Recent Developments in Constitutional Law: Presidential Power and the Dysfunctional Congress

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Presidential Power and the Dysfunctional Congress  
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I. INTRODUCTION  

A. Partisan Polarization: It will not come as news that the federal government is deeply divided along political lines. Although President Obama enjoyed a Democratic majority in both chambers of Congress during his first two years in office, the Republicans gained control of the House of Representatives in the 2010 midterm elections and control of the Senate in 2014.  

B. Congressional Dysfunction: As a result of partisan polarization, Congress has been dysfunctional. Without cooperation across party lines, it was impossible to get anything done with a divided Congress. Although the Republican Party controls Congress, procedural rules allow the minority to block many actions and there are insufficient votes to override a veto. The result is “gridlock” on critical issues.  

C. Unilateral Presidential Action: In the face of congressional dysfunction and steadfast opposition, President Obama has resorted to unilateral actions on a variety of fronts. Although these actions build on historical precedents set by previous Presidents of both parties (often with the acquiescence of Congress), they test the outer limits of presidential authority. I will focus on three examples: appointment of executive officers, immigration reform, and a prospective nuclear agreement with Iraq.  

II. GENERAL SEPARATION OF POWERS PRINCIPLES: To provide background for the discussion of particular presidential actions, I will provide a refresher course in separation of powers principles as they relate to Congress and the President.  

A. Legislative vs. Executive Power: Although the general definitions of legislative and executive power are easily stated, the line between them is often blurry in practice.  

1. Legislative Power: The legislative power is the power to “make law”; i.e., the power to determine the ends and means of public policy through legally binding rules.  

2. Executive Power: The executive power is the power to implement the laws made by Congress. Accordingly, the President is bound by (constitutionally valid) federal statutes. See Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 12 Pet. 524 (1838). Conversely, however, Congress has no power to control the implementation of the laws once they are enacted. See Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating delegation of executive functions to a congressional officer).
B. Sources of Presidential Power: In view of the relationship between legislative and executive power, the President’s power to act “must stem either from an act of Congress or from the Constitution itself.” The Steel Seizure Case (Youngstown Sheet & Tube Co. v. Sawyer), 343 U.S. 579, 585 (1952). In an influential concurring opinion in Steel Seizure, Justice Jackson observed that the scope of presidential power depends on its interplay with congressional action:

1. **Congressional Delegation:** “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” Id. at 635.

2. **Congressional Inaction:** “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” Id. at 636.

3. **Congressional Opposition:** “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Id. at 637.

C. Presidential Power in the Domestic Arena: In the domestic arena, the President’s powers relate to control over the enforcement of statutes, including the authority delegated by statute to executive officers and agencies. Article II, § 1 vests the executive power in the President and Article II, § 3 specifies that the President “shall take Care that the Laws be faithfully executed.” This power also includes substantial prosecutorial discretion, including the explicit and independent power to pardon offenders.

1. **Oversight of Executive Officers:** The President’s means of control include the appointment and removal of officers. The President’s role in the appointment of officers is spelled out in Article II, § 2, cl. 2, and will be discussed more fully below in Part III. The President’s power to remove officers is implicit, but nonetheless well established. See Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010) (invalidating provision requiring good cause for removal of inferior officers by agency whose members could be removed by President only for good cause); Myers v. United States, 272 U.S. 52 (1926) (invalidating provisions requiring congressional consent for removal of postmasters).

2. **Prosecutorial Discretion and Pardons:** The President’s principal power in the domestic arena is the power of prosecutorial discretion and the explicit power to grant pardons under Article II, § 2, cl. 1. As explained by In re Aiken County, 725 F.3d 255, 264 (D.C. Cir. 2013), “the President’s prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed.” These powers will be discussed more fully below in Part IV.
D. Presidential Foreign Relations Powers: In contrast to the domestic arena, the President has substantial independent powers in the field of foreign relations. These powers, which are the focus of Part V, include the power to conduct diplomatic relations, negotiate treaties and other international agreements, and act as commander in chief of the military.

1. Diplomatic Relations: Under Article II, the President appoints (§ 2, c. 2) and receives (§ 3) ambassadors and consuls, which reflects the President’s role “as the sole organ of the federal government in the field of international relations.” United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). Pursuant to these powers, the President has the authority to recognize foreign nations and governments and establish (or suspend) diplomatic relations with them. See U.S. v. Belmont, 301 U.S. 324 (1937) (upholding executive agreement with the Soviet Union assigning rights to disputed assets in part because “the recognition [of the Soviet government], establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction”).

2. Treaties and Other Agreements: As part of this role, the President makes treaties and other international agreements on behalf of the United States, which bind the nation under international law and may have direct legal effects in federal and state courts, including the preemption of state law.

   a. Treaties must be approved by a two-thirds vote in the Senate, see Art. II, § 2, cl. 2, and have the equivalent status of statutes (although they may not be self-executing and may require legislative implementation).

   b. The Constitution apparently contemplates international agreements other than treaties, however. Article I, § 10, cl. 1 prohibits states from entering into any treaty, but § 10, cl. 3 allows them to enter into an “Agreement or Compact . . . with a foreign Power” if Congress consents. The President may enter into such agreements without Senate consent. See American Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (holding that executive agreement to address Holocaust survivors’ insurance claims was valid and preempted state law).

3. Commander in Chief: Under Article II, § 2, cl. 1, the President is “Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual Service of the United States.”

   a. The power to declare war is reserved to Congress under Article I, § 8, cl. 11.

   b. Nonetheless, the President has inherent power to repel an invasion or suppress a rebellion, see The Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862) (upholding Lincoln’s blockade of southern ports at the start of the Civil War).

   c. The Commander in Chief power is generally understood to give the President primary responsibility for national security. Presidents of both parties have used force without a declaration of war (or other congressional authorization) to protect American interests, but the scope of this power is unclear.
III. RECESS APPOINTMENTS (THE CURIOUS CASE OF THE NLRB)

A. The Appointments Clause: The Appointments Clause, Art. II, § 2, cl. 2, provides the exclusive means of appointment for all Officers of the United States, which the United States Supreme Court has defined to include any person who exercises authority under federal laws. See Freytag v. Commission of Internal Revenue, 501 U.S. 868 (1991); Buckley v. Valeo, 424 U.S. 1, 126 (1976).

1. Classes of Officers: Article II, § 2, cl. 2 specifies that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.” This language creates two classes of officers.

   a. Principal officers: Although the Appointments Clause does not specifically refer to principal officers, the term is a logical counterpart to inferior officers and used in Article II, § 2, cl. 1 to describe the heads of departments. Principal officers must be appointed by the President with the advice and consent of the Senate.

   b. Inferior officers: The Clause provides that Congress may (but need not) specify one of three alternative means for appointing inferior officers: (1) the President alone; (2) the heads of departments; or (3) the courts. See Morrison v. Olson, 487 U.S. 654 (1988) (concluding that independent counsel was an inferior officer whose appointment could be vested in the United States Court of Appeals).

   c. Definition: A principal officer is not hierarchically inferior to another officer (i.e., serves immediately beneath the President), including cabinet level secretaries and the heads of independent agencies. See Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010); Edmond v. United States, 520 U.S. 651, 662-663 (1997). Morrison v. Olson suggested that lower level officials might be principal officers if they exercise substantial independent policy discretion, but that may no longer be good law.

2. Recess Appointments: The Recess Appointments Clause, Art. II, § 2, cl. 3, creates an exception to the requirement of Senate consent: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”

   a. Over the years, as political tensions and Senate rules have at times produced a stalemate over appointments, Presidents have used recess appointments to avoid the need for Senate approval.

   b. The Senate, for its part, now no longer takes a formal recess, and instead remains in session on a continual basis. Nonetheless, the Senate adjourns sine die (until a specified date) while remaining in session in a pro forma way.
B. Stalemate at the NLRB: Recent events at the National Labor Relations Board (NLRB) highlight the issues raised by the Senate’s refusal to confirm appointments. Labor relations are a politically charged subject, so presidential nominations to the NLRB are often controversial, and have been a particular problem for the Obama Administration.

1. Loss of a Quorum: From 2009 to 2013, Senate Republicans used the filibuster to prevent confirmation of President Obama’s nominees, and the NLRB was down to two confirmed members. In 2013, the impasse was broken and the vacancies were filled. See http://www.nlrb.gov/who-we-are/board (describing current members).

   a. The two remaining members continued to make decisions on the theory that the NLRB had implicitly delegated the authority. They reasoned that the National Labor Relations Act (NLRA) authorizes the NLRB to delegate its authority to groups of at least three members and that two members would constitute a majority of such a group. In New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010), however, the Supreme Court held that the NLRA required a minimum of three members to constitute a quorum to transact business.

   b. After New Process Steel, two-member orders were invalid and the NLRB had to reconsider a large number of cases. It used a process in which the original two members, joined by a third, reconsidered the case on the basis of the original record. The new order typically reaffirmed the prior decision and adopted it by reference. See NLRB v. County Waste of Ulster, LLC, 665 F.3d 48 (2d Cir. 2012) (upholding procedure); see also NLRB v. Contemporary Cars, Inc., 667 F.3d 1364 (11th Cir. 2012) (declining to consider due process challenge to this procedure because the issue had not been raised before the Board).

2. Use of Recess Appointments: During the impasse, the President attempted to use the recess appointments power in an to fill vacancies on the Board without Senate consent, providing a test case for the scope of that power.

C. Noel Canning: In NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), the Supreme Court interpreted the Recess Appointments Clause broadly, but nonetheless held that the President’s use of the Clause was improper because the Senate was not in recess.

   1. Scope of the Clause: The critical interpretive questions were (1) when is the Senate in “recess” for purposes of the Clause; and (2) does a vacancy “happen” during a recess if it occurred before the recess began but continues into it?

   a. The majority first held that the term “recess” is not limited to formal breaks between legislative sessions (i.e., after the elections and before the new Congress is seated), but also includes intra-session breaks. It reasoned that the term “recess” is ambiguous and that the broader construction accorded with the purpose of the Clause to “ensure the continued functioning of the Federal Government when the Senate is away.” The Court also reasoned that historical practice supported this interpretation because presidents had consistently and frequently made appointments during intra-session recesses.
b. The majority then concluded that the term “happens” is not limited to vacancies that become open during the recess, but rather includes those that happen before a recess and continue into it. Although the natural reading of the text might support the narrower reading, it was ambiguous, and the purpose and history of the Clause supported the broader reading. The majority acknowledged that this interpretation might allow Presidents to routinely evade Senate confirmation by waiting until a recess to make appointments, but stated that it was unlikely that Presidents would abuse the power in this manner.

2. Application on the Facts: The Court nonetheless held that the appointments in this case were improper because the Senate break was too short to count as a recess. The Senate had passed a resolution to convene “pro forma session[s]” only, with “no business . . . transacted,” on every Tuesday and Friday from December 20, 2011, through January 20, 2012. 2011 S.J. 923. The critical question was whether these pro forma sessions counted (which meant that the breaks were two or three business days) or did not count (which meant that the Senate was not in session for a month).

a. According to the Court, the answer to this question depended on whether the Senate “retain[ed] the capacity to transact Senate business.”

b. Notwithstanding the language of the resolution, which explicitly stated that these pro forma sessions would be with no business transacted, the Court concluded that the Senate was able to conduct business during the pro forma sessions by passing a unanimous consent agreement, which is a common procedural device.

3. Implications for the Future: Notwithstanding the Court’s broad interpretation of the Recess Appointments Clause (and the complaints of four concurring Justices who disagreed with this interpretation), the practical result of Noel Canning is the same as a narrow construction.

a. The Senate can block recess appointments so long as it meets in a pro forma way every few days and retains the ability to conduct business by unanimous consent, except during the formal breaks between the legislative sessions.

b. Securing Senate confirmation for appointments continues to be a problem for the Obama Administration.

IV. IMMIGRATION REFORM AND PROSECUTORIAL DISCRETION

A. Immigration Law and Deferred Status: The federal government has broad power over immigration and naturalization, see Article I, § 8, cl. 4 (power to establish “an uniform Rule of Naturalization”), that has been exercised since the founding. Modern immigration law and policy had its foundations in the Immigration and Nationality Act of 1952, which has been amended numerous times since its enactment.
1. **Immigration Reform Gridlock:** Immigration reform provides an excellent illustration of partisan polarization and gridlock. Nearly everyone agrees that our current immigration system is broken. According to Department of Homeland Security (DHS) estimates, there are between 11 and 12 million aliens who are unlawfully present in the United States (some who arrived illegally and others who overstayed their visas). While there is broad agreement that this is a problem, the “right” and the “left” are at odds over how to address it.

   a. From the perspective of those on the right, aliens who are not lawfully present are, by definition, law breakers who should be removed from the country. The solution to the problem is strict enforcement, including cracking down on those aliens who are not lawfully present and strengthening border security.

   b. From the perspective of those on the left, most undocumented aliens are honest, hardworking immigrants who came to the country to better their lives and the lives of their families, including many who came here as children and have lived most of their lives here. The solution to the problem is to regularize the status of those undocumented aliens and focus enforcement on criminals and terrorists.

   c. Because neither side has been willing to compromise on key issues, immigration reform legislation has been stalled for a number of years.

2. **Obama Administration and Deferred Action:** The Obama administration has issued two memoranda providing guidance for the exercise of prosecutorial discretion to defer action on the removal of some aliens who are unlawfully present. The memoranda justify the guidance in terms of (1) prioritizing scarce enforcement resources; and (2) humanitarian considerations.

   a. The first memorandum, issued in 2012, created what came to be known as DACA (Deferred Action for Childhood Arrivals). See DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), available at [http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf](http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf). The Memorandum directed prosecutors and enforcement officials in the DHS to exercise their prosecutorial discretion so as to defer action on removal for a period of two years, subject to renewal, for individuals who came to the United States as children, lived here for at least five years, were not over thirty, and met certain other requirements.

   b. The second memorandum, issued in 2014, expanded DACA to include the parents of children who are citizens or lawful permanent residents, removed the age cap, and extended the period for deferred action from two to three years. See DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).
c. Both documents emphasized that deferred action was discretionary and that the memorandum “confers no substantive right, immigration status, or pathway to citizenship,” which “[o]nly an Act of Congress can confer.” 2014 Memorandum at 5; 2012 Memorandum at 3.

d. Nonetheless, aliens who qualify for deferred action are not unlawfully present in the United States because their deferred action is a period of stay authorized by the Attorney General. See 8 U.S.C. § 1182(a)(9)(B)(ii); 8 C.F.R. 214.14(d)(3). Accordingly, these aliens are also eligible to receive Employment Authorization Documents, allowing them to work in the United States. Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053, 1059 (9th Cir.2014) (concluding that state’s refusal to grant driver’s licenses to DACA recipients violated equal protection).

B. Legal Challenges: Several lawsuits have been filed challenging the legality of the Memoranda on various grounds.

1. Standing and other Jurisdictional Issues: Many of these suits have been dismissed based on standing problems or other barriers to review. See Crane v. Johnson, ___ F.3d. ___, No. 14-10049, 2015 WL 1566621 (5th Cir. Apr. 7, 2015) (dismissing challenge to 2012 Memorandum because state and DHS workers lacked standing); Arpaio v. Obama, 27 F. Supp. 3d 185 (D.D.C. 2014) (county sheriff from Arizona lacked standing to challenge order).

2. Administrative Procedure Act Challenge: In Texas v. United States, 2015 WL 648579 (S.D. Tex. 2015), appeal filed No. 15-40238 (Feb. 23, 2015), the State argued that the 2014 Memorandum was invalid because DHS did not follow the proper procedures under the federal Administrative Procedure Act.

a. The court first rejected several jurisdictional arguments, concluding that the state had standing to sue and that review was not foreclosed by 5 U.S.C. § 701(a)(2), which specifies that agency action is not reviewable when it is committed by law to agency discretion. In keeping with the principle of prosecutorial discretion, the Court has held that decisions not to enforce are presumptively committed to agency discretion and not reviewable under § 702(a)(2). See Heckler v. Chaney, 470 U.S. 821 (1985). The district court concluded, however, that the presumption did not apply in this case because the Memorandum went beyond non-enforcement, bestowing benefits. The court also reasoned that the presumption, if it applied, was rebutted by mandatory statutory language.

b. On the merits, the question was whether DHS was required to follow “notice and comment procedures,” when adopting the 2014 Memorandum. Under 5 U.S.C. § 553(b)-(c), an agency must publish notice of a proposed rule in the Federal Register, provide an opportunity for interested persons to submit written comments to the agency, and include a concise statement of the basis and purpose of the rule to accompany its adoption. There is, however, an exception to these requirements for nonbinding statements of policy that describe how an agency
will exercise its discretion, which ordinarily would apply to this sort of memorandum. See 5 U.S.C. § 553(b)(B). The district court in this case, however, concluded that the Memorandum did not fall within this definition because it had legally binding effects.

3. **Separation of Powers Challenge:** In *United States v. Juarez–Escobar*, 25 F. Supp. 3d 774 (W. D. Pa. 2014), a federal district court in Pennsylvania concluded that the 2014 Memorandum exceeds the President’s constitutional authority. The defendant, who was arrested by local authorities while driving under the influence and charged with various related offenses, was referred to Immigration and Customs Enforcement (ICE), for prosecution and removal. He pleaded guilty to re-entry of a removed alien, see 8 U.S.C. § 1326, and the matter was before the court for sentencing. The court explained that its normal practice would be to sentence the defendant to supervised release, but suspend that sentence because the defendant would be removed from the country. The court considered the 2014 Memorandum to be relevant to sentencing, because the defendant might not be removed from the country. It then concluded that the Memorandum exceeded the scope of prosecutorial discretion, violating both separation of powers and the duty to faithfully execute the laws. See 25 F. Supp. 3d at 787-88. The Court identified two flaws in the Memorandum:

a. First, the Memorandum “provides for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination . . . .” *Id.* In the court’s view, the establishment of broad classes of immigrants who would automatically receive deferred action status differentiated the DACA program from prosecutorial discretion, which is exercised as a matter of individualized discretion, not a general rule.

b. Second, the Memorandum “allows undocumented immigrants, who fall within these broad categories, to obtain substantive rights.” *Id.* In the court’s view, deferred action status conferred legal rights because their presence in the United States would not be considered unauthorized for purposes of some statutory provisions and it allowed undocumented aliens to apply for work authorization. In addition, once this status had been granted, it would be difficult for Congress to rescind the program or for another President to withdraw it because “it would violate core American familial values to abruptly deport these individuals, who are ‘families,’ not ‘felons,’ and have been allowed to deepen and strengthen already existing ties to their lawfully present American family members and the wider community.” *Id.* at 788.

c. Oddly, the court ruled on the constitutionality of the Memorandum before deciding whether it would apply in this case, which is contrary to the rule against deciding constitutional issues unnecessarily. Moreover, even though the court held that the Memorandum was invalid, it went on to address the question whether the Memorandum would apply, concluding that the record was insufficient to make this determination and setting the matter for additional hearings on that issue.
C. The Scope of Prosecutorial Discretion: The fundamental constitutional question presented in these cases is whether the 2012 and 2014 Memoranda are consistent with the President’s constitutional duty to “take care that the laws are faithfully executed.” Resolving that question depends less on the scope of prosecutorial discretion and more on (1) the interpretation of the applicable statutory provisions; and (2) the legal effects of the Memoranda.

1. Statutory Interpretation: Although the executive power contemplates inherent prosecutorial discretion, it does not entitle the President to ignore statutory mandates or to amend the immigration statutes enacted by Congress. Thus, the legality of the Memoranda depends on the meaning of the underlying statutes. To return to Justice Jackson’s framework:

a. The DHS claims to be acting pursuant to delegated authority (in which case the President’s power is at its broadest), citing to the broad enforcement discretion conferred by 8 U.S.C. § 1103(a)(3) and 6 U.S.C. § 202. In addition, there is a long history of discretionary relief exercised by those responsible for enforcing the immigration laws (previously the Attorney General and now the Secretary of Homeland Security), including deferred action, which was formalized in 1975.

b. Both district courts, however, regarded the relevant statutory provisions, particularly 8 U.S.C.A. § 1225(a) and (b), to require that the President must take action to initiate removal proceedings. The problem with this reading, however, is that it would prevent not only the 2012 and 2014 Memoranda, but also any other discretionary relief not authorized by statute.

2. Legal Effects of Deferred Action: Another critical issue is the extent to which the Memoranda create legal rights that require statutory authorization.

a. Both the district court decisions invalidating the Memoranda emphasized that they went beyond merely declining to take enforcement action (on an individualized basis), deferred action status meant that, for a specified period of years, an alien was not unlawfully present and could obtain papers authorizing him or her to work. From this perspective, the Memoranda effectively created a new category of aliens who are lawfully present, which (as the Memoranda themselves acknowledge) only Congress may do.

b. From the Administration’s perspective, the existing statutes and regulations already contemplate this status. Thus, for example, 8 U.S.C. § 1182(a)(9)(B)(ii) provides that “an alien is deemed to be unlawfully present in the United States if the alien is present in the United States . . . without being admitted or paroled.” Other statutes specifically reference deferred action. For example, the REAL ID Act of 2005, Pub.L. No. 109–13, div. B, 119 Stat. 231, requires states to examine documentary evidence of lawful status for driver’s license purposes, including “deferred action status.” Id. § 202(c)(2)(B)(viii), (C)(ii). From this perspective, the Memoranda exercise existing statutory authority.
V. EXECUTIVE AGREEMENTS AND IRAN’S NUCLEAR PROGRAM

A. Foreign Policy and Partisan Polarization: Traditionally, the President has been accorded great deference in the conduct of foreign policy because “politics stops at the water’s edge.” If this saying ever held true, it no longer appears to be case, as reflected this spring when 47 Republican Senators published an open letter to the leadership of Iran warning that any agreement with President Obama regarding that country’s nuclear program was of dubious legality and could not be relied on going forward.

1. Propriety of Letter: One separation of powers question is whether the Senators overstepped their legitimate role in relation to separation of powers. Even assuming that any agreement would be a treaty that requires Senate consent, it is the President’s responsibility to negotiate on behalf of the nation and congressional intervention designed to derail negotiations might interfere with that power. The focus of this discussion, however, is on whether the President has authority to enter into such an agreement without Senate consent.

2. President’s Power to Make an Agreement: This question turns on the extent to which Congress has delegated authority in this area and the President’s independent power to enter into executive agreements.

B. The History of Sanctions Against Iran: The United States first imposed sanctions on Iran in 1979, when President Carter froze Iranian assets in the United States in response the Iranian Hostage Crisis of 1979-80. That crisis was ultimately resolved by an executive agreement, negotiated by President Carter, ratified by President Reagan, and upheld by the United States Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).


   a. Under 22 U.S.C. § 8551(a), most of the sanctions imposed by these statutes will cease when the President finds that Iran has ceased to provide support for international terrorist acts and “ceased the pursuit, acquisition, and development of, and verifiably dismantled its nuclear, biological, and chemical weapons and ballistic missiles and ballistic missile launch technology.”

2. *Implications for Presidential Authority:* Under this statutory framework, the scope of the President’s power depends on whether he takes action pursuant to this statutory framework.

a. If the President can make the necessary findings that the conditions for lifting sanctions have been met, then he would be acting pursuant to delegated authority and his authority is very broad.

b. If, however, the President cannot make the necessary findings or attempts to lift sanctions that are not within the scope of delegated authority, then he is acting contrary to statutory limits, and his actions would be valid only if Congress exceeded its authority in attempting to limit his authority.

C. *Executive Agreement Authority:* The United States Supreme Court has handed down four decisions concerning executive agreements. All four upheld the executive agreements in question, but stop short of holding that the President has a general power to enter into agreements.


a. *Belmont* and *Pink* concerned the same executive agreement, known as the “Litvinov Assignment,” which resolved disputed claims to property that had been nationalized by the Soviet government after the Russian revolution. Under the agreement, the United States relinquished claims to property in the Soviet Union and the Soviet Union relinquished claims to property located in the United States. That property (which had belonged to Russian nationals) was used to compensate United States citizens for their property that had been located in the Soviet Union. By resolving these disputed claims, the agreement paved the way for the recognition of the Soviet Union and establishment of diplomatic relations. The Supreme Court held that the agreement was within the President’s power, that it preempted contrary state law, and that it did not violate the Takings Clause. For present purposes, the key issue was the first one. In upholding the agreement as within Presidential authority, the Court emphasized two factors. First, the agreement was incidental to the establishment of normal diplomatic relations with the Soviet Union. Second, the Court observed that the Litvanov assignment had been “tacitly recognized” by Congress, which had authorized the appointment of an official to determine the claims of United States citizens under the agreement.

b. In *Dames & Moore*, the Court upheld the executive agreement that resolved the Iranian hostage crisis. Some of the provisions in the agreement were within the International Emergency Economic Powers Act (IEEPA) and upheld on that ground, but other provisions were not. Nonetheless, the Court considered that the IEEPA and other relevant statutes “indicat[ed] congressional acceptance of a broad scope for executive action in circumstances such as those presented in this
case.” The Court also reasoned that, in light of a longstanding historical practice accepted by Congress, the President had the independent authority to settle claims on behalf of U.S. nationals. This power could be inferred because “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.”

c. In Garamendi, the Court upheld an agreement in which President Bush committed the federal government to support a regime established to address the insurance claims of Holocaust victims and their families, concluding that it preempted contrary state legislation. Citing Belmont, Pink, and Dames & More, the Court stated broadly that “our cases have recognized that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.” The Court also observed that “[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice . . . .”

2. Implications: Insofar as the Court upheld the agreements in all three cases, they might be read broadly to support a general presidential authority to make executive agreements. Nonetheless, the cases may also be read more narrowly in light of two factors that the Court emphasized in the cases:

   a. Incidental to an Independent Presidential Power: The executive agreements in the cases were in some sense connected to the exercise of an independent power of the President. In Belmont and Pink, the agreement was incidental to the recognition of governments, a power that is implicit in the President’s role as chief representative in diplomatic relations, and has textual support in the power to “receive” ambassadors. In Dames & Moore, the Court described the longstanding practice of settling claims of U.S. nationals, which had been accepted by Congress, as an “historical gloss” on presidential power. Garamendi also referred to this power.

   b. Congressional Acquiescence: In all the cases, the President could claim some congressional support. In Belmont and Pink, Congress had enacted legislation to implement the Litvinov assignment, and thus “recognized” it. In Dames & Moore Congress had “invited” the President to make this sort of agreement by delegating broad discretion under the IEEPA and other relevant statutes. And in Garamendi it was also clear that Congress was aware of and had at least tacitly acquiesced in the policy underlying the agreement.

3. Application to a Potential Agreement: In view of these precedents, it would appear that the President would have authority to enter into an agreement with Iran unless (1) it is contrary to statute; or (2) it concerns a matter of such import that it must be addressed in a treaty.
a. The President might be able to claim that any agreement would be incidental to a specific presidential power. Such an agreement might be incidental to the reestablishment of diplomatic relations, which would be analogous to Belmont and Pink. Or the President might claim that it is incidental to the President’s Commander in Chief Power and historical roles in protecting national security. These claims would likely be sufficient if there is also congressional acquiescence, but might not be sufficient to overcome congressional disapproval.

b. If an agreement concerning sanctions is based upon the requisite statutory findings and deals only with sanctions the President is authorized by statute to lift, he can claim to be acting pursuant to delegated authority and with the acquiescence or even approval of Congress. The fact that a minority of Senators may have expressed disapproval in a letter would not alter that fact, since they lacked the power to rescind statutory authority and cannot be said to speak on behalf of either the Senate or Congress as a whole. If the President does not act in accordance with the statute, however, his power is much lower and the agreement would likely be invalid.

c. Even if the President may claim congressional acquiescence, it may be that some matters can only be addressed by means of a treaty. It is clear that the framers feared foreign entanglements and intentionally imposed a high threshold for treaties. Although it is often assumed that executive agreements made pursuant to statutory authority are valid, statutory authority is not the same as approval by 2/3 of the Senate. In view of the historical understanding, for example, it is not clear that an executive agreement, even with statutory authority, could be used to commit the United States to the defense of another country. In other words, some matters might be so important that only a treaty will do. This issue, however, has never been addressed by the Court and none of the executive agreement cases even suggest that such a limit exists.

VI. CONCLUSION

A. Differences of Degree vs. Kind: As these examples suggest, the unilateral actions of the Obama Administration in response to partisan polarization build on historical precedents established by Presidents of both parties. While the use of recess appointments, prosecutorial discretion, and executive agreements might go further than prior actions, the differences are a matter of degree and not of kind. They might exceed the limits of presidential power, but they are not a radical departure from those precedents.

B. The Future: For the short term, it appears that partisan polarization is here to stay. Even if the Republicans gain control of the White House in the next election, procedural obstacles will continue to limit the ability of Congress to act, and the public’s appetite for divided government may result in the loss of Republican control of Congress in subsequent elections (as occurred under Clinton, Bush II, and Obama). In the meantime, the issues presented by unilateral presidential action may or may not be resolved by the courts, in view of justiciability issues and the prospect that presidential policies may change before the Supreme Court has a chance to determine the issues.