EXECUTIVE OVERREACH IN FOREIGN AFFAIRS

HEARING

BEFORE THE

EXECUTIVE OVERREACH TASK FORCE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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EXECUTIVE OVERREACH IN FOREIGN AFFAIRS

THURSDAY, MAY 12, 2016

HOUSE OF REPRESENTATIVES

EXECUTIVE OVERREACH TASK FORCE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Task Force met, pursuant to call, at 10:11 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve King (Chairman of the Task Force) presiding.

Present: Representatives King, Goodlatte, Issa, Gohmert, Jordan, Gowdy, Labrador, DeSantis, Buck, Bishop, Cohen, Conyers, Jackson Lee, and Johnson.

Staff Present: (Majority) Paul Taylor, Chief Counsel; Zachary Somers, Parliamentarian & General Counsel, Committee on the Judiciary; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. KING. The Executive Overreach Task Force will come to order. And, without objection, the Chair is authorized to declare a recess of the Task Force at any time. I'll recognize myself for opening statement.

Today's hearing will focus on executive overreach in foreign affairs. The Constitution grants the President as Commander in Chief clear powers in foreign affairs. However, the Constitution also provides for a check on those powers by, for example, requiring that the Senate approval international treaties and that Congress appropriate all funds needed to foreign military engagements.

I'll focus my remarks today on two troubling developments as it relates to those checks the Constitution grants to the Congress and not the President. Regarding the Senate's treaty ratification powers in Paris late last year, the Obama administration also took part in the 21st Conference of Parties to the United Nations Framework Convention on Climate Change.

Senior Administration officials, including Secretary of State John Kerry, Environmental Protection Agency Administrator Gina McCarthy, and Secretary of Energy Ernest Moniz—who visited Ames, Iowa, just this past week, and I thank him for that—negotiated the final terms of a new climate change pact, the so-called Paris Agreement. The agreement involves the commitments that will affect every part of the U.S. And the Obama administration intends to meet those commitments by requiring changes to State

law. These Paris Agreement criteria and others listed by the State Department itself in what's called the Circular 175 procedure show clearly that the Paris Agreement is a treaty that requires the approval the Senate, under Article II, Section 2, Clause 2, of the Constitution, which provides the President shall have power by and with the advice and consent of the Senate to make treaties provided two-thirds of the Senators present concur.

Despite this, President Obama has made clear through his spokesperson that he has no intention of consulting or including either the Senate or anyone in Congress in any aspect of the international treaty. On March 31, 2015, White House spokesman Josh Earnest was asked at a press conference briefing whether Congress has the right to approve the Paris Agreement. Mr. Earnest responded, speaking for the President, as follows, "I think it's hard to take seriously from some Members of Congress who deny the fact that climate change exists that they should have some opportunity to render judgment about a climate change agreement."

Well, think of that for a moment. The chief spokesperson said that, simply because Members of Congress disagree with the President's environmental policies, the constitutional requirement that a treaty be submitted to the Senate for approval is negated. That's outrageous, and it's unlawful. And it's a clear example of the executive overreach in the area of foreign affairs.

Regarding the President's powers in war, the President does have much greater constitutional authority in the areas of military affairs than he does in domestic affairs. Yet, even in the case of war, the President's powers are not unlimited. One clear limitation on that power is Congress' constitutional authority to appropriate all Federal funds for use on anything, including war. Yet President Obama has evaded Congress' control over military appropriations, as many Presidents have, by using accounting gimmicks to move funds Congress approved for one purpose to another, as was done to pay for the U.S. intervention in Libya.

Today, Congress' power of the purse is weakened because the President has many ways to evade Congress' control over military appropriations, namely accounting procedures to move funds Congress approved for one purpose to another purpose Congress has not approved.

In the case of the intervention in Libya, President Obama paid for that conflict entirely out of funds reallocated from other Defense Department accounts. Harold Koh, President Obama's own former legal adviser to the Department of State, has also written that the President has developed over time a whole range of devices to exploit spending loopholes in the appropriation process. When Congress grants the President statutory drawdown authority, he may withdraw certain funds simply by determining that such withdrawals are vital to the security of the United States. Similar statutory provisions allow the President access to special and contingency funds based upon nebulous findings that the use of those funds is important to the security of the United States or to the national interest.

When given statutory transfer and reprogramming authority, the President has transferred—the President transfers to one appropriations account funds initially appropriated for another or may

reprogram appropriated funds within a single appropriation account, often without specific statutory authority. This is yet another example of executive overreach, albeit it one that Congress has been complicit to some extent. Nevertheless, it is an issue that this Task Force should consider.

And I also am thinking about the Iranian treaty agreement, and I expect there will be some remarks with regard to that a little bit later today. And I would point out that Congress has controlled funds with regard to war and done so effectively. And if one would read back through the appropriations debate and language that shut off all funds to support the Vietnam war: In the land of Vietnam and the seas adjacent to it, the skies over it, or the countries adjacent to it, or the skies over them, no funds would be used to conduct the Vietnam war. And it effectively, I'll say, de facto took ammunition off the docks at Da Nang by an act of Congress by using the appropriations language to shut down a war. So that's an example of how a President did honor the wishes of Congress, and we're going to want to talk today about that, but in the meantime, I look forward to hearing from all of our witnesses here today on these and many other issues.

And I would recognize the Ranking Member, Mr. Cohen from Tennessee, for his opening statement.

Mr. COHEN. Thank you, Mr. Chair. I would first like to submit for the record my prepared marks, which I will not refer to in my remarks, for entry into the record.

Mr. KING. Without objection so ordered.

[The prepared statement of Mr. Cohen follows:]

Statement of the Honorable Steve Cohen for the Hearing on "Executive Overreach in Foreign Affairs" Before the Executive Overreach Task Force

Thursday, May 12, 2016 at 10:00 a.m.
2141 Rayburn House Office Building

Perhaps it is no surprise that today's hearing, like the previous hearings of this Task Force, seems to be yet another attempt to re-litigate stale debates about President Barack Obama's achievements.

In losing the substantive debate over the President's actions, his critics have instead turned to claiming that those actions were unconstitutional or otherwise unlawful.

First, after failing to stop the Patient Protection and Affordable Care Act from being enacted, the President's critics argued that his implementation of that law was unconstitutional.

The Supreme Court and other federal courts rightly rejected those strained constitutional and legal arguments.

Then, the President's critics on immigration claimed that he failed to fulfill his constitutional duty to faithfully execute the law when he exercised sound and well-established enforcement discretion – discretion that Congress granted to him by statute – in deferring deportation for certain undocumented immigrants.

That challenge is also likely to be unsuccessful.

Applying the same tactic to foreign affairs, the President's critics now claim that his foreign policy achievements are also somehow unlawful, focusing in particular on the Iran nuclear agreement and the Paris climate agreement.

Yet these arguments are similarly unavailing.

Courts have long recognized that the Constitution gives the President broad leeway in foreign affairs, authority that is inherent in his role as the Nation's chief executive.

Moreover, there are the specifically enumerated constitutional powers like the commander-in-chief power and the power to receive ambassadors that a President can draw upon.

It is clear that the President had the authority to conclude both the Iran nuclear agreement and the Paris climate change agreement.

Neither agreement was a treaty requiring the Senate's advice and consent given that they do not contain any new *legally*-binding requirements.

Rather, they embody political commitments that use political or economic incentives and disincentives to achieve certain ends.

Moreover, both agreements were consistent with existing U.S. law.

For instance, in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Congress gave the President the discretion to lift or waive various Iran-related sanctions if Iran met certain conditions or where the President deemed doing so to be in the national interest.

In addition, Congress was given the opportunity formally to weigh in on the Iran agreement pursuant to the Iran Nuclear Agreement Review Act of 2015 and critics simply failed to muster enough opposition to stop the deal from moving forward.

The Paris climate agreement, meanwhile, was concluded pursuant to the U.S.'s already-existing treaty obligations under the United Nations Framework Convention on Climate Change, which the Senate ratified in 1992.

Moreover, while the Paris agreement did not bind the United States to specific quantitative emissions goals, the President already has the legal authority pursuant to the Clean Air Act to issue rules aimed at reducing greenhouse gas emissions.

In light of the foregoing, it is clear that the President was well within his power to conclude the Iran nuclear agreement and the Paris climate agreement.

At a time when the United States faces many daunting challenges in its foreign affairs, we in Congress could be focusing our attention on ways to effectively address those challenges, whether it is the continuing threat posed by the Islamic State, the re-emergence of strategic competitors like Russia and China, a spreading pandemic like the Zika virus, and, indeed, climate change and nuclear proliferation.

Today's hearing will, instead, be a waste of time and a wasted opportunity.

Mr. COHEN. Thank you. I was a little bit late today, for I was at the Trumpo show. And there was a gigantic crowd of reporters and television and protesters over at the Republican—wherever you all meet, at one of those places. I saw Vice President Issa over there. And he was walking down the street looking very Vice Presidential. He was ready at any minute to step in.

Mr. ISSA. Oh, no. You were the one in the Cadillac driving by.

Mr. COHEN. I thought it was Scherzer. There were so many people; I thought it was something to do with Scherzer. I mean, he had 20 strikeouts, but I found out it was Trump. Scherzer, yeah, unbelievable last night. But you think you have a problem with executive overreach now; if he becomes President, you have combover, overreach. You have got all kinds of overs and no unders.

Mr. ISSA. Does the gentleman pretend to know something about hair? Is there a level of expertise being asserted here in Halls of Congress?

Mr. COHEN. I have to admit I have hair envy. There's no question about it.

But if you think you've got problems with President Obama, if there's a President Trump, Congress will hardly exist because it will be huge and he'll do great things and he won't need anybody's advice or consent because he does great things and he has got great people. And, you know, we will truly be like we are today. Here we are pretending to do government, and nobody's really here. And everybody's watching the show, and we're not the show. And it's all going to be a show.

And you think, you know, an executive, a businessman, a billionaire: he's not going to care about Congress because he does it all. And if we suggest anything, that's he's overreaching his power, he'll fire us, so there will be nothing happening.

But it's a wonderful story that's about to happen on the Republican side. It will be a story that people will look at for centuries. And children in Eastern Europe are going to know they can be born there in Eastern Europe to parents who are economically deprived, and they can become a model and turn out to be First Lady of the United States. And it's going to give children in Eastern Europe something to look forward to, and it is going to incentivize them and give them hope. And it's going to be a great day for America. I can see it coming.

But as far as overreach, you're going to have overreach. It is going to make Obama look like the person that Mr. King would like to have President, somebody who is just strictly limited to the confines of Article—is it II? II, yeah—and doesn't do anything at all that infringes on Article I. So, with that, I——

Mr. ISSA. Will the gentleman yield?

Mr. COHEN. The gentleman will yield to the Vice President.

Mr. ISSA. I thank the gentleman, and I will remember that.

Mr. COHEN. Don't tell Mr. Corker I called you Vice President.

Mr. ISSA. The case we're making here today hopefully plays right into what you just said, that if we anticipate that there have been or measure that there have before overreaches under this Administration and anticipate under the next Administration, then wouldn't the gentleman agree that legislation that specifically empowers the House to be a more effective balancing act over execu-

tive overreach would be paramount right now before the great hair revolution begins?

Mr. COHEN. I don't disagree with you. In a lot of ways, as a lifetime legislator, 24 years in the State and now 10, 9-plus here, I agree the legislature should have more power. I disagreed that President Obama has overreached on climate change, which does exist, and/or on the Iran nuclear agreement, which keeps us safer from the destruction of the planet and mankind. And Mr. Bellinger and Mr. Goldsmith, two of the legal minds in the Bush administration who I have great regard for, concur on that, that these were authorized and appropriate. But I do think there are problems that have occurred in other areas where the executive has gone further than they should in doing things that were legislative prerogatives. And I think that, if by some chance Mr. Trump is the President, gone, it's over.

Mr. ISSA. Well, I look forward to working with the gentleman to pass that legislation under the current Administration so that all future Congresses will enjoy that protection against overreach that the gentleman agrees can occur and has occurred and that this special working group is all about.

Mr. COHEN. Would this be kind of like passing a bill that is like putting an alarm on the government that will go off and let us know when somebody is trying to break the rules, and an alarm goes off and warns us?

Mr. ISSA. I hope it is both an alarm and an auto shutdown capability.

Mr. COHEN. Auto shutdown.

Mr. ISSA. Thank you.

Mr. COHEN. I yield back.

Mr. KING. The gentleman's time has expired.

And the Chair now recognizes the Chairman of the full Committee, Mr. Goodlatte from Virginia, for his opening statement.

Mr. GOODLATTE. Well, thank you, Chairman King, for convening this third hearing of the Task Force on Executive Overreach. And I've been very interested to hear the dialogue I've just heard and especially the comments of the Ranking Member, because I look forward to the transition that will take place when we have a bipartisan effort to halt executive overreach, because it occurs in every Administration of both parties. It's occurring right now. And the point isn't whether you believe in a particular point of view about climate change or whether you believe in the necessity of doing something about nuclear weapons in Iran, we all agree on the need to do some things, not necessarily do the same things. The question is, under the United States Constitution, who has the authority to do it? And there we have a serious difference of opinion.

I have to tell you: one of the lowest days in the time that I have served in Congress was the day that President Obama came to the House to give his State of the Union address before a Joint Session of the Congress, and at the end of his long laundry list of things that he wanted Congress to do, that every President has of either party—they always have a list of things they want done—at the end of his, he said, "And if you don't do it, I will." By what authority under the United States Constitution? And the really—the reason why it was such a low day for me was that so many Members

of your party stood up and gave a standing ovation to the President when he said: I'm going to take your power, the people's power in the elected Representatives of the Congress, and I'm going to use them for other purposes.

Mr. Chairman, could I have order?

Mr. KING. Yes, the Committee will come to order.

And I recognize again the gentleman from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. I will focus my remarks on the recent deal the President struck with Iran on its nuclear capability, a deal that primarily meets Iran's goals in that sanctions are lifted, nuclear research and development continues, and America's safety is compromised, but doesn't include any requirements for inspections that can verify compliance anytime and anywhere. Amazingly, among the deal's many flaws is an end to a ban prohibiting Iranians from many coming to the U.S. to study nuclear science and nuclear engineering at American universities. Knowledge obtained in the programs is instrumental in being able to design and build nuclear bombs.

President Obama made these gutting concessions even as a senior State Department official testified before Congress that deception is part of Iran's DNA. And Iran's actions continue to prove that it can't be trusted.

With that background in mind, President Obama's agreement with Iran is being unlawfully implemented because the Administration failed to provide Congress with the documents required under the Iran nuclear agreement Review Act of 2015. Under that act, the agreement materials required to be submitted by the President to Congress "include 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." Because the President has not transmitted to Congress various side deals related to the agreement, including side deals between the International Atomic Energy Agency and Iran, he can't have Congress' approval of the agreement as required by the Iran nuclear agreement Review Act, yet the President pushes on, unlawfully, with his doomed agreement that can't protect Americans from a nuclear Iran.

President Obama is, unfortunately, no stranger to bad deals. Two years ago, this Administration negotiated with the Taliban for release of Sergeant Bowe Bergdahl, a deserter who awaits court-marshal. Despite having a policy of not negotiating with terrorists, the Administration irresponsibly exchanged Sergeant Bowe Bergdahl for five Taliban terrorists detained at Guantanamo Bay. By doing so, the Administration has emboldened all terrorist organizations and has created the risk that five terrorists will reenter the field of battle.

Making matters even worse, the President, again, violated Federal law in the process, namely the Federal law requiring 30 days' notice to Congress before the release of any terrorist prisoners from Guantanamo Bay. The nonpartisan Government Accountability Office concluded that was a violation of a "clear and unambiguous law." The GAO has concluded the President's actions constituted a

violation of the Antideficiency Act, which prohibits Federal agencies from spending funds in excess of or in advance of amounts that are legally available.

The Constitution does not and cannot require that Presidents make sound decisions in office, but it does require that Presidents obey the law. The President is sworn to do as much as are we as Members of Congress.

I look forward to hearing from today's witnesses.

Mr. KING. I thank you, Mr. Chairman.

And the Chair would now recognize the Ranking Member of the full Committee, Mr. Conyers, from the rebuilding city of Detroit.

Mr. CONYERS. Thank you, Mr. Chairman.

I welcome the witnesses.

And to my colleagues, the issue of appropriate roles of the Congress and the President is a subject worthy of a genuinely substantive discussion. And I think it's a very important discussion that's involved in the hearing today. For instance, we could consider whether our Nation's current military operations against the Islamic State of Iraq and Syria have been properly authorized by Congress. I won't go into detail, but I'm involved in research on that subject at the present moment.

Unfortunately, today's hearings may be turning into an attack against the current Administration. Let's start off with this proposition: neither the Iran nuclear agreement nor the Paris climate change agreement is a treaty within the meaning of the Constitution's Treaty Clause that requires Senate consent.

The Paris climate change agreement, for example, contains no mandatory quantitative emission standards or reductions. Rather, it is a strong exhortation that parties take concrete, transparent, but ultimately self-directed steps to reduce greenhouse gas emissions. Contrary to the assertions of some, this agreement does not contain legally binding requirements, nor does it purport to grant new authority to the President to meet any such requirements.

In short, it doesn't meet the traditional criteria of a treaty within the meaning of the Treaty Clause. And the Iran agreement was a set of political commitments rather than legally binding requirements. Thus, it also was not constitutionally required to be subject to Senate approval.

In addition, both agreements are consistent with existing law of the United States of America. For instance, the statutes imposing sanctions on Iran for its nuclear weapons program also give the President the discretion to remove these sanctions should certain criteria be met. And the Paris climate agreement was reached pursuant to a 1992 climate change treaty that the Senate had already ratified. In other words, the Paris Agreement is consistent with the obligations created by a treaty that, under the Supremacy Clause, was already the law of the land.

Now, as professor Vladeck correctly notes, arguments questioning the legality of these agreements are part of an ongoing attempt to paint policy disputes as constitutional matters. Whatever one thinks about the merits of either the Iran nuclear agreement or the Paris climate agreement, the Constitution and the historical practice make clear that the President was within his authority to

enter into them. At any rate, Congress has already had the opportunity to make its voice heard.

With respect to the Iran nuclear agreement, Congress had the chance to disapprove the agreement, but opponents of the agreement failed to obtain the necessary votes to prevent the agreement from taking effect. And as I noted and conclude, the Senate long ago ratified the climate change treaty pursuant to which the Paris Agreement was entered. So rather than sparking enlightened discussion, today's hearing I fear may be a string of partisan exercises by the Task Force, but I think it's important that we move on, and I thank our witnesses for appearing today. I look forward to hearing their testimony, and I thank the Chair.

Mr. KING. I thank the gentleman from Michigan for his opening statement. And I'll now introduce the witnesses. Our first witness is Eugene Kontorovich, professor of law at Northwestern Law School.

Our second witness, welcoming him back again, is Stephen Vladeck, professor of law at American University and Washington College of Law.

Our third witness is Steven Groves, leader of the Heritage Foundation's Freedom Project.

We welcome you all here today and welcome your testimony.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you, and that light switches from green to yellow, indicating you have 1 minute to conclude your testimony. When the light turns red, it indicates it is time to wrap it up.

Before I recognize the witnesses, it is the tradition of the Task Force that they be sworn in.

So, to the witnesses, please stand and raise your right hand. Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

Thank you. You may be seated.

Let the record reflect that the witnesses answered in the affirmative.

I now recognize our first witness, Mr. Kontorovich. Please turn on your microphone before speaking, and you're recognized for 5 minutes, Mr. Kontorovich. Thank you.

TESTIMONY OF EUGENE KONTOROVICH, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. KONTOROVICH. Thank you, Chairman King, Ranking Member Cohen, Ranking Member of the Committee Conyers and honorable Members of Committee. It is a great pleasure to be here today to discuss these matters with you.

I'll state one thing for the record: I have the pleasure to say we are now the Northwestern Pritzker School of Law. And our generous donor would be happy to hear me say that, I hope. So the executive, nobody would dispute, has vast discretion in foreign affairs, discretion imparted both by the Constitution, which gives the executive a primary role in the conduct of foreign affairs because

of the greater capacity of a single individual to enter into negotiations and conduct dealings with foreign countries and also because Congress on top of that already broad discretion, has given the executive vast leeway through statutes that allow for waivers and many other delegations of broad authority.

However, Congress also has constitutional powers, core Article I powers, including the foreign commerce power, spending power, which can greatly affect foreign affairs. And when these powers are exercised in the realm of foreign affairs, they are no less valid and no less plenipotentiary because they involve diplomacy or matters involving other countries.

Now, indeed, because the executive's powers in foreign affairs are so broad, it is hard for the executive to overreach. It's hard. But that makes it all the more amazing and all the more worrisome when the executive does indeed overreach. Because when one has vast power, claiming even more is even more problematic.

I'm going to briefly mention two examples, two recent examples, of what I see as such overreach, involving two core Article I powers of Congress: the foreign commerce power, involving the Iran Sanctions Act, and the spending power, involving funding to certain United Nations agencies.

As Chairman Goodlatte mentioned, the Iran Sanctions Review Act requires that the President transmit, as a condition for the sanctions relief that the act enables, that the President transmit the entire agreement. The language of this provision in the Iran Review Act is extraordinarily vast, and it looks like it was written by teams of redundant lawyers. And it bears quoting again: "these agreements include appendices, annexes, codicils, side agreements, implementing materials, documents"—that's one broad category; the question is, is this a "document?"—"guidance, technical or other understandings," and lots of other stuff.

The question is, are the relevant materials involving arrangements between the International Atomic Energy Agency and Iran, for inspection and review of their nuclear program, is that a document, material, codicil, and so forth, under the deal? And it seems quite clear that it is. It's actually mentioned and incorporated by reference in the Joint Comprehensive Plan of Action itself, and as such, it must be transmitted to Congress for the review period under the act to begin.

If that review period does not begin, sanctions cannot be lifted. It is true, as Ranking Member Conyers pointed out, that prior statutory sanctions had waiver provisions. But just as Congress can allow the President to waive, it can cabin and take back that waiver authority, which is exactly what happened in the Iran Nuclear Sanctions Review Act. As a result, the current lifting of some sanctions is legally problematic, and even more troubling is the executive's apparent desire to leverage this to now intimidate states into abandoning their lawful sanctions, which, again, the Iran Nuclear Review Act would prohibit.

Now, a separate law involves Congress' exercise of its spending power. Congress can, through the power of the purse, deal with any subject involving diplomacy, involving war, as the Chairman mentioned. And Congress provided that when U.N. agencies try to take sides in the Middle East conflict and improperly admit the Pales-

tinian Authority as a member state, despite it not meeting the international criteria for statehood, those agencies can't be funded by the U.S. taxpayer. That law is quite clear, and it applies to any U.N.-affiliated agency.

One such agency, the United Nations Framework Convention on Climate Control, has accepted the Palestinians as members. The clear effect must be that they cannot receive taxpayer funding. The Executive seems to take the position that he will nonetheless send a check to this agency on the theory that the framework convention is a treaty. It's true it is a treaty, but it is also an agency created by that treaty. I think the best proof of that is that a treaty can't deposit a check. Only a U.N. agency can deposit a check. I presume the money from the Treasury isn't being sent to the treaty. It is being sent to the U.N. agency, and that's exactly what the law prohibits.

Thank you. And I would refer the Committee to my written testimony for further elaboration.

[The prepared statement of Mr. Kontorovich follows:]

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

Prepared written testimony of:

Prof. Eugene Kontorovich
Northwestern University School of Law

Hearing before the
U.S. House of Representatives Judiciary Committee
Task for on Executive Overreach:

"*Executive Overreach in Foreign Affairs*"

Washington, D.C., May 12, 2016

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 statues, 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.

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[1] 42 U.S.C.A. § 2160c.
[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-

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[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 sanctions[9] - 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.*

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[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 included 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 with 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 IEAE 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. 1191available 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 policy[32] 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.

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[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-seek-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

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[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.

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[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

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[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/l07.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.

Mr. KING. Thank you, Mr. Kontorovich.

Now I recognize the gentleman Mr. Vladeck for his testimony.

TESTIMONY OF STEPHEN I. VLADECK, PROFESSOR OF LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. VLADECK. Great. Thank you, Chairman King, Ranking Member Cohen, distinguished Members of the Task Force. It's an honor and a privilege to be testifying before you again.

I do fear that 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 lacks the authority to effect the disputed policy outcome, never mind its wisdom or potentially its lack thereof. For example, when the Supreme Court interprets the Constitution in a manner some of us 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 the interpretation.

In a recent essay, my friend and George Washington law professor Orin Kerr described this phenomenon, which he harshly criticized, as the politics of delegitimization. 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 merely as exercises of executive power with which many of us simply disagree.

Indeed, of all the areas in which President Obama has been criticized for overreaching, foreign affairs may be the context in which those claims run the hollowest. Not only does the Constitution invest the President with a wide range of inherent and, as the Supreme Court just reminded us in the Zivotofsky case, preclusive constitutional authority in the field of foreign affairs, but Congress has historically acquiesced by broadly delegating much of its own authority in this field to the President. Nor does the President overreach simply by entering into diplomatic accords without formally submitting the agreement to Congress. All three branches of the Federal Government have recognized, and shortly after the founding, that the President has the constitutional power to enter into bi- or multilateral agreements that are not treaties for constitutional purposes. Indeed, as the Congressional Research Service explained in a March 2015 report, these agreements, rather than treaties, have become the constitutional norm.

With regard to the third category of these agreements, so-called sole executive agreements, as the Supreme Court explained in 2003, our cases 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 hasn't been exercised since the early years of the Republic. 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 being unconstitutional. Instead, the contemporary debate is not over the abstract validity of sole executive agreements but rather the specific criteria that separate agreements that ought—that sep-

arate—pardon me, agreements that ought not to be required in congressional involvement from those that should. To be frank, there are no bright lines, but by far, the two most important criteria for assessing whether the President should submit an international agreement to Congress are whether the agreement is inconsistent with and could not be implemented on the basis of existing U.S. law and whether the agreement establishes binding legal rules or financial commitments with which the United States comply. Unless the answer to both questions is yes, history, practice, and precedent all suggest that the President is acting within his constitutional authority when he enters into such a sole executive agreement.

As my written testimony explains in more detail, I'm hard pressed, in light of these criteria, to see the argument that my colleagues make that President Obama was constitutionally required to submit to Congress either the full Iran deal or the Paris climate agreement for many of the reasons echoed by Jack Goldsmith and John Bellinger. Obviously, I would be happy to say more about both of these lines of analysis during the Q&A. But apart from the merits of these debates, it seems to me that the more important point is the extent to which efforts to portray the foreign policy of the Obama administration, as reflected in executive overreach, are another example of the phenomenon described by Professor Kerr.

Of course, this Task Force, this Committee, and this Congress may think there is more political and rhetorical gain to be had from casting these debates on legitimacy returns. But I fear that such an approach has deleterious long-term consequences for Congress' institutional role in the formation and supervision of U.S. foreign policy. After all, the more Congress focuses its critiques on ill-conceived legitimacy objections, the more it suggests, however implicitly, that all it is capable of in the field of foreign affairs is to offer such authority-driven objections to these policies as opposed to either enacting legislation that more aggressively seeks to assert Congress' own foreign policy prerogatives or taking a more active role in stimulating and raising the national level of discourse over the normative desirability of these measures. To me, Congress should be more careful going forward to seize these imperatives in the foreign policy arena.

But as Professor Goldsmith has concluded: "I doubt Congress will be more careful in the future since it typically doesn't like and cannot organize itself to exercise the responsibility of an equal constitutional partner in the conduct of U.S. foreign relations."

Studying the origins and trouble and persistence of that institutional shortcoming is, 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 delegitimatization.

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

[The prepared statement of Mr. Vladeck follows:]

EXECUTIVE OVERREACH IN FOREIGN AFFAIRS

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

Thursday, May 12, 2016

Written Testimony of Stephen I. Vladeck

Professor of Law, American University Washington College of Law
Co-Editor-in-Chief, JUST SECURITY

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.

* * *

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

17. *Id.*

18. Goldsmith, *supra* note 9.

Mr. KING. Thank you, Mr. Vladeck.

The Chair would now recognize Mr. Groves for his testimony.

TESTIMONY OF STEVEN GROVES, LEADER OF THE HERITAGE FOUNDATION'S FREEDOM PROJECT

Mr. GROVES. Thank you, Mr. Chairman, for inviting me to testify today about executive overreach in foreign affairs.

The debate over the proper scope of executive power in foreign affairs has been going on for more than 200 years. It arose during the 1793 George Washington Presidency when he declared that the U.S. would be neutral in a war between France and Great Britain. The Monroe Doctrine, FDR's Destroyers for Bases Agreement, and the Algiers Accords are just a few historical examples where significant questions have arisen regarding executive authority in the conduct of foreign affairs. And here we are in 2016 continuing this debate.

In our defense, it's not really our fault. The text of the Constitution, though fairly specific on the distribution of power in the domestic sphere, is less helpful in the foreign affairs arena. The Constitution was written to remedy certain pre-constitutional disputes. And as a result, we're forced to strain to find textual guidance to address many of the issues that arise today, particularly in foreign affairs.

There is, of course, the Commander in Chief Clause, but most of the executive's foreign affairs powers have developed through historical practice over the past two centuries. To make things more difficult, for better or worse, the Federal courts rarely intervene to clarify the limits of executive power in foreign affairs because such cases usually present nonjusticiable political questions that courts are loath to answer one way or the other.

But, today, I'd like to focus on the President's actions in the area of treaty making and how, in my view, he has overreached and even abused his authority. This Task Force has already heard testimony regarding the President's executive actions regarding immigration and health care that constitute overreach.

In the foreign affairs realm, the President does the same thing but through so-called sole executive agreements, as mentioned by Professor Vladek. Specifically, the President's decision to treat the Paris Agreement on climate change as a sole executive agreement was an overreach and an abuse of his executive authority. Never before has an international agreement of such import been treated as a sole executive agreement, not once in American history.

The President himself stated that the Paris Agreement will literally save our planet. That's a quote. And yet the agreement somehow does not rise to the level of a treaty requiring the advice and consent of the Senate. The President's actions are an overreach for several reasons, first of which is that they fly in the face of a commitment made by the executive branch to the Senate in 1992. Back then, during the ratification debate on the U.N. Framework Convention on Climate Change, the Senate was concerned President Bush or a future President would negotiate follow-on agreements that had emissions targets and timetables but not submit those follow-on agreements to the Senate. The Senate, then controlled by Democrats, required assurances that any such follow-on

agreement containing targets and timetables would be submitted for approval. President Bush agreed on behalf of the executive branch, and the commitment was memorialized in the framework convention documentation during the ratification process.

Now, the next President, to his credit, lived up to that commitment. When President Clinton negotiated the Kyoto Protocol in 1997, he treated it as a treaty, something that would have to go to the Senate for advise and consent. He didn't attempt to circumnavigate the Senate. He didn't ignore the 1992 commitment. He didn't simply declare the Kyoto Protocol was a sole executive agreement that didn't require Senate approval. He stuck to the commitment because that's what Presidents should do.

But President Obama is unwilling to live up to those commitments. And the Paris Agreement certainly contains targets and timetables, but the President refuses to submit it to the Senate. That is executive overreach. The President's actions also ignore the objective criteria used by the State Department in determining whether an international agreement is a treaty versus an executive agreement, the so-called Circular 175 procedure mentioned by Chairman King. As I detail at length in my written testimony, when the eight factors of the C-175 procedure are applied, it's clear that the Paris Agreement must be treated as a treaty. But the President has chosen to ignore those factors as well as the 1992 commitment to the Senate.

Now, because of this overreach, that will not likely be remedied in Federal court, it is incumbent upon Congress to refuse to fund the implementation of the Paris Agreement until the people, through their elected Representatives, approve it, and at a minimum, this House should refuse to appropriate U.S. taxpayer dollars for the so-called Green Climate Fund or any other financial mechanism associated with the Paris Agreement or the U.N. Framework Convention. Congress should also continue to resist and disapprove of all regulations meant to implement the Paris Agreement such as the Clean Power Plan.

I thank you again for inviting me to testify, and I look forward to any of the questions that the panel has.

[The prepared statement of Mr. Groves follows:]

The Heritage Foundation

CONGRESSIONAL TESTIMONY

Executive Overreach in Foreign Affairs

Testimony before
Committee on the Judiciary
Task Force on Executive Overreach

United States House of Representatives

May 12, 2016

Steven Groves
Bernard and Barbara Lomas Senior Research Fellow
The Heritage Foundation

Thank you, Mr. Chairman, for inviting me to testify today about executive overreach in foreign affairs.

The debate over the proper scope of executive power in foreign affairs has been going on for more than 200 years. It arose in 1793 during George Washington's presidency when he announced that the U.S. would remain neutral in an armed conflict between France and Great Britain. The Monroe Doctrine, FDR's "Destroyers for Bases Agreement", the War Powers Act, and the Iran-Contra affair are just a few historical examples where the U.S. government had to confront significant questions regarding executive authority and the separation of powers in the conduct of foreign affairs.

And here we are today having the same debate. In our defense, this is really not our fault. The text of the Constitution, while fairly specific on the enumeration of powers in the domestic sphere, is less helpful in the foreign affairs arena. The Constitution was written to remedy certain pre-constitutional disputes, and as a result we are often forced to strain to find textual guidance to address many of the issues that arise today, particularly in foreign affairs.

There is the commander-in-chief clause, of course, but much of the executive's foreign affairs powers have developed as historical practice over the past two centuries.

To make things more difficult, for better or worse federal courts rarely step in to clarify executive powers in foreign affairs because such cases are usually non-justiciable since they present "political questions" that courts are loathe to answer one way or the other.

I'd like to focus on the President's actions in the area of treaty-making and how, in my view, he has overreached or even abused his authority. Not unlike in the domestic arena, the President has a problem in making international agreements knowing full well that Congress will not approve. This Task Force has heard testimony regarding the President's executive orders regarding immigration and health care that constitute overreach. In the foreign affairs realm, the President does the same thing, but through so-called "sole executive agreements".

Specifically, the President's decision to treat the Paris Agreement on climate change as a "sole executive agreement" was an overreach and an abuse

of his executive authority.

Never before has an agreement of such international import been treated as a sole executive agreement. The President stated that the Paris Agreement will literally "save our planet" and yet the Agreement somehow does not rise to the level of a treaty.

The Paris Conference of Parties

From November 30 to December 12, 2015, the Obama Administration was well represented at the 21st Conference of Parties (COP-21) to the United Nations Framework Convention on Climate Change (UNFCCC) in Paris. The President attended the opening of the conference, and in his speech to the assembled delegates characterized COP-21 as a "turning point" when "we finally determined we would save our planet."[1] Senior Administration officials including Secretary of State John Kerry, Environmental Protection Agency (EPA) Administrator Gina McCarthy, and Secretary of Energy Ernest Moniz stayed on in Paris to negotiate the final terms of a new climate change pact, the Paris Agreement. Ten U.S. senators (all Democrats) also appeared at the conference to send the message that they had "the president's back."[2]

Clearly the negotiation of the Paris Agreement was of major importance to the Administration, the United States, and the entire world. Also clear is the fact that the President had no intention of consulting or including either the Senate or Congress as a whole in the negotiation of this global compact. This came as no surprise to anyone paying attention to the Obama Administration's plans leading up to the conference. On March 31, 2015, months before COP-21, White House spokesman Josh Earnest was asked at a press briefing whether Congress has the right to approve the climate change agreement set to be negotiated at COP-21:

> [Reporter]: …Is this the kind of agreement that Congress should have the ability to sign off on?
>
> [Earnest]: …I think it's hard to take seriously from some Members of Congress who deny the fact that climate change exists, that they should have some opportunity to render judgment about a climate change agreement.[3]

President Obama seemingly believes that no Member of Congress who questions climate science or disagrees with his Administration's environmental policies is competent to review a major international climate change agreement. That view of Congress's role, particularly the Senate's, is especially alarming in this case because the international commitments made by the executive branch alone in the Paris Agreement have significant domestic implications.

The White House sentiment regarding the role of Congress was parroted by other foreign officials, including the host of COP-21, French foreign minister Laurent Fabius. Addressing a group of African delegates at the June climate change conference in Bonn, Germany, Fabius expressed his desire to negotiate an agreement at COP-21 that would bypass Congress: "We must find a formula which is valuable for everybody and valuable for the U.S. without going to Congress…. Whether we like it or not, if it comes to the Congress, they will refuse."[4]

The Obama Administration's unilateral treatment of the Paris Agreement is particularly disquieting for two reasons: (1) the agreement has all the hallmarks of a treaty that should be submitted to the Senate for its advice and consent under Article II, Section 2, of the U.S. Constitution; and (2) the agreement contains "targets and timetables" for emissions reductions and, as such, the Administration's failure to submit the

[1] News release, "Remarks by President Obama at the First Session of COP21," The White House, November 30, 2015, https://www.whitehouse.gov/the-press-office/2015/11/30/remarks-president-obama-first-session-cop21 (accessed March 1, 2016).
[2] Natasha Geiling, "10 U.S. Senators Travel to Paris to Show Their Support for an International Climate Deal," Climate Progress, December 5, 2015, http://thinkprogress.org/climate/2015/12/05/3728661/democratic-senators-support-climate-deal-in-paris/ (accessed March 1, 2016).
[3] "Earnest: House GOP Climate Deniers Not the Right People to Vote on Emissions Deal," *Grabien*, undated, https://grabien.com/story.php?id=25399&utm_source=eliplist201504 01&utm_medium=email&utm_campaign=eliplist&utm_content=stor y25399 (accessed March 1, 2016).
[4] "Climate Deal Must Avoid US Congress Approval, French Minister Says," *The Guardian*, June 1, 2015, http://www.theguardian.com/world/2015/jun/01/un-climate-talks-deal-us-congress (accessed March 1, 2016).

agreement to the Senate breaches a commitment made by the executive branch to the Senate in 1992 during the ratification process of the UNFCCC.

Unless and until the White House submits the Paris Agreement to the Senate for its advice and consent, the Senate should block all funding for its implementation, including any funds for the Green Climate Fund (GCF) or any other financing mechanism included in the President's umbrella Global Climate Change Initiative (GCCI). [5] Congress should also withhold funding for the UNFCCC to prevent future Administrations from participating in COP meetings and causing additional harm to U.S. national interests. Finally, Congress should take preventative legislative measures to ensure that no funding tied to implementation of the Paris Agreement is authorized or expended through other vehicles such as appropriations for the EPA or other executive branch agencies.

The Paris Agreement Is a Treaty

In form, in substance, and in the nature of the commitments made, the Paris Agreement is a treaty—not a sole executive agreement—and should be submitted to the Senate. The commitments made pursuant to the agreement are significant, open-ended, and legally binding on the United States, seemingly in perpetuity.

One of the key elements of the Paris Agreement—and a clear departure from the general commitments made in the UNFCCC—is that each party must make a specific, measurable, and time-sensitive commitment to mitigate its greenhouse gas (GHG) emissions. Those commitments are communicated by each party via nationally determined contributions (NDC) submitted to the UNFCCC secretariat. An NDC should include a GHG mitigation "target" (a percentage reduction from status quo GHG emissions) and a "timetable" (a baseline date and a future date in which the party will meet its mitigation target). [6] For instance, the U.S. NDC commits to "achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28 per cent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%." [7]

Significantly, the Paris Agreement also requires parties to update and submit a new NDC every five years, starting in 2020. [8] By contrast, the UNFCCC required parties only to adopt national policies that would mitigate GHG emissions and did not require parties to submit specific "targets and timetables" in perpetuity. Finally, each new NDC must be more "ambitious" than the party's previous NDC. [9] That is to say that new NDC can neither lessen in ambition nor maintain the status quo. The White House has referred to this provision of the agreement as "ratcheting up ambition over time." [10]

This is a serious international commitment that should not be made via a sole executive agreement. President Obama has promised (1) that his successors will submit new and revised NDC to the UNFCCC secretariat in 2020, 2025, 2030, and beyond, and (2) that each successive NDC will be more ambitious than the one he submitted in 2015. The fact that the U.S. is party to the UNFCCC does not authorize the President to bind the U.S. in perpetuity to successively aggressive GHG mitigation goals. While President Obama has some leeway to implement framework conventions like the UNFCCC through sole executive agreements, membership in the UNFCCC does not grant unbridled authority to commit the U.S. to endless and "ratcheted up" carbon emissions reductions.

For this reason alone, President Obama should

[5] Richard K. Lattanzio, "The Global Climate Change Initiative (GCCI): Budget Authority and Request, FY2010 – FY2016," Congressional Research Service, February 6, 2015, https://www.fas.org/sgp/crs/misc/R41845.pdf (accessed March 1, 2016). The GCCI is a platform within President Obama's 2010 Policy Directive on Global Development, which integrates climate change considerations into U.S. foreign assistance programs. It is funded through the Administration's Executive Budget, Function 150 account, for State, Foreign Operations, and Related Programs.

[6] See UNFCCC, "Lima Call for Climate Action," advance unedited version, December 11, 2014, ¶ 14, https://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf (accessed March 1, 2016).

[7] UNFCCC, "Party: United States of America—Intended Nationally Determined Contribution," ("U.S. INDC"), March 31, 2015, http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx (accessed March 1, 2016).

[8] Adoption of the Paris Agreement, Annex, December 12, 2015 ("Paris Agreement"), Art. 4(9) ("Each Party shall communicate a nationally determined contribution every five years in accordance with [the decision of COP-21 adopting the Paris Agreement]").

[9] Paris Agreement, Art. 4(3) ("Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition…").

[10] News release, "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," The White House, December 12, 2015, https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change (accessed March 1, 2016).

feel obligated to submit the Paris Agreement to the Senate so that it would acquire the democratic legitimacy of having passed Senate review and approval. Indeed, if the President followed the State Department's own regulations, none of this would even be at issue.

The State Department's Circular 175 Procedure

In treating the Paris Agreement as a sole executive agreement, President Obama is using the fact that there is no statutory definition of what is and is not a "treaty." This strategy, however, ignores the fact that the State Department has an established process, known as the Circular 175 Procedure (C-175), to guide its decision to designate an international agreement.[11]

C-175 establishes, *inter alia*, a procedure for determining whether a proposed international agreement should be negotiated as a treaty (requiring Senate advice and consent through the Article II process) or as an "international agreement other than a treaty" (such as a "sole executive agreement" or a "congressional-executive agreement"). In determining how to treat an international agreement, the executive branch gives "due consideration" to eight factors:

> (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole; (2) Whether the agreement is intended to affect state laws; (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; (4) Past U.S. practice as to similar agreements; (5) The preference of the Congress as to a particular type of agreement; (6) The degree of formality desired for an agreement; (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and (8) The general international practice as to similar agreements.[12]

C-175 provides no guidance as to whether any one of the eight factors should be given more weight than the others, or whether one, some, or all of the factors must be satisfied before designating an international agreement as a treaty. The terms of the Paris Agreement satisfy most or all of the eight factors and should be considered a treaty requiring the advice and consent of the Senate. Each of the eight factors is discussed below.

1. The Extent to Which the Agreement Involves Commitments or Risks Affecting the Nation as a Whole. If the executive branch negotiates an international agreement that is geographically limited or that solely affects a particular situation in a foreign country (e.g., a "status of forces" agreement), it is likely that the President may conclude such an agreement as a sole executive agreement. This makes sense because the more an agreement principally involves foreign matters, the more likely it may be concluded under the President's executive authority alone. In contrast, if the commitments made in an agreement directly impact the United States "as a whole," it is more likely to be a treaty requiring Senate approval, since the President should not be able to commit U.S. resources or affect U.S. domestic matters without congressional review and approval.

The Paris Agreement certainly "involves commitments or risks affecting the nation as a whole." Under the agreement, the United States is obligated to undertake "economy-wide absolute emission reduction targets" [13] and provide an unspecified amount of taxpayer dollars "to assist developing country Parties with respect to both mitigation and adaptation." [14] Commitments to reduce carbon emissions across the U.S. economy and send billions of taxpayer dollars to poor nations "affects the nation as a whole" (in contrast to foreign commitments that may best be dealt with via sole executive agreements).

Moreover, the Obama Administration made

[11] U.S. Department of State, *Foreign Affairs Manual*, Vol. 11 (2006), Section 720, et seq., http://www.state.gov/documents/organization/88317.pdf (accessed March 1, 2016), and "Circular 175 Procedure," U.S. Department of State website, http://www.state.gov/s/l/treaty/c175/ (accessed March 1, 2016). The Circular 175 procedure refers to regulations developed by the State Department to ensure the proper exercise of the treaty-making power. Its principal objective is to make sure that the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits, and with appropriate involvement by the State Department. The original Circular 175 was a 1955 Department Circular prescribing a process for prior coordination and approval of treaties and international agreements.

[12] Ibid., Section 723.3.

[13] Paris Agreement, Art. 4(4).

[14] Paris Agreement, Art. 9(1).

clear in its NDC that it intends to fulfill its mitigation commitments under the Paris Agreement by enforcing emissions standards through existing and new regulations on power plants, vehicles, buildings, and landfills.[15] These regulations constitute multi-sectoral, comprehensive, nationwide commitments without geographic limitation and will affect the entire nation since American taxpayers, energy consumers, energy producers, vehicle manufacturers, landfill operators, and construction companies across the nation will be impacted by them.

As such, the comprehensive nature and breadth of the Paris Agreement "involves commitments or risks affecting the nation as a whole" and is therefore more likely to be a treaty than a sole executive agreement.

2. Whether the Agreement Is Intended to Affect State Laws. While the Paris Agreement is silent on specific changes to U.S. state laws, the intentions of the Obama Administration to enforce the agreement through changes to state laws is clear. Specifically, in its NDC, the Administration committed that the U.S. would enforce the agreement domestically through the implementation of regulations, among them the Clean Power Plan (CPP) to reduce emissions from power plants. Under the CPP, the EPA will set state-specific emissions limits based on the GHG emissions rate of each state's electricity mix.[16] Individual states are then required to develop and implement their own plans to meet the limits set by the EPA.

The Administration intends to implement the Paris Agreement through changes to state laws, and as such the agreement should more likely than not be considered a treaty.

3. Whether the Agreement Can Be Given Effect without the Enactment of Subsequent Legislation by the Congress. The Paris Agreement requires major financial commitments by the United States. Any and all such funds must be authorized and appropriated by Congress. As such, the agreement cannot be "given effect without the enactment of subsequent legislation by the Congress." Since subsequent congressional legislation is necessary to give effect to the agreement it meets the criteria of a treaty rather than a sole executive agreement.

The funding required by the Paris Agreement will be significant and continuing. The principal depository for such funds is the GCF, which assists developing countries in adapting to climate change. The GCF was established by the 2009 Copenhagen Accord, a sole executive agreement that committed developed countries by 2020 to provide $100 billion per year to developing countries, every year, seemingly in perpetuity.[17] The Paris Agreement obligates developed countries such as the U.S. to "provide financial resources to assist developing country Parties with respect to both mitigation and adaptation."[18] In the decision adopting the Paris Agreement, the COP-21 set the goal of these funds at "a floor of USD 100 billion per year."[19] Only developed nations like the U.S. are obligated to contribute to the GCF, while developing nations are merely "encouraged" to make "voluntary" contributions.[20]

The amount the U.S. is obligated to pay into the GCF beginning in 2020 is likely to be several billion dollars each year. President Obama committed to contribute at least $3 billion as an initial down payment to the GCF, and Republicans were unsuccessful in blocking the first $500 million of that pledge in the 2016 omnibus spending legislation.[21]

In any event, a central aspect of the Paris Agreement—green climate finance—cannot be given effect without the enactment of legislation by Congress, indicating that the agreement is more likely a treaty than a sole executive agreement.

4. Past U.S. Practice as to Similar

[15] U.S. INDC.
[16] U.S. Environmental Protection Agency, "FACT SHEET: Components of the Clean Power Plan," http://www.epa.gov/cleanpowerplan/fact-sheet-components-clean-power-plan (accessed March 1, 2016).
[17] Copenhagen Accord, December 18, 2009, ¶ 8, http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf (accessed March 1, 2016).
[18] Paris Agreement, Art. 9(1).
[19] Adoption of the Paris Agreement, ¶ 54.
[20] Paris Agreement, Art. 9(2).
[21] Lincoln Feast and Timothy Gardner, "Obama, in Latest Climate Move, Pledges $3 billion for Global Fund," *Reuters*, November 14, 2014, http://www.reuters.com/article/us-usa-climatechange-obama-idUSKCN0IY1LD20141115 (accessed March 1, 2016), and Devin Henry, "Funds for Obama Climate Deal Survive in Spending Bill," *The Hill*, December 16, 2015, http://thehill.com/policy/energy-environment/263447-spending-bill-wont-stop-funds-for-obama-climate-deal (accessed March 1, 2016).

Agreements. Past U.S. practice regarding significant international environmental agreements is that such agreements are usually concluded as treaties and submitted to the Senate. Significant environmental agreements treated in this manner include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1973 International Convention for the Prevention of Pollution from Ships, the 1985 Vienna Convention for the Protection of the Ozone Layer (and the 1987 Montreal Protocol thereto), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1991 Protocol on Environmental Protection to the Antarctic Treaty, and the 1994 U.N. Convention to Combat Desertification.

Significant climate change agreements have also been submitted to the Senate as treaties. The UNFCCC was submitted to the Senate by the first Bush Administration; the Clinton Administration negotiated the Kyoto Protocol as a treaty and would have submitted it to the Senate had the Senate not preemptively rejected it out of hand when it passed the Byrd–Hagel Resolution by a vote of 95 to 0.[22]

The Paris Agreement qualifies as a significant international environmental agreement. After its adoption in Paris, President Obama said the agreement "represents the best chance we have to save the one planet we've got."[23] The White House also released a statement referring to the agreement as "historic" and "the most ambitious climate change agreement in history."[24] Secretary of State John Kerry stated that the agreement "will empower us to chart a new path for our planet."[25]

An international agreement of such import and historic significance should merit review by the legislative branch. Almost all other significant environmental and climate change agreements were completed as treaties, not sole executive agreements. Past U.S. practice has been to submit such agreements to the Senate, a practice that should be followed with regard to the Paris Agreement.

5. The Preference of the Congress as to a Particular Type of Agreement. Determining congressional preference as to the legal form of an international climate change agreement is difficult, but many Members of Congress have expressed their specific preference regarding the Paris Agreement and have demanded that President Obama submit it to the Senate for advice and consent.

Prior to COP-21, Senator Mike Lee (R-UT) and Representative Mike Kelly (R-PA) introduced a concurrent resolution expressing the sense of Congress that the President should submit the Paris Agreement to the Senate for advice and consent. The resolution urged Congress not to consider budget resolutions and appropriations language that include funding for the GCF until the terms of the Paris Agreement were submitted to the Senate. The concurrent resolution currently has 33 Senate cosponsors and 74 House cosponsors.[26]

In addition, several prominent Senate Republicans made clear that they object to the White House's end run around the Senate. Senator John McCain (R–AZ) stated, "All treaties and agreements of that nature are obviously the purview of the United States Senate, according to the Constitution." Senator McCain added that "the President may try to get around that…but I believe clearly [that the] constitutional role, particularly of the Senate, should be adhered to." Chairman of the Senate Republican Conference John Thune (R–SD)

[22]S. Res. 98, A Resolution Expressing the Sense of the Senate Regarding the Conditions for the United States Becoming a Signatory to any International Agreement on Greenhouse Gas Emissions Under the United Nations Framework Convention on Climate Change," July 25, 1997, Congress.gov, https://www.congress.gov/bill/105th-congress/senate-resolution/98 (accessed March 1, 2016).

[23]Elizabeth Chuck and Associated Press, "Obama: Climate Deal Is 'Best Chance We Have to Save the One Planet We've Got,'" NBC News, December 12, 2015, http://www.nbcnews.com/news/us-news/obama-climate-deal-best-chance-we-have-save-one-planet-n479026 (accessed March 1, 2016).

[24]News release, "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," The White House, December 12, 2015, https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change (accessed March 1, 2016).

[25]"Factbox: World Reacts to New Climate Accord," Reuters, December 12, 2015, http://www.reuters.com/article/us-climatechange-summit-reaction-factbox-idUSKBN0TV0Q420151213 (accessed March 1, 2016).

[26]S. Con. Res. 25, "A Concurrent Resolution Expressing the Sense of Congress that the President Should Submit the Paris Climate Change Agreement to the Senate for Its Advice and Consent," Congress.gov, November 19, 2015, https://www.congress.gov/bill/114th-congress/senate-concurrent-resolution/25 (accessed March 1, 2016), and H. Con. Res. 97, "Expressing the Sense of Congress that the President Should Submit to the Senate for Advice and Consent the Climate Change Agreement Proposed for Adoption at the Twenty-first Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, to Be Held in Paris, France from November 30 to December 11, 2015," Congress.gov, November 19, 2015, https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/97 (accessed March 1, 2016).

stated that any deal that commits the U.S. to cut greenhouse gas emissions "needs to be reviewed, scrutinized and looked at and I think Congress has a role to play in that."

While gauging congressional preference as to the legal form of an international agreement is necessarily more art than science, the available evidence indicates that many Members of Congress would prefer the Paris Agreement be treated as a treaty.

6. The Degree of Formality Desired for an Agreement. It stands to reason that the more formal an international agreement is the more likely that it should require approval by the Senate, whereas less formal agreements may be completed as sole executive agreements.

The Paris Agreement is certainly a "formal" agreement. It contains preambular language, 29 operative articles dealing with a comprehensive set of binding obligations including mitigation, adaptation, finance, technology transfer, capacity-building, transparency, implementation, compliance, and other matters. The agreement cross-references obligations concerning other treaties and bodies (such as the UNFCCC and the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts) and establishes new bodies (such as a committee to facilitate compliance and implementation of the agreement).[27]

There is nothing "informal" about the agreement, which has all the hallmarks of a treaty. It has clauses regarding when it will be open for signature, how instruments of ratification may be deposited, and under what conditions a party may withdraw from the agreement once ratified.[28]

Since the Paris Agreement is more formal than informal, it is more likely a treaty than a sole executive agreement.

7. The Proposed Duration of the Agreement, the Need for Prompt Conclusion of an Agreement, and the Desirability of Concluding a Routine or Short-Term Agreement.

Sometimes it is necessary for the President, acting as the "sole organ" of the U.S. government in the field of international relations[29] to promptly negotiate routine international agreements of limited duration. The President must have the flexibility and authority to conclude such agreements without receiving the advice and consent of the Senate on every occasion. If, however, there is no need for prompt conclusion of an agreement, or if the agreement commits the U.S. for a lengthy duration, or if the agreement is not "routine" then it should likely be completed as a treaty.

The Paris Agreement is not "routine" in any regard, and has been touted by some, including President Obama, as a measure that will save Planet Earth. Nor was there a need for a "prompt conclusion" of the agreement, which was negotiated beginning in 2011 with the launch of the Durban Platform at COP-17. Finally, the agreement is not "short-term" by any measure. In fact, the agreement appears to be completely open-ended. By the terms of the agreement, parties are legally obligated to communicate a new mitigation target and timetable commitment every five years.[30] There is no stated end date to that commitment. Nor is there any termination date for the agreement as a whole.

Since the Paris Agreement is of unlimited duration, is not "routine" by any meaning of that term, and did not require prompt conclusion (having been negotiated over several years), it is more likely than not a treaty, and not a sole executive agreement.

8. The General International Practice as to Similar Agreements. To the extent that a "general international practice" exists regarding significant international environmental and climate change agreements, that practice has been to conclude them as formal treaties rather than non-binding political agreements.

The best examples of this practice are, of course, the predecessors to the Paris Agreement—the UNFCCC and the Kyoto Protocol, which were negotiated and completed as treaties, as opposed to aspirational or political agreements. Other significant environmental agreements have been, as noted above, negotiated as treaties.

The UNFCCC process has, in the past, produced

[27]Paris Agreement, Art. 15.
[28]Paris Agreement, Art. 20, 28.

[29]See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
[30]Paris Agreement, Art. 4(3), (9).

political agreements and COP decisions not reaching the level of a treaty. These include such interim agreements as the Bali Action Plan and the Durban Platform for Enhanced Action. [31] An example of the international community negotiating an agreement as a non-binding, political agreement is the Copenhagen Accord, completed at COP-15 in December 2009.

A comparison of the Copenhagen Accord and the Paris Agreement is telling. The former is an informal, 12-paragraph agreement that had no binding commitments or emissions targets and timetables. It was not treated by any UNFCCC party as a treaty, nor did any party engage in a ratification process for the accord. To the contrary, the Paris Agreement is a formal, binding, long-term, comprehensive agreement, and indications are that all UNFCCC parties (save the United States) are treating it as a treaty requiring formal signature and ratification.

Since the general international practice as to environmental and climate change agreements is to treat them as treaties, it is more likely than not that the Paris Agreement should be treated as such.

In sum, arguably all eight of the C-175 factors, when applied to the Paris Agreement, indicate that it should be treated as a treaty requiring the advice and consent of the Senate:

1. The agreement involves commitments that will affect the U.S. on a nationwide basis;
2. The Obama Administration intends to meet those commitments by requiring changes to state law;
3. The agreement cannot be given effect without congressional legislation;
4. The U.S. has, in the past, treated pacts such as the agreement as treaties, and not sole executive agreements;
5. Significant numbers of Senators and Representatives have stated their preference to treat the agreement as a treaty;
6. The agreement is highly formal in nature, and not informal in any way that would suggest it was only a sole executive agreement;
7. The agreement is not routine, of limited duration, and was not promptly concluded;
8. The general international practice as to significant climate change agreements is to conclude them as treaties as opposed to non-binding political agreements.

Much has been made of the fact that the U.S. NDC "targets and timetables" are not legally binding and therefore the Paris Agreement is not a "treaty" requiring the advice and consent of the Senate. That sentiment simply has no basis in law: None of the eight C-175 factors turns on whether the terms of the international agreement are binding or non-binding.

Treaties may contain both binding and non-binding terms. For example, human rights treaties include both mandatory provisions (i.e. parties "shall" protect certain rights) and more aspirational provisions (i.e. parties "undertake" certain duties). Sole executive agreements may be binding on the parties (e.g. the 2008 U.S.-Iraq Status of Forces Agreement) or non-binding (e.g. the 2009 Copenhagen Accord).

The Paris Agreement is replete with legally binding provisions regarding mitigation, adaptation, financing, and other matters. The fact that the actual targets and timetables in the U.S. NDC are non-binding is irrelevant since that fact alone does not transform the entire agreement into a non-binding, political document.

Regardless, the fact that the Paris Agreement contains targets and timetables at all—binding or non-binding—obligates the President to submit it to the Senate for its advice and consent due to a commitment to do so made in 1992.

The President Is Breaking a Commitment Made During UNFCCC Ratification

The UNFCCC was negotiated, signed, and ratified by the U.S. in 1992 during the Administration of President George H. W. Bush. The UNFCCC requires the U.S. to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its

[31] UNFCCC, "Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007," March 14, 2008, http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf (accessed March 1, 2016), and UNFCCC, "Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011," March 15, 2012. http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf (accessed March 1, 2016).

anthropogenic emissions of greenhouse gases,"[32] but it does not require the U.S. to commit to specific emissions "targets and timetables."

The ratification history of the UNFCCC indicates that the Senate intended any future agreement negotiated under its auspices that adopted emissions targets and timetables would itself be submitted to the Senate.[33] Specifically, when the Senate Foreign Relations Committee considered the UNFCCC, the Bush Administration pledged to submit future protocols negotiated under the convention to the Senate for its advice and consent. In response to written questions from the committee, the Administration made specific commitments to that end:

> *Question*. Will protocols to the convention be submitted to the Senate for its advice and consent?
>
> *Answer*. We would expect that protocols would be submitted to the Senate for its advice and consent; however, given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter.
>
> *Question*. Would a protocol containing targets and timetables be submitted to the Senate?
>
> *Answer*. If such a protocol were negotiated and adopted, and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate.[34]

In addition, if the UNFCCC conference of parties adopted targets and timetables on its own accord without negotiating a new agreement, that too would require Senate advice and consent. When the Foreign Relations Committee reported the UNFCCC out of committee, it memorialized the executive branch's commitment on that point: "[A] decision by the Conference of the Parties [to the UNFCCC] to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement."[35]

The Senate gave its consent to ratification of the UNFCCC based on the executive branch's explicit promise that any future protocol "containing targets and timetables" would be submitted to the Senate. The 1992 agreement struck between the Democrat-controlled Senate and the Republican President made no exception for "non-binding" targets and timetables. Rather, the Senate relied on the good faith of future presidential Administrations to adhere to the "shared understanding" that future agreements "containing targets and timetables" be submitted to the Senate for advice and consent.

The NDC targets and timetables are integral to the Paris Agreement since they reflect the mitigation commitments made by each party. The fact that the NDC are submitted separately by each nation and posted on a UNFCCC website is irrelevant since they are incorporated by reference throughout the agreement. NDC are referenced in Article 3, Article 4(2), (3), (8)-(14), (16), Article 6(1)-(3), (5), (8), Article 7(11), Article 13(5), (7), (11), (12), and Article 14(3). By any measure, then, it must be conceded that the Paris Agreement "contains targets and timetables".

Because the Paris Agreement contains targets and timetables, and the Obama Administration has refused to submit it to the Senate, the Administration is breaching the commitment made during the ratification process for the UNFCCC.

Restoring the Role of Congress

While the executive branch must be permitted a certain amount of discretion to choose the legal form of international agreements it is negotiating, there must also be a corresponding duty by the executive branch to treat comprehensive, binding agreements that result in significant domestic impact as treaties requiring Senate approval.

President Obama has placed his desire to achieve an international environmental "win" and bolster his legacy above historical U.S. treaty practice and intragovernmental comity. Major

[32]United Nations Framework Convention on Climate Change, May 9, 1992, Art. 4.2(a), https://unfccc.int/resource/docs/convkp/conveng.pdf (accessed March 1, 2016).

[33]See Emily C. Barbour, "International Agreements on Climate Change: Selected Legal Questions," Congressional Research Service *Report for Congress*, April 12, 2010, pp. 7–8, http://fpc.state.gov/documents/organization/142749.pdf (accessed March 1, 2016).

[34]Hearing, U.N. Framework Convention on Climate Change (Treaty Doc. 102-38), Committee on Foreign Relations, U.S. Senate, 102nd Cong., 2nd Sess., September 18, 1992, pp. 105–106.

[35]S. Exec. Rept. 102-55, 102d Cong., 2d Sess., 1992, p. 14.

environmental treaties that have significant domestic impacts should not be approved by the President acting alone. An agreement with far-reaching domestic consequences like the Paris Agreement lacks sustainable democratic legitimacy unless the Senate or Congress as a whole, representing the will of the American people, gives its consent to be bound.

To attain that legitimacy, President Obama should submit the Paris Agreement to the Senate so that hearings may be held regarding its impact on the U.S. economy and American sovereignty. An international agreement such as this must be tested by the Article II advice and consent process before its costs are imposed on the American people. It is very likely that there is currently insufficient support in the Senate to approve the agreement, but that is no excuse for not following U.S. custom and practice or respecting the C-175 Procedure.

The President will not submit the Paris Agreement to the Senate because it would die there, but unless and until he does so, Congress should:

- **Block funding for the Paris Agreement and other climate change funding streams.** An illegitimate Paris Agreement should not be legitimized by congressional action. The President's fiscal year 2017 budget request proposes $1.3 billion for the President's GCCI, $750 million of which is earmarked for the GCF.[36] Congress should block these requests in their entirety. Over the past several years, the Obama Administration has successfully received at least $7.5 billion in taxpayer dollars from Congress for international climate change projects to satisfy U.S. commitments under the 2009 Copenhagen Accord.[37] Congress should not repeat that error when it comes to appropriations tied to the Paris Agreement or related international climate change funding requests.

- **Withhold funding for the UNFCCC.** If the Obama Administration continues to bypass the Senate in contravention of the commitment made by the Bush Administration in 1992, it goes to prove what mischief can result from ratifying a "framework" convention such as the UNFCCC. The Administration has based its end run around the Senate, in part, on the argument that the UNFCCC authorizes it to do so. As such, U.S. ratification of the UNFCCC has become precisely the danger that the Senate sought to prevent in 1992. Defunding U.S. participation in the UNFCCC would prevent the U.S. from attending future conferences, submitting reports, and otherwise engaging in that dubious enterprise.

- **Take preventative legislative measures.** In addition to specific legislative efforts to ensure that no funding committed under the Paris Agreement is authorized, Congress should include language in all legislation regarding the EPA and related executive agencies and programs that no funds may be expended in connection with the GCCI or implementation of any commitment made in the agreement.

- **Conduct oversight hearings regarding the Paris Agreement.** To date, the Senate has failed to conduct significant oversight into the negotiation of the Paris Agreement. The Senate Foreign Relations Committee has been particularly absent from the fray, consigning its oversight of the matter to a single subcommittee hearing last year.[38] Given the White House's blatant disregard for the Senate's role in the treaty-making process, the full Foreign Relations Committee should engage and examine, at a minimum, whether the President has breached the commitment made in 1992 during the committee's consideration of the UNFCCC. The Senate

[36] "The President's Budget for Fiscal Year 2017," Office of Management and Budget, https://www.whitehouse.gov/omb/budget (accessed March 1, 2016).

[37] According to the White House, the U.S. has "fulfilled our joint developed country commitment from the Copenhagen Accord to provide approximately $30 billion of climate assistance to developing countries over FY 2010–FY 2012. The United States contributed approximately $7.5 billion to this effort over the three year period." Executive Office of the President, "The President's Climate Action Plan," June 2013, p. 20, https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf (accessed March 1, 2016).

[38] "2015 Paris International Climate Negotiations: Examining the Economic and Environmental Impacts," Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy, Committee on Foreign Relations, U.S. Senate, October 20, 2015, http://www.foreign.senate.gov/hearings/2015-paris-international-climate-negotiations-examining-the-economic-and-environmental-impacts_10/2015p (accessed March 1, 2016).

Committee on Environment & Public Works also held a hearing last year,[39] but now that the agreement has been completed, the committee should determine the domestic, economic, and environmental impact of the President's international promises.

- **Clarify and, to the extent possible, codify the treaty process.** Which international agreements do or do not constitute treaties requiring Senate advice and consent in accordance with Article II of the Constitution is often subject to dispute. This uncertainty is amply demonstrated by the debate over whether the Paris Agreement on climate change constitutes a treaty. This uncertainty persists despite the C-175 procedure. Congress should examine past practice on how various subjects have been treated historically (treaty, sole executive agreement, or congressional-executive agreement) and specify the issues or context that should mandate consideration of international agreements as treaties under Article II and press the next administration to update and modernize the C-175 procedure in order to restore its original role as an effective mechanism for distinguishing various forms of international commitments. Congress should also explore legislative solutions to clarifying the treaty-making process in the future.

The executive branch has shown its contempt for the U.S. treaty-making process and the role of Congress, particularly the Senate. The President is attempting to achieve through executive fiat that which he could not achieve through the democratic process. The Obama Administration, by ignoring the commitment made to the Senate in 1992 by his predecessor and treating the Paris Agreement as a "sole executive agreement" in order to bypass the Senate and by seeking to enforce the agreement through controversial and deeply divisive regulations, the enforcement of which has already drawn skeptical treatment by the U.S. Supreme Court.[40]

The President's actions in connection with the Paris Agreement evince an unprecedented level of executive unilateralism, the fruits of which Congress should oppose by any and all means.

[39] "Examining the International Climate Negotiations," Senate Committee on Environment & Public Works, November 18, 2015, http://www.epw.senate.gov/public/index.cfm/hearings?ID=0BEAE2B8-416F-40A1-9698-5BED0FF72BDC (accessed March 1, 2016).

[40] Adam Liptak and Coral Davenport, "Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions," *The New York Times*, February 9, 2016, http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html?_r=0 (accessed March 1, 2016).

Mr. KING. Thank you, Mr. Groves.

I'll now recognize myself for 5 minutes.

I would go directly to the way you culminated your testimony and that would be your recommendation that if Congress—I'll ask it this way: When there's an executive overreach in the case of, say, the Paris Agreement, for example, then it's your advice that Congress should refuse to fund it and use the power of the purse to restrain an overreach of the executive branch of government. Would it be your opinion that Congress do that, whether or not we agree with the policy that's been negotiated?

Mr. GROVES. It should be dealt with, you know, on its own merits. You know, if for some reason there was a President Trump or maybe it was President G.W. Bush who negotiated this Paris Agreement and treated it as a sole executive agreement, I would still be here testifying against it as a conservative. It is the principle of the matter that Congress and the Senate is being bypassed. Then they will come to you and ask for the appropriations, billions and billions of dollars a year, by the way, for this Green Climate Fund. So, on the principles of separation of powers and executive overreach, you should still defund this until it can be remedied, regardless of whether you agree or disagree with the President's views on climate change.

Mr. KING. If your recommendation is, on the basis of the principle of the separation of powers and the doctrine that, even though Congress might agree with the policy, you would say defund that policy and say to the President: You must come to us, because that's congressional authority; don't step into our jurisdiction.

Mr. GROVES. Correct.

Mr. KING. Mr. Vladeck, would you comment on that?

Mr. VLADECK. Certainly, Mr. Chairman, I would not disagree that Congress has the power of the purse and that through the power of the purse Congress has the authority to express its views on the wisdom or lack thereof of policy initiatives in the executive branch. I don't think it is—I think Members of Congress are free to use their votes to disapprove of policies they don't like through the power of the purse.

The point I would make briefly is I think it is worth stressing that that is a very different question than whether, in the absence of a no-funds provision, the executive has overreached simply by going the executive agreement route over a treaty. But, certainly, the power of the purse is I think an obvious and long available option for Congress to assert itself.

Mr. KING. On the matter of principle rather than the matter of policy, would it be your counsel also that Congress should defend its authority to use the power of the purse, even if they agree with the policy, but there has been an overreach?

Mr. VLADECK. I mean, so I guess I would say it is up to the individual Member to decide which is more important to him or her, which is to say, is it more important to assert the institutional prerogative of Congress or to support a policy choice that you agree with? I think each Member is going to make that decision for themselves.

Mr. KING. So I'd say Mr. Groves said principle; you said pragmatism. And I'd turn then to Mr. Kontorovich to settle this dispute.

Mr. KONTOROVICH. I think principle is the long-term solution for Congress.

Mr. VLADECK. I'm going to be outvoted a lot today.

Mr. KONTOROVICH. They are going to be in the same shoes again. And the important reason to take a stand—in all of these cases, when you are going to be defunding something, it is going to hurt. It is going to hurt someone. It is going to run afore some policy imperatives. But if Congress is unwilling to use this tool, it really can't expect the President to heed their wishes. Indeed, as we see with the continued funding of the United Nations Framework Convention on Climate Control, sometimes even defunding isn't enough to get something defunded. Sometimes even a no-funds provision is going to be ignored. So what I would advise is that Congress needs to keep in mind that its legislation in the end is going to be interpreted by the President, usually in a nonjusticiable context. The President will effectively be interpreting legislation designed to bind him. And so Congress, if anything, overdo it in the direction of constraining the President, because don't worry; the President won't be overconstrained. The President will loosen whatever shackles are on him until he has comfortable room to maneuver.

Mr. KING. Thank you, Mr. Kontorovich.

Now I'd start back down the line again to Mr. Groves, and I'd phrase it this way: Even in the face of having a President who would out of his desire to advance an executive overreach policy on climate change agreement, like the Paris Agreement, if you have a President that you know will veto any legislation that uses the power of the purse to stand on principle—if Congress stands on principle, as you suggested, how does that principle stand up against a government that would be shut down and could not be opened up again without a concession to the President, given that a supermajority to override a President's veto would be required?

Mr. GROVES. You know, it's a dance that we've seen with these government shutdowns time and time again. But I would answer your question by referring to Congressman Cohen's concern that, in some time in the future, we could be faced with a President Trump and if Congress is intending on protecting its congressional prerogatives and its power of the purse and having principled positions when a government shutdown is looming, now is the time to assert those, so that if and when there is a President Trump, you are not accused of mere partisanship and you stood on principles that came out during this Task Force and these hearings.

Mr. KING. Thank you, Mr. Groves.

And I would say also that in this essentially a stare down between the Congress and the President, as the case may be, and you're faced with a government shutdown, the side that prevails will be the side that doesn't blink. And so if the public is very strongly behind the Congress itself and insists that we defend those constitutional principles that you've articulated, then it could be a different result in that kind of a showdown. And I think that is what's been the result of the shutdown we had in the past; I think it was a foregone conclusion that the President would not blink, and it was a foregone conclusion that Congress would. So I have just said: Find me 217 others who will that sign a blood oath that they will blink after I do.

Thank you. And I yield to the Ranking Member of the Task Force from Tennessee.

Mr. COHEN. Thank you, Mr. Chair.

President Trump would wink and not blink.

Mr. Kontorovich, I really enjoyed your presentation. The substance was good, but the delivery, the accent, and the style reminded me of my dear late friend Christopher Hitchens. He would not have a yarmulke on, although he did have some Jewish heritage, but he didn't necessarily believe in all of that stuff. But you sound like Christopher Hitchens.

Tell me how would you frame a statute that you think would solve the problem that you think exists? Because we've already got a Constitution that says X, Y, Z, and we have got Supreme Court opinions. So what's a statute going to do?

Mr. KONTOROVICH. So to speak generally across the different contexts we have considered, a statute would have fewer wiggle words, be more direct, and go in the direction of overbreadth. Congress, when it's legislating in the area of foreign affairs, is very conscious, self-consciously avoiding restraining the executive in ways which will be awkward for him or which will impair our diplomacy. And that is a salutary desire, except one has to remember that whatever Congress does, the executive is also going to interpret it more in line with his foreign policy objectives. And the executive will have the last word, so I would use broader, clearer language. For, for example——

Mr. COHEN. Broader, clearer. Doesn't broader—I thought you said simple and concise, more or less.

Mr. KONTOROVICH. Yes, that's exactly right. So, for example, instead of saying "U.N.-affiliated agencies," I would say "U.N. agencies." Take out of word "affiliated." Each word is going to be used by the executive as an excuse for not implementing the policy of the Congress as legislated.

Fewer waivers would also be desirable, but most importantly, Congress needs to back its legislation. Because in the examples I gave, Congress did, in fact, have very broad language, for example, about the required transmittal of documents under INARA. Congress has pretty clear defunding provisions regarding U.N. agencies and the Palestinian Authority. The question is, is Congress going to get angry about it when it doesn't happen? The question of funding the U.N. agencies and whether this is a U.N. affiliate agency or whether it is a U.N. treaty agency is somewhat reminiscent I might say, to broaden the partisan context here, of the Boland amendment and the question of whether the National Security Council was a U.S. intelligence agency for purposes of laws restricting funds to the contras.

Now when Congress considered that its directives were violated by the President, that the President spent money without their authorization using statutory interpretation, Congress didn't just say: Well, that's—what are we going to do.

Mr. COHEN. I can't remember; which President was that?

Mr. KONTOROVICH. That was Ronald Reagan.

Mr. COHEN. Oh, yeah, yeah, yeah.

Mr. KONTOROVICH. So I thought you would appreciate the broadening of the partisan context, sir. But I would remind you Con-

gress' reaction. Congress didn't say: Well, it's the President; it's foreign relations.

It was a massive national question.

Mr. COHEN. I don't know how massive it was. Certain people thought—other people thought Oliver North should have been given a Congressional Medal of Honor. There was a split of opinion on the whole deal.

Mr. KONTOROVICH. The hearings about the funding to the contras I think were much more extensive than the hearings about the funding for the United Nations Framework Convention on Climate Control, though the amount of money in question was not too different.

Mr. COHEN. Yes, sir.

Mr. Groves, do you have differing opinions on how legislation would be framed?

Mr. GROVES. Well, right now, the C-175 procedure, if everyone adheres to it, does the job. As I mentioned, during the Clinton administration, they adhered to it, and they knew the Kyoto Protocol was a treaty, and that's why they never even bothered to submit it.

You have to really strike a balance between codifying some of these procedures to make sure that these things can be better understood between the two branches in the future and stepping over the line between where the separation of powers are between the legislative and executive branch. But I think there's probably a middle ground where the current state of affairs with the C-175 factors and how it is decided whether to negotiate something as a treaty versus an executive agreement could be codified in a way that brings greater transparency to the process and we can avoid some of these disputes in the future, as we've had over——

Mr. COHEN. Do you really think if we did that, that a President Trump would give a hoot?

Mr. GROVES. I don't know about him. I wasn't on his team. I think the guy that I was backing would give a hoot. I think that other well-meaning Democrats in the office would give a hoot. We have proof of it. President Clinton gave a hoot, and there were a number of things that he would have loved to have seen. He signed the Rome Statute on the International Criminal Court; the Convention on the Rights of the Child, a human rights treaty; and the Kyoto Protocol. He would have loved to see those things come into action, but he didn't pretend that they weren't treaties. He didn't pretend they were sole executive agreements. He adhered to his obligations.

Mr. COHEN. My time has expired. But I'm just curious who you supported.

Mr. GROVES. I was on Senator Cruz' team.

Mr. COHEN. Lying Ted. As distinguished from short this one and whatever that one is.

Mr. KING. The gentleman's time has expired.

For the record, I know the whole truth to that, and that is not true.

Mr. COHEN. I was just being facetious with the term.

Mr. KING. Generally, I appreciate the gentleman from Tennessee.

And now I recognize the gentleman from Texas for his testimony, questioning.

Mr. GOHMERT. Thank you. I do appreciate the satire in satirically violating the rules of decorum of the House. I always felt it was rather satirical of somebody who had to be lying to say "lying Ted" or "the most dishonest person he had ever met" since he was the most honest man in the race.

But let's go back to this Paris Agreement, and I appreciate, Mr. Kontorovich, your written testimony. You got into more detail that the U.N. Framework Convention on Climate Change accepted the Palestinian Authority as a state party. As you say, the move is part of the Palestinian effort to be declared a state. The United States does not recognize the Palestinian Authority as a state, and U.S. policy has consistently opposed such moves. Therefore, longstanding U.S. law requires the defunding of any U.N. organization that grants Palestinian Authority such status. We also—I haven't read the Paris Agreement, but my understanding from reading articles about the Paris Agreement, the original article IX required developing nations to transfer wealth to underdeveloped nations, and normally, that would require congressional action so—and I know there was this great facade over the Iranian treaty. The Corker bill amended the Constitution with a legislative act by requiring a treaty to only get one-third of the vote of the Senate in order to be effectively ratified. I still think the Constitution is intact in that area. It should have required two-thirds to ratify what is a treaty, because it does modify a number of other treaties like with regard to missiles and proliferation. So, on one hand, I appreciate the testimony. Clearly, if we're going to be transferring American wealth, with all due respect to the President's desire to spread the wealth, that's not something he has authority under the Constitution to do without congressional concurrence. And it also does explain why after the Kyoto accords, the underdeveloped nations were all claiming: If we don't get America on board, this agreement doesn't work. What they were saying was: If America doesn't sign on, then the one country that's going to send us checks is not going to be sending us checks, which is the whole reason we're part of this; we want to get checks from the U.S. Congress, from the U.S. Treasury.

And so does anybody see a constitutional way of having the United States Treasury send money to the benefit of foreign countries without congressional concurrence in that? Anybody? Mr. Groves?

Mr. GROVES. No, there actually is no way to do that and——

Mr. GOHMERT. Constitutionally.

Mr. GROVES. Not constitutionally.

Mr. GOHMERT. Yeah. Apparently, it is going on like money being provided to Iran without congressional consent, but any other thoughts on that happening?

Mr. GROVES. Well, I mean, the House did and the Senate had an opportunity during the omnibus to put in language strictly—specifically preventing the transfer of the $3 billion to the Green Climate Fund that the President had pledged.

Mr. GOHMERT. Was there a need to put that in since they do not have authority to do that currently?

Mr. GROVES. There was a need to put that in if you wanted to prevent the President from reprogramming other funds from other climate-related international aid areas into the Green Climate Fund, which is what he ultimately did in order to come up with the $3 billion that he had pledged.

Mr. GOHMERT. Do you agree that the Senate should have taken a vote on the Iranian agreement as a treaty and determined whether or not they get two-thirds to ratify?

Mr. GROVES. Well, I would defer to Eugene on the Iran nuclear deal issues. We had a debate. We have had debates within our circles about whether the Senate can just decide on its own that an agreement is a treaty and we are going to take a vote on it. There's good arguments on both sides of that issue. I think I agree with you—whether the Senate can do that, there's good arguments. But I agree with you that the Corker-Cardin bill was, I think, a wrongheaded way to move forward because you essentially turned the two-thirds advise-and-consent vote into the one-third——

Mr. GOHMERT. Well, my time has expired, but I'm astounded that you think the Senate can call a cow a horse and then it becomes a horse. But thank you for your testimony.

Mr. KING. The gentleman from Texas yields back.

And the Chair will now recognize the Ranking Member of the full Committee, Mr. Conyers from Michigan.

Mr. CONYERS. Thank you, Chairman.

Professor Vladeck, is the Paris climate agreement and the Iran nuclear deal inconsistent with current American law?

Mr. VLADECK. If they are, I'm not sure what those laws are. I mean, I've listened to my friends Professor Kontorovich and Mr. Groves, and, you know, I haven't heard specific American statutes that these agreements are inconsistent with. Professor Kontorovich wants to suggest that failure to transmit the IAEA side deal of the Iran agreement violates the INARA, the Nuclear Agreement Review Act. I would just refer the Task Force to Jack Goldsmith's 2015 blog post on why the argument is intriguing but not convincing.

Mr. CONYERS. What say you, Professor Kontorovich?

Mr. KONTOROVICH. My friend and teacher Jack Goldsmith wrote that blog post before he read my testimony and the full presentation of my arguments.

Mr. VLADECK. Although he refers to you specifically in the post.

Mr. KONTOROVICH. Yes, indeed. So he read part of the material in the testimony but not the fully elaborated argument.

Again, I think it's important to point out, INARA does not require the President to transmit any deal. It's not a violation of INARA for the President to not transmit material. The President can say: This material is sensitive; I don't want to give it over. That is entirely consistent with INARA.

However, the consequence of that under INARA is that the sanctions, existing statutory sanctions, can't be lifted. It's not a violation. It just has consequences in terms of statutory sanctions. There is nothing unconstitutional about the President not transmitting this material. The problem is that the President wants to act as if the material were transmitted when, in fact, it was not. And I would refer the Honorable Members to the various state-

ments of congressional intent made during the discussions of INARA, where it was quite clear that Members understood they wanted to see everything to exercise their constitutional right to review the agreement.

Mr. VLADECK. Although that's not what the statute says. I mean, I think that—so the problem is that I think Professor Kontorovich is right that one can find legislative history suggesting that everything was on the table. As I think Professor Goldsmith's post makes clear, if you actually read the text of the statute, there are certainly plausible, reasonable interpretations of the language that actually only refer to agreements to which the U.S. is a party, which does not include the IAEA side deal with Iran.

I'm not saying that there is an obvious answer. My point is that I think we would need more of a smoking gun before reaching the conclusion that both of my colleagues reach that these agreements are clearly inconsistent with existing U.S. law.

Mr. CONYERS. Well, let me ask you this: Has either the Paris climate agreement or the Iran nuclear deal created new legal, binding commitments with which our country must comply?

Mr. VLADECK. So I think, I mean, my understanding of both, and I'm certainly happy to hear what my colleagues think, is that they create process commitments. They create reporting requirements but that the actual text of the agreements was carefully negotiated to avoid binding, substantive legal obligations entirely to avoid the U.S. constitutional law objections. Right, indeed, there's a great post that I cite in my testimony about how the word "shall" was changed to "should" at the last minute for the emissions cap in the Paris climate agreement entirely to avoid the very argument we are now hearing that these agreements impose mandatory substantive obligations on the U.S. and, therefore, must be submitted to Congress.

Mr. CONYERS. Professor Kontorovich, do you generally agree with that assessment?

Mr. KONTOROVICH. Yeah. I'm not as well read in the Paris deal, but I do not believe the Iran deal creates binding legal obligations for the United States, which is going to be extremely important when the Administration argues that State laws must be preempted because of the deal, which is not something that can happen if it does not create binding legal obligations for the United States.

Mr. CONYERS. Let me raise this last question here. Opponents of the Administration's policy claim that the President has exceeded his legal and constitutional authority in foreign affairs, but in what ways has Congress itself delegated its foreign policy powers to the executive branch?

Mr. VLADECK. Well, I think in the case of the Iran deal, I mean, I think it's quite clear that Congress in prior statutes had already delegated to the President a wide range of authority to figure out what the sanctions regime should look like, to set the terms of the sanctions, to control the timing of the sanctions. And so, you know, as Professor Goldsmith says, but for those delegations, I think we would be in a very different position talking about how much authority the President already had to conduct the Iran agreement without Congress.

Mr. CONYERS. Do we have agreement on that generally?

Mr. KONTOROVICH. It is exactly because Congress delegated such broad discretion to the President that limitations on that discretion, subsequent walk-backs of that discretion, and ways of monitoring that which INARA embodies need to be strictly construed.

Mr. CONYERS. Professor Groves—Mr. Groves, do you agree with that?

Mr. GROVES. I would just speak as to the Paris Agreement. We have very specific things that the President didn't adhere to that demonstrate his overreach. The test is not whether there was a specific statutory law that the President has breached. That's a pretty high bar. What we have in the Paris Agreement is we have him ignoring the C-175 procedure, which decides what's a treaty and what's a sole executive agreement. We have him ignoring the 1992 commitment made by a prior executive to the Senate to submit future agreements with targets and timetables to the Senate. That is the basis for my opinion that President Obama has gone beyond his mandate when it comes the Paris Agreement.

Mr. CONYERS. Thank you, Chairman King.

Mr. KING. I thank the gentleman from Michigan.

And now I recognize another gentleman from Michigan, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

I appreciate your testimony today. Thank you very much for being here today.

Mr. Groves, one of the questions I get from my constituents on some of these deals and, in particular, the Iran deal is, how do we know whether an international agreement should be a treaty or an executive agreement?

Mr. GROVES. Well, it's—I wish it was set in stone, but it's not. I wish the U.S. Supreme Court had come down with an opinion laying out all of the factors, but they haven't. And don't know if that's their role. What we do have is there were disputes over this back in the 1950's. You remember things like the Bricker amendment. You remember things like the Case-Zablocki Act where the separation of these powers between Congress and the President were debated. And one of the things that came out of that debate and out of that dispute was the Circular 175 procedure, which gives eight factors, which I detail ad nauseam or at least at length in my written testimony, which takes a look at the final Paris Agreement and element by element examines it to see if it meets those eight elements. And it's—my opinion is that they meet all eight of them; not one or two, not just five or six, but all eight, I believe, are satisfied when you look at the extensive and comprehensive treatment of climate change that the Paris Agreement gives you.

So my short answer would be: the C-175 procedure is our best test for what's a treaty.

Mr. BISHOP. So how might Congress codify or clarify the treaty process to ensure that the Senate does have that opportunity to provide advice and consent?

Mr. GROVES. Carefully. We want to be able to do so without breaching the separation of powers. We want to do so in a way that doesn't hamstring future Presidents, Republican or Democrat, in

making sound international agreements. I think, as I stated earlier, if it can be done in such a way that would foster transparency, it would—half the job would be there. As it stands, the State Department does an internal procedure under C-175 and ultimately submits a memo to the Chairman and Ranking of the Senate Foreign Relations, and that's the end of it. Very opaque. No one, I think, outside of those Committee hearings gets to read those, and maybe sometimes they shouldn't because they might be sensitive. But when we don't have more transparency or more ways that both Houses can kind of examine these things before it's too late, I think you end up with the disputes that we are having here today with the Iran nuclear deal and with the Paris Agreement.

Mr. BISHOP. Thank you very much.

Mr. Kontorovich, can you explain to us what the current legal status is of the statutory Iran sanctions?

Mr. KONTOROVICH. The statutory Iran sanctions, which have been embodied in numerous instruments and Congress has passed many sets of Iran sanctions, almost invariably had provisions allowing the executive to waive or suspend or sunset them. Congress can extend, can delegate that kind of authority to the executive. By the same token, that which Congress giveth, it can taketh away or limit. In INARA, and this relates to Mr. Gohmert's comment, Congress did a very unusual thing and flipped the majority presumption for congressional action, which is a significant deferral to the executive. That came at a price. The price was until the review obligations were met by the President, existing sanctions which allowed for waiver could not, in fact, be waived. Because those requirements were not complied with, the previous waiver authority contained in legislative sanctions is now suspended. That is to say: just like the legislative sanctions allowed for waiver, there has since been new legislation, namely INARA, which the President signed.

Now, one might say: Isn't it a bit much because of these IAEA documents to limit the President's waiver authority? Again, that is not an inherent waiver authority. That's a statutory waiver authority which can be modified by statute. And if the President considers it very important, he could make these documents available. More importantly, state sanctions remain on the books. Some state sanctions are specifically authorized in the Comprehensive Iran Sanctions and Divestment Act of 2011, which does not given the President authority to waive or suspend them, unlike other sanctions. More importantly, INARA provides that it's provisions do not in any way affect assisting sanctions for Iran for human rights and other things, like support of terrorism, which is what some of the state sanctions involve. So I would say that INARA locks in and protects from executive action state sanctions that aren't covered by CISADA, in particular those which deal with human rights and support of terrorism.

Mr. BISHOP. Thank you, sir.

I yield back, Mr. Chair.

Mr. KING. The gentleman returns the time.

The Chair would now recognize the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman.

Professor Kontorovich, good to see you again. I think the last time we saw you was in Israel last fall. So we appreciate you being here and the other witnesses as well. So let me see if I can get this exactly right. This Framework on the Climate Change treaty actually in a roundabout way is circumventing Federal law and allowing the State Department—not allowing, but they are usurping and violating the law and actually sending money to an organization that—well, not even an organization, a roundabout way they are getting money to this organization which recognizes the Palestinian Authority as a state. Straighten me out on what's exactly happening here.

Mr. KONTOROVICH. Okay. So the funding restrictions in question block money from being given to the United Nations if they are—treat the Palestinian Authority in various ways as a member state.

Mr. JORDAN. Right.

Mr. KONTOROVICH. But one of those ways is accepting them into the various U.N. agencies. So the funding restriction says the U.N. doesn't get money. It's not money to the Palestinian Authority.

Mr. JORDAN. Right.

Mr. KONTOROVICH. It's money to the U.N. agency.

Mr. JORDAN. Got it.

Mr. KONTOROVICH. There are, in the omnibus spending bill, various other restrictions about money going to the Palestinians if they join the International Criminal Court, again, restrictions which I think were written overly narrowly in a way which make them easy to avoid. But this particular provision is about money to the United Nations Framework Convention on Climate Control, and it's a great place, by the way, to take a stand on principle the question we were discussing before.

Mr. JORDAN. Sure.

Mr. KONTOROVICH. We are talking about $17 million. That's not going to break the climate, and it's not going to break the Middle East peace process.

Mr. JORDAN. So where does the State Department send the money?

Mr. KONTOROVICH. My understanding is they send it to the administration of the UNFCCC, which is the Secretariat, which gets the money and pays the bills for these U.N. agencies.

Mr. JORDAN. Because in your opening statement, you said there's a difference between—you can't send money to a treaty; you have to send it to an organization.

Mr. KONTOROVICH. Right. So the United Nation's Framework Convention on Climate Control is a treaty which creates an organization. So the Administration says: Oh, this doesn't count as a violation of the statute because it's not an agency. It's a treaty.

Mr. JORDAN. Yeah.

Mr. KONTOROVICH. Now, it's true it's a treaty, but it is also an agency, just like the United Nations' charter is a treaty——

Mr. JORDAN. Got it. Got it.

Mr. KONTOROVICH [continuing]. Which creates an institution, the United Nations itself.

Mr. JORDAN. Okay. So a different subject. So you have that problem, I think a direct violation of the law we are seeing from our State Department, and then you also have this a bit more, in my

judgment, more fundamental problem where the Iran agreement was not treated as a treaty, subject to the two-thirds requirement in the Senate for ratification. Would you agree with that?

Mr. KONTOROVICH. So, no, I'm afraid I would not agree with that.

Mr. JORDAN. Okay.

Mr. KONTOROVICH. Whether it's a treaty or not depends a lot on whether it creates obligations for the U.S., whether it trumps domestic law and so forth. The President has told us that that is not the case. I take his word on it, and I think the courts in the future if he would, for example, take action to preempt state sanctions——

Mr. JORDAN. Okay.

Mr. KONTOROVICH [continuing]. Would hold him at his word. And I think it's important to maintain that this deal does not create any international or national obligations for the United States.

Mr. JORDAN. Okay.

Mr. KONTOROVICH. That, by the way, also gives a lot more room to a future Administration, for example, to deal with potential violations by Iran under this treaty.

Mr. JORDAN. All right.

Mr. KONTOROVICH. Under this arrangement.

Mr. JORDAN. So the last point I would make, Mr. Chairman, is we had this—it seems in my mind we've got the issue with the climate agreement and the dollars. You have got the issue on the whole Corker-Cardin arrangement and what that was and how it moved through Congress. I think both of those are concerns. But, actually, one of the other big concerns is what we learned this week, which is this Administration, with the Iran agreement, wasn't honest with the American people, wasn't honest with the press. So that's even, in some ways, even more of a fundamental problem. You cannot have people in positions, high positions in our government, who aren't straight with the American people. You can't have them doing a con job, which is, based on what we have heard about Mr. Rhodes, is exactly what they tried to do.

Mr. Groves, would you care to comment on that in my last minute?

Mr. GROVES. Well, a lot of this goes back to what I've said about transparency. I mean, under existing procedures, when the State Department is going to open up a new set of negotiations about a new international agreement, it's under an obligation to go through internal processes under C-175 and notify Senate Foreign Relations about its intentions. What I do not know sitting here, is if and when that notification went to Foreign Relations? Was it back with the hardliners in 2009, or was it when Ben Rhodes', you know, spin and, you know, his—the picture he was painting for the press happened? That type of transparency is the type of thing that——

Mr. JORDAN. Is that something formal that they are supposed to do, the Administration is supposed to do with the Senate Foreign Relations and——

Mr. GROVES. Absolutely. It's all under this particular procedure, which arose from these types of disputes that happened back in the 1950's when everyone was trying to rebalance——

Mr. JORDAN. And do we not know if that took place or do you not know?

Mr. GROVES. I don't know what you guys have in your briefings but——

Mr. JORDAN. Well, I'm just asking in a general sense. Mr. Chairman, that might be something we want to check out to see if they did what they are supposed to do. My guess is that if they are willing to, you know, not communicate in an honest fashion, they may not have done what they were supposed to do.

Mr. GROVES. Yeah.

Mr. JORDAN. That's something we should find out.

Mr. GROVES. What I'm hearing about is—the backtrack is these were nongovernmental channels. These were back channels, and so they will probably take the view to the extent that this ever comes out, that it wasn't yet ripe to trigger notification of Senate Foreign Relations.

Mr. JORDAN. Okay. Okay. Thank you, Mr. Chairman.

Mr. KING. And I thank the gentleman from Ohio.

And the Chair takes note of the remarks and his testimony, and as we compile a report, we will also review that topic.

The Chair now recognizes the gentleman from Idaho for his 5 minutes, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman, and thank you to the witnesses for being here today.

Mr. Groves, can you briefly describe the difference between a treaty and an executive agreement?

Mr. GROVES. Well, sure. You know, the executive agreements are usually narrow. They are often bilateral. They don't require additional congressional legislation to implement them or additional funding from Congress. Their provisions can usually be executed in a fairly brief period of time. They are less formal. There are just a number of things that history and practice has done to separate the two. Whereas treaties are comprehensive, lengthy, complex with lengthy periods of time, like the Paris Agreement is open-ended—there is no end to the provisions under it, including our obligations to fund the Green Climate Fund and other mechanisms to the tune of billions and billions of dollars.

Mr. LABRADOR. So, in your opinion, is the Paris Agreement a treaty?

Mr. GROVES. I think on all fours, it's a treaty. If you just look at the objective factors under C-175—you look at historical practice, you look at the commentary of legal scholars, a lot smarter than I am—and apply that to the facts of the Paris Agreement, I think it's uncontrovertibly a treaty.

Mr. LABRADOR. So can you briefly discuss Circular 175, or C-175, and the justifications that it gives to view the Paris Agreement as a treaty?

Mr. GROVES. Say again, sir?

Mr. LABRADOR. Can you discuss the State Department Circular 175, and whatever justifications it gives to treat the Paris Agreement as a treaty?

Mr. GROVES. Yes, under the procedure, they are supposed to send a memo, a comprehensive memo, to the Foreign Relations Committee in the Senate explaining why they are going forward in a particular way, why they are going forward as an executive agreement versus a treaty. I'm not privy to that memorandum or even

know that it was sent or not. But I'd sure be interested in reading it because making the case for a comprehensive Earth-saving international agreement, I'd like to see how that got fit into a sole executive agreement format. But I'm not privy to that memorandum.

Mr. LABRADOR. So what steps or actions can Congress take in the future to ensure that a treaty negotiated by any Administration, whether it's the Obama, or the Trump administration, or any other Administration, follows the proper course of action and is properly submitted to Congress?

Mr. GROVES. Well, we need to raise the level of the current state because it was just ignored by the President. If there's a way to codify it without breaching statute—pardon me, without breaching the separation of powers agreements, there are proposals that have been out there. There is a legal scholar named Oona Hathaway who has given a comprehensive proposal on how we might approach this issue going forward, especially due to the huge propagation of executive agreements and congressional executive agreements in lieu of treaties. So it's something that the Heritage Foundation and some of my colleagues there are exploring with the idea of proposing legislation in the future—probably not during an election year, but maybe thereafter—where both the House and Senate can codify, make this process more transparent, avoid these types of conflicts in the future because the executive branch needs to know how much or little support it's going to have in the future with a particular agreement. I think more transparency is the answer.

Mr. LABRADOR. Maybe it might be a good idea to do it during an election year because we don't know who the next President is going to be, so maybe both parties can actually work together on something like this.

Mr. GROVES. Sure.

Mr. LABRADOR. What recourse does Congress have right now if an Administration refuses to submit a treaty to Congress?

Mr. GROVES. Well, it has got a few recourses. It can hold hearings. It can raise the level of scrutiny on what the President is doing. It can show the overreach. But when push comes to shove, its number one tool is exercising the power of the purse. And in things like the Paris Agreement—I'm unsure about the Iran agreement—but in the Paris Agreement, it pledges billions, tens of billions, probably over time even more, billions and billions of U.S. taxpayer dollars to go and finance something called the Green Climate Fund, which is going to redistribute funds to climate-change projects all around the world in developing countries. Congress has the absolute power to stop that money. Thus far, it has chosen not to do so, but I hope that this—hearings like these and Task Forces like these continue to keep the profile high on this so that when these funding measures come up again in the future, we can take a very close look at them.

Mr. LABRADOR. Okay.

Mr. Kontorovich, I think I'm pronouncing that right, what's the significance of the United Nations Framework Convention on Climate Change accepting the Palestinian Authority as a state party?

Mr. KONTOROVICH. The significance is that it shows that this agency, supposedly dedicated to climate change, has decided to em-

broil itself in Middle East politics and recognize as a state party an entity that does not meet the criteria of international statehood. They don't do this with, you know, any other entity, with Puntland or Kurdistan. Under U.S. law, this means that the U.S. cannot fund the relevant United Nations agency of the framework convention.

Mr. LABRADOR. Does this signal then a shift or a change in U.S. foreign policy?

Mr. KONTOROVICH. The U.S. policy has banned the use of funds for this since the 1990's. The fact that the Administration is going to probably send them a check anyway I think doesn't signal a shift of policy so much as what the Administration might perceive as wiggle room in the relevant statutory language. But the executive has been lobbying Congress to get rid of these provisions entirely. And so Congress has to understand: this is a negotiation with the executive. His policies are clear. It's clear what he wants, and Congress can assert itself by giving less of that, by going in the opposite direction, rather—so that there will be consequences for not complying with the law.

Mr. LABRADOR. Thank you, I yield back.

Mr. KING. The gentleman from Idaho returns his time.

This concludes today's hearing. Thanks to all of the witnesses and Members for participating.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. I thank the witnesses. I thank the Members and the staff and the audience. This hearing is adjourned.

[Whereupon, at 11:35 a.m., the Task Force was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Executive Overreach Task Force

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.