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Expert Analysis

President's Pursuit of Iran Deal: Treaty or Executive Power Run Amok?

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Lost in all the noise of the 2016 presidential contest is President Barack Obama's successful assault on the Treaty Clause of the United States Constitution in his pursuit of an Iran nuclear deal, the Joint Comprehensive Plan of Action (JCPOA).

JCPOA was the product of negotiations on Iran's nuclear program beginning in 2013 between Iran, the United States, China, France, Russia, United Kingdom, Germany and the European Union. The purpose ascribed to the JCPOA by the U.S. was to impede Iran's pursuit of nuclear weapons for eight to 10 years. In exchange for Iran's agreement to and implementation of the JCPOA, international and U.S. sanctions on Iran would be removed. Final agreement on the JCPOA was reached on July 14, 2015.

Given the national security importance of the JCPOA, many in Congress strongly indicated that any agreement with Iran on the nuclear issue and sanctions needed to be submitted to the Senate for advice and consent as a treaty.[1] For example, Senator McCain stated: "This is clearly a treaty. They can call it a banana, but it's a treaty."[2] The Obama administration ultimately declared that the JCPOA was an agreement "between leaders of a country" and would not be a "legally binding plan."[3]

This article addresses the damage to the Constitution inflicted by the president and how he was aided and abetted by Congress.

Treaty or Agreement?

Article II, section 2, of the U.S. Constitution provides that 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." Congress has had longstanding concerns regarding whether an international agreement should be considered a treaty for which the Senate must give its advice and consent, or an executive agreement that may properly be concluded under the sole power of the president. An executive agreement is an agreement between nations for which no congressional input is required Specifically, in 1972 Congress enacted the Case-Zablocki Act,[4] which required all such agreements to be transmitted to Congress for review.[5]

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Significantly, Case-Zablocki was also incorporated into the Department of State's regulations. Per those regulations, the criteria for whether an agreement should be submitted to the Senate as a treaty include the extent to which the agreement involves commitments or risks affecting the nation as a whole, and the preference of the Congress as to a particular type of agreement. The State Department regulations also highlight: "In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole."[6]

The regulations set forth criteria as to what should be handled as a treaty.[7] However, as will be discussed below, the Corker-Cardin legislation made the issue a moot point, as the legislation ultimately represented a congressional surrender on this point, essentially legislating away a significant constitutional power of the Senate.

Administration's Refusal

The Obama administration has waffled on the issue. In an April 8, 2014, hearing before the Senate Foreign Relations Committee, referring to the Iran negotiations, Secretary of State John Kerry stated that "clearly what we do will have to pass muster with Congress. We well understand that."[8]

But in a July 14, 2014, hearing of the Senate Foreign Relations Committee, in response to questions by Senator Bob Corker, Under Secretary of State Wendy Sherman said: "If you are asking, Senator, whether we are going to come to Congress for legislative action to affirm a comprehensive agreement, we believe, as other administrations do, that the executive branch has the authority to take such Executive action on this kind of a political understanding that might be reached with Iran. I cannot tell you whether we will or not."[9]

By the end of July 2014, it had become clear that the Obama administration would not commit to seeking advice and consent from the Senate, and in February 2015, Secretary Kerry told the Senate Foreign Relations Committee that he didn't "think there ought to be a formal approval process."[10]

In a March 12, 2015, letter to President Obama, Senate Foreign Relations Committee Chairman Corker wrote: "In recent days, senior members of your administration—including Vice President Joe Biden[11]—have stated that your administration is negotiating a nuclear agreement with Iran that you intend to 'take effect without congressional

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approval.' Yesterday, at a hearing before the Senate Foreign Relations Committee, Secretary of State John Kerry alluded to this same concept. These statements stand in stark contrast to the repeated assertions made by your administration—including Secretary Kerry—that any deal with Iran would have to 'pass muster with Congress.'"[12]

Senate Action

With each such escalation by the Executive, senators decided to act. However, instead of engaging in sober constitutional analysis concerning the treaty power of the Senate,[13] the chairman of the Senate Foreign Relations Committee (SFRC), Senator Corker (R-Tenn.), hurriedly introduced legislation requiring at least some modicum of congressional review of any final agreement with Iran. Apparently fearing they would have zero say in any Iran agreement, they opted for at least some say. However, there was no reason for this abject congressional surrender of the Senate's treaty power.

The Corker-Cardin bill required the president, within five days after reaching an agreement with Iran, to transmit to Congress the agreement and all related materials, to enable at least some review.[14] Corker-Cardin was signed by the president and enacted into law on May 22, 2015.

Thus, JCPOA was not submitted to the Senate as a treaty, and, pursuant to the Corker-Cardin legislation, was allowed to be implemented by the president. A two-thirds majority of each House of Congress could not be mustered to vote to oppose it, i.e., override a potential presidential veto. Thus, Congress had essentially traded away the Senate's treaty power—requiring a two-thirds affirmative vote—for the requirement that both houses be able to override a presidential veto, i.e. by a two-thirds negative vote.

Since the president had made quite clear his intent to veto any such disapproval, the resolution of disapproval had to be veto-proof in each house. Needless to say, such disapproval by both houses—a high bar indeed—did not happen.

Looking to the Future

To date, the State Department's analysis of the JCPOA, if any, as required per State Department regulations,[15] has remained shrouded in secrecy. Critically, Corker-Cardin gave the president the ability to proceed to an agreement with Iran, yet allowed Congress to turn a blind eye to the Constitution's requirement of a two-thirds affirmative Senate vote to consent. What about the intent of the Founders that two-thirds of the Senate be needed to approve the Executive Branch's binding of the United States? Corker-Cardin turned that on its head.

JCPOA's lifting of sanctions against Iran had an effect outside of international business relations. There are a number of attorneys, including the authors, representing judgment-creditors holding judgments obtained under the Foreign Sovereign Immunities Act based upon Iran's responsibility for various terrorist attacks throughout the world.[16] JCPOA's lifting of sanctions would have made it difficult for the terror victim judgment-creditors to collect upon Iranian assets in the United States.

In the authors' case, the challenge included a constitutional challenge to JCPOA. It could not succeed, however, for reasons unrelated to JCPOA—Congress enacted legislation creating a fund late last year to compensate such victims.[17] The victims no longer had the standing to claim that JCPOA—and the concomitant releasing of sanctions—had impeded their ability to collect upon their judgments. In fact, now that the great majority of the sanctions have been lifted or vacated, such a court challenge would also likely have fallen victim to a "mootness" argument as well.

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Further, any possibility that these judgment-creditor victims of Iranian terrorism could satisfy the "case or controversy" requirement of Article III no longer existed once the Fund was enacted into law. Thus, there could no longer be a constitutional challenge to JCPOA, given that no party could present the requisite standing to the court. In fact, three different District Court judges so held that citizens concerned about the impact of JCPOA and generalized security or policy concerns did not possess Article III standing and could not challenge JCPOA on constitutional grounds.[18]

What about a challenge from a member of Congress? Even though "standing" would surely have been much less of an issue in an action brought by a congressperson,[19] no congressperson ever challenged JCPOA in court, and it indeed appears that the merits of any constitutional challenge to JCPOA was not ever reached in any court.

Does this constitutional end-around matter now? Yes—over 200 years of precedent in foreign dealings and the State Department's own internal regulations compel a determination that JCPOA should have been submitted to the Senate.

Congress' constitutionally wobbly actions in enacting Corker-Cardin, and the president's desire to make the deal have surely stained the Constitution. Regardless of what the new president may or may not do concerning JCPOA, Congress—or a member of Congress—must attempt to clean up this mess, by commencing an action to invalidate JCPOA based upon constitutional grounds, and at a minimum, Congress must ensure such anti-constitutional actions are never again repeated.

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1. Robert Zarate, "FPI Bulletin: Will Congress Genuinely Debate What an Iran Nuclear Deal Should Look Like?" www.foreignpolicyi.org. May 22, 2014.

2. Stephen Collinson, CNN, "Iran deal: A treaty or not a treaty, that is the question," www.cnn.com/2015/03/12/politics/iran-nuclear-deal-treaty-obama-administration;

3. Id.

4. 1 U.S.C. §112b.

5. Treaties and Other International Agreements: The Role of the United States Senate, "A Study Prepared for the Committee on Foreign Relations, United States Senate, by the Congressional Research Service, Library of Congress," June 1984, S. Print 98-205, also known as "The Role of the Senate on Treaties."

6. Id., page 5.

7. A 2001 Handbook on Treaties and Other International Agreements (sometimes referred to as "The C-175 Handbook") has been included in the Department's Foreign Affairs Manual (FAM) in Section 720. See, https://fam.state.gov/searchapps/viewer?format=html&query=11%20FAM%20720&links=11,FAM,720&url=/FAM/11FAM/11FAM0720.html

8. http://www.foreignpolicyi.org/content/fpi-analysis-what-us-officials-required-what-iran-deal-concedes; Carl Von Clausewitz, On War, Edited and Translated by Michael Howard and Peter Paret. Princeton University Press, 1984. P. 202.

9. Testimony of Wendy Sherman. S. Hrg. 113–582, "Iran: Status Of The P5+1 Negotiations With Iran," Hearing Before The Committee On Foreign Relations, United States Senate, One Hundred Thirteenth Congress, Second Session, July 29, 2014, page 18.

10. http://humanevents.com/2015/03/11/senate-was-warned-about-obamas-end-run-on-iran

11. When the shoe was on his other foot, then-Senator Biden wrote: "The essence of the Treaty Power is that the President and the Senate are partners in the process by which the United States enters into, and adheres to, international obligations." Senator Joseph R. Biden, Jr. and John B. Ritch III, "The Treaty Power: Upholding A Constitutional Partnership," University of Pennsylvania Law Review, Vol. 137, No. 5, Arms Control Treaty Reinterpretation (May, 1989), pp. 1529-1557, Page 1557. http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3855&context=penn_law_review

12. http://www.foreign.senate.gov/press/chair/release/corker-to-president-obama-going-straight-to-un-on-iran-nuclear-deal-would-be-direct-affront-to-the-american-people

13. E.g. *Made in the USA Foundation v. US*, 242 F.3d 1300, 1305 (11th Cir. 2001) ["Remarkably, although perhaps not altogether surprisingly, the U.S. Supreme Court has never in our nation's history seen fit to address the question of what exactly constitutes and distinguishes "treaties," as that term is used in Art. II, §2, from "alliances," "confederations," "compacts," or "agreements…"]; see also, *Goldwater v. Carter*, 444 U.S. 996 (1979).

14. Public Law No: 114-17.

15. A 2001 Handbook on Treaties and Other International Agreements, supra; see also Circular 175.

16. See, *Stern v. Islamic Republic of Iran*, 271 F.Supp.2d 286.

17. Justice For The Victims of State Sponsored Terrorism Act, 42 USC 10609.

18. 42 USC 10609; *Klayman v. Obama*, (SD Fla. 15-81023); *Peterson v. Obama*, (D. N.H.15-cv-411-PB); *Bender v. Obama* (EDNY No. 15-CV-4776).

19. See, *Powell v. McCormack*, 395 US 486 (1969).