The Status of Treaties in United States Law - Reexamining the Last in Time Rule in Light of United States v. Palestine Liberation Organization

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THE STATUS OF TREATIES IN UNITED STATES LAW—
REEXAMINING THE "LAST IN TIME RULE" IN LIGHT
OF UNITED STATES v. PALESTINE
LIBERATION ORGANIZATION*

In his inaugural address, President George Bush declared that "[g]reat nations like great men must keep their word. When America says something, America means it, whether a treaty or an agreement or a vow made on marble steps." 1 Contrary to the President's statement, United States law recognizes that Congress may violate a treaty by passing a statute subsequent to the treaty, even against the will of the President. 2 The Supreme Court developed this doctrine, known as the "last in time rule," over 100 years ago. The recent attempt by Congress to close the Palestine Liberation Organization ("PLO") Observer Mission to the United Nations demonstrates the questionable viability of the last in time rule.

I. Introduction

In October 1987, Congress passed the Anti-Terrorism Act 3 ("ATA") as a rider amendment to the Foreign Relations Authorization Act of 1988-89. 4 The ATA's primary purpose was to terminate all PLO operations in the United States. 5 The ATA was passed despite opposition from both the State Department and the United Nations, both of whom opposed the bill on the grounds that it threatened the PLO Observer Mission to the United Nations. 6 The Secretary-General of the United Nations and the United States Secretary of State expressed concern that by mandating closure of the PLO Mission, the ATA jeopardized the independent functioning of the United Nations, 7 as provided in

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6. Id. at 1467.

7. Id.
the Headquarters Agreement of 1947, the international agreement which establishes the right of the United Nations to be headquartered in the United States. Despite numerous contrary statements from State Department officials, Congress insisted that the ATA would not violate the Headquarters Agreement.

In March 1988, the Justice Department attempted to enforce the ATA by ordering the PLO to close its United Nations Observer Mission. When the PLO refused this order, the Justice Department sought injunctive relief in the United States District Court for the Southern District of New York.

In *United States v. Palestine Liberation Organization (U.S. v. PLO)*, the court avoided a direct analysis of the issue of the status of treaties in United States law by falling back on a principle which is traditionally invoked to ameliorate the harshness of the last in time rule. This principle, first expounded by Chief Justice Marshall in *Murray v. The Schooner Charming Betsy*, states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." In *U.S. v. PLO*, the court determined that the ATA did not apply to the PLO Observer Mission and thus did not violate the United States' obligations under the Headquarters Agreement. Although the court did not base its decision on the last in time rule, the rule was submerged just beneath the surface of the opinion. The court was obviously reluctant to hold that Congress had overruled a treaty obligation between the United Nations and the United States. Other courts have been equally reluctant to directly invoke the last in time rule. This

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10. Id. at 1460.

11. Id. In Mendelsohn v. Meese, 695 F. Supp. 1474 (S.D.N.Y. 1988), the PLO countersued, alleging that the Justice Department's conduct violated a number of constitutional rights of its members. The PLO's constitutional claims were rejected. Id. at 1479-90.


13. 6 U.S. (2 Cranch) 64 (1804).

14. Id. at 118.


16. Id. at 1464-65. The court affirmed the last in time rule in dictum. Id.

17. Id. at 1469-71.

reluctance indicates that the last in time rule may no longer be a viable principle of United States law. At the very least, an in-depth examination of the desirability and constitutionality of the last in time rule is in order.

This Note examines the origins of the last in time rule and demonstrates that the rule is inconsistent with the principle of international cooperation, particularly as manifested by the creation of multilateral treaties, such as the United Nations Charter. This Note focuses on the recent PLO controversy as evidence that strict adherence to the last in time rule jeopardizes the viability of the United Nations. Furthermore, this Note demonstrates that the last in time rule is unsound as a matter of constitutional law. It concludes that if the power to violate treaties is vested anywhere in the United States government, it is vested in the executive branch, which alone is constitutionally authorized to control diplomatic relations.

II. ORIGIN OF THE LAST IN TIME RULE

The last in time rule was developed in the latter part of the nineteenth century out of the need to resolve conflicts between bilateral commercial treaties and federal statutes. Then, as now, nationalism, absolute sovereignty and legislative supremacy were prevailing political themes in America. The notion of greater international cooperation through multilateral treaties, however, had not yet been developed.

The last in time rule was firmly embraced by the United States Supreme Court in three cases decided during the 1880s: Edye v. Robertson (Head Money Cases), Whitney v. Robertson and Chae Chan Ping v. United States (Chinese Exclusion Case). The Court derived the rule from the supremacy clause of the United States Constitution, which states that the “Constitution, and the Laws of the United States which shall be

19. For a discussion of the origins of the last in time rule, see infra notes 24-39 and accompanying text.
20. For a discussion of the effect of the last in time rule on multilateral treaties, see infra notes 40-88 and accompanying text.
21. For a discussion of the PLO controversy, see infra notes 89-147 and accompanying text.
22. For a discussion of the constitutional implications of the last in time rule, see infra notes 148-225 and accompanying text.
23. For a discussion of the last in time rule as encroaching on executive authority, see infra notes 197-225 and accompanying text.
25. Id.
26. Id.
27. 112 U.S. 580 (1884).
29. 130 U.S. 581 (1889).
made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

The Court stated that because the supremacy clause gave federal statutes and treaties lexical equality, any conflict between a treaty and a statute should be resolved in favor of the latter enactment.

Each of these precedent cases involved disputes over bilateral commercial treaties. The Head Money Cases developed after Congress enacted legislation which, in an effort "to regulate immigration," imposed a tax of fifty cents per foreign passenger upon the owners of ships who brought passengers from a foreign port to a United States port. The plaintiffs argued that the act violated a number of bilateral treaties which had established rules of commerce between the United States and other nations. The Supreme Court upheld the act as a proper use of Congress' legislative authority and stated that nothing in the essential character of treaties gave them superior sanctity over statutes.

In Whitney, the plaintiffs were merchants who argued that a congressional act which imposed a tax on imported sugar should not supersede a prior commercial treaty between the United States and the Dominican Republic. The Court upheld the act and explicitly recognized the last in time rule by stating that its duty was "to construe and give effect to the latest expression of the sovereign will." In the Chinese Exclusion Case, the Court upheld a statute which regulated the immigration of Chinese laborers and abrogated immigration provisions of previous treaties between the United States and China. The Court reaffirmed the last

30. U.S. Const. art. VI, cl. 2.
32. Head Money Cases, 112 U.S. at 595.
33. Id. at 581.
34. Id. at 597. The Supreme Court doubted whether the act violated any treaties or provisions, but did not end its inquiry there. Id. The Court reasoned that even if provisions of the act conflicted with an existing treaty, the provisions of the act would prevail because a treaty "is subject to such acts as Congress may pass for its enforcement, modification, or repeal." Id. at 597-99.
35. Id. at 599-600. The Court stated that the tax was within the power of Congress to regulate foreign commerce. Id. at 596, 600.
36. Whitney, 124 U.S. at 191-92. The United States had ratified a treaty with the Hawaiian Islands providing duty-free importation into the United States for a number of articles. Id. at 191. The plaintiffs argued that a treaty between the Dominican Republic and the United States, which provided that any item imported from the Dominican Republic would not be taxed higher than items imported from any other foreign country, did not permit the United States to levy a tax on sugar imported from the Dominican Republic because sugars similar in kind produced in Hawaii were admitted to the United States duty-free. Id. at 191-92.
37. Id. at 195.
38. Chinese Exclusion, 130 U.S. at 600-11. This case was also a landmark case in support of the proposition that Congress could regulate immigration into the
in time rule, declaring that "the last expression of the sovereign will must control." 39

III. THE DEVELOPMENT OF A COOPERATIVE INTERNATIONAL LEGAL ORDER

In recent years, the Supreme Court has cited or alluded to the last in time rule for the proposition that a statute can overrule a previously enacted treaty. 40 Not since the 1880s, however, has the Supreme Court reexamined the merits of the rule. Therefore, it is appropriate to examine the last in time rule in the light of modern political and legal developments. When the last in time rule was developed, the Supreme Court did not have the opportunity to consider the impact it would have on a cooperative international legal order. Since the latter part of the nineteenth century, however, both customary international law and treaty law have developed extensively. A common movement in both customary and treaty law is the shift towards greater cooperation and shared responsibility among nations.

The modern notions of erga omnes and jus cogens demonstrate international cooperation regarding customary international law. Erga omnes is an evolving doctrine which establishes the principle that a nation's conduct may be so egregious and detrimental to the international community that all nations, not just those directly involved, have a right to respond. 41 Erga omnes emerged as a result of multilateral agreements on basic human rights, such as the outlawing of genocide and acts of aggression. 42

The establishment of jus cogens norms of customary international law takes erga omnes one step further. Jus cogens norms are customary international law norms which have achieved such overwhelming international

United States. See Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion, 100 HARV. L. REV. 853, 858-59 (1987). Professor Henkin argues that while the last in time rule has a weak foundation, there is little need for concern because Congress seldom violates treaties. Id. at 872.


41. RESTATEMENT (THIRD), supra note 2, § 902 reporters' note 1 (1987) (citing Case Concerning the Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J. 3, 32). "Some universal and some regional human rights conventions allow any party to the convention to bring before an international commission or court any breach of the convention by another party, provided both parties have accepted an optional clause on the subject." Id.

consensus that they are considered binding and absolute.\textsuperscript{43} \textit{jus cogens} norms include a number of human rights principles which are considered superior to principles of sovereignty.\textsuperscript{44} The Vienna Convention on the Law of Treaties\textsuperscript{45} states that these peremptory norms must be "accepted and recognized by the international community of states as a whole."\textsuperscript{46}

The development of a cooperative international community through codified law is best evidenced by the creation of multilateral treaties which in turn form international organizations.\textsuperscript{47} A revolutionary element of some of these organizations is that they are supranational. That is, they have the power to assert actual direct legislative authority over their members and may directly bind national enterprises without interference from member states' national governments. Thus, international organizations which impose supranational obligations require their member states to defer to treaty obligations or organizational legislative decisions even if they conflict with the member states' domes-

\textsuperscript{43} See Christenson, \textit{Jus Cogens: Guarding Interests Fundamental to International Society}, 28 VA. J. Int'l L. 585, 589 (Spring 1988) (These powerful norms "then form part of the general category \textit{jus cogens}: a symbol for unwritten constitutional guidance to the positive law-making power of sovereign nation-states reflecting those interests most basic to international society.").

\textsuperscript{44} See \textit{Restatement (Third)}, supra note 2, § 702 reporters' note 11. Section 702 reads:
A state violates international law if, as a matter of state policy, it practices, encourages, or condones
(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.


\textsuperscript{46} Vienna Convention, supra note 45, art. 53, at 344.

\textsuperscript{47} \textit{See J. Murphy, Remarks at the Meeting of the American Society of International Law Regarding the PLO Mission 1-2} (Draft Panel Report 39) (Aug. 8, 1988) (available in Villanova University School of Law Library).
tic laws. These multilateral treaties establish new legal systems which, if allowed to function properly, exert control over the conduct of the member states. In order for these multilateral organizations to remain viable, however, member states must adhere to their obligations.

The Supreme Court of the 1880s could not have anticipated the possibility of the destruction of an entire international legal system by a nation violating its treaty obligations. Thus, the declaration in the Head Money Cases that a treaty does not have "superior sanctity" over a statute should be construed narrowly to apply, if at all, only to bilateral commercial treaties, such as the treaties at issue in the Head Money Cases, Whitney and the Chinese Exclusion Case. This is because the pronouncement did not take into account the importance of multilateral regimes created by treaties such as the United Nations Charter, to which the United States is a party, and the Rome Treaty, which established the European Economic Community ("EEC").

The United Nations Charter has emerged as a paradigmatic multilateral treaty. It imposes international obligations because the nations that signed the Charter expressly agreed to be bound by its rules and principles. The Charter laid the framework for the creation and development of global cooperation, world peace and prosperity. While the United Nations, unlike the EEC, was not designed primarily as a supranational organization, its internal structure imposes some supranational obligations on its members.

In the United Nations, all member states vote in General Assembly Resolutions. These resolutions establish an international consensus and occasionally a norm of customary international law, but are not considered legally binding on member states.

48. E. Stein, P. Hay & M. Waelbroeck, European Community Law and Institutions in Perspective: Text, Cases and Readings 20-21 (1967) (citing Robertson, Legal Problems of European Integration, 91 Recueil des Cours 105, 143-48 (1957)).

49. W.P. Gormley, The Procedural Status of the Individual Before International and Supranational Tribunals 127 (1966). The purpose of multilateral treaties is "the protection of all subjects of international law and not merely sovereign nations." Id.

50. Head Money Cases, 112 U.S. at 599.

51. For a discussion of these cases, see supra notes 27-39 and accompanying text.


54. Id. art. 18.

55. See Note, The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts, 1983 Duke L.J. 876, 879-80. This article explains how General Assembly resolutions have developed from mere advisory opinions to possible sources of international law. Id. at 884-92 (citing Filartiga v. Penal-Irala, 650 F.2d 876, 882-83 (2d Cir. 1980) (court implied that it considered General Assembly resolutions "to be authoritative
The more authoritative legal source within the United Nations is the Security Council, which is entrusted with imposing supranational obligations on member states. The power to impose binding authority is conferred by articles 24 and 25 of the United Nations Charter. Article 24 states that the member states entrust the Security Council with responsibility for the "maintenance of international peace and security." Article 25 expressly provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The binding authority of Security Council Resolutions is not absolute. Articles 24 and 25 must be examined in context with the particular language of a resolution. By its terms, a resolution only may be recommended to all member states. However, if the language of a resolution unambiguously imposes obligations on member states, they are bound to comply with the Security Council decision.

The Security Council consists of eleven members, including five permanent members: the United States, the People's Republic of China, France, the U.S.S.R. and the United Kingdom of Great Britain and Northern Ireland. An affirmative vote of the Security Council affects all members of the United Nations, provided no permanent member of the Security Council vetoes the resolution. The concentration of power in the five permanent members (so-called "Great Powers") resulted from their worldwide strength following the Second World War. The victors wanted to establish an international organization for the purpose of preventing future war. In order to be effective, it was

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57. See Note, supra note 56, at 398.
59. Id. art. 25.
60. See Note, supra note 56, at 398.
61. Id. at 399.
62. Id. at 398 (citing H. Kelsen, The Law of the United Nations 293 (1966)).
64. U.N. CHARTER art. 23, para. 1.
65. Id. art. 27, para. 3.
67. Id. The goal of the Great Powers, however, was primarily to prevent their World War II enemies from again becoming belligerent. Id. The Great
necessary for the organization to have binding authority. None of the Great Powers, however, was willing to have the United Nation's authority supersede its national sovereignty. The structure of the Security Council, therefore, represents a balance between the need to impose binding supranational obligations on member states, and a reluctance to discard cherished principles of national sovereignty.

A strict interpretation of the last in time rule is inconsistent with the recognition of international obligations. When Congress passes laws inconsistent with United States international obligations, these international obligations do not disappear; the issue becomes whether and how the United States will remedy the breach. But a United States violation of a supranational obligation may be so damaging to the international community, particularly to a multilateral organization such as the United Nations, that it may effectively be remediless. For example, if the United States refused to honor its supranational obligations to the United Nations, other nations would be unable to rely fully on the United Nations' binding authority. Thus, the United States could potentially cripple the United Nations by passing superseding legislation.

An example of such a dangerous application of the last in time rule was the United States' noncompliance with the trade embargo of Southern Rhodesia. In 1966 the United Nations Security Council, with an affirmative vote from the United States, adopted Resolution 232, which imposed a trade embargo on Southern Rhodesia. In 1971 Congress adopted the Byrd Amendment which unilaterally lifted the embargo. In Diggs v. Shultz, the United States Court of Appeals for the District of Columbia rejected a claim for injunctive relief by Rhodesian nationals and others, including some prominent Americans. The Rhodesians claimed that the issuance of a license to Union Carbide Corp., which authorized importation of goods from Southern Rhodesia, violated the 1966 Security Council Resolution and was not authorized by the Byrd Amendment. The court held that the issuance of the license was authorized by the Byrd Amendment. The court also held, without citing

Powers did not adequately consider "the probability of disagreement and therefore of deadlock among those who must agree." Id. at 976.

68. Id.
69. Id.
70. RESTATEMENT (THIRD), supra note 2, § 115(1)(b).
74. Id. at 463-64. The nationals asserted that it was not Congress' intention in the Byrd Amendment to lift the trade embargo. Id. at 465.
75. Id. at 466. The court also dismissed the notion that Congress did not intend to compel the President to lift the sanctions. Id. The court reasoned that the only possible construction of the Byrd Amendment was that it was intended to directly violate the United States' international agreement. Id. at 465-66.
any authority, that Congress was entitled to pass laws denouncing treaties if it so desired. 76

The recent attempt by Congress to close the PLO Observer Mission, and thereby violate the Headquarters Agreement, posed a much greater threat to the United Nations than the Byrd Amendment. 77 The purpose of the Headquarters Agreement, which came into effect soon after the United Nations Charter, was to guarantee the United Nations' independence and authority over all of its activities, and particularly to protect those activities from intrusion by the host government, the United States. 78 The agreement expressly states that the United States will allow the United Nations "fully and efficiently to discharge its responsibilities and fulfill its purposes." 79

One aspect of the Headquarters Agreement that was overlooked by the court in U.S. v. PLO is that the agreement is technically not a treaty, but a congressional-executive agreement where, by joint resolution, the Senate and the House of Representatives authorized the President to bring the agreement into effect. 80 The Headquarters Agreement should not be viewed standing alone, however, for it is inextricably intertwined with the United Nations Charter. Indeed, the Headquarters Agreement refers exclusively to the United States' obligations to the United Nations. 81 Thus, a threat to the Headquarters Agreement is a threat to the operations of the United Nations.

If the court in U.S. v. PLO had invoked the last in time rule and allowed the United States Justice Department to close the PLO Observer Mission in violation of the Headquarters Agreement, the viability of the United Nations would have been at risk. In addition to jeopardizing the essential and independent nature of the United Nations' operations, a violation of the Headquarters Agreement would have forced the member states to question the ability and willingness of the United States to honor its international obligations.

The emergence of multilateral treaties with supranational obligations has been a significant step in creating a more peaceful, interdependent world. Many nations have officially recognized that treaties take

76. Id. at 466.
77. For an in-depth discussion of the PLO Observer Mission controversy, see infra notes 89-147 and accompanying text.
79. Id. art. IX, § 27, 61 Stat. at 3434.
80. J. Res. 357, 80th Cong., 2d Sess. (1953). See also L. HENKIN, supra note 2, at 175. Professor Henkin states that congressional-executive agreements are mechanisms whereby "the President can seek approval by joint resolution of both houses of Congress instead of two-thirds of the Senate only." Id.
precedence over domestic laws. For instance, France, Greece and the Netherlands have constitutions which expressly give treaties supremacy over even later enacted statutes.

The paradigmatic example of a supranational organization is the EEC, which was established by the Rome Treaty. The founding nations gave the EEC broad power in order to ensure economic and social prosperity. The notion of supranationality in the EEC derives primarily from Article 189 of the Rome Treaty, which unambiguously provides that regulations adopted by the Council and the Commission, the two governing bodies of the EEC, "shall be binding in every respect and directly applicable in each Member State." Although it is not a member, the United States should not be blind to the successes and growth of the EEC. Indeed, given the trend toward greater global cooperation, it is entirely possible that the United States will want to achieve greater international cooperation in economic, environmental, technological and social affairs. Moreover, it is not inconceivable that in the near future the United States will seek admission into an expanded EEC or some other emerging international organization which features supranationality as an integral element. But if the United States rigidly adheres to the last in time rule, it will be hampered in its efforts to enter into such international agreements because other nations will be unable to rely on the United States' compliance with supranational obligations.

The Belgian Cour de Cassation in a 1971 judgment, referring to the operation of the Common Market, convincingly articulated the need for treaty supremacy in today's international community. "The reason is that the treaties which have created Community law have instituted a new legal system in whose favour the member states have restricted the exercise of their sovereign powers in the areas determined by those

83. France Const. art. 55. See also Judgment of 1975, Cour de Cassation (Chambres réunies), France, 16 Common Mkt. L.R. 336 (1975), reprinted in part in Legal System, supra note 82, at 20, 22-23 ("[It] is clear that the international legal order can only be realised and developed if the states loyally apply the treaties they have signed, ratified and published.") (submissions of Procureur General M. Adolphe Touffait).
84. Const. De La Grece art. 28(1).
85. Statuut Ned. art. 66.
86. Rome Treaty, supra note 52, preamble, at 14. The original members were Belgium, West Germany, France, Italy, Luxembourg and the Netherlands. Id. at 11 n.1.
87. Id. art. 189. Article 189 also provides that directives may be adopted by the Council and Commission and "shall bind any Member State to which they are addressed." Id.
IV. The PLO Controversy

A. Background

The Supreme Court has never reexamined the merits of the last in time rule, in large measure because Congress has been careful to respect the sanctity of international law and the diplomatic channels of the executive branch. That respect, however, was egregiously absent in the recent controversy over the PLO Observer Mission to the United Nations.

Since 1974, at the invitation of the United Nations, the PLO has maintained an observer mission to the United Nations in New York City. The invitation was met with initial congressional resistance, but in *Anti-Defamation League of B’nai B’rith v. Kissinger* the United States District Court for the Eastern District of New York held that PLO representatives, under the terms of the Headquarters Agreement, were entitled to access to Manhattan in order to enhance the peacekeeping efforts of the United Nations.

The PLO maintained its mission without any further governmental opposition until July 1986, when members of Congress asked the United States Department of State to close the PLO offices in the United States because of an alleged increase in terrorism by the PLO. The Secretary of State refused to close the PLO offices because of the United States’ international obligations under the Headquarters Agreements.

In May 1987, after the State Department refused to close the PLO


89. See Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 872 (1987). Professor Henkin asserts that although the last in time rule does not have a strong foundation, there is little need for concern because Congress rarely disregards treaty obligations. Id.


91. No. 74 C. 1545, slip op. (E.D.N.Y. Nov. 1, 1974).


93. See 133 CONG. REC. E1635-36 (daily ed. Apr. 29, 1987) (letter from George P. Shultz to Jack Kemp, dated Jan. 13, 1987) ("[W]e . . . are under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN headquarters.")
offices, the ATA was introduced in the Senate. The ATA declares it unlawful

...notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

Soon after the ATA's introduction, the Secretary-General of the United Nations expressed his view that if the ATA were to become law and the United States were to close the PLO Observer Mission, the United States would be in violation of sections 11, 12, and 13 of the Headquarters Agreement, which gave United Nations members and invitees freedom of transit to the United Nations. In addition, the State Department opposed the ATA on the grounds that it violated U.S. international obligations.

Despite the possible international ramifications and opposition by the State Department, the ATA was passed without any committee hearings and with minimal congressional debate. The admonitions of several Senators that the nuances of the ATA be explored carefully went unheeded. The ATA was passed as a rider amendment to the Foreign Relations Authorization Act for Fiscal Years 1988-89 on December 16, 1987. Six days later President Reagan signed the Foreign Relations Authorization Act into law. When President Reagan signed the bill he expressed his concern that it encroached upon the Executive's power to...

95. Id. § 5202(3).
96. Article IV, § 11 of the Headquarters Agreement provides in pertinent part: "[T]he United States shall not impose any impediments to transit to or from the headquarters district of . . . (5) other persons invited to the headquarters district by the United Nations or by such specialized agency on official business." Headquarters Agreement, supra note 8, art. IV, § 11. Section 12 provides: "The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States." Id. art. IV, § 12. Section 13 provides in pertinent part: "Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11." Id. art. IV, § 13.
99. Id. at 1460 n.13 (citations omitted).
conduct foreign affairs. President Reagan insisted, however, that the ATA did not violate any international obligations because the United States continued to refuse to recognize the PLO as a sovereign.

After the passage of the ATA, and despite strong admonitions from the State Department, the Justice Department stated that it intended to apply the ATA to the PLO Observer Mission in New York. The Justice Department disregarded a United Nations Resolution calling for the United States to continue to allow the PLO access to the United Nations. Instead, the Justice Department focused on the enforcement provision of the ATA.

The controversy also raised a serious question as to whether the United States was obligated to submit to arbitration under section 21 of the Headquarters Agreement, which provides for arbitration in the event of a dispute between the United States and the United Nations. The Justice Department insisted that there was no dispute because the matter was still pending before a United States court. The General Assembly of the United Nations, however, submitted the matter to the International Court of Justice, which issued a unanimous advisory opinion maintaining that a dispute existed and that the United States was bound by international law to comply with section 21.

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102. Id.
105. 22 U.S.C. § 5203(a) (Supp V 1987). This section states: "The Attorney General shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this chapter." Id.
106. Article VIII, § 21 of the Headquarters Agreement provides: Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement . . . which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they shall fail to agree upon a third, then by the President of the International Court of Justice.

Headquarters Agreement, supra note 8, art. VIII, § 21.
108. Id.
B. Judicial Resolution of the PLO Controversy

When the PLO refused to comply with the order of the Attorney General to close its United Nations Mission, the United States sought injunctive relief. The PLO and its supporters responded with a countersuit alleging that the ATA was unconstitutional.

Two critical issues in *U.S. v. PLO* were: (1) whether the United States was bound to submit the dispute to international arbitration according to the terms of the Headquarters Agreement, and (2) whether the ATA mandated the closure of the PLO Observer Mission. The court did not address the merits of the first issue, holding that it was a political question not within the power of the judiciary, but rather under the control of the political branches of the government. Since the executive branch had decided not to submit the matter to arbitration, the court ruled that the judiciary was precluded from ordering it to do so.

The court analyzed the second issue as presenting two potential questions. The first question was whether the ATA was applicable to the PLO Observer Mission. If it were applicable, the next question would be whether the last in time rule should be invoked to give effect to the ATA over the provisions of the Headquarters Agreement granting access to the PLO. The court affirmed the last in time rule in dictum, but avoided a direct consideration of this question by ruling that the ATA did not apply to the PLO Observer Mission.

The court based its decision on the principle of statutory construction that a statute should not be read to violate international law if there is another possible interpretation. The court therefore determined that it was not the clear intention of Congress to have the ATA apply to the PLO Observer Mission. This determination was based on an analysis of the explicit language and legislative history of the Act.

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110. Mendelsohn *v.* Meese, 695 F. Supp. 1474 (S.D.N.Y. 1988); Judge Palmieri rejected the plaintiff’s claims. *Id.* at 1479-90.
111. *U.S. v. PLO*, 695 F. Supp. at 1462 (area of international policy one in which courts should refrain from participating) (citing Baker *v.* Carr, 369 U.S. 186, 211-13 (1962)).
112. *Id.* at 1463; cf. Lobel, *supra* note 24, at 1159 ("Courts often use the political question doctrine to avoid deciding difficult or politically controversial cases. This indiscriminate invocation of the doctrine represents an abandonment of principle insofar as it suggests that the political branches are subject to no legal imitations.") (footnote omitted).
114. *Id.* at 1465.
115. *Id.* at 1464-71.
116. *Id.* (citing Murray *v.* The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)).
117. *Id.* at 1468-71.
118. *Id.*
C. Explicit Language of the ATA

The government argued that by its plain terms the ATA was intended to close the PLO Observer Mission.119 The ATA expressly makes it unlawful

if the purpose be to further the interests of the Palestine Liberation Organization . . . (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of . . . the Palestine Liberation Organization.120

The government contended that the qualifying language of section 3, "notwithstanding any provision of law to the contrary," renounced any prior United States obligations, including treaties.121 The government therefore asked the court for a "literal application of the maxim that in the event of conflict between two laws, the one of later date will prevail."122

The court gave two reasons for holding that the plain language of the ATA was insufficient by itself to demonstrate a clear congressional intent to violate a treaty provision. First, the PLO Observer Mission itself was not mentioned in the Act.123 Second, there was no mention of any congressional intent to violate the Headquarters Agreement.124 In the absence of either provision, the court held that the clause "notwithstanding any provision of law to the contrary" did not establish that Congress intended to violate the Headquarters Agreement by closing the PLO Observer Mission.125

D. Legislative History of the ATA

The court further held that the legislative history of the ATA did not indicate that the ATA was applicable to the PLO Observer Mission.126 The court's primary reason for this determination was that Congress had not evinced an intent to close the PLO Observer Mission in violation of the Headquarters Agreement.127 All the members of Congress who spoke in favor of the ATA insisted, in spite of contrary interpretations by the Secretary of State and other members of the State

119. Id. at 1469.
122. Id.
123. Id.
124. Id.
125. Id.; see also Amicus Curiae Memoranda of Law and Appendices Submitted By and on Behalf of the United Nations at 8-9, U.S. v. PLO (No. 88 Civ.-1962).
127. Id. at 1469.
Department, that the bill did not violate United States obligations under the Headquarters Agreement. 128

The court noted that the debate on the merits of the bill was divided and inconsistent, and there did not appear to be a clear congressional understanding of the legal issues involved. 129 The admonitions of several senators that the issues needed to be more carefully explored were ignored. 130 Some Senators misunderstood the treaty obligations, and others desired to make only political statements; but not one member of Congress contended that the ATA would violate United States international obligations. 131

The court decided that the enforcement of the ATA against the PLO Observer Mission would clearly constitute a violation of the Headquarters Agreement. The court held that although the Headquarters Agreement does not expressly grant observer missions access to the United Nations, the United States still has an obligation to provide access to the PLO Observer Mission. 132

In ruling that the United States was bound by the Headquarters Agreement to provide access to the PLO, the court relied on section 11 of the Headquarters Agreement, which provides that "the United States shall not impose any impediments to transit to or from the headquarters district of . . . representatives of Members . . . [or] other persons invited to the headquarters district by the United Nations . . . on official business." 133 The court also relied on section 13, which provides that the United States cannot interfere with the residence of invitees of the United Nations. 134 The court determined that the purpose of the Headquarters Agreement was to prevent the United States from exerting influence over the United Nations' activities, including the United Nations' right to maintain observer missions. 135

Moreover, the court considered the established practice of the United States' noninterference with United Nations Observer Missions in New York. The United States had never once in forty years objected to a United Nations Observer Mission. 136 Furthermore, the United States had allowed PLO access to the United Nations in New York since 1974. 137 The court determined that the United States' acquiescence in allowing the PLO and all other observer missions to maintain their missions without interference indicated that the United States recognized

128. Id. at 1469-70.
129. Id. at 1470.
130. Id. at 1460 n.13 (citations omitted).
131. Id. at 1470 (citations omitted).
132. Id. at 1465-68.
133. Id. at 1465-66 (quoting Headquarters Agreement, supra note 8, § 11).
134. Id. at 1466.
135. Id. at 1465-67.
136. Id. at 1465.
137. Id.
its obligations to United Nations Observer Missions.\textsuperscript{138} Thus, the court concluded that in view of the purpose of the Headquarters Agreement and the United States' prior acquiescence, the United States was obligated under the Headquarters Agreement to provide access to the PLO.\textsuperscript{139}

The court determined that although Congress implemented the ATA in order to close the PLO offices in the United States, including the PLO Observer Mission, it did not clearly intend to do so if it meant the United States would be in violation of its international obligations.\textsuperscript{140} This congressional ambiguity coupled with the ATA's ambiguous language buttressed the court's decision that the ATA did not apply to the Headquarters Agreement.\textsuperscript{141}

Underlying the court's decision was the last in time rule. If Congress explicitly referred to the PLO Observer Mission and explicitly directed a violation of the Headquarters Agreement, the court would either have had to close the mission or abandon the last in time rule.

E. Analysis of the U.S. v. PLO Decision

The controversy over the PLO Observer Mission produced two disconcerting misinterpretations of international law. First, President Reagan either underestimated or minimalized the complexity of the controversy. When he signed the Foreign Relations Authorization Act of 1988-89, he rationalized his fear of the ATA encroaching executive authority by stating that the United States had not violated international law because it continued to refuse to recognize the PLO as a sovereign.\textsuperscript{142} This simple analysis obfuscated the real issue. The controversy was not about United States obligations to the PLO, but about United States obligations to the United Nations and its member states.

The second misinterpretation of international law was on the part of Congress. The congressional response to warnings by the State Department and the United Nations that the ATA violated the Headquarters Agreement was inadequate and remarkably unsophisticated. Congress did not consider completely the international ramifications of the bill. Not even one committee hearing was held to discuss the issues.\textsuperscript{143} Moreover, Congress relied on an extremely weak construction of the Headquarters Agreement for support of its argument that the closure of the PLO Observer Mission would not violate any international obligations.\textsuperscript{144} The court stated that there was no doubt that the Head-

\begin{itemize}
\item \textsuperscript{138} Id. at 1466-67.
\item \textsuperscript{139} Id. at 1468.
\item \textsuperscript{140} Id. at 1468-69.
\item \textsuperscript{141} Id. at 1470.
\item \textsuperscript{142} President's Statement on Signing H.R. 1777 Into Law, 23 \textit{Weekly Comp. Pres. Doc.} 1548 (Dec. 22, 1987).
\item \textsuperscript{143} \textit{U.S. v. PLO}, 695 F. Supp. at 1460.
\item \textsuperscript{144} Congress did not, as the Vienna Convention on the Laws of Treaties
quarters Agreement imposed an obligation upon the United States to refrain from impairing the functioning of the PLO Observer Mission.\textsuperscript{145} The only issue on which Congress remained consistent was its condemnation of terrorism.\textsuperscript{146} It can be inferred that Congress was more concerned with taking a tough stance against terrorism than in weighing sensitive aspects of international law. It is submitted that Congress sought to violate the spirit of the Headquarters Agreement without having to expressly overrule it.

Considering the detrimental international consequences of a violation of the Headquarters Agreement, the court strained to find some legal basis in which it could refuse to order the PLO to close its United Nations Observer Mission. The legislative ambiguity surrounding the ATA allowed the court to invoke the principle that "an act of Congress ought never to be construed to violate the laws of nations if any other possible construction remains."\textsuperscript{147} The disconcerting aspect of the U.S. \textit{v. PLO} decision, however, is that the last in time rule remains viable, although inconsistent with an international community which relies heavily on supranational obligations.

The PLO Observer Mission controversy exemplifies the danger of absolute adherence to the last in time rule. Given the stated goal of some of the framers of the ATA to close the mission and the Act's rather specific language, there is a tenable argument that Congress intended the ATA to apply to the PLO Observer Mission in New York. Moreover, considering Congress' recent bold assertion of previously dormant legislative power, it was quite possible for Congress to have directly and unequivocally drafted legislation for the specific purpose of closing the PLO Observer Mission notwithstanding any contrary law or treaty. Such a direct violation of the Headquarters Agreement would seriously undermine and jeopardize the functioning of the United Nations. The court's decision, while accomplishing its principal objective of keeping the PLO Observer Mission in operation, merely postponed the necessity to reexamine the validity of the last in time rule.

\section*{V. Constitutional Analysis of the Last in Time Rule}

\subsection*{A. Introduction}

This section will examine the constitutional underpinnings of the last in time rule. In the \textit{Head Money Cases}, \textit{Whitney}, and the \textit{Chinese Exclusion Case}, the Supreme Court relied on the supremacy clause to conclude that because treaties and statutes are lexically equal, later enacted stat-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{145} \textit{U.S. v. PLO}, 695 F. Supp. at 1471.
\item\textsuperscript{146} \textit{Id.} at 1470.
\item\textsuperscript{147} Murray \textit{v. The Schooner Charming Betsy}, 6 U.S. (2 Cranch) 64, 118 (1804).
\end{itemize}
\end{footnotesize}
utes take precedence over treaties.\textsuperscript{148} The supremacy clause, however, does not expressly address the relative status of treaties and statutes. It simply states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."\textsuperscript{149}

As one noted commentator has pointed out, the supremacy clause was not designed with the issue of the relative status of treaties and statutes in mind.\textsuperscript{150} Rather, its purpose was to establish the concept of federal sovereignty over states.\textsuperscript{151} The Supreme Court's assertion that statutes and treaties have lexical equality is without textual support. To analogize, if B and C are each greater than D, it does not necessarily follow that B is equal to C.\textsuperscript{152}

By the very terms of the supremacy clause the three sources of federal law, although all "supreme" to state law, do not carry equal weight since statutes must be enacted "in Pursuance" of the Constitution.\textsuperscript{153} In \textit{Reid v. Covert},\textsuperscript{154} Justice Black, in determining whether treaties are subject to the restrictions of the Constitution, concluded that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."\textsuperscript{155} Yet, the absence of a qualifying phrase stating that treaties must also be enacted in pursuance of the Constitution evinces textual support for the proposition that treaties are weightier than statutes.\textsuperscript{156} Moreover, no treaty has ever been declared unconstitutional by a federal court.\textsuperscript{157}

The Supreme Court's determination that the supremacy clause provides that statutes and treaties are lexically equal was a broad interpretation with limited textual support. One explanation for this broad interpretation is that during the late 1880s nationalism and legislative authority were at a zenith.\textsuperscript{158} Hence it is not surprising that the Supreme Court in the \textit{Head Money Cases} based the last in time rule on the

\textsuperscript{148} For a discussion of the last in time rule, see \textit{supra} notes 24-39 and accompanying text.
\textsuperscript{149} U.S. CONST. art. VI, cl. 2.
\textsuperscript{150} L. Henkin, \textit{supra} note 2, at 163.
\textsuperscript{151} Id.
\textsuperscript{152} See id.
\textsuperscript{153} U.S. CONST. art. VI, cl. 2.
\textsuperscript{154} 354 U.S. 1 (1957).
\textsuperscript{155} Id. at 16-17.
\textsuperscript{156} This proposition was raised by Justice Holmes in Missouri v. Holland, 252 U.S. 416, 433 (1920) (Migratory Bird Treaty with Great Britain did not encroach upon state rights under tenth amendment). The Supreme Court rejected the proposition in \textit{Reid}. \textit{Reid}, 354 U.S. at 16-17.
\textsuperscript{158} Lobel, \textit{supra} note 24, at 1110-11.
assertion that nothing "in its essential character, or in the branches of
the government by which the treaty is made, . . . gives it . . . superior
sanctity." This blanket assertion, however, needs to be carefully
scrutinized in light of recent constitutional developments in the separa-
tion of powers area.

B. Constitutional Procedure

The last in time rule creates inconsistencies with basic constitu-
tional principles. First, as mentioned above, the textual foundation of
the rule, the supremacy clause, does not support the rule. Second, the
last in time rule may well be incongruous with explicit constitutional
procedures mandating that only the President and Senate participate in
treaty making, and requiring that Congress present all bills to the Presi-
dent for his signature.

An essential element of treaties ignored by the last in time rule is
the primary role of the Executive in the treaty-making process with only
the Senate providing a legislative check. The Constitution authorizes
the President "by and with the Advice and Consent of the Senate, to
make Treaties, provided two thirds of the Senators present concur."160

In the Head Money Cases, the Supreme Court contended that the ex-
clusion of the House of Representatives from the treaty-making process
did not strengthen treaties, but rather implied a greater deference to
laws in which both houses of Congress participated.161 Careful consid-
eration of the treaty-making procedure in light of modern constitutional
developments indicates, however, that this conclusion is unsound.

Only in four instances does the Constitution expressly and without
reservation delegate powers to a single branch of Congress. The House of
Representatives has the exclusive power to initiate impeachment pro-
ceedings,162 and only the Senate is empowered to try and convict on
impeachment charges,163 to confirm or reject presidential appoint-
ments164 and to approve treaties.165

A significant aspect of these unicameral powers, which is a source of
their strength and importance, is that they are not subject to presidential
veto. The impeachment powers demonstrate the essential distinction
between unicameral powers and bicameral powers. The separate role
each branch of Congress plays in the impeachment process maximizes
the gravity of impeachment and indicates the framers' intent to prevent

159. Head Money Cases, 112 U.S. at 599.
161. Head Money Cases, 112 U.S. at 599.
162. U.S. Const. art. I, § 2, cl. 5.
163. Id. art. I, § 3, cl. 6.
164. Id. art. II, § 2, cl. 2.
165. Id.
a monopolization of power by any of the branches.\textsuperscript{166}

Similarly, the treaty approval and presidential appointment confirmation procedures are extremely important to national interests, and both procedures act as a check on the power of the Executive. Treaties establish relationships between the United States and other nations. Presidential appointments are vital to the working of the national government and essential to the implementation of executive policies. The constitutional delegation to the Senate of a role in these procedures can be construed as a necessary reduction of legislative authority. The exclusion of the House streamlines the process and insures swift and effective decisions.

Although the Constitution expressly provides that the President may make a treaty with the advice and consent of the Senate, it is unclear what procedure is necessary for a treaty to be terminated or violated.\textsuperscript{167} Under the last in time rule, both houses of Congress participate in treaty termination. In order to determine whether this violates constitutional procedure, it is useful, by way of close analogy, to catalog the ways that treaties can come to an end.

First, the President can terminate a treaty unilaterally, either in its embryonic stage or after it becomes law. The President alone can implement a treaty with another nation. Once a treaty is approved by the Senate, the President has autonomy regarding how to proceed. He can ratify it or he can ignore it.\textsuperscript{168} Thus, if the executive branch makes a treaty, and the Senate approves by a two-thirds vote, the President can derail the implementation of the treaty by simply doing nothing.

It has also been established that the President can act unilaterally to terminate an existing treaty. Some legal theorists contend that because the Senate has an advice and consent role in the making of a treaty, its consent should also be required for the termination of a treaty.\textsuperscript{169} The more convincing argument, however, is that the President may have to assert his international authority expeditiously, and should not be burdened by a requirement that he submit a treaty termination proposal to the Senate for approval. This is buttressed by the fact that the Senate has never established any conclusive treaty-terminating power.\textsuperscript{170}

\textsuperscript{166} L. Fisher, \textit{Constitutional Conflicts Between Congress and the President} 202-04 (1985) (noting that judiciary cannot act to stop impeachment).

\textsuperscript{167} L. Henkin, \textit{supra} note 2, at 129. Professor Henkin notes that the framers were eager to remove the treaty-making power from Congress, which had complete treaty-making authority under the Articles of Confederation. The result was disorder and a lack of compliance by the states. \textit{Id.}

\textsuperscript{168} \textit{Id.} at 136.

\textsuperscript{169} \textit{Id.} at 169 & 417 n.133 (citing Riesenfeld, \textit{The Power of Congress and the President in International Relations}, 25 \textit{Calif. L. Rev.} 643, 658-65 (1937); Riggs, \textit{Termination of Treaties by the Executive Without Congressional Approval}, 32 \textit{J. Air L. \\& Comm.} 526, 533-34 (1966)).

\textsuperscript{170} L. Henkin, \textit{supra} note 2, at 169.
Moreover, while the Senate is mandated constitutionally to give advice and consent on the confirmation of presidential appointees, the Supreme Court has unequivocally determined that the Senate has no authority regarding the removal of such executive officers. Similarly, once a treaty is ratified the Senate’s role should be considered essentially completed.

The executive authority to unilaterally terminate a treaty was recently exerted by President Carter when, in an effort to normalize relations with the People’s Republic of China, he unilaterally terminated the United States’ mutual defense treaty with Taiwan. In addressing a challenge to the President’s action, the Supreme Court, in Goldwater v. Carter, refused to rule that the President must share treaty-termination authority with the Senate.

In Goldwater, the Court rejected Senator Goldwater’s contention that the President had exceeded his constitutional authority by unilaterally terminating the mutual defense treaty with Taiwan. Senator Goldwater’s reasoning was that because it took two-thirds of the Senate to approve a treaty, it should take two-thirds to terminate one as well. The Supreme Court’s decision was divided in large measure because Congress as a legislative body had not challenged the President’s conduct. Four Justices held that the issue was a nonjusticiable political question. Justice Powell held that the issue was not ripe for resolution because Congress had not challenged the President. Only Justice Brennan addressed the merits, and he stated that he would not question the executive decision because it rested on the power of the President to recognize foreign governments.

The other way that a treaty can be rendered ineffective is by statute—i.e., the last in time rule. The rule is constitutionally unsound because it allows Congress to pass a law which abrogates a treaty. The last in time rule transforms the violation of treaties from an executive to a legislative function. Whereas treaties are initiated by the President, the last in time rule allows both houses of Congress to initiate the violation of a treaty. Moreover, it also allows the House of Representatives, which

171. Meyers v. United States, 272 U.S. 52 (1926). Chief Justice Taft, writing for the Court, held that Congress can not restrict the President’s power to remove executive officers. Id. at 176.


175. See L. Fisher, supra: note 166, at 270-72.


177. Id. at 997-98 (Powell, J., concurring in judgment).

178. Id. at 1006 (Brennan, J., dissenting).
is given no constitutional role in the treaty-making process, a significant role in the decision-making process concerning whether or not the United States should violate its treaty obligations.\textsuperscript{179}

For example, in the case of a statute advocating the violation of a treaty, each house of Congress needs only a simple majority to send the bill to the President. If the President vetoes the bill both houses can override his veto by a two-thirds vote. The Senate’s role in passing such legislation is highly questionable because the Senate has never been given authority to terminate a treaty against the will of the President.\textsuperscript{180} The House of Representatives’ role is more suspect because it is not even authorized to participate in the making, let alone the termination, of a treaty.\textsuperscript{181}

The above contradiction is analogous to the legislative veto controversy which was resolved in the landmark case of \textit{Immigration \\& Naturalization Service v. Chadha}.\textsuperscript{182} In that case, Congress had delegated to the Immigration and Naturalization Service (INS) the authority to suspend deportation of illegal aliens, subject to veto by either the Senate or the House of Representatives.\textsuperscript{183} The Supreme Court held this one-house legislative veto unconstitutional on the grounds that it violated the legislature’s bicamerality requirement.\textsuperscript{184} The Supreme Court stated that neither the House nor Senate could act independently absent express constitutional authority.\textsuperscript{185}

The Court discussed the explicit unicameral powers and asserted that they were not within the ambit of legislative functions, but rather were “important and binding one-House acts provided for in the Constitution.”\textsuperscript{186} The Court also stated that the unicameral exceptions “provide further support for the conclusion that congressional authority is not to be implied.”\textsuperscript{187} Similarly, where the Constitution provides for unicamerality the Congress should not be able to act bicamerally. For instance, there is no question that the House of Representatives may not

\textsuperscript{179} See L. Henkin, \textit{supra} note 2, at 164.
\textsuperscript{180} For a discussion of the process of terminating a treaty, see \textit{supra} notes 167-79 and accompanying text.
\textsuperscript{181} When the terms of the treaty manifest the intention that the treaty shall become effective in domestic law without enabling legislation, the treaty is self-executing and the House has no role at all. K. Holloway, \textit{supra} note 157, at 306. The House exerts minimal authority concerning treaties only when it, as well as the Senate, is required to pass implementing legislation which validifies non-self-executing treaties into domestic law. \textit{Id.} at 306-07. This authority does not affect the United States’ international obligations as created by the treaty. Evans, \textit{Self-Executing Treaties in the United States of America}, 1953 \textit{Brit. Y.B. of Int’l L.} 178.
\textsuperscript{182} 462 U.S. 919 (1983).
\textsuperscript{183} \textit{Id.} at 923.
\textsuperscript{184} \textit{Id.} at 948-59.
\textsuperscript{185} \textit{Id.} at 956-57.
\textsuperscript{186} \textit{Id.} at 956.
\textsuperscript{187} \textit{Id.}

https://digitalcommons.law.villanova.edu/vlr/vol34/iss6/7
assert any authority in the appointment procedure for any executive appointees. Admittedly, the Constitution provides no similar unambiguous guidance concerning the termination or violation of treaties. It is clear, however, by the text of the Constitution, that only the Senate has a role in the treaty-making process, and that the Senate's authority is curtailed once it approves a treaty.

Therefore, while only the President and the Senate have roles in the making of treaties, the termination of treaties falls within the Executive's powers alone. No authority has ever given the Senate a role in the termination of treaty process. The House has no role at all in the making of treaties, and it should have no role in the termination of treaties. The inclusion of Congress, particularly the House of Representatives, in the treaty-violation process, as allowed by the last in time rule, may well be an assertion of implied congressional authority that is constitutionally impermissible.

C. Presentment

The Supreme Court in Chadha also emphasized that the legislative veto was unconstitutional because it violated the presentment clause, which requires a legislative act to be presented to the President for approval or veto. The Supreme Court noted that the purpose of a presidential veto was to "carefully circumscribe" the powers of Congress.

The application of the last in time rule may deprive the President of his veto power as mandated by the presentment clause. If Congress adds a treaty-violation provision as a rider amendment to an important appropriations bill, the President is in essence forced to sign the bill. Otherwise, necessary funds for the operation of the government, which are appropriated at Congress' discretion, could be withheld. The procedural manner in which Congress passed the ATA is an example of the questionable use of rider amendments. The ATA was enacted as a rider amendment to the Foreign Relations Act of 1987, which appropriated essential funds for the State Department and the United Nations. The ATA was tacked on as a rider amendment even though it was unrelated to the other provisions of the Foreign Relations Act. Moreover, the ATA was enacted against the advice of the execu-

188. U.S. Const. art. I, § 7, cl. 2.
189. Chadha, 462 U.S. at 945.
190. Id. at 947.
191. See L. Henkin, supra note 2, at 79.
193. Id. § 101(a), 101 Stat. at 1335-50.
194. Id. § 102(a)(1), 101 Stat. at 1336.
195. For support of the view that the President should be able to veto non-
tive branch.\textsuperscript{196} Obscuring it in a necessary appropriations bill effectively denied the President his veto power and may have been a violation of the presentment clause.

The practice of using a rider amendment to abrogate treaties should be carefully scrutinized. The constitutional foundation for the last in time rule is already unsound. When a rider amendment is used to force the President to sign a statute which abrogates a treaty, the constitutional problems with the last in time rule are compounded. A rider amendment which violates treaty obligations, particularly supranational obligations, is quite possibly an impermissible legislative infringement on the executive function as the diplomatic representative of the nation. Congress is not only taking the initiative in the treaty-violating process, it is also greatly reducing the President's ability to participate in the process at all.

D. \textit{Executive Authority in Foreign Affairs}

Another flaw in the last in time rule is that it represents an encroachment by Congress on the President's power to conduct foreign affairs. Although the Constitution does not delineate clearly all of the specific foreign affairs powers, the Executive was intended to be the primary force in this area, particularly in the area of diplomacy.\textsuperscript{197} The last in time rule allows Congress to usurp the President's legitimate constitutional authority in the foreign affairs sphere. The delineation of foreign affairs powers in the Constitution was purposely left ambiguous in order for the political branches to gradually develop their powers.\textsuperscript{198} Some foreign affairs powers, however, were clearly left under the control of the Executive. For instance, the treaty-making power was explicitly delegated as an executive function.\textsuperscript{199} Also, the Constitution provides that the President "shall receive Ambassadors and other public Ministers."\textsuperscript{200} The President is also empowered to appoint ambassadors, public ministers and consuls with the advice and consent of the Senate,\textsuperscript{201} and is designated the commander-in-chief of the armed forces.\textsuperscript{202} Moreover, the Constitution gives the President exclusive power to recognize or not recognize a foreign entity.\textsuperscript{203}

\begin{itemize}
  \item \textit{germane riders}, see Givens, \textit{The Validity of a Separate Veto of Nongermane Riders to Legislation}, 39 \textit{Temp. L.Q.} 60 (1965).
  \item \textsuperscript{196} For a discussion of executive opposition to the ATA, see \textit{supra} notes 93-97 and accompanying text.
  \item \textsuperscript{197} L. Henkin, \textit{supra} note 2, at 33-35. The framers were dissatisfied with "multiheaded diplomacy." \textit{Id.} at 33.
  \item \textsuperscript{198} \textit{Id.} at 34.
  \item \textsuperscript{199} U.S. \textit{ Const.} art. II, § 2, cl. 2.
  \item \textsuperscript{200} \textit{Id.} art. II, § 3.
  \item \textsuperscript{201} \textit{Id.} art. II, § 2, cl. 2.
  \item \textsuperscript{202} \textit{Id.} art. II, § 2, cl. 1.
  \item \textsuperscript{203} \textit{Id.} art. II, § 3.
\end{itemize}
The enumerated powers do not exhaust the President's powers in foreign affairs. Although Congress plays a role in foreign affairs, the President has unquestionably evolved into the primary foreign policy maker.\(^{204}\) The landmark case of *United States v. Curtiss-Wright Export Corp.*\(^{205}\) established that the President is the "sole organ of the federal government in the field of international relations."\(^{206}\) The basis for this decision is that the complex and delicate nature of foreign affairs requires quick and single-minded decisions.\(^{207}\) The Supreme Court specified that while the President makes treaties with the advice and consent of the Senate, "[the President] alone negotiates."\(^{208}\)

While *Curtiss-Wright* and its progeny\(^{209}\) established the Executive's supremacy in foreign affairs, it is unquestioned that Congress has certain powers in the foreign policy area. Congress has the power to appropriate funds.\(^{210}\) It may use this power to exert influence on foreign affairs by limiting appropriations.\(^{211}\) In addition, Congress has maintained that some of the enumerated powers in article I of the Constitution,\(^{212}\) as well as some implied constitutional authority, give it the right to influence foreign affairs.\(^{213}\) Recently, Congress has challenged executive control of foreign affairs with the War Powers Resolution,\(^{214}\) which restricts executive deployment of United States armed forces, and the Boland Amendment,\(^{215}\) which prohibited the use of funds by the

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204. L. Henkin, supra note 2, at 37-38. Congress has generally been unable to usurp executive authority regarding foreign affairs. *Id.* at 38.

205. 299 U.S. 304 (1936). The defendants challenged a presidential embargo prohibiting the selling of arms to countries involved in the South America Chaco controversy, claiming that the President had overstepped his constitutional authority. *Id.*

206. *Id.* at 320 (quoting Marshall, 10 ANNALS OF CONG. 613 (1800)).

207. *Id.* at 319. The element of secrecy is also necessary for conducting foreign affairs. *Id.* (citation omitted).

208. *Id.*

209. See United States v. Pink, 315 U.S. 203, 230 (1942) (Court elevated status of executive agreements to that of treaties); United States v. Belmont, 301 U.S. 324, 330 (1937) (Court affirmed President's power to recognize foreign governments and to make executive agreements without advice and consent of Senate).


211. See L. Henkin, supra note 2, at 79.

212. Congress is granted the power to regulate foreign commerce, to declare war, provide for the common defense, define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations. U.S. CONST. art. I, § 8.

213. Congress has maintained that the necessary and proper clause of article I, § 8 of the Constitution gives it implied authority to influence foreign affairs. See J. Nowak, R. Rotunda & J. Young, CONSTITUTIONAL LAW 194-95 (3d ed. 1986).


CIA or Department of Defense to provide support for military activities to the Nicaraguan Contras.

Despite congressional inroads in the President's foreign affairs powers, one area where the executive branch maintains complete control is diplomacy.\textsuperscript{216} The unambiguous constitutional delegations of power demonstrate that the President is designated to be completely in control of United States diplomacy.\textsuperscript{217}

The last in time rule allows Congress to interfere with the diplomatic authority of the President. The distinction between the essential natures of bilateral and supranational multilateral treaties is critical in this analysis. Since bilateral treaties often control commercial agreements, Congress arguably should have authority to pass legislation which abrogates them because the Constitution expressly provides Congress with the authority to regulate foreign commerce.\textsuperscript{218}

Multilateral treaties which impose supranational obligations, on the other hand, are essentially diplomatic instruments. They provide guidelines and rules for the member states to follow in order to assure greater world peace and security.\textsuperscript{219} Even though such multilateral treaties may have commercial elements, they serve primarily a diplomatic function, because a breach could significantly affect relations among nations.\textsuperscript{220}

In \textit{Hampton \& Co. v. United States},\textsuperscript{221} Chief Justice Taft stated that "it is a breach of the National fundamental law if Congress... attempts to invest itself or its members with either executive power or judicial power."\textsuperscript{222} Thus, a statute which purports to take authority originally vested in the President and give it to the legislature should be carefully analyzed. A statute which purports to violate a treaty, especially one enacted against the President's will, should receive the closest scrutiny because it infringes upon the President's authority in the critical area of foreign affairs.

\textit{dent in International Relations: Revisited}, 75 CALIF. L. REV. 405, 409 (1987) (questioning whether Boland Amendment is undue congressional influence on Executive's right to conduct foreign affairs).


\textsuperscript{217} For a further discussion of the President's control over United States diplomacy, see \textit{supra} notes 197-203 and accompanying text.

\textsuperscript{218} \textit{U.S. Const.} art. I, § 8, cl. 3.

\textsuperscript{219} See, e.g., \textit{U.N. CHARTER} art. 24, para. 1, which provides in part: "[I]ts Members confer on the Security Council primary responsibility for the maintenance of international peace and security." \textit{Id.}

\textsuperscript{220} For a discussion of the effect of the last in time rule on multilateral obligations, see \textit{supra} notes 40-88 and accompanying text.

\textsuperscript{221} 276 U.S. 394 (1928).

\textsuperscript{222} \textit{Id.} at 406.
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Justice Jackson’s concurrence in Youngstown Sheet & Tube Co. v. Sawyer,223 which determined the limits on executive power, is useful in demonstrating that the last in time rule allows the legislature to encroach on the President’s foreign affairs powers. In the third of his categorizations of executive power, Justice Jackson stated that “when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”224

Concerning multilateral treaties which impose supranational obligations, the converse of Justice Jackson’s analysis is that for Congress to pass a law violating United States treaty obligations it must rely on its own constitutional authority minus the constitutional authority of the President. In a situation where Congress passes a law over the objection or veto of the President, its power is undoubtedly at its lowest ebb because the Constitution does not provide, and the Supreme Court has never recognized, congressional control over diplomatic functions. Rather, the Constitution explicitly empowers the President to handle the diplomatic concerns of the nation.225 Rigid adherence to the last in time rule would allow Congress to interfere with the President’s exclusive control of diplomatic affairs and would constitute a violation of the separation of powers principle.

VI. Conclusion

The last in time rule allows Congress to take the initiative in the treaty-violation process and to interfere with foreign diplomacy, an area specifically delegated to the control of the President. Even at its inception, the rule was fundamentally unsound because the Supreme Court during the late nineteenth century misconstrued the meaning and purpose of the supremacy clause. Moreover, the rapid development of the international community, particularly the widespread movement toward increased global interdependence and cooperation, has created a compelling need for the United States to repel or at least modify the last in time rule. The recent creation of multilateral treaties which impose supranational obligations empowers the international organizations which evolve from such treaties with unprecedented legal authority. The supranationality of such organizations, including to a limited extent the United Nations, gives these organizations legislative authority and mandates that a member state defer to particular treaty provisions or organizational decisions even if in conflict with the member state’s domestic law. The last in time rule contradicts the international responsibilities

223. 343 U.S. 579 (1952).
224. id. at 637 (Jackson, J., concurring).
225. For a discussion of executive authority in the diplomatic relations area, see supra notes 197-203 and accompanying text.
that the United States has voluntarily undertaken by ratifying the United Nations Charter and will hinder the United States' ability to negotiate future supranational agreements.

Indeed, the continuing controversy over the PLO Observer Mission aptly demonstrates that the United States' present policy, consistent with the last in time rule, is to disregard the United States' international obligations under the United Nations Charter by threatening the United Nations whenever its members or organizations act contrary to United States objectives. In November 1989, the United States, despite binding financial obligations under Article 17 of the United Nations Charter, threatened to cut off financing to the United Nations after the PLO circulated two draft resolutions calling for an upgrading of its observer mission status.226 Nevertheless, despite this threat, the United Nations Food and Agriculture Organization took a step toward recognizing the PLO as the official representative of Palestine by voting overwhelmingly to strengthen economic cooperation with the PLO.227 Apparently, the United States' threats to interfere with the operations of the United Nations are losing force, particularly because the United States currently owes the United Nations $430 million in regular dues and $152 million for peacekeeping operations.228

The last in time rule is at the root of the United States' policy to inconsistently honor its international obligations. The result of such a policy is a decrease in international influence and respect, as manifested by the United States' failure to establish an effective agenda in the United Nations. By consistently threatening the United Nations with sanctions and withdrawal, the United States can succeed only in either destroying the viability of the United Nations, or in forcing the United Nations to function crippled, without the support of its greatest financial benefactor. Neither result is in the United States' best interests. The United States would be better able to achieve its political objectives by demonstrating that it is willing to work for greater international peace and prosperity through cooperative diplomatic channels. A repeal or modification of the last in time rule, at least with respect to multilateral treaties which impose supranational obligations, would be an effective first step toward that end.

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227. Lewis, U.N. Group Backs a P.L.O. Role, N.Y. Times, Nov. 30, 1989, at A8, col. 3. At a meeting of the organization's general conference, 96 countries voted in favor of a resolution authorizing the agency "to assist agricultural development 'in close cooperation with the Palestine Liberation Organization.'" Id. Fourteen countries abstained, and only the United States and Israel voted against the resolution. Id.

228. Id. at A8, cols. 3-4.