6–8)*, WIKILEAKS (Apr. 27, 2009), <http://wikileaks.org/cable/2009/04/09BOGOTA1359.html> (documenting CODEL members’ discussion of a trade promotion agreement with President Uribe); *CODEL Meeks Meeting with Mugabe*, WIKILEAKS (Sept. 4, 2009), <http://wikileaks.org/cable/2009/09/09HARARE707.html> (reporting on a meeting with President Mugabe); *CODEL Price: Colombians Emphasize Defense Cooperation, Free Trade and Reelection*, WIKILEAKS (Sept. 11, 2009), <http://wikileaks.org/cable/2009/09/09BOGOTA2923.html> (describing a meeting with a USAID-funded NGO); *Speaker Pelosi Meeting with New Iraqi Speaker Samarraie*, WIKILEAKS (May 14, 2009), <http://wikileaks.org/cable/2009/05/09BAGHDAD1266.html> (recounting a meeting between Speaker Nancy Pelosi and the speaker of the Iraqi Council of Representatives).

51. The WikiLeaks cables may be somewhat misleading in this regard. By documenting only a small number of interparliamentary contacts, they seem to suggest that contacts of that kind are rare. It appears, however, that members of Congress are involved in a variety of interparliamentary exchanges with members of foreign legislative bodies. See *infra* note 132 (citing authorizing statutes). It would not be surprising if State Department cables did not report the full extent of those exchanges, which Foreign Service Officers presumably do not attend.

and contacts with foreign judges were virtually nonexistent.<sup>52</sup> CODEL members usually spoke only for themselves or for Congress<sup>53</sup> but also appeared with some frequency to make representations on behalf of the executive branch or the United States.<sup>54</sup>

A variety of motivations appear to drive CODEL travel. By far the most common is fact-finding.<sup>55</sup> An overwhelming majority of the WikiLeaks cables show legislators using foreign travel at least in part to gather information about economic, political, and social conditions in host countries. In many cases, CODEL members obtain information through discussions with their foreign counterparts. For example, during a trip to China in May 2009, a CODEL comprising House Speaker Nancy Pelosi and four other members of Congress held meetings with President Hu Jintao, the mayor of Shanghai, the chairman of the Shanghai Municipal People's Congress Standing Committee, the Catholic bishop of Shanghai, the American Chamber of Commerce and U.S.–China Business Council, and chief executive officers of

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52. Cf. *Afghans Seek Improved Judicial Security: CSTC-A Agrees to Support Training Efforts but More Resources Likely Necessary*, WIKILEAKS (Oct. 10, 2009), <http://wikileaks.org/cable/2009/10/09KABUL3185.html> (describing a meeting between Senator Lindsey Graham and the Afghan chief justice).

53. See, e.g., *Jordan: CODEL Ackerman Focused on Regional Security Issues and Cooperation*, WIKILEAKS (June 4, 2009), <http://wikileaks.org/cable/2009/06/09AMMAN1267.html> (“The delegation thanked [General] Raqqad for his cooperation and assured him that the U.S. Congress would continue to provide resources in support of our bilateral agenda.”).

54. See, e.g., *CODEL Carper Stresses Need for Greater Afghan Leadership on Governance and Addresses Civilian Casualties*, WIKILEAKS (June 1, 2009), <http://wikileaks.org/cable/2009/06/09KABUL1378.html> (“The Codel delivered effective USG messages to Karzai and other senior Afghan officials regarding the need for improved governance.”); *CODEL Schiff Meetings with the Defense Minister and Parliamentarians*, WIKILEAKS (July 22, 2009), <http://wikileaks.org/cable/2009/07/09TUNIS506.html> (“Rep. Ortiz [sic] said . . . that the US hoped to work to share intelligence and [to work] against transnational terrorists. The US would respond if Tunisia were attacked.”); *Ghana Promotes Regional Investment Hub to CODEL Butterfield*, WIKILEAKS (Aug. 25, 2009), <http://wikileaks.org/cable/2009/08/09ACCRA832.html> (“Representative Butterfield concluded by pledging U.S. commitment to partnering with Ghana in its development and to stimulating investment in ‘the emerging market of West Africa.’”); *Haiti: CODEL Conyers Meets President, Prime Minister*, WIKILEAKS (Apr. 30, 2009), <http://wikileaks.org/cable/2009/04/09PORTAUPRINCE451.html> (“Chairman Conyers and his delegation promised the U.S. would continue to support Haiti.”); *Three Congressional Chairman [sic] Bring Message of Support to President Calderon*, *supra* note 37 (“During a cordial meeting with the President the three chairmen emphasized that the U.S. would support Mexico for the ‘long haul’ in the effort against organized crime, offered to do what was possible to expedite Merida support, and expressed their personal appreciation for President Calderon’s courage.”); see also David E. Sanger, *With Rice out, President Is Expected to Name Kerry as Secretary of State*, N.Y. TIMES, Dec. 17, 2012, at A14, available at <http://www.nytimes.com/2012/12/17/us/politics/obama-expected-to-name-kerry-as-secretary-of-state.html> (“[Senator Kerry] conducted a series of quiet missions on behalf of the president, notably at moments of crisis with Afghanistan and Pakistan.”).

55. Telephone Interview with Matthew A. Reynolds, *supra* note 23.

various American and Chinese businesses.<sup>56</sup> During the course of their meetings, CODEL members inquired about issues ranging from religious liberty and human rights to business conditions for American companies, the protection of intellectual property rights, and possible solutions to climate change.<sup>57</sup>

In other cases, CODEL members use foreign travel as an opportunity for firsthand observation. In August 2009, for example, Congressman Keith Ellison visited refugee camps in Darfur to observe conditions and evaluate the need for assistance.<sup>58</sup> The understanding, it seems, is that these kinds of investigatory acts are helpful to the legislative process because they enable members of the House and Senate to ask their own questions, learn about foreign conditions through firsthand observation rather than third-party reports,<sup>59</sup> and consequently form their own impressions about appropriate action.

WikiLeaks shows that legislators also travel abroad to communicate information to foreign governments. CODEL members frequently lobby for specific actions deemed favorable to U.S. national interests. For example, during a February 2009 meeting with the Syrian vice president, then-Senator John Kerry pressed the Syrian government to avoid interfering with democratic elections in Lebanon, “help[ ] Special Envoy George Mitchell to sustain a cease fire in Gaza, and . . . stop[ ] the flow of foreign fighters through Syria to Iraq.”<sup>60</sup> In April 2009, Senator Jeff Sessions encouraged Pakistan to improve its monitoring of the Afghan border so that security conditions

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56. *CODEL Pelosi Discusses Energy Conservation and Emissions Reduction with Shanghai Entrepreneurs*, WIKILEAKS (May 29, 2009), <http://wikileaks.org/cable/2009/05/09SHANGHAI241.html>; *CODEL Pelosi Engages U.S. Business Community in Shanghai*, WIKILEAKS (May 26, 2009), <http://wikileaks.org/cable/2009/05/09SHANGHAI233.html>; *CODEL Pelosi May 27 Meeting with PRC President Hu Jintao*, WIKILEAKS (May 29, 2009), <http://wikileaks.org/cable/2009/05/09BEIJING1428.html>; *CODEL Pelosi Meeting with Shanghai People’s Congress Chairman*, WIKILEAKS (May 25, 2009), <http://wikileaks.org/cable/2009/05/09SHANGHAI229.html>; *CODEL Pelosi, Shanghai Mayor Discuss Climate Change*, WIKILEAKS (May 26, 2009), <http://wikileaks.org/cable/2009/05/09SHANGHAI232.html>; *CODEL Pelosi’s Meeting with Shanghai Catholic Bishop Jin*, WIKILEAKS (May 25, 2009), <http://wikileaks.org/cable/2009/05/09SHANGHAI230.html>.

57. *See supra* note 56.

58. *See CODEL Hears IDP Problems at Darfur’s Zam Zam IDP Camp*, WIKILEAKS (Aug. 23, 2009), <http://wikileaks.org/cable/2009/08/09KHARTOUM970.html>.

59. Legislators have on occasion expressed distrust of executive reports. In late 1979, for example, Senator Jesse Helms sent some of his staff to the Lancaster House Conference in London to observe talks aimed at facilitating an agreement on the terms for establishing a new, independent government for Rhodesia. The senator reportedly sent his own staff rather than wait for State Department reports because he did not “trust the State Department on th[e] issue.” James Reston, *The Chaos in Foreign Affairs*, N.Y. TIMES, Sept. 21, 1979, at 27 (internal quotation marks omitted); *see also* CECIL V. CRABB, JR. & PAT M. HOLT, INVITATION TO STRUGGLE 19–20 (4th ed., 1992) (“[T]he legislative branch has made increasing efforts to acquire its own sources of information in order not to remain dependent upon information supplied by executive officials.”).

60. *CODEL Kerry Presses Syrian Vice President on Specifics*, WIKILEAKS (Mar. 6, 2009), <http://wikileaks.org/cable/2009/03/09DAMASCUS176.html>.

would not further deteriorate.<sup>61</sup> In August 2009, Senator Jim Webb pushed for Vietnam to use its influence with Burma to obtain Aung San Suu Kyi's release from house arrest.<sup>62</sup>

In addition, legislators use their contacts with foreign officials as an opportunity to represent domestic constituents with international interests, such as large corporations. For example, in a meeting with the Chinese minister of commerce, then-Congressman Mark Kirk pressed for delayed implementation of a Chinese regulation that would have adversely affected Baxter Healthcare,<sup>63</sup> a corporation that was headquartered in the congressman's district. In a meeting with the president of Algeria, Senator Saxby Chambliss raised the possibility of opening a flight route to Algeria on Delta Airlines, which is headquartered in the senator's home state of Georgia.<sup>64</sup> On other occasions, legislators have promoted nonbusiness constituent interests on issues ranging from product safety to immigration.<sup>65</sup>

The executive, in turn, has its own motivations for supporting these activities. Facilitating legislative diplomacy can enhance bipartisan support for executive foreign policies.<sup>66</sup> A 1947 trip by Senator Everett Dirksen and several others, for example, helped to develop legislative support for the Marshall Plan,<sup>67</sup> and Senate involvement in negotiations has helped to cultivate legislative support for arms control treaties.<sup>68</sup> Additionally, the executive may enhance the credibility and palatability of a message by employing as

61. *Punjab Governor Taseer Tells CODEL Kyl That Extremism Is Limited to Small Minority*, WIKILEAKS (Apr. 10, 2009), <http://wikileaks.org/cable/2009/04/09LAHORE72.html>.

62. *Senator Webb's August 19–20 Meetings in Hanoi*, WIKILEAKS (Aug. 27, 2009), <http://wikileaks.org/cable/2009/08/09HANOI803.html>.

63. *Congressmen Kirk and Larsen's Meeting with Minister of Commerce Chen Deming*, WIKILEAKS (June 5, 2009), <http://wikileaks.org/cable/2009/06/09BEIJING1500.html>.

64. *Bouteflika: Serious Western Sahara Autonomy Is More Than Sovereignty over Garbage Collection*, WIKILEAKS (June 3, 2009), <http://wikileaks.org/cable/2009/06/09ALGIERS514.html>. For other communications of this kind, see, for example, *Jordan: CODEL Ackerman Focused on Regional Security Issues and Cooperation*, WIKILEAKS (June 4, 2009), <http://wikileaks.org/cable/2009/06/09AMMAN1267.html> (“Congressman Ellison asked the King to consider partnering with well-known Minnesota companies that specialized in water resource management.”).

65. See, e.g., *NODEL Kirk Takes up Security Issues and Visa Program During Mexico Visit*, WIKILEAKS (July 7, 2009), <http://wikileaks.org/cable/2009/07/09MEXICO1971.html> (describing Congressman Kirk's statement of a desire to “facilitate U.S. visa issuance to the grandparents of constituents in his district”); *Senator Nelson Raises Concerns over Contaminated Drywall with ACSIQ*, WIKILEAKS (Aug. 20, 2009), <http://wikileaks.org/cable/2009/08/09SHANGHAI367.html> (describing a complaint by Senator Bill Nelson about constituents that had suffered from contaminated Chinese-made drywall); *Visit of Senators Cardin, Mikulski, and Wicker to Montenegro*, WIKILEAKS (June 1, 2009), <http://wikileaks.org/cable/2009/06/09PODGORICA132.html> (describing statements by Senator Barbara Mikulski promoting stronger ties between Maryland and Montenegro).

66. CRABB & HOLT, *supra* note 59, at 277.

67. Susan Webb Hammond, *Congress in Foreign Policy*, in *THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY* 67, 83 (Muskie et al. eds., 1986).

68. Barry M. Blechman, *The New Congressional Role in Arms Control*, in *A QUESTION OF BALANCE: THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY* 109, 122–23 (Thomas E. Mann ed., 1990).

the messenger a legislator who has a particularly good rapport with a foreign government, perhaps due to his or her voting record or personal background.<sup>69</sup> Using CODELs as de facto agents also enables the president to indirectly pressure or reward foreign governments and thus minimize the potential political repercussions of that pressure.<sup>70</sup> Finally, executive officials understand and support the “educational” benefits that accompany the practice.<sup>71</sup> The general view is that legislative diplomacy is on the whole helpful to both U.S. foreign relations and the legislative process.<sup>72</sup>

#### b. *Aggregated Travel Data*

WikiLeaks is useful as a source of anecdotal evidence, but it cannot convey a complete sense of the contemporary practice because the organization neither obtained nor made available to the public all of the State Department’s cables for 2009 or any other year. According to one estimate, an annual average of 40 percent of the cables cross-referenced in the disclosed cables remain unavailable.<sup>73</sup> Moreover, even if WikiLeaks had disclosed a complete set of cables for 2009, it is not clear that the cables would have documented all relevant communications. Other resources are therefore necessary. This Section uses official reports on congressional travel to supplement the anecdotal evidence and provide a more complete sense of the contemporary practice, including who travels, how frequently they travel,

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69. Cf. CODEL Wexler Tells Ankara That Gaza Response Undercut Pro-Turkey Advocacy in Washington, WIKILEAKS (Mar. 4, 2009), <http://wikileaks.org/cable/2009/03/09ANKARA336.html> (“As a valued and trusted friend of Turkey, Congressman Wexler was uniquely positioned to deliver a message the Turks needed to hear: Your response to the Gaza situation damaged Turkey’s image in Washington. . . . The Turks expressed their appreciation for the Congressman’s friendship and frankness . . .”).

70. James M. Lindsay, *Congress and Diplomacy*, in CONGRESS RESURGENT 261, 278 (Randall B. Ripley & James M. Lindsay eds., 1993) (“When presidents want to put pressure on another country, but do not want to be seen doing so, Congress provides a convenient villain.”).

71. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25.

72. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25; see also, e.g., CODEL Burr Hears About Counterterrorism, Democracy Promotion, Iran and Western Sahara, WIKILEAKS (June 9, 2009), <http://wikileaks.org/cable/2009/06/09RABAT479.html> (“CODEL Burr learned a lot about Moroccan–U.S. cooperation in a short time, especially concerning counterterrorism and democracy promotion.”); CODEL Meeks Discusses Human Rights and Democracy with Senior Tunisian Officials, WIKILEAKS (Sept. 1, 2009), <http://wikileaks.org/cable/2009/09/09TUNIS644.html> (reporting that “discussions served as a useful opportunity for the Congressional delegation to remind the [Tunisian government] that the [United States] continues to focus on [democracy and human rights] issues”).

73. *Missing Referenced Cables*, CABLE DRUM (Nov. 12, 2011), [http://www.cabledrum.net/pages/referenced\\_cables.php](http://www.cabledrum.net/pages/referenced_cables.php). Comparing the cables for 2009 to the public travel reports also suggests that the WikiLeaks disclosure was incomplete. The released cables document approximately 700 trips by federal legislators, while the public reports document over 1,900. See *supra* notes 29–31 and accompanying text. At least some of those 1,900 trips were likely discussed in cables that WikiLeaks never even obtained.



and where they travel. The methodology was straightforward: collect all public data on publicly funded congressional travel,<sup>74</sup> add all public data on privately funded congressional travel,<sup>75</sup> and then add from the WikiLeaks cables all data that the public sources failed to include. The resulting figures capture the extent of the current practice in an unprecedented way.<sup>76</sup>

This methodology has a few limits. First, even the combined figures from the public reports are incomplete. WikiLeaks, for example, reveals over 100 trips by federal legislators in 2009 that the public reports do not disclose.<sup>77</sup> But because WikiLeaks is itself an incomplete collection of cable traffic, it is unclear precisely how much additional undisclosed travel occurred, and one must view the numbers below as the lowest possible travel figures for 2009, rather than grand totals. Second, foreign travel is an imperfect proxy for legislative diplomacy. Legislators at least occasionally travel overseas on official business without meeting with foreign officials,<sup>78</sup> and it is impossible to identify the extent of that practice because the public reports do not identify all of the individuals with whom CODELs meet. To that extent, the figures below might overstate the volume of intergovernmental communications by U.S. legislators who travel abroad. Finally, the data do not include travel by congressional staff. Staff members frequently accompany legislators on CODELs and travel abroad on “STAFFDELS,” or delegations comprising only staff members,<sup>79</sup> but I excluded that information to keep the data set manageable.

Turning to the aggregated data, there are a variety of intriguing details. First, the data show who was engaged in diplomacy. Counting each country visit by each legislator as one trip, the sources document that a total of 420 federal legislators, or 79% of the combined membership of the House and

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74. *Supra* note 29.

75. *Supra* note 30.

76. *Cf.* R. ERIC PETERSEN ET AL., CONG. RESEARCH SERV., R41388, INTERNATIONAL TRAVEL BY CONGRESS: LEGISLATION IN THE 111TH CONGRESS, BACKGROUND, AND POTENTIAL POLICY OPTIONS (2010), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA528261> (providing an analysis of public reports on publicly financed congressional travel); Memorandum from R. Eric Petersen, Analyst in Am. Nat'l Gov't, Cong. Research Serv., Terrence L. Lisbeth, Ref. Ass't, Cong. Research Serv., and Mabel Gracias, Library Technician Ref. Ass't, Cong. Research Serv., to Timothy V. Johnson, Congressional International Travel: Data Since 1993 and Options for Congress (Feb. 26, 2010), available at [http://hobnoblog.com/wp-content/uploads/2013/06/CongressionalTravel\\_2010\\_Feb26.pdf](http://hobnoblog.com/wp-content/uploads/2013/06/CongressionalTravel_2010_Feb26.pdf) (same).

77. The reasons for these nondisclosures are unclear. Sometimes members of Congress meet with foreign officials while vacationing abroad. Telephone Interview with Matthew A. Reynolds, *supra* note 23. Meetings of this kind might yield State Department cables if the legislators notify local embassy staff beforehand, and yet the public reports would not document the travel because the legislators would have paid for it themselves. Another possibility is that legislators neglected to report their travel on return.

78. *See, e.g., Russian Experts Give Congressman Rogers a Snapshot of Political Debate*, WIKILEAKS (May 13, 2009), <http://wikileaks.org/cable/2009/05/09MOSCOW1199.html> (reporting on a meeting between Congressman Mike Rogers and Russian scholars).

79. *See, e.g., STAFFDEL Kuiken-Cammack's Meeting with PM Advisor Ron Dermer*, WIKILEAKS (Dec. 18, 2009), <http://wikileaks.org/cable/2009/12/09TELAVIV2734.html>.

Senate, completed slightly more than 2,000 trips abroad in 2009. Members of the House were responsible for 84.5% of this travel, for an average of 4 trips per member, while members of the Senate were responsible for 15.4%, for an individual average of 3.2 trips. Legislators from both parties participated in comparable measure: Democrats averaged 4.09 trips per legislator, while Republicans averaged 3.56.<sup>80</sup> The data also show, however, that legislators engaged in diplomacy unevenly: while some never went abroad even once, 54 legislators made at least 10 foreign trips during the year; the most frequent fliers were Eni Faleomavaega (D-AS) (24 trips), Jim McDermott (D-WA) (21), Adam Smith (D-WA) (17), Gabrielle Giffords (D-AZ) (16), Sheila Jackson Lee (D-TX) (16), Lindsey Graham (R-SC) (15), Greg Meeks (D-NY) (15), Jeff Miller (R-FL) (15), Solomon Ortiz (D-TX) (15), Dana Rohrabacher (R-CA) (15), and Joe Wilson (R-SC) (15). By comparison, Secretary of State Hillary Clinton made 47 trips to foreign countries over the same period.<sup>81</sup> Although many of the legislators' visits were part of regional tours that combined stops in multiple countries, the numbers suggest that foreign travel is a significant commitment of time and energy for a non-trivial percentage of House and Senate membership.

The aggregated data also show that legislators traveled widely. CODELs visited at least 117 countries in 2009.<sup>82</sup> The most frequent destinations were Afghanistan (139 trips), Israel (134), Kuwait (119), the United Arab Emirates (86), Germany (73), Iraq (72), Pakistan (53), Jordan (49), Belgium (47), and Italy (47). Most of this travel was publicly funded—non-U.S.-government funds paid for only slightly more than 200 trips, or 9.8% of the total for the year. Legislators did not report any foreign-government-funded travel.<sup>83</sup>

Finally, the data helps to identify the committees whose members were most frequently involved. Perhaps unsurprisingly, committees with primary jurisdiction over foreign policy matters—the House Foreign Affairs Committee and Senate Foreign Relations Committee—had the highest averages

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80. The gap in these numbers may reflect the fact that a member of the majority party, which in 2009 was the Democrats, usually organizes and manages each CODEL. Telephone Interview with Matthew A. Reynolds, *supra* note 23. Minority-only CODELs tend to be less common as a result. *Id.*

81. *Interactive Travel Map*, U.S. DEP'T OF STATE, <http://www.state.gov/secretary/trvl/map/> (last visited Aug. 28, 2013). I obtained the reported figure by counting each visit to a foreign country as one trip.

82. This number counts Palestine and Taiwan as countries. It is only possible to report a minimum figure because the House and Senate intelligence committees typically do not report countries of destination when their members travel abroad on committee business. Most of the reports disclose only the destination region or continent, or no destination at all. *See, e.g.*, 155 CONG. REC. H9666 (daily ed. Sept. 16, 2009) (reporting travel to the "Middle East," among other regions).

83. Gifts to Federal Employees from Foreign Government Sources Reported to Employing Agencies in Calendar Year 2009, 76 Fed. Reg. 2956 (Jan. 18, 2011).

in terms of trips per member.<sup>84</sup> Other committees with topically related jurisdictions, such as the House and Senate Armed Services Committees, also had high averages, suggesting that at least some portion of legislative diplomacy is related to congressional committee work. The Tables below summarize this information.

TABLE 1. HOUSE COMMITTEE TRAVEL (2009)

Committee	Total Member Trips	Trips per Member
Foreign Affairs	324	6.89
Armed Services	404	6.62
Intelligence	134	6.09
Standards of Official Conduct	56	5.60
Education and Labor	224	4.57
Small Business	132	4.55
Natural Resources	215	4.39
Science and Technology	182	4.23
Rules	51	3.92
Appropriations	233	3.88
Oversight and Government Reform	158	3.85
Judiciary	152	3.71
Veterans' Affairs	106	3.66
Homeland Security	118	3.58
Transportation and Infrastructure	255	3.45
Ways and Means	136	3.32
Agriculture	151	3.28
Energy and Commerce	193	3.27
Financial Services	193	2.72
Budget	92	2.35
House Administration	21	2.33

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84. This finding is generally consistent with data from other years. *E.g.*, Glenn R. Parker & Stephen C. Powers, *Searching for Symptoms of Political Shirking: Congressional Foreign Travel*, 110 PUB. CHOICE 173, 189 (2002) (“There is strong evidence that foreign travel is related to members’ responsibilities on congressional committees. Specifically, membership on the House committees on Appropriations, Armed Services, and International Relations is related to higher levels of foreign travel.”).

TABLE 2. SENATE COMMITTEE TRAVEL (2009)

Committee	Total Member Trips	Trips per Member
Foreign Relations	105	5.53
Armed Services	119	4.58
Judiciary	79	4.16
Homeland Security	62	3.65
Agriculture, Nutrition, and Forestry	74	3.52
Environment and Public Works	59	3.11
Commerce, Science, and Transportation	69	2.76
Budget	62	2.70
Energy and Natural Resources	59	2.57
Appropriations	74	2.47
Health, Education, Labor, and Pensions	55	2.39
Intelligence	34	2.27
Finance	48	2.09
Banking, Housing, and Urban Affairs	41	1.78
Small Business and Entrepreneurship	32	1.68
Rules and Administration	29	1.53
Veterans' Affairs	20	1.33

The data are significant for a number of reasons. First, they corroborate the anecdotal evidence from WikiLeaks to establish that the contemporary practice of legislative diplomacy is extensive. An overwhelming majority of legislators participate, with many making a significant number of trips per year to destinations across the globe. There is no reason to think that the 2009 data is anomalous in this regard, at least compared to other nonelection years.<sup>85</sup> Second, while the Framers designed the Senate to exercise greater power than the House over foreign affairs,<sup>86</sup> the data suggest that senators engage in international diplomacy less frequently than House members, both in terms of the total number of trips and trips per member. Several possible explanations account for this phenomenon. One is the Defense Department's travel rules, which require House members to travel in larger groups to utilize military aircraft.<sup>87</sup> Because legislators generally prefer military over commercial transportation, these rules give House members who desire to travel abroad a stronger incentive to encourage the participation of

85. Legislators tend to travel less frequently during election years. Telephone Interview with Matthew A. Reynolds, *supra* note 23.

86. See, e.g., Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End Is Achieved, 83 AM. J. INT'L L. 718 (1989) (describing the important role of the Senate, and the exclusion of the House, in the treaty-making process).

87. Telephone Interview with Matthew A. Reynolds, *supra* note 23.

their colleagues.<sup>88</sup> Another possibility is that House members have an easier time getting away from Washington because they tend to vote less frequently than their counterparts in the Senate.<sup>89</sup> Whatever the explanation, the data raise questions about the longstanding view that the Senate has more influence and expertise in foreign affairs. Finally, the data are generally at odds with the idea that foreign travel is a mere boondoggle: legislators with topically relevant committee assignments traveled abroad more than others, and many of the top destinations were countries that pose significant foreign policy challenges, such as Afghanistan and Iraq.

## 2. Domestic Contacts

The converse to CODEL travel is communication with foreign officials in the United States. Because most of these contacts are informal and information about them is not in the public record, it is impossible to provide a detailed description of their frequency and nature. It is clear, however, that foreign governments are extremely active on Capitol Hill. Officials who visit the United States meet frequently with individual legislators,<sup>90</sup> and over 100 foreign leaders and dignitaries have addressed Congress since 1874.<sup>91</sup> Foreign governments also hire private agents to represent their interests. According to the Department of Justice, 397 entities and 1,906 individuals were registered as agents engaging in political activities for or on behalf of foreign governments, foreign political parties, and other foreign principals in the first half of 2009 alone.<sup>92</sup> These lobbies “express themselves daily by wire and letter, in meetings at home ‘back in the district,’ and in the corridors of the Senate and House office buildings where the key committees hold their

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88. *Id.*

89. *Id.*

90. *Id.*; Telephone Interview with Jeffrey Bergner, *supra* note 25.

91. *Foreign Leaders and Dignitaries Who Have Addressed the U.S. Congress: Fast Facts*, UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Foreign-Leaders/Fast-Facts/> (last visited Aug. 28, 2013). For recent examples, see Felicia Sonmez, *South Korean President Lee Myung-bak to Address Congress Next Week*, Posting to *2chambers*, WASH. POST (Oct. 7, 2011, 2:04 PM), [http://washingtonpost.com/blogs/2chambers/post/south-korean-president-lee-myung-bak-to-address-congress-next-week/2011/10/07/gIQAVBfJTL\\_blog.html](http://washingtonpost.com/blogs/2chambers/post/south-korean-president-lee-myung-bak-to-address-congress-next-week/2011/10/07/gIQAVBfJTL_blog.html), and *Transcript: Israeli Prime Minister Binyamin Netanyahu's Address to Congress*, WASH. POST (May 24, 2011), [http://articles.washingtonpost.com/2011-05-24/world/35264020\\_1\\_israel-young-people-democracy](http://articles.washingtonpost.com/2011-05-24/world/35264020_1_israel-young-people-democracy).

92. U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE SIX MONTHS ENDING JUNE 30, 2009, at I-2, *available at* <http://www.fara.gov/reports/June30-2009.pdf>. The numbers have remained fairly steady in recent years. See, e.g., U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE SIX MONTHS ENDING JUNE 30, 2011, at I-3, *available at* [http://www.fara.gov/reports/FARA\\_SAR\\_063011.pdf](http://www.fara.gov/reports/FARA_SAR_063011.pdf) (reporting 382 entities and 1,751 individuals registered).

hearings.<sup>93</sup> Moreover, the volume of such contacts vastly exceeds that which results from CODEL travel abroad.<sup>94</sup> As just a few examples, Egypt has lobbied members of Congress for security and economic assistance;<sup>95</sup> Israel has pushed for help with Iran;<sup>96</sup> Taiwan has hired lobbyists to rally congressional support for the sale of F-16 fighter jets;<sup>97</sup> and a variety of countries have recently encouraged Congress to include in immigration reform legislation provisions that are favorable to their nationals.<sup>98</sup> To foreign governments, the value of these contacts is obvious: they present opportunities to persuade members of Congress to pass legislation that promotes the acting state's interests, without executive interference.<sup>99</sup> Although the contacts can complicate U.S. foreign policy, executive officials acknowledge limits to their ability to prevent them.<sup>100</sup>

### B. Antecedents

The contemporary practice is by no means a recent development. Legislative diplomacy has been common for well over a century, and both the executive and the legislative branches have contributed to its expansion. At least as early as the mid-1800s, presidents began to appoint sitting legislators to a range of temporary diplomatic positions. Presidents Harrison<sup>101</sup> and McKinley,<sup>102</sup> for example, both appointed legislators to represent the United States at international monetary conferences in the 1890s. McKinley also

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93. William C. Olson, *The US Congress: An Independent Force in World Politics?*, 67 INT'L AFF. 547, 557 (1991).

94. Telephone Interview with Matthew A. Reynolds, *supra* note 23; Telephone Interview with Jeffrey Bergner, *supra* note 25.

95. Anupama Narayanswamy et al., *Adding It up: The Top Players in Foreign Agent Lobbying*, PROPUBLICA (Aug. 18, 2009, 1:34 PM) (corrected Oct. 23, 2009), <http://www.propublica.org/article/adding-it-up-the-top-players-in-foreign-agent-lobbying-718>.

96. See Barak Ravid, *Netanyahu Will Ask Obama to Threaten Iran Strike*, HAARETZ (Feb. 29, 2012, 2:41 AM), <http://www.haaretz.com/print-edition/news/netanyahu-will-ask-obama-to-threaten-iran-strike-1.415428> (“[T]he Obama administration suspects Netanyahu is using Congress and the Republican candidates in the presidential race to put pressure on Obama to support . . . a strike.”).

97. See Kevin Bogardus & Rachel Leven, *Taiwan Lobbyists Pressure White House to Approve Sale of F-16 Fighter Jets*, HILL (Oct. 11, 2011, 5:30 AM), <http://thehill.com/business-a-lobbying/186627-taiwan-lobbyists-pressure-white-house-on-f-16-sales> (“A lobbying team . . . representing Taiwan . . . gather[ed] lawmaker signatures for two letters that were sent to President Obama arguing for the sale of the most advanced fighter jets to the country.”).

98. Eric Lipton, *Some Countries Lobby for More in Race for Visas*, N.Y. TIMES, May 12, 2013, at A1, available at [http://www.nytimes.com/2013/05/12/us/politics/tucked-in-immigration-bill-special-deals-for-some.html?\\_r=0](http://www.nytimes.com/2013/05/12/us/politics/tucked-in-immigration-bill-special-deals-for-some.html?_r=0).

99. CECIL V. CRABB, JR. ET AL., CONGRESS AND THE FOREIGN POLICY PROCESS 40 (2000).

100. Telephone Interview with Jeffrey Bergner, *supra* note 25.

101. *Question of Eligibility*, N.Y. TIMES, Aug. 15, 1892, at 4 (Senators William B. Allison and John P. Jones and Representative James B. McCreary).

102. *To Work for Bimetallism*, N.Y. TIMES, Apr. 13, 1897, at 3 (Senator Edward O. Wolcott).

appointed legislators to a joint commission aimed at settling disagreements between the United States and Great Britain with respect to Canada,<sup>103</sup> and to the peace commission that negotiated the end of the Spanish–American War.<sup>104</sup> President Harding appointed two senators to the U.S. delegation to the Washington Naval Conference in 1921<sup>105</sup> and two others to the Foreign Debt Funding Commission in 1922.<sup>106</sup> Presidents such as Hoover, Carter, and Reagan engaged in similar practices.<sup>107</sup> According to one study, the executive reserved for sitting legislators over 250 places on U.S. delegations to international conferences between 1930 and 1960.<sup>108</sup> Sometimes legislators served as informal advisors to a U.S. delegation; other times they were part of the delegation itself.<sup>109</sup> While these appointments occasionally generated constitutional objections from Congress, presidents continued to make them anyway.<sup>110</sup>

The executive contributed to the development of legislative diplomacy in other ways as well. Not only have the Defense and State Departments provided extensive logistical support to CODELs by arranging travel and meetings with foreign governments,<sup>111</sup> the Department of Justice has never enforced the Logan Act against members of the House and Senate. Congress

103. *The Canadian Commission: Men Named by the President to Meet the Representatives of Great Britain*, N.Y. TIMES, July 17, 1898, at 6 (Senators Charles W. Fairbanks and George Gray and Representative Nelson Dingley).

104. *Peace Commission Filled*, N.Y. TIMES, Sept. 10, 1898, at 1 (Senators William P. Frye, Cushman K. Davis, and George Gray).

105. *Each Power to Send 4 to Arms Parley*, N.Y. TIMES, Sept. 10, 1921, at 1 (Senators Henry Cabot Lodge and Oscar Underwood).

106. *Hughes, Mellon, Hoover, Smoot, Burton, Named on Foreign Debt Commission*, N.Y. TIMES, Feb. 22, 1922, at 1. The Attorney General issued an opinion concluding that the appointments were constitutional notwithstanding Article I, Section 6's prohibition on legislators contemporaneously holding "civil office under the authority of the United States." See S. Doc. No. 67-151, at 2-4 (1922).

107. E.g., Fisher, *supra* note 4, at 1517 ("During 1977 and 1978, twenty-six Senators served in Geneva as official advisers to the SALT II negotiating team."); *Reed Slated to Go to 5-Power Parley*, N.Y. TIMES, Oct. 21, 1929, at 1 (reporting President Herbert Hoover's selection of Senators David A. Reed and Joseph T. Robinson as U.S. delegates to the London Naval Conference); *Team of Observers for Salvador Vote Announced by U.S.*, N.Y. TIMES, Mar. 2, 1982, at A7 (reporting a State Department announcement that Senator Nancy Kassebaum would lead an official delegation to observe elections in El Salvador and that Representative Bob Livingston would be part of the delegation); see also Blechman, *supra* note 68, at 122 (recounting how members of a Senate Arms Control Observer Group "me[t] separately with Soviet negotiators, both to learn firsthand of Soviet positions and to express their own concerns").

108. THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 141 (1979).

109. *Id.* at 141, 147.

110. See, e.g., 62 CONG. REC. 2893-96 (1922) (discussing disapproval of President Warren G. Harding's appointment of members of Congress to the Foreign Debt Funding Commission); 36 CONG. REC. 2695-96 (1903) (describing the president's use of federal legislators to carry out diplomatic functions, such as treaty negotiations, and certain senators' objections to that practice); 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 49-50 (1903).

111. See *supra* notes 32-38 and accompanying text.

passed the Act in 1799 to provide for criminal penalties against “any” U.S. citizen who, without the permission or authority of the federal government, carries on “any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof” with the intent to affect U.S. foreign relations.<sup>112</sup> In the early 1900s, legislative diplomacy occasionally generated complaints about Logan Act violations. Speculation that Senator Warren G. Harding had been in contact with French officials in 1920 led to debates about whether a violation had occurred.<sup>113</sup> A private citizen filed a complaint against Senator Joseph France in 1922 for having contact with “foreign Governments, including German Socialists and Russian Bolsheviks, in direct defiance of the measures of the Government.”<sup>114</sup> Later, critics identified potential Logan Act violations by numerous other legislators.<sup>115</sup> Not once, however, did this conduct result in prosecution.<sup>116</sup> This pattern continues today.<sup>117</sup>

Legislators in turn contributed to the development of legislative diplomacy by seeking independent contacts with foreign governments, at times contrary to executive policy. In 1927, for example, Senator William Borah conferred with the president of Mexico about oil expropriations, notwithstanding the State Department’s opposition.<sup>118</sup> Senator Henry Cabot Lodge sought to correspond with European leaders behind President Wilson’s back

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112. Logan Act, ch. 1, 1 Stat. 613 (1799) (codified as amended at 18 U.S.C. § 953 (2012)).

113. See Woodrow Wilson, *President’s Letter to Senator Harding*, N.Y. TIMES, Oct. 19, 1920, at 1; Warren G. Harding, *Senator Harding’s Reply*, N.Y. TIMES, Oct. 19, 1920, at 1.

114. *Seeks Prosecution of Senator France*, N.Y. TIMES, Apr. 15, 1922, at 1.

115. See, e.g., Sara Fritz, *Wright’s Latin Role Assailed by Republicans*, L.A. TIMES, Nov. 14, 1987, at SD1 (House Speaker Jim Wright); James Reston, *Eisenhower Official Sees M’Carthy [sic] Plan on Ships as ‘Phony’*, N.Y. TIMES, Mar. 30, 1953, at 1 (Senator Joseph McCarthy).

116. See, e.g., *Cable to Lloyd George from Senator France*, N.Y. TIMES, Apr. 16, 1922, at 2 (reporting that the attorney general would pursue the prosecution of Senator France only at the insistence of the State Department). The best history on the Logan Act is Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT’L L. 268 (1966). See also CONG. RESEARCH SERV., 106TH CONG., STUDY ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 98–100 (Comm. Print 2001), available at <http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf> (summarizing the history of the Logan Act).

117. In recent years, some have cited the Logan Act as a way of criticizing legislators who hold discussions with foreign officials. See, e.g., Andrew C. McCarthy, *Don’t Investigate Pelosi—Debate Her*, NAT’L REV. ONLINE (Apr. 7, 2007, 11:25 AM), <http://www.nationalreview.com/articles/220551/dont-investigate-pelosi-debate-her/andrew-c-mccarthy>. The executive, however, has not provided any indication that it might prosecute, and for good reason—given that contemporary CODELS obtain prior approval from congressional leadership and generally benefit from executive logistical support, it is hard to argue that their members communicate “without authority of the United States,” as prosecution would require. 18 U.S.C. § 953 (2012); see also *supra* notes 32–38 and accompanying text (discussing how the executive departments facilitate CODEL travel).

118. See William E. Borah, *Borah Answers Oil Men: No Criticism Can Deflect Him from Course on Mexico He Says*, N.Y. TIMES, Mar. 11, 1927, at 2.



throughout the Versailles conference.<sup>119</sup> Representative Adam Clayton Powell's misuse of public funds for foreign travel contributed to the House's decision to exclude him from office in the 1960s.<sup>120</sup> In 1979, Representative George Hansen traveled to Iran without State Department approval to negotiate the release of American hostages,<sup>121</sup> and Representative Thomas Ashley led a delegation to China to meet with Deng Xiaoping.<sup>122</sup> By his own account, Congressman Stephen Solarz traveled to 140 countries on official business from the mid-1970s to the early 1990s.<sup>123</sup> And in recent years, legislators have made high-profile visits to countries such as Burma, Afghanistan, and Egypt.<sup>124</sup> Executive opposition to these contacts appears to be rare.<sup>125</sup>

119. KARL SCHRIFTGIESSER, *THE GENTLEMAN FROM MASSACHUSETTS: HENRY CABOT LODGE 301-04* (1944); see also *Says Lodge Tried to Thwart Wilson: Henry White, Biographer, Asserts Senator Sent Secret Note to Allied Peace Delegates*, N.Y. TIMES, Oct. 29, 1930, at 34.

120. See H.R. Res. 278, 90th Cong., 113 CONG. REC. 4997, 5037-38 (1967) (enacted) (excluding Powell from Congress); *Texts of Statements and Resolution of Powell Panel*, N.Y. TIMES, Feb. 24, 1967, at 20 ("As Chairman of the Committee on Education and Labor, Mr. Powell made false reports on expenditures of foreign exchange currency to the Committee on House Administration."); see also Cabell Phillips, *Powell Defends His Behavior as Labor Committee Chairman*, N.Y. TIMES, Feb. 21, 1963, at 1 (reporting on the political backlash against Powell's extensive overseas travel).

121. See Bernard Gwertzman, *Nations Not Named*, N.Y. TIMES, Nov. 27, 1979, at A1; John Kifner, *Congressman Visits Captives in Tehran*, N.Y. TIMES, Nov. 26, 1979, at A1. For just a few examples of legislators communicating directly with foreign governments in recent decades, see Adam Clymer, *Senators Are Flocking to Panama for Tour of Duty*, N.Y. TIMES, Jan. 9, 1978, at A12 (discussing trips to Panama and meetings with Panamanian officials by senators deliberating on whether to ratify the Torrijos-Carter Treaties); Christopher Layne, *Lone Ranger Diplomacy a Risky Path for Liberals*, L.A. TIMES, Feb. 12, 1988, at C7, available at [http://articles.latimes.com/1988-02-12/local/me-28387\\_1\\_u-s-foreign-policy](http://articles.latimes.com/1988-02-12/local/me-28387_1_u-s-foreign-policy) (describing how House Speaker Jim Wright launched an independent diplomatic effort by meeting secretly for three days with Nicaraguan President Daniel Ortego, three members of the Contra leadership, and Nicaragua's cardinal Miguel Obando y Bravo); 8 *U.S. Legislators Will Pay a Visit to China Next Month*, N.Y. TIMES, June 27, 1973, at 6 (discussing a trip by Senator Warren Magnuson and seven other members of Congress); and *Dole Cautious on U.S. Role in Gulf Combat*, N.Y. TIMES, Dec. 31, 1990, at 6 (describing how Senator Bob Dole spoke with the Iraqi ambassador to the United States to see whether Baghdad would be willing to change the date of talks on preventing the Gulf War).

122. Fox Butterfield, *Teng Invites Senator Goldwater to Peking for a Talk*, N.Y. TIMES, Jan. 3, 1979, at A2.

123. STEPHEN J. SOLARZ, *JOURNEYS TO WAR & PEACE* 27 (2011).

124. John Lee, *Why Burma Would Turn Against China*, ATLANTIC (Feb. 2, 2012, 9:19 AM), <http://www.theatlantic.com/international/archive/2012/02/why-burma-would-turn-against-china/252412/>; Kevin Sieff, *U.S. Senators, Afghan Leaders Discuss Parameters for Long-Term Partnership*, WASH. POST (Feb. 19, 2012), [http://articles.washingtonpost.com/2012-02-19/world/35445965\\_1\\_night-raids-afghan-security-forces-afghan-leader](http://articles.washingtonpost.com/2012-02-19/world/35445965_1_night-raids-afghan-security-forces-afghan-leader); *Senator 'Optimistic' Egypt NGO Standoff Near End*, CNN (Feb. 20, 2012, 3:11 PM), [http://www.cnn.com/2012/02/20/world/africa/egypt-ngos/index.html?hptHP\\_t3](http://www.cnn.com/2012/02/20/world/africa/egypt-ngos/index.html?hptHP_t3).

125. But see Binder, *supra* note 45 (reporting on State Department opposition to a trip to Cuba by Senators Jacob Javits and Claiborne Pell); Al Kamen with Emily Heil, *Message Sent; Messenger Grounded*, WASH. POST, Apr. 23, 2012, at A17 (reporting that Secretary Clinton grounded a military jet carrying a CODEL headed for Afghanistan because of objections from President Karzai).

Finally, foreign governments have also played a role. According to James Lindsay, “[M]ost embassies conducted their business through the State Department” before the mid-1970s and “rarely lobbied Congress.”<sup>126</sup> But encouraged by independent contacts from the membership, foreign officials began to view Congress as a new channel of official communication. Their respective governments responded by developing aggressive and permanent lobbying presences on the Hill<sup>127</sup> and dispatching delegations to meet with U.S. legislators.<sup>128</sup>

Not only is legislative diplomacy now widespread—federal law explicitly endorses the practice. There is a permanent appropriation for congressional travel.<sup>129</sup> The Mutual Security Act of 1954 imposes expenditure limits and reporting requirements,<sup>130</sup> as do House and Senate rules.<sup>131</sup> A series of other federal statutes have established recurring interparliamentary exchanges between members of the House and Senate and officials from foreign legislative bodies.<sup>132</sup> The Mutual Educational and Cultural Exchange Act of 1961 authorizes U.S. legislators to participate in international cultural exchanges.<sup>133</sup> Successive House resolutions have established the House Democracy Partnership, under which congressional leadership appoints a

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126. Lindsay, *supra* note 70, at 264.

127. Olson, *supra* note 93, at 556–57.

128. Lindsay, *supra* note 70, at 263–64 (“During the 101st Congress (1989–90), the House Foreign Affairs Committee received 132 foreign dignitaries and 34 foreign delegations, while the Senate Foreign Relations Committee received foreign dignitaries on 80 occasions . . .”).

129. Telephone Interview with Matthew A. Reynolds, *supra* note 23; *see also* 22 U.S.C. § 1754(b) (2006) (making foreign currency available to members of Congress for foreign travel).

130. 22 U.S.C. § 1754(b).

131. *See* HOUSE RULES, *supra* note 30, at 1, 13, 40 (Rules 1.10, 10.8, and 24.10); Comm. on Rules & Admin., *Rules of the Senate: Public Financial Disclosure*, U.S. SENATE, available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXXIV> (Rule 34). For other rules regarding foreign travel by members of Congress, *see* HOUSE ETHICS MANUAL, *supra* note 30, at 87–105.

132. *E.g.*, 22 U.S.C. § 276c (2006) (providing for the designation of Senate delegates to the Interparliamentary Union); *id.* § 276d (providing for the appointment of legislators to the U.S.–Canada Interparliamentary Group); *id.* § 276h (U.S.–Mexico Interparliamentary Group); *id.* § 276l (United Kingdom); *id.* § 276m (Conference for Security and Cooperation in Europe); *id.* § 276n (China); *id.* § 276o (Russia); *id.* § 276p (Supp. V 2011) (Japan); *id.* § 1928a (2006) (NATO).

133. *See* 22 U.S.C. § 2452(a)(2)(i) (providing for cultural exchanges in the form of “visits and interchanges between the United States and other countries of leaders, experts in fields of specialized knowledge or skill, and other influential or distinguished persons”); *id.* § 2458a(a) (permitting the “acceptance by a Federal employee of grants and other forms of assistance provided by a foreign government to facilitate the participation of such Federal employee in a cultural exchange . . . of the type described in section 2452(a)(2)(i),” and defining “Federal employee” to include members of Congress in accordance with 5 U.S.C. § 7342(a)(1)(F)). Foreign travel under this law is increasingly common. T.W. Farnam, *Congressional Staffers Often Travel on Tabs of Foreign Governments*, WASH. POST, Feb. 18, 2013, available at [http://www.washingtonpost.com/politics/congressional-staffers-often-travel-on-tabs-of-foreign-governments/2013/02/17/25e39938-7625-11e2-8f84-3e4b513b1a13\\_story.html](http://www.washingtonpost.com/politics/congressional-staffers-often-travel-on-tabs-of-foreign-governments/2013/02/17/25e39938-7625-11e2-8f84-3e4b513b1a13_story.html).

commission of sitting legislators to “work with the parliaments of selected countries . . . on a frequent and regular basis” for the purpose of building effective foreign legislative institutions.<sup>134</sup> As part of the Helsinki Commission, eighteen members of Congress participate in U.S. delegations to the Organization for Security and Cooperation in Europe (“OSCE”), where they have “regular contact with parliamentarians, government officials, NGOs, and private individuals from other OSCE participating States.”<sup>135</sup> The Trade Act of 2002 requires that House and Senate leaders convene a Congressional Oversight Group at the beginning of each legislative session and that each member of the group “be accredited by the United States Trade Representative on behalf of the President as an official adviser to the United States delegation in negotiations for any trade agreement to which [the Act] applies.”<sup>136</sup> Thus, legislative diplomacy is now a settled means by which the United States conducts foreign relations.

## II. EXECUTIVE POWER AS A LIMITING PRINCIPLE

While legislative diplomacy is well established, there are simply no accounts of its constitutionality. At best, the orthodoxy completely neglects the practice; at worst, it implies that the practice is unconstitutional without offering supporting analysis.<sup>137</sup> The result is a significant tension—Congress routinely interfaces with foreign governments, but such contacts find no support in existing doctrine. The remainder of this Article sketches theories of constitutionality in an effort to resolve this tension. This Part begins by evaluating the scope of the executive diplomacy power by reference to the text of Article II and standard indicia of original meaning. Because the Constitution does not allocate any specific power to more than one branch, understanding the contours of the executive power permits inferences about the extent of a possible legislative counterpart. If the executive power is plenary and exclusive, for example, then it follows that diplomacy by Congress is unconstitutional, for all diplomatic communications would fall within the

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134. H.R. Res. 135, 109th Cong. § 5(a) (2005) (enacted); *accord* H.R. Res. 5, 112th Cong. § 4 (2011) (enacted); H.R. Res. 5, 111th Cong. § 4(b) (2009) (enacted); H.R. Res. 24, 110th Cong. (2007) (enacted). The House Democracy Partnership reported as follows:

In 2009, the Commission sent Members of Congress on assistance missions to seven partner countries, hosted two seminars in Washington for 48 MPs from eight partner countries, hosted seminars in Macedonia and Kenya for 54 staff from nine countries, and hosted two legislative staff institutes in Washington for 52 staff from 13 legislatures.

HOUSE DEMOCRACY ASSISTANCE COMM’N, 111TH CONG., 2009 ANNUAL REPORT iii (2009), available at [http://hdac.house.gov/docs/HDAC\\_2009\\_Annual\\_Report.pdf](http://hdac.house.gov/docs/HDAC_2009_Annual_Report.pdf).

135. *About the Commission, COMM’N ON SEC. & COOPERATION IN EUROPE (U.S. HELSINKI COMM’N)*, <http://www.csce.gov/index.cfm?FuseAction=AboutCommission.WorkOfCommission> (last visited Aug. 28, 2013); *see also* 22 U.S.C. § 3003(a) (2006) (establishing Commission membership).

136. Trade Act of 2002 § 2107(a)(4), 19 U.S.C. § 3807(a)(4) (2012).

137. *See, e.g., supra* notes 1–6 (providing examples of the orthodoxy in legal scholarship).

executive domain. If, on the other hand, the executive power is in any respect less than plenary, then Article II does not necessarily prohibit legislative diplomacy, and the task becomes one of locating the affirmative source of the legislative power elsewhere, such as in Article I.

#### A. *Textual Dimensions*

Nothing in the Constitution directly states that the president holds the power to communicate with foreign governments, much less on an exclusive basis. Thus, the executive diplomacy power must rely on the implications of express powers. This Section develops those implications under each of two possible interpretations of Article II. The first, which I will call the “Discrete Powers Thesis,” asserts that the president’s Article II, Sections 2 and 3 powers to “be Commander in Chief of the Army and Navy”;<sup>138</sup> “make Treaties”;<sup>139</sup> “nominate[ ] and . . . appoint Ambassadors, other public Ministers and Consuls”;<sup>140</sup> “take Care that the Laws be faithfully executed”;<sup>141</sup> and “receive Ambassadors”<sup>142</sup> each implicitly creates a discrete category of diplomatic power, and that the president possesses constitutional authority to communicate with foreign governments to the extent that the subject of the communication falls within one of these categories.<sup>143</sup> The second interpretation holds that the diplomacy power resides primarily in Article II, Section 1, rather than in Sections 2 and 3. Article II allocates the diplomacy power, in other words, by vesting “[t]he executive Power . . . in a President.”<sup>144</sup> This is the “Vesting Clause Thesis.” Under this interpretation, advocated by Saikrishna Prakash and Michael Ramsey, the term “executive power” includes authority to communicate with foreign governments both because that was the general understanding of the term at the time of ratification and because no provision of the Constitution delegates diplomacy power away from the president.<sup>145</sup> My purpose is not to advocate either theory, or even to suggest that they are mutually exclusive,<sup>146</sup> but instead to explore the

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138. U.S. CONST. art. II, § 2, cl. 1.

139. *Id.* cl. 2.

140. *Id.*

141. *Id.* § 3.

142. *Id.*

143. *Cf.* Bradley & Flaherty, *supra* note 4 (rejecting the position that the Vesting Clause is a source of foreign affairs powers).

144. U.S. CONST. art. II, § 1, cl. 1.

145. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 317–24 (2001) [hereinafter Prakash & Ramsey, *Executive Power*]; Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 *MINN. L. REV.* 1591, 1673–74 (2005) [hereinafter Prakash & Ramsey, *Jeffersonian Executive*].

146. Presidents have preferred to rely simultaneously on both. *See, e.g.*, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act 4–5 (Op. O.L.C. June 1, 2009), <http://www.justice.gov/olc/2009/section7054.pdf> [hereinafter Constitutionality of Section 7054].

dimensions of executive power under each in light of the absence of consensus on their merits. The relevant dimensions are threefold: the diplomacy power's functional breadth, the capacity in which the power authorizes the president to speak, and the exclusivity of the power in Article II. This analysis will delimit the communicative territory into which Congress cannot intrude.

### 1. Functional Breadth

It is an often unstated but widely held assumption that the executive diplomacy power enables the president to execute a broad range of official functions. Few would question, for example, that Article II empowers the president to lobby foreign governments, negotiate agreements, and otherwise communicate with heads of state on virtually any subject in furtherance of U.S. interests. And while Congress has at times disagreed, the president has repeatedly and successfully claimed an indefeasible power to choose the particular "form and manner" in which he executes these functions.<sup>147</sup> Administrations have thus declined to honor statutes that have restricted the president's ability to choose the individuals comprising U.S. delegations to international conferences,<sup>148</sup> the particular fora in which diplomatic contacts will occur,<sup>149</sup> the terms on which the United States participates in multilateral arrangements,<sup>150</sup> and the content of sovereign communications with foreign governments.<sup>151</sup>

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147. *Id.*

148. See *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 37–39, 42 (1990) (concluding that a statute intruded on the president's diplomacy powers by conditioning the president's ability to obligate appropriated funds for U.S. delegations to the Conference on Security and Cooperation in Europe on his inclusion of certain individuals in the delegation).

149. See *Constitutionality of Section 7054*, *supra* note 146, at 4, 7–8 & n.9 (concluding that an act of Congress unconstitutionally interfered with the president's diplomacy powers by prohibiting the State Department from using appropriated funds to pay for a U.S. delegation to any UN agency, commission, or body that is chaired by a terrorist-list state); *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995) (concluding that a statute usurped Article II diplomacy powers by conditioning the president's ability to obligate appropriated State Department funds on the building and opening of an embassy in Jerusalem).

150. See, e.g., *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996) (concluding that a statute unconstitutionally interfered with Article II diplomacy powers by prohibiting the president from placing U.S. armed forces participating in UN peacekeeping operations under UN operational or tactical control).

151. See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18 (1992) (concluding that a statute was unconstitutional because it purported to restrict the president's diplomacy powers by prohibiting the State Department from issuing more than one passport to U.S. government officials, given that the purpose of the additional passports is to facilitate compliance with an Arab League policy of denying entrance to individuals with passports that reflect travel to Israel).

Both interpretations of Article II can account for much of this breadth, albeit with different levels of complexity. The Discrete Powers Thesis encounters the greatest challenge. It asserts that the aggregate of the president's Article II, Sections 2 and 3 powers to "be Commander in Chief of the Army and Navy";<sup>152</sup> "make Treaties";<sup>153</sup> "nominate[ ] and . . . appoint Ambassadors, other public Ministers and Consuls";<sup>154</sup> "receive Ambassadors";<sup>155</sup> and "take Care that the Laws be faithfully executed"<sup>156</sup> empowers the president to pursue a full range of standard diplomatic functions. The logic through which one might find an implied diplomacy power changes, however, depending on the clause. Two of the clauses, for example, would authorize executive diplomacy by enumerating a power that the president can only exercise by communicating with foreign officials: Because a treaty is a formal agreement between the United States and at least one foreign state,<sup>157</sup> the president must negotiate terms (i.e., communicate) with officials from one or more foreign governments that may become co-parties to "make"<sup>158</sup> a treaty. Likewise, the president must communicate with a foreign official to "receive"<sup>159</sup> an ambassador to the United States through the presentation and acceptance of credentials.

Diplomacy may also follow by necessity from the president's duties under the Take Care Clause. A significant number of U.S. treaties require communication with foreign governments. Decades of nuclear weapons agreements, for example, have mandated that U.S. officials and their Russian counterparts verify stockpile reductions through extensive coordination and verification measures.<sup>160</sup> The International Convention for the Suppression of the Financing of Terrorism requires states to communicate with each other about suspected financiers of terrorism and the outcomes of criminal prosecutions.<sup>161</sup> The UN Charter alone requires the United States to engage

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152. U.S. CONST. art. II, § 2, cl. 1.

153. *Id.* cl. 2.

154. *Id.*

155. *Id.* § 3.

156. *Id.*

157. See Vienna Convention on the Law of Treaties art. 2.1(a), May 23, 1969, 1155 U.N.T.S. 331, 333 ("Treaty" means an international agreement concluded between States in written form and governed by international law . . . .").

158. U.S. CONST. art. II, § 2, cl. 2.

159. *Id.* § 3.

160. See, e.g., Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms arts. VII, VIII, IX, XII, U.S.–Russ., Apr. 8, 2010, S. Treaty Doc. No. 11-5 [hereinafter New START Treaty], available at <http://www.state.gov/documents/organization/140035.pdf>; Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms arts. VIII, XV, U.S.–U.S.S.R., July 31, 1991, S. Treaty Doc. No. 102-20 [hereinafter START I], available at <http://www.state.gov/www/global/arms/starthtm/start/treatytc.html#TREATYTOC>.

161. International Convention for the Suppression of the Financing of Terrorism arts. 9(3)(a), 19, Dec. 9, 1999, 2178 U.N.T.S. 197, 234, 238.

in a staggering array of diplomatic communications simply by specifying the duties of members of the General Assembly and Security Council.<sup>162</sup> Because of the Supremacy Clause, the communicative mandates in these treaties are supreme federal law.<sup>163</sup> And as federal law, they at least arguably fall within the scope of the Take Care Clause.<sup>164</sup> Thus, the president can fulfill his duty under the Clause only by communicating with foreign governments. The text authorizes diplomacy by requiring it.

Article II contains other clauses on which a broad diplomacy power might rely, although on different reasoning. One is the Commander-in-Chief Clause.<sup>165</sup> Unlike the exercise of the powers discussed above, the exercise of the commander-in-chief power does not necessarily entail communication with foreign governments—practically speaking, the president can set strategic policy, manage readiness and force structure, and command the military in the event of an armed attack without contacting foreign governments. Thus, the Commander-in-Chief Clause plays a role in the Discrete Powers Thesis only under a comparatively permissive reading. Such a reading would assert that the Clause implicitly authorizes executive diplomacy by enumerating a power whose effective exercise may, at times, require presidential communication with foreign governments. To the extent that effective command of the armed forces requires the president to confer with allies about military strategy or to speak with enemies for the purpose of deterrence or disarmament, for example, the Clause would empower the president to do so. The unique premise of this reading is that the enumeration of a power implicitly authorizes communicative acts that are otherwise constitutional and necessary for the power's effective use.

To justify a functionally broad diplomacy power, the Discrete Powers Thesis might also rely on the president's power to "nominate[ ] and . . . appoint Ambassadors[ and] other public Ministers and Consuls."<sup>166</sup> Here, the exercise of the enumerated power itself neither logically requires nor even practically depends on diplomacy—the president can nominate and appoint an ambassador without communicating with a foreign government. Nevertheless, the Appointments Clause may constitute the single greatest

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162. See, e.g., U.N. Charter arts. 13, 16, 20, 23, 26, 28.

163. See U.S. CONST. art. VI, cl. 2; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 611–22 (2008). Because it asserts that customary international law ("CIL") is federal common law, the so-called "modern position" on CIL's domestic status would also impose on the executive a Take Care Clause duty to carry out CIL-mandated diplomatic communications. See Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 394 (1997) (arguing that CIL is part of federal common law). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (rejecting the modern position).

164. See Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 342–72 (2008) (arguing that the Take Care Clause imposes a duty on the president to enforce treaty obligations). But see *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (concluding that the Clause does not impose a duty to enforce non-self-executing treaties).

165. U.S. CONST. art. II, § 2, cl. 1.

166. *Id.* cl. 2.

source of diplomacy power in Sections 2 and 3 of Article II. This conclusion follows from two observations. First, as the principal representatives of the United States to foreign governments, ambassadors are executive officers and vital channels of official communication on countless issues. Second, the president's power to nominate and appoint these officials at least arguably yields an accompanying power to recall them as well,<sup>167</sup> and in doing so to exercise effective control over their official speech. Given presidential control, the Discrete Powers Thesis might trace backward from the substantial communicative role of ambassadors to find a broad executive diplomacy power on the view that the responsibilities of the agent suggest something about the powers of the principal.

By contrast, the Vesting Clause Thesis has a simple explanation for the executive power's broad functional contours: the term "executive Power"<sup>168</sup> in Article II, Section 1 contains a full range of diplomatic functions because that was the understanding that accompanied ratification and because the Constitution does not give those functions to another branch.<sup>169</sup> Prakash and Ramsey argue that eighteenth-century political and legal theorists such as Montesquieu, Blackstone, and Vattel consistently defined "executive power" to include control of foreign relations, that the Framers were acquainted with these authorities, and that the Framers had the authorities' definition of executive power in mind when they adopted the Vesting Clause.<sup>170</sup> In support of this view, there is evidence that at least some of the prominent eighteenth-century legal theorists who influenced the Framers understood executive power specifically to include a broad diplomacy power. Blackstone, for example, asserted that the English king, as the holder of executive power, "has the sole power of sending [a]mbassadors to foreign states, and receiving [a]mbassadors at home" and is the "delegate or representative of his people" with "regard to foreign concerns."<sup>171</sup>

Both of these interpretations have implications for legislative diplomacy. First, and most obviously, each prohibits Congress and its members from making treaties, receiving ambassadors, or executing diplomatic functions implicit within the powers that Article II, Sections 2 and 3 expressly assign to the president. The Vesting Clause Thesis does not deny effect to those Sections; it simply reads them more narrowly and asserts that other diplomacy powers reside in Article II, Section 1. Slightly more controversially, it is plausible that each interpretation prohibits Congress from restricting the

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167. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1256 (1995) (citing *Myers v. United States*, 272 U.S. 52, 161–64 (1926)). But see Prakash & Ramsey, *Executive Power*, *supra* note 145, at 244 (arguing that the Appointments Clause is not the source of the power to recall ambassadors).

168. U.S. CONST. art II, § 1, cl. 1.

169. See generally Prakash & Ramsey, *Executive Power*, *supra* note 145 (making this argument); Prakash & Ramsey, *Jeffersonian Executive*, *supra* note 145 (same).

170. See generally Prakash & Ramsey, *Executive Power*, *supra* note 145, at 265–72 (arguing in favor of the Vesting Clause Thesis).

171. 1 WILLIAM BLACKSTONE, COMMENTARIES \*245.



“form and manner” of sovereign diplomacy, as various presidents have insisted.<sup>172</sup> To reach this position, one must conclude simply that the grant of a power—whether in the Vesting Clause or in the relevant clauses of Sections 2 and 3—implies at least some discretion over the particular circumstances and form of the power’s use, and that to deny discretion altogether would be to greatly diminish, if not effectively eliminate, the power itself.

Second, the Discrete Powers Thesis leaves more space for legislative diplomacy by supporting fewer executive diplomacy functions. It suggests, for example, that the president may at times be unable to send special envoys, as these officials are not subject to Senate confirmation (and are thus not covered by the appointment power)<sup>173</sup> and often discuss matters outside the scope of any Section 2 or 3 grant.<sup>174</sup> It also suggests that the president cannot serve as the intermediary for subsovereign legislative communications, given the absence of a Section 2 or 3 courier or transmittal power. The Vesting Clause Thesis, by contrast, would locate all of these functions within Article II, Section 1.<sup>175</sup>

Finally, the Discrete Powers Thesis leaves more space for legislative diplomacy by using permissive interpretive methods, the logic of which is sufficiently generic also to support the discovery of diplomacy power under Article I. If the president, for example, can derive diplomacy power from the Commander-in-Chief Clause to the extent necessary for the effective exercise of the power to be commander-in-chief, then perhaps Congress has diplomacy power to the extent required for the effective exercise of enumerated Article I powers. I will further develop this possibility in Part III. For now, it is enough to say that the variegated logic of the Discrete Powers Thesis can travel; once we use that logic to explain the topical breadth of the Article II diplomacy power, it becomes more difficult to justify not applying the same logic to Article I.<sup>176</sup>

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172. See *supra* notes 147–151 and accompanying text.

173. U.S. CONST. art. II, § 2.

174. See STUART, *supra* note 8, at 7–8 (“A report of the Senate Foreign Relations Committee in 1888 stated that some 438 persons had been appointed or recognized by the President without the advice or consent of the Senate or the express authority of Congress to conduct negotiations and conclude treaties.”); see also, e.g., Paul Richter, *Obama Picks Mideast, S. Asia Envoys*, L.A. TIMES, Jan. 23, 2009, at A3, available at <http://articles.latimes.com/2009/jan/23/world/fg-state23> (discussing President Obama’s appointment of George Mitchell as special envoy to the Middle East and Richard Holbrooke as special representative to Afghanistan and Pakistan).

175. Cf. Prakash & Ramsey, *Executive Power*, *supra* note 145 (explaining the Vesting Clause Thesis).

176. See discussion *infra* Part III. A difference in the text of the Article I and Article II Vesting Clauses might conceivably warrant different approaches to the interpretation of enumerated legislative and executive powers. Specifically, some have argued in favor of interpreting enumerated powers in Article I more narrowly than enumerated powers in Article II on the view that the Article I Vesting Clause “refers the reader to power grants contained elsewhere in the Constitution” and thus “indicates that Congress is receiving only a subset of the conceptual category of ‘legislative Powers,’” while the Article II Vesting Clause grants the president “the full scope of the conceptual categor[y] of executive . . . power.” Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 388 (2008). On this

## 2. Capacity

Another dimension of executive power concerns the capacity in which the Constitution authorizes the president to communicate. Regardless of which interpretive thesis one prefers, Article II authorizes executive communication only on behalf of the United States.<sup>177</sup> If one relies on the Discrete Powers Thesis, then this conclusion follows from the observation that making treaties, receiving ambassadors, acting as commander-in-chief of the armed forces, faithfully executing the laws, and appointing ambassadors are all official actions that the president carries out only on behalf of the country as a whole. Making a treaty, for example, is making an agreement that imposes international obligations on the United States rather than on the executive officials who negotiated it.<sup>178</sup> Likewise, sending and receiving ambassadors are actions carried out to facilitate official communication by the United States with foreign governments. If, on the other hand, one finds diplomacy power in Article II, Section 1 in accordance with the Vesting Clause Thesis, then the conclusion follows to the extent that the prevailing understanding of executive power at the time of the Founding assumed official communication on behalf of a nation.<sup>179</sup> Framing these observations in the negative, there is no textual basis for concluding that Article II gives the president the power to speak for Congress.

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view, comparatively strict interpretations of enumerated powers in Article I are necessary to honor the Article I Vesting Clause's rule that Congress possesses only those powers "[t]herein granted." U.S. CONST. art. I, § 1. By contrast, strict interpretations of enumerated powers in Article II are unnecessary to honor the Article II Vesting Clause if that Clause establishes that the president possesses even those executive powers that do not fall within the ambit of any enumerated power. This line of reasoning, however, presupposes that the Article I and Article II Vesting Clauses are in fact different. Because the Discrete Powers Thesis rejects that premise in holding that the Article II Vesting Clause is not an independent source of executive power, there is no reason for a proponent of this thesis to approach the interpretation of enumerated powers differently depending on their location in Article I or II.

177. See *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("In th[e] vast external realm [of foreign affairs] . . . the President alone has the power to speak or listen as a representative of the nation."). It is not possible to disentangle this dimension completely from functional breadth; certain functions seem to follow from the president's capacity to speak on behalf of the United States, even in the absence of other support in the text of Article II. See, e.g., Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 951–62 (2011) (arguing that the president's power to conduct sovereign diplomacy implies executive authority to make decisions about whether foreign heads of state are entitled to immunity from suit).

178. Cf. Vienna Convention on the Law of Treaties, *supra* note 157, art. 2.1(a), at 333 ("Treaty' means an international agreement concluded between States in written form and governed by international law . . ."); *id.* art. 26, at 339 ("Every treaty in force is binding upon the parties to it and must be performed . . . in good faith.").

179. 1 BLACKSTONE, *supra* note 171, at \*245.

### 3. Exclusivity

The final dimension of the diplomacy power concerns the exclusivity of its residence in the executive branch. Because diplomatic functions are exclusive only to the extent allocated in Article II, the analysis here is derivative of the above conclusions on functional breadth and capacity. In short, the president possesses an exclusive power to execute various diplomatic functions on behalf of the United States, but nothing more. As explained in Part III below, Article I of the Constitution confirms the incompleteness of Article II power, and thus the absence of executive exclusivity in foreign relations, by allocating certain diplomacy powers to Congress.

#### B. *Original Meaning*

Historical sources are consistent with the view that executive power is functionally broad and suggest that the Framers understood the president as holding exclusive power to engage in sovereign diplomacy.<sup>180</sup> These relatively unremarkable observations, however, leave unresolved whether the original

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180. To the extent that they discussed the issue, delegates to the Constitutional Convention described the future Department of Foreign Affairs as an executive department that would operate under presidential control. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 111 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS] (Mason); *id.* at 292 (Hamilton Plan); 2 *id.* at 53–54 (Madison); *id.* at 135–36 (Pinckney); *id.* at 329 (Ellsworth); *id.* at 335–36, 343 (Morris); *id.* at 367 (Rutledge, on behalf of the Committee of Detail); 3 *id.* at 111, 606 (Pinckney). The most detailed proposal, submitted by Gouverneur Morris to the Committee of Detail on August 20, called for a “Council of State” to “assist the President in conducting public affairs.” 2 *id.* at 335. This council was to include a Secretary of Foreign Affairs, who would be appointed by the president and charged with a duty “to correspond with all foreign Ministers, prepare plans of Treaties, and consider such as may be transmitted from abroad—and generally to attend to the Interests of the United States, in their connections with foreign Powers.” *Id.* at 335–36. Drafts of the Constitution eventually abandoned any reference to the secretary of foreign affairs and his duties. *Id.* at 367, 499, 542–43, 599. No one, however, voiced doubt that the department would be part of the new government and executive in character. Nor did anyone dispute the understanding, reflected in Morris’s original draft, that the secretary of foreign affairs would be responsible for handling official diplomatic correspondence with foreign governments. If that responsibility suggested anything about the president in whose cabinet the secretary was to serve, then it is hard to avoid the conclusion that the delegates understood the president to hold ultimate authority over the execution of official diplomatic communications between the United States and foreign governments. Cf. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 33 (1976) (“[Morris’s motion] would have had the Convention recognize as executive functions the day-to-day management of . . . foreign . . . affairs.”). Statements from the ratification debates also suggest an understanding that the president holds the exclusive power to engage in sovereign diplomacy. See, e.g., THE FEDERALIST NO. 72, at 403–04 (Alexander Hamilton) (Clinton Rossiter ed. with Charles R. Kesler introduction and notes, 1999) (explaining that the “actual conduct of foreign negotiations” is executive in nature, and that those “to whose immediate management these . . . matters are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account . . . ought to derive their offices from his appointment”); *id.* No. 84, at 487 (Alexander Hamilton) (explaining that the “management of foreign negotiations will naturally devolve” on the president); 3 FARRAND’S RECORDS, *supra*, at 162 (“The senate can make no treaties; they can approve of none unless the President of the United States lay it before them.”).

meaning of Article II is at odds with international communications by Congress. The following discussion answers this question based on an analysis of preconstitutional practice, records from the Constitutional Convention and ratification debates, and official practice during the Washington Administration. These sources generally suggest that the Framers understood Article II to allow subsovereign diplomacy by Congress and its members.

### 1. Concerns About Institutional Capacity

Practical considerations animated the Framers' approach to allocating diplomacy power. Records from the Constitutional Convention and state ratification debates document that the Framers generally opposed the idea of granting sovereign communicative powers to Congress on the view that Congress's institutional features would render it incapable of conducting foreign relations. This view rested heavily on the states' experience under the Articles of Confederation, which had assigned legislative and executive functions—including the conduct of diplomacy—to Congress.<sup>181</sup> Originally, the Congress of the Confederation appointed diplomats and chose the locations and durations of their service.<sup>182</sup> It received ambassadors from overseas.<sup>183</sup> It

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181. ARTICLES OF CONFEDERATION OF 1781, art. IX. Congress created a Department of Foreign Affairs shortly after the adoption of the Articles of Confederation, but the department was a mere agent of Congress, with powers more clerical than substantive. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 42–44 (Gaillard Hunt ed., 1912) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS]. The Secretary of Foreign Affairs held duties to keep records; transmit and, if necessary, translate communications between Congress and foreign governments; and gather information about overseas conditions from American diplomats. 28 *id.* at 56 (John C. Fitzpatrick ed., 1933); 22 *id.* at 87–92 (Gaillard Hunt ed., 1914); 19 *id.* at 42–44 (1912).

182. See, e.g., Letter from John Jay to Thomas Jefferson (July 24, 1787), in 3 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA, FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 234, 234–35 (1833) [hereinafter DIPLOMATIC CORRESPONDENCE] (discussing a congressional resolution confirming the appointment of Don Francisco Chiappe as the American agent in Morocco); 31 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 181, at 692 (John C. Fitzpatrick ed., 1934) (recording a motion to vacate the “commission and instructions issued to Mr. John Lamb[ ] for the purpose of negotiating with the Barbary powers”).

183. See, e.g., Letter from James Monroe to James Madison (July 12, 1785), in 22 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 502, 504 (Paul H. Smith ed., 1995) [hereinafter LETTERS OF DELEGATES TO CONGRESS] (discussing Congress's reception of Don Diego de Gardoqui from Spain); Extract from the Secret Journal of Foreign Affairs (Oct. 25, 1783), in 6 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 420, 420–21, 714 (documenting passage of a resolution that P.J. Van Berckel “be received as Minister Plenipotentiary from their High Mightiness the States General of the United Netherlands, and that agreeably to his request he be admitted to a public audience in Congress”).

instructed diplomats on the actions and policies they were to pursue,<sup>184</sup> dispatched official correspondence to foreign ministers and sovereigns,<sup>185</sup> and received correspondence from the same.<sup>186</sup> Individual delegates to Congress also communicated with foreign officials.<sup>187</sup>

Simply put, this arrangement proved unworkable. For one, it caused significant delays. Internal political divisions, quorum rules, lengthy recesses, and delegates' preoccupations with other responsibilities frequently slowed or prevented altogether the transmission of time-sensitive diplomatic instructions and responses.<sup>188</sup> Delays in turn complicated foreign relations.<sup>189</sup> Another issue was Congress's inability to maintain secrecy. Legislative control often necessitated the exposure of sensitive information to the delegates, but with roughly fifty delegates<sup>190</sup> and their accompanying differences of

184. See, e.g., 30 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 181, at 323 (John C. Fitzpatrick ed., 1934) (seeking instructions on how to proceed on negotiations with Spain); 22 *id.* at 46–54 (Gaillard Hunt ed., 1914) (instructing American diplomats to pursue a consular convention with France); Letter from John Jay to John Adams (May 1, 1786), in 4 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 431, 431–32 (informing Adams of congressional instructions on negotiations with Great Britain); Letter from Richard Henry Lee to Benjamin Franklin, Minister Plenipotentiary of the United States (Dec. 11, 1784), in 1 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 127, 127–28.

185. See, e.g., Letter from Elias Boudinot, President of Congress, to the Honorable the Burgomasters and Senate of the Imperial Free City, Hamburg (Nov. 1, 1783), in 1 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 67, 67–69; Letter from Elias Boudinot, President of Congress, to His Excellency P.J. Van Berckel (Oct. 24, 1783), in 6 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 419, 419; Letter from the Congress of the United States to Louis Sixteenth, King of France and Navarre (Dec. 11, 1784), in 1 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 132, 132.

186. See, e.g., Letter from the City of Hamburg to Congress (Mar. 29, 1783), in 1 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 62, 62–64; Letter from the Emperor of Morocco to the President of Congress (June 28, 1786), in 5 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 175, 175–76; Letter from the King of France to the Congress of the United States (Sept. 30, 1787), in 1 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 343, 343–44; Letter from the King of Spain to Congress (Sept. 27, 1784), in 6 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 66, 66–68.

187. See, e.g., Letter from Virginia Delegates to Bernardo de Gálvez (May 4, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, *supra* note 183, at 226, 226 (1993); see also JACK RAKOVE, REVOLUTIONARIES 260–61 (2010) (explaining that the French diplomat Conrad Gérard “was an active force in congressional politics, wining and dining delegates and courting their support” and that he “regularly received delegates wishing to ‘speak confidentially about present affairs’”).

188. See, e.g., Letter from John Jay to Thomas Jefferson (Apr. 25, 1787), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 224, 224; Letter from John Jay to Thomas Jefferson (Dec. 7, 1785), in 2 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 385, 385.

189. See, e.g., Letter from Monsieur Otto to John Jay (June 27, 1786), in 1 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 328, 328–29 (complaining about delays on behalf of the French Government).

190. See, e.g., ARTICLES OF CONFEDERATION OF 1787 (showing signatures of forty-eight delegates); List of Delegates to Congress, 26 LETTERS OF DELEGATES TO CONGRESS, *supra* note 183, at v–xlvii (Ronald M. Gephart & Paul H. Smith eds., 2000) (listing 435 delegates elected to Congress between 1774 and 1789).

opinion, leaks were a problem.<sup>191</sup> In April 1787, just a few weeks before the Constitutional Convention, John Jay lamented to Thomas Jefferson that Congress's lack of secrecy imposed "a great restraint" on the efforts of American diplomats to collect intelligence abroad.<sup>192</sup>

Those who drafted the Constitution and debated its ratification appear to have been aware of these difficulties. As early as 1776, Benjamin Franklin had expressed a belief that large legislative bodies were unable to maintain secrecy.<sup>193</sup> The Congress of the Confederation created the Department of Foreign Affairs in 1781 for the purpose of providing a "remedy against the fluctuation, the delay and indecision" that afflicted American foreign relations under the Second Continental Congress.<sup>194</sup> And over two-thirds of those who attended the Constitutional Convention had been either diplomats overseas or delegates to the Congress or one of its predecessors.<sup>195</sup> In those roles, they witnessed firsthand the complications of legislative management.

Evidence from the Constitutional Convention suggests, moreover, that the experience under the Articles influenced the Constitution's drafting. Notably, no delegate argued that Congress as a whole, or the House in particular, should be responsible for communicating with foreign governments, even though congressional control had been the longstanding arrangement up to that point. The delegates overwhelmingly opposed House involvement even in ratifying treaties on the view that its members would, like delegates

191. Report of Thomas Story to the Committee of Secret Correspondence and the Committee's Memorandum upon It (Oct. 1, 1776) [hereinafter Report of Thomas Story], in 22 THE PAPERS OF BENJAMIN FRANKLIN 636 (1982), available at <http://www.franklinpapers.org/franklin/framedVolumes.jsp> ("We find by Fatal Experience the Congress Consists of too many Members to keep Secrets . . .").

192. Letter from John Jay to Thomas Jefferson (Apr. 25, 1787), in 3 DIPLOMATIC CORRESPONDENCE, *supra* note 182, at 224, 224; see also Letter from Jonathan Arnold to William Greene (Jan. 8, 1783), in 19 LETTERS OF DELEGATES TO CONGRESS, *supra* note 183, at 559, 560–62 (Paul H. Smith ed., 1992) (disclosing Congress's discussions about secret diplomatic communications from Europe); Letter from James Madison to Edmund Randolph (Oct. 8, 1782), in 19 LETTERS OF DELEGATES TO CONGRESS, *supra* note 183, at 238, 239 (complaining about some delegates' failure to adhere to vows of secrecy).

193. Franklin cited the Continental Congress's inability to maintain secrecy as the basis for declining to inform the Congress of an offer of financial support from France during the Revolutionary War. Report of Thomas Story, *supra* note 191.

194. 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 181, at 42–44 (Gaillard Hunt ed., 1912).

195. Franklin was the only delegate at the Convention with diplomatic experience, having served as a colonial agent in London prior to the Revolutionary War and as a diplomat in France from 1776 to 1785. Jonathan R. Dull, *Franklin the Diplomat: The French Mission*, 72 TRANSACTIONS AM. PHIL. SOC'Y, no. 1, 1982, at 1 (describing Franklin's diplomatic work in England and France). Forty delegates, however, had served in one of the Continental Congresses or the Congress of the Confederation; only fifteen delegates had no such experience. *Compare America's Founding Fathers: Delegates to the Constitutional Convention*, NAT'L ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers.html) (last visited Aug. 28, 2013), with List of Delegates to Congress, *supra* note 190 (listing delegates to the Continental Congresses and the Congress of the Confederation).

to the Congress of the Confederation, have a hard time maintaining secrecy.<sup>196</sup> The story is more complicated for the Senate but is ultimately consistent: For much of the Convention, a number of delegates advocated that the Senate hold primary authority to conduct foreign relations.<sup>197</sup> In the end, however, the drafters shifted to the executive the clauses on which the Senate's diplomacy power would have relied,<sup>198</sup> and after that shift, no one suggested that the Senate would retain any sovereign communicative powers.

Evidence from the ratification debates is similar. In *The Federalist*, for example, Alexander Hamilton expanded the practical critique of legislative control: entrusting the Senate with treaty negotiations "would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations," for "the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy."<sup>199</sup> House participation would also have been problematic:

The fluctuating and, taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous.<sup>200</sup>

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196. Toward the end of the Convention on September 7, Roger Sherman objected to a motion from James Wilson to subject the president's treaty-making power to the advice and consent of both chambers on the view that "the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature." 2 FARRAND'S RECORDS, *supra* note 180, at 538. Apparently persuaded, delegates voted against Wilson's motion by a margin of ten to one. *Id.*

197. The draft produced by the Committee of Detail on August 6, for example, allotted to the president the power to "receive Ambassadors" and "be commander in chief" but otherwise gave to Congress the major diplomacy powers of making treaties and appointing ambassadors. *Id.* at 183, 185. A draft of the Pinckney Plan gave the Senate "sole & exclusive power to declare War & to make treaties & to appoint Ambassadors & other Ministers to Foreign nations." 3 *id.* at 599. Delegates also made statements suggesting a dominant Senate role. *See, e.g.*, 1 *id.* at 426 (statement by James Wilson, explaining that the Senate would "probably be the depository of the powers" relating to treaties); 2 *id.* at 235 (statement by Charles Pinckney, arguing that a longer prerequisite term of citizenship is necessary for senators because the "Senate is to have the power of making treaties & managing our foreign affairs").

198. 2 *id.* at 392–94, 495.

199. THE FEDERALIST, *supra* note 180, No. 75, at 419–20 (Alexander Hamilton).

200. *Id.* at 451; *see also The Debates in the Convention of the State of New York, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 205, 302 (Phila., J.B. Lippincott Co. photo. reprint 1937) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] ("That branch of administration, especially, which involves our political relation with foreign states, a community will ever be incompetent to." (Alexander Hamilton)).

Statements suggesting Senate involvement in international negotiations were not entirely absent,<sup>201</sup> but a clear majority of those with recorded statements on the issue shared Hamilton's views.<sup>202</sup>

This evidence aligns with the text of Article II insofar as it illuminates the rationale for allocating sovereign diplomacy power to the president. But the harder question is whether the evidence also demonstrates an original understanding against subsovereign diplomacy by Congress. Because no one directly addressed the issue at the Constitutional Convention or ratification debates, only inferences are possible, and the strength of the inference against legislative diplomacy will depend on the extent to which subsovereign communications by Congress give rise to the practical problems the Framers sought to avoid. If the communications are generally unproblematic, then there is less reason to believe that they would have troubled the Framers, and the originalist argument for prohibiting such communications becomes weaker.

Consider, then, the original practical concerns. The concern about speed and secrecy was that the size of a deliberative body corresponds negatively with its ability to decide quickly on proposed courses of action and to maintain the secrecy of sensitive information—more participants would cause more delays and increase the risk of leaks.<sup>203</sup> On the issue of respect, the concern was that a diplomatic agent of Congress would fail to garner the

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201. *The Debates in the Convention of the State of New York*, *supra* note 200, at 291 (“It is not contended that six years are too long a time for the senators to remain in office. Indeed, this cannot be objected to, when the purposes for which this body is instituted are considered. They are to form treaties with foreign nations. This requires a comprehensive knowledge of foreign politics, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate with, together with such an intimate conception of our best interests, relative to foreign powers, as can only be derived from much experience in this business.” (Robert R. Livingston)).

202. See *The Debates in the Convention of the State of Pennsylvania*, in 2 ELLIOT'S DEBATES, *supra* note 200, at 415, 506 (statement by James Wilson, arguing that the secrecy that may be necessary for treaty negotiations weighs “against committing the knowledge of these transactions to too many persons” and that the length of treaty negotiations may require that they occur when the legislature is not in session); *The Debates in the Convention of the Commonwealth of Virginia*, in 3 ELLIOT'S DEBATES, *supra* note 200, at 1, 509 (“The [House of Representatives is] excluded from interposing in making treaties, because large popular assemblies are very improper to transact such business, from the impossibility of their acting with sufficient secrecy, despatch, and decision, which can only be found in small bodies, and because such numerous bodies are ever subject to factions and party animosities.” (Francis Corbin)); 3 FARRAND'S RECORDS, *supra* note 180, at 251 (“Some members [of the Constitutional Convention] were for vesting the power for making treaties in the legislature; but the secrecy and despatch which are so frequently necessary in negotiations evinced the impropriety of vesting it there.” (Charles Pinckney)); *id.* at 348 (“The power of making treaties has, in all countries and governments, been placed in the executive departments. This has not only been grounded on the necessity and reason arising from that degree of secrecy, design, and despatch, which is always necessary in negotiations between nations, but to prevent their being impeded, or carried into effect, by the violence, animosity, and heat of parties, which too often infect numerous bodies.” (William Davie)).

203. See *supra* notes 193–194.



esteem of foreign counterparts because he would lack the stature of a head of state, such as a king or president, and that the agent might, therefore, be less effective in promoting U.S. interests abroad.<sup>204</sup> The interest-based concerns, in turn, reflected an understanding of the unique incentives the Constitution would impose on federal legislators. In establishing district- and state-based elections, Article I would give members of the House and Senate incentives to pursue the parochial interests of their constituents rather than those of the country as a whole and thus create a risk of conflicting communications among members whose constituents had divergent positions on foreign affairs.<sup>205</sup> And for members of the House, constitutionally mandated term limits would provide a strong incentive to seek short-term results even when long-term solutions might be preferable.<sup>206</sup> Those limits would also make it difficult to acquire an adequate knowledge of foreign affairs.<sup>207</sup>

Both the risk and magnitude of these problems are diminished, however, if Congress or its members conduct diplomacy only on their own behalf. Delays in legislative communications are far less problematic if the president alone negotiates treaties and otherwise transacts with foreign governments, leaving to Congress the business of communication for the purpose of investigating or lobbying, as documented in the contemporary evidence.<sup>208</sup> The same is true of leaks: because subsovereign communications are nontransactional and often concern issues that do not rise to the level of national importance, the harm of disclosing transmitted information will tend to be more limited. Further, lack of respect among foreign governments for agents of Congress is not a problem as long as the Constitution gives sovereign diplomacy power to a singular head of state, who can use the stature of his office effectively to pursue U.S. interests abroad. Similarly, parochial and short-term interests are less problematic if legislators cannot act on them in treaty negotiations or other international transactions.

In short, legislative diplomacy generally should not generate the practical problems that concerned the Framers as long as the executive alone holds the power to speak for the nation as a whole. This is not to say that subsovereign diplomacy will be entirely unproblematic. Delays, leaks, special interests, and lack of expertise might complicate congressional relations with foreign governments in a way that adversely affects national interests. But those problems are less significant if Congress does not exercise exclusive or primary power in this domain. The upshot is that the pragmatic concerns documented in the historical sources do not necessarily warrant the conclusion that the Framers would have opposed subsovereign congressional communication with foreign governments; if the Framers simultaneously accepted that practice and rejected sovereign diplomacy by Congress, they would not have acted unreasonably.

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204. See *supra* note 199.

205. See *supra* note 200.

206. See *supra* note 202.

207. See *supra* text accompanying note 200.

208. See *supra* Section I.A.1.

## 2. Practice of Members of Congress

Early practice confirms an original understanding that Article II does not preclude individual legislators from communicating with foreign governments. Direct communication in fact occurred throughout the Washington Administration. On some occasions, members of the first Congress corresponded about entirely private matters.<sup>209</sup> On others, they attended dinners and extravagant balls held by the French, Spanish, and Dutch ministers to the United States.<sup>210</sup> And on invitation, resident foreign ministers attended sessions of Congress to observe the debates.<sup>211</sup> Inevitably, some of these contacts generated discussions about official business. For example, in 1789, at least six different members of the first Congress conversed about legislation and foreign policy with George Beckwith, a senior intelligence officer in the English army and unofficial diplomat to the United States.<sup>212</sup> In one letter to Don Diego de Gardoqui, the former Spanish charge d'affaires

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209. See, e.g., Letter from George Beckwith to William Samuel Johnson (Oct. 1, 1790), in 20 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 2531 (Charlene Bangs Bickford et al. eds., 2012) [hereinafter DOCUMENTARY HISTORY] (acknowledging a gift of cheese from Senator Johnson's wife); Letter from Pierce Butler to Don Diego de Gardoqui (Feb. 17, 1791), in THE LETTERS OF PIERCE BUTLER, 1790–1794, at 101, 101 (Terry W. Lipscomb ed., 2007) [hereinafter LETTERS OF PIERCE BUTLER] (discussing Senator Butler's title to an island in East Florida); Letter from Pierce Butler to Don Diego de Gardoqui (Sept. 30, 1791), in LETTERS OF PIERCE BUTLER, *supra*, at 132, 132–33 (same).

210. See, e.g., Letter from Elias Boudinot to Hannah Boudinot (May 15, 1789), in 15 DOCUMENTARY HISTORY, *supra* note 209, at 557–58 (explaining that the Count de Moustiers, French minister to the United States, had held a ball featuring dancing “in a very curious Manner” and “Shelves filled with Cakes, Oranges, Apples, Wines of All Sorts [and] Ice Creams”); Letter from Alexander White to Mary Wood (May 20, 1789), in 15 DOCUMENTARY HISTORY, *supra* note 209, at 601–02 (stating that White was also in attendance); Letter from Henry Wynkoop to Reading Beatty (May 15, 1789), in 15 DOCUMENTARY HISTORY, *supra* note 209, at 560–61 (stating that Wynkoop was also in attendance); Letter from John Temple to Marquis de Carmarthen (May 17, 1789), in 15 DOCUMENTARY HISTORY, *supra* note 209, at 584 (stating that the French and Spanish Ministers entertained members of Congress); Dinner List (June 30, 1790), in 19 DOCUMENTARY HISTORY, *supra* note 209, at 1978 (listing Dutch minister Franco Van Berckel; French minister Louis Guillaume Otto; Spanish Charge d’Affaires Jose Ignacio Viar; and Congressmen Ralph Izard, Pierce Butler, and William L. Smith as dinner guests).

211. Letter from Louis Guillaume Otto to Comte de Montmorin (Feb. 25, 1790), in 18 DOCUMENTARY HISTORY, *supra* note 209, at 629–32.

212. See Conversation Between George Beckwith and Senator William S. Johnson (undated 1789), in 17 DOCUMENTARY HISTORY, *supra* note 209, at 1723–25; Conversation Between George Beckwith and Senator Philip Schuyler (undated 1789), in 17 DOCUMENTARY HISTORY, *supra* note 209, at 1725–26; Conversations Between George Beckwith and Other Persons (undated April 1790), in 19 DOCUMENTARY HISTORY, *supra* note 209, at 1380–88 (conversations with Senator William S. Johnson, Senator William Paterson, and Rep. Thomas Scott); Conversations Between George Beckwith and Different Persons (undated Aug. 1790), in 20 DOCUMENTARY HISTORY, *supra* note 209, at 2469–72 (conversations with Rep. Fisher Ames, Senator Richard Henry Lee, and Rep. Thomas Scott). For a discussion of Beckwith's role and contacts with legislators, see Frank T. Reuter, “Petty Spy” or Effective Diplomat: The Role of George Beckwith, 10 J. EARLY REPUBLIC 471, 481–86 (1990).

and soon-to-be finance minister, Senator Pierce Butler encouraged the Spanish government to send a permanent diplomatic representative to the United States.<sup>213</sup> In a letter to Antoine de la Forest, the acting head of the French legation in the United States, Senator Butler recommended that the French government purchase naval supplies from an American businessman named George Hooper.<sup>214</sup> In 1795 and 1796, Pierre-Auguste Adet, the French ambassador to the United States at the time, worked extensively with Republicans in Congress to secure American support for France and to prevent the United States from adopting Jay's Treaty.<sup>215</sup> Other French officials did the same.<sup>216</sup> Moreover, I came across no evidence that the Washington Administration objected to these practices or that members of the House and Senate understood the contacts as a violation of the separation of powers. Members of other early Congresses continued the practice.<sup>217</sup>

The only potentially contrary evidence concerns the Logan Act, which, as explained above, Congress passed in 1799 to provide for criminal penalties against "any" U.S. citizen who, without the permission or authority of the federal government, carries on "any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof" with the intent to affect U.S. foreign relations.<sup>218</sup> The purpose of the Act was to prevent the "usurpation of executive authority."<sup>219</sup> Moreover, the drafters intended for the Act to apply to legislators as well as private citizens: the reference to "any" U.S. citizen plainly encompasses members of the House and Senate, and during the debates on enactment, legislators who addressed the issue uniformly suggested that the Act's prohibition could apply to them.<sup>220</sup> Combining these observations, one might conclude that a majority

213. Letter from Pierce Butler to Don Diego de Gardoqui (Feb. 17, 1791), in *THE LETTERS OF PIERCE BUTLER*, *supra* note 209, at 101.

214. Letter from Pierce Butler to Antoine de la Forest (Mar. 26, 1790), in *THE LETTERS OF PIERCE BUTLER, 1790–1794*, *supra* note 209, at 20.

215. Michael F. Conlin, *The American Mission of Citizen Pierre-Auguste Adet: Revolutionary Chemistry and Diplomacy in the Early Republic*, 124 *PA. MAG. HIST. & BIOGRAPHY* 489, 492–95, 507 (2000).

216. 2 *CORRESPONDENCE OF THE FRENCH MINISTERS TO THE UNITED STATES, 1791–1797*, at 894–96, 1001–02, 1080 (Frederick Jackson Turner ed., 1904) (describing contacts between French officials and members of Congress in 1796 and 1797).

217. See, e.g., *DOCUMENTS RELATING TO NEW-ENGLAND FEDERALISM, 1800–1815*, at 366–73, 387 (Henry Adams ed., Bos., Little, Brown, & Co. 1877) (compiling correspondence from the early 1800s between Senator Timothy Pickering and G.H. Rose, a British envoy in Washington, regarding official business); ROGER H. BROWN, *THE REPUBLIC IN PERIL: 1812*, at 96 (1971) (explaining that shortly before the War of 1812, certain Federalist legislators communicated secretly with British officials to encourage Britain to maintain the Orders in Council).

218. Logan Act, ch. 1, 1 Stat. 613 (1799) (codified as amended at 18 U.S.C. § 953 (2012)).

219. 9 *ANNALS OF CONG.* 2488–89 (1798); see also Logan Act, ch. 1, 1 Stat. at 613.

220. See 9 *ANNALS OF CONG.* 2495 (1798) (statement by Rep. Nicholas); *id.* at 2498, 2639 (statements by Rep. Gallatin); *id.* at 2618 (statement by Rep. Harper); *id.* at 2677 (statement by Rep. Parker).

of the law's supporters viewed even individual legislative communications as usurping Article II power.

This argument has a few significant weaknesses, however. First, it is problematic to rely on the actions of the fifth Congress as evidence of original meaning. It convened in 1797—over a decade after the Constitution's ratification;<sup>221</sup> it featured highly partisan debates between Federalists and Anti-Federalists and passed the controversial Alien and Sedition Acts;<sup>222</sup> and those who participated in drafting and ratifying the Constitution were by that time only a small minority of the membership.<sup>223</sup> Second, the Logan Act's legislative history suggests that the drafters were primarily concerned about the prospect of individuals attempting to negotiate solutions to international disputes involving the United States—acts that would plainly fall within the scope of the executive power to speak on behalf of the nation. A majority of those who addressed the issue made statements to this effect.<sup>224</sup> Representative Samuel Dana, one of the legislation's supporters, explained that it was “not intended . . . to provide against all correspondence with foreign Governments, but against such only as ought to be carried on by the Executive.”<sup>225</sup> The recorded debates provide no evidence that the drafters aimed to prevent U.S. citizens, including legislators, from corresponding with foreign governments in ways that did not amount to international negotiations. Finally, the executive has never used the Logan Act to prosecute a federal legislator, despite several opportunities to do so.<sup>226</sup>

### 3. Practice of Congress

Early practice also confirms that Article II permits indirect, subsovereign communication between Congress and foreign governments. For example, in March 1792, the president provided Congress a letter in which Louis

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221. 7 ANNALS OF CONG. 10 (1797).

222. See GEOFFREY R. STONE, *PERILOUS TIMES* 29–41 (2004) (recounting congressional debates over the Acts).

223. Only seven members of the fifth Congress had been delegates to the Convention. Compare *America's Founding Fathers: Delegates to the Constitutional Convention*, NAT'L ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers.html) (last visited Aug. 28, 2013) (listing Abraham Baldwin, John Langdon, Jonathan Dayton, William Blount, Richard Dobbs Spaight, Alexander Martin, and Charles Cotesworth Pinckney as delegates), with THE UNITED STATES CONGRESSIONAL DIRECTORIES, 1789–1840, at 25–34 (Perry M. Goldman & James S. Young eds., 1973) (listing the same individuals as legislators).

224. See 9 ANNALS OF CONG. 2494 (1798) (statement by Rep. Griswold); *id.* at 2501–02 (statement by Rep. Pinckney); *id.* at 2545 (statement by Rep. Nathaniel Smith); *id.* at 2589 (statement by Rep. Josiah Parker); *id.* at 2637 (statement by Rep. Gallatin). *But see id.* at 2525–26 (statement by Rep. Otis) (“It is not merely the particular correspondence, but the illegal and dangerous tendency of any correspondence with our enemies, and the abuses to which it is liable, which requires attention.”).

225. *Id.* at 2499; *see also id.* at 2497 (statement by Rep. Gallatin); *id.* at 2605 (statement by Rep. Robert Williams).

226. See *supra* notes 112–117 and accompanying text (discussing the historical absence of Logan Act prosecutions against federal legislators).

XVI announced his acceptance of the French Constitution of 1791.<sup>227</sup> In response, the House passed, by a margin of fifty to two, a resolution requesting that the president's answer to the king include an "express[ion of] the sincere participation of the House in the interests of the French Nation, on this great and important event."<sup>228</sup> A similar resolution from the Senate requested that the president "make known to the King of the French the satisfaction with which the Senate of the United States has received the official communication of his acceptance of a constitution."<sup>229</sup> On Jefferson's approval,<sup>230</sup> President Washington's response to the king enclosed both resolutions.<sup>231</sup>

A second example is from 1794, when the vice president provided to Congress a letter in which Maximilien de Robespierre and other members of the French Committee of Public Safety reported a series of republican military victories and expressed a desire for close relations with the United States.<sup>232</sup> The Senate voted against a proposed resolution that would have requested that the president answer "on behalf of the United States, in such manner as shall manifest their sincere friendship and good will for the French Republic," but then overwhelmingly approved an amended resolution that was different in only one respect: it requested that the president communicate sentiments "on behalf of the Senate of the United States" rather than the United States itself.<sup>233</sup> The House of Representatives passed a counterpart resolution containing a similar request to communicate a message "on behalf of th[e] House."<sup>234</sup> Once again the Washington Administration cooperated: Secretary of State Edmund Randolph transmitted the resolutions to James Monroe, the U.S. minister to France at the time, who mentioned them in an address to the French National Convention and provided copies to French officials.<sup>235</sup>

A third example, from 1796, involved the most extensive recorded debate on legislative diplomacy's constitutionality, but its lessons are unclear. After receiving Monroe's address in 1794, the French issued a response and

227. No. 58: *France*, in 1 AMERICAN STATE PAPERS 133, 133 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).

228. H. JOURNAL, 2d Cong., 1st Sess. 532 (1792) (requesting that the president communicate a message to the king of France).

229. S. JOURNAL, 2d Cong., 1st Sess. 408 (1792).

230. Letter from Thomas Jefferson to George Washington (Mar. 13, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON 277 (Charles T. Cullen ed., 1990).

231. Letter from George Washington to Louis XVI (Mar. 14, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, *supra* note 230, at 281. It appears that Washington would have opposed transmittal of the resolutions if they had purported to speak on behalf of the United States. See Thomas Jefferson, *The Anas*, in 1 THE WORKS OF THOMAS JEFFERSON 163, 211–12 (Paul Leicester Ford ed., 1904) (entry of Mar. 12, 1792).

232. No. 92: *France*, in 1 AMERICAN STATE PAPERS, *supra* note 227, at 447, 447–48.

233. S. JOURNAL, 3d Cong., 1st Sess. 68 (1794).

234. H. JOURNAL, 3d Cong., 1st Sess. 132 (1794).

235. 2 THE WRITINGS OF JAMES MONROE, 1794–1796, at 13–15 (Stanislaus Murray Hamilton ed., New York, G.P. Putnam's Sons 1899).

had their ambassador make an official presentation of the French flag to Washington.<sup>236</sup> Washington, in turn, informed Congress of these events and explained that he had issued an official reply.<sup>237</sup> Some senators felt that the Senate should issue its own separate reply and proposed a resolution that the president “be requested to assure that magnanimous nation [France], through the proper organ, that the Senate unite with [the president] in all the feelings expressed to the Minister of France, on the presentation of the Colors of his Nation.”<sup>238</sup> Unlike the earlier resolutions, however, this one failed—by a margin of sixteen to eight.<sup>239</sup> Some objected that the communication was unnecessary because Washington had already answered on behalf of the nation.<sup>240</sup> In addition, Senator Oliver Ellsworth argued against the resolution because “[n]othing . . . could be found in the Constitution to authorize either branch of the Legislature to keep up any kind of correspondence with a foreign nation.”<sup>241</sup> It is unclear whether anyone other than Ellsworth voted against the resolution on this basis. It is clear, however, that a majority of those who addressed the constitutional question found the resolution to be unobjectionable and consistent with prior practice, given that it did not purport to represent the sentiments of the United States. Senators Pierce Butler, Aaron Burr, and Littleton Waller Tazewell disagreed with Ellsworth on this basis.<sup>242</sup>

Whether Article II prohibits *direct* communication by Congress is a harder question. The House and Senate relied on the Washington Administration to transmit their messages to France in both 1792 and 1794,<sup>243</sup> among other occasions.<sup>244</sup> Jefferson, moreover, clearly believed that Congress could correspond only through the executive branch.<sup>245</sup> One might reasonably view this evidence as demonstrating an executive monopoly on direct,

236. No. 108: France, in 1 AMERICAN STATE PAPERS, *supra* note 227, at 527, 527.

237. *Id.*

238. 5 ANNALS OF CONG. 28–29 (1796).

239. *Id.* at 36.

240. *Id.* at 30–31.

241. *Id.* at 32.

242. *Id.* at 32–35.

243. *Supra* notes 231, 235 and accompanying text.

244. E.g., S. JOURNAL, 1st Cong., 3d Sess. 279, 281, 295 (1791) (approving a resolution “requesting the President . . . to cause a communication to be made to the National Assembly of France, respecting the late Benjamin Franklin”).

245. See, e.g., Thomas Jefferson, Memoranda of Consultations with the President (Mar. 12, 1792), in 19 THE PAPERS OF THOMAS JEFFERSON, *supra* note 230, at 260–61 (Charles T. Cullen ed., 1990) (stating that when Congress desires to correspond with a foreign nation, it “shd. pass [its] sentiments thro’ the President” rather than engage in a “direct communication”); Letter from Thomas Jefferson to William Short (Mar. 8, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON, *supra* note 230, at 424, 425 (Julian P. Boyd ed., 1974) (“Let it be understood that Congress can only correspond through the Executive, whose organ in the case of foreign nations is the Secretary of State.”); Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 230, at 378, 378–82 (Julian P. Boyd ed., 1961) (“The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department,

institutional communication.<sup>246</sup> It is, however, by no means conclusive. First, it is not clear that early legislators shared Jefferson's view. Given the difficulty of international communication at the time, it seems just as plausible that Congress relied on the executive's established channels out of convenience and that the House and Senate resolutions requested executive assistance due to the absence of an Article II obligation to transmit rather than the presence of an Article II monopoly on direct contact. Second, as demonstrated above, individual members of Congress often discussed official business with representatives of foreign states,<sup>247</sup> and the Washington Administration appears never to have objected. That practice suggests an understanding that Article II does not establish an executive monopoly over direct communication. While it is conceivable that Article II simultaneously permits direct contacts by individual legislators and prohibits those by Congress as a whole, the rationale for that distinction is uncertain, particularly if the communications are substantively identical.

In summary, given the textual and historical evidence discussed so far, the best conclusion is that Article II definitely leaves room for individual members of Congress to conduct subsovereign diplomacy; definitely leaves room for Congress itself to conduct subsovereign diplomacy through the executive branch; and possibly leaves room for Congress to conduct subsovereign diplomacy without executive intermediation, depending on one's preferred interpretive framework and reading of the available historical evidence. Under the Discrete Powers Thesis, the absence of a courier or transmittal power in Sections 2 and 3 demonstrates that Article II leaves room for direct communications by Congress. The Vesting Clause Thesis, by contrast, is more likely to rely heavily on statements from Jefferson to contend that Section 1 gives the president all power over direct, official communication with foreign governments. Those who accept this latter reading must in turn either conclude that Congress has systematically violated the separation of powers by regularly interfacing directly with foreign officials or adopt a functionalism that justifies Congress's departure from the original meaning of Article II, Section 1 on the basis of longstanding official custom.<sup>248</sup> Given the evidence collected in Part I of this Article, the custom-based argument seems like a good one,<sup>249</sup> but it is not clear that adherents of the Vesting Clause Thesis are willing to make it, given that doing so would render practically irrelevant the evidence of original meaning on which their interpretation relies.

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*except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.”).

246. See, e.g., RAMSEY, *supra* note 2, at 75–79 (making this argument).

247. See *supra* notes 209–217 and accompanying text.

248. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

249. See *supra* Part I.

C. *Executive Delegation*

In addition to not prohibiting subsovereign communications by Congress and its members, Article II leaves room for legislative diplomacy if it empowers the president to delegate executive power to members of the House and Senate so that they can act on his behalf. Delegation could explain, for example, the practice of CODEL members purporting to speak for the United States, such as when Representative John Conyers promised the Haitian government that “the U.S. would continue to support Haiti” with foreign aid<sup>250</sup> and when then-Senator Kerry traveled to Afghanistan and Pakistan to “conduct[ ] a series of quiet missions on behalf of the president.”<sup>251</sup> If premised on delegation and delegation is permissible, these kinds of acts rely on, rather than usurp, Article II power.

Executive delegation is an underexplored topic that could easily warrant a separate article.<sup>252</sup> The canonical nondelegation doctrine focuses on inter-branch transfers of legislative power, deeming invalid any statute that fails to provide the transferee with an “intelligible principle” to guide the exercise of statutory authority.<sup>253</sup> But executive delegation raises the question of whether there is a converse limitation on executive transfers of Article II power to members of Congress. As a result, it is not clear that the standard arguments about the established doctrine carry much weight. Given the volume and complexity of those arguments, I will not attempt a definitive resolution of the converse practice here and will instead offer only three tentative observations.

First, the textual argument for executive delegation seems unimpressive. Article II does not explicitly address whether the president can delegate any of the power vested in him to others.<sup>254</sup> There is certainly no express prohibition to that effect. Nor does the mere vesting of power logically require a

250. *Haiti: CODEL Conyers Meets President, Prime Minister*, *supra* note 54.

251. Sanger, *supra* note 54. For other examples, see sources cited *supra* note 54. See also David D. Kirkpatrick, *2 Senators Visit Egypt with Threat on U.S. Aid*, N.Y. TIMES, Aug. 7, 2013, at A4, available at [http://www.nytimes.com/2013/08/07/world/middleeast/2-senators-visit-egypt-with-threat-on-us-aid.html?\\_r=0](http://www.nytimes.com/2013/08/07/world/middleeast/2-senators-visit-egypt-with-threat-on-us-aid.html?_r=0) (describing a visit to Egypt by Senators John McCain and Lindsey Graham, who, “at the request of President Obama,” threatened that the United States “would cut off aid if the new military-appointed government failed to move rapidly toward democracy”).

252. For limited academic treatment, see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351–52 (2002) (“[A]ll execution of federal law must ultimately be controlled by the President . . .”); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331, 1335 (2003) (arguing that advocates of the traditional nondelegation doctrine “ought to subscribe to a parallel Article II nondelegation doctrine, under which the President must provide an ‘intelligible principle’ sufficient to guide the legal discretion of subordinate executive officers”); and Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 WILLAMETTE L. REV. 701, 719–20 (2009) (“[T]he President lacks the power to delegate authority to some constitutionally created office.”).

253. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

254. U.S. CONST. art. II, § 1.



prohibition on transfer; it is conceivable that vesting simply sets an enumerated power's default institutional location.<sup>255</sup> In this way, Article II is functionally identical to Article I, which vests "all legislative Powers [t]herein granted" to Congress without addressing whether those powers are horizontally delegable.<sup>256</sup> But finding an affirmative basis for the delegation power is difficult. The power to delegate downward, within the executive branch, is clearly implied: Article II, Section 1 vests executive power only in the president, but Section 2 establishes "executive Departments" headed by "principal Officer[s]."<sup>257</sup> The only way to reconcile the president's monopoly with the presence of other executive officers is to conclude that the president has the ability to delegate his powers to them.<sup>258</sup> It is challenging, however, to find even an implied basis for horizontal delegations to federal legislators. The best candidates seem to be the Vesting Clause and the Take Care Clause. One could read the former as authorizing delegation if the term "executive power" somehow includes broad authority to deputize agents for the execution of other Article II powers. The latter might authorize the practice if necessary to fulfill the president's law-enforcement obligations. But nothing in Article II clearly permits delegation.

Second, although executive delegation does not draw any clear support from Supreme Court precedent, it is not irreconcilable with the Court's pronouncements on the unitary executive. Scattered dicta suggest that unity is important to preserve accountability and ensure the effective conduct of foreign relations,<sup>259</sup> but also leave open the possibility that the president can make delegations that preserve his "ultimate responsibility" and honor an "active obligation to supervise."<sup>260</sup> To the extent that the Court has invalidated the exercise of Article II power outside the executive branch, it has

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255. *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("In Article I, the Framers vested 'All legislative Powers' in the Congress, just as in Article II they vested the 'executive Power' in the President. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others." (citations omitted)).

256. U.S. CONST. art. I, § 1.

257. U.S. CONST. art. II, § 2.

258. Tuan Samahon, *The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. CHI. LEGAL F. 169, 179–81 (arguing in favor of an executive power to delegate to other executive officers). The Subdelegation Act authorizes the president "to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President . . . any function which is vested in the President by law." 3 U.S.C. § 301 (2012). The Act, however, "was intended only to authorize the delegation of functions vested in the President by statute." *Waiver of Claims for Damages Arising out of Cooperative Space Activity*, 19 Op. O.L.C. 140, 155 (1995). As a result, it does not imply the absence of an independent executive power of vertical delegation.

259. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (stating that "the structural advantages of a unitary Executive are essential" in the domains of national security and foreign relations).

260. *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in the judgment).

been where Congress attempted to transfer some portion of the power to individuals over whom the president could not exercise effective control.<sup>261</sup> Those precedents would seem to permit horizontal delegation where the president retains control over the content of the diplomatic communication.

Finally, while the textual foundation is at best uncertain, official practice strongly suggests that horizontal executive delegation is permissible. Contrary perceptions notwithstanding,<sup>262</sup> historical examples of transfers of executive power to nonexecutive federal officers are numerous, even outside the context of legislative diplomacy.<sup>263</sup> President Woodrow Wilson selected Justice Joseph Rucker Lamar to lead an American delegation tasked with negotiating an end to a diplomatic crisis with Mexico in 1914.<sup>264</sup> President Franklin D. Roosevelt appointed Justice Owen Roberts to lead a commission charged with investigating and reporting on the attack on Pearl Harbor.<sup>265</sup> And President Harry S. Truman designated Justice Robert H. Jackson as the chief prosecutor for the United States at the Nuremberg trials,<sup>266</sup> among other examples.<sup>267</sup> President George H.W. Bush opposed a statute that enlisted federal legislators in diplomacy at the Organization for Security and

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261. See *Printz v. United States*, 521 U.S. 898, 922–23 (1997) (holding that provisions of the Brady Act that transferred executive law-enforcement power to state officers “who [we]re left to implement the program without meaningful Presidential control” violated the principle of the unitary executive); *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (per curiam) (invalidating statutory provisions that gave law-execution power to the Federal Election Commission because some of the commission members were not executive officers).

262. E.g., John C. Yoo, Response Essay, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1332 (2002) (“As far as I know, there is no example where any branch has successfully delegated part of the executive power to another branch of government and, certainly, no example where such power was delegated to the judicial branch. Delegations, when they occur, run in only one direction, from Congress to either the executive branch or, in limited circumstances, to the courts.”).

263. See *supra* notes 103–110 and accompanying text (documenting the historical executive practice of using sitting members of Congress to conduct diplomacy).

264. Leonard Dinnerstein, *Joseph Rucker Lamar*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 978, 993 (Leon Friedman & Fred L. Israel eds., rev. ed. 1997); *Why Lamar and Lehmann Were Made Peace Delegates*, N.Y. TIMES, May 24, 1914, at 44.

265. Exec. Order No. 8,983, 3 C.F.R. 321 (Supp. 1941).

266. Exec. Order No. 9,547, 3 C.F.R. 64 (Supp. 1945); see also Lewis Wood, *Jackson Will Head War Crime Counsel*, N.Y. TIMES, May 3, 1945, at 9.

267. See, e.g., RECORDS OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS (THE ROBERTS COMMISSION), 1943–1946, at 1–3 (2007), available at <http://www.archives.gov/research/microfilm/m1944.pdf> (describing President Roosevelt’s creation of the Roberts Commission and Justice Owen Roberts’s position as chair); Alpheus Thomas Mason, *William Howard Taft*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT, *supra* note 264, at 1049, 1059 (“[Justice] Taft went on a confidential mission, approved by Secretary of State Hughes, to ‘see if the League of Nations could not so modify the statute establishing the Court as the United States might become a participant in respect to the Court, without assuming any of the obligations of the League.’”). For further discussion on this topic, see generally Wendy E. Ackerman, Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993 (1986) (arguing that judicial service on presidential commissions can be constitutional only if it does not impair the judiciary’s function or expand judicial power).

Cooperation in Europe, but only because mandating the legislators' inclusion in U.S. delegations interfered with the president's prerogative to choose the agents of official diplomacy, not because the involvement of legislators was unconstitutional *per se*.<sup>268</sup> Moreover, transfers of Article II power to private entities are not uncommon.<sup>269</sup> To name just one example, it is well known that the U.S. armed forces contract with private security firms to carry out certain quasi-military functions.<sup>270</sup> Any argument against executive delegation must be able to explain why these transfers are permissible while transfers to members of Congress are not. Furthermore, it is well known that the traditional nondelegation doctrine has ceased to restrain statutory grants of legislative power to the executive and judiciary.<sup>271</sup> Despite various opportunities to invalidate delegations of this variety, the Supreme Court has not employed the doctrine to strike down a single statute since 1935.<sup>272</sup> Anyone who accepts the constitutionality of even limited legislative delegation<sup>273</sup> must either take the same position on executive delegation or identify a unique basis for its prohibition. In summary, judicial precedent and official practice suggest that executive delegation is permissible as long as the president retains control over both the content of the communication and the delivery agent.

### III. LEGISLATIVE DIPLOMACY POWERS

Having analyzed the contours of executive power, we can begin to draw conclusions about a possible legislative counterpart. Article II of the Constitution prohibits legislators and Congress only from executing a variety of diplomatic functions on behalf of the United States and, if one accepts the

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268. Issues Raised by Foreign Relations Authorization Bill, *supra* note 148, at 37.

269. See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 441 (2006) (describing the privatization of military functions); see also Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. REV. 62, 67 (1990) ("Congress has, for instance, directed private individuals to exercise administrative authority by serving in and working with government agencies, authorized private groups targeted for federal regulation to participate in determining both the content and applicability of binding federal regulations, and authorized individuals, even in the absence of personal injury, to sue to enforce federal laws."); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437-41 (2003) (explaining that historical limits on delegations to private citizens are "all but dead in practice").

270. See Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2005 (Magazine), at E28, available at <http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html?pagewanted=all> (reporting on the role of private security firms in Iraq).

271. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004) ("[A]s far as the Supreme Court is concerned, the nondelegation doctrine imposes no effective constraint on congressional legislation. Indeed, the Court's most recent decision applying the doctrine reveals that some Justices have come to question the doctrine, and respected academic commentators are openly arguing that it be abandoned.").

272. See *id.* at 2105.

273. See, e.g., *id.* at 2181.

Vesting Clause Thesis, bars Congress from directly interfacing with foreign governments. It does not necessarily follow, however, that legislative diplomacy is to any degree permissible. What remains missing is a positive theory of constitutionality under Article I. In this Part, I develop two divergent approaches: One is that the diplomacy powers of Congress must have an affirmative basis in Article I in addition to honoring the limits imposed by Article II. The other is that legislative diplomacy does not need an affirmative basis in Article I and is constitutional as long as it does not violate Article II. The choice between these depends on one's view about the applicability of the doctrine of enumerated powers. Section III.A evaluates legislative diplomacy on the assumption that the doctrine applies and concludes that Article I permits Congress only to make international communications in the form of a war declaration or for the purpose of investigating extraterritorial facts. Section III.B explains why the enumerated powers doctrine may not apply. Section III.C in turn operates on the assumption that the doctrine is inapplicable and suggests that subsovereign diplomacy by Congress is constitutional regardless of communicative purpose, given substantial evidence of longstanding legislative practice and executive acquiescence.

#### A. *Theories Based on the Enumerated Powers Doctrine*

The doctrine of enumerated powers posits that the words and implications of the Constitution's written text are the exclusive foundation for federal power; to enumerate is both to create and confine the power of each branch.<sup>274</sup> Thus, claims to power not fundamentally based in the text are illegitimate. This is the basic premise of most constitutional interpretation. To the extent that the doctrine applies to legislative diplomacy, an Article I basis is required, and the range of constitutionally permissible communications is limited: Congress can declare war and investigate extraterritorial facts, but it cannot engage in noninvestigatory communications. Congress cannot, for example, conduct interparliamentary exchanges to educate and train foreign legislative bodies or lobby foreign governments to engage in conduct favorable to U.S. interests. Nor can CODEL members lobby on Congress's behalf. These conclusions follow from an analysis of the express and implied powers of Article I.

##### 1. Express Power: War Declarations

In one sense, the search for Article I power encounters a unique challenge. Unlike the Article II Vesting Clause, which might itself provide the executive with a range of otherwise unenumerated powers,<sup>275</sup> the Article I Vesting Clause suggests that Congress possesses only those powers enumerated elsewhere in Article I.<sup>276</sup> As a result, Congress as an institution cannot

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274. Lawson, *supra* note 252, at 336–37.

275. See Prakash & Ramsey, *Executive Power*, *supra* note 145 (making this argument).

276. U.S. CONST. art. I, § 1.

communicate with foreign nations unless there is an express diplomacy power or an enumerated power of another kind that implies the power to communicate with foreign governments.

Express power comes in the form of the Declare War Clause, which gives Congress control over a specific form of international communication on behalf of the United States. While scholars disagree about some aspects of the Clause,<sup>277</sup> all agree that it at least gives Congress the power to issue declarations that formally create a state of war.<sup>278</sup> These declarations are diplomatic communications in the sense that they are designed for an international audience—in particular, the state or states with which the United States will be at war. The power to declare war is thus analogous to the president’s power to “make Treaties” and “receive Ambassadors”;<sup>279</sup> the exercise of any of these powers entails communicating to a foreign government. The Declare War Clause is thus an exception to the executive’s power to communicate on behalf of the United States and supports the view that Article II diplomacy power is less than plenary. The power to declare war, however, cannot explain the breadth of the contemporary practice, and Article I is otherwise devoid of express communicative powers. Thus, if it exists, a broader power to engage in diplomacy must be implied.

## 2. Implied Power: Extraterritorial Investigations

The authority for subsovereign diplomacy comes primarily from Congress’s implied power of investigation. Although not specific to legislative diplomacy or investigations concerning foreign affairs, Supreme Court precedent establishes that Congress has broad power to investigate in furtherance of enumerated powers. In *McGrain v. Daugherty*, a widely cited case addressing the scope of the congressional subpoena power, the Court explained that “the two houses of Congress . . . possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective.”<sup>280</sup> The Court explained that these auxiliary powers include the “power of inquiry” because “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.”<sup>281</sup> In *Watkins v. United States*, the Court further explained that

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277. Compare, e.g., Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 48–50 (2007) (arguing that the Clause empowers Congress to decide whether and how the nation will wage war), with John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 171–74 (1996) (rejecting that argument).

278. Prakash, *supra* note 277, at 48–50; Yoo, *supra* note 277, at 242.

279. U.S. CONST. art. II, § 2, cl. 2; *id.* § 3.

280. 273 U.S. 135, 173 (1927).

281. *McGrain*, 273 U.S. at 174–75.

[t]he power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.<sup>282</sup>

There is no reason to limit these instructions to domestic investigations not involving foreign governments; the Court's only articulated Article I limit on the investigative power is that its use must be "related to, and in furtherance of, a legitimate task of the Congress."<sup>283</sup>

The Foreign Emoluments Clause might corroborate this reading of the Court's precedent by providing that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."<sup>284</sup> The Framers adopted this prohibition as a means of preventing corruption—"[g]ifts of the sort referred to in the clause were . . . the currency of diplomacy at the time" of the Founding and were viewed as a source of undue foreign influence.<sup>285</sup> Although some scholars debate the point, assume for a moment that the prohibition applies to members of the House and Senate, such that these individuals cannot accept foreign gifts without the consent of Congress.<sup>286</sup> In that event, the prohibition would seem to have implications for legislative diplomacy. The existence of the prohibition would show that the Framers anticipated contacts between federal legislators and foreign officials, and yet the prohibition's scope would show that the Framers cared only to prohibit a small category of those contacts—that is, those consisting of a legislator's receipt of an

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282. 354 U.S. 178, 187 (1957).

283. *Watkins*, 354 U.S. at 187; *see also* *Wilkinson v. United States*, 365 U.S. 399, 409 (1961) (addressing whether a subcommittee acted in pursuit of a "valid legislative purpose" and whether its question for a witness was "pertinent to the subject matter of the investigation"); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("The scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain*, 273 U.S. at 176–78 (evaluating "whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function"); *Kilbourn v. Thompson*, 103 U.S. 168, 194–95 (1880) (holding that the House of Representatives exceeded its power in directing one of its committees to make an investigation that "could result in no valid legislation on the subject to which the inquiry referred").

284. U.S. CONST. art. I, § 9, cl. 8.

285. Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U. L. REV. COLLOQUY 30, 33–34 (2012), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2012/9/LRColl2012n9Teachout.pdf>.

286. *Compare id.* at 47–48 (arguing that the Foreign Emoluments Clause applies to elected federal officials such as legislators), *with* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. REV. COLLOQUY 1, 11–17 (2012), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2012/7/LRColl2012n7Tillman.pdf> (arguing that the Clause does not apply to federal legislators).

unauthorized foreign gift. In theory, the Framers could have opted for this narrow prohibition on either of two rationales. One is that they understood Article II as already barring legislative communications with foreign governments by establishing an executive monopoly over diplomatic contacts, but they chose to render explicit, for the purpose of fighting corruption, only one of the implications of that monopoly. The other possibility is that the Framers understood Article II as not prohibiting all legislative diplomacy and viewed any form of that practice other than the receipt of gifts as insufficiently problematic to warrant Article I treatment. This latter option seems more plausible. It would comport with the circumscribed character of the Article II, Sections 2 and 3 powers, and it would avoid rendering the Foreign Emoluments Clause functionally superfluous as a clause that prohibits actions that Article II virtually makes impossible on its own. In short, the Clause might support legislative diplomacy as an exercise of implied investigative power by implying that contacts between legislators and foreign officials are generally permissible.

Moreover, legislative diplomacy may often be necessary to render Congress's implied investigatory powers effective. Congress's ability to develop effective legislation depends heavily on its capacity to collect information about the underlying problems that the legislation seeks to address. To craft effective legislation for funding public transportation, for example, Congress may first need to identify where improvements are needed, how much they would cost, and how long they would take to complete, among other considerations. For effective legislation on water pollution, Congress may need to understand the sources of pollution and the likely effects of various proposed remedies. Generally speaking, legislators can complete the necessary fact-finding by using investigative tools such as witness and document subpoenas, staff depositions, and committee hearings.<sup>287</sup>

The tools within this kit, however, are largely unavailable when it comes to facts whose discovery requires extraterritorial investigation. Imagine, for example, that in reliance on the Article I power to regulate foreign commerce,<sup>288</sup> certain senators begin to draft a bill that would impose economic sanctions on the government of Sudan. To design the sanctions, the senators and their staff will need access to a variety of information, possibly including who does business with Sudan, the degree of hardship that various types of sanctions might produce, how Sudan might respond, and whether allies might cooperate. The senators, however, will face unique challenges in discovering such facts: Due to sovereign equality, Congress cannot subpoena documents from Sudan or other relevant foreign sovereigns.<sup>289</sup> Due to limits

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287. See generally MORTON ROSENBERG, CONG. RESEARCH SERV., 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995), available at <http://www.fas.org/sgp/crs/misc/95-464.pdf>.

288. U.S. CONST. art. I, § 8, cl. 3.

289. See Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 209 (1944) (explaining the international legal principle of sovereign state equality, which establishes in part that "no State has jurisdiction over another State . . . without the latter's consent").

on extraterritorial jurisdiction, Congress cannot subpoena testimony from aliens who reside overseas and have no contacts with the United States.<sup>290</sup> And due to the state of U.S.–Sudan relations, the Sudanese government would likely refuse to cooperate in a formal investigation even if legal doctrines presented no hurdle.<sup>291</sup> Congress could of course pass the sanctions bill without using these sources, but doing so might require guesswork that undermines the quality of the legislation. Thus, the informed, effective use of the Article I power to regulate foreign commerce might demand additional means of investigation.

Perhaps the most important practical argument for legislative diplomacy is that it can fill that demand. By communicating with relevant foreign governments, legislators may acquire information that is otherwise unavailable but necessary to draft effective legislation. Such efforts may at times fail, but the relative informality and typically confidential nature of the communications seem to encourage cooperation in ways that formal, public investigations probably cannot. Indeed, WikiLeaks suggests that legislators are frequently successful in using their communications with foreign governments to gather information that may be useful to the legislative process.<sup>292</sup>

The example of Sudan shows how legislative diplomacy may be necessary for the effective use of the foreign commerce power, but its logic also extends to other Article I powers. Because the powers to “punish . . . Offences against the Law of Nations”<sup>293</sup> and approve executive agreements<sup>294</sup> have obvious international dimensions, Congress’s ability to exercise those powers effectively may also frequently depend on extraterritorial fact-finding. Congress may need to communicate with foreign governments to settle on an appropriate punishment for a violation of international criminal law, for example, or to determine whether to approve a proposed international agreement. Similarly, Congress may need to confer with foreign governments to determine how to exercise its appropriations power.<sup>295</sup> And there is no reason to limit the diplomacy power even to these domains—legislative diplomacy may be constitutional to the extent that its capacity to aid fact-

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290. See, e.g., *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) (“Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena. They owe no allegiance to the United States.” (quoting *United States v. Best*, 76 F. Supp. 138, 139 (D. Mass. 1948))); Gary E. Davidson, *Congressional Extraterritorial Investigative Powers: Real or Illusory?*, 8 EMORY INT’L L. REV. 99, 104–05 (1994) (discussing limits on the ability of Congress to subpoena aliens residing overseas).

291. See, e.g., Michele Keleman, *A New Obstacle to Normal Relations for Sudan, U.S.*, NPR (Aug. 23, 2011, 4:57 PM), <http://www.npr.org/2011/08/23/139882484/a-new-obstacle-to-normal-relations-for-sudan-u-s> (discussing the troubled relationship between the United States and Sudan).

292. See *supra* notes 55–59 and accompanying text.

293. U.S. CONST. art. I, § 8, cl. 10.

294. See generally Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1248–71 (2008) (describing the modern uses of congressional–executive agreements and Article II treaties).

295. U.S. CONST. art. I, § 9, cl. 7.



finding renders it necessary for the effective exercise of any Article I power. This is particularly true if one interprets Article II in accordance with the Discrete Powers Thesis, which relies on similar logic in concluding that Sections 2 and 3 establish an executive power with broad functional contours.

One might argue in response that legislative diplomacy is actually unnecessary as a fact-finding tool. The State Department and executive intelligence agencies collect far more information than CODELs ever could. Thus, rather than confer directly with foreign governments, Congress could simply rely on the executive as its source of information from abroad.<sup>296</sup> Such an arrangement would leave Congress with the power to investigate domestic facts and the president with the power to investigate those that are foreign.

There are several problems with this position, however. First, there is reason to doubt that executive agencies can always provide the information that legislators seek. By using the prestige of their position as elected federal officials, CODEL members may be able to acquire information that embassy staff cannot. It is apparently in part for this reason that inquisitive embassy officials often attend CODEL meetings with foreign leaders who are otherwise hard to reach.<sup>297</sup> Direct interaction with foreign officials and observation of foreign conditions may illuminate details that a third-party report cannot. As long as legislative diplomacy can aid fact-finding in unique ways, there is a policy argument for Congress not to rely entirely on the executive. Second, requiring dependence on the executive for information about foreign affairs could make even the drafting of foreign affairs legislation dependent on executive cooperation that may not be forthcoming.<sup>298</sup> That arrangement would interfere with the allocation of legislative power to Congress. Finally, the Supreme Court precedent discussed above does not suggest any territorial limits to Congress's investigatory powers.<sup>299</sup>

#### B. *Limits on the Enumerated Powers Doctrine*

While the implications of the enumerated powers doctrine are fairly clear, there is reason to question whether the doctrine applies at all. First, it does not apply even on its own terms to individual communications that lack an institutional signature—essentially anything said by NODEL members. Article I is generally agnostic to the conduct of individual legislators; it does not give them any government powers.<sup>300</sup> Section 1 vests “all legislative

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296. At least on occasion, Congress can reportedly “call upon the State Department to use diplomatic channels to generate information from abroad for congressional investigations.” Davidson, *supra* note 290, at 101.

297. See, e.g., *Tea with Mugabe: CODEL Payne's Marathon Meeting at State House*, WIKILEAKS (June 2, 2009), <http://wikileaks.org/cable/2009/06/09HARARE456.html>.

298. See Davidson, *supra* note 290, at 104 (citing a U.S. Senate investigator in explaining that “unwillingness on the part of the Executive to assist in obtaining information” can be a “significant impediment[ ] to congressional factfinding efforts”).

299. See *supra* notes 280–283 and accompanying text.

300. Article I does, however, implicitly ascribe certain *individual* powers to legislators. Members of Congress routinely vote, engage in floor debates, and participate in committee

Powers [t]herein granted” in “a Congress of the United States,” rather than in each individual comprising it.<sup>301</sup> As a result, no single legislator can pass legislation, impeach a federal officer, provide advice and consent to a treaty, or confirm a nominee for executive or judicial office.<sup>302</sup> And because individual legislators are in a sense powerless, Article I is generally unconcerned with imposing textual limits on their conduct.<sup>303</sup> This is why no one worries about the Article I basis for legislator op-eds and constituent services. It is also why purely individual legislative diplomacy is permissible as long as it does not violate Article II.

Of course, this point explains the basis for only some communications. As explained earlier, Congress as a body funds much of its members’ diplomacy by authorizing a permanent appropriation for official foreign travel,<sup>304</sup> and it has passed numerous statutes establishing official legislative contacts

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investigations. Congress could not function without these activities, and it is for this reason that Article I expressly protects legislators from arrest during their attendance and from “question[ing]” for “any Speech or Debate in either House.” U.S. CONST. art. I, § 6, cl. 1; *see also* Gravel v. United States, 408 U.S. 606, 618 (1972) (explaining that the “fundamental purpose” of the Speech or Debate Clause is “freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator”); *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (interpreting the Clause broadly to protect “things generally done in a session of [Congress] by one of its members in relation to the business before it,” including committee reports, resolutions, and the act of voting (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)) (internal quotation marks omitted)). Moreover, the official capacity to carry out these acts is not available generally. It does not accompany mere citizenship or other types of federal office; it is unique to the offices of senator and representative. And that capacity could not be the product of federal legislation founded on the Necessary and Proper Clause—legislators would have to possess a preexisting power to investigate, debate, and vote on legislation granting themselves the authority to engage in these acts. It follows that the power to engage in these acts comes from the Constitution itself. *Cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1756 (2002) (“The power to vote on bills is possessed by individual members of Congress, not by the Congress as such . . .”). But the only limits on the exercise of individual powers are impeachment and the desire for reelection.

301. U.S. CONST. art. I, § 1; *see also* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1308 (2003) (“[I]ndividual members of Congress do not have any ‘legislative powers’ [within the meaning of the Article I Vesting Clause]—only Congress does.”).

302. By contrast, Article III vests the full judicial power of the United States in “one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish,” thus making available Article III power to each federal court. U.S. CONST. art. III, § 1; *see also* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 359 (2006) (“Unlike any single Article III court, no one member of Congress can, acting alone, exercise the power of her department. Instead, members of Congress can exercise legislative power only when acting in concert with each other (and the President).”).

303. *But see* U.S. CONST. art. I, § 6, cl. 2 (prohibiting members of the House and Senate from holding “any Office under the United States”).

304. 22 U.S.C. § 1754(b)(1) (2006) (making foreign currency available to members of Congress for foreign travel).

with other governments.<sup>305</sup> CODEL travel happens only with the authorization of congressional leadership.<sup>306</sup> Congress has developed a practice of receiving foreign heads of state for official addresses.<sup>307</sup> And CODEL members on occasion use their meetings with foreign officials to communicate on behalf of Congress.<sup>308</sup> Many of these activities involve acts of Congress itself. Others suggest that legislative diplomacy may rely on an internal delegation of Congress's institutional powers to individual members. The doctrine of enumerated powers would still demand an Article I basis to that extent.

But there are also reasons to question whether the doctrine applies even to legislative diplomacy that is institutional in character. First, functionalist arguments that emphasize nontextual factors are common in Supreme Court precedent and other analyses on foreign affairs powers. Among the most influential of these is Justice Frankfurter's *Youngstown* concurrence, which explained that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."<sup>309</sup> Subsequent cases have also adopted this view<sup>310</sup> and thus established that customary practice can resolve textual indeterminacy. Factors such as the consistency of the practice, the number of times the executive engaged in it, the period of time over which it was repeated, the number of presidents who participated, whether Congress had notice of its occurrence, and whether Congress acquiesced will influence whether a constitutional custom has formed.<sup>311</sup> A similar analysis might be instructive here as well, not because legislative diplomacy concerns legislative acquiescence to customary executive acts but because the practice raises converse questions about whether legislative custom and executive response can expand or contract the powers of Congress. The converse analysis would simply look for evidence that legislative diplomacy is a custom and affirm its constitutionality as long as the practice is customary and not clearly contrary to other sources of meaning.<sup>312</sup>

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305. See *supra* notes 132–134.

306. See 22 U.S.C. § 1754(b)(1)(B).

307. See *Foreign Leaders and Dignitaries Who Have Addressed the U.S. Congress: Fast Facts*, *supra* note 91.

308. See *supra* notes 53–54 and accompanying text.

309. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

310. E.g., *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (quoting *Dames & Moore v. Reagan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring))).

311. See Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 129–46 (1984) (cataloguing the determinants of custom).

312. Cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 430 (2012) ("[T]he role of historical practice is likely to depend on the perceived clarity of other evidence of constitutional meaning. The more an interpreter deems nonpractice evidence like the text and original understanding to be clear . . . the

A second, independent reason to question the applicability of the doctrine of enumerated powers is the Supreme Court's famous *Curtiss-Wright* decision.<sup>313</sup> There, the Court addressed whether a joint resolution of Congress authorizing the president to decide whether to prohibit certain arms sales to Paraguay and Bolivia effected an invalid delegation of legislative power to the executive.<sup>314</sup> Upholding the delegation, the Court explained in dicta that the doctrine of enumerated powers applies only to powers that the colonies possessed on an individual basis prior to the Constitution's adoption.<sup>315</sup> Because no individual colony possessed "powers of external sovereignty," it followed that the doctrine did not apply to foreign affairs powers, which "would have vested in the federal government as necessary concomitants of nationality" even "if they had never been mentioned in the Constitution."<sup>316</sup> Foreign affairs powers thus have an extraconstitutional source—the national sovereignty of the United States as a "member of the family of nations."<sup>317</sup> *Curtiss-Wright* has plenty of critics,<sup>318</sup> but the Supreme Court arguably continues to endorse its reasoning today.<sup>319</sup> Under that reasoning, Congress might permissibly engage in subsovereign diplomacy even if there is no Article I basis for doing so, given that sovereignty empowers the United States to choose freely its mode of communication with foreign governments. If foreign affairs powers are generally extraconstitutional, then perhaps Congress, too, can claim diplomacy powers grounded in national sovereignty. In the next Section, I explain the logic of looking to custom or sovereignty to evaluate institutional diplomacy by Congress. I then argue that the practice would be constitutional under both frameworks.

### C. Beyond Enumerated Powers

If legislative diplomacy is not limited by the text of Article I, then the practice is generally constitutional. Individual communications that lack an

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more widespread and deeply entrenched the practice must be in order to change the outcome.”).

313. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

314. *Id.* at 314–15.

315. *Id.* at 315–16.

316. *Id.* at 316–18.

317. *Id.* at 318.

318. See, e.g., RAMSEY, *supra* note 2, at 17–28 (rejecting the theory of extraconstitutional foreign affairs powers as contrary to constitutional text and original meaning); HENKIN, *supra* note 1, at 19–20 (“That the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates.”). See generally Charles A. Lofgren, *United States v. Curtiss-Wright Export Corp.: An Historical Reassessment*, 83 YALE L.J. 1 (1973) (arguing that historical evidence and judicial precedent suggest the absence of an extraconstitutional source of foreign affairs powers).

319. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (explaining that the federal government's power over immigration rests in part on “its inherent power as sovereign to control and conduct relations with foreign nations” (citing *Curtiss-Wright*, 299 U.S. at 318)).

institutional signature are permissible as long as they comport with Article II. Institutional communications of an investigatory nature are permissible as an exercise of Congress's implied power to engage in extraterritorial investigations, and declarations of war are permissible under the Declare War Clause.<sup>320</sup> Any other institutional communications are in turn permissible if customary, as long as it is appropriate to treat official custom as a determinant of legislative power. Alternatively, other institutional communications may be permissible as an exercise of extraconstitutional power grounded in U.S. sovereignty, as long as there is a justification for allocating a portion of the sovereignty-based power of international diplomacy to Congress rather than the president.

Beginning with the converted Frankfurter framework, custom-based analyses of legislative power are not unprecedented. In *Field v. Clark*, for example, the Court relied heavily on longstanding legislative custom in rejecting a nondelegation challenge to a statute that authorized the president to suspend free trade in certain products in retaliation for foreign tariffs on U.S. agricultural exports.<sup>321</sup> The Court explained that "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."<sup>322</sup> More recently, in *Hamdan v. Rumsfeld*, the Court held that the system of military commissions established under President George W. Bush was invalid because it violated federal statutory provisions, the constitutionality of which relied heavily on longstanding practice.<sup>323</sup> Scholars have also employed functionalism in constructing arguments in favor of legislative power.<sup>324</sup>

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320. Rejecting the enumerated powers doctrine does not discount express or implied Article I powers; it means simply that congressional power is not limited by Article I.

321. See 143 U.S. 649, 683–91 (1892); see also *Twin City Bank v. Nebeker*, 167 U.S. 196, 202–03 (1897) (relying in part on the "practical construction" of the Origination Clause to conclude that a bill did not have to originate in the House if it generated revenue merely incidentally); *Bradley & Morrison*, *supra* note 312, at 421 ("Although historical practice is most frequently invoked in favor of executive authority, it is also sometimes treated as a source of congressional power.").

322. *Clark*, 143 U.S. at 691.

323. 548 U.S. 557, 592 & n.22 (2006); *id.* at 638 (Kennedy, J., concurring in part) ("In this case, as the Court observes, the President has acted in a field with a history of congressional participation and regulation."); see also, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322–29 (1936) (relying in part on "unbroken legislative practice" in rejecting a nondelegation challenge to a joint resolution that had granted the president authority to prohibit certain international arms sales).

324. See Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1217 (1988) ("[T]he flexibility of functionalism can favor executive power as well as legislative power . . ."). See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (arguing that historical practices should be taken into account when analyzing legislative and executive powers in the conduct of war).

Moreover, there is a good argument that the logic of functionalism applies more persuasively to analyses about the powers of Congress than those of the executive. A standard view holds that one branch's acquiescence to the official practice of the other informs constitutional meaning, either because it demonstrates an interbranch agreement about the practice's constitutionality or practical workability or because it is evidence that the acquiescing branch has waived its institutional prerogatives.<sup>325</sup> As Curtis Bradley and Trevor Morrison explained recently, that logic applies best to questions about executive acquiescence to congressional practice because the president encounters fewer structural impediments to protecting his constitutional prerogatives and has a greater political incentive to protect them.<sup>326</sup> For example, while Congress requires majorities in both houses to pass legislation, the president can often act unilaterally. And individual members of Congress have little incentive to expend resources protecting institutional powers that will not benefit them directly.<sup>327</sup> As a result, the absence of executive objection to legislative practice is generally a more reliable indication of agreement or waiver than the absence of congressional objection to executive practice. Moreover, there is analytical space for a functionalist resolution to the question about subsovereign, noninvestigatory legislative diplomacy because that practice does not clearly violate any textual commands from Articles I and II or their original meaning.<sup>328</sup>

Moving to *Curtiss-Wright*, even if one accepts the view that there are extraconstitutional foreign affairs powers, it does not necessarily follow that Congress gets to exercise them. In that decision, the Court asserted a robust vision of executive power, even quoting John Marshall's statement that the president is the "sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>329</sup> On this view, sovereignty confers extraconstitutional powers on the federal government, but most of them belong to the president. Moreover, because national sovereignty includes the power to decide the various means by which the government will interface with external actors,<sup>330</sup> the sovereignty-based powers of the president might conceivably include control over all diplomatic communications, subsovereign or otherwise. *Curtiss-Wright* may therefore require a justification for allocating extraconstitutional diplomacy power elsewhere, such as to Congress.

There is a plausible argument that legislative custom can provide the necessary justification here as well. First, while *Curtiss-Wright* supports a

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325. Bradley & Morrison, *supra* note 312, at 432–38.

326. *Id.* at 438–47.

327. *Id.* at 440–44.

328. See *supra* Part II.

329. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting John Marshall, 10 ANNALS OF CONG. 613 (1800)) (internal quotation marks omitted).

330. Cf. Ulrich K. Preuß, *Equality of States—Its Meaning in a Constitutionalized Global Order*, 9 CHI. J. INT'L L. 17, 26 (2008) ("With respect to each single state, sovereignty means independence, including autonomy or self-determination . . .").

broad vision of executive power, it does not suggest that *all* extraconstitutional powers belong to the president. Even taking as doctrine John Marshall's statement that the president is the "sole organ of the *nation* in its external relations,"<sup>331</sup> it does not follow that the decision prohibits Congress from relying on extraconstitutional power to engage in subsovereign diplomacy. Second, once one concludes that foreign affairs powers can be extraconstitutional, there is little to guide the analysis on whether any given power resides in Congress or in the president. Certainly the text ceases to be determinative. In that event, customary practice might be a necessary guide.

Assuming, therefore, that it is permissible to look to custom, either as a gloss on Article I or as an indicium of the allocation of extraconstitutional power, the strength of the argument in favor of noninvestigatory diplomacy by Congress hinges largely on the level of generality with which we frame the practice and the executive response. If we think about legislative diplomacy in general terms, treating all communications alike regardless of their content, then there are more data points from which to draw an inference of custom. The evidence discussed in Part I of this Article suggests that legislators from both chambers and various parties have frequently lobbied foreign officials since the Founding.<sup>332</sup> Moreover, as long as the evidence from 2009 is not aberrational, the executive has known of the practice and generally declined to object.<sup>333</sup> Presidents have backed all manner of legislative diplomacy—noninvestigatory acts included—by signing the legislation that has authorized it.<sup>334</sup> And the Defense and State Departments routinely facilitate the practice by providing logistical support.<sup>335</sup> Finally, the executive is plainly on notice that legislators lobby foreign governments, as embassy officials often accompany CODELs to meetings, and yet no one appears to object.<sup>336</sup> Noninvestigatory communications, therefore, have likely formed a gloss on legislative power that enables Congress to act beyond the limits suggested by a formalistic analysis of Article I text alone.

Greater scrutiny of contemporary practice, however, raises questions about the extent of the custom and executive support. For example, even if legislators have routinely lobbied foreign governments since the Founding, it is not clear that they have, in doing so, also established a more specific custom of speaking on behalf of the United States. Further historical research is needed to confirm the customary status of executive delegation. Likewise, not all acts of noninvestigatory diplomacy receive specific executive acquiescence. Sometimes the executive expressly disapproves, such as when Secretary Hillary Clinton opposed one CODEL's travel to Afghanistan after

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331. *Curtiss-Wright*, 299 U.S. at 319 (emphasis added) (quoting John Marshall, 10 ANNALS OF CONG. 613 (1800)) (internal quotation marks omitted).

332. See generally Part I (documenting the contemporary practice).

333. See *supra* notes 32–54 and accompanying text.

334. See *supra* notes 66–72 and accompanying text.

335. See *supra* notes 32–38 and accompanying text.

336. See *supra* note 38.

receiving objections from President Hamid Karzai.<sup>337</sup> In these cases, Congress's power may be no more than that granted by Article I and thus limited to investigatory communication.

#### CONCLUSION

For a long time, legislative diplomacy has been an enigma, both empirically and doctrinally. But WikiLeaks and other sources now make clear that the practice is an established means by which the United States engages with the world. This evidence raises important and previously overlooked questions about the separation of powers. I have argued that diplomacy attributable exclusively to individual members of Congress is constitutional as long as the practice honors the president's power to speak on behalf of the United States. But the analysis is more complicated where Congress itself is involved or where its members act as institutional agents. Here, one's view on constitutionality will hinge primarily on one's preexisting position regarding the role of the enumerated powers doctrine in foreign affairs. Those who adhere to the enumerated powers doctrine must conclude that Congress's diplomacy powers are limited to declaring war and communicating with foreign nations for investigative purposes, and must recognize that Congress frequently violates the separation of powers by engaging in activities such as lobbying foreign governments, holding interparliamentary exchanges, and speaking for the president. Those who reject the enumerated powers doctrine must in turn accept that legislative diplomacy is generally constitutional regardless of communicative purpose due to well-established custom.

These conclusions have a number of important implications for the theory and practice of U.S. foreign relations. Perhaps the most obvious is that expressions of the orthodox position on the separation of diplomacy powers are often imprecise and always incomplete. They are imprecise because they tend to overstate the president's power, which is exclusive only with respect to communications on behalf of the United States. And they are incomplete because they wholly neglect the power of Congress. If the orthodox model depicts the president as a monopolistic diplomat, theory and practice now support a model that is decentralized and pluralistic. By demonstrating as much, the analysis of legislative diplomacy bolsters preexisting critiques of the "one voice" metaphor in U.S. foreign relations law.<sup>338</sup>

This analysis also serves as a counterpoint to longstanding and widely held views about the balance of power between the president and Congress in foreign affairs. By all accounts, the president has steadily accrued power at the expense of Congress over the last several decades, to the point where he now dominates the field.<sup>339</sup> Explanations for this trend include Supreme

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337. See *supra* note 125.

338. See generally Sarah H. Cleveland, *Crosby and the "One Voice" Myth in U.S. Foreign Relations*, 46 *VILL. L. REV.* 975 (2001).

339. See, e.g., Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1291–317 (1988) (explaining how the president came to dominate foreign policymaking); G. Edward White, *The Transformation*



Court decisions from the 1930s and 1940s,<sup>340</sup> executive initiative, and congressional acquiescence.<sup>341</sup> Such accounts, however, have overlooked legislative diplomacy and its contribution to Congress's side of the power scale. By participating directly in foreign relations, legislators have collected information on overseas developments directly from primary sources, pressed foreign governments to act in accordance with congressional preferences, and aired views that at times contradicted executive policy. These acts have reduced congressional dependence on executive fact-finding, amplified Congress's voice, and complicated the ability of the president to control the execution of U.S. foreign relations. Although the president still dominates, legislative diplomacy suggests that the narrative of overwhelming dominance is overstated.

Further, legislative diplomacy has implications for the doctrine of dormant foreign affairs preemption. At its most robust, the doctrine holds that the Constitution's allocation of powers to the federal government implicitly bars states and localities from taking actions with adverse foreign policy implications that are more than "incidental."<sup>342</sup> But because the doctrine restricts only nonfederal actors, members of the House and Senate can easily avoid its limits even while operating as *de facto* agents for state and local interests. The WikiLeaks cables demonstrate that legislators regularly operate in this fashion.<sup>343</sup> Thus, ironically, federal legislative diplomacy complicates federal exclusivity in foreign affairs; the practice shows that the current doctrine cannot achieve its purposes even if state and local governments fully honor its terms. When faced with a choice between honoring constituent preferences or federal policy, it is questionable that members of Congress will consistently choose the latter.

The horizontal dispersion of diplomatic activity also has practical benefits and drawbacks. In general, legislative diplomacy democratizes U.S. foreign relations, and its investigatory dimension helps Congress to develop effective legislative solutions to foreign policy problems. The proliferation of voices, however, may also complicate the management of relations with foreign governments by generating confusion about lines of authority and U.S. policy and by infusing into the process parochial, local interests that may conflict with national policy.

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*of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999) ("Over the first four decades of the twentieth century, [a traditional] distribution of power was replaced with a vertical and horizontal centralization of foreign relations powers in the Federal Executive.").

340. See White, *supra* note 339, at 77–145.

341. See Koh, *supra* note 339, at 1291–317.

342. See *Zschernig v. Miller*, 389 U.S. 429, 432–33, 440–41 (1968) (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)) (internal quotation marks omitted). *But see* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20 & n.11 (2003) (suggesting a new doctrine that would establish field preemption where states are not acting within their traditional competence and conflict preemption where they are).

343. *Cf. supra* notes 34–38 (documenting CODEL communications on behalf of local constituents).

Finally, although legislative diplomacy is generally constitutional, participating members of the House and Senate must be cautious. Absent executive delegation, for example, CODEL members should honor Article II power by avoiding statements on behalf of the United States. Additionally, legislators should be aware of how their communications might undermine federal exclusivity in foreign affairs. Honoring the spirit of dormant foreign affairs preemption may require CODEL members to ensure that their communications on behalf of state or local interests do not conflict with federal policy in a way that harms U.S. interests. And legislators should be aware of how their communications might affect the president's ability to negotiate successfully with other governments. For example, all else being equal, legislative diplomacy will tend to strengthen the president's negotiating position anytime Congress communicates the same position to a foreign government by demonstrating a united front. Inversely, where Congress takes a position different than that of the president, legislative diplomacy will tend to weaken the president's hand by calling into question the justification for his position or his ability to deliver congressional cooperation. Of course, even absent legislative diplomacy, the president would typically have to negotiate in light of an anticipated congressional reaction to a proposed agreement. But the open line of communication between Congress and foreign governments makes it harder for the president to control strategic decisions about whether and when to reveal to negotiating parties information about Congress's views. CODEL members should pursue their various objectives in a way that is sensitive to these dynamics. Future analyses might explore these issues in more detail and thus facilitate a fuller understanding of legislative diplomacy's costs and benefits.