A SHEEP IN WOLF'S CLOTHING: ASSESSING THE DANGEROUS, HIDDEN, AND INCREASING DEFECTS OF THE IRAN NUCLEAR AGREEMENT REVIEW ACT

David S. Jonas[†] *& Erielle Davidson*[††]

TABLE OF CONTENTS

I. INTRODUCTION

When the Iran Nuclear Agreement Review Act of 2015 ("INARA")[1] was first proposed, it was touted as a serious hurdle to the Obama Administration's conclusion of the Joint Comprehensive Plan of Action ("JCPOA"),[2] a non-legally binding plurilateral arms control agreement aimed at curbing Iran's nuclear program.[3] At the time of its passage, Senator Bob Corker, a Republican from Tennessee, one of the main architects of INARA, boasted that the legislation took "power back from the president" by compelling congressional review of the JCPOA (and any future agreement with Tehran), regardless of whether the agreement was legally binding.[4] Then-Senate Majority Leader Mitch McConnell, a Republican from Kentucky, assured on the Senate floor that INARA "offers the best chance to provide the American people, and the Congress they elect, with power to weigh in on a vital issue."[5] In short, it was seen by many as practicable and objectively good legislation.

---

† Partner, FH+H; Former General Counsel, National Nuclear Security Administration; Former General Counsel, Defense Nuclear Facilities Safety Board; Adjunct Professor, Georgetown University Law Center, The George Washington University Law School, and former Adjunct Professor at the U.S. Naval War College. B.A., Denison University; J.D., Wake Forest University School of Law; LL.M., The Judge Advocate General's School, U.S. Army; LL.M., Georgetown University Law Center; M.A., U.S. Naval War College. Mr. Jonas previously served in the U.S. Marine Corps, concluding his service with the Joint Chiefs of Staff as the nuclear nonproliferation planner. The views expressed herein are his own and do not necessarily reflect the official policy or position of any organization in the U.S. Government that the author has been affiliated with. The authors thank Professor David A. Koplow for his insightful comments on the article.

† † Georgetown University Law Center, J.D. 2022. Middlebury College, B.A. 2015. Associate Director of the Center for the Middle East and International Law ("CMEIL") at George Mason University's Antonin Scalia Law School; Editor-in-Chief of the *Georgetown Journal of Law and Public Policy*, Vol. 19. The views expressed herein are her own.

1 Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201.

2 S.C. Res. 2231 (July 20, 2015).

3 Kali Robinson, *What Is the Iran Nuclear Deal?*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/what-iran-nuclear-deal [https://perma.cc/N6JK-P7J8] (Aug. 18, 2021, 9:20 AM).

4 Allison Colburn, *Haley Wrongly Says Congress Had No Input on Iran Nuclear Deal*, POLITIFACT (Oct. 19, 2017), https://www.politifact.com/factchecks/2017/oct/19/nikki-haley/haley-wrongly-says-congress-had-no-input-iran-nucl/ [https://perma.cc/DYH6-DEVM].

5 Press Release, Mitch McConnell, U.S. Sen., McConnell Calls for Senate Passage of Iran Nuclear Agreement Review Act (May 6, 2015),

As the United States attempts to resurrect the JCPOA (or possibly formulate an entirely novel arrangement with Iran),[6] INARA has re-entered the congressional vernacular. Despite the praise oft directed at the legislation, this Article examines the various ways in which INARA fell—and continues to fall—short of meeting its purported goal of mandating congressional review and input. While this Article ultimately discourages the long-term use of political commitments in the arms control and nonproliferation space, it makes recommendations for how INARA might be amended in the short term to address its immediate shortcomings. Part II provides an overview of INARA. Part III offers the frequent arguments employed in favor of INARA. Part IV examines the flaws of INARA as it was employed in the first iteration of the JCPOA, and Part V underscores its new (and worsened) defects that have emerged thanks to the impending possibility of either U.S. re-entry into the JCPOA or the conclusion of an entirely new agreement.

II. OVERVIEW OF THE IRAN NUCLEAR AGREEMENT REVIEW ACT OF 2015

The U.S. President has at his or her disposal a variety of instruments when it comes to concluding agreements with foreign states, namely treaties, executive agreements, and political commitments. Treaties, the most robust and legally binding of the three mechanisms, are international agreements that require both the advice and consent of two-thirds of the U.S. Senate in order to enter into force and carry the weight of both domestic *and* international law.[7] Conversely, executive agreements allow the President to sidestep the onerous requirements of Senate review, as they are international agreements entered

https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-calls-for-senate-passage-of-iran-nuclear-agreement-review-act [https://perma.cc/ZT2F-85US].

6 *See* Laurence Norman, *Iran, U.S. Close to Reviving Iranian Nuclear Deal*, WALL ST. J., https://www.wsj.com/articles/u-n-report-shows-iran-has-almost-enough-highly-enriched-uranium-for-a-nuclear-bomb-11646316141 [https://perma.cc/AC4M-EAXL] (Mar. 3, 2022, 3:04 PM).

7 U.S. CONST. art. II, § 2, cl. 2; *see* 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 SEC. L. & POL'Y 589, 591 (2018).

into between the United States and other States without the advice and consent of the U.S. Senate.[8]

Executive agreements may be concluded by the Executive alone (sole-executive agreements), or with the endorsement of Congress in the form of legislative support either before (*ex ante* congressional-executive agreements) or after (*ex post* congressional-executive agreements).[9] Such agreements may or may not be concluded pursuant to a prior treaty. These agreements carry the force of international law and are considered treaties under the Vienna Convention on the Law of Treaties ("VCLT").[10] The Supreme Court has deemed that, if validly concluded, they also carry the force of domestic law, despite not undergoing the Article II treaty process.[11]

Lastly, political commitments represent the weakest iteration of international agreements.[12] They are joint statements of intent and/or commitment that remain politically binding, but not legally binding, on the parties to the statement.[13] If a party to a political commitment opts to violate or withdraw from the agreement, that party faces no legal consequences for its decision, though political backlash is probable.[14] International agreements, and political commitments even more so, demand a tremendous level of good faith from both parties since they are predicated upon trust rather than any legally binding provision.[15]

8 Jonas & Taxman, *supra* note 7, at 591. There is a third category of executive agreements: those concluded pursuant to a prior treaty. This was part of the basis for, for example, the Paris Climate Agreement.

9 Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 638–39 (2020). "*Ex ante*" and "*ex post*" are useful prefixes (and distinctions) popularized by Professor Jack Goldsmith, Learned Hand Professor at Harvard Law School.

10 STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 1, 2 (2018) (citing Vienna Convention on the Law of Treaties art. 2, *adopted* May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)).

11 *See* United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

12 International lawyers do not regard political commitments as international agreements. Such agreements, as understood by international lawyers, carry legal force.

13 MULLIGAN, *supra* note 10, at 12–13.

14 *Id.* at 26.

15 *Id.* at 13. Such trust can be enhanced by including measures of verification into a politically binding agreement, but, again, the lack of legal force means good faith must be present to a substantial degree in both parties.

INARA—an amendment to the Atomic Energy Act of 1954—was passed in anticipation of a political commitment, the JCPOA, set to be concluded with Iran later in 2015. The JCPOA, or "Iran Nuclear Deal," was a non-legally binding arms control agreement between Iran, the European Union, [16] and the P5+1 (United States, United Kingdom, Russia, France, China, and Germany), aimed at curbing Iran's military nuclear program through increased oversight mechanisms in exchange for widespread sanctions relief.[17] Because not one participating State signed the agreement and the agreement itself was based upon each party committing to "voluntary measures," the Obama Administration assured Americans that the agreement did not incur any new domestic or international legal obligations.[18] Via the JCPOA, U.S. sanctions relief arrived in the following four forms:[19] statutory waivers granted by the President requiring renewal every four to six months under a variety of legislation;[20] the rescinding of

16 In some literature, the European Union ("E.U.") is regarded as a direct participant, though Iran and the P5+1 are regarded as the parties at the heart of the negotiations. *See* Kali Robinson, *What Is the Iran Nuclear Deal?*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/what-iran-nuclear-deal [https://perma.cc/V9MJ-SBDV] (June 29, 2021, 1:00 PM).

17 *See Joint Comprehensive Plan of Action*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/e/eb/tfs/spi/iran/jcpoa/index.htm [https://perma.cc/BZ3N-GJA3] (last visited Feb. 18, 2022).

18 Robinson, *supra* note 16.

19 Elena Chachko, *Trump Withdraws from the Iran Nuclear Deal: 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/U45P-G7ZU].

20 *See id.* (providing a detailed list of the legislation whose Executive statutory waiver authority President Obama opted to exercise with the conclusion of the JCPOA: "sections 212-213 of the Iran Threat Reduction and Syria Human Rights Act [22 U.S.C. §§ 8722–23]; sections 1244-1247 of the Iran Freedom and Counter-proliferation Act [22 U.S.C. §§ 8803–8806]; section 1245(d) of the National Defense Authorization Act for fiscal year 2012, also known as the Kirk-Menendez Amendment [22 U.S.C. § 8513a(d)]; and section 4(c)(1)(A) of the Iran Sanctions Act (as amended) [Pub. L. No. 104-172, Stat. (1996) (codified as amended at 50 U.S.C. 1701 note)]").

prior Executive Orders (Orders 13574,[21] 13590,[22] 13622,[23] 13645,[24] and sections 5, 6, 7, and 15 of 13628[25]); the delisting of those individuals and entities placed on the U.S. Treasury Department's list of Specially Designated Nationals ("SDN") and Foreign Sanction Evaders;[26] and the lifting of secondary sanctions previously triggered by

21 Exec. Order No. 13,574, 3 C.F.R. § 254 (2012). Titled "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Sanctions Act of 1996, as Amended," the Order implemented the provisions put forth in the Iran Sanctions Act ("ISA") against the persons enumerated in the Act. *Id.* § 1–3. Such provisions included those which prohibited U.S. financial institutions from providing loans or credit to any ISA-sanctioned person, prohibited imports from entering the United States if from an ISA-sanctioned person, and enabled the Secretary of the Treasury to block all U.S. property and interests in U.S. property held by an ISA-sanctioned person. *Id.* § 1.

22 Exec. Order No. 13,590, 3 C.F.R. § 284 (2012). Titled "Authorizing the Imposition of Certain Sanctions with Respect to the Provision of Goods, Services, Technology, or Support for Iran's Energy and Petrochemical Sectors," the Order placed various sanctions on any person who "sells, leases, or provides to Iran goods, services, technology, or support" over a certain value that would assist Iran in developing either its petroleum or petrochemical production capabilities. *Id.* § 1.

23 Exec. Order No. 13,622, 3 C.F.R. § 290 (2013). Titled "Authorizing Additional Sanctions with Respect to Iran," the Order placed various sanctions on both financial institutions and individuals who conducted or facilitated financial transactions with the National Iranian Oil Company ("NIOC") or Naftiran Intertrade Company ("NICO"), or who partook in transactions involving the purchase or procurement of petroleum or petrochemical products from Iran. *Id.*

24 Exec. Order No. 13,645, 3 C.F.R. § 298 (2013). Titled "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions with Respect to Iran," the Order placed various sanctions on both financial institutions and individuals who conducted or facilitated transactions involving the purchase or sale of Iranian rials or who kept accounts of significant value in rials outside of Iran. *Id.*

25 Exec. Order No. 13,628, 3 C.F.R. § 218 (2013). Titled "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions with Respect to Iran," the Order implemented a host of provisions put forth in the Iran Threat Reduction and Syria Human Rights Act ("ITRSHRA"), including the provision which

> prohibit[s] an entity owned or controlled by a United States person and established or maintained outside the United States from knowingly engaging in any transaction directly or indirectly with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would be prohibited by an order or regulation issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) if the transaction were engaged in by a United States person or in the United States.

22 U.S.C. § 8725(b).

26 Jennifer R. Williams, *A Comprehensive Timeline of the Iran Nuclear Deal*, BROOKINGS INST. (July 21, 2015), https://www.brookings.edu/blog/markaz/2015/07/21/a-comprehensive-timeline-of-the-iran-nuclear-deal/ [https://perma.cc/A8R3-SAL7].

designations on the U.S. Treasury Department's lists.[27] Primary sanctions, including those limiting direct transactions with the government of Iran, remained in place following "Implementation Day" of the JCPOA.[28]

Despite the heavy national security implications of the agreement, which was "designed and intended to do nothing less than to reshape the balance of power in the Middle East,"[29] President Obama's decision to conclude the JCPOA as a mere political commitment meant Congress had minimal input in the agreement, rendering the JCPOA a genuine, and arguably worrisome, anomaly in the nuclear nonproliferation realm.[30] Thus, INARA, with its emphasis on congressional review, was borne from valid concern that a deal of serious national security import—namely, the lifting of sanctions on a rogue regime in pursuit of nuclear weapons—was to be concluded with minimal input from Congress.[31]

---

27 *See* Comprehensive Iran Sanctions, Accountability, and Divestment Act, 22 U.S.C. §§ 8501–8551; *see also* Iran Freedom and Counterproliferation Act, 22 U.S.C. §§ 8801–8811.

28 *See* THE WHITE HOUSE, THE IRAN NUCLEAR DEAL: WHAT YOU NEED TO KNOW ABOUT THE JCPOA 22 (2016), https://obamawhitehouse.archives.gov/sites/default/files/docs/jcpoa_what_you_need_to_know.pdf [https://perma.cc/34SF-MMXC].

29 David S. Jonas, *Joe Biden Should Treat the Iran Nuclear Deal as a Treaty*, WASH. TIMES (Dec. 29, 2020), https://www.washingtontimes.com/news/2020/dec/29/david-s-jonas-joe-biden-should-treat-iran-nuclear-/ [https://perma.cc/WYZ3-ZHU3]; *see also* Robert Malley, *The Unwanted Wars*, FOREIGN AFF. (Nov./Dec. 2019), https://www.foreignaffairs.com/articles/middle-east/2019-10-02/unwanted-wars?utm_medium=promo_email&utm_source=lo_flows&utm_campaign=registered_user_welcome&utm_term=email_1&utm_content=20210911 [https://perma.cc/QV83-N5D6] (noting the way in which Malley, former Special Assistant to President Obama and current Special Envoy for Iran described the Obama Administration's rebalancing approach to the Middle East: "[Obama's] ultimate goal was to help the region find a more stable balance of power that would make it less dependent on direct U.S. interference or protection. Much to the Saudis' consternation, [Obama] spoke of Tehran and Riyadh needing to find a way to 'share' the region"). Some viewed the JCPOA as having far more narrow goals. *See, e.g.*, Tony Badran, *Malley in Wonderland*, TABLET (Nov. 18, 2019), https://www.tabletmag.com/sections/israel-middle-east/articles/malley-in-wonderland [https://perma.cc/Y7UV-QQA9].

30 Jonas, *supra* note 29.

31 *Id.* Some agreements in the nonproliferation space, such as the Presidential Nuclear Initiatives of 1991–1992, have occurred in non-legally-binding form, but none with a rogue state and of this magnitude. The Presidential Nuclear Initiatives resulted in a reduction of the U.S. nuclear arsenal and involved a single participant—the United States. The same could be said of the Helsinki Accords and the Vienna Document.

INARA stipulates that, *inter alia*, any "agreement related to the nuclear program of Iran . . . regardless of the form it takes,"[32] concluded between the Executive branch and Iran must be submitted to Congress for review within five days of conclusion.[33] Congress then has thirty days to review the transmitted papers,[34] after which Congress may halt the Executive's lifting of sanctions associated with the agreement, *only if* Congress passes a joint resolution *with a two-thirds majority* "stating in substance that the Congress does not favor the agreement."[35] If Congress either fails to pass a resolution of any kind or passes one approving the agreement via a simple majority, then the Executive may proceed in lifting sanctions against the regime pursuant to the concluded agreement.[36] During the congressional review period, however, the Executive branch may not lift sanctions on Tehran.[37]

In addition to including Congress immediately after the agreement's preliminary conclusion, INARA also demands that the Executive supply Congress with a compliance certification every ninety days, certifying that: (1) "Iran is transparently, verifiably, and fully implementing the agreement, including all related technical or additional agreements";[38] (2) Iran has not committed an *uncured* material breach;[39] (3) Iran has not taken actions, either covert or otherwise, "that could significantly advance its nuclear weapons program";[40] and (4) the suspension of sanctions demanded by the deal in question are "appropriate and proportionate" in relation to the measures taken by Iran and are "vital to the national security interests of the United States."[41] Congress may re-impose sanctions within sixty days if certification is not provided or if a material breach is reported.[42]

Lack of certification alone, however, is not enough to "kill" the deal. When President Trump began preparing for the United States' exit from the JCPOA, he did not provide certification for the deal when it was due in October of 2017.[43] However, he still renewed the

32 42 U.S.C. § 2160e(h)(1).
33 42 U.S.C. § 2160e(a)(1).
34 42 U.S.C. § 2160e(b)(1).
35 42 U.S.C. § 2160e(c)(2)(B).
36 42 U.S.C. § 2160e(c)(2)(A), (C).
37 42 U.S.C. § 2160e(b)(3).
38 42 U.S.C. § 2160e(d)(6)(A)(i).
39 42 U.S.C. § 2160e(d)(6)(A)(i)–(ii).
40 42 U.S.C. § 2160e(d)(6)(A)(i), (iii).
41 42 U.S.C. § 2160e(d)(6)(A)(iv).
42 42 U.S.C. § 2160e(e)(1)(A).
43 Chachko, *supra* note 19.

statutory sanctions waivers and refrained from re-issuing previously rescinded executive orders and re-listing formerly blacklisted individuals and entities.[44] In turn, Congress did not act to re-impose sanctions on Tehran.[45] These actions (or lack thereof) were enough to sustain the deal, absent certification.[46]

III. "BETTER THAN NOTHING": THE CASE FOR INARA

The argument in defense of INARA is succinct and logical: INARA allows for congressional review of and input on any agreement with Iran that is *not* an Article II treaty—in other words, in instances in which such review and input otherwise would not be afforded. This Part discusses in detail the degree to which INARA expands Congress' role in the conclusion of political commitments and executive agreements with Iran.

A. Congressional Input

In theory, there remains a case for INARA and, at cursory glance, it is reasonable largely because of the recent veering away from Article II treaties and Congress' growing willingness to accept "better than nothing" in terms of access to documents of foreign policy import. In the case of the JCPOA, the opposition to submitting the JCPOA as a treaty was strategic. Obama deliberately cast the JCPOA as a non-legally binding agreement knowing that partisan gridlock would preclude the conclusion of a treaty and opposition amongst prominent Democrats would thwart even a congressional-executive agreement.[47] But Congress still craved some sort of input.[48]

Authored by Senate Foreign Relations Committee Chairman Senator Bob Corker, along with vocal anti-regime figures in the Senate, including Republicans Senator John McCain, Senator Ted Cruz, Senator Mitch McConnell, and Senator Lindsey Graham, INARA ultimately passed in the Senate by a margin of 98-1 and in the House by

44 *Id.*

45 *Id.*

46 *Id.*

47 Bob Corker, *Americans Deserve to Know How We Stand on Iran Deal*, TENNESSEAN (Sept. 6, 2015), https://www.tennessean.com/story/opinion/contributors/2015/09/06/americans-deserve-know-we-stand-iran-deal/71811670/ [https://perma.cc/BHS3-NCX6].

48 *See id.*

400-25.[49] Its passage became reflective of a larger *bipartisan* anxiety about congressional involvement in grave matters of national security, though the degree to which INARA genuinely addressed the problem (rather than simply placing a thin bandage on it) would prove to be severely limited.

Such anxiety is well-founded. Since the 1930s, over ninety percent of all international agreements entered by the United States have been executive agreements.[50] And though the overall number of international agreements recently has declined each year, the process of treaty formation in particular "is on a path to obsolescence," as noted by Professors Oona Hathaway, Curtis Bradley, and Jack Goldsmith.[51] The data supports their conclusion. President George W. Bush submitted roughly twelve treaties per year to the Senate for review under Article II.[52] His successor, President Obama, submitted approximately five treaties per year to Congress.[53] Meanwhile, President Trump submitted five treaties *over the course of his entire term*.[54] As of April 7, 2022, President Biden has submitted two treaties to Congress.[55] In contrast to such meager treaty numbers, Presidents Bush, Obama, and Trump each concluded *hundreds* of executive agreements over the course of each of their tenures.[56] Given the reduced voice of Congress in the conclusion of executive agreements, the degree of input that Congress has been permitted to offer on international agreements has

49 *Id.* It is hard to imagine that many members of Congress fully understood what they were doing with INARA. Some may well have been surprised to learn that unless they obtained a two-thirds vote against the JCPOA, Obama had a green light to proceed. One wonders if it was an intentional means of giving the President an opening to make the deal.

50 Hathaway, Bradley & Goldsmith, *supra* note 9, at 632.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 On November 16, 2021, President Biden submitted the "Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (the 'Montreal Protocol'), adopted at Kigali on October 15, 2016, by the Twenty-Eighth Meeting of the Parties to the Montreal Protocol (the 'Kigali Amendment')," and on April 7, 2022, he submitted the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Albania. *Treaty Documents Received in the Senate During the Current Congress*, U.S. SENATE, https://www.senate.gov/legislative/trty_rcd.htm [https://perma.cc/3X9U-24GL] (last visited Apr. 13, 2022).

56 *Treaties and Other International Acts Series (TIAS)*, U.S. DEP'T OF STATE, https://www.state.gov/tias [https://perma.cc/UL8D-MEDT] (last visited Aug. 2, 2021). The value was arrived at by summing the number of non-Article II treaty agreements listed each year.

experienced a steady decline—one that INARA makes some effort to rectify.

The harsh reality of the JCPOA is that Congress cannot force the Executive to submit an international agreement to the Senate for advice and consent under Article II. Assuming the substance of the agreement falls under the constitutional authority of the Executive, the decision of whether to submit an agreement as an Article II treaty lies within the discretion of the Executive.[57] Following the Supreme Court's 1983 decision in *Immigration and Naturalization Service v. Chadha*, Congress also lacks the ability to hold a vote to invalidate an executive action (though it may pass laws to supersede an executive action).[58]

Though there are roadblocks embedded within both the Constitution and modern legislation to thwart heavy-handed executive action, the sanctions relief offered to Iran in the JCPOA was entirely within the power of the Executive. However, other sanctions established by statute could not be removed pursuant to their status as non-legally binding agreements. Admittedly, the ability of the Executive to conclude international agreements is cabined by the Constitution, which actively envisaged (and understood) the gravity of international agreements, the national repercussions they might produce, and the need for the legislature to weigh in on such matters.[59] As Professors Hathaway, Bradley, and Goldsmith note, this understanding largely accounts for why treaties constitute the bulk of international agreements in the early years of the United States and continued to be a popular mechanism until World War II.[60] That being said, the Executive derives its legal authority to conclude certain executive agreements and political commitments from independent constitutional powers accorded to it, such as the role of Commander-in-Chief, which has justified various

57 Even for agreements that are outside the realm of sole presidential constitutional authority, the Circular 175 procedure grants the President sole discretion to decide whether to cast the agreement as an Article II treaty or as a congressional-executive agreement.

58 Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). For further discussion of *Chadha*'s implications, see Hathaway, Bradley & Goldsmith, *supra* note 9, at 633–34. It is worth noting that Congress can pass a law that can supersede a prior treaty or executive agreement as a rule of decision for a U.S. court. Such a decision would not invalidate the treaty or executive agreement under international law but certainly would invalidate it under domestic law.

59 Hathaway, Bradley & Goldsmith, *supra* note 9, at 641.

60 *Id.* at 639.

military arrangements, or the implied power to recognize foreign states, which has led to executive agreements that codify recognition.[61]

Despite the Executive's power to conclude executive agreements and political commitments—which may include the imposition or lifting of sanctions—sanctions authority more generally is diffused between *both* the Executive and Congress. While the Executive often imposes economic sanctions either under the National Emergencies Act or the International Emergency Economic Powers Act, the Executive may also be granted the authority to impose a wide variety of sanctions by discrete legislation; however, this power may be limited by Congress in a variety of ways.[62] For instance, in the case of Iran, in order for the President to *terminate* sanctions[63] imposed under the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"),[64] as well as under the Iran Threat Reduction and Syria Human Rights Act of 2012 ("ITRSHRA")[65] and Iran Freedom and Counterproliferation Act of 2012 ("IFCA"),[66] the President must certify to Congress the following:

> (1) the Government of Iran has ceased providing support for acts of international terrorism and no longer satisfies the requirements for designation as a state sponsor of terrorism . . . [; and]
>
> (2) Iran has ceased the pursuit, acquisition, and development of, and verifiably dismantled its, nuclear, biological, and chemical weapons and ballistic missiles and ballistic missile launch technology.[67]

---

61 *Id.* at 640.

62 *See* DIANNE E. RENNACK, CONG. RSCH. SERV., RL43311, IRAN: U.S. ECONOMIC SANCTIONS AND THE AUTHORITY TO LIFT RESTRICTIONS 5–7 (2020) for a full explanation of sanction-lifting authority vis-à-vis Iran.

63 *Id.*

64 Comprehensive Iran Sanctions, Accountability, and Divestment Act, 22 U.S.C. §§ 8501–8551.

65 Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (codified as amended in scattered sections of 22 U.S.C.).

66 Iran Freedom and Counterproliferation Act of 2012, 22 U.S.C. §§ 8801–8811.

67 22 U.S.C. § 8551(a)(1)–(2). It is worth noting that Iran has signed both the Biological Weapons Convention, which prohibits the development, production, acquisition, and use of biological weapons, and the Chemical Weapons Convention, which prohibits the development, production, acquisition, and use of chemical weapons. *See* Biological Weapons Convention, *opened for signature* Apr. 10, 1972, 1015 U.N.T.S. 163; Chemical Weapons Convention, *opened for signature* Jan. 13, 1993, 1975 U.N.T.S. 45. Therefore, the demands of CISADA are congruent with current expectations placed upon Iran.

However, in order to *waive* or suspend sanctions pursuant to CISADA, ITRSHRA, and IFCA, the President need only show that lifting such sanctions is "in the national interest of the United States."[68] Such waivers are temporary and require repeated renewal, but they allow the President to sidestep the onerous process of certifying what is extremely unlikely: that Iran is no longer a terror-sponsoring state engaging in weapons proliferation.[69] Thus, given the constitutional basis for executive agreements, combined with the waiver authority granted in various pieces of legislation, President Obama's agenda for Iran was constitutionally proper and would not have necessitated congressional review.

Since members of Congress opposed to the JCPOA did not have the votes needed to reimpose sanctions forfeited by the agreement with Tehran, INARA provided a statutory basis for the congressional review—and a narrow window for defeating the JCPOA—that was not already present in the Constitution or relevant legislation. Congress surely could have terminated the JCPOA at any time by passing legislation to reimpose sanctions, although this would have required overriding a presidential veto.

B. Transparency

Relatedly, by demanding congressional review of *any* agreement with Iran, INARA theoretically mandated a level of transparency that is not at all afforded by the conclusion of political commitments. It nominally "pulled back the curtain" on a series of high-level, controversial negotiations of which Congress was generally unaware, but not privy to the details. To understand the level of transparency INARA attempted to compel, it is first worth examining the traditional transparency regime reserved for international agreements that are not Article II treaties—namely, executive agreements and political commitments. In short, as the Executive trends toward *less* transparency, particularly within the realm of executive agreements, INARA represented one attempt to force congressional oversight over U.S. dealings with Iran.

---

68 22 U.S.C. § 8551(b)(1).

69 In his Senate confirmation hearing in January of 2021, then-nominee for Secretary of State Antony Blinken confirmed that he still considered Iran to be the largest state sponsor of terrorism. *See Nomination of Hon. Antony J. Blinken to Be U.S. Secretary of State: Hearing Before the Sen. Comm. on Foreign Rel.*, 117th Cong. 37 (2021).

1. Transparency Requirements for Executive Agreements

Executive agreements are subject to several basic requirements that fall under the umbrella of the Circular 175 ("C-175") procedure, derived from a 1955 U.S. State Department Circular concerning treaties and other international agreements.[70] According to the Foreign Affairs Manual ("FAM") compiled by the U.S. State Department, "[t]he C-175 procedure facilitates the application of orderly and uniform measures to the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements, and facilitates the maintenance of complete and accurate records on such agreements."[71] Notably, the C-175 procedure applies only to documents that are binding under international law.[72]

First, the U.S. State Department is required by statute to publish both treaties and executive agreements into which the United States enters.[73] This obligation, however, has been qualified by various exceptions since its enactment seventy years ago, as Professors Hathaway, Bradley, and Goldsmith have traced in their own discussions of faulty transparency regimes for non-Article II international agreements.[74] These professors begin by pointing to the original statute stipulating publication, which declared that the Secretary of State, pursuant to 1 U.S.C. § 112a, must "cause to be compiled, edited, indexed, and published" each year:

> *all* treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed.[75]

70 MULLIGAN, *supra* note 10, at 11.

71 U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL § 721 (2006).

72 *Circular 175 Procedure*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/s/l/treaty/c175/index.htm [https://perma.cc/CH3U-HZ5E] (last visited Jan. 28, 2022).

73 Hathaway, Bradley & Goldsmith, *supra* note 9, at 645.

74 *Id.*

75 1 U.S.C. § 112a(a) (emphasis added). As noted by Professor David Koplow while reviewing this Article, there is a bit of circularity in the term "proclaimed" since the power to proclaim (or not proclaim) still lies with the Executive. If the Executive opts not to "proclaim" the agreement, then the statute does not require it to be published, and the possibility of secret agreements remains.

The all-encompassing statute, first passed in 1950, was eventually amended in 1994 in response to the fact that the State Department had difficulty publishing the agreements in a timely fashion.[76]

The new language included a provision that allowed for the State Department to refrain from publishing an agreement for a variety of reasons, including if "the public interest in such agreements is insufficient to justify their publication . . ."[77] or if "the public disclosure of the text of the agreement would, in the opinion of the President, be prejudicial to the national security of the United States."[78] The Code of Federal Regulations eventually expanded the initial five exemptions provided by the 1994 amendment to sixteen categories.[79] The result of such legislation is that many executive agreements simply go unpublished. According to a report by Elizabeth Goitein of New York University's Brennan Center for Justice, of the executive agreements (sole, *ex ante*, and *ex post*) and treaties concluded between 2004 and 2014, forty-two percent went unpublished.[80]

In addition to publishing requirements, the Executive also faces reporting requirements vis-à-vis Congress. As asserted by Professors Hathaway, Bradley, and Goldsmith, pursuant to the Case-Zablocki Act, the Executive must transmit all international agreements that are not Article II treaties to Congress "as soon as practicable after such agreement[s] ha[ve] entered into force with respect to the United States but in no event later than sixty days thereafter."[81] Subsequent regulations adopted by the State Department have included the additional requirement of an accompanying background statement as well.[82]

Legally binding international agreements nonetheless might find themselves disqualified from the U.S. State Department's reporting requirements, as noted by Professors Hathaway, Bradley, and Goldsmith.[83] According to State Department implementing regulations, an "international agreement" subject to Case-Zablocki reporting standards must be "legally binding, and not merely of political or personal

76 Hathaway, Bradley & Goldsmith, *supra* note 9, at 646.

77 Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 138(2)(b)(2), 108 Stat. 382, 397 (1994) (codified at 1 U.S.C. § 112a(b)).

78 1 U.S.C. § 112a(b)(2)(D); *see* ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., THE NEW ERA OF SECRET LAW 48 (2016).

79 22 C.F.R. § 181.8(a) (2021).

80 GOITEIN, *supra* note 78, at 49.

81 1 U.S.C. § 112b(a).

82 *See* 22 C.F.R. § 181.7(c) (2021).

83 Hathaway, Bradley & Goldsmith, *supra* note 9, at 650–51.

effect."[84] Furthermore, agreements which are implementing in nature and "are closely anticipated and identified in the underlying agreement" but not regarded as distinct agreements themselves are not subject to Case-Zablocki reporting requirements.[85] Those agreements containing "[m]inor or trivial undertakings, even if couched in legal language and form" also are exempted from Case-Zablocki reporting requirements.[86] As argued by Professors Hathaway, Bradley, and Goldsmith, the State Department has progressively whittled away at what documents constitute "international agreements" and, therefore, at what must be subject to publishing and reporting requirements.[87]

2. Transparency Requirements for Political Commitments

Since political commitments are not legally binding—unlike executive agreements—there is *no provision under federal law that requires the Executive to debrief, much less notify, Congress when it concludes a political commitment*.[88] Because of the general opaqueness associated with political commitments, the mechanism has perpetually disgruntled Congress, especially if the agreement proposes possible U.S. military action.[89] However, no binding legislation has been passed to address this concern.[90] Furthermore, since political commitments are nonbinding, the C-175 procedure does not apply.[91]

3. Transparency Requirements Under INARA

Given the nonexistent nature of reporting and publishing requirements for political commitments and the sheer complexity of the JCPOA, INARA carves a new window, albeit small, into the

84 22 C.F.R. § 181.2(a)(1) (2021).

85 *Id.* § 181.2(c).

86 *Id.* § 181.2(a)(2).

87 *See generally* Hathaway, Bradley & Goldsmith, *supra* note 9.

88 MULLIGAN, *supra* note 10, at 13.

89 *See id.* In 1969, Congress passed the National Commitments Resolution demanding that any "national commitment," including "the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country . . . by the use of Armed Forces . . . either immediately or upon the happening of certain events," be affirmed by both executive *and* legislative action. S. Res. 85, 91st Cong. (1969). Because this item was a Senate resolution, it was non-binding. However, it did capture the growing tension between the Executive and Legislative branches with regard to what *types* of agreements ought to require congressional input.

90 MULLIGAN, *supra* note 10, at 13.

91 *Circular 175 Procedure*, *supra* note 72. The U.S. State Department explicitly delineates political commitments as ineligible for the C-175 treatment. *Id.*

machinations of a highly complex arrangement. INARA stipulates that any agreement between the United States and Iran must be subject to congressional review. According to INARA,

> [t]he term 'agreement' means an agreement related to the nuclear program of Iran *that includes the United States*, commits the United States to take action, or pursuant to which the United States commits or otherwise agrees to take action, regardless of the form it takes, whether a political commitment or otherwise, and regardless of whether it is legally binding or not, including any joint comprehensive plan of action entered into or made between Iran and any other parties, *and any additional materials related thereto, including annexes, appendices, codicils, side agreements, implementing materials, documents, and guidance, technical or other understandings, and any related agreements*, whether entered into or implemented prior to the agreement or to be entered into or implemented in the future.[92]

Thus, INARA not only provided a narrow mechanism for defeating the JCPOA but also granted members of Congress the ability to review both the agreement and related documents, such as annexes, appendices, and side agreements *involving the United States as a participant* within a much timelier fashion and with access to far more material than even is generally afforded executive agreements. While INARA did not demand full transparency, as discussed later in the Article, it undoubtedly improved the level of access granted to Congress for any non-Article II agreement concluded with Iran. As Part IV will demonstrate, however, the degree of improvement was minimal and ultimately shielded the architects of the JCPOA from criticism without providing Congress with the necessary materials for full and complete review.

IV. THE FAILURES OF INARA IN THE AGE OF JCPOA 1.0

Despite INARA's congressional review period and increased level of transparency, the insufficiencies of the legislation far outweigh its perceived strengths. When INARA was first proposed, it was touted as a real and substantive mechanism for reviewing the JCPOA (and any future agreement with Iran).[93] As this Part will demonstrate,

92 42 U.S.C. § 2160e(h)(1) (emphasis added).

93 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),

however, such a portrayal was a far cry from reality. President Obama expressed concern as INARA traveled through the congressional pipeline, concern which created the illusion that the legislation had real teeth and genuinely might disrupt the JCPOA agenda.[94] Skeptics, particularly on the right, continued to emphasize the weakness of the Act, however.[95] The tortured story of the JCPOA—from conclusion to withdrawal to now potential reentry—reveals that initial concerns over INARA were largely well-founded. In turn, this Part details the *original* failures of INARA after its first invocation following the conclusion of the JCPOA in 2015.

A. Transparency in Name Only

The architects of INARA initially peddled the legislation as providing an opportunity for substantive congressional review and consideration. The assurances were not merely that congressional review was a true anomaly for political commitments (it was), but that the review afforded by INARA gave Americans the opportunity to "see just how bad [the JCPOA] was."[96] "Congress got a real vote on the deal," assured Lester Munson and Jamil Jaffer, two former staffers on the Senate Foreign Relations Committee and vocal supporters of INARA.[97] These assurances were simply untrue, however, in part because of how poorly written the legislation was.

The language of INARA precluded Congress from considering outside agreements between Iran and other parties.[98] Facially, such an exclusion would seem reasonable if it is Congress' ambition to review agreements to which the United States is a party. But the structure of the JCPOA was such that many of the key provisions, such as disclosures related to Tehran's nuclear program and various inspection procedures, were *not* present in the "bare bones" agreement between the United States and Iran, but rather embedded in various side agreements between Iran and the International Atomic Energy Agency

https://www.nationalreview.com/2016/11/iran-nuclear-deal-congress-review-obama-deal-was-important-inara/ [https://perma.cc/JE32-4ZDJ].

94 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/7BL3-UGV7].

95 *Id.*

96 Munson & Jaffer, *supra* note 93.

97 *Id.*

98 42 U.S.C. § 2160e(h)(1).

("IAEA").[99] Furthermore, the Obama Administration and Tehran agreed to numerous arrangements that were not in the text of the JCPOA but nonetheless likely had a bearing on the conclusion of the deal.[100] These arrangements included U.S. forgiveness of Tehran's noncompliance with previous caps on stockpiles of low-enriched uranium and heavy water,[101] permission for the IAEA to no longer supply extensive reporting on Iran's nuclear program,[102] and a $1.7 million payment to Tehran in exchange for the release of four American hostages.[103] The details of these arrangements were not included in the documents transmitted to Congress for review.

To Congress' credit, there are some hints that it anticipated these various sources of opacity but attempts to rectify the issue were minimally effective. For instance, section 135(a)(3) of INARA explicitly excludes the "EU-Iran Joint Statement made on April 2, 2015" from being transmitted to Congress for congressional review.[104] However, as Professor Eugene Kontorovich of George Mason University's Antonin Scalia Law School asserts, such an exclusion should theoretically have been unnecessary.[105] The definition of agreement supplied in section 135(h)(1) stipulates the review of agreements only between the United States and Iran—or, more technically, "that includes the United States, commits the United States to take action, or pursuant to which the United States commits or otherwise agrees to take action . . . ."[106] Therefore, stating the exclusion of the EU-Iran Joint Statement seems superfluous, unless Congress understood that relevant side agreements would be subject to review, *just not this one*.[107] In other words, Congress' explicit exclusion of the EU-Iran Joint

99 Teresa Welsh, *Kerry Denies Seeing Iran Deal's Side Agreements*, U.S. NEWS (July 28, 2015), https://www.usnews.com/news/articles/2015/07/28/kerry-denies-seeing-iran-nuclear-deals-side-agreements [https://perma.cc/QF5G-VKHK].

100 McCarthy, *supra* note 94.

101 *Id.*

102 *Assessing the Iran Deal: Hearing Before the H. Subcomm. on Nat'l Sec. of the Comm. on Oversight & Gov't Reform*, 115th Cong. 21 (2017) (statement of David Albright, President, Institute for Science and International Security).

103 McCarthy, *supra* note 94.

104 42 U.S.C. § 2160e(a)(3).

105 Eugene Kontorovich, *Opinion: Legislative History and Congress's Increasingly Strong Case vs. Sanctions Relief*, WASH. POST (Sept. 17, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/17/legislative-history-and-congresss-increasingly-strong-case-vs-sanctions-relief/ [https://perma.cc/93CK-ELLK].

106 42 U.S.C. § 2160e(h)(1).

107 Kontorovich, *supra* note 105.

Statement suggests that Congress likely anticipated being able to review side agreements intimately related to the JCPOA, such as those agreements between Iran and the IAEA, even if the United States was not nominally a party. This anticipation existed to such a degree that Congress felt it necessary to exclude certain documents.[108]

Those advocating in favor of INARA prior to its passage echoed similar sentiments of inclusivity with regards to what documents were eligible for review. Professor Kontorovich points to Representative Ted Deutch, a Democrat from Florida, who justified his support of INARA on the House floor in May of 2015, stating, "[b]efore Iran gains access to billions of dollars in frozen assets, I want the details. I want details on conditions for sanctions relief and access to military sites and unannounced inspections, and you should, too."[109] Representative Nita Lowey, a Democrat from New York, echoed a similar understanding that congressional access to the JCPOA meant congressional access to possible arrangements between Iran and the IAEA: "Any deal must include full and unfettered inspections by the International Atomic Energy Agency of any facility, military or otherwise—including Parchin, Fordow, Natanz—and Iran must account for the possible military dimensions of its past activities."[110] These statements by Representatives Deutch and Lowey reflect a forgivable misunderstanding on the part of Congress as to which documents INARA forced into the sunlight, a confusion wrought from poorly written legislation. From this vantage point, INARA's intentions were nobler than its execution evinced.

B. Specificity

While presenting ambiguity problems vis-à-vis what constitutes an "agreement" for the purposes of congressional review, the language of INARA also suffers from *over specificity* in certain key provisions, namely those that stipulate a specific date. The first instance in which this specificity is problematic is in section 135(b)(2), in which the period of congressional review is granted a thirty-day extension if the agreement is submitted during Congress' August recess, *but only if that recess falls between July 10, 2015 and September 7, 2015.*[111] A

108 *Id.*

109 161 CONG. REC. H2980 (daily ed. May 14, 2015) (statement of Rep. Ted Deutch); *see* Kontorovich, *supra* note 105.

110 161 CONG. REC. H2979 (daily ed. May 14, 2015) (statement of Rep. Nita Lowey).

111 42 U.S.C. § 2160e(b)(2).

textualist reading of this legislation would limit the application of the extension to those dates specified, meaning that any agreement beyond the JCPOA would not be afforded the benefits of this extension should the President conclude an agreement with Iran that is not an Article II treaty during any August recess in the future.

Another instance in which specificity is problematic is in the definition provided in section 135(h)(6) (clarifying the term in section 135(a)(3)(A)), which posits that the EU-Iran Joint Statement to be excluded from review "means only the Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif made on April 2, 2015, at Lausanne, Switzerland."[112] The highly specific nature of the exclusion does little to clarify whether *future* EU-Iran joint statements should be actively excluded from future congressional reviews. The wording of the legislation does not spell out whether *that* statement is problematic or whether the problem is joint statements *in general*. The specificity also generates confusion over whether *some* agreements not between the United States and Iran should, in fact, be reviewed.

C. Quickening the Collapse of Article II Treaties

Arms control and nonproliferation agreements of serious consequence have historically been concluded as Article II treaties. Arms control agreements of "serious consequence" may include "regime-creating" agreements (such as the Nuclear Nonproliferation Treaty or the United Nations Charter) or "regime-altering" agreements (those agreements that "directly and significantly impact the arsenals of nuclear weapons states . . . or the ability of [non-nuclear weapons states] to acquire a weapons program[,] and treaties that prohibit an entire class of conventional weapons").[113] The JCPOA, as a multilateral nonproliferation agreement seeking to limit the ability of a non-nuclear weapon state to acquire a nuclear weapon, fits squarely into the regime-altering category of arms control agreements.[114] While sole-executive agreements do appear in the arms control arena, they usually emerge in order to reiterate prior commitments or confidences. Oftentimes, those agreements will reference congressional approval if funding is at issue.[115] Rarely, if ever, has a political commitment been

112 42 U.S.C. § 2160e(h)(6).

113 Jonas & Taxman, *supra* note 7, at 606.

114 *Id.* at 610.

115 *Id.* at 594. There are limited instances in which an Article II treaty and a related congressional-executive agreement are concluded simultaneously, as in the instance

concluded to address a nonproliferation matter of this magnitude; "it is a wonder that the most significant nuclear nonproliferation agreement of a generation was not conducted as an Article II treaty."[116] At the least, it could have been an executive agreement. The SALT I Interim Agreement on Strategic Offensive Arms was a congressional-executive agreement, concluded simultaneously with the Anti-Ballistic Missile Treaty—which was handled as an Article II treaty[117]—which showed that, right from the start of the process of reaching strategic nuclear agreements, the Executive and Legislative branches were willing to frame important agreements in both formats.

Though INARA attempts to alleviate the sting by introducing *some* level of congressional review, it creates an executive "workaround" that will ultimately have damaging consequences in the long term. INARA essentially normalizes political commitments on issues of serious national security import by window dressing these agreements with an incredibly weak (and limited) form of congressional review. INARA allows any political commitment with Iran to "borrow" the Article II political legitimacy traditionally reserved for treaties by requiring a show trial of congressional review that is neither robust, thorough, nor particularly effective at checking executive power. With regards to the latter descriptor, it is worth noting that INARA inverts the "Advice and Consent" requirement of Article II.[118] Instead of an agreement requiring the consent of two-thirds of the Senate in order to survive, under INARA, the default is survival—two-thirds of each House must vote in favor of a resolution *disapproving* of the agreement in order to effectively kill it.[119] In short, the Executive is increasingly less likely to take the treaty route if legislation akin to INARA is enacted that ultimately shields the Executive from

of the Anti-Ballistic Missile Treaty and the Strategic Arms Limitation Treaty I on Strategic Offensive Arms.

116 *Id.* at 610.

117 Treaty on the Limitation of Anti-Ballistic Missile Systems, Soviet Union-U.S., May 26, 1972, 944 U.N.T.S. 13.

118 U.S. CONST. art. II, § 2, cl. 2.

119 Andrew C. McCarthy, *Democrats Cash GOP's Check, Ending Iran Sanctions*, NAT'L REV. (Sept. 12, 2015, 8:00 AM), https://www.nationalreview.com/2015/09/iran-deal-corker-sanctions-obama-republicans/ [https://perma.cc/6X5T-SDC7]. It is worth noting that though unusual, the inverted procedure is not entirely novel. Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, 120 Stat. 2726, has a similar procedural mechanism, whereby any follow-on nuclear agreement struck with India can be defeated *only if* Congress adopts a joint resolution of disapproval. *See* United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, Pub. L. No. 110-369, 122 Stat. 4028 (2008).

criticism, for INARA has all the outward trappings of serious congressional review but with less substance and far fewer consequences.

V. THE FAILURES OF INARA IN THE AGE OF JCPOA 2.0

During the 2020 election, President Biden campaigned heavily on re-entry into the JCPOA, or "JCPOA 2.0," arguing that the Trump Administration's exit in May of 2018 constituted a serious mistake.[120] As soon as President Biden entered office, reviving the Iran Nuclear Deal became a primary focus of the U.S. State Department; as of August of 2021, the United States had concluded six rounds of negotiations with Tehran but has yet to successfully re-enter the JCPOA.[121] Discussions of resuscitating the deal or possibly formulating an entirely new one have, unsurprisingly, revived debates over INARA and Congress' controversial role in the conclusion of international agreements with Iran. As congressional opponents of U.S. re-entry into the JCPOA examine possible avenues of resistance, INARA has once again come under scrutiny, exposing either new flaws in the legislation or exacerbating old ones, as discussed in detail below.

A. What is an Agreement?

Despite section 135(h)(1) of INARA providing an extensive definition of what constitutes an "agreement" for the purposes of congressional review, the latest rounds of debate over U.S. re-entry have reinvigorated discussions over what constitutes an agreement. As former Assistant Secretary of State Stephen Rademaker asserts, if the Biden Administration successfully maneuvers U.S. re-entry into the deal, the Administration will, likely, attempt to sidestep INARA by arguing: (1) that re-entry into the JCPOA does not constitute a new agreement and therefore, (2) since the JCPOA was already subjected to congressional

120 Joby Warrick & Anne Gearan, *Biden Has Vowed to Quickly Restore the Iran Nuclear Deal, but That May Be Easier Said Than Done*, WASH. POST (Dec. 9, 2020, 8:00 AM), https://www.washingtonpost.com/politics/2020/12/09/biden-foreign-policy-iran/ [https://perma.cc/25D3-R5SW]. A pertinent issue is whether Congressional approval should be required for the President to withdraw the United States from a treaty.

121 *U.S. Expects Seventh Round of Iran Nuclear Talks; No Details When*, REUTERS (July 7, 2021, 3:49 PM), https://www.reuters.com/world/middle-east/us-expects-seventh-round-iran-nuclear-talks-no-details-when-2021-07-07/ [https://perma.cc/YJK4-T78J].

review under INARA in 2015, a second round of review now is unnecessary.[122]

By treating President Trump's exit from the JCPOA (and subsequent Iranian non-compliance with the JCPOA) as a mere interruption to a singular deal, the Biden Administration ignores the fact that any reentry into the JCPOA may require concluding a separate pathway to reentry to bring all parties into compliance.[123] Furthermore, given the degree of non-compliance on the part of Iran for the past several years,[124] the *substance* of the United States' arrangement with Iran has categorically changed, thanks to the different environment and circumstances in which the renewed arrangement would operate. One must wonder, however, that if the participating states were to agree to return to the original JCPOA, exactly on its original terms, if it would still be the same agreement and no new vote would be required under INARA.

Representative Michael McCaul, a Republic from Texas, Ranking Member of the House Foreign Affairs Committee, led a number of congressmen in composing a letter to Secretary of State Antony Blinken in June of 2021, urging the Biden Administration to comply with INARA by submitting *any* agreement it concludes with Iran for congressional review.[125] Representative McCaul's argument that INARA applies to U.S. reentry into the JCPOA is precipitated on the notion that reentry does not represent simply a "continuation" of the 2015 agreement, since Iran "is farther down the road toward a nuclear weapon than it was when the original JCPOA was concluded."[126] In other words, the agreement that Congress reviewed and approved

122 Stephen Rademaker, *Why a Return to the JCPOA Will Be Even Harder Than Many Think*, REALCLEAR (Mar. 1, 2021), https://www.realclearworld.com/articles/2021/03/01/why_a_return_to_the_jcpoa_will_be_even_harder_than_many_think_731930.html [https://perma.cc/3KXD-9CJR].

123 *Id.*

124 The IAEA began reporting in July of 2019 that Iran was exceeding certain JCPOA-mandated limits on its nuclear activities. However, Iran's tortured relationship with the IAEA—from refusals to grant access to sites to failures to notify the IAEA of changes to its uranium enrichment program—long predate Iran's JCPOA noncompliance. PAUL KERR, CONG. RSCH. SERV., RL40094, IRAN'S NUCLEAR PROGRAM: TEHRAN'S COMPLIANCE WITH INTERNATIONAL OBLIGATIONS 4, 13 (2021).

125 Letter from Michael McCaul et al., Ranking Member, H. Foreign Aff. Comm., to Antony Blinken, U.S. Sec'y of State (June 14, 2021), https://gop-foreignaffairs.house.gov/wp-content/uploads/2021/06/Final-HFAC-IranINARA-letter-6.14.21.pdf [https://perma.cc/BU69-8KZK].

126 *Id.* at 2.

ultimately was accepted under entirely different circumstances—the circumstances surrounding the deal represent a facet of the deal itself, and the circumstances have changed dramatically. But as Representative McCaul argued to Secretary Blinken:

> It is impossible to resume mutual compliance with the JCPOA as written and considered by Congress six years ago as though it were the continuation of the same agreement. The United States withdrew from the JCPOA over three years ago . . .. In the interim, as you testified on June 7, 2021[,] Iran's nuclear program has been 'galloping forward', with numerous violations of the nuclear limitations of the JCPOA . . ..
>
> These violations make it impossible to simply 'return' to the JCPOA, because Iran's noncompliance has changed the deal itself. Many of Iran's key JCPOA commitments involved categorically forswearing certain [research and development] and enrichment activities for a period of 8, 10, or 15 years (depending on the activity) from the effective date of the agreement. Once violated, those commitments were irretrievably broken, and can no longer be complied with as drafted.[127]

Despite Representative McCaul's arguments, the ambiguity in section 135(h)(1) of INARA affords the Biden Administration the limited leeway it needs to argue that INARA is simply inapplicable.[128] That the Biden Administration's argument against INARA's application is somewhat cogent—and likely to survive both internal and public criticism—speaks to the poor crafting of INARA itself. Since political commitments rise and fall at the whim of the Executive—and the JCPOA (and Iran, for that matter) remain particularly polarizing issues—the language of INARA should flatly have anticipated the possibility of exit and re-entry from any non-Article II treaty agreement with Iran.

If Congress wisely seeks to amend INARA, below is a suggested rewording of section 135(h)(1) that would mandate review of previously entered agreements. The amended language appears in italics:

> The term 'agreement' means an agreement related to the nuclear program of Iran that includes the United States, commits the United States to take action, or pursuant to which the United States commits or otherwise agrees to take action, regardless of the form it takes, whether a political commitment

127 *Id.*

128 42 U.S.C. § 2160e(h)(1).

> or otherwise, and regardless of whether it is legally binding or not, including any joint comprehensive plan of action entered into, *including those to which the United States was previously a participant*, or made between Iran and any other parties, and any additional materials related thereto, including annexes, appendices, codicils, side agreements, implementing materials, documents, and guidance, technical or other understandings, and any related agreements, whether entered into or implemented prior to the agreement or to be entered into or implemented in the future.

Of course, the Biden Administration's weak justification for bypassing INARA following JCPOA re-entry should be rendered irrelevant, if the Administration jettisons the JCPOA and seeks a new arrangement instead. As of September of 2021, abandoning the JCPOA completely seems increasingly likely, as the Biden Administration ponders offering limited sanctions relief in exchange for a freeze on Iran's more pernicious nuclear activities.[129] The Administration may argue that, because the lifted sanctions comprised *some* of those lifted under the JCPOA, relief from such sanctions has already been reviewed under INARA.[130] An understanding of basic contract law would render this argument fatuous, as it is understood that it is not the *individual sanctions* which are subject to INARA review, but the total package that they collectively compose, with the term "agreement" capturing the holistic nature of the congressional review requirement. While the current language of section 135(h)(1) should apply to any arrangement the Biden Administration ultimately negotiates with Iran, the language should be clarified to leave absolutely no ambiguity.

B. No Recourse in the Instance of a Lawless Executive

As a result of section 135(h)(1)'s ambiguous language and the subsequent exercise of executive discretion, Congress has virtually no recourse should the Executive determine that a particular agreement with Iran does not constitute an "agreement" under section 135(h)(1). Members of Congress could file suit against the President in federal court for violating INARA, but the suit likely would be dismissed,

129 *US Said to Mull Easing Sanctions on Iran in Exchange for Nuclear Freeze*, TIMES OF ISR. (Aug. 9, 2021, 6:12 PM), https://www.timesofisrael.com/us-said-to-mull-easing-sanctions-on-iran-in-exchange-for-nuclear-freeze/ [https://perma.cc/293K-4WCE].

130 *See* E-mail from the Hon. Stephen Rademaker, Senior Of Counsel, Covington & Burling, to author (Aug. 12, 2021, 8:03 AM) (on file with authors).

potentially under the political question doctrine.[131] This quandary has become particularly acute in the wake of the Biden Administration's recent negotiations with Tehran, as some members of Congress rightfully fear they will not have any access to the latest nonproliferation arrangement with Iran.

From a negotiations standpoint, the Biden Administration likely does not want to submit to Congress the agreement detailing U.S. re-entry into the JCPOA (or any possible arrangement, for that matter) because doing so will hamstring the Administration from being able to offer Tehran the immediate sanctions relief the regime currently seeks.[132] Were such an arrangement to be submitted to Congress for congressional review, preparing the paperwork alone for transmittal would take close to one month following preliminary U.S. re-entry, after which Congress would have thirty days to review the documents.[133] During both transmittal and review, the Biden Administration would be prohibited from providing sanctions relief to Iran and, as a consequence, would likely be pressured to offer compensation to the regime to ensure conclusion of the agreement.[134]

C. The Materialization of the August Recess Problem

Since the United States has not yet re-entered the JCPOA, but the Biden Administration remains keen to do so, the concern over the INARA congressional review period coinciding with the August recess remains a legitimate fear.[135] The text of INARA does not account for such an occurrence, as the dates provided for congressional extension are specific to 2015. Without this extension, upon transmission of the documents, Congress will have thirty days for review, regardless of whether it is in session. Congress could (and should have) amended INARA to rectify this error by adding language that would grant an extension for recess, regardless of the year.[136] Until the language of INARA is amended, the simple clash between any congressional recess and INARA review will persist. A suggested rewording of section 135(b)(2) appears below, with the suggested revision in italics:

131 *See* Telephone Interview with the Hon. Stephen Rademaker, Senior Of Counsel, Covington & Burling (July 14, 2021).

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

> (2) Exception. —The period for congressional review under paragraph (1) shall be 60 calendar days if an agreement, including all materials required to be transmitted to Congress pursuant to subsection (a)(1), is transmitted pursuant to subsection (a) *during any congressional recess, as mandated by the Legislative Reorganization Act of 1970*.

VI. CONCLUSION

While INARA continues to be advertised as a real weapon in confronting the use of political commitments in the arms control and nonproliferation arena, its passage amounts to the functional equivalent of bringing a knife to a gunfight. The legislation is not only poorly written and ill-suited to carry out its purported aims, but it is also emblematic of a possibly larger, and worrisome, trend in the national security space, namely the erasure of Congress' voice in matters of serious national security import. Congress has not helped itself in this area by consistently proving how difficult it is for treaties to obtain advice and consent.

As presidents continue to shy away from concluding Article II treaties, legislation like INARA represents the dying breath of a Congress eager to say something—*anything*—in the face of critical and consequential international agreements. As this Article notes, there are short-term "fixes" for INARA, such as amending the language of the legislation to both increase and decrease the level of specificity in the text, but the institutional mindset that INARA represents—including the tacit acceptance of a weakened Congress—cannot be fixed by merely rewording a section 135 provision.