

**Two Recent Examples of Executive Undermining
of Congress's Spending and Foreign Commerce
Powers**

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Chairman King, Ranking Member Cohen, and honorable members of the Task Force on Executive Overreach, I am honored to be invited to testify before you today on the subject of the Executive Branch's overstepping of separations of powers limits in the area of foreign relations. I am a professor of law at Northwestern University Pritzker School of Law, and have studied these issues closely. I have written numerous scholarly studies on the separation of powers in foreign relations as it has been understood since the drafting of the Constitution, as well as on contemporary applications of these principles.

I have co-authored an amicus brief to Supreme Court on behalf of the petitioners in *Zivotofsky v. Clinton*, and helped drafted numerous state laws dealing with boycotts of Israel. My scholarship has been frequently cited in leading foreign relations cases in federal courts, and I have testified repeatedly before Congress, as well as the European Parliament. I have advised legislators from numerous Western countries on issues of U.S. foreign relations law and international law.

My testimony today will examine how the Executive improperly ignored legislation pursuant to the Foreign Commerce Clause in implementing the Iran nuclear deal and also ignored restrictions on funding certain U.N. agencies imposed by Congress pursuant to its exclusive and fundamental power of the purse.

The Executive has relatively broader constitutional authority in foreign than domestic affairs. Some of this comes from the constitutional commitment to the president of certain diplomatic functions (his power to "Receive Ambassadors" and "Make Treaties"); much of it comes from historical practice and the perceived convenience of having one voice, rather than 535, speak for the U.S. in external matters. On top of his broad inherent power, Congress typically delegates further powers quite broadly; its legislation is typically careful, perhaps to a fault, to not unduly hamper the President in his conduct of the nation's foreign policy, which often requires flexibility and discretion.

Congress also has numerous core Article I powers that can bear greatly on Foreign Affairs, such as its powers to regulate commerce with foreign countries, impose duties and tariffs, and spend money. Congress's exercise of these powers is in no way limited by the fact that they may affect, or even contradict, the President's exercise of his core diplomatic prerogatives.

The very factors that give the Executive a greater share of foreign affairs powers also make him relatively effective in contests with Congress over the scope of those already broad powers. And it is precisely because the President commands a relatively greater share of authority over foreign affairs that it is important that Congress not abdicate its portion. Because Congress's limited checks on action impacting the foreign sphere are more limited, its failure to use the supervisory mechanisms it has will more quickly result in Executive omnipotence.

The Executive typically gets his way in matters dealing with foreign affairs for three reasons, at least one of which is good and one of which is bad. First, the Constitution places a significant amount of foreign affairs authority with the President, and the structure of both the constitution and modern geopolitics empowers the President to undertake substantial initiatives unilaterally. The second reason is that, pursuant to the implementation of statutes, Congress has, for a century, broadly delegated even greater discretion to the Executive. Finally, when the Executive has acted in ways that may go beyond his constitutional powers or that contradict legislative commands, Congress has been politically unwilling or institutionally unable to hold him to account.

To put it simply, it is difficult for the Executive to overreach in foreign affairs because his constitutional powers are broad and Congress is generally happy to augment that authority with sweeping delegations. Yet the Executive has found ways to go even beyond those expansive limits, ignoring the few restrictions Congress has emplaced in those areas of foreign relations that fall within its enumerated powers.

I. Iran Sanctions: Congress's Foreign Commerce power, Congress's conditions

The deal with Iran regarding its nuclear program is one of the most important foreign policy events of our time. Unfortunately, it also presents one of the clearest examples of the President exceeding constitutional limits on his power and taking action in a field of core Congressional power that is specifically disallowed by law. Even more lamentably, Congress has failed to respond vigorously and clearly to this Executive overreaching. Congress, which began by broadly delegating powers to the Executive even beyond the broad ones he already possessed in foreign affairs, has failed to police and to enforce the minor limitations on its generous delegation.

The President, under our constitutional arrangement, has the primary role in the conduct of diplomacy. Since the early days of the Republic, the Executive, with little or no Congressional involvement or supervision, undertaken significant interactions with, and made serious commitments to, foreign countries. However, for such diplomacy to translate into domestically binding legal obligations, the president needs the affirmative action of Congress.

In particular, economic sanctions against other countries, such as the multiple levels of sanctions against Iran, are core exercises of Congress's Article I power over foreign

commerce. Foreign Commerce legislation can legitimately constrain the Executive's conduct of foreign relations. Nonetheless, Congress has typically structured sanctions legislation – and other foreign commerce legislation with a significant diplomatic impact – in a way that gives the President a great deal of control over its implementation. Thus most – but not all – sanctions measures allow for presidential waiver or even unilateral termination under certain circumstances. Nonetheless, Congress is not required to allow for executive waivers and suspension. Therefore, it can condition such grants of authority on the President taking steps that allow Congress to supervise its delegations. That is precisely what Congress has done with Iran sanctions – and what the President has failed to comply with.

A. The requirement to transmit the entire deal and consequences of non-transmission

In passing the Iran Nuclear Agreement Review Act of 2015 (INARA),¹ Congress consciously gave its assent to broad presidential authority to make deals with Iran regarding its nuclear program, pursuant to which the U.S. suspended or terminated many existing statutory sanctions. Congress delegated power to the President by in effect “pre-approving” deals with Iran unless they later met with explicit Congressional disapproval made under the procedures provided for by the law. By flipping the presumptions for legislative action, Congress further strengthened the President's position and weakened its own.

Yet Congress built in requirements and safeguards into its pre-approval. In particular, it required the president to transmit the entire agreement regarding Iran's nuclear program to Congress for its review. Though the results of such a review were likely to be favorable to the president because of the structure of the review procedure, some level of review by Congress was essential “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.”² In other words, the breadth of the powers delegated to the President demand that Congress be able to police its delegation, and that requires a review of the agreement pursuant to which sanctions would be lifted. Failure to provide Congress with the necessary information to fulfill its constitutional role raises serious separation of powers questions.³

INARA requires the President to transmit the entire agreement for review as a pre-condition to any sanctions relief. INARA gave the President much more than what the Constitution gives him and demands little of him in return. Yet the President refused to comply with even the token insurance for the separation of powers built into INARA.

¹ 42 U.S.C.A. § 2160e.

² 42 U.S.C.A. § 2160e(c)(1)(E).

³ Jerome M. Marcus, *An Informed Vote on the Iran Deal*, Wall Street Journal (Aug. 26, 2015), <http://www.wsj.com/articles/an-informed-vote-on-the-iran-deal-1440628384>.

As events transpired, the President never transmitted the entire deal to Congress for its review. In particular, the Administration claimed that certain parts of an agreement between Iran and the International Atomic Energy Agency (IAEA) did not fall within INARA's transmittal requirements.⁴ However, anticipating that the final agreement would be embodied in numerous separate, interlocking texts between different parties, INARA adopted an extremely broad definition of what needs to be transmitted:

an agreement related to the nuclear program of Iran that includes the United States, commits the United States to take action, or pursuant to which the United States commits or otherwise agrees to take action, regardless of the form it takes, whether a political commitment or otherwise, and regardless of whether it is legally binding or not, including any joint comprehensive plan of action entered into or made between Iran and any other parties, and any additional materials related thereto, including annexes, appendices, codicils, side agreements, implementing materials, documents, and guidance, technical or other understandings, and any related agreements, whether entered into or implemented prior to the agreement or to be entered into or implemented in the future.⁵

The broadness of the statutory definition clearly indicates that Congress wanted to prevent the very kind of lawyerly evasions later employed by the Administration.⁶ As a result of the Administration's failure to transmit the entire "agreement" to Congress, the period for "Congressional review" under INARA never began.⁷ Indeed, to this day, the transmittal has not occurred. And INARA clearly provides that "prior" to such transmittal, the president may not lift or waive any Iran sanctions whatsoever, even where he would have previously been authorized by the relevant sanctions legislation to do so.⁸ Moreover, any congressional action to approve or disapprove sanctions under the INARA scheme is ineffective until the entire agreement has been transmitted.

This means that Congress acted improperly in proceeding to vote on approving the deal absent transmission of the required documents. However, Congress cannot waive legislative requirements without enacting new legislation, and thus the President's non-

⁴ Bill Gertz, *Secret Iran Deal Covers Military Site, Other Past Arms Work*, Washington Free Beacon (July 23, 2015), <http://freebeacon.com/national-security/secret-iran-deals-cover-military-site-other-past-arms-work/>.

⁵ 42 U.S.C.A. § 2160e(h)(1) (emphasis added).

⁶ Marc A. Thiessen, *Obama's secret Iran deals exposed*, The Washington Post (July 27, 2015), https://www.washingtonpost.com/opinions/obamas-secret-iran-deals-exposed/2015/07/27/26d14dbc-3460-11e5-8e66-07b4603ec92a_story.html

⁷ See supra note 42 at 2160e(b).

⁸ See supra note 42 at 2160e(b)(3).

compliance with INARA made his subsequent lifting of sanctions⁹ - and any further such actions he might take - unlawful, despite Congress's unwillingness to call him on it.¹⁰

B. The IAEA-Iran deal falls within INARA's transmission requirements.

1. *Congress required transmission even of "side deals," while the IAEA materials are arguably an integrated part of the deal itself.*

The statutory language of INARA, quoted above, is quite broad regarding what needs to be transmitted to Congress, encompassing "related agreements" such as "side agreements." That is enough to sweep in the IAEA documents. But they are more than just "side agreements" — they are actually part of the deal itself. Thus, not only the letter, but also the most basic purpose of the agreement requires Congress to see them for the relevant review period to begin.

First, it is important to understand the role of the IAEA in the Iran deal. It is not merely an outside actor. The Joint Comprehensive Plan of Action (JCPOA) mentions the IAEA more than 100 times by name.¹¹ The IAEA is an integral part of the JCPOA mechanism. The deal is built around IAEA action. The IAEA's inspection and verification processes are used in the JCPOA as triggers for sanctions relief and other actions by the signatories. The JCPOA's timetables for implementation are heavily based on IAEA actions. In short, the IAEA is itself part of the structure of the deal. Indeed, the Iran-IAEA arrangements are explicitly incorporated into the JCPOA itself:¹⁰

The International Atomic Energy Agency (IAEA) will be requested to monitor and verify the voluntary nuclear-related measures as detailed in this JCPOA. The IAEA will be requested to provide regular updates to the Board of Governors, and as provided for in this JCPOA, to the UN Security Council. All relevant rules and regulations of the IAEA with regard to the protection of information will be fully observed by all parties involved.¹²

Unless one thinks this paragraph authorizes the agency to disregard its own rules, the reference to "parties" in this paragraph of the JCPOA clearly includes the IAEA. This then supports the view that the term "parties" in INARA includes the IAEA (though is

⁹ The White House Office of the Press Secretary, *Executive Order -- Revocation of Executive Orders 13574, 13590, 13622, and 13645 with Respect to Iran, Amendment of Executive Order 13628 with Respect to Iran, and Provision of Implementation Authorities for Aspects of Certain Statutory Sanctions*, (Jan. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/16/executive-order-revocation-of-executive-orders-with-respect-to-iran>

¹⁰ See *supra* note 3; see also, Jack Goldsmith, *The Non-Trivial But Probably Losing Argument That The Iran Review Act Bars The President from Lifting U.S. Sanctions Against Iran*, Lawfare (September 14, 2015), <https://www.lawfareblog.com/non-trivial-probably-losing-argument-iran-review-act-bars-president-lifting-us-sanctions-against>.

¹¹ Joint Comprehensive Plan of Action (July 14, 2015) available at <http://www.state.gov/documents/organization/245317.pdf>

¹² Id at Preamble, Par. x.

not necessary to this conclusion about INARA, which was obviously written before the JCPOA).

Among the roles of the IAEA under the JCPOA is to ensure that “Iran will fully implement the ‘Roadmap for Clarification of Past and Present Outstanding Issues’ agreed with the IAEA, containing arrangements to address past and present issues of concern relating to its nuclear programme...”¹³ This “Roadmap for Clarification” referred to in the JCPOA is an agreement between Iran and the IAEA, which includes subordinate agreements dealing with particular verification issues relating to the military aspects of the nuclear program, most saliently, activities at the Parchin site.¹⁴ It was signed by Iran and the IAEA the same day as, and in tandem with, the conclusion of the JCPOA. Thus the JCPOA specifically incorporates by reference the various arrangements between Iran and the IAEA that the President failed to transmit.

There is nothing artificial or strained about Iran-IAEA agreements being treated as part of the JCPOA for INARA purposes. The Roadmap is clearly a “relevant” document under the JCPOA; indeed, it is incorporated by reference in the JCPOA. The arrangements *pursuant* to the Roadmap are by their terms not separate “agreements.” Rather, as the introduction to the Roadmap makes clear, the missing documents in question are “arrangements” that are part of the “context” of the Roadmap agreement. They then fall within the Roadmap (and are explicitly adopted by it) and the Roadmap is, in turn, explicitly adopted and incorporated into the JCPOA.¹⁵ These are not separate agreements from the JCPOA; they are intertwined.

In any case, one not need belabor the question of whether they are merely side deals or part of the deal itself because the statutory language on transmittal is purposefully sweeping and redundant: If not part of the deal, the documents are surely “additional materials related thereto, including annexes, appendices, codicils, side agreements, implementing materials, documents, and guidance.”¹⁶ Indeed, it would be hard to argue that the IAEA-Iran materials are not at the very least “implementing materials” which INARA requires be transmitted, since these arrangements implement the Roadmap, which is explicitly incorporated into the JCPOA. Apart from the parsing, the crucial point here is that this is not some purely separate set of agreements that it would be incongruous for Congress to inspect. Rather, the IAEA is a direct participant in the administration of the JCPOA. The arrangements in question are part of the Roadmap, which, in turn, is explicitly adopted by the JCPOA.

2. Other provisions of INARA confirm requirement to transmit IAEA documents as a condition of sanctions relief.

¹³ *Id.*, Part C.14.

¹⁴ International Atomic Energy Agency, *IAEA Director General's Statement and Road-map for the Clarification of Past & Present Outstanding Issues regarding Iran's Nuclear Programme*, (July 14, 2015) available at <https://www.iaea.org/newscenter/statements/iaea-director-generals-statement-and-road-map-clarification-past-present-outstanding-issues-regarding-irans-nuclear-programme>

¹⁵ See *supra* note 11 generally and also Annex I, par. 66.

¹⁶ S. 615, *Iran Nuclear Agreement Review Act of 2015*, available at <https://www.congress.gov/bill/114th-congress/senate-bill/615>.

Other provisions of INARA confirm that the IAEA documents omitted by the President fall within the transmission requirement. Section (a)(3) of INARA explicitly exempts one particular document from most of the transmission and other review requirements of the law: the “EU-Iran Joint Statement of April 2, 2015.” However, as discussed above, INARA only requires transmission of “the agreement” with Iran. Because it was not a formal agreement with the United States, the Administration takes the position that this does not include the IAEA protocol (though it was an integral part of a nexus of larger undertakings that clearly involved the U.S.). But under the Administration’s definition of “agreement” in INARA, the EU-Iran Joint Statement would certainly not come close to falling within the scope of documents that must be transmitted to Congress, because the U.S. is obviously not a direct participant in the Joint Statement. Yet Congress obviously understood the EU-Iran Joint Statement to be a “side agreement” that would fall within the scope of INARA, as defined in subsection (h)(1), and for various reasons chose specifically to exempt it. By explicitly addressing transmittal requirements for agreements between Iran and third-parties, Congress made clear that the INARA default is that they must be transmitted.

To be sure, INARA applies only to agreements that “commit the United States to take action.”¹⁷ The JCPOA is not a binding legal commitment under international law. But the statute’s definition of “commitments” is expansive, including “a political commitment . . . and regardless of whether it is legally binding or not.” In other words, even diplomatic, non-binding commitments count. The United States (non-bindingly) committed to the JCPOA, and the JCPOA sets out expectations for the United States and Iran. Under the JCPOA, Iran’s compliance with the Roadmap is determined by IAEA as part of a sequence of commitments that also trigger U.S. political commitments.¹⁸ Note that the U.S. steps that accompany Iran’s Roadmap compliance are specifically called “commitments” in the JCPOA. Thus, the subsidiary arrangements to the Roadmap directly trigger political commitments by the United States. It is impossible to describe the Roadmap set of documents as not being directly or indirectly part of the deal that Congress can review.

3. The purpose and legislative history of INARA demonstrate that non-transmittal of IAEA documents freezes existing statutory sanctions in place.

If there were any ambiguity, the purpose and goal of the INARA — letting Congress review the Iran deal to determine how to exercise its Foreign Commerce powers regarding lifting legislative sanctions — should play a significant role in guiding the interpretation of the relevant terms.¹⁹ The law is called the “Iran Nuclear Agreement Review Act of 2015,” and the relevant materials are an incorporated part of the agreement.²⁰ By its very structure, the Iran nuclear agreement arose from negotiations

¹⁷ See *id.* at section h(1).

¹⁸ See Annex V, arts. 9 & 11.

¹⁹ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2493-94 (2015).

²⁰ See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015) (interpreting statute in light of its purpose, as inferred from its title).

between numerous parties, and was not merely an agreement involving the U.S. Congress cannot properly “review” the “Iran nuclear agreement” without, at a minimum, seeing all of the agreement, as well as related and supporting documents.

The legislative history also sheds light on whether the law can be understood as requiring transmittal of the IAEA-Iran deal. First, Congress clearly understood that IAEA was not some random third-party to deal, but rather a crucial part of its implementation. Its crucial role at “ensuring access” to Iranian sites is mentioned several times, and the terms of this access are in part set forth in the IAEA arrangements. As Rep. Ted Deutch, of this Task Force, put it in arguing for passage of INARA: “I want details on conditions for sanctions relief and access to military sites and unannounced inspections, and you should, too.”²¹ This is exactly the kind of thing that might be found in the withheld materials.

The legislative history of the INARA also adds significant support to the argument that the failure by the President to transmit the complete agreement to Congress for review prevents the initiation of the review period, and thus effectively freezes existing sanctions in place. This point was made repeatedly in the course of Congress’s deliberations over the bill in 2015. As Mr. Royce, Chairman of the House Foreign Affairs Committee, clearly explained: “*Sanctions relief is frozen* until Congress receives the agreement and then holds a referendum on its merits.”²²

In the Senate, the point received further elaboration. As the bill’s co-sponsor, Sen. Corker put it:²³

[A]s discussed during the committee markup, we all agree that the period for review only begins when all the documents required to be submitted along with the agreement itself and all of the annexes and other materials that are covered by the definition of agreement in the bill have been submitted to Congress. That is, the period for review under our bill only begins to run when all of the documents that make up the agreement and have to be submitted with it are submitted to Congress, as provided in the bill.

No one argued against these characterizations of the meaning of the bill and Congress’s understanding of it, and the President signed the law knowing this was Congress’s interpretation.

C. Is the transfer requirement constitutional?

Some scholars have argued that while INARA requires the transmittal of the complete deal, it might be unconstitutional for Congress to “force” the President to produce all

²¹ 161 Cong. Rec. H2980 (daily ed. May 14, 2015) (statement of Rep. Deutch) available at <https://www.gpo.gov/fdsys/pkg/CREC-2015-05-14/pdf/CREC-2015-05-14.pdf>

²² 161 Cong. Rec. H2976 (daily ed. May 14, 2015) (statement of Rep. Royce) available at <https://www.gpo.gov/fdsys/pkg/CREC-2015-05-14/pdf/CREC-2015-05-14.pdf> (emphasis added).

²³ S.Amdt.1140 to H.R. 1191 available at <https://www.congress.gov/amendment/114th-congress/senate-amendment/1140/text>.

such documents, because they are classified, or because it might require diplomatic or other efforts to secure them. The Iran-IAEA protocol could fall into such a category. The extent of Congress's power to compel the Executive to turn over sensitive diplomatic correspondence is indeed a debate almost as old as the Constitution itself. Regardless of the abstract merit of these constitutional arguments, they simply do not fit the facts of INARA. The law does not "force" or "compel" the President to produce any documents whatsoever. Rather, it simply provides that the production of these documents triggers the "review period," and provides that, after that period, sanctions relief is possible. That is, it delegates to the Executive various powers, with conditions on their exercise. That is unremarkable. The President does not have to transfer the documents; there is no effort to penalize the Executive.

The only reason the President can waive sanctions is because Congress has authorized it. INARA modifies and narrows that authorization by conditioning it on congressional review of the entire Iran deal. That is not forcing the President to provide the relevant documents. Rather, it is delegating to him the power to waive sanctions, provided he allow for congressional review of the deal. Since sanctions are fundamentally in Congress's exclusive Art. I power, they can certainly narrow the scope of their delegation in this way.

Indeed, the Supreme Court's recent affirmation of certain areas of sole Executive power in foreign affairs repeatedly pointed out that even in the broadest conceptions of this view, foreign commerce remains a matter for Congress.²⁴ The sanctions are quite clearly a foreign commerce matter. The mere fact that the law also bears on foreign policy won't help the Executive, as that will typically be the case with foreign commerce legislation. Indeed, the Solicitor General conceded in oral arguments in *Zivotofsky* that Congress could legitimately legislate economic sanctions against the foreign policy of the Executive, indeed, even if it would seriously interfere with his foreign diplomatic efforts.²⁵

Then there is the argument that the president does not have the documents and that the JCPOA ensures their secrecy. That is indeed a problem, but mostly for the President. INARA is a statute with certain requirements. A non-binding non-executive agreement cannot excuse the Executive from complying with the terms of a statute. So if there is a conflict between the disclosure required by INARA, which the President of course signed, and the disclosure permitted by the JCPOA, the former would prevail.

D. What next?

Congress's protest of the Executive's actions has been muted, to put it mildly. This underscores the structural limitations of congressional pushback to Executive

²⁴ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087, 2100 (2015) ("[A]ny decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action.")

²⁵ See oral arguments in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (U.S. 2015) at 27-28 available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-628_fe9g.pdf.

overreaching in Foreign Affairs. Action in this area will often be nonjusticiable, or at least will not readily give rise to cases before the courts. Executive action will carry its own forward momentum, accelerated by the course of global events. Legislative enforcement of technical but important limitations on executive action will be practically and politically difficult to organize, especially as the Executive's action will likely find considerable sympathy, *ex post*, by at least legislators of his political party.

In the case of Iran sanctions, there are still numerous battles that have yet to be fought. The Administration has written to state governors, asking them to consider setting aside their own sanctions on Iran.²⁶ For sanctions related to Iran's energy sector, state authority to implement such measures is clearly granted by the Comprehensive Iran Sanctions, Accountability, and Divestment Act.²⁷ Under this law, the President lacks the authority to waive or suspend state sanctions (unlike federal ones).²⁸ The fairly unusual omission of a presidential waiver option also means that the President cannot seek the nullification of such laws by invoking the foreign policy preemption doctrine.²⁹

However, some state sanctions are broader than the scope of CISADA, and parallel federal sanctions relating to Iran's human rights practices and other issues.³⁰ Whatever the President's power to seek to preempt these laws as contrary to U.S. foreign policy, his non-compliance with INARA makes it moot. INARA provides that Iran can enjoy *no* sanctions relief until after the President submits the entire agreement to Congress. Moreover, even if INARA had been complied with, it codifies a federal policy that protects the broader state sanctions from foreign policy preemption. The law makes clear that the JCPOA shall not be used to undo "sanctions on Iran for terrorism, human rights abuses, and ballistic missiles."³¹ Thus any authority the president had before INARA to seek preemption of such state divestment measures as contrary to federal foreign policy³² is limited by the legislative framework he agreed to for implanting the JCPOA.

If the Executive seeks, through withholding funds or through invoking the preemption doctrine to invalidate state-level Iran sanctions, all these issues can ultimately wind up in court. There, not just the preemption issues, but the basic question of whether INARA has been complied with, would be subject to judicial review. That would give at least some opportunity for Congress to protest, as an *amicus curiae*, the Executive's flouting of Foreign Commerce legislation. But Congress should not count on the courts to rescue it. It must exercise those powers that it still has to reclaim those it has lost.

²⁶ Eli Lake, *Obama Administration Urges States to Lift Sanctions on Iran*, BloombergView (April 18, 2016), <http://www.bloomberg.com/view/articles/2016-04-18/obama-administration-urges-states-to-lift-sanctions-on-iran>

²⁷ See Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Public Law 111-195, sec. 202(a) & (f) available at <https://www.treasury.gov/resource-center/sanctions/Documents/hr2194.pdf>.

²⁸ *Id.*, sec. 401(a)(1) & (b)(1).

²⁹ Jack Goldsmith and Amira Mikhail, *Does the Iran Deal Require the USG to Seek Preemption of (Some) State Sanctions?*, Lawfare Blog (April 27, 2016), <https://www.lawfareblog.com/does-iran-deal-require-usg-look-for-preemption-some-state-sanctions>.

³⁰ Kenneth Katzman, *Iran Sanction*, <https://www.fas.org/sgp/crs/mideast/RS20871.pdf>

³¹ 42 U.S.C.A. § 2160e(d)(7)(A).

³² See *supra* note 29.

II. Will the Power of the Purse get snatched?

The power to appropriate funds is perhaps Congress's most important and far-reaching power, and one in which the Executive has no share. The Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."³³ The Framers saw this as the centerpiece of congressional power, and in particular of the legislature's ability to restrain the Executive. As Madison wrote:

The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. . . This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.³⁴

Similarly, Justice Story saw the power of the purse as giving Congress a "controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable."³⁵ Yet, in recent months, the Executive has asserted an alarming willingness to adopt strained interpretations of spending limitations that leave the power of the purse liable to be purse-snatched.

The problem arises in the fraught nexus of climate politics and Palestinian unilateralism. The United Nations Framework Convention on Climate Change (UNFCCC) has recently accepted the Palestinian Authority (PA) as a state party.³⁶ The move is part of the Palestinian effort to be declared a state outside of negotiations with Israel.³⁷ The United States does not recognize the PA as a state, and U.S. policy has consistently opposed such moves in international organizations. Moreover, longstanding U.S. law requires the defunding of any U.N. organization that grants the Palestinian Authority such status.

Federal law bars any funding for U.N. agencies or affiliates that "grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood." According to the State Department, the PA lacks such attributes. Thus, when it joined the United Nations Educational, Scientific and

³³ U.S. Const. art. I, § 9, cl. 7.

³⁴ Federalist 58.

³⁵ Joseph Story, *Commentaries on the Constitution of the United States*, Book III, Ch. 7 (1833).

³⁶ UN Climate Change Newsroom, *State of Palestine Joins UNFCCC Climate Change Convention Now Totals 197 Parties (2015)*, available at <http://newsroom.unfccc.int/unfccc-newsroom/state-of-palestine-joins-convention/>

³⁷ For an example of the Palestinian bid to declare statehood outside of negotiations with Israel, see United Nations: Meetings Coverage and Press Releases, *General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations*, (Nov. 29, 2012), available at <http://www.un.org/press/en/2012/ga11317.doc.htm>.

Cultural Organization (UNESCO) in 2011, it triggered U.S. defunding of that organization.³⁸ American contributions had amounted to nearly a quarter of its budget. The law now also requires a similar cessation of any funding to UNFCCC.³⁹ (The Obama administration requested \$13 million for the UNFCCC in the 2017 fiscal year.)

There are actually two separate U.N. defunding laws. Reading them together makes clear that UNFCCC falls within the prohibition on funding. The first is a 1990 measure barring aid to “the United Nations or any specialized agency thereof” that accords the Palestinian Authority “the same standing as members states.”⁴⁰ Congress added to the funding prohibition in 1994, extending it to other U.N. “affiliated organizations.” “Specialized agency” refers to a distinct kind of entity within the U.N. system, of which UNESCO is one. The latter provision’s term – “affiliated organization” is a more general term, not borrowed from or corresponding to the U.N.s’ bureaucratic nomenclature. It must be read in its natural meaning as encompassing all agencies affiliated with the U.N. system.

The UNFCCC organization is certainly a U.N. affiliate. While UNFCCC is a treaty, it is also an organization – like the U.N. itself. The Convention creates agencies to supervise its implementation. Thus UNFCCC is administered by a Secretariat that is “institutionally linked” to the United Nations. Moreover, the Secretariat is “administered under U.N. rules and regulations,” the head of the agency is appointed by the U.N. secretary general, and its staff sits in U.N. offices. It is listed in the United Nations’ directory of “United Nations System Organizations.” UNFCCC officials can give work assignments to U.N. bureaucrats.⁴¹ Indeed, the UNFCCC’s handbook states that it is “under the umbrella of the United Nations.”⁴² If this is not “affiliated,” nothing is.

While the administration grudgingly stopped sending checks to UNESCO, it lobbied Congress to amend the law to eliminate the funding restrictions. Congress did not oblige. And so apparently the Executive has decided to ignore them in future cases.

The State Department has indicated it would continue funding UNFCCC. Two justifications were offered. First, the State Department said that UNFCCC was just “a treaty,” not an *organization*, thus “*the Palestinians’ purported accession does not involve their becoming members of any ... international organization.*”⁴³ That is simply not true.

³⁸ See Colum Lynch, UNESCO votes to admit Palestine; U.S. cuts off funding, Washington Post (Oct. 31, 2011), https://www.washingtonpost.com/world/national-security/unesco-votes-to-admit-palestine-over-us-objections/2011/10/31/gIQAMleYZM_story.html

³⁹ See Brett Schaefer, *US Law Should Now Prohibit Funding to UN Climate Change Convention*, The Daily Signal (March 24, 2016), <http://dailysignal.com/2016/03/24/us-law-should-now-prohibit-funding-to-un-climate-change-convention/>

⁴⁰ Pub. L. 101–246, title IV, § 414, Feb. 16, 1990, 104 Stat. 70.

⁴¹ Id.

⁴² See United Nations Framework Convention on Climate Change, p. 53 available at <https://unfccc.int/resource/docs/publications/handbook.pdf>.

⁴³ See Timothy Cama, *Palestine is latest GOP offensive in climate change wars*, The Hill (April 23, 2016), <http://thehill.com/policy/energy-environment/277336-palestine-is-latest-gop-offensive-in-climate-change-wars>

The UNFCCC is a treaty, but it is a treaty that in part constitutes international agencies, which happen to be U.N.-affiliated. Indeed, by virtue of its purported accession to UNFCCC, the PA is automatically a member of the Conference of State Parties, the “supreme body of the convention.”⁴⁴ Thus, it is clearly not just a treaty, it is also an organization. And the U.N.-affiliated Secretariat is a creature of the Conference of Parties.⁴⁵ As the UNFCCC’s own organizational chart reveals, the Secretariat is directly integrated into the Conference of Parties.⁴⁶ Being part of the Conference, which the PA is automatic upon treaty accession, makes the PA also a part of the subsidiary secretariat.

Thus UNFCCC is a treaty that, like numerous treaties do, creates agencies. In this case, it creates a heavily bureaucratic structure with agencies within agencies. One of those subsidiary agencies – the one that mostly runs the show – is expressly a U.N. affiliate.⁴⁷ The administration’s argument that appropriations to UNFCCC don’t fall under the 1994 defunding law because it is a “treaty” not an “organization” fall flat because one cannot write a check to a treaty, nor can a treaty deposit it. Rather, checks are written to organizations, in this case UNFCCC’s U.N.-affiliated secretariat.⁴⁸ U.S. contributions constitute 21.5% of its budget (as with UNESCO before defunding).⁴⁹

The State Department’s other justification for continuing funding was even more alarming: “we do not believe that it advances U.S. interests to respond to Palestinian efforts by withholding critical funds that support the implementation of key international agreements.” What makes this troubling is that under the Constitution, it is not the Administration, but rather Congress via appropriations legislation, who decides what it is in U.S. interests to fund or not to fund. The Executive has no independent policy discretion to spend funds whatsoever. It is of absolutely no import whether the Executive thinks spending these funds is a good idea.⁵⁰

Because of the central role of Congress – and in particular this House – in appropriations, ambiguities about conditions on such appropriations must be resolved restrictively. That is, the presumption is against spending unless specifically authorized, rather than for spending unless specifically prohibited. Congress has in this case fairly

⁴⁴ See Art. 7(1)-(2) in *supra* note 10.

⁴⁵ *Id.* at Art. 8(3).

⁴⁶ See UNFCCC Organizational Chart, available at http://unfccc.int/files/inc/graphics/image/png/unfccc_bodies_large.png.

⁴⁷ The question of U.S. contributions to the “Green Climate Fund,” the financial instrument of UNFCCC, may have a different resolution. The Fund is entirely organizationally independent of the UNFCCC apparatus and of the U.N. It is run by an independent board, and its relationship with the Conference of Parties is far more remote than that of the UNFCCC secretariat.

⁴⁸ See United Nations Framework Convention on Climate Change, *Proposed programme budget for the biennium 2016–2017*, FCCC/SBI/2015/3, (Mar. 23, 2015) available at <http://unfccc.int/resource/docs/2015/sbi/eng/03.pdf>; See also United Nations Framework Convention on Climate Change, *Programme budget for the biennium 2014–2015*, FCCC/CP/2013/L.7 (Nov. 22, 2013), available at <http://unfccc.int/resource/docs/2013/cop19/eng/107.pdf>.

⁴⁹ *Id.* at 11.

⁵⁰ *Cf. United States v. MacCollom*, 426 U.S. 317, 321 n.1 (1976) (even if federal courts believe there are “sound policy reasons” to make free transcripts available to indigent litigants at public expense, this is forbidden when “these considerations have not yet commended themselves to Congress.”)

clearly forbidden spending.⁵¹ Just as the Executive is likely to win separation of powers fights that deal primarily with foreign relations, Congress must win those that deal primarily with taxpayer money.

The President's apparent readiness to spend money in clear defiance of statute and Congress's clear intent represents a remarkable and very unusual example of overreach. Previous Administrations have occasionally invoked Executive discretion to *not* spend money Congress has appropriated for a particular purpose. But doing the opposite is an overwhelming usurpation of legislative prerogatives.

The power of the purse is supposed to be Congress's strongest check against the Executive. It is one the Congress has been extremely reticent about using in the area of foreign affairs, at least without waiver provisions. When the Executive has most strongly objected to such funding restrictions, it has even sought to finance its policy preferences through third countries and private donors rather than spend money in defiance of Congress's will.⁵²

The issues at stake here are far larger than U.N. climate change efforts or the Israeli-Palestinian conflict. They are the integrity of the most basic aspects of the separation of powers that limit taxing and spending discretion to Congress.

III. Concluding Observations

Going forward, Congress must be clearer and more forceful when it wishes to exercise its enumerated powers in foreign affairs. It must, in drafting legislation in this area, remember that most of it will not be susceptible to judicial review, and thus, in practice, the Executive himself will be the final interpreter of the limitations Congress seeks to place on his action. Statutes not to his liking may go unenforced or receive artificially narrow interpretations. Congress will usually be able to do little more than hold hearings like this one.

The proper way to control Executive overreach in foreign affairs – and, more importantly, to allow Congress to exercise its Article I powers meaningfully, – is to write broader, clearer and stronger legislation in the first place. Congressional legislation in these areas is typically phrased quite narrowly and is replete with exceptions, waiver provisions, and so forth. Much of this is justified by the need to provide the Executive with maneuverability in the fast-changing currents of world

⁵¹ *Id.* at 321 (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”).

⁵² See *Report of Congressional Committees Investigating the Iran-Contra Affair*, H. Rep. 100-433, S. Rep. 100-216, pg. 4 (November 18, 1987). The Obama Administration's contention that UNFCCC is not an “affiliated agency” bears some structural similarity to the Reagan Administration's implicit position that the National Security Council is not an agency “involved in intelligence activities” for purposes of the funding restrictions in the 1984 Boland Amendment.

affairs. But, in practice, the Executive has proven itself more than up to the task of finding statutory authorities to meet various exigencies. The fear of tying the Executive's hands in undesirable ways seems far less real than the fear of justified constraints that he can slip out of.

Thank you for giving me the opportunity to address these issues, and I welcome your questions.