EXECUTIVE OVERREACH IN FOREIGN AFFAIRS

Hearing Before the House Committee on the Judiciary
Executive Overreach Task Force

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Chairman King, Ranking Member Cohen, and distinguished members of the Task Force:

Thank you for inviting me to testify once again before the task force.

I

It has become an all-too-common refrain in contemporary American discourse for those who object to the *wisdom* of particular policy outcomes to disguise that objection behind claims of legitimacy — that is, that the relevant government actor lacked the authority to effect the disputed policy outcome, never mind its wisdom (or lack thereof). Thus, when the Supreme Court interprets the Constitution in a manner some don't like, critics often object to the Court's *power* to even reach the contested interpretation in the first place, rather than the *merits* of that interpretation.[1]

In a thoughtful post at the *Volokh Conspiracy* last Friday, my friend (and GW law professor) Orin Kerr described this phenomenon, which he harshly critiqued, as "the politics of delegitimization."[2] It seems to me that today's hearing is a variation on the same theme — portraying a range of perfectly legitimate substantive disagreements over various of the Obama administration's foreign policy initiatives as *arrogations* of executive power, rather than as exercises of executive power with which many of us simply disagree. In the process, this focus crowds out far more important discussions, including the relative merits (or lack thereof) of these substantive policy results, and the reasons why Congress has largely abandoned the *regulation* of foreign relations to the President, notwithstanding its broad and long-standing role and responsibility as a coordinate branch even (if not especially) where U.S. foreign policy is concerned.

Indeed, of all of the areas in which President Obama has been criticized for "overreaching," foreign affairs may be the context in which those claims ring the hollowest. Not only does the Constitution invest the

1. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting).

2. Orin Kerr, *The Rise of Donald Trump and the Politics of Delegitimization*, VOLOKH CONSPIRACY, May 6, 2016, http://wpo.st/lt4Z1.

President with a wide range of inherent (and, as the Supreme Court just reminded us in the *Zivotofsky* case,[3] preclusive) constitutional authority in the field of foreign affairs, but Congress has historically acquiesced by broadly delegating its own authority in this field to the President.[4] For example, as I noted in my testimony before this Task Force's initial hearing, Congress, in the 2001 Authorization for the Use of Military Force,[5] arguably delegated to the President the power to use military force against all terrorist groups with even remote connections to the perpetrators of the September 11 attacks, and in perpetuity.[6] Reasonable minds may disagree about such breathtaking constructions of the 2001 AUMF, but those disputes sound in statutory interpretation, not executive overreach — at least until and unless Congress enacts a statute to rein in such readings.

Nor does the President overreach simply by entering into diplomatic accords without formally submitting the accord as a treaty to the U.S. Senate. Although the Constitution's text contemplates treaties as the principal means by which agreements with foreign sovereigns become U.S. law, all three branches of the federal government have recognized since shortly after the Founding that the President has the constitutional power to enter into many bi- or multilateral agreements that are *not* treaties for constitutional purposes. Moreover, these agreements—rather than treaties—have become the norm. As the Congressional Research Service explained in a March 2015 report,

> it would appear that over 18,500 executive agreements have been concluded by the United States since 1789 (more than 17,300 of which were concluded since 1939), compared to roughly 1,100 treaties that have been ratified by the United States. However, this estimate seems likely to undercount the

3. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (invalidating Act of Congress insofar as it interfered with the President's Article II power to recognize foreign sovereigns).

4. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

5. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note (2012)).

6. *The Original Understanding of the Role of Congress and How Far We've Drifted from It*: *Hearing Before the Executive Overreach Task Force of the House Comm. on the Judiciary*, 114th Cong., Serial No. 114-61, at 56–68 (Mar. 1, 2016) (statement of Stephen I. Vladeck), *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/114-61_98898.pdf.

> number of executive agreements entered by the United States. While the precise number of unreported executive agreements is unknown, there is likely a substantial number of agreements (mainly dealing with "minor or trivial undertakings") that are not included in these figures.[7]

These non-treaty agreements typically fall into three categories: so-called "congressional-executive agreements," which are approved by both Houses of Congress either *ex ante* or *ex post*; "treaty-executive agreements," where a treaty approved by the Senate itself authorizes the conclusion of a non-treaty agreement; and "presidential-executive agreements" (also known as "sole executive agreements"), where the President concludes the process entirely on his own.

With regard to this last category, as the Supreme Court explained in 2003, "our 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, this power having been exercised since the early years of the Republic."[8] Indeed, although "the extent of the president's authority to conclude executive agreements is uncertain," as one recent study concluded, "the courts have *never* struck down a presidential-executive agreement as unconstitutional."[9]

Instead, the contemporary debate is not over the abstract validity of sole executive agreements, but rather the specific criteria that separate agreements that do *not* require congressional involvement from those that do. To be frank, there are no bright lines in this field. But by far, the two most important criteria for assessing whether the President *should* submit an international agreement to Congress are:

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7. MICHAEL JOHN GARCIA, CONG. RES. SERV., INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 4–5 (RL32528, Feb. 18, 2015) (footnotes omitted), *available at* https://fas.org/sgp/crs/misc/RL32528.pdf.

8. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003).

9. DANIEL BODANSKY, CTR. FOR CLIMATE & ENERGY SOLUTIONS, LEGAL OPTIONS FOR U.S. ACCEPTANCE OF A NEW CLIMATE CHANGE AGREEMENT 7 (2015), *available at* http://www.c2es.org/docUploads/legal-options-us-acceptance-new-climate-change-agreement.pdf.

1) Whether the agreement is inconsistent with, and could not be implemented on the basis of, existing U.S. law; and

2) Whether the agreement establishes binding legal rules or financial commitments with which the United States must comply.

Unless the answer to both questions is yes, history, practice, and case law all suggest that the President is acting within his constitutional authority when he enters into a sole executive agreement.

II

With these criteria in mind, I'm hard-pressed to see the argument that President Obama was constitutionally required to submit the Iran Deal or the Paris Climate Agreement to Congress for ratification.

Taking the Iran Deal first, as Harvard law professor Jack Goldsmith (formerly Assistant Attorney General in charge of the Office of Legal Counsel) has explained, the Iran Deal is deeply *consistent* with "the pre-existing congressional sanctions regime that gave the President discretion to waive or lift the sanctions [against Iran] under certain circumstances." In his words, "if you think Congress ought to have more power to stop the President from lifting Iran sanctions, blame past Congresses, not the Iran Review Act,"[10] or President Obama. And as former State Department Legal Adviser John Bellinger has concluded, the pursuit of a Resolution from the United Nations Security Council to effectuate the *international* sanctions regime similarly raises no legal hackles: "The [Security Council] resolution appears to have been carefully crafted by Administration lawyers to avoid imposing binding legal obligations on the United States before Congress considers the [Iran Deal], or with which the United States might be unable to comply if Congress disapproves the [Iran Deal]."[11]

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10. 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, https://www.lawfareblog.com/why-congress-effectively-powerless-stop-iran-deal-and-why-answer-not-iran-review-act.

11. John Bellinger, *The New UNSCR on Iran: Does it Bind the United States (and future Presidents)?*, LAWFARE, July 18, 2015, https://www.lawfareblog.com/new-unscr-iran-does-it-bind-united-states-and-future-presidents.

Although we often disagree, I find it impossible to quibble with Goldsmith's bottom line — that President Obama "stitched together his legal authorities in a clever way to empower him to pull off the very consequential Iran Deal. The Deal may well show that Congress has delegated or acquiesced in the expansion of too much presidential power."[12] But what it doesn't show is "overreach" by President Obama.

Similar reasoning applies to the Paris Climate Agreement. As Bellinger told the *Washington Post*,

> The Obama administration carefully negotiated the Agreement to ensure that the binding provisions are not so burdensome as to require the agreement to be treated as a treaty for purposes of U.S. law, thereby requiring Senate advice and consent. The administration has already complied with one of the binding provisions, which was to announce a carbon reduction goal. But the agreement does not require a future president actually to achieve that goal.[13]

In other words, the provisions of the Agreement that *are* binding are either hortatory or already consistent with U.S. law; and the provisions that are controversial (such as the emissions cap) aren't actually *binding*, and thus do not require congressional ratification.[14] And lest it seem like this debate breaks down along partisan lines, I think it's striking that two of the most vocal defenders of the legality of the Iran Deal and the Paris Climate Agreement are two of the *Bush Administration*'s senior lawyers. There may be serious policy grounds on which to criticize either or both of these initiatives. But what cannot be gainsaid, based upon these analyses, is that

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12. Goldsmith, *supra* note 9; *see also* Jack Goldsmith, *More Weak Arguments For The Illegality of the Iran Deal*, LAWFARE, July 27, 2015, https://www.lawfareblog.com/more-weak-arguments-illegality-iran-deal.

13. Chris Mooney & Juliet Elperin, *Obama's Rapid Move To Join the Paris Climate Agreement Could Tie Up The Next President*, WASH. POST, Apr. 11, 2016, http://wpo.st/t65Z1.

14. *See* Marty Lederman, *The Constitutionally Critical, Last-Minute Correction To the Paris Climate Change Accord*, BALKINIZATION, Dec. 13, 2015, http://balkin.blogspot.com/2015/12/the-last-minute-correction-to-paris.html.

it is deeply consistent with U.S. practice and precedent for both of these agreements to be entered into *without* congressional ratification.[15]

III

In his incisive essay that I referred to above, Professor Kerr described the "politics of delegitimization" as

> a broader rhetorical strategy of delegitimizing those on the other side that has found a lot of currency on the political right since Obama was elected. You can sometimes find the same narrative on the left, of course. But you don't find it nearly as often or as prominently as you find it on the right. You can see the strategy at work if you follow popular conservative news or commentary programs. Too often, people who are barriers to good results (whether they are Democrats or the GOP "establishment") aren't described as simply disagreeing in good faith. Instead, you'll often hear that they are illegitimate. They are acting in bad faith. Their motives are corrupt. Some are criminals. You hear that all the time.[16]

It seems to me that efforts to portray the foreign policy of the Obama administration as reflecting "executive overreach" are another example of this phenomenon. And in the context of foreign policy, specifically, focusing so much energy on questions of "overreach" may well obfuscate the (in my view) far more significant debates we ought to be having over the substantive *merits* of the foreign policy initiatives of the Obama administration, including the debate over the (ever-increasing) scope of the armed conflict against ISIL, and whether new legislation should be enacted more comprehensively to authorize these increasing uses of military force.

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15. Nor, as Goldsmith has explained, is the calculus in this regard changed by the Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (to be codified at 42 U.S.C. § 2011 note), which merely *delayed* the implementation of domestic U.S. sanctions, and did not otherwise prohibit the Obama administration from going to the U.N. Security Council with regard to international sanctions. *See* Goldsmith, *supra* note 9.

16. Kerr, *supra* note 2.

Of course, this Task Force, this Committee, and this Congress may think there's more political and rhetorical gain to be had from casting these debates in legitimacy terms, but I fear that such an approach has deleterious long-term consequences for Congress's *institutional* role in the formation and supervision of U.S. foreign policy. (It may also have had a dramatic short-term effect on the 2016 presidential election, as Professor Kerr suggested.[17]) After all, the more Congress focuses its critiques on ill-conceived legitimacy objections, the more it suggests, however implicitly, that *all* this institution can do in the field of foreign affairs is offer legal *objections* to these policies, as opposed to (1) enacting legislation more aggressively seeking to assert Congress's *own* foreign policy powers; and (2) taking a more active role in stimulating (and raising the level of) national discourse over the normative desirability of these policies. To me, *these* should be the imperatives for Congress in these contexts.

As Goldsmith concluded, though, "I doubt Congress will be more careful in the future, since it typically doesn't like (and cannot organize itself to exercise) the responsibility as an equal constitutional partner in the conduct of U.S. foreign relations."[18] The origins and persistence of that institutional shortcoming are, in my view, far more worthy of this Task Force's time than trumped-up charges of "executive overreach" that, once subjected to meaningful scrutiny, smack of nothing more than the politics of delegitimization.

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Thank you again for the opportunity to testify before the Task Force this morning. I look forward to your questions.

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17. *Id.*

18. Goldsmith, *supra* note 9.