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Elements of Its Own Demise: Key Flaws in the Obama Administration's Domestic Approach to the Iran Nuclear Agreement

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ELEMENTS OF ITS OWN DEMISE: KEY FLAWS IN THE OBAMA ADMINISTRATION’S DOMESTIC APPROACH TO THE IRAN NUCLEAR AGREEMENT

*Jamil N. Jaffer**

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I. INTRODUCTION

A great deal of opprobrium has been levied at President Donald Trump’s decision to pull out of the Iran nuclear deal.¹ Many

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supporters of the deal have argued that the decision to leave the deal undermines America's credibility abroad, marking it as an itinerant partner, and may even violate international law.² Contrary to this popular view of the deal and its legal status, this paper argues that early decisions made by the Obama Administration contributed to the deal's failure and led to the United States' eventual withdrawal. For one, the Obama Administration chose not to submit the agreement—known as the Joint Comprehensive Plan of Action (JCPOA)—to Congress for ratification as a treaty nor did the Administration seek to negotiate an *ex post* approval regime ahead of time.³ Second, the Obama Administration decided to enter into the agreement solely as a “political commitment” between two sovereigns without even so much as complying with the typical formalisms—like a signed document—that are typically associated with sole executive agreements.⁴ These decisions, combined with Congress's forced review of the agreement and bipartisan majority votes against the deal—while ultimately not binding at law—sapped the deal of its legitimacy and eased the path for President Trump's withdrawal. That is, if one is looking to understand why the deal is no longer in place, one need look no further than the way the deal was reached, the prior Administration's decision to ignore the clear domestic political opposition to the agreement, and its concomitant effort to freeze Congress out of the process. It was these decisions that planted the key seeds for the deal's ultimate demise.

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1. See Max Matza & Ritu Prasad, *US Withdrawal Reverberates Across World*, BBC NEWS (May 8, 2018, 5:35 PM), <https://www.bbc.com/news/live/world-us-canada-44032008> [<https://perma.cc/Z8YQ-AWYL>]. (listing statements and reactions from individuals and organizations across the world from President Trump's actions).
 2. Richard Nephew & Ilan Goldenberg, *Here's What to Expect Now That Trump Has Withdrawn From the Iran Nuclear Deal, the United States Will Be Worst Off Once the Smoke Clears*, FOREIGN POL'Y (May 9, 2018, 4:25 PM), <https://foreignpolicy.com/2018/05/09/heres-what-to-expect-now-that-trump-has-withdrawn-from-the-iran-nuclear-deal/>. [<https://perma.cc/6NYY-B888>].
 3. Bret Stephens, *Opinion, A Courageous Trump Call on a Lousy Iran Deal*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/opinion/trump-courageous-iran-decision.html> [<https://perma.cc/C4TE-CJTG>].
 4. Jack Goldsmith, *The Trump Administration Reaps What the Obama Administration Sowed in the Iran Deal*, LAWFARE (May 9, 2018, 9:29 AM), <https://www.lawfareblog.com/trump-administration-reaps-what-obama-administration-sowed-iran-deal> [<https://perma.cc/9VPA-TJVK>].

II. BACKGROUND

At the outset, it is worth reviewing a bit of the history behind the Iran nuclear agreement. Bilateral negotiations underlying the deal between the United States and Iran began in secret in Oman in 2012.⁵ This followed the imposition of strict Congressional sanctions, including the Central Bank of Iran secondary sanctions, which put a significant amount of stress on the Iranian economy by forcing major reductions in international oil purchases by putting purchasers under threat of being cut off from the U.S. banking system.⁶ The key negotiations began to take further shape as they came into public view in 2013, with the reentry of the P5+1 negotiating group—composed of the permanent five members of the United Nations Security Council (United States, United Kingdom, France, Russia, and China) plus Germany—into the U.S.-led negotiations.⁷ The negotiations nominally took place under the aegis of the P5+1 through 2015; in reality, however, the principal negotiations were being conducted directly between the United States and Iran.⁸ The framework elements of the deal were initially announced on November 24, 2014, as part of the initial Joint Plan of Action (JPOA), which was ultimately finalized and formalized in the JPCOA, announced on July 14, 2015.⁹

As the public negotiations progressed, it eventually became clear to all involved, including Congress and the American public (and the Iranian leadership), that the President and his team did not intend on submitting the deal to Congress for its review or approval, whether as treaty subject to Senate advice and consent, or otherwise.¹⁰ In

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5. David Ignatius, *The Omani 'Back Channel' to Iran and the Secrecy Surrounding the Nuclear Deal*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/opinions/the-omani-back-channel-to-iran-and-the-secrecy-surrounding-the-nuclear-deal/2016/06/07/0b9e27d4-2ce1-11e6-b5db-e9bc84a2c8e4_story.html?utm_term=.3d3817b030e1 [<https://perma.cc/4PQV-VZWG>].
 6. *Protecting America from a Bad Deal: Ending U.S. Participation in the Nuclear Agreement Hearing Before the Subcomm. On National Security of Comm. on Oversight and Government Reform*, 115th Cong. 115-84 (2018) (statement of Richard Goldberg, Senior Advisor, Foundation for Defense of Democracies).
 7. *Timeline of Nuclear Diplomacy with Iran*, ARMS CONTROL ASSOCIATION, <https://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran> [<https://perma.cc/HF3H-JHS6>].
 8. *Id.*
 9. Joint Comprehensive Plan of Action, July 14, 2015, *available at* <https://www.state.gov/documents/organization/245317.pdf> [<https://perma.cc/5KS8-ASHL>] [hereinafter JPCOA].
 10. Matthew Weybrecht, *State Department Affirms That Iran Deal is Only a Political Commitment*, LAWFARE (Nov. 28, 2015, 2:10 PM),

addition, over time, it also became clear that the President did not intend to seek additional authority from Congress to remove the statutory and other sanctions imposed on Iran, but rather that he intended to use his existing statutory waiver authority to implement any sanction relief necessary under the agreement.¹¹ At times, the President and his team indicated that Congress would have an opportunity to weigh in on the deal,¹² however, as the deal was being finalized, it became apparent this opportunity would come only at the end of the deal itself, when, if Iran had fully complied, Congress would take action to permanently remove its statutory sanctions on Iran.¹³

Notwithstanding the President's determination to cede little, if any, ground to Congress on the negotiations with Iran, Congress nevertheless sought to influence the deal in a variety of ways. Senior members of Congress introduced legislation that sought to provide guidance to the executive branch on the aspects of an eventual agreement that would be important to obtaining Congressional support for a deal.¹⁴ These same members of Congress also held hearings and sought briefings to obtain information about the course of the negotiations and to communicate their preferences directly to the Administration.¹⁵

<https://www.lawfareblog.com/state-department-affirms-iran-deal-only-political-commitment>. [<https://perma.cc/QAL2-ZC9B>]; see also *Timeline of Nuclear Diplomacy with Iran*, *supra* note 7.

11. Elena Chachko, *Trump Withdraws from the Iran Nuclear Agreement: What Comes Next*, LAWFARE (May 8, 2018, 7:30 PM), <https://www.lawfareblog.com/trump-withdraws-iran-nuclear-agreement-what-comes-next>. [<https://perma.cc/R9L8-UASG>]
12. Weybrecht, *supra* note 10.
13. Natasha Turak, *Iran Deal Won't Survive Beyond May 2018, Sanctions Expert Says*, CNBC (Jan. 19, 2018, 8:15 AM), <https://www.cnbc.com/2018/01/19/iran-deal-wont-survive-beyond-may-2018-sanctions-expert-says.html>. [<https://perma.cc/W47B-9WJA>].
14. Jonathan Weisman & Peter Baker, *Obama Yields, Allowing Congress Say on Iran Nuclear Deal*, N.Y. TIMES (Apr. 14, 2015), <https://www.nytimes.com/2015/04/15/us/senators-reach-deal-on-iran-nuclear-talks.html>. [<https://perma.cc/ZF2D-SBFS>].
15. *See, e.g.*, Iran Nuclear Negotiations Act of 2014, S. 2650, 113th Cong. (2014) (expanding sanctions imposed with respect to Iran and to impose additional sanctions with respect to Iran, and for other purposes); Nuclear Weapon Free Iran Act of 2013, S. 1881, 113th Cong. (2013) (expanding sanctions imposed with respect to Iran and to impose additional sanctions with respect to Iran, and for other purposes); Iran Nuclear Compliance Act of 2013, S. 1765, 113th Cong. (2013) (ensuring the compliance of Iran with agreements relating to Iran's nuclear program); and United States-Iran Nuclear Negotiations Act, H.R. 3292, 113th Cong. (2013) (preventing the Government of Iran from gaining a nuclear weapons capability and to maximize the United States

Following the announcement of the initial JPOA, while the final agreement was being negotiated, it likewise became apparent to key members of Congress that, not only did the President not intend to submit the deal to Congress for its approval, but also that the Administration might not even provide Congress with a copy of the agreement at all, at least not prior to its implementation.¹⁶ As a result, while Congress could not reach a bipartisan agreement to stop the President from making a deal with Iran, to require the President to seek additional waivers from Congress, or to remove or condition the President's waiver authority on its approval, a strong bipartisan consensus began building around the notion that Congress ought at least get to see the deal ahead of time and ought have an opportunity to act on the deal before it was implemented.¹⁷

The result of these efforts was the Iran Nuclear Agreement Review Act of 2015 (INARA).¹⁸ INARA, which initially drew a strong veto threat from the White House,¹⁹ eventually garnered enough support amongst members of Congress that the Administration not only withdrew its veto threat on the brink of an initial vote in the Senate Foreign Relations Committee, but ultimately allowed members of its own party to support the legislation.²⁰ The legislation temporarily withdrew the President's waiver authority and required him to submit the JPCOA and related materials to Congress.²¹ Under INARA, the President was then required to wait for a period of time to allow Congress to consider and vote on resolutions of approval or disapproval on the deal before

diplomatic influence to achieve, consistent with the national security interest of the United States and its allies and partners, a negotiated settlement with the Government of Iran regarding Iran's nuclear weapons program).

16. Karen DeYoung, *Republican Investigation Finds That Obama Administration Misled Congress on Possible Iranian Access to U.S. Financial System: The State and Treasury Departments Were Willing to Bend the Rules for the 2016 Transaction, Though it Never Went Through*, BLOOMBERG LAW (June 7, 2018, 6:40 PM), <https://www.bloomberglaw.com/ms/document/P9Z5N13HBS3K&headlineOnly=false> [<https://perma.cc/7TQZ-NGN8>].
17. *See The Hill's Whip List: Obama has 42 Senate votes for Iran Deal*, THE HILL (July 14, 2015, 7:56 PM), <https://thehill.com/blogs/floor-action/senate/247956-the-hills-whip-list-senators-take-sides-on-iran-deal>. [<https://perma.cc/P37B-8GT4>] (outlining each U.S. representative's opinions on the Iran Deal).
18. H.R. 1191, 114th Cong. (2015).
19. Weisman & Baker, *supra* note 14.
20. *Id.*
21. Iran Nuclear Agreement Review Act of 2015, 42 USC § 2160e(a)(1).

he could implement any waivers of existing statutory sanctions.²² The bill eventually passed the Senate nearly unanimously (98-1) and garnered a supermajority in the House of Representatives (400-25).²³

Following the passage of the INARA, Senator Tom Cotton (R-AR), the one member of the Senate who voted against the INARA, authored a letter, joined by 46 other U.S. Senators, to the Iranian President, noting that any Iran deal not approved by Congress could be revoked by the next President “with the stroke of a pen,” and that “future Congresses could modify the terms of the agreement at any time.”²⁴ This letter—widely panned by most foreign policy pundits and claimed by some to run afoul of a rarely utilized (and almost never enforced), century-old law²⁵—nonetheless served to convey the deep concerns among many members of Congress about the process by which the agreement was reached.²⁶ The letter also put Iran—and the rest of the world community, including the P5+1—on notice that a significant portion of the elected representatives of the American people (at least in the upper house of Congress) were adamantly opposed to the deal.²⁷

The President, having been forced to withdraw his veto threat, signed the legislation and eventually provided the agreement along with certain key documents to both Houses of Congress.²⁸ He also sent

22. *Id.* at §2160e(b).

23. Patricia Zengerle, *U.S. House Passes Iran Nuclear Review Legislation*, REUTERS (May 14, 2015, 4:18 PM), <https://www.reuters.com/article/us-iran-nuclear-usa-idUSKBN0NZ29M20150514> [<https://perma.cc/GG9R-STC6>]; Lester Munson & Jamil Jaffer, *Setting the Record Straight on Congress’s Review of the Obama-Iran Nuclear Deal*, NAT’L REV. (Nov. 17, 2016, 5:37 PM), <https://www.nationalreview.com/2016/11/iran-nuclear-deal-congress-review-obama-deal-was-important-inara/> [<https://perma.cc/CXS8-SFK2>].

24. Letter from Senate Republicans to the Leaders of Iran (Mar. 9, 2015), available at <https://www.nytimes.com/interactive/2015/03/09/world/middleeast/document-the-letter-senate-republicans-addressed-to-the-leaders-of-iran.html> [<https://perma.cc/B82T-ZJ3Y>].

25. Jeremy Diamond, *Did 47 Republican Senators Break the Law in Plain Sight*, CNN (Mar. 11, 2015, 11:21 AM), <https://www.cnn.com/2015/03/10/politics/tom-cotton-iran-letter-logan-act/index.html>. [<https://perma.cc/M2KQ-K8U6>].

26. *Id.*

27. Peter Baker, *G.O.P. Senator’s Letter to Iran About Nuclear Deal Angers White House*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/2015/03/10/world/asia/white-house-faults-gop-senators-letter-to-irans-leaders.html> [<https://perma.cc/QV2U-8VBC>].

28. Kevin Liptak, *Now That He Has A Deal with Iran, Obama Must Face Congress*, CNN (July 14, 2015), <https://www.cnn.com/2015/07/14/politics/iran-nuclear-deal-congress-obama-block/index.html> [<https://perma.cc/HB6B-TP8E>].

cabinet members and other senior national security officials to the Hill to testify on the agreement and to provide both classified and unclassified briefings to members.²⁹ In essence, having been forced to cut Congress into the process at some level, the Administration mounted a full-throated campaign, leveraging sympathetic outside organizations, to put pressure on members of Congress to support the deal—or at least not vote against it when the INARA-driven vote came up.³⁰ Ultimately, resolutions on the deal were considered in both Houses, and while the House voted against the deal with a substantial 269-162 bipartisan majority, the Senate—while also garnering a bipartisan 58 vote majority opposed to the deal—was unable to overcome the 60 vote threshold needed to stop a legislative filibuster of the disapproval resolution.³¹ And neither chamber was able to muster the supermajorities that would have been necessary to survive the inevitable presidential veto of any disapproval measure.³² Thus, while INARA succeeded in forcing the President to submit the deal to Congress and to pause on providing immediate sanctions relief to Iran,³³ since Congress was unable to muster the votes necessary to overcome a filibuster and an eventual veto, following the end of the statutory review period mandated by the legislation, President Obama's waiver authority was restored and he utilized it to provide the sanctions relief sought by Iran as part of the deal.³⁴ Even more interesting, while the deal was pending review in Congress, the Administration went to the U.N. Security Council and obtained an ostensibly binding—at least under international law—

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29. Kristina Wong, *Former Top Officials Urge Congress to Back Iran Deal*, THE HILL (July 20, 2015, 11:26 AM), <https://thehill.com/policy/defense/248483-former-top-us-officials-iran-deal-meets-key-objectives> [<https://perma.cc/L4M9-WSNB>].
 30. *Id.*
 31. See Cristina Marcos, *House Rejects Obama's Iran Deal*, THE HILL (Sept. 11, 2015, 12:34 PM), <https://thehill.com/blogs/floor-action/house/253370-house-rejects-iran-deal> [<https://perma.cc/67FQ-GR35>]; see also Jennifer Steinhauer, *Democrats Hand Victory to Obama on Iran Nuclear Deal*, N.Y. TIMES (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/us/politics/iran-nuclear-deal-senate.html> [<https://perma.cc/44VY-3284>].
 32. *Id.*
 33. Stephen Dinan, *Senate Forces Obama to Submit Iran Nuclear Deal for Congressional Approval*, WASH. TIMES (May 7, 2015), <https://www.washingtontimes.com/news/2015/may/7/senate-forces-obama-submit-nukes-deal-approval/> [<https://perma.cc/E4GR-65ZP>].
 34. Sabrina Siddiqui, *Republican-Led Attempt to Block Iran Deal Fails in Senate*, THE GUARDIAN (Sept. 10, 2015, 4:13 PM), <https://www.theguardian.com/us-news/2015/sep/10/iran-nuclear-deal-senate-day-of-decision> [<https://perma.cc/9U2G-EX8U>].

Security Council Resolution requiring states to comply with certain provisions of the deal.³⁵

And that was where things stood on the eve of the November 2016 Presidential election when, against nearly every poll (and perhaps against all odds), Donald Trump became the President of the United States. Then-President-Elect Trump, who—like nearly every other Republican candidate during the primaries—had made opposition to the Iran nuclear deal a centerpiece of his foreign policy platform during the general election campaign,³⁶ once again made clear that he remained steadfastly opposed to the deal and that he intended to do away with it upon entering office.³⁷ And yet through the first year of his presidency, despite near-unanimous opposition to the deal amongst the Republican members of Congress,³⁸ and multiple opportunities to cease providing sanctions relief to Iran,³⁹ even President Trump kept the Iran deal alive.⁴⁰ Much of the pressure to keep the deal alive came from outside the Administration, from third party groups who supported the deal and former Obama

35. See Press Release, Security Council, Security Council Adopting Resolution 2231 (2015), Endorses Joint Comprehensive Agreement on Iran's Nuclear Programme, U.N. Press Release SC/11974 (July 20, 2015); see also Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1203, 1242 (2018) (noting that while the Administration did seek a UN Resolution, the resolution did not mandate the end of U.S. sanctions).

36. See, e.g., Yeganeh Torbati, *Trump Election Puts Iran Nuclear Deal on Shaky Ground*, REUTERS (Nov. 9, 2016, 7:16 AM), <https://www.reuters.com/article/us-usa-election-trump-iran/trump-election-puts-iran-nuclear-deal-on-shaky-ground-idUSKBN13427E> [<https://perma.cc/9R77-GNDZ>] (“A businessman-turned-politician who has never held public office, Trump called the nuclear pact a ‘disaster’ and ‘the worst deal ever negotiated’ during his campaign and said it could lead to a ‘nuclear holocaust.’ In a speech to the pro-Israel lobby group AIPAC in March, Trump declared that his ‘Number-One priority’ would be to ‘dismantle the disastrous deal with Iran.’”).

37. *Id.*

38. Kevin Liptak & Nicole Gaouette, *Trump Withdraws from Iran Nuclear Deal, Isolating Him Further From World*, CNN (May 9, 2018, 1:51 AM), <https://www.cnn.com/2018/05/08/politics/donald-trump-iran-deal-announcement-decision/index.html>. [<https://perma.cc/66VJ-LWUW>].

39. *Trump Administration to Reinstate All Iran Sanctions*, BBC NEWS (Nov. 3, 2018), <https://www.bbc.com/news/world-us-canada-46071747> [<https://perma.cc/D824-9FNH>].

40. Brian Naylor & Ayesha Rascoe, *Trump: U.S. ‘Will Withdraw’ From Iran Nuclear Deal*, NPR (May 8, 2018, 2:32 PM), <https://www.npr.org/2018/05/08/609383603/trump-u-s-will-withdraw-from-iran-nuclear-deal> [<https://perma.cc/6JUD-JP72>].

Administration officials,⁴¹ as well as the United States' international partners, primarily the other P5+1 nations, who argued that the Iran deal, while perhaps not perfect, had largely been complied with and had successfully kept Iran at least some distance from a viable nuclear breakout capability.⁴²

While these arguments enjoyed some amount of resonance amongst staff and some key leaders in the Trump Administration, the President himself remained significantly skeptical.⁴³ Outside groups looking at the deal argued that there were key aspects of Iranian noncompliance that had gone ignored by the prior Administration, as well as that fatal flaws in the deal which prevented it from truly being an effective bulwark against an Iranian nuclear capability.⁴⁴ For these groups, at least, the Iran deal actually made the situation worse as it: (i) pulled the rug out from under an extremely effective, maximum-pressure sanctions policy; (ii) overturned decades-long U.S. non-proliferation policies, including opposing domestic uranium enrichment capabilities; and (iii) permitted Iran to escape accountability for its past nuclear weapons-related activities⁴⁵ (including employing a testing regime for former suspected weapons sites that would have made a Russian Olympic athlete proud). Moreover, for the individuals and groups opposed to the deal, the late-breaking decision by the Obama Administration to permit Iran to continue to develop its ballistic missile capabilities (and therefore its

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41. Rick Gladstone, *76 Experts Urge Donald Trump to Keep Iran Deal*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/world/middleeast/trump-iran-deal.html> [<https://perma.cc/H4YJ-JGNY>].
 42. Steve Holland & David Ljunggren, *U.S. Allies Press Trump to Keep Iran Nuclear Deal Alive*, REUTERS (Apr. 23, 2018, 12:05 PM), <https://www.reuters.com/article/us-iran-nuclear/u-s-allies-press-trump-to-keep-iran-nuclear-deal-alive-idUSKBN1HU28R> [<https://perma.cc/599B-DZY7>].
 43. Peter Baker, *Trump Recertifies Iran Nuclear Deal, but Only Reluctantly*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/politics/trump-iran-nuclear-deal-recertify.html> [<https://perma.cc/8T6W-VHES>].
 44. TZVI KAHN, FOUNDATION FOR DEFENSE OF DEMOCRACIES, CERTIFYING IRAN'S COMPLIANCE WITH THE JOINT COMPREHENSIVE PLAN OF ACTION 1-2, 5-6 (2017).
 45. Michael R. Gordon & David E. Sanger, *Deal Reached on Iran Nuclear Program; Limits on Fuel Would Lessen with Time*, N.Y. TIMES (July 14, 2015), <https://www.nytimes.com/2015/07/15/world/middleeast/iran-nuclear-deal-is-reached-after-long-negotiations.html?module=inline> [<https://perma.cc/L95G-ZD5P>].

nuclear weapons delivery capability), reversing a long-standing U.N. policy on ballistic missile launch by Iran,⁴⁶ was particularly galling.

Nonetheless, at least for the bulk of the first year, the President's advisors who favored the deal were able to stave off Presidential action by seeking to work with Congress and the P5+1 nations to modify the deal without the United States backing out and reinstating sanctions.⁴⁷ Not surprisingly, with little leverage on its international partners and Congress, and even less with Iran, this Administration effort was unsuccessful, and the issue came to a head in 2018. At that point, the President, having given in to pressure from his advisors on multiple occasions, and having sought alternative efforts to improve the deal through work with Congress and the P5+1 partners, ultimately decided to use the mechanism provided under INARA.⁴⁸ He first declined to certify Iran's compliance with the deal,⁴⁹ then eventually stopped issuing the Obama-era waivers that kept the deal in place.⁵⁰ Thus, as of early November 2018, two years after his election, President Trump reinstated the full scope of American sanctions against Iran, including the crushing secondary CBI sanctions that had pushed Iran to the negotiating table six years earlier.⁵¹

While it remains to be seen whether the reinstatement of strict sanctions on Iran will once again force the regime back to the table to negotiate the "better deal" that President Trump and his foreign policy team has indicated they seek, this episode can perhaps provide future Administrations some critical lessons about the permanence and political stability of international agreements they enter into.

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46. Eyder Peralta, *The Latest On Iran Deal: Obama Says Deal Provides New Way Forward*, NPR (July 14, 2015, 6:41 AM), <https://www.npr.org/sections/thetwo-way/2015/07/14/422809249/the-latest-on-iran-deal-obama-to-deliver-speech-from-white-house> [<https://perma.cc/DT28-E7RH>].
47. Colin Kahl, *The Myth of a 'Better' Iran Deal*, FOREIGN POLICY (Sept. 26, 2017), <https://foreignpolicy.com/2017/09/26/the-myth-of-a-better-iran-deal/> [<https://perma.cc/GYU5-BTG6>].
48. *Id.*
49. Adam Edelman, *Trump Threatens to Cancel Iran Nuclear Deal If It's Not Strengthened*, NBC NEWS (Oct. 13, 2017), <https://www.nbcnews.com/politics/donald-trump/trump-puts-iran-nuclear-deal-hands-congress-n810366>. [<https://perma.cc/RBD2-DJQ8>].
50. Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html> [<https://perma.cc/H3MJ-D35D>].
51. Michelle Linderman et al., *United States Reinstates Full Iran Embargo*, CROWELL & MORING (Nov. 6, 2018), <https://www.cmtradelaw.com/category/iran-sanctions/> [<http://perma.cc/QAU6-G5BA>].

III. MISTAKES AT HOME: HOW THE OBAMA
ADMINISTRATION'S APPROACH TO GETTING THE IRAN DEAL
DONE EASED THE PATH TO THE TRUMP WITHDRAWAL

A. *What Kind of a Commitment Was the Iran Deal?*

The first question often litigated by proponents and opponents of the Iran nuclear deal is exactly what type of agreement it was and whether it should have been something else (or at least have been treated as such).⁵² There are five primary types of binding agreements between nation-states under international law: treaties, *ex ante* congressional-executive agreements, *ex post* congressional-executive agreements, executive agreements made pursuant to an existing treaty, and sole executive agreements.⁵³ In addition, states often enter into certain agreements that are not classically binding—either domestically or internationally: the so-called political commitment.⁵⁴ While scholars have noted that such political commitments have a questionable constitutional pedigree, including lacking stable grounding in any founding era understandings,⁵⁵ the historical record indicates that fairly soon after the birth of the nation, the U.S. government began entering into such informal

52. Gordon & Sanger, *supra* note 45.

53. Bradley & Goldsmith, *supra* note 35, at 1207-08.

54. See, e.g., Duncan B. Hollis & Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VA. J. INT'L L. 507, 516 (2009) (defining political commitments as "a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature"); see *id.* at 519-20 & n. 42 (quoting the State Department's position—expressed in a transmittal document accompanying the START Treaty in 1991—that "[a] 'political' undertaking is not governed by international law Until and unless a party extricates itself from its 'political undertaking,' which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response."); see also Bradley & Goldsmith, *supra* note 35, at 1218 ("A political commitment is an agreement, usually written, between the President or one of the President's subordinates and a foreign nation or foreign agency. Its defining characteristic is that it imposes no obligation under international law and a nation incurs no state responsibility for its violation. As a result, a successor President is not bound by a previous President's political commitment under either domestic or international law and can thus legally disregard it at will."); Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FIU L. REV. 371, 374-76 (2016).

55. Hollis & Newcomer, *supra* note 54, at 512-513.

agreements.⁵⁶ According to Professors Curtis Bradley and Jack Goldsmith, since the founding era, “Presidents have asserted the authority to make a political commitment on practically any topic without authorization from Congress or the Senate, and without any obligation to even inform Congress about the commitment, as long as the commitment does not violate extant federal law.”⁵⁷ While there may have been some debate within the Obama Administration on whether the deal ought be entered into as a sole executive agreement early on, after the deal was reached, the Administration made clear that it had entered into the agreement as an unsigned, non-binding “political commitment.”⁵⁸

As a result, much of the debate since then has turned on whether, in fact, the Administration (and Congress) should have handled the deal differently. Some opponents of the deal suggest that Congress actually did the nation a disservice by not forcing the President to submit the deal as a treaty, and have argued—perhaps in contrast to the most common-sense understanding of INARA—that by passing legislation that required the deal to be submitted to Congress (and ultimately voting to oppose the deal by bipartisan margins in both Houses), Congress was actually complicit in making the deal lawful.⁵⁹

56. Bradley & Goldsmith, *supra* note 35, at 1207 (“There is no evidence that the Founders discussed the possibility that the U.S. government would make international agreements through any process other than the treaty process. Nonetheless, beginning in the 1790s, the U.S. government began to make some international agreements through mechanisms other than the one described in Article II, although for a long time Article II treaties were still the dominant mode of agreement making.”); *id.* at 1218 (“The constitutional basis for a political commitment is unclear, but it appears to be closely related to the President’s power to conduct diplomacy, since at bottom a political commitment is like diplomatic speech backed by a personal pledge of the executive official who made it.”).

57. Bradley & Goldsmith, *supra* note 35, at 1207.

58. See Letter from Julia Frifield, Assistant Sec’y for Leg. Affairs, U.S. Dep’t of State, to Mike Pompeo, U.S. Representative, U.S. Congress (Nov. 19, 2015), *available at* <http://www.humanrightsvoces.org/assets/attachments/documents/11.24.2015.state.dept.letter.jcpoa.pdf> (“The Joint Comprehensive Plan of Action (JCPOA) is not a treaty or an executive agreement, and is not a signed document. The JCPOA reflects political commitments between Iran, the P5+1 (the United States, the United Kingdom, France, Germany, Russia, China), and the European Union. As you know, the United States has a long-standing practice of addressing sensitive problems in negotiations that culminate in political commitments.”).

59. Andrew C. McCarthy, *Distorting the Iran-Deal Bill*, NAT’L REV. (Nov. 19, 2016, 9:00 AM), <https://www.nationalreview.com/2016/11/obama-iran-deal-corker-bill/>[<https://perma.cc/PJM6-YU94>]; see also Andrew McCarthy, *The Corker Bill Isn’t a Victory — It’s a Constitutional Perversion*, NAT’L REV. (Apr. 18, 2015), <https://www.nationalreview.com/2015/04/the-corker-bill-isnt-a-victory-its-a-constitutional-perversion/>.

Interestingly—in perhaps a paradigmatic situation of tough cases making for strange bedfellows—supporters of the Iran deal have likewise argued that Congress’s action effectively added to the President’s legal authorities.⁶⁰

The reality, of course, is that Congress was completely uninterested in assisting the President with the Iran deal. To the contrary, as became clear later in the process, bipartisan majorities (including key players in President Obama’s own party like Senators Chuck Schumer and Bob Menendez) were steadfastly opposed to the deal.⁶¹ Thus, the notion that, somehow, those who were fervently opposed to the deal actually sought to expedite its path or strengthen the President’s hand, simply makes no sense. Indeed, as Professors Samuel Estreicher and Steven Menashi point out, the text of INARA clearly suggests that Congress “thought it was being unfairly sidelined from Iran policy and desperately wanted to reclaim some role in the process.”⁶² Estreicher and Menashi also correctly point out that, rather than authorizing unilateral executive action, INARA actually sought to restore significant congressional participation in the executive process related to the deal.⁶³ And, as Bradley and Goldsmith accurately recognize, contrary to shepherding the deal through, the INARA successfully forced the President to submit the deal and its underlying materials to Congress and “spark[ed] an extensive national debate on the deal that forced the Obama Administration to explain and justify the Iran deal like it had not before.”⁶⁴ Perhaps even more importantly, INARA also put members of Congress on the record—whether for or against the deal.⁶⁵

nationalreview.com/2015/04/corker-bill-isnt-victory-its-constitutional-perversion-andrew-c-mccarthy/ [<https://perma.cc/77HR-Y62W>].

60. See Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. FORUM 338, 354-55 (2017) (“The only new piece of legislation enacted in response to the JCPOA, the Iran Nuclear Agreement Review Act (‘Corker/Cardin’ bill), does not undermine the President’s legal authorities; if anything, it added to them.”).
61. Burgess Everett, *Menendez, Schumer May Not Matter Much On Iran*, POLITICO (Aug. 18, 2015 6:09 PM), <https://www.politico.com/story/2015/08/iran-deal-robert-menendez-chuck-schumer-121501> [<http://perma.cc/KP4X-XEZW>].
62. Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1243 (2017).
63. *Id.*
64. *Id.* at 1296.
65. *Id.*

With respect to the question whether the agreement was properly conceived as a non-binding political commitment, Estreicher and Menashi argue that there are good reasons not to take the prior Administration's position at face value.⁶⁶ For example, they note that the agreement "simultaneously describes its provisions as voluntary and obligatory" and seeks to bind future Administrations to treating the waiver of sanctions under the deal "as an ongoing obligation of the United States."⁶⁷ Professor Michael Ramsey likewise notes that while "[i]n many respects [the JPCOA] has the character of a nonbinding agreement" it also has key aspects that "suggest[] a binding commitment," including that "[i]t is very specific with respect to the sanctions relief the United States undertakes to provide and very specific as to the timetable."⁶⁸ Professor Ramsey also notes that "it is uncertain whether the U.S. negotiators made clear to the other parties that the agreement was nonbinding" and that "[s]ome statements by Iranian officials indicate the contrary."⁶⁹

Not surprisingly, supporters of the Iran deal take a different view. Harold Hongju Koh, the former legal advisor to the State Department in the Obama Administration, argues that the JCPOA is purely a "political...commitment in both form and substance" in that "[o]n matters of substance, the parties went out of their way to style the obligations as 'voluntary'—things they 'will do' (not 'shall do')—and carefully avoided all the procedural trappings of a binding convention."⁷⁰

Of course, the proof is in the agreement itself. And when one turns to the agreement, it seems that Estreicher, Menashi, and Ramsey have the better of the argument. While the agreement is nominally political, in that it is unsigned, it also makes clear that the breach of its terms relieves the other parties of their obligation to comply.⁷¹ Likewise, given that the agreement itself purports to commit the United States to a fifteen-year course of action wherein, if Iran complies, sanctions must regularly be waived every 90-to-180

66. Estreicher & Menashi, *supra* note 62, at 1203-4.

67. *Id.* at 1203.

68. Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FIU L. REV. 371, 378-9 (2016).

69. *Id.* at 379.

70. Koh, *supra* note 60, at 353.

71. See Chris Bushell & Sam Waudby, *An Unsigned Agreement Can Still Bind The Parties*, HERBERT SMITH FREEHILLS (Apr. 10, 2015 9:51 AM), <https://hsfnotes.com/litigation/2015/04/10/an-unsigned-agreement-can-still-bind-the-parties/> [<https://perma.cc/T57E-ZFZT>] (discussing the implications of breaching an unsigned agreement); see also Letter from Julia Frifield, *supra* note 58.

days, over the course of at least five separate presidential terms.⁷² Given these provisions, it is hard to understand how any future President might view the agreement as anything other than an attempt to bind him or her to its terms in the long-run.

Even if we take the prior Administration's position at face-value that they sought to put in place a political commitment in, it is worth assessing whether they succeeded in doing so. Professor Ramsey has argued that for political commitments to be considered legitimate, they ought meet certain constitutional requirements, such that they don't "erode the protections of the treaty-making clause":

First, nonbinding agreements...should have no domestic legal effect in U.S. courts nor impose any legal obligations on U.S. domestic entities...[] Second, the President...must [en]sure that a purportedly nonbinding agreement is clearly and unequivocally nonbinding under international law....[] Third, a nonbinding agreement [cannot] constrain future Presidents (even informally)...Thus, a nonbinding agreement cannot be understood as imposing constraints on policymakers within the U.S. domestic legal or political system and it cannot be represented to foreign parties as imposing any constraints on U.S. policymakers in the international legal or political system.⁷³

Professor Ramsey further argues that an additional limitation is worth considering: ensuring that nonbinding agreements not make "specific commitment[s] on behalf of the United States which the current U.S. President cannot fulfill" because such future commitments "might create expectations and reliance by the other party, and thus implicate the policies of the treaty-making clause."⁷⁴

In at least three respects, the JCPOA runs afoul of Professor Ramsey's criteria. First, the JCPOA clearly seeks to impose some measure of constraints on U.S. policymakers within our domestic political system, in that it required the issuance of waivers on a going-forward basis during the then-current Administration.⁷⁵ Second, the Obama Administration's decision to go to the U.N. Security Council for a formal resolution, also sought to impose constraints on U.S. policymakers in both the international legal and political systems, in that it bound the United States, like all other member states, to comply with certain of the JCPOA's provisions (albeit not the requirement to lift U.S. sanctions).⁷⁶ Third, the JPCOA makes

72. JCPOA, *supra* note 9.

73. Ramsey, *supra* note 68, at 375-6.

74. *Id.* at 376-77.

75. *Id.* at 379.

76. *See* Press Release, *supra* note 35.

commitments that then-current President cannot fulfill, in that it purports to commit future Presidents—like the current President in this instance—to continue issuing the same waivers that the prior President used to effectuate the Iran deal.⁷⁷

Moreover, as Professors Bradley and Goldsmith point out, regardless whether such agreements are formally binding, “[i]n practice...the actions of an earlier President affect and narrow the options of a later President.”⁷⁸ And indeed, that is exactly what happened here. Even though President Trump came into office adamantly opposed to the Iran nuclear deal—the very “status quo bias and bureaucratic inertia” that Bradley and Goldsmith highlight, accompanied by concerns about upsetting the ongoing allied efforts to reintegrate Iran into the global economy—hampered the President from implementing his preferred policy of getting rid of the Iran deal for over the first year-and-a-half of his Administration.⁷⁹

B. Why a Political Commitment?

In assessing the impact of the prior Administration’s decision to use a political commitment-style vehicle for the JCPOA, it may be valuable to understand why it went down that road rather than entering into a treaty or another form of binding international agreement. At a minimum, it is clear, as Estreicher and Menashi note, that at least one key factor in the decision was the fact that the “President could not proceed...by treaty because majorities in both houses of Congress opposed the pact.”⁸⁰ This fact, highlighted by the votes required by INARA, made clear that the Administration simply did not have the votes it would have needed to get a congressional-executive agreement in place, much less the supermajority of votes needed to obtain the Senate’s advice and consent to a treaty.⁸¹ Indeed, Secretary John Kerry—in a moment of candor before the House Foreign Affairs Committee—admitted as much, arguing that the Administration had treated the JPCOA as a political commitment specifically because they didn’t think they could get it through the Senate as a treaty.⁸² And while Secretary Kerry argued at that

77. Ramsey, *supra* note 68, at 380.

78. Bradley & Goldsmith, *supra* note 35, at 1253-54.

79. *Id.* at 1254.

80. Estreicher & Menashi, *supra* note 62, at 1202.

81. *Id.*

82. *See Iran Nuclear Agreement: The Administration’s Case, Hearing before the House Foreign Affairs Committee*, 114th Cong. 83 (2015) (testimony of Secretary Kerry responding to a question from Rep. Ribble: “I spent quite a few years ago trying to get a lot of treaties through the United States Senate. Frankly, it’s become physically

hearing that treaties had generally become “impossible” to get through the Senate,⁸³ as the immediate past Chairman of the Senate Foreign Relations Committee, he had to be aware that between 2009 and 2014, the Senate had given its advice and consent to 13 treaties submitted by the Obama Administration, including the controversial New START Treaty.⁸⁴

impossible...you can't pass a treaty anymore...It's become impossible to pass.”).

83. *Id.*

84. *See id.*; Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Nov. 14, 2009, S. Treaty Doc. No. 113-1, *available at* <https://www.congress.gov/treaty-document/113th-congress/1/resolution-text?r=26&s=1> [<https://perma.cc/3ZWS-DEEJ>]; Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Sept. 28, 2007, S. Treaty Doc. No. 113-3, *available at* <https://www.congress.gov/treaty-document/113th-congress/3/resolution-text?r=24&s=1> [<https://perma.cc/FJY2-PQM8>]; Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, Nov. 22, 2009, S. Treaty Doc. No. 112-4, *available at* <https://www.congress.gov/treaty-document/112th-congress/4/resolution-text> [<https://perma.cc/MP48-Y38H>]; Mutual Legal Assistance Treaty with Bermuda, Jan. 12, 2009, S. Treaty Doc. No. 111-6, *available at* <https://www.congress.gov/treaty-document/111th-congress/6/resolution-text?r=37&s=1> [<https://perma.cc/ZF87-88WM>]; Investment Treaty with Rwanda, Feb. 19, 2008, S. Treaty Doc. No. 110-23, *available at* <https://www.congress.gov/treaty-document/110th-congress/23/resolution-text> [<https://perma.cc/WQ3B-C4WQ>]; Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms, Apr. 8, 2010, S. Treaty Doc. No. 111-5, *available at* <https://www.congress.gov/treaty-document/111th-congress/5/resolution-text> [<https://perma.cc/K8XC-3324>]; Treaty with United Kingdom Concerning Defense Trade Cooperation, June 21-26, 2007, S. Treaty Doc. No. 110-7, *available at* <https://www.congress.gov/treaty-document/110th-congress/7/resolution-text> [<https://perma.cc/38CR-RR9U>]; Treaty with Australia Concerning Defense Trade Cooperation, Sept. 5, 2007, S. Treaty Doc. No. 110-10, *available at* <https://www.congress.gov/treaty-document/110th-congress/10?r=56&s=1> [<https://perma.cc/RLE6-9T2V>]; Hague Convention on International Recovery of Child Support and Family Maintenance, Nov. 23, 2007, S. Treaty Doc. No. 110-21, *available at* <https://www.congress.gov/treaty-document/110th-congress/21/resolution-text?r=26> [<https://perma.cc/B7AD-JDWH>]; Tax Convention with Malta, Aug. 8, 2008, S. Treaty Doc. No. 111-1, *available at* <https://www.congress.gov/treaty-document/111th-congress/1/resolution-text?r=21> [<https://perma.cc/P4XN-XQ5G>]; Protocol Amending Tax Convention with New Zealand, Dec. 1, 2008, S. Treaty Doc. No. 111-3, *available at* <https://www.congress.gov/treaty-document/111th-congress/3/resolution-text> [<https://perma.cc/UV2K-GJ22>]; Treaty Doc. 111-4, Protocol Amending Tax Convention with France, Jan. 13, 2009, S. Treaty Doc. No. 111-4, *available at*

Moreover, the prior Administration's approach to the JCPOA was not a mere flash in the pan, but rather was reflective of a larger trend of the Administration eschewing treaties in favor of more Executive-friendly approaches. For example, Professors Goldsmith and Bradley point out that while the overall trend of treaty submission has been on a downward slope in prior Administrations for structural reasons, the Obama Administration had historically low numbers in the average number of treaties transmitted per presidential year—4.75—as compared to the modern post-Truman average of 15.3 per year.⁸⁵ This is not to suggest that Secretary Kerry was incorrect when he assessed that the Administration would face an uphill battle in the Senate if it were to have submitted the JPCOA as a treaty, after all, his vote count correctly previewed the majority bipartisan opposition demonstrated by the INARA deal votes.⁸⁶ And, to be fair, Secretary Kerry was also right that as a general matter, the Obama Administration faced a tougher treaty approval regime than prior Administrations; as Goldsmith and Bradley point out, the prior Administration's treaty approval rate was substantially lower—39% versus 92% historically—suggesting that politics also likely played a key role.⁸⁷

Given all this, one can perhaps understand why the Administration eschewed the treaty mechanism and sought to go down the political commitment road in the case of the JCPOA. But the next question that must be considered is whether there is a historical basis for entering into an agreement like the JCPOA through the mechanism of an unsigned, non-binding political commitment. And on that front, the Administration doesn't fare quite well either. At least one academic piece to examine the

<https://www.congress.gov/treaty-document/111th-congress/4/resolution-text?r=20> [<https://perma.cc/LK5H-DT35>].

85. Bradley & Goldsmith, *supra* note 35, at 1210-11.

86. Munson & Jaffer, *supra* note 23.

87. Bradley & Goldsmith, *supra* note 35, at 1211; *see also* David S. Jonas & Dyllan M. Taxman, *JCP-No-Way: A Critique of the Iran Nuclear Deal as A Non-Legally-Binding Political Commitment*, 9 J. NAT'L SECURITY L. & POL'Y 589, 595-96 (2018) (noting that "the Senate has actually been a friend to the President in international agreement-making: it has rarely denied advice and consent...and its partisan identity has not been indicative of its ability to pass important arms control and nonproliferation agreements"). Indeed, according to Jonas and Taxman, the Senate has repeatedly expressed its preference for treaties in the arms control area by consistently granting its advice and consent—at a "near-perfect rate"—to such agreements. *Id.* at 602-03. According to them, the Senate's overall rejection rate for treaties is below two percent, and even accounting for treaties that are left to lie fallow, between 1949-2000, under eight percent of treaties failed to receive the Senate's advice and consent. *Id.* at 603.

question closely has made the strong argument that the JCPOA is “the only highly significant nonproliferation agreement to be negotiated as an unsigned non-binding political commitment in modern American history.”⁸⁸

In examining the historical pedigree of arms control agreements, Professor David Jonas and Dyllan Taxman compiled what they argue is a comprehensive list of the most significant international arms control and nuclear nonproliferation agreements involving the United States.⁸⁹ According to Jonas and Taxman, 79% of these agreements have been classic Article II treaties, 95% have been binding at international law, and *all* of these agreements, save the JCPOA, were signed.⁹⁰ Moreover, Jonas and Taxman note that the significant majority of multilateral agreements of all varieties—of which the JCPOA is one—are entered into as Article II treaties (between 60-75%).⁹¹ Indeed, according to their analysis, only *one* multilateral arms-control agreement other than the JCPOA has *ever* been entered into outside the treaty process.⁹² This all, of course, bears significant note because, if Jonas and Taxman have it right, the JCPOA is a significant deviation from the norm of nonproliferation and arms control agreements across a variety of factors—even when it comes to non-binding political commitments which are, themselves, quite rare in this arena.⁹³

Jonas and Taxman also note that some of the obvious reasons that Presidents use treaties as the primary vehicles for major international arms control agreements is that successful completion of

88. Jonas & Taxman, *supra* note 87, at 590.

89. *Id.* at 596 (“The authors have compiled, in an Appendix to this article, a comprehensive list of the most significant arms control and nuclear nonproliferation agreements to which the United States has been party or participant.”).

90. *Id.* (“The Appendix spans nearly 100 years of U.S. treaty history and includes 58 national security agreements, 57 of which deal directly and specifically with arms control or nuclear nonproliferation. Of the 57 most significant nuclear- or arms control-specific agreements into which the United States has entered, 45 have been Article II treaties (79%)--these agreements are listed in the first segment of the Appendix; 54 have been legally binding international law treaties (95%)--these agreements comprise the first and second sections of the Appendix; of the 58 agreements, all but the Iran Nuclear Deal are signed.”).

91. *Id.* at 598.

92. *Id.*

93. *See id.* at 595 (“Non-binding political commitments in arms control and nonproliferation are scarce, and significant landscape-altering political commitments in the nonproliferation and arms control arenas are almost non-existent outside of the Iran Nuclear Deal.”).

the treaty process demonstrates deep public (and elite) support and provides foreign governments—who understand the significant expenditure of political capital required to obtain Senate consent—with assurance that the deal will likely have relative permanence.⁹⁴ Indeed, the authors argue that the value of treaties is even more significant in cases—like here—where there is limited trust between the parties.⁹⁵ For example, the Soviet Union repeatedly pressed the United States to submit arms control agreements as treaties, including SALT II in the Carter Administration (which was never ratified due to the Soviet invasion of Afghanistan which caused Carter to pull the treaty from the Senate) and SORT in the Bush 43 Administration (which was ratified 95-0 in the US Senate and was in effect from 2003-2011).⁹⁶

Contrary to this historical trend with respect to arms control agreements, however, the prior Administration chose to implement the Iran nuclear agreement as a political commitment. In doing so, Bradley and Goldsmith argue that the Administration essentially “established a new form of unilateral international lawmaking,” by creating an international agreement that relied inherently upon existing statutory authority delegated to the executive branch.⁹⁷ That the Administration was able to do so and essentially ignore the fact that bipartisan majorities in both houses opposed the agreement was, in the view of these scholars, a “significant constitutional innovation” that “vastly expand[ed] the President’s power to make and implement international agreements (albeit nonbinding ones).”⁹⁸

C. And What About the Sanctions?

One final question that may be worth considering is why the prior Administration sought to unilaterally use its existing statutory waiver authority, rather than going back to Congress for clear authority to implement the deal. Interestingly, Europe chose a different path. As

94. *Id.* at 597-98 (“Scholars have noted that foreign leaders prefer Article II treaties and are aware of the political capital required of a U.S. President to acquire a two-thirds Senate majority making it highly unlikely that the United States will renege on an agreement....The widespread support for an agreement demonstrated by the Article II process has a spiraling effect on its perceived longevity: the President’s predecessors are less likely to back out when support is high; legislators are less likely to pass laws inconsistent with the treaty, putting the U.S. in breach; and foreign heads of state are less likely to resist execution or withdraw knowing that the President, the legislature, their predecessors, and the American people stand behind the agreement.”); *id.* at 602.

95. *Id.* at 602.

96. *Id.*

97. Bradley & Goldsmith, *supra* note 35, at 1219.

98. *Id.* at 1219-20.

Estreicher and Menashi point out, under the terms of the deal itself, while the United States committed itself to “act[ing] ‘pursuant to Presidential authorities’ to ‘ceas[e] the application of the statutory nuclear-related sanctions,’” the “European Union also agreed to lift the sanctions it had imposed, but it adopted implementing legislation in order to do so.”⁹⁹

At the outset, it’s worth noting that unlike in the political sphere, the Obama Administration “never claimed that [its] decision to impose or to lift sanctions on a foreign state [was] an area of exclusive presidential authority.”¹⁰⁰ Rather, President Obama took the position that “he could lift the sanctions based on congressionally delegated authority in the existing sanctions legislation.”¹⁰¹ The problem with this approach, as Professors Estreicher and Menashi point out, is that it “contradicts the expressed intent of Congress in the sanctions statutes.”¹⁰² According to Estreicher and Menashi, the waiver provisions in those statutes were specifically focused on individual cases, rather than the “across-the-board,” long-term waivers of the type contemplated in the deal.¹⁰³ Indeed, they argue that contrary to “act[ing] within the legislative framework established by Congress...[President Obama] essentially overturned that framework.”¹⁰⁴ Even more troubling, Estreicher and Menashi note that there is little if any historical precedent—save in the narrow area of claims settlement—for the notion that the President can enter into non-treaty agreements that have such legislative effects.¹⁰⁵

99. Estreicher & Menashi, *supra* note 62, at 1201 nn.2 & 3 (citing JCPOA, *supra* note 9, annex V, at 1-2; EUR. UNION EXTERNAL ACTION, INFORMATION NOTE ON EU SANCTIONS TO BE LIFTED UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) 13 (2016), http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf [<https://perma.cc/28HM-LRA6>]).

100. Estreicher & Menashi, *supra* note 62, at 1201-02. Of course, as Estreicher and Menashi note, the Administration probably didn’t make such a claim because it “would be highly doubtful.” *Id.*

101. *Id.* at 1203.

102. *Id.* at 1204.

103. *Id.*; see also *id.* at 1230-41 (examining each of the applicable Iran sanctions regimes and concluding that the waivers contained therein were focused on individual exceptions).

104. *Id.* at 1204.

105. See *id.* at 1215 (“There is no basis for arguing that a history of congressional acquiescence has added a ‘historical gloss’ to the foundational constitutional principle that the executive is not a lawmaker even when dealing with foreign relations....[Indeed, the] understanding of the limited, nonlegislative effect of sole executive agreements has not been disturbed in subsequent practice, with one

Again, perhaps unsurprisingly, supporters of the JCPOA argue that the legislative sanctions framework explicitly provided the President all the authority he needed to carry out the terms of his political commitment in the Iran Deal.¹⁰⁶ For example, Professor Koh argues that not only is there “ample domestic legal authority for...the President to suspend economic sanctions pursuant to waiver authority provided by Congress,” but that “this [authority] is not just ‘general preauthorization,’ of the type that one might find in certain types of congressional-executive agreements, “but *specific statutory authorization of the Youngstown Category One* land.”¹⁰⁷ Moreover, Professor Koh argues that while the Constitution provides Congress clear authority over foreign commerce, including sanctions, Congress has “undeniably” delegated the implementation of this authority to the President and given him specific statutory authority to waive sanctions in the national interest.¹⁰⁸

On this point the record is perhaps more mixed. To be sure, the textual waiver authority provided to the President does not admit any specific temporal or substantive limitations save, in some cases, certain findings with respect to national security and the requirement to renew the waivers on a regular basis.¹⁰⁹ So, while Estreicher and Menashi are right that the structure of the sanctions laws make clear that Congress intended the typical waivers to be narrow and short-term, nothing on the face of the law itself prevents the President from making the type of findings both President Obama and Trump (at least for the first year) made, and nor does anything prevent any President from implementing such waivers over and over again for years to come. On the other hand, what is also clear is that a key reason for the Administration’s decision to go down the road of using its existing statutory authority, just like its decision to go down the political commitment road, was its inability to muster the votes in Congress to get new authority from Congress to reduce sanctions as part of the Iran nuclear deal.¹¹⁰

possible exception: the President’s practice of utilizing executive agreements to settle claims of Americans against foreign governments.”).

106. See, e.g., Koh, *supra* note 60, at 353 (asserting that the President has such authority under domestic law).

107. *Id.* (emphasis in original).

108. *Id.* at 353-54.

109. See, e.g., 22 U.S.C. § 8804(g) (2018).

110. See Estreicher & Menashi, *supra* note 62, at 1202 (indicating that President Obama could not enact the Iran Nuclear Deal by statute or treaty because of lack of support from Congress).

IV. LESSONS LEARNED

So, what might all of this teach a future Administration about international accords and their stability? One obvious lesson—that our allies and counterparties have already learned—is that if one is looking for permanence in an international accord with the United States, one ought encourage the United States to look for a vehicle that has at least some measure of interbranch cooperation and, to the extent you can get it, you want to get a treaty. That much, perhaps, was obvious from the outset, but the question then becomes what happens when the executive is faced with a recalcitrant legislature that prefers additional pressure to a potential deal, as the Obama Administration was.

The answer is perhaps counterintuitive. The typical reaction of executive branch officials—as it was in the prior Administration—is to try to get out from under the thumb of Congress, whether by hook or by crook. As it turns out, that approach, while perhaps easier in the short-run, can have the long-term effect of actually sapping the core authority and legitimacy of a deal. Instead, a wiser path might have been to include key members of Congress—particularly Senators, including those of the opposite party from the President—on the negotiating team. Under such a scenario, if a deal is reached, it would put a bipartisan group of members on the hook to advocate for an agreement. That is, taking such an approach would give a future Administration a group of key players on Capitol Hill with built-in buy-in for the Administration’s position.

A more limited version of this approach might be to use the method employed by the Iranians in their negotiations with the United States: that is, using the legislature as the “bad cop” in the negotiation. Indeed, repeatedly throughout the negotiation process, when the deal terms got tough, the Iranians would go to U.S. negotiators with the old saw that they were under pressure back home, whether from the Supreme Leader or from the Iranian Majlis.¹¹¹ The Iranians would repeatedly exploit this claim—even in the late hours of the final deal—to extract further concessions from the P5+1.¹¹² In stark contrast, the prior Administration regularly stiff-

111. See generally Ariane Tabatabai, *Reading the Nuclear Politics in Tehran*, ARMS CONTROL ASSOCIATION (Sept. 2, 2015), https://www.armscontrol.org/ACT/2015_09/Feature/Reading-the-Nuclear-Politics-in-Tehran#note12 [<https://perma.cc/4UZ3-GZZX>] (“The distinction between rhetoric and policy is crucial in understanding Iranian intentions and actions.”).

112. See generally Gareth Porter, *Behind the Scenes: How the US and Iran Reached Their Landmark Deal*, THE NATION (Sept. 5, 2015), <https://www.thenation.com/article/behind-the-scenes-how-the-us-and-iran-reached-their-landmark-deal/> [<https://perma.cc/XN4Y-GSQN>] (outlining the timeline of the Iran Nuclear Deal provisions).

armed Congress, telling the Iranians that the President had all the authority needed to do the deal on his own and that Congress would be kept tightly in its lane.¹¹³ This approach, of course, turned Congress against the President and his deal and, at the same time, gave away a potential bargaining chip the President might otherwise have used to improve the deal vis-à-vis the Iranians.

One might argue, however, that a President brings Congress into a negotiation early at his or her own risk. Namely, one might reasonably argue that bringing in Congress will simply make a deal harder to get because members of Congress are likely dig in on negotiations, sometimes even seeking to undermine the entire effort. However, as Estreicher and Menashi point out, when responding to executive action in the foreign affairs arena that exceeds classic boundaries of the separation of powers, Congress is handicapped by practical difficulties that make it difficult for Congress to oppose such action, including the need to obtain supermajorities to overcome a potential Presidential veto.¹¹⁴ This is particularly true where, as here, prior Congressional action appears to provide sufficient authority for the President to act.¹¹⁵ Thus, at least in the circumstance facing the prior Administration, there's good reason to believe that members of Congress, knowing it would have been difficult getting engaged substantively on the Iran issue without the President bringing them in, might actually appreciate the effort and be good actors—including as potential “bad cops”—if brought into the process.

Finally, one key element for executive branch negotiators to consider: if a major international deal cannot get even a bare majority of political support in either House of Congress, it simply may not be the right deal to do. Here, the Iran deal was seen—correctly—as having so many deep-seated flaws, it would have been hard to catalogue them all.¹¹⁶ Nonetheless, the prior Administration

113. *See generally id.*

114. *See* Estreicher & Menashi, *supra* note 62, at 1249 (“Recent scholarship on ‘historical gloss’ and congressional acquiescence to executive action testing the boundaries of separated powers rightly emphasizes the practical difficulties Congress faces when trying to act as a unitary body to resist perceived executive overreach. These logistical barriers are part of the constitutional design. The President has the advantage of initiative, both in the foreign relations and domestic spheres. It is difficult for Congress to pass laws, amend or repeal them, or take other action as a body to express opposition to executive action. Even when a course of action enjoys majority support in both houses, that may still not be enough congressional consensus to override an express or impliedly threatened veto; this was the dynamic behind the Iranian Nuclear Agreement Review Act of 2015.”).

115. *Id.*

116. *See, e.g.,* Blaise Misztal, *Iran Deal Limits Inspectors’ Access to Suspicious Sites*, BIPARTISAN POL’Y CTR. (July 17, 2015),

barreled forward, ignoring the complaints, committed to the notion that all those legislators on Capitol Hill (and the American people they represented) were just wrong and that the deal, properly understood by the elite P5+1 negotiators, the Secretary of State, and the President, was, in fact, worth doing. Of course, had the Administration forced itself to get congressional assent, whether through the treaty or another process, or had cut key members of Congress into the process, it likely would have been back at the negotiating table and might very well have gotten a better deal that would have been more politically sustainable in the long run.

At the end of the day, the key takeaway from the Iran nuclear deal experience for all is pretty straightforward: do not do a major deal that you cannot sell at home. The framers understood this, having created a system of separated powers for just such deals. Executive branch officials would be wise to look back to those constructs going forward.

<https://bipartisanpolicy.org/blog/delayed-inspections-jcpoa-provisions-for-iaea-access-to-suspicious-sites/> [https://perma.cc/R3VA-4VK2] (describing key flaws in the Iran deal related to sites with prior military dimensions).