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JUDICIARY COMMITTEE
EXECUTIVE OVERREACH TASK FORCE HEARING ON:
"EXECUTIVE OVERREACH IN FOREIGN AFFAIRS"

OPENING STATEMENT

2141 RAYBURN HOB
THURSDAY, MAY 12, 2016
10:00 A.M.

- Thank you, Mr. Chairman. Good morning and welcome to our witnesses.

- We are here today to review and "explore" purported claims that President Barack Obama's Administration has engaged in executive overreach in matters of foreign affairs.

- In particular, the Majority asserts that the Administration acted beyond its executive powers when it did not submit to Congress

for ratification two agreements known as the Iran Nuclear Deal and the Paris Climate Agreement.

- During a time when our Congressional calendar days are incredibly valuable and limited, it is disappointing that we are here "exploring" the validity executive actions that clearly fall within the boundaries of well-established executive powers.

- As Members of the Judiciary Committee, we all know and acknowledge that the United States Constitution invests the President with inherent constitutional authority in foreign affairs.

- That is, pursuant to Article II, Section 2, the President's executive authority includes the Commander-in-Chief power, as well as the power to make treaties, by and with the advice and consent of the Senate and provided two thirds of the Senate concurs.

- Once the Senate gives consent, the treaty, pursuant to the Constitution's Supremacy Clause, becomes the law of the land. (U.S. Const. Art. VI, cl. 2).

- This inherent power was recently protected and upheld by the Supreme Court in *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2085 (2015), which struck down a Congressional Act that constrained the President's constitutional authority to recognize foreign states.

- The Zivotofsky Court further explained that courts have "recognized that the President has the 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."

- And as highlighted by Mr. Vladeck in his testimony, although "the extent of the president's authority to conclude executive

agreements is uncertain…the courts have *never* struck down a presidential executive agreement as unconstitutional."

- Moreover and more broadly recognized is Congress's traditional and historically acquiesced delegation of discretion to the Executive in matters of foreign affairs.

- By the acknowledgments of the Majority's own witnesses, this hearing is a futile attempt to control undeniably, far-reaching powers that have been constitutionally rooted or delegated to the Executive for more than two centuries.

- Yet, President Obama has repeatedly been accused of exceeding such powers that are simultaneously acknowledged as being readily available and legally permissible.

- While, *the law always limits every power it gives*, one cannot breach boundaries that have been legally given, nor can one overreach limitations unbreached. (*David Hume*)

- Notwithstanding, the central issue of concern here today is whether the Obama Administration had the constitutional authority to enter into executive agreements without congressional assent or whether the commitments made under these agreements may be otherwise unlawful.

- The Majority fails to take into consideration the true nature of the agreements as non-legally binding.

- An international agreement is generally presumed to be legally binding in the absence of an express provision indicating its nonlegal nature.

- State Department regulations recognize that this presumption may be overcome when there is "clear evidence, in the negotiating history of the agreement or otherwise, that the

parties intended the arrangement to be governed by another legal system."

- However, there is no statutory requirement that the executive branch notify Congress of every nonlegal agreement it enters on behalf of the United States.

- State Department regulations, including the Circular 175 procedure, also do not provide clear guidance for when or whether Congress will be consulted when determining whether to enter a nonlegal arrangement in lieu of a legally binding treaty or executive agreement.

- The primary means Congress uses to exercise oversight authority over such nonbinding arrangements is through its appropriations power or via other statutory enactments, by which it may limit or condition actions the United States may take in furtherance of the arrangement.

The Iran Nuclear Deal

- The Iran Nuclear Agreement Review Act of 2015 (P.L. 114-17) is a notable exception where Congress has opted to condition U.S. implementation of a political commitment upon congressional notification and an opportunity to review the compact.

- This act was passed during negotiations that culminated in the Joint Comprehensive Plan of Action (JCPOA) between Iran, the United States, the United Kingdom, France, Russia, China, and Germany.

- Under the terms of the agreement, Iran pledged to refrain from taking certain activities related to the production of nuclear weapons, while the other parties have agreed to ease or suspend sanctions that had been imposed in response to Iran's nuclear program.

- The agreement does not take the form of a legally binding compact, but rather a political agreement which does not purport to alter their domestic or international legal obligations.

- The Iran Nuclear Agreement Review Act provided a mechanism for congressional consideration of the JCPOA prior to the Executive being able to exercise any existing authority to relax sanctions to implement the agreement's terms.

- Although the act contemplates congressional consideration of a joint resolution of approval or disapproval of the agreement, it does not purport to transform the JCPOA into binding U.S. law.

- At most, the President would be authorized (but not required) to implement the JCPOA in a manner consistent with existing statutory authorities concerning the application or waiver of sanctions.

The Paris Climate Agreement

- In 1992 the Senate ratified the United Nations Framework Convention on Climate Change (UNFCCC) which created several legally binding treaty obligations upon the United States.

- The Majority fails to understand that these treaty obligations, however, did not create any quantitative reductions in greenhouse gases (GHGs) nor did they create enforceable objectives and commitments to do so.

- Importantly, the UNFCCC *qualitatively* obligates the United States to participate in and support international climate change discussions, commits the U.S. to work towards reducing its GHG emissions, and it signals U.S. agreement with the principal notion that climate change is a significant future challenge that must be addressed.

- The UNFCCC itself, however, creates no legally enforceable quantitative commitments to reduce GHG emissions.

- Per the UNFCCC, the 21st yearly session of the Conference of the Parties (COP21) met in Paris starting on November 30, 2015 and later adopted the Paris Agreement as well as a consensus decision intended to supplement and give effect to the agreement.

- The stated goal of the agreement is to "[hold] the increase in the global average temperature to well below 2 degrees Celsius about pre-industrial levels" and to pursue "efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."

- The Paris Agreement and the decision together create a single framework through which all of the parties, including the U.S., would work to reduce emissions.

- Significantly, the Paris Agreement contains no *quantitative* emission reduction requirements nor does it contain any enforcement mechanisms or penalties for parties who fail to meet their self-determined NDC.

- Instead, the agreement expects individual parties to set individual GHG emission reduction goals based upon their global contribution and their technological and economic capacities.

- The transparency framework under the agreement essentially provides the international community with the means to review the seriousness of a parties' stated NDC and to hold parties publically accountable for failing to set an NDC which will make meaningful progress towards the agreement's stated goal.

- Accordingly, the Administration is not constitutionally required to present the Paris Agreement to the Senate for ratification as it is not a treaty that "bind[s] the United States to a course of action."

- Moreover, the Clean Air Act49 and the UNFCCC already provide authority for President Obama to carry out the United States' NDC commitments under the Paris Agreement.

- With these considerations and facts, the misguided direction of this hearing is undeniable.

- In fact, the Majority's own witness, Mr. Kontorovich, acknowledges in his concluding testimony that this hearing serves little purpose, if none other than to highlight that "Congressional legislation in these areas is typically phrased quite narrowly and is replete with exceptions, waiver provisions, and so forth. [And that] much of this is justified by the need to provide the Executive with maneuverability in the fast-changing currents of world affairs."

- As a solution, Mr. Kontorovich instructs Congress "to write broader, clearer legislation in the first place" – or to legislate with an eye of "*tying the Executive's hands*".

- This solution indecorously encourages Congress to actually violate the separation of powers by creating an implausible imbalance tipped to Congress.

- The only hands that are tied here are those of the American public, as they are denied constructive and effective legislative action by their representational body of Congress.

- I urge my colleagues to consider this much in further consideration of hearings by this task force and committee.

- Thank you.