
Expanding the Executive Branch's Foreign Relations Power: An Analysis of the Iran Nuclear Agreement

*“The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.”*¹

I. INTRODUCTION

One of the most important aspects of the U.S. Constitution is the establishment of three separate but equal branches of government, and the division of the power to manage foreign relations among the branches.² As a result of the Obama Administration's successful passage of the 2015 Iran Nuclear Agreement (Agreement), the executive branch has potentially assumed some of the Senate's constitutional power.³ This Agreement lifts economic sanctions against Iran, with the expectation of curtailing the Iranian nuclear program.⁴ The magnitude of this Agreement on the international stage cannot be understated: With the passage of the Agreement, more than \$100 billion will become available to Iran.⁵

While this Agreement will have significant foreign policy repercussions as the United States attempts to reposition itself in the Middle East, its impact on our domestic political structure is worthy of even greater legal analysis.⁶ The manner in which the Agreement was implemented establishes a potential precedent that could significantly alter how future international agreements take effect.⁷ President Obama likely acted against the will of Congress when he instituted the Agreement, which raises important constitutional questions in

1. THE FEDERALIST NO. 75 (Alexander Hamilton).

2. See U.S. CONST. art. I (outlining powers of legislative branch); *id.* art. II (outlining powers of executive branch); *id.* art. III (outlining powers of judicial branch); David Gray Adler, *Protecting the Nation at the Expense of Individuals? Defining the Scope of U.S. Executive Power at Home and Abroad in Times of Crisis: George Bush and the Abuse of History: The Constitutional and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 90 (2007) (explaining Founders feared abuse of power in foreign affairs).

3. See *infra* Part III.B (arguing Obama's actions in implementing Agreement unconstitutional).

4. See Eric Pianin, *End of Sanctions Worth Hundreds of Billions to Iran*, FISCAL TIMES (June 29, 2015), <http://www.thefiscaltimes.com/2015/06/29/End-Sanctions-Worth-Hundreds-Billions-Iran> [<http://perma.cc/8QLY-HFGL>] (noting \$100 billion of Iranian assets unfrozen in exchange for halting of nuclear program).

5. See *infra* note 113 and accompanying text (explaining up to \$100 billion additional Iranian assets could become unfrozen).

6. See Paul D. Shinkman, *Defense Secretary Ash Carter: Iran Deal Safer Than Alternative*, U.S. NEWS (Sept. 4, 2015), <http://www.usnews.com/news/articles/2015/09/04/defense-secretary-ash-carter-iran-deal-safer-than-alternative> [<http://perma.cc/82BU-4M92>] (explaining Agreement will address significant source of “risk and uncertainty” in Middle East).

7. See *infra* Part III.B.

light of *Youngstown Sheet & Tube Co. v. Sawyer*⁸ (*Youngstown*), *United States v. Curtiss-Wright Export Corp.*⁹ (*Curtiss-Wright*), and other judicial precedent.¹⁰

Per the U.S. Constitution, two-thirds of the Senate must vote in favor of a treaty for it to be approved.¹¹ Due to unique voting procedures, however, the Agreement was implemented with the support of only forty-two senators and without Congress's direct affirmation.¹² The forty-two senators who supported the Agreement prevented the Senate from casting a formal vote to either approve or deny the Agreement.¹³

This Note examines the executive branch's role in enacting agreements with foreign nations, and considers how the Agreement alters the delicate balance of power between the executive and legislative branches.¹⁴ Part II.A presents the Madisonian perspective on the division of the federal government's power to manage foreign affairs between the executive and legislative branches.¹⁵ Part II.B outlines Supreme Court precedent concerning the scope of executive

8. 343 U.S. 579 (1952).

9. 299 U.S. 304 (1936).

10. See *infra* Part III.B; see also *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (explaining Presidents' power reaches lowest level when they take measures incompatible with Congress's will); Shahrzad Noorbaloochi, Comment, *The Limits of Executive Authority to Preempt Contrary State Laws in Foreign Affairs After Medellin v. Texas*, 64 AM. U. L. REV. 687, 726 (2015) (noting Jackson's *Youngstown* concurrence reinforces constitutional safeguards against consolidation of power to manage foreign affairs).

11. See U.S. CONST. art. II, § 2, cl. 2 (explaining President shall make treaties "provided two thirds of the Senators present concur"); see also Stephen Collinson, *Iran Deal: A Treaty or Not a Treaty, That Is the Question*, CNN (Mar. 12, 2015), <http://www.cnn.com/2015/03/12/politics/iran-nuclear-deal-treaty-obama-administration> [<http://perma.cc/H32M-PSWY>] (questioning failure to call Iran agreement bona fide "treaty"). Arizona Senator John McCain stated, "[t]hey can call it a banana, but it's a treaty." Collinson, *supra*.

12. See Bill House & Kathleen Miller, *Obama Gains 41 U.S. Senate Votes to Uphold Iran Nuclear Deal*, BLOOMBERG (Sept. 8, 2015), <http://www.bloomberg.com/politics/articles/2015-09-08/obama-gains-41-u-s-senate-votes-to-uphold-iran-nuclear-deal> [<http://perma.cc/TJ4A-L7K8>] (noting President Obama only needed forty-one senatorial votes to protect Agreement).

13. See Karoun Demirjian, *Senate Rejects Attempt to Derail Iran Deal in Victory for Obama*, WASH. POST (Sept. 10, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/09/10/senate-set-to-vote-on-iran-nuclear-deal/> [<https://perma.cc/5NGN-8FWH>] (explaining forty-two senators voted to block resolution to support Agreement); David M. Herszenhorn, *Iran Deal Debate Delayed as Talk of Secret Deals Divides G.O.P.*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/world/middleeast/iran-nuclear-deal-republican-house-debate.html> [<http://perma.cc/A2N2-9VU7>] (noting outcome of Agreement already predetermined after forty-two senators supported Agreement); see also Jordain Carney, *McConnell: We're Voting Again on Iran Deal*, HILL (Sept. 10, 2015), <http://thehill.com/blogs/floor-action/senate/253293-mcconnell-were-voting-again-on-iran-deal> [<https://perma.cc/S6GY-8C72>] (discussing cloture motion filed by Senate Majority Leader McConnell on resolution of Agreement); Press Release, Speaker Ryan Press Office, Statement on Implementation of the Iran Nuclear Agreement (Jan. 16, 2016), <http://www.speaker.gov/press-release/statement-implementation-iran-nuclear-agreement> [<https://perma.cc/VJN8-2BCQ>] (noting Speaker of House Paul Ryan opposed implementation of the Agreement).

14. See *infra* note 107 and accompanying text (explaining majority of senators attempted to block Agreement's implementation three separate times).

15. See *infra* Part II.A (noting Madison advocated for cooperation between Congress and President in managing foreign affairs).

power with respect to foreign affairs.¹⁶ Part II.C traces the implementation of sanctions against Iran by the United States between 1979 and 2008.¹⁷ Part II.D discusses the implementation of additional sanctions against Iran during President Obama's presidency and the subsequent enactment of the Agreement.¹⁸

In Part III.A, this Note argues that President Obama should not have implemented the Agreement without the support of a majority of Congress.¹⁹ Part III.B asserts that President Obama's actions in implementing the Agreement were unconstitutional.²⁰ This Note concludes by maintaining that President Obama's unconstitutional implementation of the Agreement jeopardizes the separation of powers that is essential to the constitutional structure of the U.S. government.²¹

II. HISTORY

A. *The Madisonian Perspective on the Power to Conduct Foreign Affairs*

The Framers of the U.S. Constitution created a government with three co-equal branches.²² In doing so, they hoped to establish a system of checks and balances, preventing the types of abuses that might occur if all governmental powers were to be concentrated in a single branch.²³ In the Federalist Papers, Hamilton examined the necessity of requiring legislative support for the executive branch to enact treaties.²⁴ Hamilton noted that once enacted, treaties have the force of law, and the Union would benefit from the executive and legislative branches working together to formulate and implement such treaties.²⁵ Hamilton explained in the Federalist No. 47 that “[t]he accumulation

16. See *infra* Part II.B.

17. See *infra* Part II.C.

18. See *infra* Part II.D.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. See *infra* Part IV (concluding President Obama expanded presidential power to Senate's detriment). The Senate needs to act more carefully when dealing with the executive branch in the enactment of treaties if it does not wish to be circumvented in the future. *Id.*

22. See *supra* note 2.

23. See *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring) (explaining co-equal branches check each other's actions and create governmental balance); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 221 (1993) (explaining Framers established three separate branches of government to prevent abuses by single branch).

24. See THE FEDERALIST NO. 75, *supra* note 1 (explaining before ratification of Constitution Framers debated which branch should make treaties). Some delegates believed this power should be given exclusively to the President, while others believed it should be exclusive to the Senate. *Id.* Hamilton argued this power should belong “neither to the legislative nor to the executive.” *Id.*; see also Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 630 (2004) (noting Hamilton insisted on cooperation of Senate and President in conducting foreign negotiations).

25. See THE FEDERALIST NO. 75, *supra* note 1. Hamilton asserted it would be best for both the branch responsible for enacting laws (the legislative branch) and the branch responsible for executing laws (the

of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.”²⁶ Scholars who advocate for a stronger legislative branch have cited Federalist No. 47 to argue for congressional authority to regulate functions that could fall exclusively within the executive branch.²⁷

B. Examining Supreme Court Jurisprudence Concerning the Scope of the Executive Branch’s Power to Manage Foreign Affairs

In 1934, Congress passed a resolution that prevented the United States from selling arms to Bolivia or Paraguay.²⁸ After the resolution’s enactment, President Franklin D. Roosevelt issued a proclamation in support of it, but he revoked the resolution less than a year later.²⁹ In *Curtiss-Wright*, the Curtiss-Wright Corporation was charged with violating the arms embargo.³⁰ Because President Roosevelt revoked the embargo, the Curtiss-Wright Corporation argued that the revocation compelled the dismissal of all charges.³¹ In deciding the case, the Supreme Court set the high-water mark of executive power, holding that the President alone has the power to speak as a representative of the nation in negotiating with foreign nations.³² The Supreme Court did not,

executive branch) to share in the power to make treaties. *See* Adler, *supra* note 2, at 98-99 (explaining Framers limited powers of executive branch to prevent abuses suffered under British monarchs).

26. THE FEDERALIST NO. 47 (Alexander Hamilton). However, Hamilton did not believe the branches of government should be kept “absolutely separate and distinct.” *See id.* In fact, Hamilton argued some mixture of the branches is both unavoidable and desirable in a system of checks and balances. *See id.* Hamilton believed the Constitution as proposed “distributed and blended” the powers of government in a manner that did not create a risk of tyrannical government. *See id.*; *see also* Bradley & Flaherty, *supra* note 24, at 604 (noting Madison recognized British constitution created tyrannical government via excessive concentration of governmental powers).

27. *See* Peter E. Quint, *The Federalist Papers and the Constitution of the United States*, 77 KY. L.J. 369, 393-94 (1989) (explaining some advocates have successfully argued for congressional checks on executive action using Federalist No. 47); *see also* U.S. CONST. art. II, § 2, cl. 2 (stating President “with the Advice and Consent of the Senate” shall make Treaties). The Constitution also notes that two-thirds of the Senate must concur for a treaty to be ratified. U.S. CONST. art. II, § 2, cl. 2. In addition, the role of foreign policy is specifically reserved to only the federal government, and the Constitution states “[n]o State shall enter into any Treaty, Alliance, or Confederation.” *See* U.S. CONST. art. I, § 10, cl. 1.

28. *See Curtiss-Wright*, 299 U.S. at 311-12 (explaining Congress passed resolution in 1934 in response to Bolivia-Paraguay war).

29. *See id.* at 313 (noting President Roosevelt ended embargo because ongoing hostilities ended).

30. *See id.* at 311 (naming charges within indictment).

31. *See id.* at 314, 333 (reversing district court’s judgement and reinstating conviction). The Court explained that the President is the “sole organ” of foreign relations because he or she is in the best position to know certain information about the ongoing state of foreign affairs. *See id.* at 319 (citation omitted).

32. *See Curtiss-Wright*, 299 U.S. at 319 (explaining President embodies “constitutional representative of the United States with regard to foreign nations”) (citation omitted). In addition, the Court noted Congress is “powerless” to invade the President’s ability to negotiate treaties, but that there is no question that Congress possesses the power to ratify treaties. *See id.* at 320. Proponents of a strong executive branch have used *Curtiss-Wright* to argue for the expansion of executive authority to act in matters of national security. *See* Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer*

however, give the President the power to implement treaties unilaterally.³³

In *Goldwater v. Carter*,³⁴ the Supreme Court refused to consider the question of whether President James E. Carter acted against the will of Congress when he unilaterally ended a treaty between the United States and Taiwan.³⁵ Members of the Senate brought the case and argued President Carter's termination of the United States's defense treaty with Taiwan was unconstitutional because it lacked congressional approval.³⁶ Concurring in the judgment, Justice Rehnquist, believing the issue before the Court to be a political question, argued that if an Article III court decided such a question, it could create a significant disruption among the three branches of government.³⁷ In another concurring opinion, Justice Powell argued that the political question doctrine did not render this issue nonjusticiable, but that the Court should not address the issue because it was not ripe for review.³⁸

Notwithstanding the Court's holdings in *Curtiss-Wright* and *Goldwater*,

in *National Security Jurisprudence*, 16 J.L. & POL. 1, 8-9 (2000).

33. See *Curtiss-Wright*, 299 U.S. at 319 (noting President enacts treaties with advice and consent of Senate). The Court's decision in *Curtiss-Wright* has been criticized for not adequately addressing the constitutional conflict between Congress and the President with respect to the authority to manage foreign affairs. See Edward A. Purcell Jr., *Understanding Curtiss-Wright*, 31 L. & HIST. REV. 653, 656 (2013) (considering court's discussion of executive power "vague and unnecessary"); see also Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 380-81 (2000) (asserting *Curtiss-Wright* decision inconsistent with drafters' understanding of Constitution). Despite its criticisms, *Curtiss-Wright* has played a very important role in the development of the Court's jurisprudence concerning the balance of power to conduct foreign affairs between the legislative and executive branches. Brownell, *supra* note 32, at 17-18.

34. 444 U.S. 996 (1979).

35. See *id.* at 996 (Powell, J., concurring) (remanding case with instructions to dismiss complaint). Justice Powell, concurring in the Court's disposition of the case, asserted that the Court did not need to decide whether the President had the authority to unilaterally terminate the treaty as Congress had not, by "appropriate formal action," challenged the President's authority to do so. See *id.* at 1002. But see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1253 n.108 (1995) (questioning whether President Carter had authority to end treaty because he acted against will of Congress).

36. See *Goldwater*, 444 U.S. at 997-98 (Powell, J., concurring).

37. See *id.* at 1005-06 (Rehnquist, J., concurring) (advocating for vacating prior proceedings and dismissing complaint for posing nonjusticiable political question); see also Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 135-36 (2000) (noting "Court did not reach a majority opinion"). Justices Burger, Stewart, and Stevens joined Justice Rehnquist's opinion. See *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring).

38. See *Goldwater*, 444 U.S. at 998 (Powell, J., concurring) (arguing analysis of factors of political question doctrine required Court to review case if ripe). Justice Powell employed the political doctrine test from *Baker v. Carr*, 369 U.S. 186, 217 (1962) in his analysis. See *id.* The political doctrine test asks: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Id.* Justice Powell asserted each of these questions must be answered in the negative with respect to the matter before the Court. See *id.* at 998-1002. In asserting the case was not ripe for review, Justice Powell noted Congress had not formally challenged the President's authority to revoke the treaty. See *id.* at 998 (highlighting Congress had taken no vote on matter).

Youngstown has provided the framework for analyzing the President's power to conduct foreign relations vis-à-vis congressional oversight.³⁹ In *Youngstown*, the Court considered whether President Harry S. Truman could order the seizure of privately operated steel mills during the Korean War without congressional authority.⁴⁰ President Truman, concerned about an imminent labor strike's potentially disastrous effect on the war effort, seized the steel mills and placed them under government control.⁴¹ The Supreme Court held that President Truman exceeded his constitutional authority because he did not have congressional approval to seize private property.⁴²

While *Youngstown*'s majority opinion had immediate consequences, it is Justice Jackson's concurring opinion that continues to play an influential role in analyzing the President's power to conduct foreign affairs.⁴³ In *Youngstown*, Justice Jackson created a tripartite test for use in determining presidential authority with respect to foreign affairs.⁴⁴ Justice Kennedy has lauded Justice Jackson's concurrence in *Youngstown* as a preservative of the country's checks and balances system.⁴⁵

Justice Jackson's tripartite test states that when the President is acting pursuant to the express or implied will of Congress, his or her "authority is at its maximum."⁴⁶ When the President acts neither pursuant to the will of

39. See *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring) (outlining proposed tripartite test for evaluating constitutionality of executive actions); see also Sarah H. Cleveland, *Wartime Security and Constitutional Liberty: Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 ALA. L. REV. 1127, 1128 (2005) (considering Justice Jackson's opinion in *Youngstown* "greatest single opinion ever written"); Noorbaloochi, *supra* note 8, at 726 (asserting Justice Jackson's concurrence in *Youngstown* consistent with Framers' conception of checks and balances); Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 666 (2009) (explaining *Youngstown* became very important aspect of separation of powers analysis over time).

40. See *Youngstown*, 343 U.S. at 582.

41. See *id.* at 583 (explaining President Truman ordered steel mills seized only hours before labor strike began).

42. See *id.* at 587-89.

43. See Laura A. Cisneros, *Youngstown Sheet to Boumediene: A Story of Judicial Ethos and the (Un)Fastidious Use of Language*, 115 W. VA. L. REV. 577, 578 (2012) (explaining how Justice Jackson's analysis became "controlling paradigm" for separation of powers issues). In his concurring opinion, Justice Jackson argued, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); see also David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1045 (2015) (considering *Youngstown* "counterpoint" to *Curtiss-Wright*'s holding).

44. See *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring) (outlining proposed tripartite test).

45. See Moore, *supra* note 43, at 1045. Justice Kennedy applauded *Youngstown* for "preserving separation of powers and checks and balances." *Id.* (citations omitted). But see Chad Deveaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47 CONN. L. REV. 395, 412 (2014) (arguing *Youngstown* gave President "unprecedented power").

46. See *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring) (explaining heavy burden on anyone challenging President who has Congress's support); see also Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1946 (2012) (explaining *Curtiss-Wright*

Congress nor against Congress, he or she may rely only on his or her “independent powers.”⁴⁷ When the President acts against the express or implied will of Congress, his or her power is at its lowest, and the President can only rely on his or her authority minus the authority of Congress to act.⁴⁸ If a President’s actions fall within the third category of Justice Jackson’s test, they are likely unconstitutional and should not be upheld.⁴⁹

In *Dames & Moore v. Regan*,⁵⁰ (*Dames*) the Court examined the constitutionality of a deal between the United States and Iran to secure the return of hostages seized from the U.S. Embassy in Tehran.⁵¹ The Court applied Justice Jackson’s tripartite test in holding President Carter’s actions constitutional.⁵² The first issue was whether Congress gave President Carter the authority to issue Executive Order 12,294, which ordered the termination of all lawsuits in U.S. courts against Iran, and required arbitration as the method of resolving these disputes.⁵³ Even though the Court held that the International Emergency Economic Powers Act (IEEPA) did not give President Carter the authority to suspend claims against Iran in the United States, the Court concluded that President Carter’s actions fell into Justice Jackson’s second category because he had been granted this authority through congressional acquiescence.⁵⁴ The Court further held that President Carter could unfreeze Iranian assets held in the United States because Congress explicitly authorized such action.⁵⁵

holding operates consistently with first category of Justice Jackson’s tripartite test).

47. See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (noting some circumstances where both President and Congress have concurrent authority). The second level of Justice Jackson’s test is also known as the “zone of twilight,” and the determination of whether the President has the authority to act should be based on the circumstances surrounding the disagreement. See *id.*; see also Cisneros, *supra* note 43, at 592 (noting determination difficult where Congress has neither acted nor acquiesced to presidential action).

48. See *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) (explaining Courts must “scrutiniz[e] President’s actions] with caution” in third category).

49. See Brownell, *supra* note 32, at 46 (discussing Justice Jackson’s conclusion that President Truman unconstitutionally seized steel mills). But see Turner, *supra* note 39, at 675 (highlighting Congress would not always win in category three type cases).

50. 453 U.S. 654 (1981).

51. See *id.* at 664; see also George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 468 (1998) (explaining plaintiff challenged President’s ability to execute Agreement).

52. See *Dames*, 452 U.S. at 674, 686 (holding actions in question authorized by either explicit or implicit congressional approval); Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive’s War Powers and Judicial Review*, 57 ALA. L. REV. 1081, 1097 (2006) (noting “power to preempt any civil judgment against Iran enabled” President to finalize hostage negotiations).

53. See *Dames*, 453 U.S. at 662, 665 (noting hostage deal established tribunal, which arbitrates any claim not settled in six months). Shortly after taking office, President Reagan issued his own executive order to ratify President Carter’s executive orders related to the hostage deal. See *id.* at 666.

54. See *id.* at 678-79 (noting Congress had not enacted, nor intended to enact, any contrary legislation). But see Cleveland, *supra* note 39, at 1138 & n.60 (arguing *Dames* misapplied Justice Jackson’s tripartite test).

55. See *Dames*, 453 U.S. at 674 (explaining Congress specifically authorized President to maintain foreign assets for purpose of negotiations). The Court held that the petitioner did not meet the high standard of

In *Zivotofsky v. Kerry*⁵⁶ (*Zivotofsky II*), the Supreme Court yet again used Justice Jackson's test to analyze an ongoing dispute between the legislative and executive branches.⁵⁷ *Zivotofsky II* examined whether Congress could enact a statute that orders the executive branch to recognize Jerusalem as the capital of Israel on U.S. passports.⁵⁸ Originally entitled *Zivotofsky v. Clinton*⁵⁹ (*Zivotofsky I*), the Court ruled it could hear the case despite arguments that the key issue was a political question and nonjusticiable.⁶⁰

In *Zivotofsky II*, the Court held that Congress could not order the President to recognize certain territorial boundaries on U.S. passports, including Jerusalem's identity as the capital of Israel, because the decision was exclusively within the President's discretion.⁶¹ *Zivotofsky II* presents a potentially long-term victory for the executive branch because it provides the executive branch the exclusive power to recognize foreign nations.⁶² Nevertheless, the Court went out of its way to note Congress still has

proof necessary to overcome the actions of President Carter and President Reagan. *See id.*

56. 135 S. Ct. 2076 (2015).

57. *See id.* at 2096 (holding statute invalid and determining President has exclusive power "to control recognition determinations"). In his dissent, Justice Scalia argued passionately that the majority had acted against the likely wishes of the founding fathers by drawing on Federalist No. 47. *Id.* at 2126 (Scalia, J., dissenting). Justice Scalia explained that the founding fathers purposefully did not entrust the President or Congress with the sole power to adopt uncontradictable policies about any subject—including foreign relations. *See id.*

58. *See id.* at 2095 (majority opinion) (holding intended purpose of §214(d) "was to infringe on the [President's] recognition power"). The Court noted that President Obama's refusal to implement §214(d) placed his actions into the third category of Justice Jackson's tripartite test. *See id.* at 2084. Therefore, President Obama's actions must be "scrutinized with caution," and he is only able to act "on powers the Constitution grants to him alone." *Id.* (citation omitted). The Court held that recognizing another nation is a power of the President alone, but noted it was not "question[ing] the substantial powers of Congress over foreign affairs . . . or passports." *See id.* at 2096.

59. 132 S. Ct. 1421 (2012).

60. *See id.* at 1431. The dispute in this case involved § 214(d), which stated that Americans born in Jerusalem had the opportunity to list Israel and their place of birth on their passports. *Id.* at 1424. The State Department, under orders from the executive branch, refused to enforce this statute. *Id.* The Court held the judiciary was "fully capable of determining whether the statute" should be struck down and, therefore, the case was remanded to be tried on its merits. *See id.* at 1425; *see also* Elad Gil, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 B.U. PUB. INT. L.J. 245, 263 (2014) (explaining Court believed it could determine constitutionality of statute).

61. *See Zivotofsky II*, 132 S. Ct. at 2096 (noting, despite holding, Congress still had considerable control over foreign affairs); *see also* Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law As an Alternative to the Senate's Advice and Consent*, 2015 BYU L. REV. 1525, 1547-48 (2015) (asserting legal ramifications of *Zivotofsky II* unclear).

62. *See* Jack Goldsmith, *Zivotofsky II As Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114, 133 (2015) (noting *Zivotofsky II* provides advocates of strong executive branch arguments supporting presidential exclusivity in foreign sphere); *see also* Adam Liptak, *Supreme Court Backs White House on Jerusalem Passport Dispute*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/politics/supreme-court-backs-white-house-on-jerusalem-passport-dispute.html> [<http://perma.cc/UL56-WDCA>] (emphasizing nation must speak with one voice regarding foreign policy). In addition, Justice Kennedy stressed in *Zivotofsky II* that Congress should not be able to contradict the President with respect to his or her recognition authority, even on something as small as a line on a passport. *See* Liptak, *supra*.

“substantial authority” to regulate both passports and foreign affairs.⁶³ Also, the Court’s holding stressed Congress’s important role in developing foreign affairs policy.⁶⁴

C. History of United States-Iran Sanctions Between 1979 and 2008

Shah Muhammad Reza Pahlavi (the Shah) took over the Iranian throne after his father, Reza Shah Pahlavi, abdicated in 1941.⁶⁵ The Shah’s reign lasted nearly forty years, but he fled the country in January 1979 due to extreme internal unrest.⁶⁶ Shortly after fleeing Iran, the Shah was admitted to the United States to receive medical treatment for cancer.⁶⁷ Perceiving his admittance as an insult, militant students took the American personnel inside the U.S. embassy in Iran hostage on November 4, 1979.⁶⁸

In response to the hostage crisis, President Carter blocked the sale of Iranian oil and prevented any transfer of Iranian deposits “in American banks, both in the United States and abroad.”⁶⁹ In addition, President Carter used the power granted to him under the IEEPA to negotiate the release of the U.S. embassy hostages in Iran.⁷⁰ President Carter had the authority to block the importation of Iranian oil by using section 232 of the Trade Expansion Act of 1962 (Section 232) and the IEEPA.⁷¹ The IEEPA also gave the President the ability to use

63. See *Zivotofsky II*, 135 S. Ct. at 2096 (explaining how Court specifically invalidated passport statute).

64. See Hannah Cole-Chu, Note, *Zivotofsky v. Kerry: Choosing International Reputation Over Separation of Powers*, 75 MD. L. REV. 865, 886 (2016) (explaining congressional check over President’s foreign policy recognition power).

65. See Joshua Womack, Comment, *Discretionary Death: A Comparative Analysis of Imposing the Death Penalty in the United States and Islamic Republic of Iran*, 16 TULSA J. COMP. & INT’L L. 101, 105-06 (2008) (explaining Shah continued many western reforms his father attempted implementing). These reforms included increasing the rights of women, which upset many religious fundamentalists in the country. See *id.*

66. See H. Lee Hetherington, *Negotiating Lessons from Iran: Synthesizing Langdell & Macerate*, 44 CATH. U. L. REV. 675, 688 (1995) (noting fundamentalist Islamic Cleric Ayatollah Ruhollah Khomeini directly caused civil unrest). Ayatollah Khomeini quickly took control over Iran after the Shah fled. See *id.* at 689.

67. See Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 404 (2001) (noting Shah’s entrance into United States caused resentment against United States in Iran).

68. See *id.* at 315-16 (demonstrating hostage emergency). The anti-American protests, which led to the hostage crisis, were also fueled by the virulent rhetoric of Ayatollah Khomeini, who supported the hostage situation. See *id.* at 315 n.53.

69. See *id.* at 316 (noting President Carter blocked assets totaling more than \$12 billion after hostage crisis).

70. See *Dames*, 453 U.S. at 662, 681 (noting Congress accepted authority of President in entering international settlement agreements).

71. See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1162, 1200-01 (1987) (noting Section 232 “provides . . . President with broad authority to limit imports” for “national security” reasons). The term national security is not actually defined in Section 232. *Id.* at 1200; see also Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962) (codified at 19 U.S.C. § 1862 (2012)) (noting President must notify Congress within thirty days if President takes action under statute).

economic regulatory powers during non-war emergencies.⁷²

President Ronald W. Reagan continued in the steps of his predecessor by working with Congress and using previously enacted legislation to implement additional sanctions against Iran.⁷³ President Reagan issued Executive Order 12,613 in 1987, which banned the importation of all goods and services from Iran.⁷⁴ Congress gave President Reagan the authority to sign Executive Order 12,613 via section 505 of the International Security and Development Cooperation Act of 1985 (ISDCA).⁷⁵

Through his authority under the IEEPA, President William J. Clinton issued Executive Order 12,959, which prohibited the exportation of any goods, technology, or services from the United States to Iran.⁷⁶ President Clinton also signed the Iran and Libya Sanctions Act (ILSA) in 1996 to help combat international terrorism, and weaken the status of the Iranian regime.⁷⁷ Despite the Court's 2001 holding *United States v. Reyes*,⁷⁸ suggesting President Clinton had broad powers under the IEEPA, he continued to work with Congress to tighten sanctions on U.S. companies who wanted to do business with Iran.⁷⁹

72. See Jason Luong, Note, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1188-89 (2000) (explaining IEEPA assigns President power to “investigate, regulate, or prohibit” any transaction involving foreign exchange”). In addition, the President can prohibit any transactions involving the property of a foreign country or a foreign national. See *id.* at 1189.

73. See ROBIN WRIGHT, THE IRAN PRIMER: POWER, POLITICS, AND U.S. POLICY 116 (Robin Wright ed., 2010) (recounting President Reagan declared Iran sponsor of terrorism after 1983 U.S. Marine bombing in Lebanon). President Reagan also instituted additional restrictions, such as preventing Iran from obtaining loans from the World Bank. *Id.*

74. See Lucien J. Dhooge, *Meddling with the Mullahs: An Analysis of the Iran and Libya Sanctions Act of 1996*, 27 DENV. J. INT'L L. & POL'Y 1, 21 (1998) (noting order also prohibited importation of Iranian goods and services through third countries).

75. See International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 505, 99 Stat. 190, 247 (codified at 22 U.S.C. § 2349aa-9(a)-(b) (2012)) (noting President shall consult with Congress before exercising authority granted in statute). The statute gives the President the power to “ban the importation into the United States of any good or service from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations.” *Id.* § 2349aa-9(a).

76. See Meredith Rathbone et al., *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Law*, 44 GEO. J. INT'L L. 1055, 1083-84 (2013) (noting sanctions also prevented subsidiaries of U.S. companies from trading with Iran).

77. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996); Raj Bhala, *Linkage As Phenomenon: An Interdisciplinary Approach: National Security and International Trade Law: What the Gatt Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 295 (1998) [hereinafter Bhala, *Linkage As Phenomenon*] (noting Congress gave President authority to unilaterally enact sanctions through ILSA); see also Raj Bhala, *Fighting Iran with Trade Sanctions*, 31 ARIZ. J. INT'L & COMP. L. 251, 267 (2014) [hereinafter Bhala, *Fighting Iran*] (explaining previous to ILSA, “President, not Congress, principally determined” sanctions against Iran). ILSA's sanctions were designed to deter foreign investment in the Iranian petroleum industry, and prevent exportation of nuclear and conventional arms to Iran. Bhala, *Fighting Iran*, *supra* at 268. President Clinton also used the IEEPA to issue Executive Order 12,957 in 1995 to prevent U.S. oil companies from helping Iran develop its oil fields. Bhala, *Linkage As Phenomenon*, *supra*, at 284 & n.72.

78. 270 F.3d 1158 (7th Cir. 2001).

79. See M. McCary, *End Run on Sanctions (a Case Study on Contemporary Energy Investment in Iran)*, 12 FLA. J. INT'L L. 263, 278 (1998) (noting President received pressure from lobbying groups and Congress to exercise his power under IEEPA); see also A. John Radsan, *A More Regular Process for Irregular Rendition*,

Prior to the events on September 11, 2001, President George W. Bush pressured Congress to loosen some of the sanctions against Iran.⁸⁰ Specifically, the ILSA was set to expire in August 2001, and President Bush pushed to have the ILSA extended only two years as opposed to the five-year extension that Congress supported.⁸¹ The attacks on September 11, 2001 ended any chance of reconciliation; a few weeks after the attacks President Bush issued Executive Order 13,224, declaring a national emergency based on his authority under the IEEPA.⁸² Executive Order 13,224 allowed branches of the United States government to seize the assets of individuals who were considered threats to the United States.⁸³

In response to the continued perceived threat of Iran's development of weapons of mass destruction, President Bush issued Executive Order 13,382 on June 28, 2005.⁸⁴ Executive Order 13,382 gave President Bush's Administration the power to freeze assets of "designated persons engaged in proliferation of weapons of mass destruction (and their means of delivery) and their support networks."⁸⁵ President Bush issued this Order pursuant to his authority under the IEEPA and the National Emergencies Act (NEA).⁸⁶ Additionally, in 2007, President Bush used another Executive Order to sanction the Iranian military and banking sector for their suspected ties to international terrorism and attempted development of weapons of mass destruction.⁸⁷

President Reagan worked with Congress to implement the ISDCA, and this legislation specifically mandated that the President consult with Congress

37 SETON HALL L. REV. 1, 9 n.38 (2006) (explaining Court upheld conviction of defendant because he "willfully violated IEEPA"). In addition, the defendant knew or should have known that the military aircraft parts in question might be forwarded to the Iranian armed forces. Radsan, *supra*, at 9 n.38.

80. See Quinton Cannon Farrar, Comment, *U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction*, 79 FORDHAM L. REV. 2347, 2362 (2011) (noting because President Bush's Administration had former oil executives, he had motivation to lift sanctions).

81. See *id.* (explaining September 11th attacks ended possibility of rapprochement with Iran). Congress officially renewed the ILSA, and the President signed it into law on August 3, 2001. See *id.* at 2362 n.133.

82. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (noting "continuing and immediate threat of further attacks" justified declaration of national emergency).

83. See *id.* (explaining Secretary of State responsible for determining who posed risks to United States); see also Jennifer Lynn Bell, *Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 KAN. J.L. & PUB. POL'Y 450, 458 n.50 (2008) (explaining President's ability to declare national emergency under IEEPA).

84. See Orde F. Kittrie, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789, 805 (2009) (explaining Executive Order 13,382 allowed United States to freeze assets of persons under U.S. jurisdiction).

85. See *id.* at 805-06 (noting over fifty Iranian individuals and companies had assets frozen).

86. See National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified in scattered sections of 50 U.S.C.); CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign to Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT'L L. 849, 852 (2009) (noting Executive Order 13,382 issued to stop Iran from developing weapons of mass destruction). Furthermore, President Clinton originally declared a national emergency related to weapons of mass destruction. *Id.* at 852.

87. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); Kittrie, *supra* note 84, at 808-09 (explaining Iran provided support for anti-Coalition activity in Afghanistan).

before implementing its provisions.⁸⁸ In addition, under President Clinton's Administration, Congress enacted the ILSA so that the President would have the ability to further expand sanctions against Iran.⁸⁹ Even though President Bush was not able to persuade Congress to shorten the length of the ILSA, he still signed the bill into law when it was up for renewal.⁹⁰ President Carter through President Bush actively worked with Congress to further refine how the United States would implement sanctions against Iran.⁹¹

D. U.S.-Iran Sanctions and Nuclear Agreement Under President Obama

President Barack H. Obama also worked with Congress to significantly expand economic sanctions against Iran by signing the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA).⁹² In addition to enacting the CISADA, Congress passed, and President Obama signed, the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA) with the goal of putting additional pressure on Iran to engage in negotiations related to its nuclear program.⁹³ In 2013, the Iran Freedom and Counter-Proliferation Act (IFCA) took effect, which was the third major piece of legislation Congress passed and President Obama signed that directly related to sanctions against Iran.⁹⁴ Furthermore, the ITRSHRA amended the ILSA to address Iranian petroleum development partnerships.⁹⁵ President Obama also

88. See International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 505, 99 Stat. 190, 243-44 (codified at 22 U.S.C. § 2349aa (2012)) (explaining how often and when President should report findings to Congress).

89. See Bhala, *Linkage As Phenomenon*, *supra* note 77, at 280 (explaining ILSA passed after congressional findings of Iran's support of terrorism).

90. See Farrar, *supra* note 80, at 2362 n.33 (noting President Bush used his signing statement to discuss his perspective on ILSA).

91. See *supra* Part II.C.

92. See Bhala, *Fighting Iran*, *supra* note 77, at 285 (explaining CISADA significantly expanded original scope of ILSA sanctions). See generally Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (2010) (providing overview new sanctions against Iran).

93. See John R. Crook, *U.S. Department of State Fact Sheet Summarizes U.S. Sanctions on Iran*, 107 Am. J. Int'l L. 230, 230 (2013) (noting CISADA also pressured Syrian government for its human rights abuses); see also *Iran Sanctions Contained in the Iran Threat Reduction and Syria Human Rights Act (ITRSHRA)*, U.S. DEP'T STATE (Sept. 28, 2012), <http://www.state.gov/e/eb/rls/fs/2012/198393.htm> [<http://perma.cc/NBE3-ELB9>] (listing twelve newly available sanctions against Iran noted in ITRSHRA). See generally Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (2012) (noting purpose of ITRSHRA encourages Iran to stop pursuing nuclear weapons).

94. See Iran Freedom and Counter-Proliferation Act, 22 U.S.C. § 8803(a)(1) (2012) (noting Iran's shipping and building sectors contribute to "Iran's nuclear proliferation activities"); see also Judson Bradley, Comment, *The Legality of Executive Orders 13628 and 13645: A Bipartite Analysis*, 29 EMORY INT'L L. REV. 705, 723 (2015) (noting IFCA addresses transportation of goods "related to energy development, weapons programs, or shipbuilding").

95. See Alexandra L. Anderson, Comment, *Good Grief! Iran Sanctions and the Expansion of American Corporate Liability for Non-U.S. Subsidiary Violations Under the Iran Threat Reduction and Syria Human Rights Act of 2012*, 34 NW. J. INT'L L. & BUS. 125, 126-27 (2013) (explaining ITRSHRA placed extreme pressure on any companies who conducted business with Iran).

signed six executive orders between 2011 and 2013 to facilitate the implementation of the CISADA, ITRSHRA, and IFCA.⁹⁶

Even though the Obama Administration and Congress worked closely together to implement a wide array of sanctions against Iran, tensions between the United States and Iran began to thaw once Hassan Rouhani was elected President of Iran in September 2013.⁹⁷ Even before Rouhani was elected, the United States initiated secret talks with Iranian officials regarding Iran's nuclear program.⁹⁸ Beginning in March 2013, diplomats from the Obama Administration worked with representatives from the United Kingdom, Germany, China, France, and Russia to craft a nuclear agreement with Iran.⁹⁹ When the international negotiators were nearing a deal with Iran, President Obama approached Congress hoping to lift the U.S. sanctions against Iran.¹⁰⁰ President Obama and Congress agreed that the United States would lift its economic sanctions against Iran if Iran and the United States reached a formal deal, and that Congress would have the ability to review and vote on the deal.¹⁰¹

After substantial negotiations with President Obama, Congress passed the Review Act in May 2015, giving Congress the power to reject any final agreement with Iran.¹⁰² According to the Review Act, once the Obama Administration officially announced the nuclear agreement, Congress would have sixty days to review the Agreement between the United States and Iran.¹⁰³

96. See Executive Orders, U.S. DEP'T STATE, <http://www.state.gov/e/eb/tfs/spi/iran/eo/> (last visited Dec. 12, 2016) [<http://perma.cc/Y7JS-JZ87>] (listing all of President Obama's executive orders related to Iran).

97. See Kate Lyons, *Iran Nuclear Talks: Timeline*, GUARDIAN (July 14, 2015), <http://www.theguardian.com/world/2015/apr/02/iran-nuclear-talks-timeline> [<http://perma.cc/AR26-PNJ4>] (explaining importance of Obama's telephone call with Rouhani in September 2013).

98. See *id.* (explaining United States kept talks with Iran secret even from its international partners).

99. See Jethro Mullen & Nic Robertson, *Landmark Deal Reached on Iran Nuclear Program*, CNN (July 14, 2015), <http://www.cnn.com/2015/07/14/politics/iran-nuclear-deal> [<http://perma.cc/2QJ9-XGDQ>] (explaining parties reached interim deal called "Joint Plan of Action" in November 2013).

100. See Christopher Beall, *The Emerging Investment Landscape of Post-Sanctions Iran: Opportunities, Risks, and Implications on US Foreign Policy*, 39 FORDHAM INT'L L.J. 839, 889-90 (2016) (noting Congress's goal of increasing its power to review any final agreement with Iran).

101. See Milena Sterio, *President Obama's Legacy: The Iran Nuclear Agreement?*, 48 CASE W. RES. J. INT'L L. 69, 80 n.69 (2016) (noting President Obama signed Iran Nuclear Agreement Review Act of 2015 (Review Act) into law on May 22, 2015). The Senate passed the Review Act by a margin of 98-1 on May 7, 2015, and the House passed the Review Act by a vote of 400-25 on May 14, 2015. *Id.* See generally Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (2015) (providing "congressional review and oversight of agreements relating to Iran's nuclear program").

102. See Iran Nuclear Agreement Review Act of 2015 § 135b(2) (explaining Congress had sixty days to review Agreement); Paul Kane, *House Passes Iran Review Bill, Sending It to Obama's Desk for Signature*, WASH. POST (May 14, 2015), https://www.washingtonpost.com/politics/house-passes-iran-review-bill-sending-it-to-obamas-desk-for-signature/2015/05/14/fcb7567e-fa6d-11e4-9030-b4732caefe81_story.html [<http://perma.cc/RQC5-N67V>] (noting Congress and Obama Administration negotiated Review Act for three months).

103. See Jordain Carney, *Senate Overwhelmingly Approves Iran Review Bill in 98-1 Vote*, HILL (May 7, 2015), <http://thehill.com/blogs/floor-action/senate/241355-senate-votes-to-approve-iran-review-bill> [perma.cc/5TEH-2VC2] (explaining purpose of Review Act to hold Obama Administration accountable); Herszenhorn,

As part of the compromise in agreeing to the Review Act, Congress gave President Obama the authority to lift economic sanctions against Iran unilaterally unless Congress disapproved the deal with a majority vote during the agreed upon sixty-day window.¹⁰⁴

The deal between Iran and the international negotiators, including the United States, was officially reached on July 14, 2015.¹⁰⁵ Throughout July and August 2015, both President Obama and those against the Agreement lobbied members of Congress to support their respective positions.¹⁰⁶ President Obama was able to use his allies in Congress to prevent the Senate from conducting a vote on the Agreement.¹⁰⁷ The senators who opposed the Agreement were unable to bring the Agreement to a formal vote per normal Senate rules; sixty senators were needed to end the debate and hold a vote, but only fifty-eight senators wanted to close the discussion and vote.¹⁰⁸ Therefore, with the support of only forty-two senators, President Obama was able to execute the Agreement because the sixty-day period to review the Agreement expired on September 17, 2015.¹⁰⁹

supra note 13 (explaining Congress and Obama compromised on sixty-day window for congressional review of treaty); *see also* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: P5+ 1 and Iran Reach Agreement on Iranian Nuclear Program; Obama Administration Seeks Congressional Approval*, 109 Am. J. Int'l L. 649, 656 (2015) (explaining no need for congressional approval of any agreement with Iran). The Review Act gave only Congress the power to change or end any current actions. *See* Daugirdas & Mortenson, *supra*, at 656.

104. *See* Andrew Rudalevige, *Old Laws, New Meanings: Obama's Brand of Presidential "Imperialism,"* 66 SYRACUSE L. REV. 1, 31-32 (2016) (explaining very difficult process for congressional disapproval of Agreement); Stephen Dinan, *Senate Democrats Sustain Obama's Iran Nuclear Deal as Boehner Threatens Suit*, WASH. TIMES (Sept. 10, 2015), <http://www.washingtontimes.com/news/2015/sep/10/senate-democrats-sustain-iran-nuclear-deal> [<http://perma.cc/Y534-D4DM>] (noting members of Congress's sixty-day argument period for review never actually began).

105. *See* Daugirdas & Mortenson, *supra* note 103, at 649 (explaining five permanent members of U.N. Security Council and Germany participated in negotiations).

106. *See* Jonathan Weisman & Michael R. Gordon, *Kerry Defends Iran Nuclear Deal Before Skeptical Senate*, N.Y. TIMES (July 23, 2015), <http://www.nytimes.com/2015/07/24/world/middleeast/john-kerry-defends-iran-nuclear-deal-before-skeptical-senate.html> (explaining three cabinet secretaries, including Secretary of State Kerry, testified before Congress regarding Agreement); *see also* Avidan Cover, *Talking Foreign Policy: The Iran Nuclear Accord*, 48 CASE W. RES. J. INT'L L. 329, 339 (2016) (considering congressional override of potential presidential veto unlikely); Beall, *supra* note 100, at 890 (noting Congress needed veto-proof majority to actually block Agreement).

107. *See* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relation to International Law: General International and U.S. Foreign Relations Law: Agreement on Iran Nuclear Program Goes into Effect*, 109 AM. J. INT'L L. 874, 877 (2015) (explaining Congress failed three times to pass resolution to schedule vote on Iran Nuclear Agreement); *see also* Erica Werner, *A Guide to Congress' Upside-Down Vote on Iran*, YAHOO (Sept. 8, 2015), <http://news.yahoo.com/guide-congress-upside-down-vote-iran-072832466.html> [<http://perma.cc/8TNK-3CMQ>] (explaining congressional vote on Agreement considered "particularly bewildering"). The Senate never actually voted on the Agreement, but instead only voted three times to end formal debate on the Agreement. *Id.*

108. *See* Demirjian, *supra* note 13 (noting forty-one senators prevented resolution to stop voting on Agreement).

109. *See* Sterio, *supra* note 101, at 81 (pointing out low probability Congress could get votes necessary to

President Obama and the international community set forth a number of specific requirements Iran would need to meet under the Agreement before it was entitled to lifted sanctions.¹¹⁰ These benchmarks were formally reached in January 2016, and as a result, members of the international community and President Obama began to take the final steps necessary to lift many of the economic sanctions.¹¹¹ In response to the lifting of sanctions, Speaker of the House Ryan released a statement asserting “a bipartisan majority in the House voted to reject this deal in the first place, and we will continue to do everything possible to prevent a nuclear Iran.”¹¹² As soon as sanctions were officially lifted, Iran gained immediate access to \$32 billion in frozen assets, as well as the ability to trade with companies and governments around the world.¹¹³ Nevertheless, the question remains whether President Donald J. Trump will abruptly end or attempt to renegotiate the Agreement.¹¹⁴

III. ANALYSIS

President Obama acted against the will of Congress when he implemented the Agreement.¹¹⁵ The last six Presidents, including President Obama, worked

override presidential veto).

110. See The Data Team, *Iran's Nuclear Deal Becomes a Reality*, *ECONOMIST* (Jan. 14, 2016), <http://www.economist.com/blogs/graphicdetail/2016/01/graphics-iran-sanctions-and-nuclear-deal> [<http://perma.cc/9PHP-4DYA>] (explaining Iran must dismantle certain parts of its nuclear program); see also Michael P. Scharf & Julia Liston, *The International Legal Practice of the Obama Administration: Foreword: The International Law Legacy of the Obama Administration*, 48 *CASE W. RES. J. INT'L L.* 1, 3 (2016) (considering Agreement one of President Obama's central legacies); Christopher Alessi & Laurence Norman, *Iran's Sanctions End as Deal Takes Effect*, *WALL STREET J.* (Jan. 16, 2016), <http://www.wsj.com/articles/iran-completes-steps-to-implement-nuclear-accord-1452978143> (explaining Iran's removal of thousands of uranium-enrichment centrifuges required if sanctions lifted).

111. See Don Melvin & Michael Martinez, *Sanctions Lifted After Iran Found in Compliance on Nuclear Deal*, *CNN* (Jan. 16, 2016), <http://www.cnn.com/2016/01/16/middleeast/vienna-iran-iaea-nuclear-deal> [<http://perma.cc/L3XJ-5A8K>] (noting President Obama signed executive order lifting some sanctions).

112. Press Release, *supra* note 13; see also Doug G. Ware, *GOP-Controlled House Rejects Iran Nuclear Deal in Largely Symbolic Vote*, *UPI* (Sept. 11, 2015), http://www.upi.com/Top_News/US/2015/09/11/GOP-controlled-House-rejects-Iran-nuclear-deal-in-largely-symbolic-vote/4561441992269/?st_rec=1981442509895 [<http://perma.cc/HCK8-FXUL>] (noting House rejected Agreement by significant margin of 162-269).

113. See Aditya Kondalimahanty, *Iran to Get \$32B of Unfrozen Assets After Lifting of Sanctions: Central Bank*, *INT'L BUS. TIMES* (Jan. 19, 2016), <http://www.ibtimes.com/iran-get-32b-unfrozen-assets-after-lifting-sanctions-central-bank-2270236> [<http://perma.cc/UH4Y-AKLS>] (noting international community froze over \$100 billion in Iranian assets during dispute over nuclear development); see also Stelios Bouras, *Iran Makes First Post-Sanctions Sale of Oil to Europe*, *WALL STREET J.* (Jan. 23, 2016), <http://www.wsj.com/articles/greeces-hellenic-petroleum-to-buy-iranian-oil-1453554806> (identifying first sale of Iranian oil to European country since sanctions ended); Asa Fitch & Robert Wall, *Iran Plans to Buy 114 Civilian Aircraft from Airbus*, *WALL STREET J.* (Jan. 16, 2016), <http://www.wsj.com/articles/iran-plans-to-buy-114-civilian-aircraft-from-airbus-once-sanctions-removed-1452975657> (highlighting only days after sanctions lifted, Iran announced plans for purchasing 114 civilian aircrafts).

114. See Yeganeh Torbati, *Trump Election Puts Iran Nuclear Deal on Shaky Ground*, *REUTERS* (Nov. 9, 2016), <http://www.reuters.com/article/us-usa-election-trump-iran-idUSKBN13427E> [<https://perma.cc/WY7H-ABBE>] (explaining President Trump vowed during his campaign to repeal Agreement).

115. See *supra* note 13 and accompanying text (explaining Speaker of House and Senate Majority leader

with Congress to impose economic sanctions against Iran.¹¹⁶ However, President Obama lifted many of these sanctions without Congress's direct approval.¹¹⁷ Because the Agreement's implementation lacked congressional approval, President Obama's actions in implementing the Agreement fall under the third level of Justice Jackson's tripartite test.¹¹⁸ Therefore, President Obama's actions were likely unconstitutional.¹¹⁹

A. How President Obama Reversed Three Decades of Cooperation in Implementing Sanctions Against Iran

In continuing the tradition of working with Congress on Iranian sanctions, President Obama signed four pieces of legislation implementing sanctions against Iran.¹²⁰ In negotiating the Review Act, President Obama gambled that he could gain the support of at least forty-one Senators, and thus Congress would be unable to stop the Agreement's implementation.¹²¹ The Agreement's execution was a departure from the normal cooperation between the President and Congress when dealing with Iranian sanctions because President Obama consciously attempted to bypass Congress in implementing the Agreement.¹²²

However, Congress likely did not intend to be circumvented when it passed the Review Act by a margin of 98-1 in the Senate.¹²³ Unfortunately, the Review Act made it difficult to block the implementation of the Agreement.¹²⁴ The question remains why the Senate would pass a bill that gave its own power away?¹²⁵ The Senators who opposed the Agreement likely believed they could

did not support Agreement).

116. See *supra* Part II.C.

117. See Ware, *supra* note 112 (recognizing House overwhelmingly rejected agreement); *supra* note 112 and accompanying text (noting fifty-nine Senators voted affirmatively on resolution of disapproval of Agreement); see also Dinan, *supra* note 104 (noting some members of Congress believe sixty-day window to review Agreement never actually began).

118. See *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) (explaining Presidents can only rely on their own powers minus congressional authority in third category).

119. See *id.* (describing effect of President acting against will of Congress).

120. See Executive Orders, *supra* note 96 (noting President Obama signed into law CISADA, ITRSHRA, and IFCA).

121. See Werner, *supra* note 107 (explaining Congress would have needed two-thirds support to stop Agreement from taking effect). What is most bewildering is that even if both chambers of Congress had voted against the Agreement, President Obama still could have vetoed a congressional resolution against the Agreement. *Id.* President Obama ended up receiving the support of forty-two senators, one more than he needed. See Demirjian, *supra* note 13.

122. See *supra* note 96 and accompanying text (noting President Obama worked very closely with Congress on Iran prior to 2015); see also Werner, *supra* note 107 (explaining President Obama knew he could not get majority of Senate to support Agreement).

123. See Carney, *supra* note 103 (highlighting bipartisan effort in passing legislation for reviewing Agreement). When asked about the Review Act, Senate Foreign Relations Committee Chairman Bob Corker (R-Tenn.) noted the bill would take "power back" from President Obama. See *id.*

124. See Rudalevige, *supra* note 104, at 31-32 (explaining Congress limited to negotiating only over notice and review period of Agreement).

125. See Cover, *supra* note 106, at 339 (explaining threat of presidential veto limited Congress's options

prevent President Obama from gaining the support of at least forty-one senators.¹²⁶ Additionally, Congress passed the Review Act with overwhelming support in the Senate, which demonstrated the Senate's confidence that President Obama would have difficulty securing the support of forty-one senators.¹²⁷

In late summer 2015, President Obama successfully lobbied a number of reluctant Democratic Senators to support the Agreement.¹²⁸ Additionally, President Obama had Secretary of State Kerry, testify in front of Congress to secure additional votes.¹²⁹ A few Republican members of Congress have challenged the Agreement in federal court because they believe President Obama illegally implemented the Agreement.¹³⁰ However, due to his astute political judgment, President Obama was still able to secure a significant, legacy-shaping victory.¹³¹

B. How President Obama's Implementation of the Agreement Fits into the Third Level of Justice Jackson's Tripartite Test

A situation is analyzed under the third level of Justice Jackson's tripartite framework when the President is acting against the implied or expressed will of Congress.¹³² In *Dames*, the Court identified factors that are relevant in determining if presidential action should be analyzed under the third level of the tripartite test.¹³³ These factors include whether there was a history of congressional action on the subject and whether Congress has passed a

for rejecting agreement).

126. See Demirjian, *supra* note 12 (noting only forty-one senators supported resolution blocking review of Agreement).

127. See Carney, *supra* note 103 (explaining Senate passed Review Act by margin of 98-1); see also Daugirdas & Mortenson, *supra* note 103, at 656 (noting Congress only had ability to alter or end existing sanctions).

128. See Daugirdas & Mortenson, *supra* note 107, at 875-76 (explaining President Obama invited ninety House Democrats to White House for discussion about Agreement).

129. See Weisman & Gordon, *supra* note 106 (noting Secretary Kerry testified in front of Senate Foreign Relations Committee regarding Agreement). Energy Secretary, Ernest J. Moniz, and Treasury Secretary, Jacob J. Lew, also testified in front of skeptical lawmakers to encourage them to support the Agreement. See *id.*

130. See *supra* note 104 and accompanying text (noting House Republicans' lawsuit against Obama has its roots in Review Act's implementation). House Republicans argued that the sixty-day window to review the Agreement never actually began because Congress was not given all of the details of the Agreement. See *id.*

131. See Scharf & Liston, *supra* note 110, at 3 (highlighting President Obama's Agreement implementation, considering it one of his biggest accomplishments).

132. See *supra* note 48 and accompanying text (explaining lowest point of President's power under tripartite analysis).

133. See *Dames*, 453 U.S. at 686 (asserting Congress supported claims tribunal); Cleveland, *supra* note 39, at 1138 n.60 (noting *Dames* Court liberally applied first level of Justice Jackson's tripartite test). This situation is unlikely to fall under the second level of Justice Jackson's tripartite test because that level is reserved for times when the President is acting neither pursuant to the will of Congress nor against Congress. See *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). In this circumstance, the House of Representatives did pass a resolution against the implementation of the Agreement; however, a minority of Senate members stopped this legislation from being implemented. See Ware, *supra* note 112.

resolution against the intended presidential action.¹³⁴

Although Congress did pass the Review Act, the House rejected the Agreement by a significant margin.¹³⁵ Furthermore, if an up-down vote for the Agreement had taken place in the Senate, it would have very likely failed to pass.¹³⁶ It is clear that a majority of Congress was against the implementation of the Agreement because both the 112th and the 113th Congress had approved legislation that explicitly supported the implementation of additional sanctions against Iran and anti-Agreement supporters' actions.¹³⁷ Therefore, unlike in *Dames*—where Congress had not spoken about the termination of legal proceedings against Iran—in the present matter, majorities in both the House and Senate clearly opposed the Agreement's implementation.¹³⁸

If the case brought by members of Congress ever reaches the Court, it is possible, albeit unlikely, the Court will refuse to hear the case, as it did in *Goldwater*.¹³⁹ Unlike *Goldwater*, where the Court seemed reluctant to settle a politically charged matter, the Court decided that *Zivotofsky I*, a case that also required the Court to settle conflicts between two co-equal branches of government, posed a justiciable question.¹⁴⁰ Even if the Court were to hear the case, it took over ten years of litigation for the Court to finally decide *Zivotofsky II*, and President Trump may render the Agreement moot.¹⁴¹ The Court could use this case to either affirm or deny whether future Presidents need Congress's approval to institute important international agreements.¹⁴²

134. See *Dames*, 453 U.S. at 686 (explaining Congress did not challenge President Reagan's actions); Cleveland, *supra* note 39, at 1138 n.60 (explaining Court also likely considers whether Congress has historically intervened in similar circumstances).

135. See Ware, *supra* note 112 (explaining House rejected Agreement by significant margin). This margin, however, did not actually reach the needed two-thirds majority to potentially override a presidential veto. *Id.*

136. See Werner, *supra* note 107 (noting President likely knew Congress could not override Agreement).

137. See *supra* note 96 and accompanying text (noting President Obama worked with Congress to implement sanctions beginning in 2010).

138. See Ware, *supra* note 112 (explaining majority of members of House of Representatives voted against Agreement); see also *supra* note 107 and accompanying text (explaining majority of senators attempted blocking Agreement's implementation three separate times); *supra* note 54 and accompanying text (explaining Congress needs to intend enactment or actually enact legislation, otherwise acquiescence implied).

139. See *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (holding judgement vacated and remanded); Ku, *supra* note 36, at 135 (noting Court refused case because it posed political question); see also *supra* note 37 and accompanying text (explaining Court likely refuses case if it could cause disruption among branches).

140. See *Zivotofsky I*, 132 S. Ct. at 1431 (leaving lower courts to decide merits of case); see also *id.* at 1437 (Breyer, J., dissenting) (quoting *Goldwater*, 444 U.S. at 1000 (1979) (Powell, J., concurring)) (noting political question doctrine calls for "mutual respect among the three branches of Government").

141. See Torbati, *supra* note 114 (noting during campaign President Trump vowed to dismantle Agreement on first day in office); see also *Zivotofsky I*, 132 S. Ct. at 1426 (noting suit originally reached federal appeals court in 2006). Nevertheless, the focus of the argument in *Zivotofsky I* surrounded the interpretation of a statute and not on executive action. See *Zivotofsky I*, 132 S. Ct. at 1428.

142. See Mullen & Robertson, *supra* note 99 (noting President Obama implemented Agreement despite lack of support by foreign governments and Congress). If the Court does decide to hear the case, and the Court agrees that the Agreement falls under the third level of the tripartite test, the Agreement may not automatically

IV. CONCLUSION

Since the U.S. Constitution's formation, there has been a power struggle between the legislative and executive branches with respect to the authority to conduct foreign affairs. Several seminal cases, including *Youngstown* and *Zivotofsky II*, have attempted to define each branch's role in conducting foreign affairs. In advocating for the Review Act's enactment, President Obama believed that he could prevent Congress from voting against the Agreement, and he was correct. Unfortunately, because President Obama unilaterally implemented the Agreement, President Trump could vacate it in a similar fashion; another reason why it is preferable to have congressional support on major foreign policy initiatives.

President Obama was able to implement the Agreement, a legacy-shaping initiative, despite only having the support of a minority of senators and representatives. However, Congress may still be successful in suing because President Obama's actions are likely unconstitutional under *Youngstown*. It is likely that President Obama's actions will fall under the third level of Justice Jackson's tripartite test because he acted against the will of Congress. Regardless of the result of its pending lawsuit against the President, Congress must learn from its mistake in passing the Review Act to prevent future Presidents from passing monumental international agreements with the support of only a minority of Congress.

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be considered unconstitutional. See Turner, *supra* note 39, at 675 (explaining Congress could still lose when analyzed under third level of tripartite test).