# THE POWERS OF ECONOMIC WAR AND PEACE: THE CONSTITUTIONALITY OF THE PROTECTING FLORIDA'S INVESTMENTS ACT

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> Unlike China, for example, where the leader determines the agenda and everyone follows accordingly, the system that sets the American agenda is much more complicated. The president is not a one-man show. There is public opinion to contend with, there is Congress, and there is the media. Anyone who thinks that when dealing with America you only have to work with the president is wrong. You have to face the entire system.[**]
>
> Prime Minister Benjamin Netanyahu (2015)

## INTRODUCTION

The clash between Congress and President Obama over the Iran sanctioning regime demonstrates how the breakdown of the bipartisan Cold War consensus on foreign affairs has entered the realm of constitutional law. Congress and the President were fundamentally at odds about how to address the Islamic Republic of Iran's pursuit of a nuclear weapon. In 2010, Congress enacted the Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA")[1] which authorizes the states to divest public funds from the Iranian energy sector.[2] The states enthusiastically took up the call.[3] The greatest divestment has come from Florida which has divested over $1.3 billion from the Iranian energy sector under the Protecting Florida's Investments Act ("PFIA").[4] In 2015, President Obama signed the Joint Comprehensive Plan of Action with Iran ("JCPOA") where he committed to "take appropriate steps, taking into account all available authorities" toward removing state

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[**] Ben Caspit, *Why Bibi is Rejoicing as Obama's Term Nears End*, AL-MONITOR (Aug. 24, 2016), *available at* https://www.haaretz.com/world-news/americas/jewish-insider-s-daily-kickoff-august-25-2016-1.5429252.

[1] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. §§ 8501–8551 (2012).

[2] *See id.* § 8532(b).

[3] *See* Watson Inst. for Int'l & Pub. Affairs, IRAN STATE SANCTIONS PROJECT, https://iranstatesanctions.org/ (last visited July 10, 2017); *State Legislation*, UNITED AGAINST NUCLEAR IRAN, http://www.unitedagainstnuclearіran.com/state-legislation (last visited July 10, 2017).

[4] *See* FLA. STAT. § 215.473 (2017); *see also State Legislation*, *supra* note 3.

measures "inconsistent with this change in policy."[5] The states refused to repeal their divestment legislation and, while the President waived many federal Iran sanctions, Congress did not repeal CISADA's authorization for state divestment measures.[6] Congress and President Obama were fundamentally at odds over how to deal with a foreign affairs issue of great magnitude. This was a conflict of institutions over which branch directs foreign sanctioning policy. The will of Congress embodied in statutory law conflicted with the express policy of President Obama embodied in an executive international agreement.[7] This was a situation without much precedent in American constitutional history; the states emphatically attempted to contradict President Obama's stated foreign policy with the support of Congress.[8] This conflict put at stake separation of powers, federalism, and the institutional authority of Congress to enlist voluntary state cooperation in accomplishing foreign affairs goals.

This Comment examines the complex interplay of federalism and separation of powers in the context of the constitutional validity of state Iran sanctions with a focus on the original meaning of the Foreign Commerce Clause and founding era practice to illustrate the constitutional division of economic war powers between the President and Congress. Part I outlines the chronology of events leading to this constitutional impasse. Part II outlines the history of state foreign affair actions in court. Part III presents historical background and demonstrates that the Framers of the Constitution (1) recognized that Congress was supreme in the realm of foreign commerce regulation, even if aimed to influence foreign affairs; and (2) had no constitutional qualms about enlisting the states in the accomplishment of foreign affairs goals. Part IV sketches the modern debate surrounding state divestment measures intended to impact foreign affairs. Finally, Part V argues that the PFIA is constitutional because it is authorized by the branch empowered by the Constitution to regulate foreign commerce—Congress. Congress has deemed it necessary to enlist voluntary state cooperation in a federal scheme of foreign commerce regulation and it is constitutionally proper to do so. Even under the broadest conception of executive power, the PFIA must stand.

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[5] Joint Comprehensive Plan of Action ¶ 25, July 14, 2015, https://www.state.gov/documents/organization/245317.pdf [hereinafter JCPOA].

[6] *See* 22 U.S.C. § 8532(b) (2012).

[7] *Compare* 22 U.S.C. §§ 8501–8551, *with* JCPOA, *supra* note 5.

[8] *See, e.g.*, Letter from Greg Abbott, Governor of Texas, to Barack Obama, President of the United States (May 16, 2016); Stephen Dinan, *Governors Vow to Keep State Sanctions in Place Against Iran, Undercutting Obama Deal*, WASH. TIMES (Sept. 8, 2015), http://www.washingtontimes.com/news/2015/sep/8/governors-vow-keep-state-sanctions-against-iran/; *Governor McCrory Rejects Obama Administration's Request to Reverse Iran Sanctions*, Apr. 26, 2016, https://votesmart.org/public-statement/1071527/governor-mccrory-rejects-obama-administrations-request-to-reverse-iran-sanctions#.WukFoE2pXcs.

## I. COMPREHENSIVE IRAN SANCTIONS

The United States has pursued a comprehensive program of economic sanctions against Iran to deter its pursuit of a nuclear weapon and punish its support of terror.[9] This sanctioning regime consists of both federal measures, such as CISADA, and state measures, such as the PFIA. In the summer of 2015, President Obama signed the JCPOA, which consists of a series of political commitments.[10] In return for Iran's assurances that it would not pursue a nuclear weapon, President Obama committed to waiving numerous federal Iran sanctions and utilizing his authority to bring about the end of state divestment measures.[11]

### A. *The Protecting Florida's Investments Act*

Claiming it was "sending a message to the world" that "[e]vil will flourish no more," the Florida state legislature enacted the PFIA.[12] It mandates that the Florida State Board of Administration ("FSBA") put together a list of "scrutinized companies" consisting of organizations conducting significant business with Iran's energy sector.[13]

A scrutinized company is:

> (1) one that has business operations with the government of Iran; or
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> (2) one in which the government of Iran has an interest worth more than ten percent of the company's revenues; or
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> (3) one that has made investments of $20 million or more that directly or significantly contribute to Iran's ability to develop petroleum resources.[14]

The FSBA must issue written notice to every newly identified scrutinized company. This written notice must inform the company that it may become subject to divestment, offer it an opportunity to clarify its business activities, and encourage it to cease scrutinized business operations.[15] If the company has not ceased scrutinized activities or demonstrated that it does not engage in significant business with Iran's energy sector within ninety

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9 *See* 22 U.S.C. §§ 8501–8551; FLA. STAT. § 215.473 (2017).

10 *See* JCPOA, *supra* note 5.

11 *See id.* ¶¶ iii, v.

12 *See* Janet Zink, *Florida Looks to Lead Charge on Businesses in Iran, Sudan*, ST. PETERSBURG TIMES (Apr. 28, 2007), http://www.sptimes.com/2007/04/28/State/Florida_looks_to_lead.shtml.

13 § 215.473(2)(a).

14 *Id.* § 215.473(1)(v).

15 *Id.* § 215.473(3)(a)(2)–(3).

days of written notice, the FSBA is required to sell, redeem, or divest all public funds and withdraw all publicly traded securities that it owns in the scrutinized company.[16] PFIA also prohibits FSBA from using public funds to acquire any securities of the scrutinized companies.[17]

In response to the JCPOA, the state legislature added a significant amendment to the expiration provisions of PFIA.[18] As enacted in 2007, the PFIA would expire if the Congress or President of the United States unambiguously states that Iran has ceased to acquire weapons of mass destruction, the United States revokes all sanctions against Iran, or

> [t]he Congress or President of the United States affirmatively and unambiguously declares, by means including, but not limited to, legislation, executive order, or written certification from President to Congress, that mandatory divestment of the type provided for in this section interferes with the conduct of United States foreign policy.[19]

In an amendment to the PFIA effective July 1, 2016, the legislature removed subsection 3 while it left undisturbed an identical provision relating to Sudanese divestment.[20] Thus, the PFIA now only expires if Congress or the President unambiguously states through legislation, executive order, or written certification that Iran ceased to acquire weapons of mass destruction and support of terrorism or the United States revokes all sanctions against Iran.[21]

### B. *Here Comes the Cavalry: Federal Authorization*

In 2007, after the enactment of the PFIA, then-Senator Barack Obama introduced a bill explicitly authorizing states to divest from the Iranian energy sector.[22] Senator Obama specifically cited his concern that "past Supreme Court decisions have called into question whether States have the constitutional authority to pass such laws" as Florida and Illinois had recently enacted.[23] Senator Obama's bill, the Iran Sanctions Enabling Act, would authorize state and local governments to divest from companies that invested $20 million or more in the Iranian energy sector.[24] Senator Obama's bill also contained a provision declaring that a federal law or regulation would not

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16 *Id*. § 215.473(3)(b)(1).
17 *Id*. § 215.473(3)(c).
18 *See* 2016 Fla. Laws 2300-01.
19 § 215.473(5)(b).
20 *See* 2016 Fla. Laws 2300-01.
21 § 215.473(5)(b).
22 S. 1430, 110th Cong. (2007).
23 153 CONG. REC. S10142 (statement of Sen. Obama).
24 *See* S. 1430, *supra* note 22.

preempt state divestment of companies doing business in excess of $20 million with Iran.[25] While Senator Obama's bill died, his state and local government authorization would be later enacted in the CISADA.[26] Earlier in 2007, Senator Obama co-sponsored another bill, the Sudan Accountability and Divestment Act of 2007, which was enacted into law.[27] This legislation authorized state and local divestment of funds from companies doing more than $20 million worth of business in Sudan.[28]

Although President Bush ultimately signed the Sudan Accountability and Divestment Act into law, his Department of Justice ("DOJ") vehemently opposed its provisions authorizing states to sanction foreign nations citing various constitutional and policy concerns.[29] The Bush administration could "not understand why Congress would want to protect" state and local governments ability to "expand their divestment activity to interfere with Federal foreign policy."[30] The Bush DOJ recognized that the purpose of the bill "appears to be to lift the Federal preemption that the Supreme Court and other Federal courts have cited consistently in invalidating State divestment" measures that "interfere with national foreign policy."[31] President Bush signed the bill into law, however, with the signing statement caveat that he would construe the statute so as to not interfere with the exclusive authority of the federal government to conduct foreign relations.[32] As things stood in 2007, the forces of President Bush's DOJ were arrayed against Senator Obama and the Senate. President Bush had an expansive view of presidential preeminence in the sphere of foreign affairs while Senator Obama sought to carve out a sphere for Congress and the states.[33]The office of the presidency has a way of adjusting one's views on the Constitution.[34]

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25 *Id.* § 4(b).

26 *See* 22 U.S.C. § 8532(b) (2012).

27 *See* Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (2007).

28 *Id.* § 3(b).

29 *See* Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, to Hon. Richard B. Cheney, President of the United States Senate (Oct. 26, 2007).

30 *Id.*

31 *Id.* (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 380 (2000); Nat'l Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731, 750–51 (N.D. Ill. Feb 23, 2007)).

32 President George W. Bush, *Statement on Signing the Sudan Accountability and Divestment Act of 2007* (Dec. 31, 2007), https://www.gpo.gov/fdsys/pkg/PPP-2007-book2/pdf/PPP-2007-book2-doc-pg1596.pdf. This signing statement provoked a congressional hearing regarding the constitutionality of Congressional authorization of state foreign affairs sanctions in the Sudan Accountability and Divestment Act. *See Negative Implications of the President's Signing Statement on the Sudan Accountability and Divestment Act: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 1-2 (2008) (statement of Sen. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

33 *See* Letter from Brian Benczkowski to Hon. Richard B. Cheney, *supra* note 29; 153 CONG. REC. S10142 (statement of Sen. Obama).

34 This is entirely natural, perhaps necessary. It is vital to the Republic's well-being that the man ought to identify with the office; indeed Publius envisioned this as one of the surest protections of liberty.

### C. *The Comprehensive Iran Sanctions, Accountability, and Divestment Act*

In 2010, Congress enacted CISADA. True to its title, it is a comprehensive scheme that seeks to cripple Iran's economy. CISADA also includes a provision that closely mirrors Senator Obama's 2007 proposal allowing state and local governments to divest from companies doing business in the Iranian energy sector.[35] CISADA declares that it is the "sense of Congress that the United States should support the decision of any State or local government" which "divests from, or prohibits the investment of assets of the State or local government in, a person that engages in investment activities in the energy sector of Iran."[36] To enact this congressional sense, state and local governments are authorized to divest funds or prohibit government investment in a person who has invested $20 million or more in the energy sector of Iran,[37] "[n]onwithstanding any other provision of law."[38] CISADA requires that state or local governments give sanctioned persons an "opportunity to comment in writing" to establish that they have been erroneously targeted.[39] Also included is a "nonpreemption" provision declaring that any authorized state or local measure is not preempted by any federal law or regulation.[40] Vitally for the PFIA, which was enacted in 2007, CISADA contains a blanket authorization for state divestment measures enacted prior to 2010:

> (i) Authorization for prior enacted measures
>
> (1) In general
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> Notwithstanding any other provision of this section or any other provision of law, a State or local government may enforce a measure (without regard to the requirements of subsection (d), except as provided in paragraph (2)) adopted by the State or local government before July 1, 2010 that provides for the divestment of assets of the State or local government from, or

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*See* THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003) ("The interest of the man must be connected with the constitutional rights of the place."). One need look no farther than President Jefferson's new found predilection for the powers of the Presidency after 1800. *See* FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 246 (1994). Examining Presidents Washington and Jefferson, Professor McDonald demonstrates that this identification of the character of the man and the interests of the office was vital to establishing the Presidency. *See* MCDONALD at 216, 247.

35 *See* 22 U.S.C. § 8532(b) (2012).

36 *Id.*

37 *Id.* § 8532(c)(1)–(2).

38 *Id.* § 8532(b).

39 *Id.* § 8532(d)(3).

40 *Id.* § 8532(4)(f). As enacted, the nonpreemption provision reads: "A measure of a State or local government authorized under subsection (b) or (i) is not preempted by any Federal law or regulation." Proposed legislation amends the nonpreemption provision to read: "A measure of a State or local government authorized under subsection (b), (i), or (j) is authorized and not preempted by any Federal law or regulation, or any policy, agreement, or exercise of waiver authority of the executive branch." H.R. 4448, 114th Cong. § 2(a)(4) (2d Sess. 2016).

> prohibits the investment of the assets of the State or local government in, any person that the State or local government determines, using credible information available to the public, engages in investment activities in Iran (determined without regard to subsection (c)) or other business activities in Iran that are identified in the measure.[41]

The President may waive certain federal Iran sanctions on a case-by-case basis in the interest of national security.[42] The comprehensive sanctioning regime of CISADA sunsets when the President verifies to Congress that (1) the government of Iran is no longer a state sponsor of terror and (2) Iran has ceased the pursuit, acquisition, and development of its nuclear, biological, chemical, and ballistic missile programs.[43]

### D. *The Joint Comprehensive Plan of Action and Equal and Opposite Reactions*

In the summer of 2015, the five permanent members of the United Nations Security Council, plus Germany and the European Union, agreed to the JCPOA with Iran.[44] In return for Iran's "ceasing" its pursuit of a nuclear weapon, President Obama agreed to exercise his waiver authority to cease enforcement of much of the CISADA sanctioning regime.[45] Among the various political commitments of the JCPOA, the President pledged to "take appropriate steps, taking into account all available authorities" to address state or local sanctions preventing the implementation of sanction lifting.[46]

Perhaps reacting to Iranian discontent with U.S. fulfillment of obligations,[47] the DOJ sent a letter to every state governor urging them to consider reviewing their sanction regimes due to the change in U.S. foreign policy toward Iran brought about by the JCPOA.[48]

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41 22 U.S.C. § 8532(i)(1).

42 *See* Iran Freedom Support Act, Pub. L. No. 109-293, 120 Stat. 1344 (2006).

43 22 U.S.C. § 8551(a). At the time of this writing, the United States government has not made these findings.

44 *See* JCPOA, *supra* note 5.

45 *Id.* at ¶ 21.

46 *Id.* at ¶ 25.

47 *See* Eli Lake, *Obama Administration Urges States to Lift Sanctions on Iran*, BLOOMBERG (Apr. 18, 2016), https://www.bloomberg.com/view/articles/2016-04-18/obama-administration-urges-states-to-lift-sanctions-on-iran.

48 *Id.*; Lea Speyer, *Obama Administration Launches Campaign to Pressure All 50 States to Overturn Iran Sanctions*, ALGEMEINER (Apr. 20, 2016), http://www.algemeiner.com/2016/04/20/obama-administration-launches-campaign-to-pressure-all-50-states-to-overturn-iran-sanctions/#; *see* Letter from Stephen D. Mull, Lead Coordinator for Iran Nuclear Implementation, to Pat McCrory, Governor of North Carolina (Apr. 8, 2016), for an example of the letter.

Congress reacted to the JCPOA by proposing legislation that would expand CISADA's protection of state and local divestment provisions by explicitly shielding them from preemption by executive agreements.[49] No state that currently divests from Iran has proposed legislation to repeal divestment measures.[50] The Obama Administration's urging may have had the opposite effect as three states have newly proposed divestment legislation pending.[51] Florida reacted to the JCPOA by strengthening PFIA to preclude expiration by a presidential declaration that the divestment measure interferes with federal foreign policy.[52] The message: the Florida legislature anticipates a potential challenge to PFIA due to the JCPOA. Some states have gone even farther; for example, Governor Greg Abbott of Texas sent a letter to President Obama emphatically declaring that Texas's divestment laws would remain on the books and that he would introduce legislation strengthening existing divestment measures.[53]

In the likely event that the states refuse to reconsider their sanctioning regimes,[54] President Obama may have found much to like in President Bush's opposition to state divestment measures.

Thus, there are three elements at play with respect to the JCPOA: (1) federal statutory authorization for state divestment in CISADA; (2) state divestment measures made pursuant to CISADA such as the PFIA; and (3) executive blanket waivers of federal sanctions and expressions of displeasure with state and local sanctions. The question is, does a state law such as the PFIA unconstitutionally conflict with the President's authority to act as the "sole organ"[55] of the nation in foreign affairs when the state law is intended to have an impact on a foreign nation but is promulgated pursuant to congressional authorization? For PFIA to be unconstitutional, it must mean that the congressional authorization itself is an unconstitutional usurpation of executive power by Congress.

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49 *See* H.R. 4448, 114th Cong. § 3(a)(4) (2d Sess. 2016).

50 David Royse, *States Defy D.C. by Keeping Iran Sanctions*, ST. NET CAPITOL J., https://www.lexisnexis.com/communities/state-net/b/capitol-journal/archive/2016/02/12/states-defy-d-c-by-keeping-iran-sanctions.aspx (last accessed July 11, 2017).

51 *Id*.

52 *See* FLA. STAT. § 215.473(5)(b)(2) (2017).

53 Letter from Greg Abbott to Barack Obama, *supra* note 8.

54 *See* Dinan, *supra* note 8; *Governor McCrory*, *supra* note 8; Chuck Lindell, *Greg Abbott to President Obama: No Dice on Lifting Iran Sanctions*, MY STATESMAN (May 16, 2016), http://www.mystatesman.com/news/news/abbott-to-obama-no-dice-on-lifting-iran-sanctions/nrNdY/; Rusty Weiss, *Obama Demands All States Lift Their Iran Sanction, So Texas Did THIS!*, POL. INSIDER (May 18, 2016), http://www.thepoliticalinsider.com/texas-just-flipped-obama-the-bird-on-iran-sanctions/.

55 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

## II. STATE FOREIGN AFFAIRS ACTIONS IN COURT

Without congressional authorization, the Supreme Court would likely hold measures such as the PFIA to be unconstitutional. Over the last century, the Supreme Court has disfavored state actions in foreign affairs.[56] The Court has carefully limited the ability of the states to pass laws intended to affect foreign relations, especially when they conflict with federal foreign affairs policy.[57]

### A. *State Foreign Affairs Powers*

States may not interfere with foreign affairs if it would conflict with federal foreign policy. Cases such as *Zschernig v. Miller*[58] have gone farther to find a kind of dormant foreign affairs clause that prevents states from legislating in the realm of foreign affairs even absent federal policy to the contrary.[59] Publius lists foreign commerce regulation alongside the class of powers that are federal in nature as they "regulate the intercourse with foreign nations . . . [t]his class of powers forms an obvious and essential branch of the Federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations."[60] Publius places the foreign commerce clause amongst other exclusively federal foreign affairs powers (some lodged in Congress, others in the president) including the power to make treaties, send and receive ambassadors, and punish piracy and offenses against the laws of nations.[61]

The Court has held that states may not upset a carefully calibrated federal statutory regime. In *Hines v. Davidowitz*,[62] the Court held that states were precluded from imposing additional registration requirements over aliens due to Congress' exclusive authority over naturalization.[63] As with the interstate

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56 *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 440 (1968) ("[State] regulations must give way if they impair the effective exercise of the Nation's foreign policy."); United States v. Pink, 315 U.S. 203, 233 (1942) ("No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

57 *See* discussion *infra* Section II.A.

58 389 U.S. 429 (1968).

59 *See id.* at 441.

60 THE FEDERALIST NO. 42, *supra* note 34, at 260 (James Madison).

61 *See id.*

62 312 U.S. 52 (1941).

63 *See id.* at 62–63, 73–74.

commerce clause,[64] the foreign commerce clause is entrenched as an exclusively federal power.[65] Even if the federal government has not legislated in the realm, state action may be precluded unless it is incidental to a legitimate exercise of state police power.[66] In *Japan Line, Ltd. v. Los Angeles County*,[67] the Court ruled that power over regulating foreign commerce excludes states more than the interstate commerce clause and is exclusively within Congress' power due to the need for the nation to speak with one voice in foreign affairs.[68] Thus, state regulation of foreign commerce receives more scrutiny than state regulation of interstate commerce because foreign commerce regulation impacts "intercourse with foreign nations" and states may not prevent the nation from speaking with one voice in foreign affairs.[69]

In *Zschernig*, the Court invalidated a state law because it conflicted with a generalized foreign affairs power that was exclusively vested with the federal government.[70] The Court held most state interference in foreign affairs even in the absence of federal policy to the contrary was facially unconstitutional unless authorized by the federal government—giving rise to dormant foreign affairs preemption.[71]

The Court has held that executive agreements may preempt state law in the field of claims settlement.[72] In the Second World War era, the Supreme Court held that executive recognition of the Soviet Union preempted state action in *United States v. Belmont*[73] and *United States v. Pink*.[74] Those cases rely heavily upon the President's recognition power and the power to settle claims with foreign governments was incidental to the recognition power.[75] More recently, in *American Ins. Ass'n v. Garamendi*,[76] the Court ruled that

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64 *See, e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179–80 (1995) ("[W]e have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause . . . .").

65 *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 850 (2004); *see also* THE FEDERALIST NO. 42, *supra* note 34, at 260 (James Madison).

66 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

67 441 U.S. 434 (1979).

68 *See id*. at 451–54.

69 *Id.* at 451; *see also* THE FEDERALIST NO. 42, *supra* note 34, at 260 (James Madison); Sapna Desai, Note, *Genocide Funding: The Constitutionality of State Divestment Statutes*, 94 CORNELL L. REV. 669, 684 (2009).

70 Zschernig v. Miller, 389 U.S. 429, 441 (1968).

71 *Id*.; Carlos Manuel Vazquez, *W(h)ither* Zschernig*?*, 46 VILL. L. REV. 1259, 1262 (2001).

72 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); United States v. Pink, 315 U.S. 203, 228–31 (1942); United States v. Belmont, 301 U.S. 324, 331–32 (1937); *see also* Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: Implications for the Iran Nuclear Agreement*, 86 FORDHAM L. REV. 119–20 (forthcoming 2017).

73 301 U.S. 324 (1937).

74 315 U.S. 203 (1942).

75 *See Belmont*, 301 U.S. at 330–31.

76 539 U.S. 396 (2003).

an executive agreement with Germany settling insurance claims preempted a California law requiring insurance companies doing business in the state to disclose all policies sold in Europe during the Holocaust period.[77] The Court reasoned that the California law infringed upon the dormant foreign affairs clause and that a law that interfered with the president's ability to act as the sole voice of the nation in foreign affairs was unconstitutional.[78] Because there was no congressional action and claims settlement is traditionally an executive power, the president was free to make foreign policy and state laws must yield to the president's foreign policy decisions.[79]

In 1996, Massachusetts passed a law similar to the PFIA. The Massachusetts Burma Law sought to prevent state entities from buying goods or services with entities on a "restricted purchase list" of companies that had business interests in Burma.[80] The National Foreign Trade Council ("NFTC") brought suit to challenge the constitutionality of the state measure.[81] The United States Court of Appeals for the First Circuit held that the law was unconstitutional on three grounds: (1) the state law interfered with the foreign affairs power of the federal government; (2) the state law violated the dormant Foreign Commerce Clause; and (3) the state law was preempted by the Federal Burma Act.[82] In *Crosby v. National Foreign Trade Council*,[83] a unanimous Supreme Court invalidated Massachusetts' sanctions on Burma.[84] The Court relied on preemption principles to hold that the state law interfered with Congress's "full purposes and objectives" embodied in the Federal Burma Act but did not rely on the broader dormant foreign affairs and commerce powers that formed the basis of the First Circuit's opinion.[85] Because Congress sought to occupy the field with its Burma sanctioning regime, Massachusetts could not add foreign commerce restrictions.[86] *Crosby*'s holding rests on Congress's power to preempt and its delegation of broad negotiating authority to the President.[87] The opinion also indicates that the President has

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77 *Garamendi*, 539 U.S. at 408–10, 420–21; Denning & Ramsey, *supra* note 65, at 870–72.

78 *See Garamendi*, 539 U.S. at 424. The "dormant foreign commerce clause" prevents states from interfering with foreign commerce even in the absence of preemptive Federal legislation or action. *See* Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After* Garamendi *and* Crosby, 107 COLUM. L. REV. 746, 749–50 (2007).

79 *Garamendi*, 539 U.S. at 429.

80 *See* 1996 Mass. Acts 241.

81 Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 44–45 (1st Cir. 1999).

82 *Id.* at 45.

83 530 U.S. 363 (2000).

84 *Id.* at 388.

85 *Id.* at 372–74*; see also* Denning & Ramsey, *supra* note 65, at 875.

86 *Crosby*, 530 U.S. at 372–74.

87 *See id.* at 372–77.

broad authority in this field.[88] The Court was concerned that the state act undermined the President's capacity to speak for the nation with one voice.[89] The Court grounded almost all of these references to broad presidential authority in congressional delegation except for one instance, a somewhat cryptic reference to *United States v. Curtiss-Wright*[90]: "the President's power in the area of foreign relations is least restricted by Congress."[91] The Court thus implied that Congress granted the President broad discretionary power over foreign commerce regulation but "with an eye toward national security" ensuring that the President's power is at its relative maximum.[92]

A similar issue occurred in *National Foreign Trade Council, Inc., v. Giannoulias*.[93] At issue in that case was the Illinois Sudan Act which prohibited the state treasurer from depositing funds into institutions which made loans to "forbidden entities" (i.e., the Sudanese government and companies with their principal place of business in Sudan.).[94] The District Court for the Northern District of Illinois followed *Crosby's* rationale and held that the Illinois Sudan Act was unconstitutional.[95]

It was in response to this case law that then Senator Obama introduced legislation to protect state and local divestment provisions.[96]

### B. *Congressional Primacy*

While states may not make unilateral forays into foreign affairs, the Court has held that Congress may authorize states to take actions that would be otherwise unconstitutional because Congress is the nation's voice in the realm of foreign commerce.[97] Although Congress often delegates "very large

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88 *See id*. at 375–76, 380–81.

89 *See id*. at 380–81.

90 299 U.S. 304 (1936).

91 *Crosby*, 530 U.S. at 375 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 576, 635–36 n.2 (1952)).

92 *Id.* at 375–76.

93 523 F. Supp. 2d 731 (N.D. Ill. 2007)*; see also* Desai, *supra* note 69, at 678–80.

94 Illinois Sudan Act, 15 ILL. COMP. STAT. 520/22.6(a) (2006).

95 *Giannoulias*, 523 F. Supp. 2d at 738–42; Desai, *supra* note 69, at 678–80.

96 *See* 110 CONG. REC. S10141 (daily ed. July 26, 2007) (statement of Sen. Obama) ("[D]ivestment is a useful tool that State and local governments can use to increase economic pressure to persuade Iran to end its dangerous policies . . . past Supreme Court decisions have called into question whether States have the constitutional authority to pass such laws. For that reason Congress needs to pass the Iran Sanctions Enabling Act, S. 1430, which I introduced . . . [t]his bill would clarify that States have the authority to pass divestment legislation with respect to Iran . . . .").

97 Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 324–27 (1994).

grants of its power over foreign commerce to the President,"[98] it is still the "preeminent speaker" regarding foreign commerce regulation.[99]

*Dames & Moore v. Reagan*[100] did not involve states, but rather the power of the executive in claims settlement.[101] There, the Court held the executive agreement to be constitutional because the President made it pursuant to the President's emergency executive powers and historical practice of executive claims settlement, and International Emergency Economic Powers Act ("IEEPA") authorization.[102] However, what was "crucial" to the Court's holding was the approval of Congress.[103] The government itself relied on IEEPA and congressional delegation rather than inherent executive emergency authority.[104] Thus, the *Dames & Moore* Court held that executive action in the realm of foreign commerce, even when there are facets of inherent emergency power and longstanding executive practice in play, must trace itself to a congressional delegation, even of wide discretion.[105]

The preemptive authority of executive acts regarding foreign commerce have not fared as well when going beyond claims settlement. In *Barclays Bank PLC v. Franchise Tax Bd. of California*,[106] the Court held that Congress, not the President is the voice of the nation in foreign commerce.[107] The Court emphatically rejected the contention that "Executive pronouncements" could have preemptive effect on state corporate reporting requirements.[108] The Court looked to Congress, which had refrained from prohibiting the reporting requirements, because "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations."[109] The Court observed that "the Executive Branch proposed legislation . . . but encountered an unreceptive Congress . . . the preeminent speaker [Congress] decided to yield the floor to others [the states]."[110] The parallels between the situation in *Barclays Bank PLC* and the potential for JCPOA preemption are striking. Not only has Congress decided to "yield the floor" to the states through refusing to legislate, it has explicitly enacted authorizing legislation for state sanctions.[111] In *Barclays Bank PLC*, the Court goes on to say that it

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98 *Id.* at 329; *see, e.g.*, International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2012).

99 U.S. CONST. art. I, § 8, cl. 3; *Barclays Bank PLC*, 512 U.S. at 329.

100 453 U.S. 654 (1981).

101 *Id.* at 665.

102 *Id.* at 680.

103 *Id.*

104 *Id.* at 669–70.

105 *Id.* at 680.

106 512 U.S. 298 (1994).

107 *Id.* at 323.

108 *Id.* at 328–29.

109 *Id.* at 329.

110 *Id.*

111 *Compare id.*, *with* 22 U.S.C. § 8532(b) (2012).

is possible for the President to displace state law but only acting "pursuant to authority delegated by a statute or a ratified treaty" and reserves judgment on whether the President may displace state law through his independent power "[i]n the absence of either a congressional grant or denial of authority."[112] What the holding of *Barclays* makes clear is that Congress is the "preeminent speaker" in the realm of foreign commerce and may "yield the floor" to state actors.[113]

### C. *Allowing State Foreign Commerce Regulation*

The Court has recognized that the Constitution grants Congress wide authority to allocate power over commerce. State regulations of commerce, which would otherwise be unconstitutional under the foreign commerce clause, may be authorized by Congress.[114] Article I section 8's distribution of the commerce power to Congress means:

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.[115]

In 1983, the Florida legislature imposed a fuel tax that impacted foreign owned airlines operating exclusively in foreign commerce.[116] The measure sought to implement a tax on airline fuel in conformance with the permissible state taxes outlined in the Airport Development Acceleration Act of 1973.[117] A foreign airliner challenged the Florida law arguing that it conflicted with the Foreign Commerce Clause and an executive agreement between the United States and Canada.[118] In *Wardair Canada, Inc. v. Florida Dep't of Revenue*[119] the Court quickly found that the supposed conflict between the Florida law and the need for the nation to speak with "one voice" was "not the stuff of pre-emption" because Congress "expressly and unequivocally

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112 *Barclays Bank PLC*, 512 U.S. at 329 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

113 *Id.* at 329.

114 *See* S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945); Desai, *supra* note 69, at 684.

115 *S. Pac. Co.*, 325 U.S. at 769.

116 *See* FLA. STAT. § 212.08(4)(a)(2) (1985).

117 Airport Development Acceleration Act of 1973, Pub. L. 93-44, § 7(a), 87 Stat. 90.

118 Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 4 (1986).

119 477 U.S. 1 (1986).

permitted the States to exercise" the challenged authority.[120] The Court reasoned that the Foreign Commerce Clause was aimed at the states.[121] It prevents states from impeding the federal government from speaking with one voice if it desires but does not act as a blanket denial of state authority over foreign commerce if permitted by the federal government.[122]

This precedent establishes that Congress may authorize states to act in a manner that would otherwise unconstitutionally infringe on federal foreign commerce authority.[123] The need for uniformity in foreign commerce regulation, embodied in the dormant commerce clause, does not trump congressional primacy in Foreign Commerce Regulation and its power to "redefine the distribution of power over interstate commerce."[124]

It may be asked, if Congress thought it so vital to include states in the Iran sanctioning regime, why not just mandate state legislatures divest funds? Why not just circumvent the state legislatures and mandate that the state pension boards divest? The answer is that Congress is prevented from utilizing the states in this manner by the federalism principles embedded in the text and structure of the Constitution and confirmed by Supreme Court precedent.[125] The federal government acts directly upon the people, not the states, except in limited circumstances.[126] It may not "simply 'comandee[r] the legislative process of the States by directly compelling them to enact and enforce a Federal regulatory program.'"[127] Under the Articles of Confederation, it may have been appropriate for the Confederate Congress to act directly upon

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120 *Id.* at 7.

121 *Id*. at 7–8.

122 *Id.* at 13 ("Foreign Commerce Clause analysis requires that a court ask whether a state tax 'prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments."' But we never suggested in that case or any other that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice [referring to federalism, not necessarily separation of powers]." (quoting Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 451 (1979))).

123 Accord Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429–30 (1946); *see also* William Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 STAN. L. REV. 387 (1983).

124 S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945); *accord* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 329–30 (1994); *see also* Desai, *supra* note 69, at 689–90.

125 *See* New York v. United States, 505 U.S. 144, 156–57 (1992) ("[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power . . . [t]he Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.").

126 *See* U.S. CONST. amend. XIV, § 5; United States v. Morrison, 529 U.S. 598, 619 (2000); Civil Rights Cases, 109 U.S. 3, 13 (1883).

127 *New York*, 505 U.S. at 161 (quoting Hodel v. Va. Surface Min. & Reclamation Ass'n. Inc., 452 U.S. 264, 288 (1981)).

the states.[128] One of the radical departures of the Constitution was that it allowed the federal government to act directly upon the people rather than upon the states.[129] Thus, while Congress may "direct" or "motivate" state legislatures to take particular actions regarding commerce, Congress may not directly compel the state legislatures to divest state funds from particular entities.[130]

In *Printz. v. United States*,[131] the Supreme Court extended the anti-commandeering rationale of *New York v. United States*[132] to state executive officers.[133] The Court rejected a congressional attempt to compel state law enforcement officers to enforce the Brady Handgun Violence Prevention Act ("Brady Act").[134] Interestingly, the Court went beyond the rationale of *New York v. United States* because the case implicated not only federalism but also separation of powers.[135] It was unconstitutional for Congress to attempt to compel state executive officers to enforce a federal law because of traditional anti-commandeering principles.[136] The Brady Act was also held unconstitutional because it divested the president's duty under the Take Care Clause and placed it with state enforcement officials, dangerously undermining the President's executive authority and shrouding accountability for the law's enforcement.[137] These issues are not present with CISADA because Congress merely allows state legislators to act.[138] It does not compel state legislators or executive officers to act. Justice Scalia's concerns about congressional fragmentation of the executive power, which undermines the President's "vigor and accountability," are not implicated by CISADA.[139] Under the statute at issue in *Printz*—the Brady Act—Congress shielded itself from

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128 *See* THE FEDERALIST NO. 15, *supra* note 34, at 103 (Alexander Hamilton).

129 *See id.* at 105 ("[W]e must extend the authority of the Union to the persons of the citizens–the only proper objects of government.").

130 *New York*, 505 U.S. at 161.

131 521 U.S. 898 (1997).

132 505 U.S. 144 (1992).

133 *Printz*, 521 U.S. at 927.

134 *Id.* at 935 (O'Connor, J., concurring).

135 *Id.* at 923 (majority opinion).

136 *Id.* at 920–22 ("The power of the Federal Government would be augmented immeasurably if it were able to impress into service—and at no cost to itself—the police officers of the 50 States.").

137 *Id.* ("[T]he President . . . 'shall take Care that the Laws be faithfully executed', personally and through officer whom he appoints . . . [t]he Brady Act effectively transfers this responsibility.") (citing U.S. CONST. art. II, § 3); *see also* THE FEDERALIST NO. 70, *supra* note 34, at 426–27 (Alexander Hamilton) ("[T]he multiplication of the Executive ads to the difficulty of detection . . . [i]t often becomes impossible . . . to determine on whom the blame . . . ought really to fall.").

138 *Compare* Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1537–38 (codified as amended 18 U.S.C. §§ 921–922 (2012)), *with* 22 U.S.C. § 8532(b) (2012).

139 *Printz*, 521 U.S. at 922.

accountability by enlisting state officers to do its bidding rather than legislating directly[140] and divested the President of his duty to "take Care that the Laws be faithfully executed."[141] Under CISADA, the state legislature enacts a measure that is enforced by state executive officials.[142] The lines of accountability are clear and the President's power to execute *federal* law is not fragmented.

*Crosby* and *Garamendi* establish that the PFIA, standing alone, would likely be unconstitutional.[143] The PFIA is not a unilateral state action meant to affect foreign affairs; it closely adheres to the authorization of CISADA bringing it into accordance with *Wardair Canada, Inc*. and *Barclays Bank PLC*. However, state divestment intended to influence foreign affairs seems different from *Wardair* and *Barclays* where the state's measure intends to raise revenue, not impact foreign relations.[144] However, the original understanding of the power to regulate foreign commerce included the power to impact foreign relations—indeed most of the early uses of the Foreign Commerce Clause were intended to affect foreign relations.[145] However, states entering the equation seems to create apprehension due to the need for the nation to speak with "one voice"[146] and fears of "[t]he faith, the reputation, the peace of the whole Union" being "continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."[147]

There is room to question the precedent itself. Is it within Congress' province to redefine the separation of foreign affairs power? If there is a dormant foreign affairs clause, how can Congress properly divest foreign affairs power from the federal government and delegate it to the states? Is this not rewriting the Constitution? Original practice demonstrates that in this area of commerce clause jurisprudence, the precedent does not stray from the text and structure of the Constitution as understood at the time of ratification.[148]

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140 *See* United States v. Lopez, 514 U.S. 549, 552 (1995) (asserting that it is unclear whether Congress could have legislated directly under the commerce clause).

141 U.S. CONST. art. II, § 3; *Printz*, 521 U.S. at 923 (citing Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 568–70 (1994) ("The insistence of the Framers upon unity in the Federal Executive . . . is well known . . . That unity would be shattered . . . if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.")).

142 22 U.S.C. §§ 8532(b), (i)(1).

143 *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375–76 (2000); American Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003)*; see also* discussion *supra* Section II.A.

144 *Compare* 1999 CAL. STAT. 6008–09, *and* FLA. STAT. § 212.08(4)(a)(2) (1985), *with* FLA. STAT. § 215.473 (2017).

145 *See* Anthony Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 962 (2010).

146 *Crosby*, 530 U.S. at 381.

147 THE FEDERALIST NO. 22, *supra* note 34, at 147 (Alexander Hamilton).

148 *See* discussion *infra* Sections III.A, III.B.

## III. HISTORICAL PRACTICE: HELPING HERCULES

It is well established that the federal government has exclusive authority over foreign affairs.[149] It is also established that the federal government may not commandeer the states to enact laws or enforce federal laws.[150] However, it is equally well established that the federal government may enlist voluntary state support in supplementing federal actions, foreign or domestic. The federal government has solicited the assistance of the several states in pursuing federal and foreign affairs goals since the Washington Administration.[151]

### A. *States Supplementing Federal Power*

In 1794, a grave threat was posed to the authority of the new federal government. In response to an excise tax on whiskey, western Pennsylvania farmers rose up in an armed rebellion, which slowly gathered force and adherents across the frontier.[152] The Washington Administration determined that decisive action was necessary to firmly establish federal authority.[153] Writing of the show of force necessary to quell the Whiskey Rebellion, Secretary Hamilton wrote that "[w]henever the Government appears in arms it ought to appear like a *Hercules*, and inspire respect by the display of strength."[154] President Washington's quelling of the Whiskey Rebellion emphatically established the federal government's supremacy.[155] Often forgotten is that the army President Washington used to decisively establish federal authority was composed almost entirely of state militia under state officers, enlisted pursuant to congressional authorization.[156]

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149 *See* THE FEDERALIST NO. 42, *supra* note 34, at 260 (James Madison) ("This class of powers [those which regulate the intercourse with foreign nations] forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); Dr. James McHenry, *Papers of Dr. James McHenry on the Federal Convention of 1787*, AVALON PROJECT (May 14, 1787), http://avalon.law.yale.edu/18th_century/mchenry.asp ("If a state acts against a foreign power contrary to the laws of nations or violates a treaty, it cannot punish that State, or compel its obedience . . . ."). *But see* Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 975 (2001); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379–81 (2000).

150 *See* New York v. United States, 505 U.S. 144, 161 (1992).

151 *See* discussion *infra* Section III.A.

152 *See* Forrest McDonald, The Presidency of George Washington 145 (1974).

153 *See* Forrest McDonald, Alexander Hamilton: A Biography 300 (1978).

154 Letter from Alexander Hamilton to James McHenry (Mar. 18, 1799), *in* 22 THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION 552, 552–53 (Harold C. Syrett, ed., 2011).

155 *See* MCDONALD, *supra* note 34, at 302–03.

156 *See* MCDONALD, *supra* note 34, at 240; Militia Act of 1792, 2d Cong. § 1 (1792).

President Washington also enlisted support of state governors to enforce the Neutrality Proclamation.[157] Because the federal government possessed no navy and state courts were often uncooperative, President Washington requested that the state governors utilize their officials and militias to enforce the federal neutrality policy.[158] The state governors, even enemies of the neutrality policy like Governor Clinton of New York, cooperated.[159] Governor Vanderhorst of South Carolina banned the fitting of privateers and closed French recruiting stations in Charleston.[160] Thus, President Washington relied on the voluntary cooperation of the states to accomplish several of his most substantial acts as President.

President Jefferson also believed that states would be able to "deploy their powers in ways that would assist" federal foreign trade policy.[161] As early as 1793, then Secretary Jefferson believed that state trade policies could supplement the federal government's retaliatory tariffs against Britain thereby allowing the federal government to pursue a comprehensive foreign commerce strategy against the British Empire.[162] Later, President Jefferson vigorously utilized state personnel when enforcing his comprehensive embargo although the participation was at the discretion of the states.[163]

Both Presidents Washington and Jefferson believed that states could be utilized to aid the federal government provided that the states did so willingly. The fact that not all states participated was not seen as unconstitutionally preventing the nation from speaking with "one voice" in foreign affairs.[164]

### B. *Congressional Primacy in Foreign Commerce Regulation*

An important impetus for the inclusion of the Foreign Commerce Clause amongst Congress's powers was the need to effectively retaliate against British trade policy which was seen as a continuation of the shooting

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157 *See* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878 at 22–23 (1996).

158 *Id.* at 22–23.

159 *See* MCDONALD, *supra* note 34, at 127–28.

160 *Id*. at 127.

161 Robert J. Delahunty, Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs, 37 STAN. J. INT'L L. 1, 25 (2001).

162 *See* Report on the Privileges and Restrictions on the Commerce of the United States in Foreign Countries, AVALON PROJECT (Dec. 16, 1793), http://avalon.law.yale.edu/18th_century/jeffrep2.asp.

163 *See* Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1666–67 (2007) (asserting that the embargo's enforcement was decentralized even though this "delegation to the states . . . threatened to wreck the system.").

164 *See* John Yoo, *George Washington and Executive Power*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1, 13–14 (2010); John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 450–51 (2008).

war by other means.[165] The Framers were convinced that British commercial policy sought to reestablish prerevolutionary British dominance over American trade.[166] This helps explain why the Foreign Commerce Clause was one of the few elements of the Constitution that was virtually uncontested.[167] The only aspect of the Foreign Commerce Clause that was debated at the Philadelphia Convention was whether it ought to take a majority or super majority vote to enact regulation—it was undisputed that Congress was to play the lead role in the commercial branch of foreign affairs.[168] President Jefferson's response to British trade practices during the Napoleonic Wars demonstrate that Congress was understood to have the primary responsibility for foreign commerce regulation.[169]

President Jefferson sought to maintain American independence from Britain primarily through economic measures.[170] Although foreign commerce regulations were the centerpiece of President Jefferson's foreign policy, he stringently adhered to the forms of the Constitution and ensured that Congress enacted every measure rather than imposing them by executive fiat.[171] Rather than resort to war, Jefferson attempted to protect American honor and interests through economic measures.[172] These economic measures had a foreign affairs purpose, but that did not mean that President Jefferson (no enemy

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165 The economic depression of the 1780s, which was a major cause of the calling of the Philadelphia Convention, was exacerbated greatly by the British Order in council of 2 July 1783. *See* Delahunty, *supra* note 161, at 18–19.

166 *See id.* at 19.

167 *See id.* at 19–20; *see also* THE FEDERALIST NO. 42, *supra* note 34, at 262 (James Madison) ("The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.").

168 *See* Delahunty, *supra* note 161 ("The debate at the Philadelphia Convention over whether a bare majority or a supermajority of each House was required to enact foreign commerce regulations demonstrates that the Framers intended such regulation to be made by a legislative body, rather than an executive or judicial one.").

169 *See* discussion *infra* Section III.B.

170 *See* MCDONALD, *supra* note 34, at 256; Yoo, *supra* note 164, at 448.

171 *See* Yoo, *supra* note 164, at 449; *see also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 349 (2001) ("A second area where the President ceded the lead to Congress involved the regulation of foreign commerce . . . [R]egulation of commerce with foreign nations—including embargoes—was encompassed by Congress's express Article I, Section 8 power. Not surprisingly, there was no discussion of the President imposing an embargo (or other regulation of commerce) during the Washington Administration; these matters were handled in Congress. In particular, Congress obviously thought the President lacked the ability to impose an embargo on his own authority, for in 1794 it delegated to the President the power to impose an embargo during the legislative recess 'whenever, in his opinion, the public safety shall so require.' This further confirms the general understanding that foreign affairs powers conveyed to Congress by the Constitution were conveyed away from the President, even where these powers had previously been traditional executive powers.").

172 *See* FORREST MCDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 139–43 (1976).

to broad executive power while in office[173]) took unilateral action.[174] The President recognized that if he chose to employ commercial means to achieve foreign policy goals, he was in the realm of Congress.[175] President Jefferson worked with Congress to enact a series of Embargo Acts.[176] As Professor John Yoo has written, the embargo policy was not the result of unilateral executive action, but was an execution of statutes by the President.[177] Although embargo was clearly the policy Jefferson favored,[178] both the President and Congress recognized that it was Congress that was constitutionally empowered to take such measures.[179] Thus, Congress was understood to be the primary architect of foreign commerce policy and could enlist the states to support the policy.[180]

The Embargo Acts also granted the President the power to suspend the embargo in the event peace broke out between Britain and France.[181] The President could suspend the embargo if, in his judgment, he found that Britain and France reached a peace accord or modified their behavior to render American commerce safe.[182] The inclusion of this and its acceptance by President Jefferson and use by President Madison[183] indicates that the power to suspend an embargo was not inherently executive and must stem from congressional authorization (lest it be mere redundancy) further confirming congressional primacy in the realm of economic warfare.[184]

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173 Yoo, *supra* note 164, at 425.

174 *See* Mashaw, *supra* note 163, at 1647 ("While the embargo's legal technique was regulation of commerce, it was motivated by foreign policy concerns.").

175 *Id.* at 1649.

176 It was actually Secretary Gallatin who drafted the Embargo Acts which were passed by Congress. *See* Yoo, *supra* note 164, at 449.

177 *Id*.

178 *Id*. at 448.

179 *See* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 126 (2015) ("[C]onstraints on the executive power over foreign affairs, such as the bar on presidential regulation of foreign commerce, were implicit in the Constitution's design. Unlike those governors who had state constitutional authority to impose short-term embargoes . . . the president lacked such powers . . . [T]he [Second Embargo Act's] structure fairly proved that neither the president nor Congress believed that the president enjoyed any constitutional power to lay an embargo.").

180 President Jefferson believed that states would be able to "deploy their powers in ways that would assist" federal foreign trade policy. *See* Delahunty, *supra* note 161.

181 *See The Aurora*, 11 U.S. 382, 383 (1813).

182 *See id.*

183 President Madison followed the statutory procedure when he lifted the embargo through a decree finding that "France had so revoked or modified her edicts, as that they ceased to violate the neutral commerce of the United States." *Id.* at 384.

184 *See id.* at 386 (upholding this particular provision of the Embargo Act against a delegation challenge); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363–64 (2002), for a discussion of contingent legislation and how it does not subtract from Congress' power.

Founding era practice reveals two relevant principles regarding the Constitution's allocation of foreign sanctioning power. First, Congress sets foreign trade policy even if it has the intent of forcing a foreign nation to modify its behavior.[185] Second, there is nothing inherently unconstitutional with the states participating in foreign affairs so long as the branch responsible for the area the state is participating in (Congress for purposes of foreign commerce) approves.[186]

### C. *Case Study in the Original Understanding of Economic War Powers: The Chesapeake Affair*

The view that Congress must set foreign commerce policy, even when it touched on matters of war and international diplomacy, was so thoroughly accepted that President Jefferson, who had just unilaterally issued a proclamation banning armed British ships from U.S. waters and called upon state governors to prepare one hundred thousand militia and reallocated appropriations without consulting Congress (he relied on the laws of necessity), saw it as absolutely necessary to convene Congress to allow them to pass an Embargo Act rather than taking unilateral action against British commerce.[187]

In 1807, the HMS *Leopard* attacked the USS *Chesapeake* killing three American sailors and forcing the USS *Chesapeake* to surrender.[188] Amidst the national outrage, President Jefferson made emergency expenditures on arms, called one hundred thousand state militiamen into a state of readiness, dispatched instructions to American diplomats to demand an apology from the British government and the cessation of the impressment policy, and issued a proclamation ordering British warships out of American waters.[189] Amidst this flurry of activity, President Jefferson, no enemy of unilateral executive action in response to a crisis, believed he did not possess the authority to pursue his desired foreign policy against Britain—economic embargo—and relied on Congress to pass the appropriate measures.[190]

These actions are not at all inconsistent, rather they demonstrate the government operating properly in foreign affairs. President Jefferson exercised his residual executive power over foreign affairs to ban British warships

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185 Eighteenth century political theorists and the framers considered foreign commerce regulation to be an executive power perhaps due to its importance to the conduct of foreign affairs in the age of mercantilism when economics and foreign affairs were as intertwined as they are in 2017. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 247–49 (1985); *see also* discussion *infra* Section V.B.2.

186 *See* MCDONALD, *supra* note 34, at 136; Yoo, *supra* note 164, at 450–51.

187 *See* Yoo, *supra* note 164, at 451–52.

188 They may actually have been British deserters lending credence to the British complaint. *See* MCDONALD, *supra* note 34, at 135.

189 *Id.* at 135–36.

190 *See* Yoo, *supra* note 164, at 449.

from American waters.[191] The President exercised his shared power in time of crisis to call forth the state militias, not into actual service, but to a state of readiness.[192] Rather than a military response, the President chose to pursue a comprehensive economic policy to retaliate for this provocation.[193] The Embargo Acts were openly foreign affairs measures meant to alter the behavior of a foreign power but President Jefferson understood that he did not have unilateral authority over absolutely anything that impacted foreign affairs.[194] He understood that he was reliant on the "preeminent speaker" regarding foreign commerce, namely, Congress.[195]

At the time of the Constitution's ratification, the power to embargo was considered a foreign affairs power, executive in nature, that was specifically divested from the President's general executive power and granted to Congress.[196] The embargo crises illustrate this point well. President Jefferson faced a delicate geopolitical situation as the British public was clamoring for war against the defiant Americans.[197] Although foreign commerce regulation was primarily understood to be a tool of foreign affairs, it did not mean that Congress was disqualified from setting foreign policy in this arena.[198] The Constitution specifically divested this power over economic foreign policy from the President and placed it with Congress.[199] Even President Jefferson did not believe that his prerogative extended to the regulation of foreign commerce to effectuate foreign affairs goals.[200]

This historical backdrop supports the two practices discussed above: (1) that Congress sets foreign trade policy even if its intent is to modify the behavior of a foreign nation;[201] and (2) that state participation in foreign affairs is constitutional provided that Congress approves of the actions taken by them. [202]

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191 *See* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2096–97 (2015) (Thomas, J., concurring); PRAKASH, *supra* note 179, at 110–19, for descriptions of residual power over foreign affairs,.

192 *See* MCDONALD, *supra* note 34, at 135–36.

193 *Id.* at 139.

194 *Id.* at 143–46 (maintaining that the primary objectives were for Britain to end its impressment policy, respect the neutral rights of American merchants and to demonstrate the indispensability of American trade to the world.)

195 *Id*. at 143–45; *see also* Barclays Bank PLC v. Franchise Tax Bd. Of Cal. 512 U.S. 298, 329–30 (1994); United States v. the William, 28 F. Cas. 614, 622 (D. Mass. 1808) ("If an embargo, or suspension of commerce, of any description, be within the powers of congress, the terms and modifications of the measure must also be within their discretion.").

196 *See* U.S. CONST. art. II, § 1; Prakash & Ramsey, *supra* note 171, at 349.

197 *See* MCDONALD, *supra* note 34, at 136–37.

198 *See* Delahunty, *supra* note 161, at 24–25; *see also the William*, 28 F. Cas. at 621.

199 *See* U.S. CONST. art. I, § 8, cl. 3; THE FEDERALIST NO. 42, *supra* note 34, at 260, 262 (James Madison); Prakash & Ramsey, *supra* note 171, at 348–49.

200 *See* Yoo, *supra* note 164, at 449.

201 *See* discussion *supra* Section II.B.

202 *See* discussion *supra* Section II.C.

## IV. THE STATE DIVESTMENT DEBATE

The debate over the constitutionality of state foreign affairs divestment measures has gone on in different guises since at least the state attempts to divest from South Africa in the 1980s.[203]

If state Iran divestment provisions like the PFIA are unconstitutional their authorizing legislation, CISADA, must be as well. If CISADA is constitutional, PFIA plainly fits within the congressional authorization. The question is: May Congress authorize states to engage in these measures? In response to the Sudan Accountability and Divestment Act, President George W. Bush's administration argued that Congress may not authorize states to engage in foreign affairs activities because it infringed the executive power over foreign affairs.[204] The basis of the Bush DOJ's argument seems to be that Congress cannot divest the federal government of its sole authority over foreign affairs.[205] This argument is akin to a double-delegation restriction; since the people delegated the powers of foreign affairs to the federal government, the federal government cannot then delegate that power to the states.[206] Congress has the "power to make laws not legislators."[207] The DOJ relied on the President's independent Article II authority[208] to argue that the Congress does not have the power to protect state divestment laws from the President's independent authority over foreign affairs, citing *Garamendi*.[209] Historical practice and Supreme Court precedent runs counter to this as *Garamendi* seems limited to the accepted and narrow executive power over international claims settlement; it does not extend to foreign commerce regulation as well.[210]

Others, such as the NFTC,[211] and Professors Hart and Eckert have argued that state divestment actions run afoul of the federal foreign affairs

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203 *See, e.g.*, Lucien J. Dhooge, *Darfur, State Divestment Initiatives, and the Commerce Clause*, 32 N.C. J. INT'L L. & COM. REG. 391, 391–92 (2007); Shawna Fullerton, *State Foreign Policy: The Legitimacy of the Massachusetts Burma Law*, 8 MINN. J. GLOBAL TRADE 249, 249–50 (1999); Peter J. Spiro, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 813–15 (1986).

204 *See* Letter from Brian Benczkowski to Hon. Richard B. Cheney, *supra* note 29.

205 *See id.*

206 *See id.*

207 Philip Hamburger, Is Administrative Law Unlawful? 393 (2014).

208 *See* U.S. CONST. art. II, § 1.

209 *See* Letter from Brian Benczkowski to Hon. Richard B. Cheney, *supra* note 29.

210 *See* discussion *supra* Section II.B.

211 The NFTC has been perhaps the most successful opponent of state action in foreign trade in the Supreme Court. *See Sanctions and Export Controls*, NAT'L FOREIGN TRADE COUNCIL, http://www.nftc.org/?id=253&cat=Issues_SanctionsandExportControls (last visited July 10, 2017), for a description of NFTC's successes. NFTC lists one of its 2016 objectives as "[o]ppos[ing] state and local sanctions and divestment legislation on the grounds that the Constitution reserves the conduct of foreign policy to the President, and that a multiplicity of governmental agents seeking to conduct their own policies is against

power and must be unconstitutional.[212] The NFTC relies on *Crosby* and *Gianoulias* to argue that state divestment measures are in violation of the Supremacy Clause, Foreign Commerce Clause, and the President's independent authority to conduct foreign policy.[213] The broad holding of the United States Court of Appeals for the First Circuit in *National Foreign Trade Council v. Natsios*[214] also provides hope to potential challengers.[215] In *Natsios*, the court held that the Massachusetts Burma Law was unconstitutional on three grounds (1) it violated the dormant foreign commerce clause; (2) it violated the federal government's exclusive foreign affairs powers; and (3) it was preempted by the Federal Burma Act.[216] The Supreme Court restrained its holding to only the preemption grounds and did not address the dormant foreign commerce clause or the broader dormant foreign affairs power holding of the First Circuit.[217] Relying on indications in *Crosby's* dicta and the holding in *Natsios*, some have argued that CISADA unconstitutionally infringes on the President's independent foreign affairs power.[218]

The dormant foreign affairs argument does not work because the PFIA conforms to express congressional authorization.[219] This means that *Crosby* and most other precedents, which rely on traditional preemption principles and direct congressional authorization not being present, are irrelevant.[220] The president stands stripped of all congressional delegation; thus, he must rely

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the national interest." *2016 Priorities*, NAT'L FOREIGN TRADE COUNCIL 9, http://www.nftc.org/default/general%20information/2016goalsandpriorities.pdf (last visited July 10, 2017).

212 *See* Jo-Anne Hart & Sue Eckert, *Most U.S. States Have Sanctions Against Iran. Here's Why That's a Problem*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/01/most-u-s-states-have-sanctions-against-iran-heres-why-thats-a-problem-2/.

213 *See* U.S. Const. art. I, § 8; *id.* art. II, § 1; *id.* art. VI; Crosby v. Nat'1 Foreign Trade Council, 530 U.S. 363, 388 (2000); Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 741–42 (N.D. Ill. 2007); *State and Local Sanctions*, USA ENGAGE, http://usaengage.org/Issues/State-and-Local-Sanctions/ (last visited July 10, 2017).

214 181 F.3d 38 (1st Cir. 1999).

215 *See id.* at 44–45.

216 *Id*. at 45.

217 *See Crosby*, 530 U.S. at 388.

218 Tyler Cullis, *Additional Notes on State Sanctions Laws*, SANCTION L. BLOG (Sept. 10, 2015), http://sanctionlaw.com/additional-notes-on-state-sanctions-laws/. This is not a fringe position; it closely echoes that of the Bush administration*; see* Letter from Brian Benczkowski to Hon. Richard B. Cheney, *supra* note 29. It is also the position that the NFTC endorses. *See State and Local Sanctions*, supra note 213. Brown University's Watson Institute for International & Public Affairs has established the Iran Sanctions Project devoted to "investigating state governmental involvement in sanctions against Iran following the signing of last year's [JCPOA]" and defending this "landmark achievement in diplomacy" against "[s]tate-level interference . . . a potential challenge to executive branch authority in the conduct of US foreign policy." Watson Inst. for Int'l & Pub. Affairs, *State-Level Sanctions Against Iran: Why Do They Matter?*, IRAN SANCTIONS PROJECT, http://watson.brown.edu/news/explore/2016/IranSanctions Project (last visited July 10, 2017).

219 *See* discussion *supra* Section I.B.

220 *See Crosby*, 530 U.S. at 372–74; Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 737 (N.D. Ill. 2007).

only upon his unilateral foreign affairs powers. The PFIA is constitutional only if it is constitutionally proper for Congress to allow state divestment measures regardless of the effect on the president's ability to promulgate and execute foreign policy.

## V. ARGUMENT: "I MAKE AMERICAN FOREIGN [COMMERCE?] POLICY"[221]

This argument is framed within the conception of executive power most commonly associated with Professors Saikrishna Prakash, Stephen Calabresi, John Yoo, and Christopher Yoo.[222] The divestment measures cannot be unconstitutional under a weaker conception of executive power.[223] Because all executive power is vested in the President and the meaning of executive power at the time of ratification was understood to include the general foreign relations powers of the nation, the President may exercise all powers in foreign affairs that are not expressly divested from him and granted to Congress.[224] The Constitution expressly divests from the President the power to regulate foreign commerce and gives it to Congress.[225] Under Article I, Section 8, Congress may make all laws necessary and proper to regulate foreign commerce.[226] Sanctions are an exercise of foreign commerce power.[227] Congress enacted a comprehensive scheme to sanction the Iranian energy industry and found it necessary to enlist the states as supplemental support in its foreign commerce regulation.[228] Founding era practice and Supreme Court

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221 Lee H. Hamilton, *Congress and the Presidency in American Foreign Policy*, 18 PRESIDENTIAL STUD. Q. 507, 507 (1988).

222 *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451 (1997); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701 (2003). For further support of this theory of executive power, *see* U.S. CONST. art. II, § 1; ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS, ON THE PROCLAMATION OF NEUTRALITY OF 1793 7–8 (1845); *Zivotofsky II*, 135 S. Ct. 2076, 2096–98 (2015) (Thomas, J., concurring in part, dissenting in part).

223 Unless one were to give an expansive meaning to the recognition power to include other foreign affairs powers, which is a possibility given the majority in *Zivotofsky*. *See* discussion *infra* Section V.B.5.

224 *See Zivotofsky II*, 135 S. Ct. at 2096–98 (Thomas, J., concurring); HAMILTON & MADISON, *supra* note 222; Prakash & Ramsey, *supra* note 171, at 253.

225 *See* U.S. CONST. art. I, § 8, cl. 3.

226 Id.

227 They are a restriction on citizens from conducting business with certain foreign entities and persons. *See* discussion *infra* Section V.B.3, for more on the scope of the foreign commerce regulation power and its original understanding as it relates to foreign relations.

228 *See* 22 U.S.C. § 8532(a) (2012) ("It is the sense of Congress that the United States should support the decision of any State or local government that . . . divests from, or prohibits the investment assets of the State or local government in, a person that engages in investment activities in the energy sector of Iran, as long as Iran is subject to economic sanctions imposed by the United States.").

precedent confirms that it is constitutionally proper for the federal government to enlist state aid in carrying out its foreign commerce powers.[229] Thus, the PFIA and other similar state divestment measures made pursuant to CISADA's authorization are constitutional.

### A. *The Executive Power Over Foreign Affairs*

The original understanding of executive power included foreign affairs power.[230] Inherent in the meaning of executive power was the power to conduct foreign relations.[231] Thus, the Constitution's vesting of *the* executive power in *one* President of the United States means that the President is vested the residual foreign affairs powers of the nation—all those foreign affairs powers except those that are expressly divested from him and given to Congress.[232]

One of the greatest influences on the framers political thought was John Locke.[233] He defined executive power as containing both domestic power to execute the laws and the federative power, consisting of "war and peace, leagues and alliance, and all the transactions with all persons and communities without the commonwealth."[234] Montesquieu similarly concluded that foreign affairs authority was by nature executive.[235] Blackstone emphatically vested the monarch with all traditional foreign affairs authority including that of regulating commerce, making war, declaring peace.[236] Writing as Pacificus, Hamilton argued that all powers of foreign affairs were granted to the President by the Executive Vesting Clause except those executive powers such as declaring war and regulating commerce that were granted to other branches.[237] President Washington agreed.[238] There are also partial divestments of executive foreign affairs power such as the shared treating-making

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229 *See, e.g.*, Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 12–13 (1986); discussion *supra* Section III.A.

230 *See* Prakash & Ramsey, *supra* note 171, at 253.

231 *Id.* at 253–54.

232 *See* U.S. CONST. art. II, § 1; *Zivotofsky II*, 135 S. Ct. 2076, 2096 (Thomas, J., concurring); HAMILTON & MADISON, *supra* note 222; Prakash & Ramsey, *supra* note 171, at 253.

233 *See Zivotofsky II*, 135 S. Ct. at 2098 (Thomas, J., concurring).

234 *Id*.

235 *Id.* ("Baron de Montesquieu similarly described executive power as including the power to 'mak[e] peace or war, sen[d] or receiv[e] embassies, establis[h] the public security, and provid[e] against invasions.'").

236 *See id*.; MCDONALD, *supra* note 185, at 247–48.

237 *See* U.S. CONST. art. II, § 1; HAMILTON & MADISON, *supra* note 222, at 7–10.

238 *See* Prakash & Ramsey, *supra* note 171, at 349.

power.[239] In sum, most political writers of the eighteenth century were "inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs."[240]

## B. *Separation of Powers: How the Constitution Allocates the Foreign Commerce Power*

The Framers divided traditional executive powers over foreign affairs at the Constitutional Convention.[241] Congress was given certain foreign affairs powers and the President retained the remainder.[242] The President is possessed of broad powers over the conduct of foreign affairs.[243] When the President seeks to pursue an economic program, however, he is completely reliant on delegation from Congress.[244] The President has no independent authority over foreign commerce.[245] Thus, the President, like the states, is acting to carry out Congress's policy over foreign commerce. To be sure, the President has discretionary authority within his own realm in deciding his own enforcement levels, but this executive discretion does not extend to taking an action that would subvert the law he is supposed to be faithfully executing (such as compelling state inaction in an area where Congress has authorized and encouraged action).[246]

### 1. The "Proper" Limitation on Congress

Congress does not prevail over the President in foreign affairs simply because it has legislated.[247] Legislation must both be "necessary" and "proper," meaning the means chosen by Congress must be "plainly adapted" to the exercise of an enumerated power and not otherwise prohibited by the Constitution or inconsistent with its "letter and spirit."[248] Congress cannot contradict the President in areas of vested executive authority because this

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239 *See* U.S. CONST. art. II, § 2.

240 *Zivotofsky II*, 135 S. Ct. at 2098 (Thomas, J., concurring).

241 *See* MCDONALD, *supra* note 185, at 249.

242 *See* Prakash & Ramsey, *supra* note 171, at 253.

243 *See id.*; *see also* John Yoo, Crisis and Command: The History of Executive Power from George Washington to George W. Bush xv (2010).

244 *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375–76 (2000).

245 *See* U.S. CONST. art. I, § 8, cl. 3; Prakash & Ramsey, *supra* note 171, at 280.

246 *See* Prakash & Ramsey, *supra* note 171, at 253–54.

247 *Contra* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

248 U.S. CONST. art. I, § 8, cl. 18; McCulloch v. Maryland, 17 U.S. 316, 421 (1819); *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) ("[L]aws must be consistent with principles of separation of powers, principles of federalism, and individual rights.").

would not be constitutionally "proper."[249] Thus, a threshold question exists: Does Congress possess authority over foreign commerce allowing it to contradict the President on a matter of foreign affairs? Or is this a Congressional infringement upon the President's power? Do sanctioning powers and other powers of economic diplomacy belong to Congress or to the President? The propriety of CISADA, "in a constitutional light, must always be determined by the nature of the powers upon which it is founded" lest it "excee[d] [Congress's] jurisdiction."[250] Thus, it is necessary to examine the source of the power of economic diplomacy in the Constitution: the Foreign Commerce Clause.

### 2. Foreign Commerce Regulation is Congress's Domain

The Framers understood at the time of ratification that foreign commerce regulation is by nature an executive power.[251] It is one of the foreign affairs powers explicitly stripped from the President's general grant of executive power and granted to Congress in Article I, Section 8.[252] Congress has broad authority over foreign commerce.[253] Broader, generally, than its authority over war.[254] It may be tempting to place the sanctioning and embargo power under Congress' power to "declare war."[255] However, the war declaration power is quite narrow[256] and cannot account for the embargo power, which naturally fits into the category of a restriction of foreign commerce, albeit with a foreign affairs purpose.[257] The power to "regulate" is much

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249 *See* Lawson & Granger, *supra* note 248, at 298–99.

250 THE FEDERALIST NO. 33, *supra* note 34, at 199–200 (Alexander Hamilton).

251 *See* Prakash & Ramsey, *supra* note 171, at 349.

252 U.S. CONST. art. I, § 8, cl. 3.

253 *See id.*

254 *See id.* cl. 11.

255 *Id.*

256 Professors Yoo and Delahunty marshal overwhelming evidence to demonstrate that the original Declaration Clause allowed Congress to "serve notice on American citizens, neutral nations, and intended or actual foreign enemies of the existence of a state of war between the United States and another power or powers" and "clothe the bare state of general hostilities with appropriate legal characteristics and to subject it . . . to the Laws of War." The general power of "directing and employing the common strength of society" in a shooting war "forms a usual and essential part in the definition of the executive authority." Congress can influence the President's conduct of foreign affairs, not primarily through the Declaration clause but through the spending power or its own powers such as that over "international commerce, which allow it to set an alternative foreign policy." Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 130–31, 151–52 (2007).

257 *See* Delahunty, *supra* note 161.

broader.[258] Additionally, Congress has broad authority to regulate the military.[259] Even in time of crisis and imminent threat, Congress' power to "make rules for the Government and Regulation of the land and naval forces" is supreme.[260] The Supreme Court has been emphatic in its affirmance of Congress' "plenary," "exclusive and absolute" control over the regulation of foreign commerce.[261] Congress' power to regulate foreign commerce includes economic measures intended to affect foreign countries, such as sanctions.[262] Founding era practice demonstrates that the congressional regulations of foreign commerce with an impact on foreign affairs do not infringe on the president's independent constitutional authority over foreign affairs.[263] There is a long history of Congress enacting sanctions and other restraints on Congress with intended foreign affairs impact.[264]

### 3. Sanctions are Within Congress's Power Under the Foreign Commerce Clause

The Foreign Commerce Clause was originally understood to be a power over foreign affairs akin to the treaty power.[265] It was not just thought of as a domestic power of Congress akin to the Interstate Commerce Clause, rather the Foreign Commerce Clause was understood to be a vital tool of foreign policy.[266] The Constitution was promulgated in the age of mercantilism when foreign commerce regulation was a key diplomatic tool. A major cause of the calling of the Philadelphia Convention was the perceived need to form a government capable of responding to the "intense commercial rivalry" with Britain, which was thought to be a British continuation of her war aims through

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258 Gibbons v. Ogden, 22 U.S. 1, 196 ("It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.").

259 *See* U.S. CONST. art. I, § 8, cls. 11–16.

260 *Id.* cl. 14; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 591–92 (2006).

261 Buttfield v. Stranahan, 192 U.S. 470, 493, 496 (1904); *see also* David H. Moore, Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power, 90 NOTRE DAME L. REV. 1019, 1037–38 (2015).

262 *See* 50 U.S.C. § 1707 (2012).

263 *See* discussion *supra* Section III.B.

264 *See* Stephen R. Weissman, *Congress and War: How the House and the Senate Can Reclaim Their Role*, FOREIGN AFFAIRS (Dec. 12, 2016), https://www.foreignaffairs.com/print/1118836.

265 *See* THE FEDERALIST NO. 42, *supra* note 34, 261 (James Madison). The Federal District Court for the District of Massachusetts considered whether the Jeffersonian Embargo was constitutional. The court marshalled evidence from the Philadelphia convention to find that the embargo was a constitutional exercise of Congress' power under the Foreign Commerce Clause which granted the embargo power to Congress. The court held that embargos and other exertions of economic war were within the Foreign Affairs Clause. *See* United States v. the William, 28 F. Cas. 614, 621 (D. Mass. 1808).

266 *See, e.g.*, discussion supra Section III.B. Contra Saikrishna Prakash, Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity, 55 ARK. L. REV. 1149, 1161 (2003).

commercial rather than military means.[267] The Foreign Commerce Clause was viewed by the Framers as a means of "retaliation against British trade measures" intended to bring about a change in British policy, namely, "a relaxation in her present system" of restrictions on the former colony's West Indian trade.[268] Professor Prakash has demonstrated that the means of retaliation against British trade measures, embargos, was thought of in state constitutions as a foreign affairs power that was often vested in state governors.[269] Madison described the need of an effective national power to "counteract[] [the] commercial regulations of other nations" as an impetus for the calling of the Philadelphia Convention.[270] The Foreign Commerce Clause was a reaction to the former colonies inability to engage in the commercial diplomacy necessary to survive in the age of mercantilism.[271] It was viewed as a tool of foreign affairs placed squarely in the hands of Congress.[272] The Presidents of the founding generation with the most robust view of their office never sought to usurp the powers of economic war from Congress.[273] Thus, CISADA, a measure of economic diplomacy is within Congress' enumerated powers under the Foreign Commerce Clause.

### 4. Congressional Leadership or Delegation: The Peculiar Nature of the Iran Sanctions Regime

The adoption of the IEEPA has ushered in an era of congressional delegation of sanctioning authority to the president.[274] However, the Iranian

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267 Delahunty, *supra* note 161, at 18–19.

268 The dual nature of the foreign commerce clause is illustrated by the debates over whether it would take a two thirds majority of both houses of Congress or a simple majority to impose commerce restrictions. The domestic aspect of the Foreign Commerce Clause is illustrated by the southerners' support of a two-thirds requirement due to the economic benefit to agriculture of free trade. The northern view represented the diplomatic aspect of the Foreign Commerce Clause with Gouverneur Morris and John Rutledge (a South Carolinian but a supporter of national power) opposing the two-thirds requirement because it would impede the federal government's ability to respond to foreign trade developments. Madison vociferously argued for "unlimited" congressional power over foreign commerce and dismissed the southern domestic view of the Foreign Commerce Clause because it would be outbalanced by the "essential advantage" and "general security afforded by the increase of our maritime strength." *Id.* at 21–23.

269 PRAKASH, *supra* note 179, at 126.

270 *Madison Debates*, AVALON PROJECT (May 29, 1787), http://avalon.law.yale.edu/18th_century/debates_529.asp.

271 *See* Delahunty & Yoo, *supra* note 256, at 135 ("Britain and France imposed harmful trading rules against American ships while Spain closed the critical port of New Orleans to American commerce. American ambassadors could do nothing to reverse British and French policies because Congress had no authority over commerce with which to threaten retaliatory sanctions.").

272 *See* Delahunty, *supra* note 161, at 24–25.

273 *See* discussion *supra* Section III.B.

274 *See* 50 U.S.C. § 1707(a) (2012). This section of the International Emergency Economic Powers Act stipulates the following:"(a) Policy on the establishment of embargoes: It is the policy of the United States, that upon the use of the Armed Forces of the United States to engage in hostilities against any

sanctioning regime is a return to Congressional primacy in economic diplomacy. A comparison with the Russian sanctioning regime demonstrates that CISADA is a congressional attempt to reclaim its lead role in foreign commerce regulation.[275] The sanctioning regime Congress has imposed on Iran stands apart from normal sanctioning regimes and reflects the interest Congress has in actively directing and playing a leading role in Iran sanctions. With the IEEPA, Congress delegated to the president wide authority and discretion to sanction foreign nations and lift sanctions.[276] The Iranian sanctioning regime is marked by restraints on the president's authority to lift sanctions, except on a case-by-case basis.[277] Comparison with the current Russian sanctioning regime demonstrates the different nature of the Iran sanctions and the reduced sphere for presidential discretion under the Iran sanctioning regime.

America employs three types of sanctions against Russia.[278] The first set of sanctions affect Russia indirectly. Russian arms dealers are sanctioned under the Iran, North Korea, and Syria Nonproliferation Act ("INKSNA").[279] INKSNA is part of the broader Iranian sanctioning regime and does not include presidential waiver provisions.[280] It represents congressional leadership over sanctions with little room for executive discretion.[281] Congress has also enacted the Magnisky Act which sanctions Russian individuals determined to be complicit in rule of law abuses.[282] Like INKSNA, the Magnisky Act represents congressional direction over a sanctioning regime but there are broad presidential waiver provisions.[283]

The most serious sanctions the United States has imposed on Russia have been in response to the Ukrainian crisis. President Obama issued Executive Orders 13660, 13661, and 13685 pursuant to the authority vested in the

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foreign country, the President shall, as appropriate–(1) seek the establishment of a multinational economic embargo against such country; and (2) seek the seizure of its foreign financial assets."

275 *Compare* 22 U.S.C. §§ 8501–8551 (2012), *with* 50 U.S.C. §§ 1701–1707.

276 *See* 50 U.S.C § 1701.

277 *See* Estreicher & Menashi, *supra* note 72, at 105.

278 Zeeshan Aleem, *Trump Can Lift Some Russia Sanctions. But it Won't Be Easy*, VOX (Dec. 23, 2016), http://www.vox.com/world/2016/12/23/14028546/trump-lift-russia-sanctions; Andrew S. Weiss & Richard Nephew, *The Role of Sanctions in U.S.–Russia Relations*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 11, 2016), http://carnegieendowment.org/2016/07/11/role-of-sanctions-in-u.s.-russian-relations-pub-64056.

279 Iran, North Korea, and Syria Nonproliferation Act, 50 U.S.C. § 1701 note.

280 *See id.*

281 *See id*. §§ 2(a), 4.

282 *See* Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L 112-208, § 404(a), 126 Stat. 1496 (2012) (codified as amended 19 U.S.C. § 2101 note).

283 *See id*. § 404(a)–(f).

"President by the Constitution and laws of the United States of America, including the IEEPA."[284] The IEEPA accords wide discretion to the president to declare an emergency and impose economic sanctions.[285]

Congress later passed the Ukraine Freedom Support Act which vests the president with additional authorities to sanction Russian individuals complicit in the invasion of Ukraine.[286] Interestingly, President Obama issued a signing statement that made clear that the Ukraine Freedom Support Act "does not signal a change in the Administration's sanctions policy . . . [a]t this time, the Administration does not intend to impose sanctions under this law, but the Act gives the Administration additional authorities that could be utilized in circumstances warranted."[287]

Because the bulk of Russian sanctions are imposed through presidential discretionary authority under IEEPA, a future president may lift them by simply rescinding the executive orders.[288] However, the structure of the Iran sanctions regime is not marked by executive orders based upon IEEPA but upon comprehensive legislation with mandatory sanction provisions and limited waiver authority.[289] In the realm of Russian sanctions, imposition is discretionary; in the realm of Iranian sanctions, the only discretion vested in the president by law is in limited case by case waivers.[290] Removing sanctions placed upon Russia does not dispense with a duly enacted law because the president is acting within the discretion that Congress bestowed.[291] A blanket removal of sanctions on Iran is beyond the discretion vested in the president by law.[292]

If state actions, pursuant to CISADA, are held to be unconstitutional due to the JCPOA, in effect the president is held to be able to dispense with a duly enacted statute through an international executive political commitment. Imagine the *Crosby* or *Garamendi* rationale being utilized to preempt the PFIA.[293] In effect, this would mean that, although authorized by Congress, states are not able to divest because it would infringe on the president's ability to conduct foreign affairs.

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284 Exec. Order No. 13,660, 79 Fed. Reg. 46 (Mar. 10, 2014); Exec. Order No. 13,661, 79 Fed. Reg. 53 (Mar. 19, 2014); Exec. Order 13,685, 79 Fed. Reg. 247 (Dec. 24, 2014).

285 *See* 50 U.S.C. § 1701(a); Joel B. Harris & Jeffrey P. Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71, 77–80 (1985).

286 Ukraine Freedom Support Act, 22 U.S.C. § 8923(a)–(c) (2012).

287 Statement by the President on the Ukraine Freedom Support Act, WHITE HOUSE (Dec. 18, 2014), https://www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act.

288 *See* Aleem, *supra* note 278.

289 *See* Estreicher & Menashi, *supra* note 72, at 141.

290 *See id.* at 105.

291 *See* 50 U.S.C. § 1701 (2012).

292 *See* 22 U.S.C. § 8514(d) (2012).

293 *See supra* notes 143–152 and accompanying text.

This must mean one of two things: (1) Congress is without the power to have enacted the statute in the first place or (2) the president's authority in foreign affairs allows him to dispense with a statute. Congress placed the state divestment provisions beyond the President's control; beyond the President's executive discretion.[294] If it is held that a statute is null because it infringes upon the President's foreign affairs initiative, it would have the effect of granting the President the ability to dispense with laws through his power to promulgate foreign policy. However, this would not really be dispensing. Rather, it would mean that Congress did not have the enumerated authority to enact the "dispensed" statute in the first place.

### 5. The Impact of *Zivotofsky I* & *Zivotofsky II*

The Supreme Court's holding in *Zivotofsky II*[295] seems to be an expansive declaration of unilateral presidential power over foreign affairs. Chief Justice Roberts believed as much:

> Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches 'its lowest ebb' when he contravenes the express will of Congress, 'for what is at stake is the equilibrium established by our constitutional system.'[296]

However, the holding of *Zivotofsky II* is not as expansive as many believe. In fact, it may limit executive power more than anything due to its narrow reading of the Executive Vesting Clause.[297] Further, the power at stake in *Zivotofsky II*, recognition, is not enumerated and had to be implied from other powers, while the power at stake with CISADA is expressly enumerated and granted to Congress.[298] Under *Zivotofsky II*'s conception of executive power, the President can only exercise foreign affairs authorities specifically granted to him in Article II.[299] There is no place in *Zivotofsky II* for

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294 This may seem to present a *Printz* issue as the executive power is fragmented and given to state officials, however this is a red herring because the divestment of state funds is something entirely beyond the Federal power—even if Congress passed a law directing the president to divest funds from state pensions, he would be without Constitutional authority to do so, thus Congress is not divesting the President of the executive power. *See supra* notes 131-141 and accompanying text.

295 135 S. Ct. 2076 (2015).

296 *Id*. at 2113 (Roberts, J., dissenting).

297 *See* Michael Dorf, Zivotofsky *May Be Remembered as Limiting Exclusive Presidential Power*, DORF ON L. (June 8, 2015, 12:52 PM), http://www.dorfonlaw.org/2015/06/zivotofsky-may-be-remembered-as.html.

298 *See Zivotofsky II*, 135 S. Ct. at 2084; *see also supra* notes 271–273 and accompanying text, for a discussion of how CISADA falls within Congress' power over foreign commerce.

299 *See Zivotofsky II*, 135 S. Ct. at 2086 ("Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which

residual powers granted through the Executive Vesting Clause.[300] That is why the majority must go through such a painstaking process to imply a recognition power from the Reception Clause. It could have achieved this result much less painlessly if it had recognized that the executive power vested in the President contains, by its nature, power over foreign affairs. Article II's enumerations grant the President nothing that remotely implies a general power to regulate foreign commerce.

### a. *Standing:* Zivotofsky I

It may seem a remote possibility that a case so clearly reflecting a political battle between the branches would clear standing barriers. However, *Zivotofsky I*[301] has done much to reduce the political question doctrine.[302] Because each branch has "taken action asserting its constitutional authority," even under Justice Powell's more restrictive "constitutional impasse" standard in *Goldwater v. Carter*,[303] this case presents standing.[304] Each branch has exhausted the extent of its political powers and the situation presents a question that can be resolved only by the Court.[305]

### b. Youngstown's *Domain*: Zivotofsky II

> The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded.[306]

The comprehensive congressional supremacy assumption implicitly underlying *Zivotofsky II* is flawed conceptually.[307] Congress is only supreme in the areas it has been granted enumerated power by the Constitution—it may

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provides that the 'executive Power' shall be vested in the President, provides further support for the President's action here.").

300 *See id.*; *see also* Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 127 (2015).

301 132 S. Ct. 1421 (2012).

302 *See id.* at 1428. *But see* Elad Gil, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 B.U. PUB. INT. L.J. 245, 262–63 (2014).

303 444 U.S. 996 (1979).

304 *Id.* at 997 (Powell, J., concurring).

305 *Id.* at 996. The underlying standing issues may remain problematic in light of the original public meaning of judicial power.

306 THE FEDERALIST NO. 33, *supra* note 34, at 199 (Alexander Hamilton).

307 *See* Mark D. Rosen, Revisiting Youngstown: Against the View That Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief, 54 UCLA L. REV. 1703, 1742–43 (2007).

not use the Necessary and Proper Clause to establish congressional supremacy over every power vested in the federal government.[308] However, *Zivotofsky II*'s holding does shed light on the way that the Court may examine separation of powers issues and demonstrates that the mere fact that Congress has legislated does not mean that the Court will uphold its power to do so.[309] Congress must act pursuant to a power that it has been granted by the Constitution.[310] The impasse over Iran sanctions is distinguishable from *Zivotofsky II* as there is no Article II provision such as the Reception Clause for the Court to latch onto.[311] None of Article II's enumerations can be stretched in the way the *Zivotofsky II* Court stretches Reception to encompass the power to deregulate foreign commerce at the state level. The only way for the Court to find that Congress exceeded its authority would be to adopt Justice Thomas's residual power approach.[312] Even there, however, the power to regulate foreign commerce, although executive in nature, is divested from the President and vested in Congress by the Constitution.[313] Thus, under all four opinions in *Zivotofsky II*, CISADA must stand.[314]

Before reaching *Youngstown*,[315] there is a threshold question: Does Congress possess the enumerated foreign affairs power? Courts must not assume without analysis that Congress has the power to legislate over an area simply because it has legislated. Courts must first determine the nature of the power, then determine where it is vested.[316] In *Youngstown*, the three acts at stake—

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308 Congress does have the power to help carry into execution all of the federal government's powers including those of the other branches. But, it does not have the power to enact laws telling the other branches "'how they ought to carry into execution' one of their powers . . . [the Necessary and Proper] Clause has nothing to do with altering constitutionally granted powers and prerogatives; nor does it allow Congress to tell constitutionally empowered actors how they can implement their exclusive powers. The Clause has everything to do, however, with permitting Congress to help itself, the President, and the federal judiciary exercise their own respective powers." Calabresi & Prakash, *supra* note 141, at 591–92.

309 *See Zivotofsky II*, 135 S. Ct. 2076, 2096 (2015).

310 *See* THE FEDERALIST NO. 33, *supra* note 34, at 199 (Alexander Hamilton) ("The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded.").

311 *See Zivotofsky II*, 135 S. Ct. at 2085.

312 *See id.* at 2097 (Thomas, J., concurring).

313 *See supra* notes 252–264 and accompanying text.

314 *See Zivotofsky II*, 135 S. Ct. at 2085 (holding that the recognition power is with the President through the Reception Clause); *id.* at 2097 (Thomas, J., concurring) (maintaining that power over passports is with President through the Recognition power, which is a residual executive power and that power over consular reports with Congress through the Naturalization Clause); *id.* at 2114 (Roberts, C.J., dissenting) (concluding that power is with Congress due to *Youngstown*); *id.* at 2117 (Scalia, J., dissenting) (asserting that the recognition power is with Congress through the Necessary and Proper Clause).

315 343 U.S. 579 (1952).

316 *See id.* at 588–89.

the Defense Production Act,[317] the Selective Service Act,[318] and the Taft-Hartley Act[319]—were promulgated pursuant to Congress's enumerated powers to raise and support armies and regulate interstate commerce. Thus, the holding of *Youngstown* is unremarkable—in an area of enumerated congressional power (the power to support armies), the President has no independent authority and must rely on Congress.[320]

The Necessary and Proper Clause cannot act as a backdoor to congressional supremacy as Congress can only legislate to carry into execution its own powers or those powers "vested by this Constitution" in another branch.[321] Congress can legislate in support of, but not infringe, powers vested in other branches.[322] The President may lay down policy and rely on Congress to supplement just as President Washington relied on Congress to implement the Neutrality Proclamation, which it did with the Neutrality Act.[323] When supplementing presidential policy, Congress is acting in support of the President's vested powers and cannot contradict the President's policy with its legislation.[324]

Regarding Iran sanctions, it seems clear that there is a conflict between Congress and President Obama in the field of foreign affairs. The existence of a conflict does not automatically mean that Congress trumps the President, although this seems to be the prevailing majority view of *Youngstown*.[325] However, even rejecting both (1) the presumption of congressional supremacy; and (2) that the Necessary and Proper Clause allows Congress to override presidential action in areas of unilateral executive power, Congress does trump the President in this area of foreign affairs. This is because sanctions are an exercise of Congress's foreign commerce regulatory power, which is a foreign affairs power that is specifically divested from the President and granted to Congress by the Constitution.[326]

Applying *Youngstown* analysis, the assertion of presidential foreign affairs precedence over state sanctions operates at the "lowest ebb" of executive power.[327] The President cannot rely on any independent authority to regulate commerce. While *Youngstown* has no place in areas of exclusive presidential authority over foreign affairs, this is as clear of a case for *Youngstown*

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317 Defense Production Act of 1950, 50 U.S.C. App. §§ 2061–2172 (2012).

318 Military Selective Services Act, 50 U.S.C. §§ 460, 468, 469 (2012).

319 Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–197 (2012).

320 *Youngstown Sheet & Tube Co.*, 343 U.S. at 589.

321 U.S. CONST. art. I, § 8, cl. 18.

322 *See* Calabresi & Prakash, *supra* note 141, at 591–92.

323 *See* Prakash & Ramsey *supra* note 171, at 350.

324 *See* Calabresi & Prakash, *supra* note 141, at 591.

325 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, at 585, 588–89 (1952).

326 *See* Executive Overreach in Foreign Affairs: Hearing Before the H. Judiciary Comm. Task for on Executive Overreach, 114th Cong. 4 (2016) (prepared written testimony of Eugene Kontorovich).

327 *See Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

analysis because the Constitution places Congress in control of this area of foreign affairs.[328]

### 6. Constitutional Dynamics: Fragmenting the Prince?

The Framers viewed economic measures as a vital, even central, tool of foreign affairs.[329] It is vital to discern where the powers of economic war and peace lie. It may be more prudent for Congress to legislate broader delegations to the President so he may cope with the unpredictability of economic warfare. However functionally prudent, this is not a constitutional imperative.[330] Functional benefits do not transfer into constitutional grants of power. Implying powers out of functional benefits carries with it the unforeseen costs and consequences of upsetting a carefully calibrated system of checks and balances.[331] The functional benefits do not define the form; adhering to the form creates the functional benefits. The Constitution created an office that is "responsible for less harm and more good, in the nation and in the world, than perhaps any other secular institution in history."[332] Congress may make bad policy. It may not exercise executive power without an express constitutional grant of such power.[333] In the realm of economic sanctions, however imprudent it may be for Congress to remove the President's ability to react to crisis and conduct diplomacy, it is vested with this power.[334]

This is not to say that there are no situations in which the President could not lift congressionally authorized sanctions. If a situation arose in which it was absolutely necessary to national security for the President to lift all sanctions, this may be permissible and there are important popular accountability checks.[335] Decisive presidential action in the face of existential crisis is not extraconstitutional.[336] The Constitution recognizes necessity and constitutionalizes it—extreme circumstances may mandate decisive action—this is

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328 U.S. CONST. art. I, § 8, cl. 3.

329 *See* discussion *supra* Section V.B.3.

330 *See* U.S. CONST. art. I.

331 *See Youngstown Sheet & Tube Co.*, 343 U.S. at 634 (Jackson, J., concurring).

332 MCDONALD, *supra* note 34, at 6.

333 *See* Calabresi & Prakash, *supra* note 141, at 621.

334 U.S. CONST. art. I, § 8, cl. 3. However, there must always be room for unilateral executive action if necessary "to save the nation." *See* U.S. CONST. art. II, § 1, cl. 1; *id.* cl. 8; President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) ("[A]re all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?").

335 *See* THE FEDERALIST NO. 70, *supra* note 34, at 429 (Alexander Hamilton) ("[O]ne man, from the very circumstance of his being alone, will be more narrowly watched and more readily suspected.").

336 *See* Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) ("A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."); Richard

the true core of "the executive Power."[337] However, invoking this extraordinary but dormant emergency power to "preserve, protect, and defend" the Constitution against existential threats in order to deal with ordinary foreign affairs matters, even those of great magnitude, dilutes the power of the President.[338]

Congress may not alter the balance of constitutional power. The people acting through their fundamental instrument, the Constitution, allocate power.[339] It is not proper for Congress to divest executive authority from the President by lodging it with the states.[340] However, CISADA does not attempt to alter the balance of power among the branches or between the federal executive and state executives. Congress sets a policy and enlisting state support, over an area that Congress would be otherwise powerless to legislate—state pension divestment.[341] In sum, Congress is legislating in the proper manner.

### C. *Federalism: Federal Enlistment of Voluntary State Support*

Congress is using the states to supplement its comprehensive sanctioning regime.[342] This is not a wholesale delegation of a federal power—the states may only act within the limited authorization of CISADA.[343] Congress sets out clear, intelligible, and precise standards.[344] This is an instance of Congress reasserting its institutional capacity. Given recent trends toward collusion with the executive branch, it should be welcomed.[345] This federal enlisting of state support is consistent with traditional practices of enlisting state support in enforcement.

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A. Posner, NOT A SUICIDE PACT. THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 156–57 (2006); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004) ("In short, if I am mistaken in all this, so was President Lincoln.").

337 HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 4, 142 (1989).

338 Publius refers to the executive emergency power as "essential to the protection of the community" and analogous to an emergency mechanism of the Roman Republic which went under a "formidable title." THE FEDERALIST NO. 70, *supra* note 34, at 421–22 (Alexander Hamilton); *see also* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257, 1297 (2004).

339 *See* McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

340 *See* Printz v. United States, 521 U.S. 898, 909 (1997).

341 *See* 22 U.S.C. § 8532(a), (g)(1)(A) (2012).

342 *See id.* § 8532(b).

343 *See id.* §§ 8532(b), (d)(1)–(4).

344 *See id.* §§ 8501–8551; J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404 (1928).

345 *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1496 (2015).

Congress can authorize a state to do something that would otherwise be an unconstitutional impairment of federal authority.[346] This is the key to distinguishing *Crosby* from the present situation. Massachusetts had no authorization whatsoever from Congress to attempt to influence a foreign actor through regulating its foreign commerce.[347] Its actions were correctly found to infringe on the federal government's exclusive power over foreign commerce regulation.[348] Here, however, Congress, the branch empowered to regulate foreign commerce has seen fit to enlist state support.[349] This activity does not impair the ability of the nation to speak with "one voice" because it is authorized by the constitutional voice of the nation in foreign commerce—Congress.[350] Congress may take measures necessary and proper to regulate commerce.[351] It is not improper to authorize states to regulate because Congress is not infringing on the power of the President, it is not derogating from its own power; it is pursuing necessary means to supplement its own enumerated power.[352]

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.[353]

## CONCLUSION

Foreign commerce regulation is exclusively congressional and exclusively federal—Congress can allow states to pursue foreign commerce if it sees fit.[354] States cannot interfere in the conduct of foreign affairs unless authorized to do so by the branch of government with power over the area of foreign affairs in which the state seeks to interfere—usually this will be the President but in the realm of foreign commerce regulation it is Congress.[355] Foreign commerce regulation, even when it is for the purpose of influencing the behavior of a foreign nation, is within Congress' enumerated powers.[356] It is irrelevant whether this congressional action conflicts with the president's favored policy. Congress' voice is the nation's voice in this field of foreign

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346 *See* Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986); S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945).

347 *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366, 386–88.

348 *See id.* at 366; THE FEDERALIST NO. 42, *supra* note 34, at 260–61 (James Madison).

349 *See* 22 U.S.C. §§ 8352(a)–(b) (2012).

350 *See Wardair Can., Inc.*, 477 U.S. at 8; *S. Pac. Co.*, 325 U.S. at 769; Desai, *supra* note 69, at 684.

351 U.S. CONST. art. I, § 8, cl. 3.

352 *See id.*

353 *S. Pac. Co.*, 325 U.S. at 769 (citations omitted).

354 *See* U.S. CONST. art. 1 § 8, cl. 3; Desai, *supra* note 69, at 689.

355 *See* U.S. CONST. art. I, § 8, cl. 3; Desai, *supra* note 69, at 689–90.

356 U.S. CONST. art. I, § 8, cl. 3.

commerce, which encompasses economic war. The PFIA is constitutional because it conforms with Congress' express and narrow grant of authority over foreign commerce regulation to the states.

It is not possible to direct a comprehensive foreign policy without a commercial dimension. It never has been.[357] Economic policy was as vital to foreign affairs in 1787 as it is in 2018. It is essential that the President and Congress work collaboratively to build a foreign affairs consensus that can last longer than a President's term. The rise of the United States to super-power status and its corresponding need for strategic stability have confirmed the framers' wisdom—building consensus, despite the short-term costs, is necessary to the successful conduct of foreign affairs.

> [The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.[358]

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357 *See* discussion *supra* Section V.B.2.

358 Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 81 (1993) (Scalia, J., concurring).