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## Taking *Steel Seizure* Seriously: The Iran Nuclear Agreement and the Separation of Powers

Samuel Estreicher  
*New York University School of Law*

Steven Menashi  
*George Mason University Scalia Law School*

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### Erratum

Law; Constitutional Law; Legislation; Military, War, and Peace; National Security Law; President/Executive Department; Transnational Law; International Law

## ARTICLES

### **TAKING STEEL SEIZURE SERIOUSLY: THE IRAN NUCLEAR AGREEMENT AND THE SEPARATION OF POWERS**

*Samuel Estreicher\* & Steven Menashi\*\**

*This Article examines the constitutional validity of President Obama's decision, as part of his 2015 agreement with Iran, effectively to repeal seventeen different sanctions provisions for the fifteen-year life of the agreement. Although Congress had legislated extensively in this area, the President effected this change by entering into a "nonbinding political agreement" with Iran and by aggregating individual waiver provisions in the sanctions laws into an across-the-board waiver of sanctions. We argue that the commitments made by the President in the Iran agreement violate a fundamental separation-of-powers limit on executive power—what we term "the Steel Seizure principle," after Youngstown—the Steel Seizure case.*

*As the U.S. Supreme Court reaffirmed in Steel Seizure, the President does not have lawmaking power even where national security and foreign relations concerns are at stake. A vast literature has grown around Steel Seizure, especially its influential concurring opinion by Justice Robert Jackson. Yet relatively little attention has been paid to the majority view of the Justices that President Truman's seizure order was unlawful not because it contravened any express statutory prohibition but because it flouted the congressional "plan" for addressing the particular policy issue. This aspect of Steel Seizure highlights what is particularly problematic about President Obama's decision to aggregate authorities in the sanctions laws and to commit the United States to an across-the-board waiver of nuclear-related sanctions pursuant to his agreement with Iran. President Obama treated the waiver provisions as an invitation to end the congressionally prescribed sanctions regime for addressing Iran's nuclear weapons program and to replace it with his own nonsanctions regime for addressing the same issue. Yet the President lacks the unilateral power to overturn Congress's prescribed policy and to replace it with his own.*

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\* Dwight D. Opperman Professor of Law, New York University School of Law.

\*\* Assistant Professor of Law, George Mason University Scalia Law School. The authors thank Daniel Katz and Daniel Shapiro for research assistance and Laurence Gold, Thomas Lee, Peter Margulies, Neomi Rao, Paul Stephan, and the participants in the 2016 Manne Faculty Forum at George Mason University for helpful comments. All remaining errors lie with us.

*The President can be viewed both as an agent and, particularly in the foreign relations area, as a co-principal with Congress. The Steel Seizure principle highlights the limits of the co-principal conception of the President's role in foreign affairs. Once Congress has developed a legislative framework for a subject matter, that framework occupies the field; the President's role becomes one of a responsible agent. In the Iran sanctions laws, Congress provided bounded waiver authority, acting responsibly to allow limited executive discretion rather than requiring the President to seek new legislation each time flexibility was needed. It did not, however, invite the President to override the sanctions framework altogether.*

*An emergent literature in administrative law and U.S. foreign relations law has praised Congress's willingness to delegate waiver authority to the President for providing needed flexibility and other policy benefits. Yet that literature recognizes that the President's exercise of waiver authority must be carefully circumscribed to avoid enabling the President effectively to revise a statutory regime out of disagreement with Congress's policy choices. Such limiting principles are no less necessary in the foreign affairs context, where President Obama used purported waiver authority in the Iran sanctions statutes to pursue his own policy in defiance of Congress.*

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## INTRODUCTION

When President Obama signed the Joint Comprehensive Plan of Action (JCPOA), a 2015 agreement with Iran concerning its nuclear program, he committed the United States to cease enforcing a sanctions regime that Congress had imposed on Iran through legislation over the preceding thirty years.<sup>1</sup> The European Union also agreed to lift the sanctions it had imposed, but it adopted implementing legislation in order to do so.<sup>2</sup> The President sought no legislation to implement the agreement; the government instead acted “pursuant to Presidential authorities” to “ceas[e] the application of the statutory nuclear-related sanctions.”<sup>3</sup>

The President’s commitment involved a reversal of the usual course of lawmaking. Typically, Congress legislates a policy framework, and the President must act within that framework unless it is altered by statute or by treaty.<sup>4</sup> Overturning that framework requires a new law supported by both houses of Congress. Absent legislation or a treaty—both of which require affirmative congressional support—the President may defy legislation<sup>5</sup> only in the limited area where the President has exclusive executive authority that Congress cannot countermand.<sup>6</sup> The Obama administration never claimed that the decision to impose or to lift sanctions on a foreign state is an area of

1. See Joint Comprehensive Plan of Action annex II, at 8, U.S. DEP’T ST. (July 14, 2015), <https://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> [<https://perma.cc/7K3R-JL5Y>] (“The United States commits to cease the application of, and to seek such legislative action as may be appropriate to terminate, or modify to effectuate the termination of, all nuclear-related sanctions as specified in Sections 4.1-4.9 below.”); see also *id.* at 12 (providing “[t]he United States commits to” authorize other trade measures previously the subject of prohibition).

2. See *id.* annex V, at 1–2 (“The EU and its Member States will adopt an EU Regulation, taking effect as of Implementation Day, terminating all provisions of the EU Regulation implementing all nuclear-related economic and financial EU sanctions as specified in Section 16.1 of this Annex.”); see also EUR. UNION EXTERNAL ACTION, INFORMATION NOTE ON EU SANCTIONS TO BE LIFTED UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) 13 (2016), [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/iran\\_implementation/information\\_note\\_eu\\_sanctions\\_jcpoa\\_en.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf) [<https://perma.cc/3LTT-MPLT>] (“It is through the adoption of legal acts providing the legislative framework for the lifting of EU sanctions that the European Union implements UN Security Council resolution 2231 (2015) in accordance with the JCPOA.”).

3. Joint Comprehensive Plan of Action, *supra* note 1, annex V, at 2.

4. See U.S. CONST. art. VI, cl. 2.

5. For discussion on the President’s power to terminate treaties, see *infra* note 196.

6. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”); see also *id.* at 637–38 (Jackson, J., concurring) (“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. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”).

exclusive presidential authority, and any such claim would be highly doubtful.<sup>7</sup>

In the case of the Iran nuclear agreement, the President could not proceed either by statute or by treaty because majorities in both houses of Congress opposed the pact.<sup>8</sup> Instead, the President acted on the basis of authorities he argued he already possessed. First, the administration claimed that the JCPOA was a nonbinding political commitment that the President could make on his own rather than a legally binding treaty that required congressional approval.<sup>9</sup> It is generally recognized that the President may “establish commitments of an exclusively political or moral nature” by

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7. See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994) (“The Constitution expressly grants Congress, not the President, the power to ‘regulate Commerce with foreign Nations.’” (quoting U.S. CONST. art. I, § 8, cl. 3)). This power includes the imposition of sanctions or embargoes. See *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904) (“[I]t is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion.”); see also David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1037–38 (2015) (“The Constitution . . . explicitly grants Congress the power ‘[t]o regulate Commerce with foreign Nations.’ The Supreme Court has described this power as ‘plenary,’ ‘complete,’ ‘exclusive and absolute,’ and has recognized congressional supremacy over the executive in foreign commerce.” (footnotes omitted) (quoting U.S. CONST. art. I, § 8, cl. 3)); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 349 (2001) (“[R]egulation of commerce with foreign nations—including embargoes—was encompassed by Congress’s express Article I, Section 8 power. . . . [T]here was no discussion of the President imposing an embargo (or other regulation of commerce) during the Washington Administration; these matters were handled in Congress.” (footnote omitted)).

8. Majorities in both houses eventually voted to express disapproval of the agreement. See Erin Kelly, *Democrats Block Senate Vote to Reject Iran Nuclear Deal for Second Time*, USA TODAY (Sept. 15, 2015) [hereinafter Kelly, *Senate Vote*], <https://www.usatoday.com/story/news/2015/09/15/democrats-block-senate-vote-reject-iran-nuclear-deal-second-time/72317408/> [<https://perma.cc/C6UC-DRZB>] (“Senators voted 56-42 in favor of bringing to the floor a resolution of disapproval opposing the Iran deal.”); Erin Kelly, *House Votes to Reject Iran Nuclear Deal, But Action Has Little Impact*, USA TODAY (Sept. 11, 2015) [hereinafter Kelly, *House Vote*], <https://www.usatoday.com/story/news/2015/09/11/house-votes-reject-iran-nuclear-deal-but-action-has-little-impact/72061716/> [<https://perma.cc/9QLY-JPB3>]. For a discussion of the Iran Nuclear Agreement Review Act, see *infra* Part III.D.

9. See Letter from Julia Frifield, Assistant Sec’y, Legislative Affairs, U.S. Dep’t of State, to Mike Pompeo, U.S. Rep. From Kan. (Nov. 19, 2015), [http://pompeo.house.gov/uploadedfiles/151124\\_-\\_reply\\_from\\_state\\_regarding\\_jcpoa.pdf](http://pompeo.house.gov/uploadedfiles/151124_-_reply_from_state_regarding_jcpoa.pdf) [[https://web.archive.org/web/20160310175929/http://pompeo.house.gov/uploadedfiles/151124\\_-\\_reply\\_from\\_state\\_regarding\\_jcpoa.pdf](https://web.archive.org/web/20160310175929/http://pompeo.house.gov/uploadedfiles/151124_-_reply_from_state_regarding_jcpoa.pdf)] (“The Joint Comprehensive Plan of Action (JCPOA) is not a treaty or an executive agreement, and is not a signed document. The JCPOA reflects political commitments between Iran, the P5+1 (the United States, the United Kingdom, France, Germany, Russia, China), and the European Union. As you know, the United States has a long-standing practice of addressing sensitive problems in negotiations that culminate in political commitments.”); Jen Psaki, Spokesperson, U.S. Dep’t of State, State Department Daily Press Briefing (Mar. 10, 2015), <https://2009-2017.state.gov/r/pa/prs/dpb/2015/03/238718.htm> [<https://perma.cc/FZ2P-XMTN>] (describing the JCPOA as involving “a multilateral understanding between many countries,” “political commitments,” and “nonbinding arrangements”).

stating how he will act pursuant to his constitutional or statutory authorities in response to the actions of other countries.<sup>10</sup> Second, the President concluded he could lift the sanctions based on congressionally delegated authority in the existing sanctions legislation.<sup>11</sup> As a general matter, when authorizing the President to impose sanctions on Iran or those doing business with Iran, Congress provided that the President could grant limited waivers in order to exempt certain persons, entities, or financial transactions from penalties when the national interest so required.<sup>12</sup> To comply with the commitments he made in the JCPOA, however, President Obama invoked these waiver provisions in tandem to cease altogether enforcing sanctions provisions related to Iran's nuclear program.<sup>13</sup>

Both steps in President Obama's reasoning are problematic. First, it is not clear that the JCPOA is a nonbinding political commitment. The text of the agreement provides that Iran and the other signatories "will take the following voluntary measures within the timeframe as detailed in this JCPOA," which simultaneously describes its provisions as voluntary and obligatory.<sup>14</sup> The "U.S. Administration," meanwhile, is obliged to "refrain from re-introducing or re-imposing the sanctions . . . that it has ceased applying under th[e] JCPOA" and to "refrain from imposing new nuclear-related sanctions" for the fifteen-year life of the agreement, which extends beyond President Obama's tenure in office.<sup>15</sup> So the agreement purports not simply to explain how the Obama administration intended to act in response to Iranian activities but to govern the actions of succeeding administrations—that is, to treat President Obama's waivers of sanctions enforcement as an ongoing obligation of the United States.<sup>16</sup>

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10. Duncan B. Hollis & Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VA. J. INT'L L. 507, 517 (2009); see also Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787, 797, 807 (1986); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 302–04 (1977).

11. See David E. Sanger, *Obama Sees an Iran Deal That Could Avoid Congress*, N.Y. TIMES (Oct. 20, 2014), <https://www.nytimes.com/2014/10/20/us/politics/obama-sees-an-iran-deal-that-could-avoid-congress-.html> [<https://perma.cc/9YUL-NP9Y>] ("The Treasury Department, in a detailed study it declined to make public, has concluded Mr. Obama has the authority to suspend the vast majority of those sanctions without seeking a vote by Congress, officials say.").

12. See *infra* Part III.A.

13. See Letter from John F. Kerry, U.S. Sec'y of State, to U.S. Congress (Oct. 18, 2015), <http://www.state.gov/documents/organization/248501.pdf> [<https://perma.cc/KM6Z-6UAM>] (invoking four waiver provisions of the Iran Freedom and Counter-Proliferation Act of 2012 to lift thirteen sanctions provisions of that law, the waiver provision of the National Defense Authorization Act of 2012 to cease the imposition of sanctions under that law, two waiver provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012 to lift two sanctions provisions of that law, and the waiver provision of the Iran Sanctions Act of 1996 to waive the sanctions provision of that law).

14. Joint Comprehensive Plan of Action, *supra* note 1, at 6.

15. *Id.* at 13.

16. For a discussion whether the JCPOA is indeed nonbinding, see Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FIUL REV. 371, 377–81 (2016).

Second, and more fundamentally, the President's across-the-board exercise of waiver authority contradicts the expressed intent of Congress in the sanctions statutes. Congress authorized the President to waive the application of sanctions penalties in individual cases.<sup>17</sup> The limited waiver provisions stand in contrast to the "sunset provisions" of the same legislation, which allow for the wholesale cessation of sanctions only if the President certifies to Congress that Iran has stopped supporting terrorism and ceased pursuing nuclear, biological, and chemical weapons as well as ballistic missile technology.<sup>18</sup> President Obama did not make the certifications required for across-the-board lifting of sanctions but made use of the more limited waiver provisions to the same end.<sup>19</sup>

That Congress did not intend the waiver provisions to authorize a comprehensive lifting of sanctions is apparent not only from the contrast between the waiver and sunset provisions but also from other restrictions on waivers in the sanctions legislation. Under one such statute, the Iran Freedom and Counter-Proliferation Act of 2012, the President may waive the imposition of sanctions "for a period of not more than 180 days," which he may renew "for additional periods of not more than 180 days" if he submits to the appropriate congressional committees a report providing a national security justification for the waiver.<sup>20</sup> Accordingly, to comply with his commitments under the JCPOA, the President must return to Congress every 180 days with a report justifying his decision to renew the time-limited waiver.

It is difficult, as we set out in detail below, to read the sanctions legislation as authorizing the President to cobble together the individual waiver provisions throughout the statutory sanctions framework and extend numerous blanket waivers simultaneously in order to grant Iran systematic sanctions relief without having to go back to Congress.<sup>21</sup> In doing so, the President did not act within the legislative framework established by Congress but essentially overturned that framework.<sup>22</sup> That he did so in order

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17. 50 U.S.C. § 1701 note sec. 4(c)(1)(A) (2012) ("The President may, on a case by case basis, waive for a period of not more than six months the application of section 5(a) with respect to a national of a country, if the President certifies to the appropriate congressional committees at least 30 days before such waiver is to take effect that such waiver is vital to the national security interests of the United States."); *see also infra* Part III.A.

18. 50 U.S.C. § 1701 note sec. 8.

19. *See infra* notes 246, 259, 265, 283 and accompanying text.

20. 22 U.S.C. § 8804(g) (2012).

21. *See infra* Parts III.A, IV.

22. Even defenders of "big waiver"—the view that statutes may properly authorize the President to waive important substantive provisions—agree that any exercise of waiver authority must be "justified as being within the statutory enactment." David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 332 (2013) ("[W]aiver should therefore have to be justified as being within the statutory enactment, as carrying forward one or more of what can be reasonably thought to be the purposes of the statute."); Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 265–66 (2016) ("In allowing waivers, Congress presumably did not intend to authorize outright cancellation of statutory provisions based on mere executive disagreement with statutory requirements."); *see also infra* Part IV.

to comply with a political commitment made on his own unilateral authority—even if to undergird an agreement with a foreign state—does not justify disregarding the legislative framework Congress has established.

The President's exercise of unilateral authority evidenced in the Iran nuclear agreement violates the constitutional separation of powers. Altering the governing legal framework set by Congress requires an exercise of legislative power, and the President is not a lawmaker.<sup>23</sup>

This point has been missed in the debate over the JCPOA and the academic literature on sole executive agreements. That literature focuses almost exclusively on whether and under what circumstances the President must act pursuant to the treaty power rather than concluding agreements on his own authority or with congressional assent.<sup>24</sup> Accordingly, critics of the JCPOA have argued that the agreement represents an evasion of the treaty power.<sup>25</sup> Defenders of the agreement's legality have praised the President's "creative lawyers" for effectuating "significant changes in U.S. domestic law without recourse to a congressional vote" by utilizing "delegated authority from Congress that Congress had no idea would lead to such" changes.<sup>26</sup>

Neither side grapples with what might be termed "the *Steel Seizure* principle"—that the President lacks the authority to change enacted law without congressional authorization and must respect the framework established by Congress. All concede that the President cannot contravene congressional requirements; the *Steel Seizure* principle extends the limit on presidential action to include the policies embodied in the legislated framework even if no express statutory prohibition is directly violated.<sup>27</sup> The President acts unlawfully, even in the foreign relations area, when he acts in derogation of the extant legislative framework—that is, when he fails to follow "the plan Congress adopted" for dealing with the particular subject

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23. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.").

24. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 175–230 (2d ed. 1996); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 40–45 (1990); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1574–78 (2007); Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455, 464 (2016); Hollis & Newcomer, *supra* note 10, at 514–15; Ramsey, *supra* note 16, at 371–73; Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 134–39 (1998); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 11–14 (2003).

25. See, e.g., David B. Rivkin Jr. & Lee A. Casey, *The Lawless Underpinnings of the Iran Nuclear Deal*, WALL ST. J. (Jul. 26, 2015, 6:32 PM), <https://www.wsj.com/articles/the-lawless-underpinnings-of-the-iran-nuclear-deal-1437949928> [<https://perma.cc/WB4U-LAUT>]; see also Ramsey, *supra* note 16, at 380–84.

26. Goldsmith, *supra* note 24, at 467, 473.

27. See *Steel Seizure*, 343 U.S. at 602 (Frankfurter, J., concurring) ("It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words."); see also *infra* Part I.A.

matter, in the words of Justice Hugo Black's opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*.<sup>28</sup>

This Article focuses on the *Steel Seizure* principle and its implications for the Iran nuclear agreement as well as similar actions testing the limits of executive authority. Part I reviews the separation of powers jurisprudence of *Steel Seizure* and subsequent cases that affirm the President is not a lawmaker even in the realm of foreign affairs. Next, Part II considers the practice of sole executive agreements and concludes that there is no well-established practice of, or basis for claiming congressional acquiescence to, the use of a sole executive agreement to bypass the legislated framework for dealing with a particular subject matter. Part III then argues that in committing the United States to the JCPOA without congressional authorization, the President violated the *Steel Seizure* principle by acting in disregard of congressionally mandated policy. Part IV concludes with a discussion of the separation of powers implications of the President's claimed exercise of waiver authority in connection with the JCPOA. Together, these Parts show that the President's authority to enter into sole executive agreements or to take other executive action is limited by the President's duty to honor "the will of Congress as expressed by a body of enactments" as he exercises the executive power.<sup>29</sup>

#### I. THE *STEEL SEIZURE* PRINCIPLE

An essential feature of our system of separated powers is that the President "cannot of himself make a law."<sup>30</sup> The President's lack of legislative power has important implications for foreign affairs. In particular, the President may have authority unilaterally to set foreign policy in areas where Congress has not legislated, as part of the residual foreign affairs authority encompassed within "the executive power."<sup>31</sup> But where Congress has legislated—for example, by establishing a statutory sanctions framework for dealing with Iran and those with whom it does business—altering (including departing from) the legislative framework requires an exercise of legislative power, which the President lacks.<sup>32</sup> The legislative framework encompasses the substantive provisions of law and excludes alternative approaches that were rejected by Congress or are otherwise incompatible with the policy choices Congress has made. The President may not act contrary to the congressionally specified policy until Congress changes it.

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28. 343 U.S. 579, 586 (1952). As Justice Jackson famously put it in his concurrence, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and such measures are permissible only if the Constitution grants the President "a power at once so conclusive and preclusive" that it disables Congress from acting upon the subject. *Id.* at 637–38 (Jackson, J., concurring).

29. *Id.* at 604 (Frankfurter, J., concurring).

30. THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961).

31. U.S. CONST. art. II, § 1, cl. 1; Prakash & Ramsey, *supra* note 7, at 234.

32. Prakash & Ramsey, *supra* note 7, at 345 ("The traditional executive power over foreign affairs did not include a general power of legislation in support of foreign affairs objectives.").

The U.S. Supreme Court articulated this principle most prominently in *Steel Seizure*. In that case, President Truman did not violate any statutory proscription when he ordered the seizure of the steel mills to avoid a threatened work stoppage in the midst of the Korean War; indeed, three Justices believed he acted constitutionally to meet a national emergency before Congress was able to act.<sup>33</sup> The President even invited Congress to disapprove the seizure after the fact, and it did not do so.<sup>34</sup> But Congress had, before the seizure, legislated policies to address labor disputes that might lead to work stoppages in critical industries and to address the circumstances under which government seizure of private property was appropriate. The problem with the President's action was not that he violated any express statutory provision but that he acted in an area in which Congress had made "a conscious choice of policy" and imposed his own, alternative policy solution.<sup>35</sup> When Congress has prescribed a particular approach to subject matter within its legislative authority, the President cannot follow an alternative approach without flouting congressional will and offending the separation of powers.

#### A. *The Steel Seizure Case*

Before directing the Secretary of Commerce to seize and to operate the steel mills during the Korean conflict, President Truman had unsuccessfully attempted to resolve the dispute between the steel companies and their employees over new collective bargaining agreements by referring the matter to the Federal Wage Stabilization Board.<sup>36</sup> On April 4, 1952, the steelworkers union announced that a nationwide strike would begin at 12:01 a.m. on April 9, 1952.<sup>37</sup> Because steel was an essential component of virtually all war materials and the country was then engaged in the Korean War, the President concluded that "a work stoppage would immediately jeopardize and imperil our national defense" and that governmental operation of the steel mills was necessary "to assure the continued availability of steel

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33. *Steel Seizure*, 343 U.S. at 680 (Vinson, C.J., dissenting) ("[I]f the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case."); *id.* at 703 ("In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.").

34. *Id.* at 677 ("[T]he President sent a letter to the President of the Senate in which he again described the purpose and need for his action and again stated his position that 'The Congress can, if it wishes, reject the course of action I have followed in this matter.' Congress has not so acted to this date." (footnote omitted)). As *Steel Seizure* holds, and as we argue below in the Iran sanctions context, the failure of Congress to disapprove executive action in disregard of an extant legislated framework does not provide ex post justification for the action. *See id.* at 587–89 (majority opinion); *infra* Part III.B.

35. *Steel Seizure*, 343 U.S. at 602 (Frankfurter, J., concurring).

36. *Id.* at 582–83 (majority opinion).

37. *Id.* at 583.

and steel products during the existing emergency.”<sup>38</sup> He ordered the seizure a few hours before the strike was to begin.<sup>39</sup> The steel companies complied under protest but challenged the seizure on the ground that it “was not authorized by an act of Congress or by any constitutional provisions.”<sup>40</sup>

The Supreme Court agreed with the companies that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”<sup>41</sup> The Court found no statute that authorized the seizure expressly or by fair implication.<sup>42</sup> Rather, Congress had established a framework for resolving work stoppages that excluded the governmental seizure of industrial facilities.<sup>43</sup> When, in 1947, it considered the Labor Management Disputes Act (colloquially referred to as the Taft-Hartley Act), Congress rejected an amendment that would have authorized governmental seizures in cases of national emergency so as not to undermine the process of collective bargaining.<sup>44</sup> Thus, “the plan Congress adopted in that Act did not provide for seizure” but instead “sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports.”<sup>45</sup> The 1947 law left unions “free to strike after a secret vote by employees as to whether they wished to accept their employers’ final settlement offer.”<sup>46</sup>

President Truman understood that his order of seizure was not authorized by the Taft-Hartley Act and instead sought to justify his action on the basis of his commander-in-chief power and inherent executive authority.<sup>47</sup> The Court held that the President lacked authority to disregard the policy framework Congress had established for dealing with strikes even in cases of

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38. *Id.* at 589–91 (appendix to the majority opinion). The appendix reproduces Executive Order 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952).

39. *Steel Seizure*, 343 U.S. at 583 (majority opinion).

40. *Id.*

41. *Id.* at 585.

42. *Id.*

43. *Id.* at 586.

44. *Id.*

45. *Id.* As Justice Frankfurter noted:

Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special Congressional enactment to meet each particular need. Under the urgency of telephone and coal strikes in the winter of 1946, Congress addressed itself to the problems raised by ‘national emergency’ strikes and lockouts. The termination of wartime seizure powers on December 31, 1946, brought these matters to the attention of Congress with vivid impact. A proposal that the President be given powers to seize plants to avert a shutdown where the ‘health or safety’ of the Nation was endangered, was thoroughly canvassed by Congress and rejected. No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress. Authorization for seizure as an available remedy for potential dangers was unequivocally put aside.

*Id.* at 598–600 (Frankfurter, J., concurring) (footnotes omitted).

46. *Id.* at 586 (majority opinion).

47. *Id.* at 579.

national emergency.<sup>48</sup> To alter the framework Congress established for resolving national emergency labor disputes would require the exercise of legislative power.<sup>49</sup> The President lacked authority to seize the steel mills even during wartime because the President is not a lawmaker. “The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”<sup>50</sup> It entrusts “the lawmaking power to the Congress alone in both good and bad times.”<sup>51</sup> The President’s seizure of the mills—in the face of the congressionally established framework for resolving labor disputes—violated this separation of powers. The constitutional flaw was that “[t]he President’s order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.”<sup>52</sup>

Importantly, it was not that Congress had expressly prohibited the President from seizing industrial property to avert a crisis. Rather, Congress had by legislation set in place a particular policy—that labor disputes would be resolved by collective bargaining and without government seizure of plants—and the President sought to establish a different approach to labor disputes in its place.<sup>53</sup> As Justice Felix Frankfurter emphasized, Congress had even addressed the issue of governmental seizure and authorized seizures under other circumstances.<sup>54</sup> Where “Congress did specifically address itself to a problem, as Congress did to that of seizure,” Justice Frankfurter wrote, the President cannot implement a different solution without violating “the constitutional division of authority between President and Congress.”<sup>55</sup>

For Frankfurter and other Justices in the majority, it might have been a different case if Congress had not already acted in this area.<sup>56</sup> Yet when

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48. *Id.* at 587–89.

49. *Id.* at 588–89.

50. *Id.* at 587; see also Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 216 (2002) (“*Youngstown* holds that the President, as chief executive, may not ‘execute’ laws of his own making . . . . He may not enact domestic legislation unilaterally, by executive decree, but may only carry into effect enactments of the legislature or execute his own constitutional powers—which pointedly do not include any general legislative powers. And this remains true even in the case of war or national emergency.”).

51. *Steel Seizure*, 343 U.S. at 589 (majority opinion).

52. *Id.* at 588.

53. See *id.* at 657 (Burton, J., concurring) (“Collective bargaining, rather than governmental seizure, was to be relied upon. Seizure was not to be resorted to without specific congressional authority.”).

54. *Id.* at 597–98 (Frankfurter, J., concurring) (“Congress has frequently—at least 16 times since 1916—specifically provided for executive seizure of production, transportation, communications, or storage facilities.”); see also *id.* at 615–19 (summarizing legislation authorizing seizures).

55. *Id.* at 609.

56. *Id.* at 597 (“We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.”); *id.* at 659 (Burton, J., concurring) (“The foregoing circumstances distinguish this emergency from one in which Congress takes no action and outlines no governmental policy. In the case before us, Congress authorized a procedure which the President declined to follow.”); *id.* at 662 (Clark,

Congress has “made a conscious choice of policy,”<sup>57</sup> presidential departure from that policy “invade[s] the jurisdiction of Congress.”<sup>58</sup> Such a change of policy “is an exercise of legislative power” and therefore such presidential action cannot be sustained “without reading Article II as giving the President not only the power to execute the laws but to make some.”<sup>59</sup> Certainly, wrote Frankfurter, no one would contend that the President “would have had power to issue this order had Congress explicitly negated such authority in formal legislation.”<sup>60</sup> By establishing a policy framework that prescribes an alternative course, “Congress has expressed its will to withhold this power from the President as though it had said so in so many words.”<sup>61</sup>

Justice Robert Jackson underscored the point in his influential concurrence. “Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure,” he wrote.<sup>62</sup> “In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.”<sup>63</sup> That meant that the decision to seize the mills did not fall into the “zone of twilight” in which the President and Congress enjoy concurrent powers and in which congressional neglect of pressing issues might “enable, if not invite, measures on independent presidential responsibility.”<sup>64</sup> Because the President was acting in the face of Congress’s alternative solution to the same problem—that is, taking “measures incompatible with the expressed or implied will of Congress”—his power was “at its lowest ebb, for then he can rely only upon his own constitutional powers.”<sup>65</sup> But the President had no power to alter the existing legislative framework. “The Executive, except for recommendation and veto, has no legislative power,”

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J., concurring) (“[I]n the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation.”).

57. *Id.* at 602 (Frankfurter, J., concurring).

58. *Id.* at 660 (Burton, J., concurring) (“The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency.”); *id.* at 662 (Clark, J., concurring) (concluding that “where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis” and that in this case “Congress had prescribed methods to be followed by the President in meeting the emergency at hand”); *id.* at 602 (Frankfurter, J., concurring) (“[N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice.”).

59. *Id.* at 630, 633 (Douglas, J., concurring). The President lacks the power to make laws. *Id.* at 632 (“The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate.”).

60. *Id.* at 602 (Frankfurter, J., concurring).

61. *Id.*

62. *Id.* at 639 (Jackson, J., concurring).

63. *Id.*

64. *Id.* at 637.

65. *Id.*

Justice Jackson concluded.<sup>66</sup> The attempt to address the risk of a work stoppage through a policy of governmental seizure “originates in the individual will of the President and represents an exercise of authority without law.”<sup>67</sup>

### B. *The Steel Seizure Principle in Foreign Affairs*

A possible objection to the application of the *Steel Seizure* principle to international agreements is to emphasize the domestic aspects of the labor dispute and plant seizure in *Steel Seizure* and to suggest that the President enjoys more expansive power in the foreign affairs context<sup>68</sup>—perhaps even extending to a kind of legislative power.<sup>69</sup> The President has considerable authority to command the armed forces, to make treaties, and to speak for the nation in dealings with foreign states, but the Court has never recognized a legislative authority in the President to alter congressional policy even in the realm of foreign affairs.<sup>70</sup> *Steel Seizure* itself involved an assertion of the President’s foreign affairs powers as executive and Commander in Chief during wartime.<sup>71</sup> As Justice Jackson put it, “it is said he has invested himself with ‘war powers.’”<sup>72</sup> The Court rejected the notion that the President’s power over foreign affairs allowed him to exercise legislative authority: “He has no monopoly of ‘war powers,’ whatever they are,” wrote Jackson, noting that even in military affairs “heed has been taken of any efforts of Congress to negative his authority.”<sup>73</sup>

*Steel Seizure* also provided the occasion to clarify the scope of presidential authority as enunciated in *United States v. Curtiss-Wright Export Corp.*,<sup>74</sup> in which the Court suggested that the President possessed broad inherent power

66. *Id.* at 655.

67. *Id.*

68. *See, e.g.,* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (identifying not only “authority vested in the President by an exertion of legislative power” but also “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution”). *But see infra* notes 74–78 and accompanying text (discussing the Court’s subsequent treatment of this language).

69. *See* HENKIN, *supra* note 24, at 228 (“If one accepts Presidential primacy in foreign affairs in relation to Congress, one might allow his agreements to prevail even in the face of earlier Congressional legislation. If one grants the President some legislative authority in foreign affairs—as in regard to sovereign immunity—one might grant it to him in this respect too.” (footnotes omitted)).

70. *See* *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting) (“Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”). For a discussion of the *Zivotofsky* decision, see *infra* notes 93–98 and accompanying text.

71. President Truman had determined that “a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression.” *Steel Seizure*, 343 U.S. at 590–91 (appendix to the majority opinion).

72. *Id.* at 642 (Jackson, J., concurring).

73. *Id.* at 644–45; *see also id.* at 645 n.14.

74. 299 U.S. 304 (1936).

over foreign affairs.<sup>75</sup> Justice Jackson observed that *Curtiss-Wright* fell into his first class of cases, in which the President acted pursuant to congressional authorization: the case “involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress.”<sup>76</sup> The actual holding of the case was that, in the area of foreign affairs, Congress could delegate authority to the President in broader terms than perhaps would be permissible in domestic affairs.<sup>77</sup> Jackson recognized that “[i]t was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.”<sup>78</sup> Nothing even in *Curtiss-Wright*’s dicta about the President’s inherent authority, nor anything in the *Steel Seizure* opinions, suggests that the President’s obligation to adhere to the legislative framework for dealing with a particular subject has limited application in the foreign affairs arena.<sup>79</sup>

The *Steel Seizure* principle remains a vital part of the Supreme Court’s separation of powers jurisprudence in cases involving the foreign relations power of the United States. The Court relied on the principle when it invalidated the President’s use of military commissions in *Hamdan v. Rumsfeld*.<sup>80</sup> In that case, the Court held that, “[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”<sup>81</sup> Justice Anthony Kennedy, writing for himself and for Justices David Souter, Ruth Bader Ginsberg, and Stephen Breyer, wrote that “the three-part scheme used by Justice Jackson” in his *Steel Seizure* concurrence was “[t]he proper framework for assessing whether executive actions are authorized.”<sup>82</sup> For

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75. See *id.* at 319–21. But see Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379–83 (2000).

76. *Steel Seizure*, 343 U.S. at 635 n.2 (Jackson, J., concurring).

77. *Id.* at 635 n.2 (“[*Curtiss-Wright*] recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs.”); see also *Curtiss-Wright*, 299 U.S. at 327–28 (upholding a joint resolution of Congress against a challenge alleging “an unlawful delegation of legislative power”); *id.* at 320 (“[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”). Since *Curtiss-Wright*, the Court has made clear that broad delegations will be upheld even with respect to internal affairs. See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 258 (2010) (“Congress may now delegate authority to regulate the private sector in ‘the public interest, convenience, or necessity’ and to be ‘generally fair and equitable.’” (footnote omitted) (first quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943); then quoting *Yakus v. United States*, 321 U.S. 414, 420 (1944))).

78. *Steel Seizure*, 343 U.S. at 635 n.2 (Jackson, J., concurring).

79. See *id.* at 579 (majority opinion). See generally *Curtiss-Wright*, 299 U.S. 304.

80. 548 U.S. 557 (2006). See generally Samuel Estreicher & Diarmuid O’Scainnlain, *Hamdan’s Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403 (2006).

81. *Hamdan*, 548 U.S. at 593 n.23 (citing *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring)).

82. *Id.* at 638 (Kennedy, J., concurring).

those Justices, it mattered that “the President has acted in a field with a history of congressional participation and regulation.”<sup>83</sup> Because the Court concluded that the President’s system of military commissions was inconsistent with the military justice system Congress had created, the President’s power was “at its lowest ebb” because he had taken “measures incompatible with the expressed or implied will of Congress.”<sup>84</sup>

The Court’s most recent reaffirmation of the *Steel Seizure* principle was in *Medellin v. Texas*.<sup>85</sup> In that case, the Court concluded that a judgment of the International Court of Justice (ICJ) was not a binding rule of domestic law because the treaties pursuant to which the United States participates in the ICJ are not self-executing and therefore require implementing legislation to have domestic effect.<sup>86</sup> President George W. Bush had issued a memorandum to the Attorney General stating that the United States would comply with its obligations under the ICJ judgment by having state courts give effect to the decision.<sup>87</sup> The government argued that the President’s memorandum made the ICJ judgment binding law pursuant to the President’s power “to establish binding rules of decision that preempt contrary state law.”<sup>88</sup> The Court rejected that argument because converting an international obligation arising from a non-self-executing treaty into a binding rule of domestic law would require an exercise of legislative power, which the President lacks.<sup>89</sup>

According to *Medellin*, the Senate’s decision to ratify a non-self-executing treaty could not be taken to authorize the President to make the treaty’s obligations binding on courts as domestic law. Rather, such congressional action “implicitly prohibits him from doing so” because “the implicit understanding of the ratifying Senate” was that the treaty would be non-self-executing; the President’s assertion of authority to enforce the treaty as binding domestic law conflicted with that implicit congressional understanding.<sup>90</sup> That conflict between the *implicit* understanding of Congress and the President’s attempt to alter that understanding placed the

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83. *Id.*; see also *id.* at 639 (“Congress has set forth governing principles for military courts.”).

84. *Id.* at 638.

85. 552 U.S. 491 (2008).

86. *Id.* at 528–30.

87. *Id.* at 498.

88. *Id.* at 523 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Medellin*, 552 U.S. 491 (No. 06-984)).

89. *Id.* at 525–26 (“The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”); *id.* at 526 (“Once a treaty is ratified without provisions clearly according it domestic effect . . . whether the treaty will ever have such effect is governed by the fundamental constitutional principle that ‘[t]he power to make the necessary laws is in Congress; the power to execute in the President.’” (quoting *Hamdan*, 548 U.S. at 591)); *id.* (“[T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President’s signature or a congressional override of a Presidential veto.”).

90. *Id.* at 527.

President's action "within Justice Jackson's third category," where presidential power is at its lowest.<sup>91</sup> As in *Steel Seizure*, the President had not violated any express statutory proscription. But where Congress had acted by ratifying a non-self-executing treaty without providing implementing legislation, the President could not adopt an alternative approach for giving domestic effect to the ICJ judgment without congressional authorization.<sup>92</sup>

The *Steel Seizure* principle that the President may not take actions incompatible with congressional policy was so ingrained in American jurisprudence that "[f]or our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs."<sup>93</sup> That streak was broken in 2015 with *Zivotofsky v. Kerry*,<sup>94</sup> in which the Court upheld the President's refusal to allow American citizens born in Jerusalem to have Israel listed as their birthplace on their passports—in the face of a congressional statute requiring exactly that.<sup>95</sup> *Zivotofsky* nevertheless coheres with the *Steel Seizure* principle.<sup>96</sup> In line with the Jackson concurrence, the Court accepted that "when 'the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter'" and "[t]o succeed in this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue."<sup>97</sup> In the Court's view, however, the *Zivotofsky* case involved the President's power to recognize foreign states, which the Court placed in Justice Jackson's category of powers "at once so conclusive and preclusive" as to "disabl[e] the Congress from acting upon the subject."<sup>98</sup>

The *Zivotofsky* Court's conclusion that the President possesses an exclusive recognition power is debatable.<sup>99</sup> But acknowledging such an exclusive executive power does not undermine the foundational *Steel Seizure* principle that the President cannot exercise legislative power and therefore cannot act contrary to "the expressed or implied will of Congress,"<sup>100</sup> unless

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91. *Id.*

92. *Id.* at 530.

93. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting).

94. 135 S. Ct. 2076 (2015).

95. *Id.* at 2096 (majority opinion).

96. The Court explicitly noted that "[i]n considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework" from *Steel Seizure*. *Id.* at 2083.

97. *Id.* at 2084 (first alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)).

98. *Steel Seizure*, 343 U.S. at 637–38 (Jackson, J., concurring); see *Zivotofsky*, 135 S. Ct. at 2087 ("The formal act of recognition is an executive power that Congress may not qualify.").

99. See *Zivotofsky*, 135 S. Ct. at 2116 (Scalia, J., dissenting) ("The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views.").

100. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).

he is acting in an area of exclusive executive authority.<sup>101</sup> No one, including President Obama, has suggested that the subject matter of the JCPOA—the imposition of sanctions on Iran—is an area of exclusive executive authority.<sup>102</sup> The President did not claim that Congress is “disabl[ed] . . . from acting upon the subject”<sup>103</sup> and that the sanctions statutes are unconstitutional but rather that he acted consistent with the expressed or implied will of Congress embodied in those statutes.

## II. THE PRACTICE OF SOLE EXECUTIVE AGREEMENTS

The history of the President’s use of sole executive agreements is consistent with the *Steel Seizure* understanding that the President must respect congressional policy even in the foreign relations arena. There is no basis for arguing that a history of congressional acquiescence has added a “historical gloss” to the foundational constitutional principle that the executive is not a lawmaker even when dealing with foreign relations.<sup>104</sup>

In the founding period, it was not clear that the lead role in making treaties was an executive function because the binding character of such agreements “partake[s] more of the legislative than of the executive character.”<sup>105</sup> According to an early perspective, the President made treaties only as an agent of the Senate.<sup>106</sup> So when the President made agreements on his own authority, those agreements were not understood to have the legislative weight of a treaty or statute or to involve the exercise of a lawmaking power.<sup>107</sup> That understanding of the limited, nonlegislative effect of sole executive agreements has not been disturbed in subsequent practice, with one possible exception: the President’s practice of utilizing executive agreements to settle claims of Americans against foreign governments. Historically, settlement of such claims could be regarded as an executive function because foreign states enjoyed absolute immunity from suit, so the only way such claims could be vindicated was for the President to pursue the claim diplomatically.<sup>108</sup> Yet even after Congress abrogated foreign sovereign

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101. For the same reason, Professor Henkin is mistaken to characterize presidential recognition decisions—which may affect sovereign and diplomatic immunity—as exercises of legislative power. See HENKIN, *supra* note 24, at 54 (“There may be domestic legal consequences when the President decides to recognize or not to recognize a foreign state or government.”).

102. See *supra* note 7 and accompanying text.

103. *Steel Seizure*, 343 U.S. at 637–38 (Jackson, J., concurring).

104. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016).

105. THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

106. JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 202–04 (1959); HENKIN, *supra* note 24, at 177; Ramsey, *supra* note 16, at 371 (“[D]uring most of the Convention, the draft Constitution did not involve the President in treaty making at all, giving the power entirely to the Senate.”).

107. BURNHAM, *supra* note 106, at 202–03.

108. See HENKIN, *supra* note 24, at 41–43, 41 n.19; Clark, *supra* note 24, at 1626–27; Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1855–58 (2004).

immunity in 1976, thus permitting Americans to pursue most claims against foreign states in American courts,<sup>109</sup> the Supreme Court continued to recognize claims settlement as an executive function that did not require ex ante congressional authorization.<sup>110</sup> This view, whatever its merits, does not contradict the applicability of the *Steel Seizure* principle even in the foreign relations area.

#### A. Claims Settlement

The prime example of the President's ostensible power to effect legislative change through sole executive action that has been cited by scholars,<sup>111</sup> and arguably even by the Supreme Court,<sup>112</sup> is the President's "authority to resolve claims disputes with foreign nations."<sup>113</sup> It is certainly true that "[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice."<sup>114</sup> But the argument that this practice represents a presidential exercise of lawmaking power ignores the origin of the practice. As mentioned, until 1976, foreign states enjoyed absolute immunity from suit, and therefore the only way an American could vindicate a claim against a foreign state was for the President to espouse his claim and resolve it diplomatically. In doing so, the President was not displacing legislative action or otherwise making law; he was occupying a diplomatic area that legislation then could not reach. The Supreme Court put the point clearly in the nineteenth century:

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war.<sup>115</sup>

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109. See *infra* note 120 and accompanying text.

110. See *infra* Part II.B.

111. See, e.g., HENKIN, *supra* note 24, at 228 n.\* (arguing that executive claims settlement agreements "made law").

112. *Medellin v. Texas*, 552 U.S. 491, 531–32 (2008) (noting that "the making of executive agreements to settle civil claims between American citizens and foreign governments" emerged from a "'longstanding practice' of congressional acquiescence" (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981))).

113. *Id.* at 530.

114. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003); see also SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 108–11 (2d ed. 1916).

115. *United States v. Diekelman*, 92 U.S. 520, 524 (1875); see also Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1158 (2009) (discussing the founding-era consensus that "immunity to suit is an inherent attribute of sovereignty").

When the President backed such claims, he did not make law binding on the nation but acted as a representative of the country seeking to further national interests. As the U.S. Court of Claims stated in an 1884 ruling, the government acted “not as an agent advancing private claims, but as a sovereign seeking satisfaction of its own demands for injuries done to its subjects.”<sup>116</sup> It followed that the President could also decide that pursuing such claims would undermine the national interest and therefore choose not to espouse them.

The presidential practice of resolving claims against foreign states can be said to rest on congressional acquiescence only because it was unthinkable until very late in American history that Congress could abrogate the sovereign immunity of foreign states. Rather, when Congress took a position on how claims ought to be resolved, its action took the form of a request that the President seek a particular settlement.<sup>117</sup> It was not that Congress passively accepted the President’s exercise of lawmaking power in this area but that Congress recognized the diplomatic pursuit of foreign claims to be a nonlegislative executive function. The President could make agreements with foreign governments to settle such claims, but, pursuant to such a sole executive agreement, “no obligation, except to relinquish the claim, is assumed on the part of the United States.”<sup>118</sup> And such agreements—being neither treaties nor statutes—did not constitute “the law of the land” and could not modify the operation of existing statutes.<sup>119</sup>

The historical practice of presidential claims settlement, then, provides no precedent for the President’s exercise of a legislative power to displace

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116. *Great W. Ins. Co. v. United States*, 19 Ct. Cl. 206, 218, *aff’d*, 112 U.S. 193 (1884).

117. For example, in the nineteenth-century case of Antonio Maximo Mora—a naturalized American citizen whose property in Cuba was confiscated by Spain for “alleged complicity in the Cuban rebellion,” H.R. REP. NO. 52-2573, at 1 (1893)—Congress, by resolution, “requested” that the President pursue the claim and keep Congress apprised of his negotiations. *See* H.R.J. Res. 30, 53d Cong. (1895) (“*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be, and he is hereby, requested to insist upon the payment of the sum agreed upon between the Governments of Spain and the United States in liquidation of the claim of Antonio Maximo Mora against the Government of Spain, with interest from the time when the said amount should have been paid under the agreement.”); *see also* S. EXEC. DOC. NO. 53-10, at 1 (1894) (“In response to the resolution of the Senate, dated December 6, 1894, requesting that copies of correspondence in regard to the claim of Antonio Maximo Mora against the Government of Spain, exchanged since my last message to the Senate on the same subject, dated June 20, 1894, be communicated to it if not incompatible with the public interests, I transmit herewith the report of the Secretary of State on the matter, with accompanying copies of correspondence.”).

118. CRANDALL, *supra* note 114, at 108.

119. *See, e.g., United States ex rel. Angarica de la Rúa v. Bayard*, 15 D.C. (4 Mackey) 310, 320 (1885) (“[A] treaty would be the law of the land, as much as the statute to which we have referred. But this agreement between the American Minister at Madrid and the Spanish Minister of State was not a treaty, and its terms could not modify the operation of a statute, even if they had been intended to do so.”), *aff’d*, 127 U.S. 251 (1888); *see also* U.S. CONST. art. VI, cl. 2 (“This 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

congressional policy. Once Congress abrogated foreign sovereign immunity in 1976 and provided a legal framework for resolving such disputes, the President's unilateral authority in this area necessarily became more constrained.<sup>120</sup>

For these and other reasons, the leading cases decided prior to 1976 concerning presidential claims-settlement agreements—*United States v. Belmont*<sup>121</sup> and *United States v. Pink*<sup>122</sup>—are fully consistent with the *Steel Seizure* principle. To be sure, both opinions contain broad language suggesting that sole executive agreements settling foreign claims have enough legal force to displace state law.<sup>123</sup> But in both cases, the particular agreement was held to displace state law only because it was part of the President's exercise of the recognition power.<sup>124</sup> These cases involved recognition by the United States of a foreign state—an exercise of executive power that the courts were bound to accept (and which the Court later made clear could countermand legislation).<sup>125</sup> At issue in both cases was President Roosevelt's 1933 recognition of the Soviet Union and the accompanying agreement, termed the "Litvinov Assignment," pursuant to which claims by the Soviet Union against Americans holding the assets of nationalized Russian companies would be released and assigned to the United States.<sup>126</sup>

In *Belmont*, pursuant to the Litvinov Assignment, the United States sued August Belmont, a private banker in New York, to recover money that Petrograd Metal Works deposited with Belmont prior to its nationalization by the Soviet Union in 1918.<sup>127</sup> Pursuant to the act-of-state doctrine, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."<sup>128</sup> So once the United States recognized the Soviet Union as the legitimate government in Russia,

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120. See, e.g., 28 U.S.C. §§ 1330, 1332(d)(2)(c), 1391(f), 1441(d), 1602–1611 (2012); see also Clark, *supra* note 24, at 1618 (arguing the historical practice provides no real support for a "freestanding executive power to settle legal claims by citizens with a federal statutory right to sue foreign states in U.S. courts").

121. 301 U.S. 324 (1937).

122. 315 U.S. 203 (1942).

123. *Id.* at 230 ("A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."); *Belmont*, 301 U.S. at 331 ("[T]he external powers of the United States are to be exercised without regard to state laws or policies . . . . [W]hile this rule in respect of treaties is established by the express language of [Article 6, Clause 2] of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."); see also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 53 (1993) ("[I]n *United States v. Belmont* and *United States v. Pink*, the Supreme Court apparently assumed the existence of some independent presidential law-making authority." (footnotes omitted)).

124. *Pink*, 315 U.S. at 230; *Belmont*, 301 U.S. at 329–30.

125. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015); see also *Lehigh Valley R. Co. v. Russia*, 21 F.2d 396, 400 (2d Cir. 1927) ("The courts may not independently make inquiry as to who should or should not be recognized.").

126. See *Pink*, 315 U.S. at 211–13; *Belmont*, 301 U.S. at 326.

127. *Belmont*, 301 U.S. at 325–26.

128. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

American courts were bound to accept the Soviet nationalization of property within Russian territory.<sup>129</sup> But the Second Circuit had concluded that the act-of-state doctrine did not apply to property located in New York and, moreover, that enforcing the Soviet nationalization in New York would violate the state's public policy.<sup>130</sup> The Supreme Court reversed.<sup>131</sup> The Court broadly stated that “no state policy can prevail against the international compact here involved,” suggesting that the Litvinov Assignment—entered into by the President without congressional authorization—could preempt state law.<sup>132</sup> But the Court immediately proceeded to a discussion of the act-of-state doctrine and the principle that the President's recognition decision is binding on the courts.<sup>133</sup> The Court explained:

We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the Government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence.<sup>134</sup>

In the *Belmont* Court's view, the Second Circuit's decision failed to respect the Soviet government's nationalization of Russian corporations.<sup>135</sup> The situs of the deposit did not alter the effect of the act-of-state doctrine in this case. The doctrine bound the courts to recognize “the Soviet Government as the successor to the [nationalized] corporation” and therefore holding “[t]he substantive right to the moneys,” which it “has passed to the United States” via the Litvinov Assignment.<sup>136</sup> President Roosevelt's compact with the Soviet Union did not establish law displacing state public policy. Rather, it was the recognition of the Soviet Union that required the courts to respect the Soviet nationalization.<sup>137</sup> In a concurring opinion, Justice Harlan Stone—

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129. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”).

130. *Belmont*, 301 U.S. at 327 (discussing the lower court ruling).

131. *Id.* at 333.

132. *Id.* at 327.

133. *Id.* at 328 (“This court held that the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision; that who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts; and that recognition by these departments is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence.”).

134. *Id.* at 330.

135. *Id.* at 332 (“What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.”).

136. *Id.*

137. *Id.* at 330 (“The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments.”).

joined by Justices Louis Brandeis and Benjamin Cardozo—emphasized that the President’s recognition decision both resolved the case and obviated any conflict with New York’s public policy.<sup>138</sup>

The Court’s decision in *Pink* confirms that the President’s recognition of the Soviet Union, which triggered the act-of-state doctrine, was responsible for the outcome in both cases. *Pink* involved an action by the United States to recover the assets of the New York branch of the First Russian Insurance Company, about a million dollars of which remained in the custody of New York’s Superintendent of Insurance after the company’s domestic creditors had been paid.<sup>139</sup> The New York Court of Appeals—like the Second Circuit in *Belmont*—declined to hold that assets located in New York were owed to the Soviet government by virtue of the nationalization of the company.<sup>140</sup> The Supreme Court reversed, holding that “[t]he action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system.”<sup>141</sup>

Again, the Court included some language suggesting that the Litvinov Assignment had some legal force of its own, but this was only because “[r]ecognition and the Litvinov Assignment were interdependent.”<sup>142</sup> The Court said that it “would usurp the executive function if we held that that decision was not final and conclusive in the courts”—that is, “the power of recognition might be thwarted or seriously diluted.”<sup>143</sup> In *Belmont* and *Pink*, then, it was not that an executive agreement with the Soviet Union could make law displacing state law but that the state could not take actions

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138. *Id.* at 334 (Stone, J., concurring) (“It does not appear that the state of New York, at least since our diplomatic recognition of the Soviet government, has any policy which would permit a New York debtor to question the title of that government to a claim of the creditor acquired by its confiscatory decree, and no reason is apparent for assuming that such is its policy.”). Justice Stone also criticized the majority for its language regarding the preemptive effect of the compact. *See id.* at 336 (“It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty . . . for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden.”).

139. *United States v. Pink*, 315 U.S. 203, 210–11 (1942); *see also* *People v. Russian Reinsurance Co.*, 175 N.E. 114, 115 (N.Y. 1931).

140. *United States v. Pink*, 32 N.E.2d 552, 552 (N.Y. 1940) (per curiam) (citing *Moscow Fire Ins. Co. v. Bank of N.Y. & Tr. Co.*, 20 N.E.2d 758 (N.Y. 1939)); *see also* *Moscow Fire*, 20 N.E.2d at 766 (holding that the Soviet government “had no power of control” over property that “at all times has been within the State of New York,” meaning “its situs was in this State”); *id.* at 769 (“The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here.”).

141. *Pink*, 315 U.S. at 233. The Court noted that “[t]hat power was denied New York in *United States v. Belmont*” and “the *Belmont* case is determinative of the present controversy.” *Id.* at 222. *Belmont* determined the outcome “[w]ith one qualification,” namely whether “the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result.” *Id.* at 222, 226. The Court concluded that those factors did not dictate a different result. *See id.* at 226–30.

142. *Id.* at 230.

143. *Id.*

contrary to the “underlying policy adopted by the United States when it recognized the Soviet Government.”<sup>144</sup> As the Court stated in *Zivotofsky*, “[l]egal consequences follow formal recognition” because, among other things, “[t]he actions of a recognized sovereign committed within its own territory . . . receive deference in domestic courts under the act of state doctrine.”<sup>145</sup> The *Belmont* and *Pink* decisions are forerunners of *Zivotofsky* in recognizing legal consequences to the President’s recognition decisions. Neither case provides convincing support for the notion that the President’s unilateral signing of an international agreement itself is an exercise of legislative authority capable of altering an extant legislative framework.

#### B. *Dames & Moore and Garamendi*

In two cases that followed Congress’s abrogation of foreign sovereign immunity in 1976—*Dames & Moore v. Regan*<sup>146</sup> and *American Insurance Ass’n v. Garamendi*<sup>147</sup>—the Supreme Court reaffirmed that the President has the power to extinguish state law claims via executive agreement.<sup>148</sup> These decisions have attracted substantial criticism.<sup>149</sup> In both cases, the Court relied on an apparent history of congressional approval of executive claims settlement. In *Dames & Moore*, the Court said that the President’s settlement of claims by executive agreement reflects “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned”<sup>150</sup> so as to “raise a presumption that the [action] had been [taken] in pursuance of [Congress’s] consent.”<sup>151</sup> In *Garamendi*, the Court noted “the practice goes back over 200 years, and has received congressional acquiescence throughout its history.”<sup>152</sup> In both cases, the Court determined that the executive agreements did not contravene congressional policy,<sup>153</sup> and therefore the Court was free to conclude that the President’s actions were

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144. *Id.* at 232.

145. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015). The act-of-state doctrine follows from the constitutional separation of powers. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“The act of state doctrine does . . . have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.”); *see also* *W.S. Kirkpatrick & Co. v. Env’tl. Tectonics Corp.*, 493 U.S. 400, 404 (1990) (describing the act-of-state doctrine “as a consequence of domestic separation of powers, reflecting ‘the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs” (quoting *Banco Nacional*, 376 U.S. at 423)).

146. 453 U.S. 654 (1981).

147. 539 U.S. 396 (2003).

148. *Id.* at 415; *Dames & Moore*, 453 U.S. at 682–83.

149. *See, e.g.*, KOH, *supra* note 24, at 138–40 (criticizing *Dames & Moore*); Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 925–42 (2004).

150. *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

151. *Id.* (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

152. *Garamendi*, 539 U.S. at 415.

153. *See id.* at 427 (finding no “tension between an Act of Congress and Presidential foreign policy”); *Dames & Moore*, 453 U.S. at 687–88.

consistent with the *Steel Seizure* principle.<sup>154</sup> The Court has recently clarified that any implicit congressional approval of executive agreements extends no further than the specific context of claims settlement.<sup>155</sup> Still, these cases might be taken to authorize presidential lawmaking by executive agreement, so it is important to emphasize the limited scope of their holdings.

### 1. *Dames & Moore*

In *Dames & Moore*, the Court upheld the Algiers Accords, a sole executive agreement that aimed to resolve the Iranian hostage crisis.<sup>156</sup> Pursuant to the Accords, President Carter nullified judicial attachments of Iranian assets in this country and ordered the transfer of frozen Iranian assets.<sup>157</sup> The Accords also called for the establishment of an Iran-United States Claims Tribunal, and President Reagan (upon ratifying and adopting President Carter's executive orders) "'suspended' all 'claims which may be presented to the . . . Tribunal' and provided that such claims 'shall have no legal effect in any action now pending in any court of the United States.'"<sup>158</sup> *Dames & Moore*, a company with pending claims against Iran, sought to prevent enforcement of the executive actions implementing the Algiers Accords.<sup>159</sup>

The Court held in *Dames & Moore* that there was "specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets"<sup>160</sup> pursuant to provisions of the International Emergency Economic Powers Act (IEEPA).<sup>161</sup> There was not, however, specific statutory authorization to suspend claims.<sup>162</sup> The Court nevertheless upheld the suspension for several reasons. First, the Court explained, the enactment of related legislation that "evinces legislative intent to accord the President broad discretion" may be considered to "'invite' 'measures on independent presidential responsibility,'" at least "where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."<sup>163</sup> Second, the Court explained that "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by

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154. See *Garamendi*, 539 U.S. at 429; *Dames & Moore*, 453 U.S. at 686 (applying *Steel Seizure* to presidential suspension of claims).

155. *Medellin v. Texas*, 552 U.S. 491, 531 (2008); see *infra* notes 186–188 and accompanying text.

156. *Dames & Moore*, 453 U.S. at 687–88; see also Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to Commitments Made by Iran and the United States, U.S.-Iran, Jan. 19, 1981, 20 I.L.M. 224.

157. *Dames & Moore*, 453 U.S. at 665–66 (citing executive orders).

158. *Id.* at 666 (quoting Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981)).

159. *Id.* at 666–67.

160. *Id.* at 675.

161. Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–1707 (2012)).

162. *Dames & Moore*, 453 U.S. at 677 ("[N]either the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims.").

163. *Id.* at 678–79 (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

executive agreement.”<sup>164</sup> That implicit approval followed from historical practice as well as statutory law, such as the International Claims Settlement Act of 1949, that facilitated presidential claims settlement.<sup>165</sup> Third, the Court referred to prior decisions, such as *Pink*, that “recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.”<sup>166</sup> Fourth, Congress had not disapproved of the President’s actions.<sup>167</sup> For that reason, the Court was “clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.”<sup>168</sup>

The *Dames & Moore* Court upheld presidential claims settlement authority even though the enactment of the Foreign Sovereign Immunities Act (FSIA) in 1976 removed one of the reasons previously given for treating claims settlement as a political function to be performed by the President. According to the Court, the FSIA was “designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments.”<sup>169</sup> The Court also pointed to post-FSIA legislation that assumed that the President would continue to exercise claims settlement authority.<sup>170</sup> The Court concluded that

where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.<sup>171</sup>

The Court’s opinion repeatedly and emphatically emphasizes the narrowness of its decision,<sup>172</sup> the apparent congressional approval of the President’s

164. *Id.* at 680.

165. *Id.* (“By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements.”).

166. *Id.* at 682. *But see id.* at 683 (“The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, *at least when it is an incident to the recognition of that government.*” (emphasis added) (quoting *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951))).

167. *Id.* at 687 (“Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary.” (footnote omitted)).

168. *Id.* at 688.

169. *Id.* at 685. This seems to sidestep the point that once Americans could bring claims in court, and did not need to rely on executive grace to vindicate their claims, the President required some measure of legislative power to alter or extinguish those claims.

170. *Id.* at 685–86 (“[T]he Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements. . . . [J]ust one year after enacting the FSIA, Congress enacted the IEEPA, where the legislative history stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens.” (footnote omitted)).

171. *Id.* at 688.

172. *See id.* at 661 (“We attempt to lay down no general ‘guidelines’ covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.”); *id.* at 688 (“We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities.”); *see also* KOH,

action, and its understanding that the Algiers Accords did not contravene congressional policy.<sup>173</sup>

## 2. *Garamendi*

*Garamendi* involved a challenge by insurance companies to California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which required all insurers doing business in California to disclose information about policies the insurers sold in Europe between 1920 and 1945.<sup>174</sup> The aim of the HVIRA was to facilitate claims related to policies that were confiscated during the Nazi period.<sup>175</sup> The President, however, had signed the German Foundation Agreement, an agreement with Germany whereby Germany agreed to establish a fund to compensate those "who suffered at the hands of German companies during the National Socialist era."<sup>176</sup> In return, the United States agreed that it would submit a statement to American courts entertaining such claims that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era."<sup>177</sup>

The *Garamendi* Court held that the policy of the executive branch embodied in the German Foundation Agreement served to preempt the HVIRA.<sup>178</sup> The Court noted that its "cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress" and that "[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice" that "has received

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*supra* note 24, at 140 (identifying "the narrow reading originally intended" in *Dames & Moore*).

173. See *Dames & Moore*, 453 U.S. at 682 n.10 ("Congress, though legislating in the area, has left 'untouched' the authority of the President to enter into settlement agreements."); *id.* at 685 ("The President has exercised the power, acquiesced in by Congress, to settle claims."); *id.* at 686 ("In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.").

174. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 409 (2003).

175. *Id.* at 410–11.

176. *Id.* at 405 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," Ger.-U.S., annex A, at 1, July 17, 2000, T.I.A.S. No. 13,104).

177. *Id.* at 406 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," *supra* note 176, annex B, at 1). The United States was "unwilling to guarantee that its foreign policy interests would 'in themselves provide an independent legal basis for dismissal,'" though "the Government agreed to tell courts 'that U.S. policy interests favor dismissal on any valid legal ground.'" *Id.* (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," *supra* note 176, annex B, at 3).

178. See *id.* at 413 ("The principal argument for preemption made by petitioners and the United States as *amicus curiae* is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France.").

congressional acquiescence throughout its history.”<sup>179</sup> The Court concluded that it did not matter that the claims at issue were against foreign corporations rather than governments because it was difficult to distinguish the actions of each (at least during wartime) and that insisting on such a distinction would undermine the President’s ability to settle international controversies.<sup>180</sup> Because the President had the constitutional authority to set policy regarding such claims, and state law conflicted with the President’s policy, the Court held that state law must yield.<sup>181</sup> The Court emphasized that “Congress has done nothing to express disapproval of the President’s policy” and that “Congress has not acted on the matter addressed here.”<sup>182</sup>

The *Garamendi* Court may have been on solid ground in holding that where Congress has not legislated in an area of foreign relations, the President has some latitude to pursue his own policy in that area. However, the conclusion that the President’s policy preempted state law is more doubtful—both because the German Foundation Agreement did not purport to preempt state law<sup>183</sup> and on the ground that the Court never explains how unilateral executive policy can become “the supreme Law of the Land” with the power to displace state law.<sup>184</sup>

Perhaps aware of the difficulties underlying *Garamendi*, the Court’s most recent pronouncement on the issue has been to emphasize that *Dames & Moore* and *Garamendi* depend on a notion of congressional consent and that the President’s authority to preempt state law without congressional

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179. *Id.* at 415 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679–80, 682–83 (1981); *United States v. Pink*, 315 U.S. 203, 223, 230, 240 (1942); *United States v. Belmont*, 301 U.S. 324, 330–31 (1937)).

180. *Id.* at 416 (“[U]ntangling government policy from private initiative during wartime is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments. While a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive’s international negotiations would hamstring the President in settling international controversies.”).

181. *Id.* at 421 (“The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two.”); *id.* at 421–23 (“[T]he national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers . . . to develop acceptable claim procedures, including procedures governing disclosure of policy information. . . . California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail.”); *id.* at 425 (“HVIRA is an obstacle to the success of the National Government’s chosen ‘calibration of force’ in dealing with the Europeans using a voluntary approach.” (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380 (2000))); *id.* at 427 (“The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.”).

182. *Id.* at 429.

183. *See id.* at 430 (Ginsburg, J., dissenting) (“Although the federal approach differs from California’s, no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA.”); *see also supra* note 177 and accompanying text.

184. U.S. CONST. art. VI, cl. 2. Some such mechanism would seem to be necessary once sovereign immunity no longer bars judicial cognizance of most claims against foreign states. *See supra* Part II.A.

authorization does not extend beyond the narrow area of foreign claims settlement.<sup>185</sup>

In *Medellin*, the Court emphasized that the President's memorandum directing state courts to comply with the ICJ judgment was "not supported by a 'particularly longstanding practice' of congressional acquiescence."<sup>186</sup> Rather, any such practice was limited to the foreign claims settlement context—"a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."<sup>187</sup> Even though in *Medellin* President Bush had acted to accomplish "the resolution of a major foreign policy dispute,"<sup>188</sup> he lacked the authority to issue binding directives to the states when not acting pursuant to legislation.

In sum, the *Garamendi* line of cases suggests that the President can enter into agreements to settle claims against foreign states and foreign nationals, perhaps displacing state law, provided that the President is not contravening congressional will. Though the cases somewhat elevate the President at the expense of Congress by recognizing independent authority to act in advance of legislative authorization in this area,<sup>189</sup> the Court has never held that the President's authority is exclusive or that he may act in disregard of congressional policy, even with respect to foreign claims settlement. To the contrary, as *Medellin* illustrates, the *Steel Seizure* requirement that the President must respect congressional policy judgments continues in full force.<sup>190</sup>

### C. Other Practices

Other contexts in which the President has employed sole executive agreements demonstrate that unless the President acts within an area of exclusive presidential responsibility, such agreements cannot contravene congressional policy. The President has reached agreements with foreign countries based on his authority to direct the armed forces, for example, or

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185. *Medellin v. Texas*, 552 U.S. 491, 531–32 (2008).

186. *Id.* at 532 (quoting *Garamendi*, 539 U.S. at 415).

187. *Id.* at 531.

188. *Garamendi*, 539 U.S. at 438 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981)); see Brief for the United States as Amicus Curiae Supporting Petitioner at 15, *Medellin*, 552 U.S. 491 (No. 06-984), 2007 WL 1909462, at \*15 ("The President's determination pursuant to the Optional Protocol and U.N. Charter is an exercise of this dispute-resolution power. The President's determination to accept and implement the ICJ's decision resolves the dispute between the United States and Mexico over the ability of 51 individuals to secure review and reconsideration of their convictions and sentences. In crucial respects, the President exercises a more modest power in implementing the *Avena* decision than in entering into claims settlement agreements in other contexts.").

189. See Denning & Ramsey, *supra* note 149, at 937.

190. See *Medellin*, 552 U.S. at 531–32 ("[T]he limitations on this source of executive power are clearly set forth and the Court has been careful to note that '[p]ast practice does not, by itself, create power.'" (quoting *Dames & Moore*, 453 U.S. at 686)); *Dames & Moore*, 453 U.S. at 688 ("We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities.").

the recognition power.<sup>191</sup> Other examples involve temporary measures, such as agreements that serve as a basis of negotiations<sup>192</sup> or agreements “to afford a *modus vivendi* pending the ratification of a treaty.”<sup>193</sup> In a revealing instance, when it became clear to President Theodore Roosevelt in 1906 that the Senate would not ratify a treaty pursuant to which the United States would take over customs houses in the Dominican Republic, he executed the protocol as an executive agreement “pending the action of the United States Senate upon the treaty.”<sup>194</sup> His action sparked a significant constitutional debate.<sup>195</sup> Notably, even when the President was attempting to assert unilateral presidential authority, he formally took the action as a temporary measure in anticipation of congressional authorization—and that step was controversial.

There is, in our view, no basis for maintaining that a pattern of congressional acquiescence has created a historical gloss on the Constitution conferring authority on the President—by political agreement with foreign states or other unilateral executive action—to disregard congressional policy, whether in the foreign claims settlement arena or another foreign relations context.<sup>196</sup> We turn now to the question whether the President’s action in

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191. CRANDALL, *supra* note 114, at 102–08; *see also* EDWARD S. CORWIN, *THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS* 116 (1917) (explaining that sole executive agreements “fall into two main orders: first, those of which the initiating force is the power of Congress; second, those which the President may make in virtue either of his diplomatic powers or of his powers as Commander-in-Chief of the Army and Navy”).

192. CRANDALL, *supra* note 114, at 111–12.

193. *Id.* at 112. *See generally* WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* (1941) (arguing for the President’s power to enter into executive agreements and identifying historical precedents).

194. HENKIN, *supra* note 24, at 497 n.164 (quoting 1905 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 360 (1906)); *see also* CORWIN, *supra* note 191, at 121.

195. *See, e.g.*, 40 CONG. REC. 2125–48 (1906); 40 CONG. REC. 433–36 (1905).

196. A preliminary draft of the Restatement (Fourth) of Foreign Relations Law of the United States states that “the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments and in withdrawing the United States from treaties.” *RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES* § 113(1) (AM. LAW. INST., Council Draft No. 2, 2016). The comments and reporters’ notes provide no authority for this proposition. The Restatement draft is likely based on an overreading of *Goldwater v. Carter*, 444 U.S. 996 (1979). In that case, members of Congress sued to block President Carter’s announcement that he would recognize the People’s Republic as the sole legitimate government of China and that he planned to terminate the mutual defense treaty with Taiwan. *Goldwater*, 444 U.S. at 997–98 (Powell, J., concurring). The district court ruled that the termination would be ineffective without the consent of two-thirds of the Senate or approving legislation, and the Court of Appeals reversed. *Goldwater v. Carter*, 481 F. Supp. 949, 965 (D.D.C.), *rev’d*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979). The Supreme Court vacated the judgment and remanded with directions to dismiss. *Goldwater*, 444 U.S. at 996. Four Justices concurred in the dismissal on the ground that the action involved a nonjusticiable political question. *See id.* at 1002 (Rehnquist, J., concurring). Justice Lewis Powell concurred on ripeness grounds. *See id.* at 997 (Powell, J., concurring). Justice William Brennan would have affirmed the judgment “insofar as it rests upon the President’s well-established authority to recognize, and withdraw recognition from, foreign governments.” *Id.* at 1006 (Brennan, J., dissenting). As Justice Brennan explained, termination of the treaty with Taiwan necessarily followed from the President’s recognition of the People’s Republic. *Id.* at 1007 (“Abrogation of the defense treaty with Taiwan was a

lifting sanctions against Iran pursuant to the JCPOA contravenes congressional policy or is consistent with the *Steel Seizure* principle.

### III. THE IRAN NUCLEAR AGREEMENT AND CONGRESSIONAL POLICY

The President's unilateral implementation of the JCPOA entailed the unraveling by sole executive action of congressionally specified policy with respect to sanctions against Iran. Whatever the merits of the Court's decision in *Garamendi*, that decision did not confront any "tension between an Act of Congress and Presidential foreign policy" because, as the Court put it, "Congress has done nothing to express disapproval of the President's policy" and "has not acted on the matter addressed here."<sup>197</sup> By contrast, it cannot be gainsaid that Congress acted on the matter of Iranian sanctions and specifically prescribed the application of sanctions as the policy framework for addressing the Iranian nuclear program.<sup>198</sup> The JCPOA not only ignored but effectively ended that framework.<sup>199</sup> The result was that valid and applicable laws called for sanctioning entities that engage in certain transactions with Iran, but the United States no longer enforced those laws because of commitments President Obama made in the JCPOA.<sup>200</sup>

To be sure, some of the sanctions laws leave the decision whether to apply sanctions to the President's discretion. The IEEPA and its companion statute,

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necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes.").

The scope of the President's power to terminate or to withdraw from Senate-approved treaties remains unsettled. According to one view, such a power must involve law execution rather than lawmaking; Prakash and Ramsey emphasize that "treaties may be terminated by their own terms" or "by the occurrence of certain events." Prakash & Ramsey, *supra* note 7, at 264–65. When a President makes the requisite determinations and terminates a treaty "in accordance with its express terms or with international law," he is executing rather than making law. *Id.* at 265. Other scholars have emphasized that any presidential power to terminate treaties would not entail the authority to alter domestic law. *See* HENKIN, *supra* note 24, at 54 ("No one has suggested that under the President's 'plenary' foreign affairs powers he can, by executive act or order, enact law directly regulating persons or property in the United States."); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2235 n.56 (1999) ("[N]one of these theories recognize an executive authority to legislate upon the legal rights and duties of American citizens.").

197. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427–29 (2003).

198. *See infra* Part III.A.

199. *See infra* Part III.B.

200. In the JCPOA, President Obama agreed to end enforcement of "all nuclear-related sanctions" that are "directed towards non-U.S. persons." Joint Comprehensive Plan of Action, *supra* note 1, annex II, at 8 & n.6. That is, the JCPOA applied to those sanctions related to Iranian pursuit of nuclear weapons. The President did not end enforcement of other sanctions related to Iranian support for terrorism or violations of human rights. The following discussion focuses on the nuclear-related sanctions laws that were waived pursuant to the JCPOA. *See infra* Parts III.A–B. For an overview of all sanctions statutes applicable to Iran, including those that were not waived, see generally KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS (2016).

the National Emergencies Act,<sup>201</sup> provide substantial authority to impose sanctions to address international threats,<sup>202</sup> and Presidents have exercised these authorities to sanction Iran.<sup>203</sup> But Congress did not leave Iran sanctions policy entirely to presidential discretion. It prescribed not only that the President “may” apply certain sanctions policies but also that the President “shall” impose a range of sanctions on specified entities.<sup>204</sup> In doing so, “Congress made a conscious choice of policy”<sup>205</sup> for addressing the Iranian nuclear program via economic sanctions. As one federal appeals court has concluded, “Far from sitting by as successive Presidents maintained a sweeping sanctions regime, Congress has expanded, deepened and formalized the sanctions in a comprehensive legislative effort to target Iran through economic measures.”<sup>206</sup>

This is, in short, not an area of congressional inaction or acquiescence but one in which Congress prescribed a comprehensive legislative solution. The President’s reliance on a sole executive agreement essentially to reject Congress’s solution—indeed, to decline to enforce applicable law—renders the President’s exercise of authority pursuant to the JCPOA a violation of the *Steel Seizure* principle.

#### A. The Legislative Sanctions Regime

Sanctions have been part of American policy toward Iran since the Iranian Revolution of 1979.<sup>207</sup> In the 1980s and 1990s, sanctions policy largely focused on limiting Iranian strategic influence in the Middle East and its support for terrorism.<sup>208</sup> Since the mid-2000s, sanctions policy has been

201. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651 (2012)).

202. See 50 U.S.C. § 1702(a)(1)(A) (2012) (providing that the President may “investigate, regulate, or prohibit” any transactions in foreign exchange, any transfers between banking institutions that involve foreign interests, and any importing or exporting of currency or securities “by any person, or with respect to any property, subject to the jurisdiction of the United States”); *id.* § 1702(a)(1)(B) (providing that the President may “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States”).

203. See, e.g., Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 22, 2012); Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005); Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 19, 1997). No one doubts that the President may revoke prior executive orders. See Exec. Order No. 13,716, 81 Fed. Reg. 3693 (Jan. 16, 2016) (revoking prior executive orders).

204. See *infra* Part III.A.

205. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 602 (1952) (Frankfurter, J., concurring).

206. *United States v. Amirnazmi*, 645 F.3d 564, 579 (3d Cir. 2011). The court was addressing a defendant’s argument that the sanctions regime “violated fundamental separation-of-powers precepts” because Congress had neglected its “responsibility to monitor the implementation of the Iranian sanctions regime” and thereby “allowed the President to arrogate ‘virtually unlimited power over foreign trade.’” *Id.* at 577.

207. See KATZMAN, *supra* note 200, at 1.

208. *Id.*

aimed at thwarting the further development of Iran's nuclear weapons program, and the American effort has become the focal point of international cooperation toward that goal.<sup>209</sup> Beginning in 2006, the United States deployed sanctions to limit the ability of Iran to transact with non-U.S. counterparties through the international financial system.<sup>210</sup> This strategy involved the imposition of secondary sanctions, which prohibited U.S. entities from transacting with non-U.S. entities that engaged in certain transactions with Iran.<sup>211</sup> The goal was to pressure Iran by denying it access to international markets.<sup>212</sup> When he signed the JCPOA, President Obama committed to suspend, if not effectively to terminate, this nuclear-related sanctions regime,<sup>213</sup> so it is worth outlining the relevant congressional legislation establishing the regime.

### 1. Iran Sanctions Act

In 1996, Congress adopted the Iran Sanctions Act (ISA or ILSA)<sup>214</sup> to deny Iran financial resources by targeting its energy sector. The Act was an attempt to apply secondary sanctions against Iran by authorizing U.S. penalties against third-country firms.<sup>215</sup> In particular, section 5(a) of the Act, which was codified as a statutory note to 50 U.S.C. § 1701, provides that “the President shall impose” five or more specified financial penalties<sup>216</sup> on any entity that makes an investment of \$20 million or more which “directly and significantly contributes to the enhancement of Iran’s ability to develop petroleum resources.”<sup>217</sup> With the Comprehensive Iran Sanctions,

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209. *Id.*

210. *Id.* at 26–28.

211. *Id.* at 28–29.

212. *Id.* at 28.

213. *See generally* Joint Comprehensive Plan of Action, *supra* note 1.

214. Pub. L. No. 104-172, 110 Stat. 1541 (1996) (codified as amended at 50 U.S.C. § 1701 note (2012) (Iran Sanctions)). Originally named the “Iran and Libya Sanctions Act,” the law was retitled after it terminated with respect to Libya in 2006. Iran Freedom Support Act, Pub. L. No. 109-293, § 205(g), 120 Stat. 1344, 1347 (2006) (codified as amended at 50 U.S.C. § 1701 note sec. 205(g) (2012) (Iran Sanctions)).

215. *See* KATZMAN, *supra* note 200, at 10.

216. 50 U.S.C. § 1701 note sec. 5(a)(1)(A) (Supp. II 2015) (Iran Sanctions). Originally, the Act required three or more penalties, 50 U.S.C. § 1701 note sec. 5(a)(1)(A) (2012) (Iran Sanctions), but Congress later raised that number to five, 50 U.S.C. § 1701 note sec. 5(a)(1)(A) (Supp. II 2015) (Iran Sanctions). As amended, the Act provides for penalties including a prohibition on Export-Import Bank assistance for exports to sanctioned persons; a prohibition on export licenses to a sanctioned person; a prohibition on loans from U.S. financial institutions; a prohibition on designating a sanctioned financial institution as a primary dealer in U.S. Government debt instruments; a prohibition on allowing a sanctioned financial institution to serve as a repository of U.S. Government funds; a prohibition on U.S. Government procurement of goods or services from a sanctioned person; a prohibition on foreign-exchange transactions in which the sanctioned person has an interest; a prohibition on transactions between financial institutions in which the sanctioned person has an interest; a prohibition on property transactions in which the sanctioned person has an interest; a prohibition on investments in the equity of a sanctioned person, the denial of visas or expulsion of any corporate officer or controlling shareholder of a sanctioned person; and the imposition of any of these sanctions on the principal executive officers of a sanctioned person. *Id.* § 1701 note sec. 6(a).

217. *Id.* § 1701 note sec. 5(a)(1).

Accountability, and Divestment Act of 2010 (CISADA),<sup>218</sup> Congress amended section 5(a) to impose the same requirement with respect to any entity that (1) provides Iran with “goods, services, technology, information, or support that could directly and significantly facilitate the maintenance or expansion of Iran’s domestic production of refined petroleum products”<sup>219</sup> or (2) provides Iran with refined petroleum products or support that could enhance Iran’s ability to import refined petroleum products.<sup>220</sup> Congress expanded the scope of sanctions under section 5(a) yet again with the Iran Threat Reduction and Syria Human Rights Act of 2012 (TRA),<sup>221</sup> which extended the required sanctions to any entity that (1) participates in a joint venture with Iran with respect to the development of petroleum resources outside Iran,<sup>222</sup> (2) supports Iran’s ability to develop domestic petroleum resources or domestic production of refined petroleum products,<sup>223</sup> (3) supports Iran’s domestic production of petrochemical products,<sup>224</sup> (4) transports crude oil from Iran,<sup>225</sup> or (5) conceals the Iranian origin of crude oil or refined petroleum products transported on a vessel in which the entity has an interest.<sup>226</sup>

In addition to specifying the required sanctions and the entities to which those sanctions must be applied, Congress also identified in the Iran Sanctions Act the circumstances under which the President would no longer be obliged to impose sanctions. Congress provided that “[t]he requirement under section 5(a) to impose sanctions shall no longer have force or effect with respect to Iran if the President determines and certifies to the appropriate congressional committees that Iran” (1) has ceased its efforts to develop or to acquire nuclear, chemical, and biological weapons as well as ballistic missiles, (2) has been removed from the list of countries that support international terrorism, and (3) “poses no significant threat to United States national security, interests, or allies.”<sup>227</sup>

If the President cannot make such certifications, the Act allows more limited case-by-case waivers of the mandatory sanctions where the President certifies that national security interests require a waiver. Section 9(c) of the Iran Sanctions Act provides that “[t]he President may waive, on a case-by-case basis and for a period of not more than one year, the requirement in section 5(a) to impose a sanction or sanctions” if “the President determines and so reports to the appropriate congressional committees that it is essential to the national security interests of the United States to exercise such waiver

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218. Pub. L. No. 111-195, § 102, 124 Stat. 1312, 1317 (2010) (codified as amended at 22 U.S.C. §§ 8501–8551 (2012)).

219. 50 U.S.C. § 1701 note sec. 5(a)(2)(B) (Supp. V 2006).

220. *Id.* § 1701 note sec. 5(a)(3).

221. Pub. L. No. 112-158, 126 Stat. 1214 (2012) (codified as amended at 50 U.S.C. § 1701 note secs. 5–6 (Supp. II 2015) (Iran Sanctions)).

222. 50 U.S.C. § 1701 note sec. 5(a)(4) (Supp. II 2015) (Iran Sanctions).

223. *Id.* § 1701 note sec. 5(a)(5).

224. *Id.* § 1701 note sec. 5(a)(6).

225. *Id.* § 1701 note sec. 5(a)(7).

226. *Id.* § 1701 note sec. 5(a)(8).

227. 50 U.S.C. § 1701 note sec. 8 (2012) (Iran Sanctions).

authority.”<sup>228</sup> The required report under this section requires the President to provide “a specific and detailed rationale” for each entity so exempted from the penalties under section 5(a).<sup>229</sup> The President must supply “a description of the conduct that resulted in the determination” that sanctions apply to that entity in the first place.<sup>230</sup> The President must provide, “in the case of a foreign person, an explanation of the efforts to secure the cooperation of the government with primary jurisdiction over the sanctioned person to terminate or, as appropriate, penalize the activities that resulted in the determination.”<sup>231</sup> He must further provide “an estimate of the significance of the conduct of the person in contributing to the ability of Iran to” obtain weapons or petroleum products<sup>232</sup> as well as “a statement as to the response of the United States in the event that the person concerned engages in other activities that would be subject to” sanctions.<sup>233</sup>

If the President is not pursuing a particular entity while acting in concert with its host country—but wants instead to avoid diplomatic fallout from sanctioning a foreign national under section 5(a)—the Act provides a more general but also more time-limited waiver authority for foreign nationals. Section 4(c) provides:

The President may, on a case by case basis, waive for a period of not more than six months the application of section 5(a) with respect to a national of a country, if the President certifies to the appropriate congressional committees at least 30 days before such waiver is to take effect that such waiver is vital to the national security interests of the United States.<sup>234</sup>

The President may renew such a waiver “for subsequent periods of not more than six months each.”<sup>235</sup>

The waiver authority provided by section 4(c) is carefully delimited. Waivers must be on a “case by case basis,” are limited to six-month periods, and are authorized only when “vital” to national security interests.<sup>236</sup> These requirements did not appear in the original legislation.<sup>237</sup> Rather, Congress specifically added such language to section 4(c) as well as other waiver

228. *Id.* § 1701 note sec. 9(c)(1)(A).

229. *Id.* § 1701 note sec. 9(c)(2).

230. *Id.* § 1701 note sec. 9(c)(2)(A).

231. *Id.* § 1701 note sec. 9(c)(2)(B).

232. *Id.* § 1701 note sec. 9(c)(2)(C).

233. *Id.* § 1701 note sec. 9(c)(2)(D).

234. *Id.* § 1701 note sec. 4(c)(1)(A).

235. *Id.* § 1701 note sec. 4(c)(2)(B)(i).

236. *Id.* § 1701 note sec. 4(c)(1)(A).

237. Originally, section 4(c) provided as follows:

The President may waive the application of section 5(a) with respect to nationals of a country if—

(1) that country has agreed to undertake substantial measures, including economic sanctions, that will inhibit Iran’s efforts to carry out activities described in section 2 and information required by subsection (b)(1) has been included in a report submitted under subsection (b); and

(2) the President, at least 30 days before the waiver takes effect, notifies the appropriate congressional committees of his intention to exercise the waiver.

50 U.S.C. § 1701 note sec. 4(c) (2000) (Iran and Libya Sanctions).

provisions to clarify its intention that waiver authority “shall be case by case and shall not be used as a general waiver.”<sup>238</sup> Congress amended section 4(c) to add the “case by case” proviso, the time limitation, and the “vital” standard when it adopted the Iran Freedom Support Act of 2006 (IFSA).<sup>239</sup> The tightening of waiver authority responded to the use of that authority by the Clinton administration to exempt companies in the European Union from sanctions related to Iran’s energy sector.<sup>240</sup> Members of Congress insisted that the statute authorized waivers only with respect to individual entities and that “there was no provision in ILSA for extending the waiver to the entire continent nor was there ever intended to be.”<sup>241</sup> Accordingly, Congress clarified that waivers could be granted only on an individualized and time-limited basis.<sup>242</sup> Congress also created a heightened standard for invoking a national security justification for waiver.<sup>243</sup> The “vital” standard represented a higher threshold than the “important to the security interests of the United States” standard, which Congress had used elsewhere,<sup>244</sup> or the lack of a standard appearing in the original section 4(c).<sup>245</sup>

Despite Congress’s intent in section 4(c) to authorize waivers only on an individualized, time-limited, and extraordinary basis, the Obama administration invoked section 4(c) to cease enforcing sanctions under section 5(a) of the Iran Sanctions Act against all non-U.S. nationals for the fifteen-year life of the JCPOA.<sup>246</sup>

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238. H.R. REP. NO. 111-512, at 69 (2010).

239. Pub. L. No. 109-293, § 201, 120 Stat. 1344, 1345 (2006) (codified as amended at 50 U.S.C. § 1701 note sec. 4(c) (2012) (Iran Sanctions)); *see also* H.R. REP. NO. 109-417, at 20 (2006) (“Subsection (b) amends Section 4(c) of ILSA to provide that waivers of sanctions against nationals of countries (including entities) under Section 5(a) of ILSA may be made by the President, on a case by case basis, for a period of not more than six months with respect to a national of a country, if the President certifies to the appropriate congressional committees at least 30 days before such waiver is to take effect that: (A) such waiver is vital to the national security interests of the United States; and (B) the country of the national has undertaken substantial measures to prevent the acquisition and development of weapons of mass destruction by the Government of Iran.”).

240. H.R. REP. NO. 109-417, at 10 (“In 1998, then-Secretary of State Madeleine Albright found that an investment by Total, a French firm, in Iran violated ILSA but waived sanctions and indicated that additional waivers would be forthcoming if there was cooperation from European Union states on non-proliferation matters with respect to Iran.”).

241. *Enforcement of the Iran-Libya Sanctions Act and Increasing Security Threats from Iran: Hearing Before the H. Subcomm. on the Middle E. & Cent. Asia of the H. Comm. on Int’l Relations*, 108th Cong. 4 (2003) (statement of Rep. Ileana Ros-Lehtinen, Chairwoman, Subcomm. on the Middle E. & Cent. Asia) (“Secretary Albright . . . went too far in granting this waiver. While statutorily permitted to grant the company a waiver, there was no provision in ILSA for extending the waiver to the entire continent, nor was there ever intended to be.”).

242. 50 U.S.C. § 1701 note sec. 4(c)(1)(A) (2012) (Iran Sanctions).

243. *See id.*

244. *See, e.g.*, H.R. REP. NO. 109-417, at 7 (using an “important to the national security interests of the United States” standard in the waiver context).

245. 50 U.S.C. § 1701 note sec. 4(c) (2000) (Iran and Libya Sanctions); *see also* H.R. REP. NO. 111-512, at 46 (2010) (“Among other provisions, the IFSA strengthened sanctions under ISA, including raising certain waiver thresholds to ‘vital to the national security interests of the United States.’”).

246. Kerry, *supra* note 13, at 4–5; *see infra* notes 287–88 and accompanying text.

## 2. National Defense Authorization Act for Fiscal Year 2012

In Section 1245 of the National Defense Authorization Act for Fiscal Year 2012, Congress expanded its use of financial sanctions to target the Iranian Central Bank and Iranian oil exports.<sup>247</sup> Congress designated “[t]he financial sector of Iran, including the Central Bank of Iran,” as “a primary money laundering concern.”<sup>248</sup> Congress mandated in the 2012 National Defense Authorization law that “[t]he President shall . . . block and prohibit all transactions in all property and interests in property of an Iranian financial institution” if such property is subject to U.S. jurisdiction.<sup>249</sup> Congress further required that the President “shall prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account . . . by a foreign financial institution that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran.”<sup>250</sup>

Again, Congress specified the circumstances under which these sanctions would no longer be required. Congress provided that the sanctions “shall terminate” thirty days after the President certifies to Congress that “the Government of Iran has ceased providing support for acts of international terrorism and no longer satisfies the requirements for designation as a state sponsor of terrorism” and that “Iran has ceased the pursuit, acquisition, and development of, and verifiably dismantled its, nuclear, biological, and chemical weapons and ballistic missiles and ballistic missile launch technology.”<sup>251</sup>

If the conditions for this sunset provision are not met, the 2012 National Defense Authorization Act provides for limited waivers. To reward international cooperation with the sanctions regime, the sanctions “shall not apply” to a financial transaction involving a foreign financial institution if its host country “has significantly reduced its volume of crude oil purchases from Iran.”<sup>252</sup> If neither the sunset provision nor this exception apply, and the President still believes that the strict application of sanctions would jeopardize national security interests, he may waive the imposition of sanctions pursuant to section 1245(d)(5) “for a period of not more than 120 days, and may renew that waiver for additional periods of not more than 120 days, if the President” determines that a waiver “is in the national security interest of the United States” and submits a report to Congress that

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247. Pub. L. No. 112-81, § 1245, 125 Stat. 1298, 1647–50 (2011) (codified as amended at 22 U.S.C. § 8513a (Supp. IV 2017)).

248. 22 U.S.C. § 8513a(b) (2012).

249. *Id.* § 8513a(c). Congress said the President shall do so pursuant to the International Emergency Economic Powers Act, which generally empowers the President to impose economic sanctions at his discretion. 50 U.S.C. §§ 1701–1707 (2012). Congress made this sanction mandatory. 22 U.S.C. § 8513a(c).

250. 22 U.S.C. § 8513a(d)(1)(A).

251. *Id.* § 8513a(i) (providing that “[t]he provisions of this section shall terminate on the date that is 30 days after the date on which the President submits to Congress the certification described in section 8551(a) of this title”); *see also id.* § 8551(a) (describing the required certification).

252. *Id.* § 8513a(d)(4)(D).

(1) provides “a justification for the waiver,” (2) certifies “that the country with primary jurisdiction over the foreign financial institution otherwise subject to the sanctions faced exceptional circumstances that prevented the country from being able to reduce significantly its purchases of petroleum and petroleum products from Iran,” and (3) specifies “any concrete cooperation the President has received or expects to receive as a result of the waiver.”<sup>253</sup>

Again, Congress made the waiver provision more restrictive over time. The original section 1245(d)(5) contained no requirement that the President certify “exceptional circumstances” on the part of the host country.<sup>254</sup> Congress amended section 1245(d)(5) to add this requirement when it passed the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA) as part of the National Defense Authorization Act for Fiscal Year 2013.<sup>255</sup> The amendment “insert[ed] an additional determination the President is required to make when issuing a waiver of sanctions with respect to petroleum transactions.”<sup>256</sup> Under the provision, the President is “required, prior to issuing a waiver of sanctions, to certify that the country with primary jurisdiction over the foreign financial institution otherwise subject to the sanctions faced exceptional circumstances that prevented the country from being able to significantly reduce its volume of crude oil purchases.”<sup>257</sup> The provision demonstrates Congress’s intent to authorize a presidential waiver only with respect to an individual “foreign financial institution.”<sup>258</sup> The requirement that the President make specific findings about the institution’s host country is incompatible with a blanket waiver that extends to entities in multiple countries. Nevertheless, the Obama administration invoked section 1245(d)(5) to waive the imposition of sanctions under section 1245 with respect to *all* foreign financial institutions.<sup>259</sup>

### 3. Iran Threat Reduction and Syria Human Rights Act of 2012

In addition to the amendments to the Iran Sanctions Act discussed above,<sup>260</sup> the Iran Threat Reduction and Syria Human Rights Act of 2012 (TRA) includes freestanding provisions that impose additional sanctions.<sup>261</sup> Section 212 of the Act provides that “the President shall impose [five] or more” of the financial sanctions outlined in the Iran Sanctions Act on any entity that “provides underwriting services or insurance or reinsurance for the National Iranian Oil Company, the National Iranian Tanker Company, or a

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253. *Id.* § 8513a(d)(5).

254. Pub. L. No. 112-81, § 1245(d)(5), 125 Stat. 1298, 1649 (2011).

255. Pub. L. No. 112-239, sec. 1250, § 1245(d)(5)(B), 126 Stat. 1632, 2016–17 (2013) (codified at 22 U.S.C. § 8513(a) (2012)); *see infra* note 266.

256. H.R. REP. NO. 112-705, at 907 (2012).

257. *Id.*

258. *See id.*

259. The waiver excludes transactions involving persons on the Treasury Department’s Specially Designated Nationals List. Kerry, *supra* note 13, at 4; *see also infra* notes 299–300.

260. *See supra* notes 221–26 and accompanying text.

261. 22 U.S.C. §§ 8722–8723 (2012).

successor entity to either such company.”<sup>262</sup> Section 213 provides that “[t]he President shall impose [five] or more of the sanctions” on any entity that “purchases, subscribes to, or facilitates the issuance” of “sovereign debt of the Government of Iran”—or “debt of any entity owned or controlled by Iran”—including bonds.<sup>263</sup> For these sanctions, the Iran Threat Reduction Act adopts by reference the same sunset and waiver provisions as the Iran Sanctions Act.<sup>264</sup> The Obama administration invoked the waiver provisions to cease the imposition of sanctions under sections 212 and 213 to all non-U.S. nationals.<sup>265</sup>

#### 4. Iran Freedom and Counter-Proliferation Act of 2012

Four sections of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA)<sup>266</sup> further expand the nuclear-related sanctions regime applicable to Iran. Section 1244 designates as “entities of proliferation concern” all “[e]ntities that operate ports in Iran and entities in the energy, shipping, and shipbuilding sectors of Iran, including the National Iranian Oil Company, the National Iranian Tanker Company, the Islamic Republic of Iran Shipping Lines, and their affiliates” because of Congress’s determination that those institutions “play an important role in Iran’s nuclear proliferation efforts.”<sup>267</sup> Accordingly, section 1244(c)(1) mandates that “the President shall block and prohibit all transactions in all property and interests in property” of any entity that is part of the Iranian energy, shipping, or shipbuilding sectors; that operates a port in Iran; or that provides support to any such entity.<sup>268</sup> Section 1244(d) requires the President to apply at least five of the sanctions specified in the Iran Sanctions Act to any entity that engages in trade related to the Iranian energy, shipping, or shipbuilding sectors<sup>269</sup> and to restrict the maintenance in the United States of a correspondent account for any financial institution that facilitates such trade.<sup>270</sup> Congress indicated in section 1244(h)(2) that these sanctions “shall apply to a foreign financial institution that conducts or facilitates a financial transaction for the sale, supply, or transfer to or from Iran of natural gas” except under specified circumstances.<sup>271</sup> The President may waive the imposition of sanctions under section 1244 “for a period of not more than 180 days, and may renew

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262. *Id.* § 8722(a). For those financial sanctions, see *supra* note 216.

263. 22 U.S.C. § 8723(a).

264. *Id.* § 8722(d) (providing that those “provisions of the Iran Sanctions Act of 1996, as amended by this Act, apply with respect to the imposition of sanctions under subsection (a) to the same extent that such provisions apply with respect to the imposition of sanctions under section 5(a) of the Iran Sanctions Act of 1996”); *id.* § 8723(b) (same); see *supra* notes 227–35 and accompanying text.

265. Kerry, *supra* note 13, at 4.

266. The IFCA was adopted as Title XII, Subtitle D, of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 1244–1247 (2012) (codified as amended at 22 U.S.C. §§ 8803–8806 (2012)).

267. 22 U.S.C. § 8803(b).

268. *Id.* § 8803(c)(1); see also *id.* § 8803(c)(2) (defining covered entities).

269. *Id.* § 8803(d)(1).

270. *Id.* § 8803(d)(2).

271. *Id.* § 8803(h)(2).

that waiver for additional periods of not more than 180 days,” if the President “determines that such a waiver is vital to the national security of the United States” and “submits to the appropriate congressional committees a report providing a justification for the waiver.”<sup>272</sup>

Section 1245 requires the President to apply at least five of the sanctions described in the Iran Sanctions Act to any entity that engages in trade with Iran involving precious metals and other specified materials.<sup>273</sup> The section also directs the President to restrict the maintenance of a correspondent account for any foreign financial institution that facilitates such trade.<sup>274</sup> Congress was apparently concerned that Iran was using such materials to alleviate the impact of economic sanctions. It required the President to publish a periodic report on whether Iran was using the specified materials “as a medium for barter, swap, or any other exchange or transaction” or was listing such materials “as assets of the Government of Iran for purposes of the national balance sheet of Iran.”<sup>275</sup> Congress also directed the President to report on which sectors of the Iranian economy are controlled by Iran’s Revolutionary Guard Corps and which of the specified materials are used in connection with Iran’s nuclear, military, or ballistic missile programs.<sup>276</sup> The President may waive the imposition of sanctions under section 1245 “for a period of not more than 180 days, and may renew that waiver for additional periods of not more than 180 days,” if the President “determines that such a waiver is vital to the national security of the United States” and “submits to the appropriate congressional committees a report providing a justification for the waiver.”<sup>277</sup>

Section 1246 mandates the application of five sanctions specified in the Iran Sanctions Act to entities that provide underwriting or insurance services for any sanctioned activity or entity—including activities in the energy, shipping, and shipbuilding sectors and trade in specified materials.<sup>278</sup> The President may waive the imposition of sanctions under section 1246 “for a period of not more than 180 days, and may renew that waiver for additional periods of not more than 180 days,” if the President “determines that such a waiver is vital to the national security of the United States” and “submits to the appropriate congressional committees a report providing a justification for the waiver.”<sup>279</sup>

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272. *Id.* § 8803(i)(1).

273. *Id.* § 8804(a)(1); *see also id.* § 8804(d) (“Materials described in this subsection are graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes.”).

274. *Id.* § 8804(c).

275. *Id.* § 8804(e) (“Not later than 180 days after January 2, 2013, and every 180 days thereafter, the President shall submit to the appropriate congressional committees and publish in the Federal Register a report that contains the determination of the President with respect to [these issues].”).

276. *Id.*

277. *Id.* § 8804(g)(1).

278. *Id.* § 8805(a)(1).

279. *Id.* § 8805(e)(1).

Section 1247 requires the President to prohibit any correspondent account by a foreign financial institution that has “knowingly facilitated a significant financial transaction on behalf of any Iranian person included on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of the Department of the Treasury.”<sup>280</sup> The President may waive the imposition of sanctions under section 1247 “for a period of not more than 180 days, and may renew that waiver for additional periods of not more than 180 days,” if the President “determines that such a waiver is vital to the national security of the United States” and “submits to the appropriate congressional committees a report providing a justification for the waiver.”<sup>281</sup>

The use of the “vital” standard in the waiver provisions of the IFCA contrasts with more lax standards used in other portions of the National Defense Authorization Act for Fiscal Year 2013, which allow executive officials to waive other requirements upon a determination that “it is in the national security interest of the United States to do so.”<sup>282</sup> These provisions, which the Obama administration invoked to waive the corresponding sanctions provisions of the IFCA,<sup>283</sup> entail a high burden of justification.

### B. Bypassing the Legislative Framework

Over a long period, Congress entrenched, expanded, and fine-tuned the sanctions regime targeted at Iran’s nuclear program. All the sanctions provisions discussed in the preceding Part remain binding law.<sup>284</sup> Yet when President Obama signed the JCPOA, the President agreed that “[t]he United States commits to cease the application of . . . all nuclear-related sanctions” as specified in annex II of the agreement, which identifies the statutory provisions designed to deny Iran access to the international financial system and to prevent the development of its energy and shipping sectors.<sup>285</sup>

To follow through on the commitment made in the JCPOA, the President purported to exercise the waiver provision applicable to each sanction in order to cease enforcing the nuclear-related sanctions altogether. Secretary

280. *Id.* § 8806(a). The sanction does not apply to an Iranian financial institution that has not been designated for the imposition of sanctions in connection with Iran’s proliferation of weapons of mass destruction, support for international terrorism, or abuses of human rights. *Id.* § 8806(b).

281. *Id.* § 8806(f)(1).

282. Compare National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1228(c)(2), 126 Stat. 1632, 2002 (2013), with *id.* § 913(c)(1) sec. 2277(c)(3)(B), 126 Stat. at 1876, and *id.* § 1028(d)(1)(D), 126 Stat. at 1916, and *id.* § 1227(d)(2), 126 Stat. at 2001.

283. See Kerry, *supra* note 13, at 1.

284. See 22 U.S.C. §§ 8501–8551 (2012); 22 U.S.C. §§ 8701–8795 (2012); 22 U.S.C. §§ 8803–8806 (2012); 50 U.S.C. § 1701 note (2012); 50 U.S.C. §§ 1701–1707 (2012).

285. Joint Comprehensive Plan of Action, *supra* note 1, annex II, at 8. The agreement notes that “[t]he sanctions that the United States will cease to apply . . . pursuant to its commitment under [the JCPOA] are those directed towards non-U.S. persons.” *Id.* at 8 n.6. U.S. persons and U.S.-controlled entities remain generally prohibited from conducting transactions with Iran, unless the Office of Foreign Assets Control of the Treasury Department authorizes them to do so. *Id.*

Kerry wrote to Congress on behalf of the President to invoke the eight different waiver provisions.<sup>286</sup> Pursuant to section 4(c) of the Iran Sanctions Act, for example, Secretary Kerry purported to “find that it is vital to the national security interests of the United States to issue waivers regarding the application of sanctions” under section 5(a) “for transactions by non-U.S. nationals in cases where the transactions are for activities described in [specified provisions] of Annex II of the JCPOA.”<sup>287</sup> The specified provisions of Annex II, in turn, describe all the activities that are sanctionable under section 5(a) of the Iran Sanctions Act.<sup>288</sup> Each description of an activity is listed alongside the provision of U.S. law that sanctions that activity, indicating that the intent is to end enforcement of the applicable legal provision.<sup>289</sup>

In other words, President Obama invoked the various waiver provisions—some of which explicitly must be applied “on a case by case basis”<sup>290</sup> and all of which are time-limited<sup>291</sup>—effectively to repeal seventeen different sanctions laws for the fifteen-year life of the JCPOA and presumably thereafter.<sup>292</sup> It would be difficult to argue that such an action is compatible “with the expressed or implied will of Congress” so as to be consistent with the *Steel Seizure* principle.<sup>293</sup> First, Congress mandated sanctions that had previously been subject to the President’s discretionary authority under IEEPA.<sup>294</sup> Second, Congress limited the President’s ability to waive sanctions to individual cases, to individual sanctions provisions, and to limited periods of time.<sup>295</sup> Third, Congress provided sunset provisions that specified the conditions under which the President could cease applying sanctions altogether—conditions that were not met prior to the JCPOA.<sup>296</sup> Even if there might be some room to debate the scope of a permissible waiver, the presence of these sunset provisions indicates that the scope must be something short of wholesale suspension, which the President purported to accomplish in agreeing to the JCPOA.

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286. Kerry, *supra* note 13.

287. *Id.* at 4–5.

288. See Joint Comprehensive Plan of Action, *supra* note 1, annex II, at 9–10 (committing to end “[s]anctions on the provision of underwriting services, insurance, or reinsurance in connection with activities consistent with this JCPOA”; “[e]fforts to reduce Iran’s crude oil sales, including limitations on the quantities of Iranian crude oil sold and the nations that can purchase Iranian crude oil”; “[s]anctions on investment, including participation in joint ventures, goods, services, information, technology and technical expertise and support for Iran’s oil, gas, and petrochemical sectors”; “[s]anctions on the export, sale or provision of refined petroleum products and petrochemical products to Iran”; and “[s]anctions on associated services for each of the categories”).

289. See *id.*

290. See *supra* note 234 and accompanying text.

291. See *supra* notes 234–35, 253–55, 264, 272, 277, 279, 281 and accompanying text.

292. Kerry, *supra* note 13.

293. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

294. See *supra* Part III.A; see also *supra* notes 205–06 and accompanying text.

295. See *supra* Part III.A.

296. See *supra* notes 227, 251, 264 and accompanying text.

Defenders of the President's strategy suggest that if Congress did not want the President to be able effectively to repeal the sanctions legislation it passed, Congress should not have provided waiver authority to the President.<sup>297</sup> But this position implies that Congress's only option was to mandate an inflexible sanctions regime that made no allowance for national security exceptions. Short of a flat-out bar on executive discretion, it is unclear what else Congress could have done to implement a policy of imposing sanctions but allowing waivers in particularized circumstances. Congress cannot feasibly or constitutionally retain a veto over the President's waiver decisions.<sup>298</sup> The most it can responsibly do is what it did in the Iran sanctions legislation it enacted: require the President to provide a detailed justification for each waiver so he is required to focus on individual circumstances case by case and limit the length of the waiver period so that the President must periodically return to Congress to justify his decision.

With his blanket waivers of sanctions, President Obama does not appear to have complied even with these modest requirements. In waiving sanctions under the 2012 National Defense Authorization Act, for example, the President did not submit a report to Congress "certifying that the country with primary jurisdiction over the foreign financial institution otherwise subject to the sanctions faced exceptional circumstances that prevented the country from being able to reduce significantly its purchases of petroleum and petroleum products from Iran"<sup>299</sup> and "that includes any concrete cooperation the President has received or expects to receive as a result of the waiver."<sup>300</sup> The President did not and could not provide such individualized reports for all the financial institutions that would be subject to sanctions in the absence of his waiver because it is not possible to identify them all. That is the point. Requiring individualized reports makes clear that Congress has authorized only individualized waivers—that is, waivers "on a case by case basis"<sup>301</sup>—which is apparent from reading the provisions reasonably in context. If the JCPOA experience leads to Congress writing stricter statutes with less flexibility, it would not be because Congress erred in giving the President too much waiver authority but because the President failed to respect the limited character of the waiver provisions Congress enacted in the first place.

This is not a question of the President merely failing to dot i's or cross t's. The *Steel Seizure* principle requires the President to respect "the plan Congress adopted"<sup>302</sup> or, in other words, "the expressed or implied will of

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297. See, e.g., Jack Goldsmith, *More Weak Arguments for the Illegality of the Iran Deal*, LAWFARE (July 27, 2015, 2:46 PM), <https://www.lawfareblog.com/more-weak-arguments-illegality-iran-deal> [<https://perma.cc/DTH5-VCCC>] ("The Deal may well show that Congress has delegated or acquiesced in the expansion of too much presidential power. Perhaps Congress will draw lessons from and act on that realization—but I doubt it.")

298. *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding legislative vetoes to be unconstitutional).

299. 22 U.S.C. § 8513a(d)(5)(B)(ii) (2012); see also *id.* § 8513a(d)(4)(D); *supra* note 255 and accompanying text.

300. 22 U.S.C. § 8513a(d)(5)(B)(iii); see *supra* note 253 and accompanying text.

301. See *supra* note 234 and accompanying text.

302. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 586 (1952).

Congress.”<sup>303</sup> It resembles a preemption analysis. If Congress has legislated a framework to govern a particular area, erecting an alternative framework requires new legislation and cannot be accomplished by executive action alone.<sup>304</sup> The President might have discretion to act where the field is open,<sup>305</sup> but where Congress has acted, it has, in effect, occupied the field—and the President is correspondingly constrained.

The President’s unilateral commitments in the JCPOA disregarded the congressional policy framework in violation of the separation of powers. Congress adopted a plan for the imposition of sanctions and for impeding the Iranian nuclear program—just as Congress, in *Steel Seizure*, had adopted policies for the seizure of property as a means of dealing with labor disputes. The President, in both cases, sought to address the same issues by acting contrary to the congressional plan.<sup>306</sup> The JCPOA might have represented a different circumstance if Congress had not entered the field—if Congress, for example, had never adopted mandatory sanctions on Iran but left the matter to executive discretion. But Congress did legislate in that area, and its plan remains law until it is changed by statute or by treaty.

### C. The Foreign Subsidiary Loophole

It turns out that Congress did not authorize even case-by-case waivers for every aspect of the sanctions regime. White House lawyers apparently wondered whether the JCPOA could be implemented without legislative changes because of the so-called “‘foreign sub’ loophole.”<sup>307</sup> Prior to 2012, foreign subsidiaries of American companies were not prohibited from transacting business with Iran.<sup>308</sup> Congress closed this “loophole” when it adopted the TRA, which in section 218 made American parent companies liable for the conduct of foreign subsidiaries.<sup>309</sup>

In the JCPOA, the President agreed effectively to restore the foreign subsidiary loophole by committing to “[I]cense non-U.S. entities that are owned or controlled by a U.S. person to engage in activities with Iran that are

303. *Id.* at 637 (Jackson, J., concurring).

304. Provided, of course, that Congress had the authority to legislate in the first place.

305. *See supra* note 56 and accompanying text.

306. *See supra* Parts I.A, III.B.

307. James Rosen, *Exclusive: U.S. Officials Conclude Iran Deal Violates Federal Law*, FOX NEWS (Oct. 9, 2015), <http://www.foxnews.com/politics/2015/10/08/exclusive-us-officials-conclude-iran-deal-violates-federal-law.html> [<https://perma.cc/AF56-8D8G>].

308. During the 2015 Republican primary, the foreign-sub loophole was featured in the news when criticism emerged that while Carly Fiorina was CEO of Hewlett-Packard, the company sold printers and other equipment to Iran. *See* Josh Rogin, *Fiorina’s HP Earned Millions from Sales in Iran*, BLOOMBERG (Sept. 14, 2015, 3:45 PM), <http://www.bloombergview.com/articles/2015-09-14/under-fiorina-hp-earned-millions-from-sales-in-iran> [<https://perma.cc/TVT2-947G>]. It turned out that a subsidiary of Hewlett-Packard based in the Netherlands sold the equipment to a distributor based in the United Arab Emirates before it finally reached Iran. *Id.* Though Hewlett-Packard was itself prohibited from transacting with Iran, this arrangement did not violate American law at the time. *Id.*

309. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 218, 126 Stat. 1214, 1234 (2012) (codified as amended at 22 U.S.C. § 8725 (2012)). President Obama implemented section 218 by executive order in October 2012. Exec. Order No. 13,628, 77 Fed. Reg. 62,139 (Oct. 12, 2012).

consistent with this JCPOA.”<sup>310</sup> Section 218 of the TRA lacks a waiver provision altogether. It terminates only upon the President’s certification that “the Government of Iran has ceased providing support for acts of international terrorism and no longer satisfies the requirements for designation as a state sponsor of terrorism” and that “Iran has ceased the pursuit, acquisition, and development of, and verifiably dismantled its, nuclear, biological, and chemical weapons and ballistic missiles and ballistic missile launch technology.”<sup>311</sup> President Obama did not make this certification.

The White House reportedly settled on an alternative legal theory that purportedly allows the reopening of the loophole without turning to Congress. The TRA provides that “[t]he President may exercise all authorities provided under sections 203 and 205 of the International Emergency Economic Powers Act to carry out” provisions of the TRA.<sup>312</sup> Because the IEEPA authorizes the President to license foreign subsidiaries to trade with Iran, the argument goes, the reference to the IEEPA means that the TRA allows him to exercise that authority.<sup>313</sup> The Office of Foreign Assets Control at the Treasury Department therefore authorized foreign entities owned or controlled by U.S. persons to transact business with Iran.<sup>314</sup>

The White House’s argument, at least as reported in the press, is not compelling. The TRA authorizes the use of the President’s IEEPA authorities “to carry out” the TRA, including section 218.<sup>315</sup> It is strange to read that phrase as meaning “to cancel out” the specific requirements of section 218. The President’s annulment of section 218 is a small part of the overall JCPOA framework. But the lack of a justification for the nonenforcement of that provision further demonstrates that President Obama’s commitments in the JCPOA clash with the congressional framework and require legislation to be properly implemented.

#### *D. The Iran Nuclear Agreement Review Act*

During negotiations but before the conclusion of the JCPOA, Congress passed the Iran Nuclear Agreement Review Act of 2015 (“Review Act”).<sup>316</sup> The Review Act required the President to transmit the agreement, once reached, to Congress for review.<sup>317</sup> Congress then had a sixty-day review period during which it could adopt a joint resolution of approval or

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310. Joint Comprehensive Plan of Action, *supra* note 1, annex II, at 13.

311. 22 U.S.C. § 8551(a) (2012); *see also id.* § 8785(a) (providing that section 218 “shall terminate” after the President makes the certification described in § 8551(a)).

312. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 601(a), 126 Stat. 1214, 1263–64 (citations omitted).

313. Rosen, *supra* note 307.

314. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF TREASURY, GENERAL LICENSE H: AUTHORIZING CERTAIN TRANSACTIONS RELATING TO FOREIGN ENTITIES OWNED OR CONTROLLED BY A UNITED STATES PERSON 1 (2016).

315. 22 U.S.C. § 8781(a) (2012).

316. Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (2015) (codified as amended at 42 U.S.C. §§ 2011 note, 2160e (Supp. III 2016)).

317. 42 U.S.C. § 2160e(a)(1) (Supp. IV 2017).

disapproval or take no action.<sup>318</sup> The President was prohibited from waiving or otherwise limiting the application of statutory sanctions during the sixty-day review period.<sup>319</sup> As it happened, a majority in the House voted to disapprove the JCPOA; in the Senate, Democrats prevented a resolution of disapproval from reaching a vote.<sup>320</sup> The Senate's avoidance of a vote spared the President from having to veto a congressional disapproval.<sup>321</sup>

Commentators have suggested that the Review Act amounts to congressional authorization of the JCPOA.<sup>322</sup> According to this view, the Review Act “explicitly grants the Administration authority to negotiate and implement binding legal commitments with Iran.”<sup>323</sup> Yet the Review Act does not provide such authorization. The statutory text reads as if Congress thought it was being unfairly sidelined from Iran policy and desperately wanted to reclaim some role in the process.<sup>324</sup> “[E]ven though the agreement may commence,” it reads, “because the sanctions regime was imposed by Congress and only Congress can permanently modify or eliminate that regime, it is critically important that Congress have the opportunity, in an orderly and deliberative manner, to consider and, as appropriate, take action affecting the statutory sanctions regime imposed by Congress.”<sup>325</sup>

While the Review Act acknowledges that the President intended to continue negotiations and to conclude an agreement, it does not authorize those actions. What the Act accomplished was to require the President to submit the details of any agreement to Congress and to prohibit the President from implementing the agreement for sixty days so that Congress has an opportunity to express an opinion.<sup>326</sup>

The Review Act represented an attempt to reclaim a congressional role, not to authorize unilateral executive action. The congressional role could be reclaimed only partially because the President had reversed the usual lawmaking dynamic. He was effectively exercising lawmaking authority through the JCPOA by requiring Congress to muster the majority support needed to pass a law rather than following the normal requirement for the

318. *Id.* § 2160e(b)(2).

319. *Id.* § 2160e(b)(3).

320. See Kelly, *Senate Vote*, *supra* note 8; Kelly, *House Vote*, *supra* note 8.

321. Kelly, *Senate Vote*, *supra* note 8 (“The votes spare President Obama from having to veto a disapproval resolution since it will not come to his desk.”).

322. See Bruce Ackerman & David Golove, *Can the Next President Repudiate Obama’s Iran Agreement?*, ATLANTIC (Sept. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/09/can-the-next-president-repudiate-obamas-iran-agreement/404587/> [<https://perma.cc/594X-P34K>] (arguing that the JCPOA has its “foundation in statutes authorizing the president to commit the nation”).

323. *Id.*

324. That is what many members of Congress were thinking when voting for the Review Act. See Jordain Carney, *Senate Overwhelmingly Approves Iran Review Bill in 98-1 Vote*, HILL (May 7, 2015 2:24 PM), <http://thehill.com/blogs/floor-action/senate/241355-senate-votes-to-approve-iran-review-bill> [<https://perma.cc/V55J-JDJV>] (quoting Senator Rubio as saying, “at least it creates a process whereby the American people through their representatives can debate an issue of extraordinary importance” and “I hope this bill passes here today so at least we’ll have a chance to weigh in”).

325. 42 U.S.C. § 2160e(c)(1)(E) (Supp. IV 2017)).

326. See *supra* notes 317–19 and accompanying text.

President to demonstrate the overriding political support needed to overturn a law. When in the past Congress has authorized the President to enter into executive agreements, it has required congressional approval before those agreements go into effect.<sup>327</sup> The lack of such a provision in the Review Act was not an expression of enthusiasm for the President's Iran policy but a recognition that the President was determined to conclude the deal without Congress.<sup>328</sup>

#### IV. IMPLICATIONS FOR THE SEPARATION OF POWERS

There are two steps to the President's claim of authority with respect to the JCPOA. The first is his constitutional authority to enter into political agreements with foreign states. The second is his authority under the sanctions statutes, with the various waiver provisions, to lift nuclear-related Iran sanctions across the board. Commentary on the President's legal strategy has suggested that these two steps are independent and were satisfied in this case—that the President had the authority to conclude a “nonbinding” political agreement and separate authority to lift sanctions.<sup>329</sup> But if the President had not agreed to the JCPOA, could he still have ended enforcement of the nuclear-related statutory sanctions against Iran? That is, if there were no agreement with Iran but the President still believed that continued enforcement of the sanctions regime was not the correct policy, could the President plausibly have invoked the various waiver provisions to end sanctions in the across-the-board manner evidenced in the JCPOA and thus, in effect, launch his own nonsanctions Iran policy?

The case for the legality of the President's action depends on the answer to this question being yes. If it were otherwise, it would mean that a sole executive agreement—explicitly treated by the Obama administration as a nonbinding political commitment—altered domestic law.

Yet it is difficult to avoid the conclusion that if the President could not invoke compliance with the JCPOA as a pressing national security interest, he could not have managed as easily to cease enforcing the congressional sanctions regime. The problem, however, is that the JCPOA is in fact the President's own nonsanctions Iran policy. It was not approved by Congress

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327. See Julian Ku, *Why Professors Ackerman and Golove Are Still Wrong About the Iran Deal*, OPINIO JURIS (Sept. 16, 2015, 8:09 PM), <http://opiniojuris.org/2015/09/16/why-professors-ackerman-and-golove-are-still-wrong-about-the-iran-deal/> [<https://perma.cc/J8H5-5KUJ>] (citing the example of the Trade Promotion Authority Act, which authorizes the President to enter into trade agreements but provides that no agreement shall enter into force unless an “implementing bill is enacted into law”).

328. Congress could not have enacted legislation preventing the JCPOA from going into effect without congressional approval because the President would have vetoed such legislation. Carney, *supra* note 324 (noting that the threat of presidential veto prevented amendments and stronger provisions in the Review Act).

329. Goldsmith, *supra* note 24, at 466–67 (“[T]he President . . . made political commitments that did not require legislative approval and then exercised independent domestic authorities to effectuate the changes in domestic law that were needed to make the pledges in the . . . commitments credible and efficacious.”).

or by the public, and it was opposed by majorities of both.<sup>330</sup> To allow the President's own Iran policy to trump Congress's Iran policy is to invest the President with a freestanding legislative authority that has no constitutional foundation or legal precedent. In effect, it is to allow the President to reverse the usual lawmaking dynamic required by the Constitution.

In *Steel Seizure*, President Truman sought to implement his own policy on plant seizure as a means of quelling a labor dispute thought to pose a national emergency during the Korean War.<sup>331</sup> In the case of the JCPOA, President Obama initiated his own new no-sanctions policy toward Iran, compliance with which he claimed was so "vital to the national security of the United States" that it justified nonenforcement of binding domestic law. Even in such circumstances, the *Steel Seizure* principle requires the President to act within the congressional plan, respecting both substantive provisions of law and the legislated policy framework. If the President finds that plan too confining, it is his burden to convince Congress to change the law, not Congress's burden to muster supermajorities to overturn a threatened veto, as occurred in connection with the Iran Review Act.<sup>332</sup>

Recent scholarship has focused on the increasing salience of waiver provisions in congressional statutes.<sup>333</sup> In a leading analysis, Judge David Barron and Professor Todd Rakoff coined the term "big waiver" to describe the "delegation of the power to unmake major statutory provisions."<sup>334</sup> Such delegation of waiver authority has important benefits. In particular, "Congress takes ownership of the first draft of a regulatory framework, confident that its handiwork will not prove to be rigid and irreversible," and therefore Congress achieves "regulatory flexibility that enables it to codify fundamental policy choices that it otherwise might be unwilling (or unable) to specify, thereby making legislative policymaking viable."<sup>335</sup> In the national security context, such flexibility is especially useful. Congress may specify a baseline sanctions policy, for example, without worrying that the

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330. Bradford Richardson, *Poll: Americans Oppose Iran Nuclear Deal 2-1*, HILL (Feb. 17, 2016, 8:55 AM), <http://thehill.com/blogs/blog-briefing-room/news/269667-americans-oppose-iran-nuclear-deal-2-1-poll> [<https://perma.cc/Q6NU-AHMY>]; Kelly, *Senate Vote*, *supra* note 8; Kelly, *House Vote*, *supra* note 8.

331. *See supra* notes 38–39 and accompanying text.

332. *See supra* notes 320–21, 327–28 and accompanying text.

333. *See, e.g.*, Barron & Rakoff, *supra* note 22, at 267 (identifying a "form of delegation of broad policymaking power that is becoming increasingly important" that "gives agencies the broad, discretionary power to determine whether the rule or rules that Congress *has* established should be dispensed with"); Price, *supra* note 22, at 257 ("[S]tatutory provisions expressly authorizing executive cancelation of key features of substantive statutes also appear to have grown in salience."); *see also* Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1551 (2016) (discussing "[d]elegations to agencies of the power to deprive statutory provisions of legal force and effect"); R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L.Q. 525, 527 (2013) ("[M]any types of lawmaking delegations in the administrative state allow the Executive to change the text of duly enacted statutes.").

334. Barron & Rakoff, *supra* note 22, at 265.

335. *Id.* at 270.

requirement to sanction particular entities might undermine the President's ability to address some future—and unforeseeable—diplomatic crisis.

For this reason, the national security context has occasioned numerous statutes providing for “little waiver,”<sup>336</sup> the delegation of “a limited power to handle the exceptional case.”<sup>337</sup> But what happens when the executive attempts to transform its little-waiver authority into big waiver? It might do so either through a broad reading of a narrow waiver provision or the simultaneous exercise of a series of little waivers negating the limitations of each. Both of these strategies were necessary to the President's actions to meet his commitments under the JCPOA. The President interpreted provisions allowing waivers on a case-by-case basis to authorize across-the-board waivers of certain sanctions. And the President combined the authority provided by each waiver provision to grant Iran simultaneous, sweeping sanctions relief.

The JCPOA is not a unique instance of this phenomenon. In defending the grant of work authorization under the Obama administration's program for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), for example, the government focused on a provision of the Immigration and Nationality Act defining “unauthorized alien” to mean, “with respect to the employment of an alien at a particular time,” that the alien is not “authorized to be so employed by this chapter or by the Attorney General.”<sup>338</sup> According to the government, this provision authorized the Attorney General to dispense with the elaborate requirements for work authorization that the Act lays out.<sup>339</sup> The state challengers to DAPA, meanwhile, argued that the provision could not be understood to authorize so sweeping a waiver as to “grant the Executive power to undo Congress's comprehensive 1986 IRCA reforms with the stroke of a pen.”<sup>340</sup> The states essentially offered a *Steel Seizure* argument: that the waiver provision cannot be read to overturn the congressionally specified framework.

Any conception of “big waiver” must respect limitations inherent in the *Steel Seizure* principle. Exercises of waiver authority must be consistent with the congressional plan: “Big waiver should . . . have to be justified as being within the statutory enactment, as carrying forward one or more of what can

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336. *Id.* at 287 (“[T]he national security realm has occasioned the delegation of the little waiver power in a number of regulatory domains.”).

337. *Id.* at 277.

338. 8 U.S.C. § 1324a(h)(3) (2012).

339. Brief for the Petitioners at 63, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (arguing that § 1324a(h)(3) “ratifies and independently supports the Secretary's . . . position that he can ‘authorize[.]’ aliens to be lawfully employed as a component of the exercise of his discretion”).

340. Brief for the State Respondents at 53, *Texas*, 136 S. Ct. 2271 (No. 15-674); *see also* *Texas v. United States*, 809 F.3d 134, 182–83 (5th Cir. 2015) (“For the authority to implement DAPA, the government relies in part on 8 U.S.C. § 1324a(h)(3), a provision that does not mention lawful presence or deferred action, and that is listed as a ‘[m]iscellaneous’ definitional provision expressly limited to § 1324a, a section concerning the ‘Unlawful employment of aliens’—an exceedingly unlikely place to find authorization for DAPA.” (footnote omitted) (quoting 8 U.S.C. § 1324a(h)(3)).

be reasonably thought to be the purposes of the statute.”<sup>341</sup> After all, “[i]n allowing waivers, Congress . . . did not intend to authorize outright cancellation of statutory provisions based on mere executive disagreement with statutory requirements.”<sup>342</sup> The outer limit of the President’s waiver authority, even if authorized, must be that he cannot disregard the legislated policy framework in favor of his own independent agenda.<sup>343</sup> In addition, any waiver authority must be conferred “using relatively clear language.”<sup>344</sup> That is, waiver authority “may not be lightly implied, at least where forbearance would result in a ‘fundamental revision’ of the regulatory scheme enacted by Congress.”<sup>345</sup>

While scholars have suggested these interpretive principles in the administrative law context, the use of executive waiver authority pursuant to the JCPOA was not subjected to such scrutiny. In the JCPOA context, the President’s exercise of waiver authority was based on a strained and expansive reading of the statutory text, and it aimed at a purpose contrary to the statute—namely, to abandon sanctions as the policy framework for dealing with Iran’s pursuit of nuclear technology. Yet the academic response was, essentially, that Congress had gotten what it asked for. “If Congress doesn’t like the position it is in now,” one well-regarded commentator wrote at the time of the JCPOA, “it should be more careful when it gives the President discretion to implement (and waive) its sanctions.”<sup>346</sup> The truth is that Congress was careful. When it added the “case-by-case” language, the six-month time limitation, and the “vital to the national security interests of the United States” reporting requirement to the waiver provision in the Iran Sanctions Act, Congress received criticism for unreasonably confining the

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341. Barron & Rakoff, *supra* note 22, at 332; *see also* Deacon, *supra* note 333, at 1607 (“[W]hen reviewing agency forbearance decisions, courts should presume that Congress intends the agency to consider the underlying purposes of the statute when deciding whether to forbear. . . . Such a presumption would require agencies to articulate more clearly how their decisions advance the goals of the statute as a whole.”).

342. Price, *supra* note 22, at 265–66.

343. Deacon, *supra* note 333, at 1607 (“[Such a presumption] would minimize the dangers associated with a runaway Executive negating the will of Congress.”).

344. *Id.* at 1606.

345. *Id.* (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)); *see also* Barron & Rakoff, *supra* note 22, at 323 (advocating a “clear statement rule” for waiver authority in some circumstances); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 764 (2014) (“[T]o comply with the presumption against suspending and dispensing authority, . . . executive waivers must have clear statutory authorization.”).

346. Jack Goldsmith, *Why Congress Is Effectively Powerless to Stop the Iran Deal (and Why the Answer Is Not the Iran Review Act)*, LAWFARE (July 20, 2015, 8:23 AM), <https://www.lawfareblog.com/why-congress-effectively-powerless-stop-iran-deal-and-why-answer-not-iran-review-act> [<https://perma.cc/X9BA-CP8A>]. Professor Goldsmith later made a similar argument with respect to President Obama’s possible pursuit of a United Nations Security Council resolution banning nuclear testing, suggesting that Congress perhaps should not have authorized the President to direct American votes in the Security Council. Jack Goldsmith, *Quick Reactions to Obama’s UN Gambit on Nuclear Testing*, LAWFARE (Aug. 5, 2016, 7:02 AM), <https://www.lawfareblog.com/quick-reactions-obamas-un-gambit-nuclear-testing> [<https://perma.cc/9LQM-SEZV>].

President's waiver discretion.<sup>347</sup> Yet Congress nevertheless acted to narrow that discretion.<sup>348</sup> The argument that Congress has itself to blame for the JCPOA amounts to the contention that the President cannot be trusted to remain within the bounds of a narrow waiver provision and therefore Congress ought never to authorize waivers, at least in the realm of foreign affairs. This is a recipe for irresponsible congressional action that would harm relations with foreign states.

To avoid perilous interbranch competition in which Congress tests the limits of directing the President's activities in foreign affairs through inflexible mandates, it makes sense to embrace limits on delegated waiver authority with respect to foreign affairs such as have been suggested in the administrative law context.<sup>349</sup> Controversies over the President's foreign affairs authority are less likely than administrative law matters to end up in court, at least when individual rights are not at stake.<sup>350</sup> But that means the views of the legal culture with respect to presidential waivers are more important in this context.<sup>351</sup> The President was able to exercise expansive

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347. *See, e.g.*, 152 CONG. REC. H1770 (daily ed. Apr. 26, 2006) (statement of National Foreign Trade Council et al.) ("If the President chose to waive the sanctions, which is possible under an inadequately narrow provision in this bill, he would be required to renew that waiver every six months. This policy of requiring investigations and sanctions determinations on each and every past and future investment in Iran by a person described in the Act would severely restrict the Administration's flexibility to conduct foreign policy in ways that can adapt to complex, changing circumstances.").

348. *See id.* at H1772 (statement of Rep. Cardin) ("I am pleased that the legislation today establishes mandatory sanctions for contributions to development of weapons, limits the President's flexibility to waive sanctions, authorizes funding to promote democracy activities in Iran, and supports efforts to strengthen the Nuclear Nonproliferation Treaty. Finally, this bill eliminates the sunset of sanctions against Iran, and requires them to remain in place until the President certifies that Iran has dismantled its WMD programs."); *see also supra* notes 239–45 and accompanying text.

349. *See supra* notes 341–45 and accompanying text.

350. For controversies between Congress and the President, legislators may have standing to challenge executive action where such action effectively nullifies their votes, *see Raines v. Byrd*, 521 U.S. 811, 823 (1997), and houses of Congress might have standing where its institutional powers are at stake, *see House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 74 (D.D.C. 2015) ("The House of Representatives as an institution would suffer a concrete, particularized injury if the Executive were able to draw funds from the Treasury without a valid appropriation."). But legislators do not have standing to police executive enforcement of the law. *See Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978) ("Once a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public."); *see also Russell v. DeJongh*, 491 F.3d 130, 134 (3d Cir. 2007) ("[T]he authorities appear to hold uniformly that an official's mere disobedience or flawed execution of a law for which a legislator voted . . . is not an injury in fact for standing purposes."). Nevertheless, one might imagine the merits of the waivers pursuant to the JCPOA being litigated if, for example, the federal government sued a state arguing that federal sanctions policy should preempt the state's sanctions against Iran. *See Eugene Kontorovich, Standing to Challenge the Iran Deal—Congress and the States*, WASH. POST (Sept. 10, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/10/standing-to-challenge-the-iran-deal-congress-and-the-states/> [<https://perma.cc/BVG4-Y6U7>].

351. *Cf.* Jack N. Balkin, *The Framework Model and Constitutional Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 241, 249 (David Dyzenhaus & Malcolm Thorburn eds., 2016) (noting the constraining effect of "what legal professionals thought were reasonable and unreasonable claims about the meaning of the Constitution");

waiver authority in the Iran nuclear agreement because informed commentators largely accepted his claim that Congress had already delegated authority to the President to suspend the sanctions regime. The legal culture ought to be skeptical of claims that Congress has authorized the executive branch to suspend a legal regime and replace it with another of the executive's own making. Such claims require the President to demonstrate textual warrant and consistency with congressional purpose. Respect for the separation of powers, embodied in the *Steel Seizure* principle, requires no less.

Recent scholarship on “historical gloss” and congressional acquiescence to executive action testing the boundaries of separated powers rightly emphasizes the practical difficulties Congress faces when trying to act as a unitary body to resist perceived executive overreach.<sup>352</sup> These logistical barriers are part of the constitutional design. The President has the advantage of initiative, both in the foreign relations and domestic spheres. It is difficult for Congress to pass laws, amend or repeal them, or take other action as a body to express opposition to executive action. Even when a course of action enjoys majority support in both houses, that may still not be enough congressional consensus to override an express or impliedly threatened veto; this was the dynamic behind the Iranian Nuclear Agreement Review Act of 2015.

The *Steel Seizure* principle plays an important role in setting the appropriate ground rules for such contests over the separation of powers. When the executive acts in an area where Congress has been silent or where Congress has authorized the executive action, the burden is on the legislative branch, with all the practical and logistical hurdles the Constitution and institutional history have erected, to enact law circumscribing the President's sphere of action. Yet when Congress has established a policy framework for dealing with the matter, and the President cannot claim an exclusive sphere of action,<sup>353</sup> the burden is on the President to work within that framework, even when addressing relations with foreign states. “In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>354</sup>

#### CONCLUSION

The President can be viewed both as an agent and, particularly in the foreign relations area, as a co-principal with Congress. The *Steel Seizure* principle highlights the limits of the co-principal conception of the President. Once Congress has developed a legislative framework for a subject matter within its authority, that framework occupies the field; the President's role becomes one of a responsible agent. In the Iran sanctions laws, Congress

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Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1024 (2009) (discussing normative constraints on executive officials).

352. See, e.g., Bradley & Morrison, *supra* note 104, at 441–44; Roisman, *supra* note 104, at 681–82.

353. See, e.g., Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2087 (2015).

354. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952).

provided bounded waiver authority, acting responsibly to allow limited executive discretion rather than requiring the President to seek new legislation each time flexibility was needed. It did not, however, invite the President effectively to override the sanctions framework altogether, as occurred in connection with the JCPOA. In general, Congress's delegation of waiver authority to the executive branch may provide needed flexibility. Yet the President's exercise of waiver authority must be carefully circumscribed to avoid the problem of the President revising a statutory regime out of disagreement with Congress's policy choices. Limiting principles are no less necessary in the foreign affairs context, where the President has used purported waiver authority in the Iran sanctions statutes to pursue his own independent policy in defiance of Congress.