

Trumping Congress

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Modern legal scholars are sharply divided regarding how to interpret the Constitution's assignment of foreign affairs powers to Congress and the President, and the division is augmented when Congress and the President have conflicting foreign affairs impulses. Absent from contemporary legal scholarship is a generally accepted conceptual framework for how to understand the separation of constitutional foreign affairs powers in the event that one political branch's constitutional exercise of its foreign affairs authority conflicts with the other's. Part I of this Note aims to build such a framework, using the text of Articles I and II of the Constitution, Founding Era scholars' understanding of the Constitution's original intent, and a recent Supreme Court case to argue that the President ought to enjoy an exclusive power over diplomacy.

Part II applies the proposed framework from Part I to a real-world situation: the passage of the Countering America's Adversaries Through Sanctions Act (the Act). The Act, which President Trump signed into law on August 2, 2017, illustrates the balance-of-powers predicament created when the President and Congress have conflicting foreign policy goals. Part II argues that the Act is an example of legislation that impermissibly interferes with the President's ability to conduct diplomacy, and it provides certain criteria that, if met, should authorize the President to disregard an act of Congress.

Part III argues that certain provisions of the Act meet those criteria and accordingly should be considered unconstitutional. It then concludes by discussing how the proposed framework will facilitate the resolution of foreign affairs disputes, provide more efficacious foreign policy outcomes, and produce more respect for our constitutional arrangements.

Introduction

The separation of power between the Legislative and Executive Branches of the U.S. government has been the subject of considerable debate throughout the nation's history. Central to this debate is the extent of each political branch's constitutional authority over foreign affairs. It is relatively clear that neither the President nor Congress alone enjoys exclusive power over all aspects of foreign policy, but it is unclear how and to what extent the Constitution allocates foreign affairs powers to each branch. While the Constitution provides some guidance in this area, few constitutional provisions explicitly allocate foreign policy authority to one branch or

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another. And even with certain explicitly assigned constitutional powers, it is unclear which of the two branches has authority over foreign affairs when the President and Congress disagree about foreign policy.

A cooperative arrangement between the President and Congress in the context of foreign affairs is important to the national interest. The details of such an arrangement are complex and elusive, but understanding its intricacies will produce more respect for our constitutional arrangements and provide a sounder, more efficacious foreign policy. An understanding of the division of foreign policy authority between the Legislative and Executive Branches is especially important when the President and Congress appear to have different foreign affairs impulses. The Countering America's Adversaries Through Sanctions Act (the Act) provides a recent example of such a scenario.

Part I of this Note begins by introducing two competing theories for the constitutional division of foreign affairs powers between Congress and the President: executive primacy theory and congressional primacy theory. It identifies each theory's weaknesses and then proposes a general conceptual framework for how to properly understand the separation of constitutional foreign affairs powers in the event that one branch's constitutional exercise of its foreign affairs authority conflicts with the other's. The proposal derives from an analysis of Articles I and II of the Constitution, Founding Era constitutionalists' original understanding of the Executive power, and a recent Supreme Court case, *Zivotofsky ex rel. Zivotofsky v. Kerry*¹ (*Zivotofsky II*). It analogizes the Act to the passport statute at the heart of *Zivotofsky II*, and it argues that the rationale underlying the *Zivotofsky II* Court's decision to permit the President to disregard a congressional foreign affairs statute should be extended to apply to the Act. In so doing, Part I contends that the central argument of this Note is compatible with Justice Jackson's familiar tripartite analysis in *Youngstown Sheet & Tube Co. v. Sawyer*² (the *Steel Seizure Cases*). The ultimate crux of the framework, which resembles certain features of executive primacy theory, is that the Executive should enjoy exclusive constitutional authority to dictate and maintain *diplomacy*.

Part II examines Title II of the Act, which is the portion of the Act that concerns sanctions against the Russian Federation. It first lays out what appear to be Title II's most impactful sanctions, and it explores their probable effect on the United States' overall diplomatic interests.³ It then applies the Part I framework to Title II. In doing so, Part II argues that the Title II

1. 135 S. Ct. 2076 (2015).

2. 343 U.S. 579 (1952).

3. By "overall diplomatic interests," I mean both the direct foreign policy impact of the provisions themselves and the present and future impact laws like the Act are likely to have on our constitutional arrangement. For further explanation of this point, see *infra* section II(A)(1).

sanctions—which limit the President’s flexibility in negotiating with foreign nations, obstruct his ability to conduct sound diplomacy, and set a precedent that will strain future relationships between the President and Congress and between the United States and foreign nations—illustrate that the Executive’s authority over diplomacy *should* prevail over Congress’s foreign affairs authority if certain criteria are met.

Part III concludes the Note and builds on Part II by describing why certain provisions of the Act meet the criteria described in Part II.

I. Competing Theories for the Proper Allocation of the Constitution’s Foreign Affairs Powers

A. *Congressional Primacy Theory versus Executive Primacy Theory*

The Constitution explicitly grants the Legislative and Executive Branches certain prerogatives related to foreign affairs. Namely, among other things, Article I of the Constitution provides Congress the power to legislate,⁴ regulate commerce with foreign nations,⁵ declare war,⁶ and make all laws that are necessary and proper for carrying into execution its enumerated powers.⁷ Article II vests the Executive power in the President,⁸ designates the President commander in chief of the armed forces,⁹ and empowers him to “make Treaties,”¹⁰ “nominate . . . Ambassadors,”¹¹ and “receive Ambassadors and other public Ministers.”¹² Despite these explicit constitutional grants of power, scholars disagree over how to interpret these provisions and how to understand the practical roles they prescribe to each branch for shaping U.S. foreign policy.¹³ Indeed, since the early to mid-twentieth century, scholars have contemplated and debated the nature, scope, and significance of both the President’s and Congress’s constitutional power over foreign affairs.¹⁴ Some hold to an “executive primacy”

4. U.S. CONST. art. I, § 1.

5. *Id.* § 8, cl. 3.

6. *Id.* cl. 11.

7. *Id.* cl. 18.

8. *Id.* art. II, § 1.

9. *Id.* § 2, cl. 1.

10. *Id.* § 2, cl. 2.

11. *Id.*

12. *Id.* § 3, cl. 4.

13. See H. Jefferson Powell, *The President’s Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 527–28 (1999) (describing a split among scholars holding the “Congressional primacy” view, which provides that the Constitution gives Congress the primary role in formulating foreign policy, and those holding the “executive primacy” view, which provides that the President is primarily responsible for forming and carrying out foreign policy).

14. See, e.g., Craig Matthews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 345 (1955) (noting that the extent of the President’s

interpretation, in which the Executive is primarily responsible for shaping U.S. foreign policy; others hold to a “congressional primacy” interpretation, in which Congress possesses the constitutional authority to dictate the majority of foreign policy.¹⁵ Proponents of executive primacy and congressional primacy alike often appeal largely to the Constitution’s text,¹⁶ to the intent and original understanding of the Framers, and to policy considerations to advance their arguments in favor of one view or the other.¹⁷

But both the executive primacy and congressional primacy theories of the distribution of foreign policy power between Congress and the President contain significant shortcomings. A primary argument against executive primacy is that it is ultimately grounded beyond the Constitution’s text. That is, the Constitution’s express grants of power in the Executive, taken alone, are insufficient to support the claim that the Constitution grants the Executive primary authority to conduct U.S. foreign affairs. Executive primacy theory, some contend, depends on extraconstitutional foreign affairs powers as a source of Executive authority, which ostensibly conflicts with the notion that the U.S. Constitution is one of enumerated powers. For example, in *United States v. Curtiss-Wright Export Corp.*,¹⁸ the Court held that “powers of external sovereignty . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary

constitutional authority to conclude international agreements is “one of the most important constitutional issues of recent times”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 238 (2001) (dividing scholars into three camps: “those who think that foreign affairs should be largely controlled by the President, those who see Congress as the dominant power in foreign affairs, and those who find no satisfactory allocation of foreign affairs powers”); Robert F. Turner, *Understanding the Separation of Foreign Affairs Powers Under the Constitution*, N.Y. ST. B.J., Oct. 1988, at 8, 14 (understanding the constitutional grant of executive power to the President as a grant in broad terms but limited by specific grants of power to the Senate and Congress).

15. Powell, *supra* note 13, at 527–28; H. Jefferson Powell, *The Founders & the President’s Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1471–72 (1999).

16. Prakash & Ramsey, *supra* note 14, at 233–34.

17. *See id.* at 288 (“Thus no one insisted that Congress would control foreign relations generally or even specific, seemingly unapportioned powers like communications or direction of diplomatic personnel.”); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs & The Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1664 (2005) (“Jefferson insisted upon the executive’s monopoly over foreign communication.”). As Professor Reinstein explained:

There is no recorded evidence that any of the participants in the drafting and ratifying of the Constitution . . . understood that any provision in the Constitution *vested* [a plenary power to recognize foreign states or governments] in the presidency On the other hand, one cannot conclude with confidence that the Founders deliberately *denied* such a power to the President. If such an executive power does exist . . . its constitutional source must be found in post-ratification theory and practice.

Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 861–62 (2011).

18. 299 U.S. 304 (1936).

concomitants of nationality.”¹⁹ In other words, the source of federal power in foreign affairs is extraconstitutional, existing independently of any textual grant of power.²⁰ The Court then went on to identify the President as the “sole organ of the federal government in the field of international relations”—even if such a plenary and exclusive power in the Executive was not explicitly provided for by the Constitution nor based in some act of Congress.²¹ Despite its recognition of the absence of any enumerated power or congressional act recognizing the President as the sole representative to foreign nations, the Court inferred that such authority belongs to the President nonetheless.²² It suggested that it belongs to the President as a matter of necessity or convenience—as he is best situated to conduct foreign policy and achieve U.S. foreign policy objectives—rather than as a matter of explicit constitutional assignment.²³

Congressional primacy theory also contains weaknesses. First, Article I of the Constitution provides Congress with specific foreign affairs powers, but even taken collectively, these powers fall short of empowering Congress to perform all the functions necessary for executing U.S. foreign policy. In fact, Congress needs the Executive’s participation in order to fully carry out a number of its enumerated foreign affairs powers. Second, the structure of Congress presents challenges to congressional primacy theory. Congress is composed of elected officials whose terms expire every two or six years, and this makes the development of a unified foreign policy difficult. Communication with foreign states is a key component of foreign policy, and the cyclical nature of the political process limits Congress’s ability to develop and maintain a fixed foreign policy message. Many congressional primacy advocates even concede the President’s role as the “sole organ of official communication in foreign affairs,” which leaves Congress with few areas in which it can meaningfully impact and shape foreign policy without

19. *Id.* at 318.

20. See Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 382 (2000) (“The truly radical part of *Curtiss-Wright* is . . . its claim that [Presidential foreign affairs] power arose outside the Constitution.”).

21. *Curtiss-Wright*, 299 U.S. at 320.

22. *Id.* at 319–20.

23. Writing for a majority of the Court, Justice Sutherland explained this unique position occupied by the President:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . [The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.

See *id.* at 319–20.

substantial participation by the Executive.²⁴ Finally, congressional primacy theory relies upon the assumption that “the constitutional thought and practice of the Founding Era are devoid of support” for the view that the President possesses broad authority over foreign affairs—an assumption that is far from generally accepted among scholars.²⁵ Indeed, a reasonable interpretation of the Constitution’s original meaning suggests that Founding Era authority may support aspects of the opposite view—executive primacy.²⁶

B. A More Comprehensive Framework for Understanding the Constitution’s Division of Foreign Policy Authority

The weaknesses of the congressional primacy and executive primacy theories, combined with the tendency of both Congress and the Executive to assert powers that do not attach to any specific constitutional prerogative, reinforce the importance of developing a conceptual framework for understanding the Constitution’s division of foreign policy authority. Such a framework should meet three minimum criteria:²⁷ (1) distribute authority over foreign policy to each branch in a manner consistent with a reasonable reading of the Constitution’s assignments of power in Articles I and II; (2) correspond generally to judicial precedent as expressed by the Supreme Court; and (3) guide the political branches and, when necessary, the courts in resolving disputes that arise between the branches over the assignment of foreign policy authority when one branch’s foreign policy impulses conflict with the other’s. The first component involves an analysis of both the actual text of Articles I and II and Founding Era constitutionalists’ understanding of its meaning and significance. This is important because it ensures that the proposed assignments of power to Congress and the President are faithful to

24. Prakash & Ramsey, *supra* note 14, at 243 (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 14–15 (2d ed. 1996)).

25. See Powell, *supra* note 15, at 1474–75 (arguing that such an assumption is “clearly mistaken”); Prakash & Ramsey, *supra* note 14, at 286, 294 (noting that while the Philadelphia Convention offers little support for either Congressional primacy or executive primacy, the ratification debates provide less support for Congressional primacy than executive primacy). *But see* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY & LAW 177 (1986) (“Articles I and II of the Constitution reveal the intent of the framers to give Congress the dominant hand in the establishment of basic policy regarding foreign relations.”).

26. Powell, *supra* note 15, at 1475.

27. I do not mean to assert that this conceptual structure is unique, nor do I claim that the criteria it includes are exhaustive. Indeed, it may be that a much broader set of criteria—or a more meticulous, comprehensive development of this suggested criteria—is necessary to address the many problems that arise from the tug-of-war between Congress and the President in the context of foreign policy. My aim here is simply to (1) address the shortcomings of current theories for how the Constitution allocates foreign policy authority among the Executive and Congress when they seem at odds regarding their foreign policy objectives, and (2) propose a modest approach for how to remedy the poor outcomes that result from the incomplete nature of modern foreign affairs scholarship.

the Constitution and are grounded in legitimate methods of interpretation. The second component involves examining a modern Supreme Court case that touches on the question of how the Constitution commits foreign affairs powers. The requirement that the framework's proposed distribution of foreign affairs powers correspond generally with modern Supreme Court precedent is important because it means each branch's powers are substantiated by authoritative constitutional interpretation rather than arbitrarily assigned. The third component of the framework is important because it will help each branch better understand the extent to which it can participate in the arena of foreign policy without impermissibly preventing another branch from doing so. It will make it more feasible for opposing branches to work out differences between themselves when disagreements arise, and when judicial intervention is necessary, it will guide the courts in resolving disputes with more clarity.

Indeed, the allocation of authority resulting from this conceptual structure—which focuses on the unique circumstance of diverging foreign policy impulses between Congress and the President—will be efficacious in promoting good outcomes for the nation. Not only will it make for quicker and more legitimate resolutions of disputes than current theories enable, but it will provide a sounder constitutional arrangement of foreign affairs powers and make setting and executing the country's foreign policy objectives a more cooperative process between Congress and the President.

1. *A Brief Textual Analysis of Articles I and II.*—The analysis begins by first assuming that all meaningful constitutional foreign affairs powers belonging to the federal government reside in either the Legislative Branch or the Executive Branch.²⁸ Under this assumption, the text of the Vesting Clauses of Articles I and II provides guidance. While the Article I Vesting Clause provides Congress with all legislative powers “herein granted,”²⁹ the Article II Vesting Clause generally vests “[t]he executive Power” in the President.³⁰ This implies that the legislative powers are limited to those enumerated in Article I, but the executive powers *could* extend beyond the scope of the enumerated powers in Article II. Based on the original assumption that the Legislative and Executive Branches collectively possess all the constitutional foreign affairs powers of the federal government, it follows that any foreign affairs power not fairly understood to reside in Congress as a matter of its enumerated powers or vis-à-vis the Necessary and Proper Clause belongs to the President vis-à-vis an Article II enumerated

28. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 208 (3d ed. 1948) (noting that the Constitution does nothing more than confer certain foreign relation powers upon the President, certain foreign relation powers upon the Senate, and certain foreign relation powers upon Congress).

29. U.S. CONST. art. I, § 1.

30. U.S. CONST. art. II, § 1.

power or through the Article II Vesting Clause.³¹ And of those powers, any that do not fall among the President's enumerated powers belong to the President vis-à-vis the Article II Vesting Clause.³² Such powers are commonly referred to as "residual" executive powers.³³ This is important because it provides that the only foreign affairs powers *not* possessed by the President are those specifically provided to Congress in Article I. Thus, the constitutional allocation of enumerated Article I foreign affairs powers to Congress amounts to a subtraction of powers from the Executive, leaving the Executive with his enumerated powers *plus* all other foreign affairs powers belonging to the federal government ("residual" powers).³⁴

But a textual analysis of Articles I and II still leaves unanswered the question of what the Executive's residual powers comprise (if anything at all)³⁵ and, more critically for the purposes of this Note, whether the Article II powers are collectively robust enough to tip the scales in favor of the Executive over Congress in certain circumstances. Two sources that help answer this question are Founding Era documents and recent Supreme Court precedent.

2. *Founding Era Documents and Statements.*—Contemporary constitutional scholarship focused on understanding the extent of the Executive's foreign affairs powers is informed partly by how the country's Founders and other prominent thinkers during the Founding Era understood such powers.³⁶ Late eighteenth-century and early nineteenth-century statements and documents suggest that some Founding Era scholars

31. Prakash & Ramsey, *supra* note 14, at 253–54.

32. *Id.*

33. *Id.* at 253.

34. *Id.* at 254.

35. This is a contested point; scholars have by no means universally accepted the view that residual powers in the Executive exist in the first place. Compare Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004), with Prakash & Ramsey, *supra* note 14, at 234. Moreover, the Supreme Court is yet to officially interpret the Article II Vesting Clause as a general source of residual foreign affairs powers. Jack Goldsmith, *Zivotofsky II and the Vesting Clause Theory of Presidential Foreign Relations Power*, LAWFARE (Sept. 18, 2015, 7:28 AM), <https://www.lawfareblog.com/zivotofsky-ii-and-vesting-clause-theory-presidential-foreign-relations-power> [<https://perma.cc/E676-3MKZ>]. In any case, this Note does not take a position on the potential breadth of the Executive's residual powers. It simply contends that the power of diplomacy is executive in nature. Whether diplomacy, or for that matter any other constitutional power, is properly understood to be a *residual* power rather than a product of the *enumerated powers alone* is outside the scope of this Note.

36. See, e.g., Powell, *supra* note 13, at 546 (referencing statements made by eighteenth-century thinkers such as Thomas Jefferson and John Marshall that discussed the President's role in conducting foreign affairs); Prakash & Ramsey, *supra* note 14, at 265, 272, 279, 287, 295 (constructing a theory of the Constitution's division of foreign affairs powers by appealing to how eighteenth-century political scientists, delegates to the Continental Congress, participants of the Philadelphia Convention and Ratification Debates, and members of the Washington Administration understood such powers).

understood the Executive to possess considerable authority over foreign affairs. For example, in the *Pacificus–Helvidius* debates, Alexander Hamilton developed a theory that conferred substantial power upon the President to conduct foreign relations—particularly in the context of treaty formation.³⁷ He asserted that the Executive, not Congress, was the “organ of intercourse” between the country and foreign nations.³⁸ Thomas Jefferson, too, argued that the Executive should possess more prominent foreign affairs authority than Congress.³⁹ Specifically, he maintained that “[t]he transaction of business with foreign nations is executive altogether” and that exceptions to that power should be “construed strictly.”⁴⁰ John Marshall echoed this general sentiment in a speech to the House of Representatives in 1800, claiming that “[t]he [executive] department . . . is entrusted with the whole foreign intercourse of the nation.”⁴¹

The Senate Committee on Foreign Relations, in a report it issued to the full Senate body in 1816, appeared to agree with the understanding of Hamilton, Jefferson, and Marshall.⁴² The report recommended that the Senate refrain from passing measures urging the President to engage the United Kingdom in certain negotiations, and it included the claim that “[t]he President is the constitutional representative of the United States with regard to foreign nations.”⁴³ It further asserted that the President “manages [the country’s] concerns with foreign nations, and [the President] must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.”⁴⁴

Though some proponents of executive primacy use such statements and documents to support the theory that the Executive enjoys exclusive and plenary authority over foreign affairs, subject to certain narrow exceptions,⁴⁵ this Note does not go that far. Instead, it simply uses eighteenth- and nineteenth-century documents as support for the proposition that Founding

37. See ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS–HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 11–14 (Morton J. Frisch ed., 2007) (discussing President Washington’s constitutional authority to issue the Proclamation of Neutrality, thus constructing a broad theory of executive power).

38. *Id.* at 11, 56.

39. Powell, *supra* note 13, at 546 (citing Thomas Jefferson, *Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions* (Apr. 24, 1790), in 5 *THE WRITINGS OF THOMAS JEFFERSON* 161 (Paul L. Ford ed., New York, G.P. Putnam’s Sons 1895)).

40. *Id.*

41. *Id.* at 546–47 n.87 (quoting John Marshall, *Speech of Mar. 7, 1800*, in 4 *THE PAPERS OF JOHN MARSHALL* 105 (Charles T. Cullen ed., 1984)).

42. *Id.* at 546–47 (quoting S. COMM. ON FOREIGN RELATIONS, 14TH CONG., 1ST SESS., REP. OF FEB. 15, 1816, reprinted in S. DOC. NO. 56-231, pt. 6, at 21 (1901)).

43. *Id.* at 547.

44. *Id.*

45. *Id.* at 548–49.

Era constitutionalists understood the Executive to enjoy authority over *diplomacy*. This means that “the presidency is the institution on which the Constitution places the duty to look to the Republic’s interests in the international arena.”⁴⁶ This duty involves the formulation of diplomatic goals and policies and the execution of those goals and policies in cooperation with other nations.⁴⁷ It does not follow, however, that Congress is effectively powerless over diplomacy; rather, it follows only that Founding Era scholars and thinkers understood the President to possess the constitutional authorization to set the nation’s diplomatic agenda.

3. *Modern Supreme Court Precedent.*—Contemporary scholars disagree as to the extent to which judicial precedent has provided guidance in determining the proper allocation of foreign affairs powers between the President and Congress,⁴⁸ and the Supreme Court has done little to help resolve their disagreements. In terms of sheer volume, the Supreme Court has issued relatively few opinions addressing direct conflicts between Congress and the President concerning foreign relations.⁴⁹ But it has done so in one recent decision, *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*,⁵⁰ which one scholar, Professor Jack Goldsmith, called “the most important Supreme Court decision ever on the sources and scope of the President’s independent and exclusive powers to conduct foreign relations.”⁵¹

The Supreme Court decided *Zivotofsky II* in 2015 in an opinion that involved evaluating the constitutionality of a certain provision of a federal statute allowing American citizens born in Jerusalem to list their place of birth as Israel on their U.S. passport.⁵² Official U.S. policy, dating back to the Truman Administration, recognizes Israel as a sovereign nation, but it does not recognize Israeli sovereignty over Jerusalem.⁵³ The Court struck down the provision as unconstitutional on the ground that it interfered with the President’s authority to conduct foreign affairs.⁵⁴

46. *Id.* at 546.

47. *Id.*

48. *See id.* at 528 (maintaining that Supreme Court precedent supports the view that the President has unique authority over certain foreign affairs matters). *But see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 36 (2d ed. 1996) (arguing that the Supreme Court has said little about foreign affairs and thus that judicial precedent has far from settled the debate over the extent of each branch’s foreign affairs powers).

49. Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015) (noting that it was “the rare case in which the Supreme Court address[ed] a clash between the political branches concerning foreign relations”).

50. 135 S. Ct. 2076 (2015).

51. Goldsmith, *supra* note 49, at 114.

52. *Zivotofsky II*, 135 S. Ct. at 2082.

53. *Id.* at 2081.

54. *Id.* at 2096.

The majority opinion began by submitting that the President possesses the constitutional authority to “recognize foreign nations and governments.”⁵⁵ For support, the Court looked to the Reception Clause, maintaining that Founding Era international scholars would have understood a President’s act of receiving ambassadors and other public ministers as tantamount to a recognition of the sending state’s sovereignty.⁵⁶ The majority found further support in the President’s additional Article II powers, namely the President’s power to negotiate treaties and to nominate and appoint ambassadors.⁵⁷ These powers, the majority maintained, “give the President control over recognition decisions.”⁵⁸ Finally, the Court then turned to the question of whether the recognition power is *exclusive* to the President,⁵⁹ and it held that it is.⁶⁰ To support its holding, the Court appealed to functional considerations, namely the country’s interest in speaking with one voice regarding recognition, which the President is uniquely situated to do,⁶¹ and judicial precedent and historical practice.⁶² Regarding precedent and history, no prior Supreme Court case directly addressed the division of recognition power between Congress and the President, and the Court acknowledged that the cases that were relevant in helping determine whether the recognition power is exclusive to the Executive were equivocal.⁶³ But ultimately it concluded that, on balance, “a fair reading of the cases shows that the President’s role in the recognition process is both central and exclusive.”⁶⁴

The *Zivotofsky II* decision is significant because it provides an example of a scenario in which the Supreme Court has held that the President may properly disregard a constitutional foreign affairs statute, even when the President’s actions—or, for purposes of this Note, potential actions⁶⁵—fall within Justice Jackson’s third category as described in his concurring opinion in the *Steel Seizure Cases*. In this way, the situation in *Zivotofsky II* is analogous to the situation this Note’s framework attempts to address. Specifically, the passport statute in *Zivotofsky II* is analogous to the Act in that both statutes interfere with the President’s ability to engage in activity that each President asserted⁶⁶ belongs exclusively to the Executive but that

55. *Id.* at 2086.

56. *Id.* at 2085.

57. *Id.*

58. *Id.*

59. *Id.* at 2086.

60. *Id.*

61. *Id.*

62. *Id.* at 2086–95.

63. *Id.* at 2088.

64. *Id.*

65. As of October 10, 2018, President Trump has not taken any action in defiance of the Act.

66. For President Obama, recognizing foreign sovereigns; for President Trump, setting the nation’s diplomatic agenda.

nevertheless lacks an explicit source of power in the Constitution's text. Indeed, the *Zivotofsky II* Court acknowledged as much, pointing out that "the Constitution does not use the term 'recognition,' either in Article II or elsewhere."⁶⁷

Nor does the Constitution explicitly vest in the President the power to dictate and conduct diplomacy, either in Article II or elsewhere. But as the *Zivotofsky II* Court demonstrated, other considerations may be used to show that a foreign affairs power is nevertheless properly understood as exclusive in the Executive. For example, the *Zivotofsky II* Court supported its conclusion that the recognition power belongs exclusively to the Executive by explaining that the Framers and other Founding Era scholars would have understood it that way.⁶⁸ Moreover, the Court contended that functional considerations, namely the country's interest in speaking with one voice and presenting a single, unified policy to foreign countries regarding recognition, which the President is best equipped to do, supported the conclusion that the recognition power is exclusive to the Executive.⁶⁹ These very same reasons support the conclusion that the power over diplomacy belongs exclusively to the Executive,⁷⁰ as the exercise of both the recognition power and diplomacy, while called for in different circumstances, aim to secure the same objective: favorable foreign policy outcomes for the nation.

But the structure for understanding the Constitution's division of foreign affairs authority outlined in Part I contains a conceptual difficulty that, while reconcilable, bears mentioning. The difficulty concerns the framework's compatibility with the *Steel Seizure Cases*. The *Steel Seizure Cases* involved a dispute that arose in 1951 between steel companies and their workers over employment terms and conditions to be included in collective bargaining agreements.⁷¹ In 1952, when the steel companies failed to reach a settlement with the workers' representative, the Union Steelworkers of America, the Union gave notice of a nation-wide strike.⁷² Because of the necessity of steel to support weapons and war materials for use in the then-ongoing Korean War, the President responded to the strike by ordering the Secretary of Commerce to seize the steel mills and keep them in operation.⁷³ The Court concluded that the seizure was an improper exercise of Executive power—one that amounted to executive lawmaking—and struck down the seizure order.⁷⁴

67. *Zivotofsky II*, 135 S. Ct. at 2084.

68. *Id.* at 2085–86.

69. *Id.* at 2086.

70. See discussion *supra* sections II(A)(1), (2), and Part III.

71. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

72. *Id.* at 582–83.

73. *Id.* at 583.

74. *Id.* at 585–89.

In his famous concurring opinion, Justice Jackson presented a tripartite framework for determining the constitutionality of Executive action.⁷⁵ In category one, the President acts pursuant to an express or implied authorization of Congress, and as a result, the President's authority is at its maximum.⁷⁶ In category two, the President acts without either congressional grant or denial of authority.⁷⁷ There, the President can rely only on the President's independent, inherent authority.⁷⁸ In category three, the President takes action incompatible with the expressed or implied will of Congress.⁷⁹ There, the President's 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."⁸⁰ When an Executive action falls within the scope of category three, "[c]ourts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject."⁸¹

In other words, Presidential action taken in defiance of the expressed or implied will of Congress is unconstitutional unless the Court determines that Congress lacks the constitutional authority to act on the matter. It would appear, then, that President Trump taking measures in defiance of the Act would place such action squarely within Justice Jackson's third category. And therein lies the rub: in order for the Part I framework to work in the context of the Act, it must be the case that Congress lacks the constitutional authority to pass the Act—or at least that it lacks authority to pass the specific provisions of the Act the President wishes to disregard. Until 2015, little to no meaningful Supreme Court precedent existed on which the position of this Note could rely. But the Court's ruling in *Zivotofsky II* made such a position possible,⁸² and the same type of rationale the *Zivotofsky II* Court used to

75. *Id.* at 635–38 (Jackson, J., concurring).

76. *Id.* at 635–36.

77. *Id.* at 637.

78. *Id.*

79. *Id.* at 637–38.

80. *Id.* at 637.

81. *Id.* at 637–38.

82. Professor Jack Goldsmith recognized this—acknowledging that the Executive's assertion of the right to defy the passport statute in *Zivotofsky II* fell squarely within Justice Jackson's third category—in his 2015 analysis of *Zivotofsky II*'s precedential value in the executive branch. *See* Goldsmith, *supra* note 49, at 121 ("It is thus significant that in Category Three's first test, the President won and won big."). Goldsmith also briefly mentioned two modern foreign relations situations in which the executive branch may apply *Zivotofsky II* to argue for an exclusive diplomacy power in the Executive: (1) Israeli-related trade promotion authority Congress gave the President in 2015, the stated objectives of which ran counter to the State Department's policy toward the occupied territories in the West Bank, and (2) the controversy surrounding U.S. Soldier Bowe Bergdahl, whose release then-President Obama negotiated in exchange for the release of five Guantánamo Bay detainees in defiance of a statute requiring thirty-day notice to Congress prior to releasing a Guantánamo prisoner. *Id.* at 140. *Zivotofsky II*'s application in the examples presented by Goldsmith tracks my discussion of the Act in Parts II and III of this Note, *infra*.

permit the President to disregard the passport statute should apply here to permit the President to disregard certain components of the Act.

While *Zivotofsky II* does not directly contemplate the power of diplomacy, the Court found support for its argument for an exclusive recognition power in the Executive that tends to support the argument for a similarly exclusive diplomacy power in the Executive. For these reasons, *Zivotofsky II* lends credence to the position that the President could constitutionally take actions that disregard certain provisions of the Act, *Steel Seizure* notwithstanding.

II. The Countering America's Adversaries Through Sanctions Act

On August 2, 2017, President Trump signed into law the “Countering America’s Adversaries Through Sanctions Act.”⁸³ The Act, among other things, codifies certain sanctions imposed by Executive Order (EO) under President Obama and imposes new sanctions against Iran, Russia, and North Korea. The measure received overwhelming bipartisan support in both chambers of Congress, passing in the House of Representatives by a margin of 419–3⁸⁴ and in the Senate by a margin of 98–2.⁸⁵ But President Trump objected to certain provisions of the Act. In particular, after signing the bill, he issued two signing statements expressing his concern that Title II of the Act unlawfully infringes upon the President’s constitutional authority to conduct foreign affairs.⁸⁶

The question raised by the Act is not whether, *taken alone*, Title II contains blatantly unconstitutional provisions. Indeed, the Title II provisions are, strictly speaking, legitimate exercises of constitutional authority by Congress; pursuant to its Article I powers, Congress is entitled to pass legislation imposing sanctions against foreign entities.⁸⁷ Rather, the question is whether, despite the Act’s facial constitutionality, specific provisions of Title II still unconstitutionally encroach upon the President’s authority to conduct foreign affairs. That is, in light of *Zivotofsky II*, do certain provisions of the Act undermine the President’s ability to pursue the President’s diplomatic agenda—an arena this Note argues is exclusive to the Executive?

This Part examines the Title II sanctions, including their likely effects on U.S. foreign policy. It argues that such sanctions—which limit the

83. Countering America’s Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) [hereinafter “The Act”].

84. 163 CONG. REC. H6278-79 (daily ed. July 25, 2017).

85. 163 CONG. REC. S4389 (daily ed. July 27, 2017).

86. President Trump issued two separate, simultaneous signing statements on August 2, 2017 that are similar in their criticisms of the Act. Presidential Statement on Signing H.R. 3364, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 2, 2017); Presidential Statement on Signing the Countering America’s Adversaries Through Sanctions Act, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 2, 2017).

87. Presumably, the constitutional source of power for the Title II sanctions is the Foreign Commerce Clause of Article I.

President's flexibility in negotiating with foreign nations, obstruct the President's ability to conduct sound diplomacy, and set a precedent that will strain future relationships between the President and Congress and between the United States and foreign nations—illustrate that the Executive's authority over diplomacy *should* prevail over Congress's foreign affairs authority in certain limited circumstances. Namely, the Executive should have the authority to defy an otherwise constitutional congressional foreign affairs statute when (1) the congressional enactment materially limits the President's authority over a key aspect of diplomacy and leaves the President no other reasonable constitutional means to dictate and manage that aspect of the country's diplomatic agenda, (2) the legislation reasonably jeopardizes the nation's international interests, and (3) the President's proposed actions reasonably relate to improving the nation's international interests.⁸⁸

A. *Sanctions with Respect to the Russian Federation*

Title II of the Act, which contains most of the provisions President Trump took issue with in his signing statements, concerns sanctions against the Russian Federation.⁸⁹ Section 222 of the Act codifies the Ukraine-related sanctions imposed by EOs 13660, 13661, 13662, and 13685,⁹⁰ and it further codifies the sanctions regarding significant malicious cyber-enabled activity imposed by EOs 13694 and 13757.⁹¹ Section 224 of the Act requires the President to impose sanctions against any person the President determines knowingly engaged on behalf of or assisted the Government of the Russian Federation (GOR) in undermining cybersecurity against another person or entity.⁹² Sections 225 and 226 of the Act amend the Ukraine Freedom Support Act of 2014 to require the President to impose sanctions against foreign persons or foreign financial institutions that the President has determined knowingly made significant investments in special Russian crude oil projects such as Arctic offshore, shale, or deepwater projects.⁹³ Section 231 of the Act requires the President to impose sanctions against any person the President determines knowingly engaged in a significant transaction with

88. *Zivotofsky II* puts the position that the diplomacy power is exclusive to the Executive on stronger footing than the position enjoyed prior to the decision, but it is not alone enough to confer upon the President the authority to defy any congressional foreign affairs statute that the President wishes in the name of diplomacy. These requirements help to ensure that, to the extent a President asserts the diplomacy power to defy an otherwise valid congressional foreign affairs statute, such an assertion properly falls within the limits of diplomacy and is narrowly tailored to achieving an outcome that advances the national interest.

89. The Act, tit. II.

90. *Id.* at § 222(a).

91. *Id.*

92. *Id.* § 224.

93. *Id.* §§ 225, 226 (referring to 22 U.S.C. § 8923(b)(1) (2012) (foreign persons) and § 8924(a) (foreign financial institutions), respectively).

a person who operates for or on behalf of the defense or intelligence sectors of the GOR.⁹⁴ Finally, Section 232 of the Act authorizes the President to impose sanctions against any person who knowingly made an investment in the construction of Russian energy export pipelines.⁹⁵

1. *The Impact of Codifying Sanctions.*—Section 222 represents a significant limitation on the President’s ability to conduct foreign relations with Russia. While the substance of the codified EOs—ranging from sanctioning foreign individuals, businesses, and government officials for undermining democratic processes in Ukraine to sanctioning foreign individuals and officials for engaging in malicious cyber-related activities—is relevant to advancing American interests at home and abroad, Congress’s decision to codify the EOs was motivated by more than mere allegiance to foreign allies or desire to protect U.S. intelligence. It was motivated by growing concerns that, despite Russia’s continued occupation of certain regions in Ukraine and its interference in the 2016 Presidential Election, President Trump planned to unilaterally lift the Obama-era EOs after taking office.⁹⁶ Indeed, President Trump’s message during his campaign and early presidency that he desired to improve U.S.–Russia relations suggested that he planned to soften Washington’s stance toward the Kremlin.⁹⁷ Thus, the codification of Obama-era sanctions against Russia had a clear intent: to prevent President Trump from providing Russia any sanctions relief and from potentially inaugurating a new U.S. foreign policy toward Russia.

Congress’s move to effectively handcuff the President’s ability to keep or lift sanctions against Russia hurts U.S. diplomatic interests. In the first place, Congress’s passage of the Act sends a clear signal to the rest of the world that it does not trust the President to act in the best interests of the country. Second, it limits the country’s ability to present a unified front to the rest of the world, which reduces the effectiveness of American foreign policy. Third, it disturbs the smooth and dynamic flow of international diplomacy. Once sanctions are enshrined in U.S. law, it takes another law to undo them, which reduces other countries’ incentive to negotiate with the United States. They know that Congress will be hesitant to lift what it imposed with bipartisan support, thus making future cooperation and potential exchange of concessions unlikely. Moreover, the prospect of constant congressional division over whether sanctions should remain law or be lifted will limit

94. *Id.* § 231. This includes the Main Intelligence Agency of the General Staff of the Armed Forces of the Russian Federation, or the Federal Security Service of the Russian Federation. *Id.*

95. *Id.* § 232.

96. Michael Isikoff, *How the Trump Administration’s Secret Efforts to Ease Russia Sanctions Fell Short*, YAHOO! NEWS (June 1, 2017), <https://www.yahoo.com/news/trump-administrations-secret-efforts-ease-russia-sanctions-fell-short-231301145.html> [<https://perma.cc/V3HU-3VQN>].

97. *Id.*

future Presidents' ability to renew diplomatic ties with once-sanctioned countries after relations improve.

Enshrining sanctions into law against another country, as Congress did with the Act, can result in poisoned relationships with that country in the long term. Take for example the Jackson–Vanik Amendment of the Trade Act of 1974 (the Amendment), which a bipartisan Congress passed against the wishes of then-President Gerald Ford.⁹⁸ Congress enacted the Amendment in response to unease with the country's trade openings to certain countries—particularly the Soviet Union.⁹⁹ The Amendment denied most-favored-nation status to nations unduly restricting emigration, and the President reserved the right to restore normal trade relations to those nations provided they came into compliance with the requirements of the Amendment and demonstrated that they would substantially promote the Amendment's objectives.¹⁰⁰ The purpose of the Amendment was to apply pressure to governments that were denying citizens fundamental human rights and to promote freer emigration from communist countries.¹⁰¹

From 1974 until 1994, Russia was subject to the Amendment and thus excluded from enjoying normal trade relations with the United States.¹⁰² By 1994, the Soviet Union had collapsed, Russia had opened its gates to allow hundreds of thousands of Jews to emigrate to the United States and Israel, and the Clinton Administration found Russia in full compliance with the Amendment's requirements.¹⁰³ Yet it was not for another eighteen years until the United States granted Russia normal trade relations.¹⁰⁴ Rather than trade and humanitarian policy explaining Congress's refusal to graduate Russia from Jackson–Vanik, such congressional inaction was due to differing diplomatic impulses between the President and Congress. As one scholar noted, it may have been a matter of “political tug-of-war between Congress and the President,” with Jackson–Vanik functioning as “one of the laws with which Congress can irritate the administration.”¹⁰⁵ Whatever the explanation,

98. See, e.g., Memorandum from the President's Assistant for National Security Affairs (Kissinger) to President Ford, U.S. National Security Council, Remarks to the President Regarding the Jackson Amendment to the Trade Bill (Oct. 8, 1974) (noting President Ford's opposition to certain provisions of the Jackson–Vanik Amendment).

99. Robert H. Brumley, *Jackson-Vanik: Hard Facts, Bad Law?*, 8 B.U. INT'L L.J. 363, 365–66 (1990).

100. *Id.*

101. *Id.* at 367.

102. Steven Pifer, *Congress, Russia, and Sanctions*, BROOKINGS (Jan. 18, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/01/18/Congress-russia-and-sanctions/> [https://perma.cc/2GTR-E4GJ].

103. *Id.*

104. *Id.*

105. Julie Ginsberg, *Reassessing the Jackson–Vanik Amendment*, COUNCIL ON FOREIGN RELATIONS (July 2, 2009), <https://www.cfr.org/background/reassessing-jackson-vanik>

the United States' continued application of Jackson–Vanik long after the Cold War ended has negatively impacted U.S.–Russia relations,¹⁰⁶ and the Amendment illustrates the adverse effects permanent laws sanctioning a foreign country can have on the countries' long-term relationship.

2. *Primary and Secondary Sanctions.*—In addition to codifying existing U.S. sanctions against Russia, Title II of the Act provides other sanctions against U.S. and non-U.S. persons and entities for engaging Russia in certain activities and transactions involving cybersecurity, defense and intelligence, and energy. One provision, Section 232, involves discretionary sanctions concerning individuals investing in Russian export pipelines.¹⁰⁷ The other provisions, including Sections 224, 225, 226, and 231, provide mandatory sanctions.¹⁰⁸ Though all are significant, Sections 224, 225, 226, and 231 are especially so because they represent the first time the United States has implemented mandatory *secondary* sanctions—sanctions against non-U.S. persons—targeting Russia.¹⁰⁹

Because of Russia's economic influence in Europe, particularly in the energy sphere, the sanctions implicate the interests of the United States' European allies. Not surprisingly, European leaders have expressed their opposition to the Act since it passed in the House in late July.¹¹⁰ Jean-Claude Juncker, President of the European Commission, issued a statement in response to the Act's passage calling out the United States for failing to sufficiently consider the interests of the European Union (EU).¹¹¹ Concerned about the potentially adverse impact the Act could have on the EU, Juncker said that “the EU would reserve the right to retaliate if the U.S. sanctions disadvantaged” EU companies and noted that the EU would “defend [its] economic interests vis-a-vis the United States.”¹¹² Martin Schäfer, German Foreign Ministry spokesman, expressed similar concerns about the sanctions,

amendment [<https://perma.cc/BG5J-5AYK>] (quoting Anders Åslund, a senior fellow at the Peterson Institute for International Economics and an adjunct professor at Georgetown University).

106. Cory Welt, *Russia, Trade, and Human Rights*, CTR. FOR AM. PROGRESS (Apr. 30, 2012), <https://www.americanprogress.org/issues/economy/reports/2012/04/30/11384/russia-trade-and-human-rights/> [<https://perma.cc/6UNR-RFXQ>].

107. See the Act § 232 (“The President . . . may impose . . .” (emphasis added)).

108. See *id.* §§ 224–226, 231 (all providing sanctions that the President “shall impose”).

109. Peter Jeydel et al., *A Detailed Look at the Countering America's Adversaries Through Sanctions Act*, STEPTOE (Aug. 10, 2017), <https://www.steptoel.com/en/news-publications/a-detailed-look-at-the-countering-america-s-adversaries-through-sanctions-act.html> [<https://perma.cc/WZ2E-GBVW>].

110. Yasmeeen Serhan, *Why Europe Opposes America's New Russia Sanctions*, ATLANTIC (Aug. 2, 2017), <https://www.theatlantic.com/international/archive/2017/08/why-europe-opposes-the-uss-new-russia-sanctions/535722/> [<https://perma.cc/99W7-Z4HP>].

111. *Id.*

112. *Id.*

asserting that it would be “unacceptable for the United States to use possible sanctions as an instrument to serve the interests of US industry policies.”¹¹³

European leaders’ apprehension about the new sanctions stems from legitimate potential threats to the economic interests of European countries. Title II requires the President to impose sanctions against any foreign firm engaged in a business venture with Russian energy companies for the development of Arctic offshore, shale, and other oil and gas projects. These sanctions will not only affect EU countries’ investment opportunities, but they will substantially curb EU countries’ autonomy regarding how to build their energy sectors and grow their economies. With respect to economic autonomy, officials from Germany and Austria issued a joint statement in June 2017 opposing the Act, asserting that “Europe’s energy supply is a matter for Europe, and not the United States of America!”¹¹⁴ Additionally, both proponents and opponents of certain European energy projects that may be subject to the Act’s sanctions agree that “[t]he U.S. should not intervene in the dispute via sanctions or other means.”¹¹⁵

Regarding European leaders’ concerns over the impact the sanctions may have on investment opportunities, experts have pointed to potentially beneficial investment opportunities for Europe that the sanctions could prevent.¹¹⁶ In particular, experts say the sanctions “could undermine partnerships between EU and Russian firms to develop offshore energy projects in Egypt.”¹¹⁷ Moreover, experts claim that the sanctions could also “prevent Italian and Russian companies from working together on the so-called Southern Gas Corridor, which would go through Turkey to southern EU states.”¹¹⁸ And statistics measuring import activity by European countries from Russia suggest that Europe may become *more*, not less, competitive by importing gas from Russia, which the sanctions would prohibit.¹¹⁹ Russian oil prices from 2016 through the beginning of 2018 are relatively low in comparison to Russian oil prices from 2012 through 2014.¹²⁰ This price drop

113. Laura Smith-Spark & Yon Pomrenze, *EU Warns US Over ‘America first’ Russia Sanctions Bill*, CNN (July 27, 2017, 6:36 AM) (quoting German Ministry spokesman Martin Schäfer), <http://www.cnn.com/2017/07/26/europe/russia-us-sanctions/index.html> [https://perma.cc/KL7M-FZ33].

114. Ivana Kottasová, *Europe to U.S.: Your New Russia Sanctions Would Hurt Us Too*, CNN: MONEY (July 24, 2017, 2:29 PM), <http://money.cnn.com/2017/07/24/news/economy/europe-us-sanctions-natural-gas-russia/index.html> [https://perma.cc/22UN-QXV8].

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Chart of Russian Natural Gas Monthly Price—US Dollars per Million Metric British Thermal Unit, INDEX MUNDI (Jan. 5, 2018), <https://www.indexmundi.com/commodities/?commodity=russian-natural-gas&months=60> [https://perma.cc/WMV2-Y39A].

would provide European countries a cost-effective opportunity to grow their energy sectors, but the U.S. secondary sanctions would curb that opportunity. Restrictions such as these have the potential to strain EU–U.S. relations in both the short- and long-term.

Congress’s passage of the Act also represented a clear departure from the way the United States has formerly involved itself in the process of imposing international sanctions against Russia. From 2014 until the Act’s passage in 2017, the United States and the EU have coordinated sanctions intended to cripple the Russian economy and induce the Kremlin to abandon its support for separatists in Ukraine.¹²¹ The effort has been a cooperative one, featuring a commitment from both the United States and the EU to present a unified front against Russia.¹²² According to a 2014 statement by then-President Obama, the close coordination between the United States and the EU was responsible for the sanctions’ success in weakening the Russian economy.¹²³ But in passing the Act, Congress did not first consult with European countries or make any effort to coordinate with them to establish the EU–U.S. unified front that was characteristic of the Obama-era sanctions.

In short, there are a number of practical and functional considerations that demonstrate why the Act’s passage is ultimately costly to the United States. First, the Act’s codification of existing sanctions threatens to spoil any kind of amicable relationship between Russia and the United States in the near future. Just as Jackson–Vanik resulted in a poisoned relationship between the United States and Russia that continued for nearly four decades, the codification of existing U.S. sanctions against Russia enshrines those sanctions into law, which will make them difficult for future Congresses to undo even if Russia comes into compliance with U.S. demands. Second, the Act’s sanctions threaten to harm the economies of European countries and reduce their autonomy of judgment over how to grow their energy sectors. Not only do experts agree that the Act’s sanctions will likely reduce EU countries’ investment opportunities in energy that could potentially grow their economies, officials from those countries have expressed concern over the notion that the United States feels it can punish them for engaging in transactions with Russia.¹²⁴ U.S. disputes with Russia should not translate to EU disputes with Russia, unless the EU independently agrees to participate

121. Peter Spiegel & Geoff Dyer, *EU and US Present United Front with Tough Sanctions on Russia*, FINANCIAL TIMES: RUSSIA BUSINESS & FINANCE (July 29, 2014), <https://www.ft.com/content/1905aac0-1738-11e4-87c0-00144feabdc0> [<https://perma.cc/4MSH-VTDN>]; Gabriela Baczynska, *Factbox: Existing EU sanctions against Russia over turmoil in Ukraine*, REUTERS (Nov. 28, 2018), <https://www.reuters.com/article/us-ukraine-crisis-russia-eu-sanctions-fa/factbox-existing-eu-sanctions-against-russia-over-turmoil-in-ukraine-idUSKCN1NX1A3> [<https://perma.cc/6TY7-DCGR>].

122. Baczynska, *supra* note 121.

123. Presidential Statement on Ukraine, 2014 DAILY COMP. PRES. DOC. 1, 2 (July 29, 2014).

124. See Kottasová, *supra* note 114.

in sanction-related activity, which it did not. Third, the Act represents a deviation from how the United States has previously engaged in the process of imposing sanctions. It did not cooperate with the EU or any other international body or ensure that its allies were on board with the sanctions, which lessens the foreign policy impact of the sanctions because it does not demonstrate to Russia that the sanctions have the support of every country implicated.

Finally, handcuffing the President's ability to engage in strategic diplomatic activities with another world leader sets poor governing precedent. From a domestic standpoint, one branch intentionally preventing another branch from performing its constitutional duties and functions fails to serve the purposes of our constitutional arrangement. The Constitution contemplates cooperation between Congress and the President, but the Act represents Congress's intent to do just the opposite. Indeed, in passing the Act, Congress clearly expressed its opinion that the President could not be trusted to make the right decision on Russia,¹²⁵ so it took the country's diplomatic position on Russia into its own hands. Such politics and lack of cooperation does not bode well for future relationships between Congress and the President. From an international standpoint, the Act presents to Russia two divergent and inconsistent foreign policy messages by Congress and the President, which weakens U.S. negotiating power: What would compel the leader of another country to engage the U.S. President in negotiations when he or she knows the U.S. Congress is constitutionally authorized to pass a bill directly contravening the President's position? Strong congressional support against a foreign policy position does nothing to diminish the potential importance of taking that position, and handcuffing the President's ability to pursue that position when the President would otherwise be constitutionally authorized to do so is poor policy.

III. The Act's Constitutionality Under a New Framework

The framework discussed in Part I could help avoid the harmful effects on U.S. diplomacy that the Act presents and aid courts and the Executive and Legislative branches in resolving similar conflicts in the future. Under the framework, the Legislative and Executive branches are constitutionally authorized to enact foreign policy measures pursuant to Articles I and II, respectively. But the specific function of diplomacy—particularly the act of setting the nation's diplomatic agenda towards another country—should begin with the Executive, and congressional legislation affecting another

125. Presumably, the "right" decision is the decision that is most consistent with the interests of the American people. But arguing that the Act is in the best interests of the American people is a strange contention to make, especially in light of the fact that President Trump, who generally opposes the Act, had won a national election less than a year prior to the Act's passage. During his campaign, President Trump made his intent to take a softer stance on Russia well-known, and he was elected nonetheless. If this does not represent a mandate of the people, it is unclear what does.

country should not materially interfere with that agenda. The Executive should have the freedom to dictate the country's diplomatic approach, and the general nature of actions taken by Congress should not jeopardize or undermine that approach.

Thus, legislation like the Act should be considered unconstitutional under the Part I framework, provided that it includes provisions materially limiting the President's ability to negotiate with Russia in a way he sees fit to accomplish his diplomatic agenda. And the Act does include a number of such provisions. Members of the Trump Administration, including the President himself and Rex Tillerson, the former Secretary of State, made clear that the Administration's goal was to restore the relationship between Russia and the United States.¹²⁶ In a press briefing, Tillerson commented that "the action by the Congress to put these sanctions in place and the way they did, neither the President nor I are very happy about that. We were clear that we didn't think it was going to be helpful to our efforts. But that's the decision they made."¹²⁷ By passing legislation that materially limits President Trump's ability to dictate a major aspect of his diplomatic agenda towards Russia, Congress impermissibly encroached on a key presidential prerogative.

But this does not render Congress completely impotent to participate in foreign affairs decisions. The President, while constitutionally authorized to direct the tone, nature, and objectives of the country's diplomatic agenda, does not have the constitutional power to take action that carries the force of law. The Constitution clearly gives Congress, not the President, the power to enact legislation, so any *laws* affecting foreign affairs must be a product of Congress. Congress reserves the right to participate in the process of diplomacy, as it is authorized to make policy decisions and to pass laws that generally correspond to the President's diplomatic agenda. Additionally, it has the right to refuse to pass legislation supporting the President's international agenda, and this represents a check on the Executive because it prevents the President from unilaterally advertising Presidential policies to the rest of the world as being backed by U.S. law. Indeed, an Executive Order aimed at establishing a certain foreign policy objective packs a far weaker long-term punch than does a congressional statute, and once an Executive Order accomplishes its goal and the need for it no longer persists, it is much easier to reverse than a statute.

Moreover, under the Part I framework, the President does not have the ability to defy any foreign affairs statute the President chooses. Rather, the

126. E.g., David Kaplan & Conor Finnegan, *President Trump Not 'Very Happy' with Russia Sanctions Bill, Says Tillerson*, ABC NEWS (Aug. 2, 2017), <http://abcnews.go.com/Politics/President-trump-happy-russia-sanctions-bill-tillerson/story?id=48981626> [<https://perma.cc/F6MX-X7WY>].

127. Press Release, U.S. Dep't of State, Remarks by Sec'y of State (Aug. 1, 2017).

President may defy a foreign affairs statute only under narrow circumstances. First, the legislation must *materially* interfere with the President's ability to conduct diplomacy. In other words, the President cannot defy a congressional foreign affairs statute merely because it makes carrying out the President's diplomatic agenda inconvenient or difficult. The President may defy a statute only when there is no other practical way to engage in the type of diplomacy a reasonable Executive in a similar position would see fit. It is this feature of the conceptual structure outlined in this Note that will guide courts in helping resolve disputes between the President and Congress. To uphold an Executive's defiance of a foreign affairs statute, the reviewing court will have to determine that the Act interferes with the President's ability to effectuate the President's diplomatic agenda in a way that renders the President incapable of carrying it out by any other constitutional means. The Act meets this criterion because, although the President does have prosecutorial discretion in deciding whether to enforce the sanctions as mandated by Sections 224, 225, 226, and 231, the President does not have the ability to lift the codified sanctions since the President is not a lawmaker. A central part of President Trump's diplomatic agenda towards Russia was to ease existing sanctions and negotiate with Russian leaders as a way of improving an otherwise tense relationship, but Section 222 prevents the President from doing so.

Next, the legislation must reasonably threaten the nation's interests. The Act meets this criterion, too, as it threatens to harm the country's relationship with the EU. By bypassing the usual procedure for enacting sanctions against Russia, namely through coordination with the EU, Congress demonstrated a willingness to disregard the input of one of its key international partners. Not only does this send a poor diplomatic message to those partners, but it delegitimizes the sanctions in the eyes of Russia, which knows the Act does not have full support in the international community. Similarly, the Act threatens to weaken the nation's relationship with its allies in the EU. Officials from EU nations were quick to express their discontent with the Act, claiming it is an "America First" law that ignores their interests and has the potential to harm their economies.¹²⁸ In an increasingly globalized world, strategic partnerships with European allies are a critical component of U.S. diplomacy, and acting in a way that harms their interests directly compromises America's interests.

Finally, the President's proposed course of action must reasonably relate to advancing America's international interests. Here, President Trump's plans to relax sanctions against Russia and negotiate with Russian officials in order to improve relations do reasonably relate to improving American interests abroad. Though the Trump Administration did not formally specify its objectives for relaxing sanctions against Russia, there are a number of

128. See Smith-Spark & Pomrenze, *supra* note 113.

practical reasons why it may want to do so. First, as tensions grow between the United States and North Korea, the Administration may view Russia as a potentially key partner in helping curb the dangers presented by Kim Jong-un's regime. Russia remains the country with the world's largest nuclear stockpile,¹²⁹ and the Trump Administration may hope that by easing sanctions against Russia, Russia will be more likely to come to the negotiating table and help America resolve conflicts with North Korea.¹³⁰ Second, easing tensions with Russia may help advance the interests of America's European allies. Historically, the EU has been one of the largest investors in Russia, particularly in terms of importing energy products such as oil and gas.¹³¹ The codification of existing sanctions, and the implementation of new ones, will punish the EU for continuing to invest in Russian oil products, and the Administration may believe that reversing the sanctions will protect the economies of its European allies.

For the foregoing reasons, the provisions of the Act that encroach upon the President's ability to set and direct the nation's diplomatic agenda should be considered unconstitutional.

Conclusion

Contemporary constitutional scholarship is incomplete regarding the precise foreign affairs powers of the President and Congress. While the Constitution provides to each political branch certain powers over foreign affairs, its explicit provisions do not provide a source of authority for certain other foreign affairs powers—powers that are necessary for sound governance and that one or both of the political branches exercises notwithstanding the Constitution's virtual silence on the matter. Because modern scholarship's attempts to paint a more complete picture of the foreign affairs powers of Congress and the President fall short, it is the aim of this Note to lay out a framework that addresses its shortcomings.

Specifically, this Note seeks to address the situation that arises when Congress and the President have diverging foreign policy impulses. It argues that understanding the President's constitutional foreign affairs powers to include the exclusive power over dictating and managing the country's diplomatic agenda would help resolve such disagreements. This position finds support in the text of the Constitution, which confers substantial—though not plenary, as some scholars argue—foreign affairs authority to the President; in Founding Era scholars' understanding of the foreign affairs

129. *Nuclear Arsenals*, ICAN, <http://www.icanw.org/the-facts/nuclear-arsenals/> [https://perma.cc/KD8G-PUNR].

130. Samuel Ramani, *Can Russia Help Solve the North Korea Crisis?*, DIPLOMAT: DEBATE (Dec. 22, 2017), <https://thediplomat.com/2017/12/can-russia-help-solve-the-north-korea-crisis/> [https://perma.cc/F6YB-WZ7Z].

131. *Russia*, EUR. COMMISSION (Apr. 16, 2018), <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/> [https://perma.cc/3SKV-H5HL].

powers of the President; and in a recent Supreme Court opinion, *Zivotofsky II*, in which the Court ruled that the President can disregard a congressional foreign affairs statute when exercising an exclusive Presidential power. Consistent with the *Zivotofsky II* ruling, the conceptual structure proposed in Part I squares with Justice Jackson's tripartite framework in *Youngstown*.

But this position would permit presidential defiance of a congressional statute in even narrower circumstances than the *Zivotofsky II* Court prescribed. Namely, in addition to encroaching upon a Presidential function—what Part II of this Note calls “materially limiting” the President's ability to execute a presidential prerogative—the congressional foreign affairs statute must reasonably jeopardize the nation's international interests. Further, the President's proposed actions must reasonably relate to improving the nation's international interests. The latter two functional considerations help ensure that, pursuant to the conceptual structure expounded in Part I, the Executive would not have power to disregard any foreign affairs statute the Executive pleases.

The Countering America's Adversaries Through Sanctions Act provides the most recent example of a scenario in which the Constitution's allocation of foreign affairs powers should permit the President to defy certain provisions of a congressional statute. Not only does the statute materially limit the President's ability to set and conduct the nation's diplomatic agenda, but it can reasonably be said to potentially jeopardize the country's international diplomatic interests. Moreover, the Act does not leave the President any other meaningful Constitutional mechanism for carrying out his intended diplomatic objectives, and the President's proposed actions—taking a softer stance on Russia—are reasonably in line with advancing America's interests abroad.

In general, the proposed framework central to this Note will provide guidance to the branches and, when necessary, the courts when resolving foreign affairs disputes. A better understanding of the Constitution's allocation of foreign affairs powers to Congress and the Executive will produce more respect for our constitutional arrangement and be efficacious in promoting good outcomes for the nation.