Trick or treaty: Process of Iran nuclear deal needs scrutiny

Los Angeles/San Francisco Daily Journal, September 11, 2015

A progressive president seeks to end a long conflict through a multilateral agreement, but faces skeptical Senators, especially Republicans. If only Woodrow Wilson had studied Constitutional Law under Professor Obama, he would have ignored the Senate altogether. The fight for the League of Nations basically killed Wilson, but he never considered sidelining a coequal branch of government.

The substance of the Joint Comprehensive Plan of Action (JCPOA) concerning Iran's nuclear program has received intense scrutiny, yet the process of the plan's adoption has not. Whether JCPOA is a "treaty" or "executive agreement" will shape the outcome of not only this debate but future ones as well.

The Constitution authorizes a **treaty**'s ratification upon the "consent" of two-thirds of the Senate. (Art. II, § 2.) In Federalist No. 75, Hamilton explained it was "imprudent" for the President to have exclusive authority but inefficient for the Senate. Instead, "the joint possession of the power . . . by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them."

A former Senator summarized, "The essence of the Treaty Power is that the President and the Senate are partners in the process by which the United States enters into, and adheres to, international obligations." He therefore created a rule requiring treaty applications to conform to Senate expectations — known as the "**Biden Condition**."

The Constitution contemplates at least states' making international agreements other than treaties. Article I, section 10, forbids states from making any "Treaty, Alliance or Confederation," but permits their making an "Agreement" or "Compact" with foreign powers. Contemporary commentary contrasted treaties, which "relate ordinarily to subjects of great national magnitude . . . and are often perpetual or made for a considerable period of time" with agreements, which concern "transitory or local affairs, or such that cannot possibly affect any other interest but that of the parties." (*U.S. Steel Corp v. Multistate Tax Comm.*, 434 U.S. 452 (1978), citing Blackstone's Commentaries.)

Historical practice has confirmed that Article II, section 2 applies to matters of "great national magnitude." Agreements concerning the Treaty of Versailles, the United Nations Charter, the Panama Canal, and the reunification of Germany all required a Treaty Clause supermajority. Not only the creation of multilateral defense blocs (NATO, SEATO,

ANZUS), but also entry of new members faced the two-thirds vote.

Multilateral economic pacts like Bretton Woods, GATT, WTO, and NAFTA, have passed as "**congressional-executive agreements**," which require just a majority, but from both House and Senate. This reflects the House's traditional prominence in economic matters.

The President has instead deemed JCPOA a **sole executive agreement**. Presidents have some unilateral authority in this area. When Americans sued Iran after the 1979 hostage crisis, President Carter froze Iranian assets, and then released them pursuant to an agreement. The Supreme Court affirmed the President's authority to unfreeze accounts, but not to suspend claims against Iran in U.S. courts. (*Dames & Moore v. Regan*, 453 U.S. 654 (1981).) This is relevant today, although President Carter, unlike President Obama, made some provision for unfrozen funds to satisfy Americans' claims against Iran.

But although presidents may exercise sole executive authority to resolve financial claims, no President has ever unilaterally implemented an international agreement as important as JCPOA, with the possible exception of the Yalta Agreement, where President Roosevelt effectively acquiesced to Soviet influence in Eastern Europe. Seventy years later, we still face the consequences of that executive decision.

Executive agreements have been used more widely in recent years (especially for bilateral relations) but arms control agreements, like the Nonproliferation Treaty (NPT), (which JCPOA modifies), Antiballistic Missile (ABM), Intermediate Nuclear Forces (INF), and START (Strategic Arms Reduction Treaty) continue to pass as treaties. Why is this nuclear agreement different from all other nuclear agreements?

The real question is not whether the President may unilaterally implement JCPOA, but whether his lack of authority is so obvious that other nations cannot possibly rely on it. The Restatement addresses the concern: "Some agreements, such as the United Nations Charter or the North Atlantic Treaty, are of sufficient formality, dignity and importance that, *in the unlikely event that the President attempted to make such agreement on his own authority*, his lack of authority might be regarded as 'manifest.' " (Foreign Relations § 311, Comment c, emphasis added.)

Even Iran understands the significance of legislative approval. The AP reported President Rouhani opposes a vote in Iran's parliament because "it will create an obligation for the government" under Iranian law. If there is "common cause" between Americans and Iranians, it is not between Republicans and "hardliners" but between two presidents trying to evade the rule of law.

Although President Obama asserts this is not a treaty, he has already applied Article II, section 2's terms incorrectly in trying to evade Senate consent. He decided the Senate was in "Recess" to authorize several unilateral appointments to the NLRB. Perhaps the most polarized Supreme Court in history joined unanimously to reject his (mis)definition. (*NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).)

Secretary Kerry's explaining why JCPOA is not a treaty is no more persuasive: "Because you can't pass a treaty anymore. It has become impossible to schedule, to pass . . . ." Of course, Kerry's success as Senate Foreign Relations Chair in getting START passed in 2010 suggests otherwise, not to mention the Senate's passing the Amendment to the Convention on the Physical Protection of Nuclear Material, presented to IAEA *two days after Kerry's testimony*.

But Kerry is right that it's hard to pass a treaty. *It's supposed to be hard*. Treaties bind future administrations and Congresses. Such irrevocability demands a clear national consensus, not one man's preference.

It's not as if President Obama campaigned on JCPOA. He plausibly claimed public support for his tax increase because he campaigned on its terms. But for years he advocated the end of any

Iranian nuclear program, "anytime, anywhere" inspections, full "snap-back" provisions, a full accounting of past violations, shipping uranium abroad, closing Fordow etc. JCPOA includes none of these. If anything, a 2012 Obama vote was a vote *against* JCPOA's terms.

But the Secretary's justification goes beyond JCPOA; if Presidents can evade Senate consent on controversial measures by calling them executive agreements because it's too hard to pass treaties, they will always do so. The Treaty Clause, and the President-Senate partnership, will recede into history.

Of course, some modern realities compel changes to constitutional procedures. For example, the need to use military force sometimes cannot await a formal declaration of war. But there is no such urgency or "scheduling" problem here; the Iran Nuclear Agreement Review Act (Corker-Cardin) actually adds the layer of a House vote. The only difference between Corker-Cardin and the Constitution is which side bears the supermajority burden of proof.

Observers have explained why, even if Corker-Cardin could apply in theory, it should not in practice, based on developments unknown when the Senate passed it.

- It demands all disclosure of all agreements, but the Administration has not provided the "side agreements" and tried to conceal them. (To be fair, I would also want to conceal acquiescence to Iran's self-inspections.) See Biden & Ritch, *The Treaty Power: Upholding a Constitutional Partnership*, 137 Penn. L. Rev. 1529, 1539: "it must be taken as axiomatic that the Senate cannot consent to that which it did not understand."

- Corker-Cardin was designed to cover only nuclear-related sanctions, but JCPOA also covers conventional-weapons sanctions. (Andrew McCarthy)

- JCPOA modifies the Nonproliferation *Treaty*, and by NPT's own terms, modifications require approval as a treaty. (Harold Furchgott-Roth)

But the most basic reason is the President already breached Corker-Cardin. He recognized Congress' right to vote approve or disapprove JCPOA, but then without that approval went to the UN, giving Russia's Putin and Venezuela's Maduro the voice he would deny the U.S. Senate. The administration now claims it would be "sabotage" and "screwing the Ayatollah" to contradict our vote at the UN. But voting there in violation of both the Constitution and statute sabotages the rule of law.

Even if JCPOA were optimal policy, its passage does not warrant constitutional noncompliance. Or as then-Senator Biden quoted the Foreign Relations Committee, "[t]he means of a democracy are its ends; when we set aside democratic procedures in making our foreign policy,

we are undermining the purpose of that policy." Even Democratic Senators who support JCPOA should demand the preservation of the President-Senate partnership. They may be Senators for a long time, but there will soon be a new president, perhaps a Republican. It is in the Senators' self-interest, as well as the Nation's, to preserve the "joint possession" of authority that the Constitution so wisely established.

The mullahs chanting "Death to America" may fail to destroy us physically, but as Twilight Zone fans remember from "Monsters are Due on Maple Street," destruction can come from within. If presidents can evade the Senate's advice and consent just by renaming a treaty, and delegate that authority to hostile foreign powers, the effect on our constitutional tradition could be fatal.

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