

# INDETERMINATE AND UNRECOGNIZED: EXPLORING THE RELATIONSHIP BETWEEN THE MORSI OUSTER, POST-COUP SANCTIONS, AND THE RECOGNITION POWER

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*In July 2013, Mohamed Morsi, the President of Egypt, was deposed by the Egyptian military. At that time, the United States was required under section 7008 of the Consolidated Appropriations Act of 2012 to suspend assistance to the government of any country whose democratically elected head of state was overthrown in a coup d'état. However, the Obama administration refused to apply section 7008, reasoning that it was not required to make a sanctions-triggering determination.*

*There have been few attempts to comprehensively examine the Obama administration's response to the Morsi ouster. Existing scholarship has either focused on tangential issues or overlooked the legal basis for the executive branch's response altogether. This Note accordingly seeks to address this gap, and argues that the Obama administration was probably justified in its response, as section 7008 likely infringed on the President's power to recognize foreign governments.*

*Part I provides historical background to this issue, explaining the Morsi ouster, the relevant laws concerning assistance to post-Morsi Egypt, and the Obama administration's position with respect to post-coup sanctions. Part II surveys the existing literature on the topic and explains what this Note proposes to add. Part III then contextualizes the Obama administration's response to the Morsi ouster, explaining how the executive branch generally deals with constitutionally problematic statutes. Part IV introduces the recognition power, and presents previously overlooked historical evidence corroborating the hypothesis that post-coup sanctions implicate this constitutional power. Part V, in turn, draws upon international law and historical practice in order to conclude that section 7008 both formally and functionally violates the separation of powers. The Note then discusses possible reforms to post-coup sanctions in Part VI, before concluding.*

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\* J.D. 2015, New York University School of Law; B.A. 2011, Columbia University. My thanks to Dean Trevor Morrison for his invaluable guidance and feedback throughout the writing process. I am further indebted to Roger Zakheim and Catherine McElroy for introducing me to the issues explored herein and for supervising the initial research upon which this paper builds. And above all, I am grateful to Kelly for her superior editing skills, encouragement, and endless support.

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*[I]t is interesting to see how close has become the connection between the extending of recognition and the extending of foreign aid. To a great many people downtown, the two have become synonymous.*

—Senator Wayne Morse<sup>1</sup>

## I. HISTORICAL BACKGROUND

During the summer of 2013, Egypt was engulfed by political turmoil. On July 3, following the outbreak of widespread anti-government protests, Mohamed Morsi—the first democratically elected head of state in Egyptian history—was removed from power by the Egyptian military and placed under house arrest.<sup>2</sup> Over the following weeks, the world watched as the military suspended the Egyptian constitution,<sup>3</sup> installed a transitional government,<sup>4</sup> and violently cracked

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1. 109 CONG. REC. 21,563 (1963) (statement of Sen. Morse).

2. See Matt Bradley & Reem Abdellatif, *Egyptian Military Ousts President Morsi*, WALL ST. J. (July 4, 2013), <http://online.wsj.com/articles/SB10001424127887323899704578583191518313964>.

3. See *Egypt Army Chief Gen Abdul Fattah al-Sisi Statement*, BBC (July 4, 2013), <http://www.bbc.com/news/world-middle-east-23175529> (announcing suspension of the Egyptian constitution).

4. See Molly Hunter, *Egypt's Interim Government Sworn in After Deadly Clashes*, ABC NEWS (July 16, 2013), <http://abcnews.go.com/blogs/headlines/2013/07/egypts-interim-government-sworn-in-after-deadly-clashes/>.

down on Morsi's supporters and political allies.<sup>5</sup> Many were focused on whether the Obama administration would determine that these events constituted a "coup d'état."<sup>6</sup> However, the executive branch refused to declare that a coup had taken place.<sup>7</sup>

Over the course of the following month, amidst this wave of violence and political repression, members of the media pressed the State Department and White House on whether the executive branch believed the Egyptian military had committed a coup d'état.<sup>8</sup> Executive-branch officials initially refused to provide an answer, emphasizing that a review of the United States' legal obligations was ongoing and that a determination was still in the works.<sup>9</sup> The repeated refusal to publicly classify the ouster as a coup was not a mere exercise in semantics: if the Obama administration determined that a coup had taken place, it would have been statutorily obligated to suspend more

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5. See, e.g., Alexander Dziadosz & Shadia Nasralla, *At Least 51 Killed in Egypt as Islamists Urge Defiance*, REUTERS (July 8, 2013), <http://www.reuters.com/article/2013/07/08/us-egypt-protests-idUSBRE95Q0NO20130708>.

6. See generally *id.* At a State Department briefing held shortly after Morsi's ouster was first reported, journalists pressed Jen Psaki, the State Department's spokesperson, on whether the executive branch considered the events to be a "military coup" or a "coup d'état." See Press Briefing by Jen Psaki, Spokesperson, U.S. Dep't of State, in Wash., D.C. (July 3, 2013), <http://www.state.gov/r/pa/prs/dpb/2013/07/211535.htm> (transcript of press briefing that addressed the unfolding situation in Egypt). What constitutes a "coup d'état" and how (if at all) it differs from a "military coup" will be explored in greater depth later in this Note. See *infra* Part II.B.

7. Immediately after the ouster, the White House released a statement "call[ing] on the Egyptian military to move quickly and responsibly to return full authority back to a democratically elected civilian government," but never used the term "coup." See President Barack Obama, Statement on Egypt (July 3, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/03/statement-president-barack-obama-egypt>; see also Eli Lake & Josh Rogin, *Despite Obama Administration's Entreaties, Egyptian Military Deposes Morsi*, DAILY BEAST (July 3, 2013), <http://www.thedailybeast.com/articles/2013/07/03/despite-obama-administration-s-entreaties-egyptian-military-deposes-morsi.html> (noting that "in the initial hours" following the ouster, "the U.S. government ha[d] yet to make a formal determination that such an event even happened").

8. See, e.g., Press Briefing by Jen Psaki, Spokesperson, U.S. Dep't of State, in Wash., D.C. (July 3, 2013), <http://www.state.gov/r/pa/prs/dpb/2013/07/211844.htm>; Press Briefing by James Carney, White House Press Sec'y, in Wash., D.C. (July 17, 2013), <http://www.whitehouse.gov/photos-and-video/video/2013/07/17/press-briefing#transcript>.

9. See, e.g., Press Briefing by James Carney, *supra* note 8 (declining to make a rapid decision regarding whether a coup had taken place "because we do not think it would be in our interest to do so"); see also Press Briefing by Jay Carney, White House Press Sec'y, in Wash., D.C. (July 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/10/press-briefing-press-secretary-jay-carney-7102013> ("Q: Back on Egypt. If the White House ultimately decides to call what happened there a military coup, does that automatically guarantee that the aid, the \$1.5 billion in aid will be cut off? MR. CARNEY: Well, what I would say is that we are reviewing a legal framework here.").)

than a billion dollars of foreign assistance to Egypt, a longstanding American ally and one of the United States' few friends in a volatile region.<sup>10</sup>

#### A. Section 7008

At the time of Morsi's ouster, U.S. assistance to the Egyptian government was subject to section 7008 of the Consolidated Appropriations Act, 2012,<sup>11</sup> which restricted certain types of funds from being:

obligated or expended to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup d'état or decree or, after the date of enactment of this Act, a coup d'état or decree in which the military plays a decisive role.<sup>12</sup>

Notably, section 7008 does not authorize the President to waive these cut-offs even if doing so would be in the best interests of the United States.<sup>13</sup> Moreover, once section 7008 has been triggered, the law prohibits the resumption of aid unless and until the President certifies to Congress that a democratically elected government has been installed in that nation.<sup>14</sup>

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10. For much of the past fifty years, the United States has used generous amounts of foreign aid and military assistance to win the cooperation of the Egyptian government in maintaining "regional stability, built primarily on long-running military cooperation and on sustaining" a 1979 peace treaty between Egypt and Israel. JEREMY M. SHARP, CONG. RESEARCH SERV., RL33003, EGYPT: BACKGROUND AND U.S. RELATIONS 13 (2015), <http://fas.org/sgp/crs/mideast/RL33003.pdf>. Thus, suspending aid to a key regional ally would have—as many noted at the time—potentially devastating consequences for U.S. interests in the Middle East. See Jonathan S. Tobin, *Obama Blunders Again on Egypt*, COMMENTARY (Oct. 9, 2013, 5:45 PM), <http://www.commentarymagazine.com/2013/10/09/obama-blunders-again-on-egypt-aid-cut-off/> (arguing that suspending assistance to Egypt would harm regional stability and counterterrorism efforts).

11. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7008, 125 Stat. 786, 1195 (2011). For ease of reference, unless explicitly mentioned otherwise, "section 7008" shall refer exclusively to that provision of the 2012 version of the Consolidated Appropriations Act.

12. *Id.*

13. See Note, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 HARV. L. REV. 2499, 2500 (2014) [hereinafter Harvard Note] ("Unlike many other restrictions on U.S. foreign assistance, the coup provision does not include a waiver; if the provision applies, aid must be cut.").

14. See § 7008, 125 Stat. at 1195 ("[A]ssistance may be resumed to such government if the President determines and certifies to the Committees on Appropriations that subsequent to the termination of assistance a democratically elected government has taken office . . ."). Indeed, the Executive Branch has—at times—explicitly conceded this point. See, e.g., U.S. DEP'T OF STATE, MEMORANDUM OF JUSTIFICATION CONSISTENT WITH THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000, REGARDING DETERMINATIONS WITH RESPECT TO "TIER 3" COUNTRIES (2009), <http://www.state.gov/j/tip/rls/other/2009/129593.htm> (describing this determination as "nec-

Although Congress had considered and ultimately rejected a similar provision as early as 1963,<sup>15</sup> no forerunner of section 7008 was enacted until the Reagan administration. In 1984, Congress passed a law that would have cut off funding to El Salvador if its civilian government were overthrown;<sup>16</sup> this restriction was renewed the following year, along with a similar provision with respect to Guatemala.<sup>17</sup> Global post-coup sanctions were then included in an appropriations bill for the 1986 fiscal year.<sup>18</sup> Similar provisions have been in effect ever since (albeit with minor modifications),<sup>19</sup> and despite the

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essary to lift section 7008 coup restrictions"); *see also The Impact of Coup-Related Sanctions on Thailand and Fiji: Helpful or Harmful to U.S. Relations?: Hearing Before the Subcomm. on Asia, the Pacific, & the Glob. Env't of the H. Comm. on Foreign Affairs*, 110th Cong. 20 (2007) (statement of Eric G. John, Deputy Assistant Secretary, Southeast Asia, Bureau of East Asian and Pacific Affairs, U.S. Department of State) (noting that the United States halted aid to Thailand following a military coup, and that the aid would not be resumed "as required by law, until there is a determination that a democratically elected government has taken office"). *But see infra* Part III.C (discussing whether the President possesses the inherent legal authority to lift post-coup sanctions without a congressionally enacted waiver allowing the President to do so).

15. H.R. 7885, 88th Cong. (1963). This proposal, H.R. 7885, will be discussed *infra* in Part IV.B.

16. *See* Pub. L. No. 98-473, § 537, 98 Stat. 1837, 1902 (1984) ("Notwithstanding any other provision of law, if at any time following the appropriation of funds herein the duly elected President of El Salvador should be deposed by military coup or decree all funds appropriated herein for El Salvador and not theretofore obligated or expended shall not thereafter be available for expenditure or obligation unless reappropriated by Congress."). My research has not revealed similar language in any earlier law.

17. *See* International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 702(g), 99 Stat. 190, 239 ("All assistance authorized by this Act which is allocated for El Salvador shall be suspended if the elected President of that country is deposed by military coup or decree."); *id.* § 703(d) ("All assistance authorized by this Act which is allocated for Guatemala shall be suspended if the elected civilian government of that country is deposed by military coup or decree.").

18. *See* Pub. L. No. 99-190, § 513, 99 Stat. 1185, 1305 (1985) ("None of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to finance directly any assistance to any country whose duly elected Head of Government is deposed by military coup or decree."); *see also* DIANNE E. RENNACK ET AL., CONG. RESEARCH SERV., R40557, FOREIGN OPERATIONS APPROPRIATIONS: GENERAL PROVISIONS 3 (2011), <http://fas.org/sgp/crs/row/R40557.pdf> (noting similarities between section 7008 and section 513).

19. *See* Harvard Note, *supra* note 13, at 2502-03 ("Since the passage of the 1986 Act, the post-coup foreign assistance restriction has proven remarkably durable. The restriction has been repassed numerous times, and the statute's language—though it has been loosened slightly since the original act—has remained largely consistent."); *see also* RENNACK ET AL., *supra* note 18, at 3 ("Reference to 'government of any country' replaced 'any country' in FY2002. The first proviso first appeared in sec. 513 of Foreign Ops, 1988. The second and third provisos were first enacted in Foreign Ops, 2002."). Additionally, the law was slightly revised in 2009; these changes (and the reasons that motivated them) will be explored in Part I.C of this Note.

controversy explored in this Note, section 7008 remains in effect as of this writing.<sup>20</sup>

Pursuant to these restrictions, the United States had previously suspended aid to a variety of countries that underwent coups, including Pakistan, Fiji, Algeria, and Mali.<sup>21</sup> At that point in time, it remained to be seen whether Egypt would be the next country to experience these post-coup sanctions.

B. “*We have determined that we do not need to make a determination . . .*”<sup>22</sup>

It was within this context that State Department spokesperson Jen Psaki was asked again about the executive branch’s position vis-à-vis the Morsi ouster during a press briefing on July 26, 2013. This time, rather than assuring reporters that State Department lawyers were re-viewing the situation, Psaki announced that no determination regarding the Morsi ouster would be forthcoming, stating, “The law does not require us to make a formal determination—that is a review that we have undergone—as to whether a coup took place, and it is not in our national interest to make such a determination.”<sup>23</sup> Thus, rather than wading into the debate over what constitutes a coup d’état under section 7008 and whether the events in Egypt fit those criteria, the State Department sidestepped the issue altogether. As Psaki succinctly put it, the Obama administration had “determined that we do not need to make a determination about whether or not this was a coup.”<sup>24</sup> As the executive branch had not characterized the ouster as a coup, section

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20. The so-called “Cromnibus” that reauthorized section 7008 made no changes to the text of the statute. *See* Pub. L. No. 113-235, § 7008, 128 Stat. 2130, 2603 (2014); *see also* Pub. L. No. 113-76, § 7008, 128 Stat. 5, 494 (2014). That section 7008 has not been changed is not due to a lack of trying, as will be discussed in Part VI of this Note. However, Congress recently passed a law allowing the United States to provide assistance to Egypt “notwithstanding the certification requirements of . . . similar provisions of law in prior Acts.” *See* Pub. L. No. 113-235, § 7041(a)(6)(C), 128 Stat. 2130, 2635 (2014); *cf.* Pub. L. No. 113-76, § 7041(a)(5), 128 Stat. 5, 523 (2014) (allowing certain types of military assistance to be provided to Egypt “[n]otwithstanding any other provision of law restricting assistance to Egypt”). As Jeremy Sharp has explained, this “would allow aid to continue despite Section 7008 of P.L. 113-235, which prohibits foreign assistance to a country whose elected head of government is deposed by military coup d’etat or decree.” SHARP, *supra* note 10, at 23.

21. *See* Harvard Note, *supra* note 13, at 2502–04.

22. Press Briefing by Jen Psaki, Spokesperson, U.S. Dep’t of State, in Wash., D.C. (July 26, 2013) [hereinafter Psaki Daily Press Briefing (July 26, 2013)] <http://www.state.gov/r/pa/prs/dpb/2013/07/212484.htm>.

23. *Id.*

24. *Id.*

7008 did not apply and the U.S. government was not legally obligated to suspend aid to Egypt.<sup>25</sup>

The State Department's approach to section 7008 was roundly criticized,<sup>26</sup> but the Obama administration adhered to this position and publicly reaffirmed it on a number of subsequent occasions.<sup>27</sup> The White House made clear that it had no plans to make a determination at any point.<sup>28</sup> Accordingly, even though the Obama administration briefly suspended some assistance to the post-Morsi government,<sup>29</sup> it denied that it was *legally required* to do so.<sup>30</sup> That the Obama admin-

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25. See Harvard Note, *supra* note 13, at 2509 ("The executive branch's position was that it is not obligated to determine whether the statute applies at all.").

26. In response to Psaki's statement, for instance, one reporter asked her to explain "how it took this crack team of warriors three-and-a-half weeks to come up with a determination that essentially sounds like something that Sergeant Schultz would have said on *Hogan's Heroes*." Psaki Daily Press Briefing (July 26, 2013), *supra* note 22. At that same briefing, members of the press accused the State Department of ignoring the law, "flouting the spirit of the law," and enforcing section 7008 selectively. *Id.* They also suggested that this interpretation of the law would diminish U.S. influence abroad. *Id.*

27. See, e.g., *Next Steps on Egypt Policy: Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 44 (2013) (statement of Hon. A. Elizabeth Jones, Acting Assistant Secretary, Bureau of Near East Affairs, U.S. Department of State) ("We decided that we did not have to make a determination about—you're asking about whether or not a coup took place. We decided we did not have to make a decision on that or make a statement one way or the other.").

28. See Press Briefing by Josh Earnest, Principal Deputy Press Sec'y, in Wash., D.C. (Aug. 20, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/20/press-briefing-principal-deputy-press-secretary-josh-earnest-8202013> ("[W]e're going to set aside this decision about whether or not a coup occurred and evaluate our ongoing relationship with Egypt in a way that maximizes the national security interests of the United States of America.").

29. See, e.g., Josh Rogin, *Senator: Obama Administration Secretly Suspended Military Aid to Egypt*, DAILY BEAST (Aug. 19, 2013), <http://www.thedailybeast.com/articles/2013/08/19/senator-obama-administration-secretly-suspended-military-aid-to-egypt.html>; see also Press Briefing by Josh Earnest, Principal Deputy Press Sec'y, on Air Force One en route to Jacksonville, Fla. (July 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/25/press-gaggle-principal-deputy-press-secretary-josh-earnest-en-route-jack> (discussing the administration's decision to halt delivery of F-16 military airplanes to the government of Egypt).

30. See Harvard Note, *supra* note 13, at 2509 ("[T]he decision to cut aid [to Egypt] was not made on the basis of a legal obligation under the coup provision."). At a congressional hearing, in response to a question asking whether aid to Egypt had been halted as a matter of policy or whether the U.S. government was legally required to do so, a State Department official testified that "[i]t was a policy decision." *Next Steps on Egypt Policy: Hearing Before the H. Comm. on Foreign Affairs*, *supra* note 27, at 44 (statement of Hon. A. Elizabeth Jones). Moreover, administration officials suggested that the government only cut off aid in order to be "consistent with" section 7008. *Id.* at 45. This choice of language was significant, as the executive branch will often announce that it is acting "consistent with" (as opposed to "pursuant to") a statute in order to signal that it does not actually believe the law to be binding. See generally Andrew Rudalevige, *War Powers and the White House*, WASH. POST: MONKEY CAGE

istration did not believe it was obligated to cut off aid to post-Morsi Egypt is supported by the fact that the United States resumed its provision of assistance to Egypt, even though the President did not (and could not, at that point) certify that a democratically elected government had taken office in Egypt, which section 7008 requires before the resumption of foreign aid.<sup>31</sup> In sum, the executive branch took no position as to whether a coup had taken place because it believed that it did not need to make such a determination; accordingly, section 7008 did not apply to post-Morsi Egypt.<sup>32</sup> But having identified the

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(Sept. 10, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/10/war-powers-and-the-white-house/> (discussing the differences between acting “pursuant to” a statute and “consistent with” that statute); cf. Petition for Writ of Certiorari at 14 & n.17, *Campbell v. Clinton*, 531 U.S. 815 (2000) (No. 99-1843) (claiming that “every President since President Nixon has refused to comply with the War Powers Resolution’s strictures” insofar as the executive branch has “filed reports of military action ‘taking note’ of the War Powers Resolution or ‘consistent with’ the Resolution, but never pursuant to the Resolution”).

31. See Press Release, Am. Forces Press Serv., Hagel Notifies Egypt of Upcoming U.S. Certification (Apr. 23, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=122105> (announcing resumption of aid to Egypt even though the executive branch was “not yet able to certify that Egypt is taking steps to support a democratic transition”); see also Phil Stewart & Arshad Mohammed, *U.S. to Deliver Apache Helicopters to Egypt, Relaxing Hold on Aid*, REUTERS (Apr. 23, 2014), <http://www.reuters.com/article/2014/04/23/us-usa-egypt-apaches-idUSBREA3M03L20140423>. There have, however, been suggestions that the President possesses the inherent constitutional power to restore aid even without a congressional waiver, as will be discussed below. See *infra* Part III.C. Moreover, it appears that Congress has since given the administration authority to bypass some of section 7008’s requirements. See Pub. L. No. 113-235, § 7041(a), 128 Stat. 2130, 2632–35 (2014) (“The Secretary of State may provide assistance [to Egypt], notwithstanding the certification requirements of subparagraphs 6(A) and (B) of this subsection or similar provisions of law in prior Acts making appropriations for the Department of State, foreign operations, and related programs, if the Secretary, after consultation with the Committees on Appropriations, certifies and reports to such Committees that it is important to the national security interest of the United States to provide such assistance . . . .”); Pub. L. No. 113-76, § 7041(a)(5), 128 Stat. 5, 523 (2014) (allowing the United States to provide certain types of assistance to Egypt “notwithstanding any other provision of law restricting assistance for Egypt”); see also Harvard Note, *supra* note 13, at 2509 (“The question of the provision’s application to Egypt was resolved in January 2014 when Congress passed a special exemption waiving the coup provision’s requirements with respect to only Egypt.”). See generally SHARP, *supra* note 10 (discussing the possible impact of these congressional reforms).

32. There are, however, statements from the Obama administration that arguably undercut this view and show that the executive branch, in fact, believed itself bound by section 7008 following the Morsi ouster. Specifically, at a press conference several months after the ouster, Secretary of State John Kerry was asked about the United States’ decision to withhold certain forms of assistance to Egypt, which the questioner characterized as a form of punishment and pressure. See John F. Kerry, U.S. Sec’y of State, Remarks with Egyptian Foreign Minister Nabil Fahmy (Nov. 3, 2013), <http://www.state.gov/secretary/remarks/2013/11/216220.htm>. Secretary Kerry insisted in response that the suspension of aid was “not a punishment. It’s a reflection of a policy

Obama administration's interpretation of section 7008 in the wake of the Morsi ouster, the question remains whether this interpretation is consistent with the text and legislative history of that statute.

### C. Assessing the Convincingness of the Obama Administration's Interpretation of Section 7008

From the outset, it must be conceded that the Obama administration's position with respect to section 7008 is not clearly contradicted by the literal terms of the statute: section 7008 does not explicitly call for the President to make a determination as to whether a coup has transpired.<sup>33</sup> This might suggest that aid is to be suspended whenever the President determines that a coup d'état has occurred, but that the executive branch need not make such determinations whenever a political transition has taken place. Nevertheless, while the administration's position is arguably not inconsistent with plain meaning of the statute, it certainly seems to be at odds with congressional intent and does not appear to be the best reading of the statute, as discussed *infra*.

Indeed, executive-branch lawyers have previously advised that the President may be obligated to make determinations pursuant to a valid statute, even if the text of that statute does not explicitly require that a determination be made. One opinion from the Office of Legal

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in the United States under our law. We have a law passed by the United States Congress regarding how certain events unfold with respect to the change of a government in a country *and we're bound by that.*" *Id.* (emphasis added). That is, Secretary Kerry appeared to suggest that the executive branch was "bound" (i.e., obligated) to suspend the aid. However, it would be a mistake to assign too much weight to these remarks insofar as they are a rare exception to the Obama administration's otherwise consistent message. The executive branch has not wavered from its position that it did not need to make a determination, and has reaffirmed that it suspended assistance to Egypt only so as to be consistent with section 7008. *See Next Steps on Egypt Policy: Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 44–46 (2013) (colloquy between Alina Romanowski, Hon. A. Elizabeth Jones, and Rep. Mark Meadows concerning the State Department's position that it was not necessary to make a determination under section 7008).

33. *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7008, 125 Stat. 786, 1195 (2011). The law's silence in this respect is underscored by the fact that section 7008 explicitly requires that the President determine that a democratically elected government has been installed before aid is resumed. *See id.* ("[A]ssistance may be resumed . . . if the President determines and certifies to the Committees on Appropriations that subsequent to the termination of assistance a democratically elected government has taken office . . . ."). The Supreme Court has announced that when interpreting a statute, it "will avoid a reading which renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Thus, reading section 7008 as requiring the President to determine whether a coup has transpired arguably runs afoul of this canon of statutory construction, as this would render the aforementioned language concerning the resumption of aid superfluous.

Counsel (OLC),<sup>34</sup> for example, directly addressed the question of whether the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991<sup>35</sup> required the President to make determinations that would trigger the imposition of sanctions when “presented with sufficient evidence to compel the determination,”<sup>36</sup> or whether the option to make such determinations was left entirely to the executive branch’s discretion.<sup>37</sup> That law did not explicitly stipulate that a determination must be made, providing only that sanctions must be imposed “*if the President determines* that a foreign person . . . has knowingly and materially contributed . . . to the efforts by any foreign country, project, or entity . . . to use, develop, produce, stockpile, or otherwise, acquire, chemical or biological weapons.”<sup>38</sup>

Reasoning that “it would defeat Congress’s . . . intent of ensuring that sanctions are imposed . . . if the President could simply refuse to make sanction-triggering determinations at all,”<sup>39</sup> the memorandum concluded that the President had “a *duty* to make determinations [under the law], not merely the *discretion* to do so.”<sup>40</sup> This rationale would clearly support a similar conclusion regarding section 7008: if the President could simply determine that he did not need to make a determination, it would vitiate congressional intent regarding aid to post-coup regimes.<sup>41</sup>

This reasoning is particularly persuasive in light of the legislative history of section 7008. Recent revisions to that law support a view that Congress expected the President to make a determination in any

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34. Presidential Discretion to Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306 (1995).

35. Pub. L. No. 102-182, § 305(b), 105 Stat. 1245, 1250 (codified at 50 U.S.C. app. § 2410c(a)(1) (2015)).

36. 19 Op. O.L.C. at 306.

37. See *id.* at 308 (“Our first question is whether § 2410c *requires* the President to make a determination . . . or whether the President has the discretion to make or decline to make that determination in those circumstances.”).

38. *Id.* at 307 (emphasis added) (quoting § 305, 105 Stat. at 1250).

39. *Id.* at 309–10.

40. *Id.* at 309. Additionally, this opinion cited previous OLC documents (which do not appear to be publicly available) that had reached similar conclusions. Cf. *id.* (recounting how executive-branch lawyers have previously “advised that reading . . . arguably indeterminate phrases . . . as doing no more than authorizing a discretionary determination would nearly make a nullity” of the legislature’s attempt to implement a mandated sanctions regime).

41. See Noah Feldman, *Obama Ignores U.S. Law to Ignore Egypt’s Coup*, BLOOMBERG VIEW (July 26, 2013, 5:15 PM), <http://www.bloombergview.com/articles/2013-07-26/obama-ignores-u-s-law-to-ignore-egypt-s-coup> (arguing that while the text of section 7008 does not require a determination as to whether a coup has happened, such a reading of the statute “makes no sense”).

situation to which the law might potentially apply. Federal law formerly required suspension of assistance only to post-coup regimes that came to power via “military coups.”<sup>42</sup> However, in 2010, Congress modified the triggering mechanism so as to require aid to be cut off in the event of “a coup d’État or decree in which the military plays a decisive role.”<sup>43</sup> It also changed the title of the section from “Military Coups” to “Coups D’État.”<sup>44</sup>

It seems that these revisions were partially prompted by the Obama administration’s response to the 2009 ouster of Manuel Zelaya, the democratically elected leader of Honduras.<sup>45</sup> In response to Zelaya’s increasingly authoritarian and self-aggrandizing rule, the Honduran military removed Zelaya from power and expelled him from the country, with the support of the Honduran judiciary and legislature.<sup>46</sup> Despite the military’s important role in facilitating this political transition and while admitting that the ouster constituted a coup d’État, the Obama administration declined to characterize it as a *military coup*: officials emphasized “the complexity of [the ouster]—there were executive branch elements, there were judicial branch elements, there were military elements.”<sup>47</sup> The United States eventually sus-

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42. Compare Pub. L. No. 110-161, § 608, 121 Stat. 1844, 2315 (2007) (“Military Coups: None of the funds appropriated or otherwise made available pursuant to titles II through V of this Act shall be obligated or expended to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup or decree . . .”), with Pub. L. No. 112-74, § 7008, 125 Stat. 786, 1195 (2011) (“Coups D’État: None of the funds appropriated or otherwise made available pursuant to titles III through VI of this Act shall be obligated or expended to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup d’État or decree or, after the date of enactment of this Act, a coup d’État or decree in which the military plays a decisive role.”).

43. § 7008, 125 Stat. at 1195; see also PETER J. MEYER, CONG. RESEARCH SERV., R41064, HONDURAN POLITICAL CRISIS, JUNE 2009–JANUARY 2010, at 15 (2010), <http://fas.org/sgp/crs/row/R41064.pdf>.

44. Compare § 608, 121 Stat. at 2315 (“Military Coups”), with § 7008, 125 Stat. at 1195 (“Coups D’État”).

45. See MEYER, *supra* note 43, at 15 (“The Honduran political crisis also influenced a change to one of the provisions of the FY2010 Consolidated Appropriations Act . . . . The heading of section 7008 . . . was changed from ‘Military Coups’ to ‘Coups d’État.’”).

46. See *id.* at 1–5 (describing the Zelaya ouster).

47. Special Briefing by Senior Admin. Officials on Honduras, via teleconference (Sept. 3, 2009), <http://www.state.gov/r/pa/prs/ps/2009/sept/128653.htm> [hereinafter Special Briefing via Teleconference]. Indeed, Zelaya’s removal occurred with the active participation of the other branches of the Honduran government: the Honduran Supreme Court had issued a warrant for his arrest, and the legislature promptly swore in a successor. See Marc Lacey, *Envoy Seeks Ousted Honduran President’s Return*, N.Y. TIMES (July 3, 2009), <http://www.nytimes.com/2009/07/04/world/americas/04honduras.html>. Similarly, another official from the State Department suggested that

pended aid to the post-Zelaya regime “as a matter of principle and policy,”<sup>48</sup> but maintained that it was not legally required to do so, as the executive branch did not consider these events a “military coup.”<sup>49</sup> Congress, in turn, apparently disapproved of the executive branch’s attempts to avoid being bound by section 7008; it responded by enacting the aforementioned changes to post-coup sanctions provisions, explaining that the changes stemmed from concern “that the previous title implied an unintended limitation of the provision’s application.”<sup>50</sup>

These revisions to section 7008 and the backdrop against which they were made suggest that Congress wanted the law to apply broadly, disapproved of the Obama administration’s response to the Zelaya ouster, and wanted to prevent the executive branch from undertaking similar actions in the future. It would therefore seem odd to conclude that Congress intended to make the application of section 7008 turn entirely on the discretion of the executive branch. To argue otherwise would render the prospect of post-coup sanctions ineffectual—something that Congress clearly did not intend. Accordingly, then, the Obama administration’s refusal to make a determination under section 7008 following the Morsi ouster is difficult to reconcile with congressional intent and with executive-branch precedent.

## II.

### GAPS IN THE SCHOLARSHIP: WHAT WAS THE LEGAL BASIS FOR THE OBAMA ADMINISTRATION’S RESPONSE TO THE MORSI OUSTER?

As of this writing, there have been few attempts to explain the U.S. response to the Morsi ouster and the Obama administration’s in-

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the fact that Zelaya’s successor had been sworn in by the Honduran legislature might have been dispositive in the administration’s thinking. See Special Briefing by Two Senior State Dep’t Officials, in Wash., D.C. (July 1, 2009), <http://www.state.gov/r/pa/prs/ps/2009/july/125564.htm> (“The military moved against the president; they removed him from his home and they expelled him from a country, so the military participated in a coup. However, the transfer of leadership was not a military action. The transfer of leadership was done by the Honduran congress, and therefore the coup, while it had a military component . . . is a larger event.”).

48. Special Briefing by Senior Admin. Officials on Honduras, *supra* note 47.

49. *Id.*; see also MEYER, *supra* note 43, at 13 (“The U.S. government would have been legally required to terminate some foreign assistance if it had declared Zelaya’s ouster a ‘military coup.’ Although the United States never made such a declaration, it terminated the foreign assistance that it would have been required to discontinue had it done so.”).

50. H.R. REP. No. 111-366, at 1497 (2009) (Conf. Rep.); see also MEYER, *supra* note 43, at 15 (quoting the conference report language and linking it to the Zelaya ouster). But cf. H.R. REP. No. 111-366, at 1497 (noting that “there is no substantive change to” post-coup sanctions).

terpretation of section 7008. Some have written on the political incentives that motivated the Obama administration's refusal to make a determination under section 7008,<sup>51</sup> while others have written articles supporting or criticizing the executive branch's policies vis-à-vis aid to Egypt in the wake of the State Department's decision to not make a determination.<sup>52</sup> However, while there have been some cursory suggestions that the government's refusal to make a determination was inconsistent with the letter of the law or at least flouted the spirit of the law,<sup>53</sup> to date, very few commentators have comprehensively examined the *legal* basis for the administration's response to the Morsi ouster, and those who have done so have focused on the wrong issue.<sup>54</sup>

Thus, despite this literature (a survey of which follows below),<sup>55</sup> our understanding of section 7008 and the Obama administration's response to the Morsi ouster remains incomplete. This accordingly presents the questions with which this Note is concerned: what is the legal basis for the executive branch's refusal to make the determination contemplated by section 7008? What could justify the Obama administration's decision to adopt a strained reading of the statute and practice avoidance in a situation in which Congress likely intended the law to apply?

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51. See Harvard Note, *supra* note 13. A detailed summary of the Harvard Note follows in Part II.A.

52. See, e.g., Max Boot, *The Case for Cutting Off Aid to Egypt*, L.A. TIMES (Aug. 22, 2013), <http://articles.latimes.com/2013/aug/22/opinion/la-oe-boot-egypt-sisi-coup-obama-20130822> (arguing that terminating assistance to the post-Morsi regime would make the United States a more credible advocate for human rights); Dina Khayat, *America's Aid and Egypt's Indifference: The Obama Administration Chooses to "Re-calibrate" Aid Rather than Help the Interim Government Fight Terrorism*, WALL ST. J. (Oct. 16, 2013, 3:38 PM), <http://online.wsj.com/articles/SB10001424052702304561004579134924240940340> (arguing that cutting aid to post-Morsi Egypt would be detrimental to U.S.-Egyptian relations).

53. See, e.g., Feldman, *supra* note 41. In his article, Feldman briefly suggests (and summarily dismisses) several explanations for the administration's refusal to suspend aid to the Morsi regime, including the possibility that the President is relying on his inherent powers under Article II. *Id.* ("Perhaps the president might claim an inherent commander-in-chief power or foreign-relations power to keep the money coming because of national security. But we aren't at war, and Congress certainly has the power of the purse. . . . It's hard to escape the conclusion that the Obama administration is adopting some highly doubtful legal conclusion just because it thinks it can get away with it.").

54. This point will be explored in greater depth in Parts II.B, III, IV, and V of this Note.

55. See *infra* Parts II.A–B.

### A. Political Incentives and the Morsi Ouster: The Harvard Note

To date, the most comprehensive examination of Section 7008 and post-coup sanctions in general is an unsigned student note in the Harvard Law Review (the “Harvard Note”).<sup>56</sup> The Harvard Note provides a detailed study of how the United States has acted with regards to regimes that came to power via coups d’état, and identifies a distinctive pattern of behavior: the executive branch has repeatedly tried to avoid being bound by section 7008.<sup>57</sup> The Harvard Note concludes that while the United States has often suspended aid to nations that experienced coups d’état,<sup>58</sup> the executive branch avoids triggering its legal obligations under section 7008 or searches for other means of circumventing section 7008’s prohibitions.<sup>59</sup> In short, the author argues that the executive branch practices “statutory avoidance” with respect to section 7008,<sup>60</sup> though it may at times suspend foreign aid as a matter of policy.<sup>61</sup>

The Harvard Note then attempts to identify possible reasons that the executive branch would employ statutory avoidance in this context, suggesting that “rationalist and normative models of executive behavior” are the cause.<sup>62</sup> For instance, the author suggests that the President may wish to avoid being bound by section 7008 because it “constrains executive discretion with respect to the state in question.”<sup>63</sup> The author also suggests that statutory avoidance is motivated by a number of structural and legal considerations: for instance, any determination made under the statute creates a precedent as to its in-

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56. Harvard Note, *supra* note 13.

57. *See id.* at 2503–07 (arguing that the executive branch sought to avoid being bound by the relevant coup provisions with respect to post-coup regimes in Algeria, Thailand, Madagascar, and Honduras).

58. This was done, for example, with respect to Fiji and Mali. *See id.* at 2503–04.

59. For example, Congress has—at the request of the executive branch—enacted legislation allowing the President to waive section 7008 sanctions against specific countries. *See An Act to Authorize the President to Exercise Waivers of Foreign Assistance Restrictions with Respect to Pakistan Through September 30, 2003, and for Other Purposes*, Pub. L. No. 107-57, § 1, 115 Stat. 403, 403 (2001) (authorizing the executive branch to waive sanctions against Pakistan).

60. *See* Harvard Note, *supra* note 13, at 2507.

61. *See id.* at 2508–09 (noting that cuts in aid to Egypt following the Morsi ouster were “not made on the basis of a legal obligation under the coup provision”).

62. *Id.* at 2509.

63. *Id.* at 2514; *see also id.* at 2513 (noting the difficulty in modifying “the country’s assistance level without going back to Congress” after a determination has been made pursuant to the statute).

terpretation,<sup>64</sup> impacting any understanding of the separation of powers between the executive branch and Congress.<sup>65</sup> The author similarly suggests that acquiescing to Congress's post-coup sanctions regime would limit the executive branch's ability to act unilaterally with respect to foreign policy at a later date.

In sum, the Harvard Note frames the incentives for statutory avoidance by discussing the political consequences of acquiescence rather than exploring the legal mechanisms that could justify this avoidance *ex ante*. But while the Obama administration's response to the Morsi ouster was undoubtedly a political decision driven by the incentives cogently explained by the Harvard Note, it was a legal decision, too. The executive branch's determination that it did not need to make a determination about whether a coup had occurred was made by government lawyers within a legal framework.<sup>66</sup> Insofar as the Harvard Note discusses the legality of the executive branch's response to the Morsi ouster, it states (without elaborating): "decisions declining to make determinations under the coup provision may themselves be illegal."<sup>67</sup> Similarly, it does not substantially delve into the constitutional issues at stake with regard to the separation of powers. It suggests that if the President would agree to be bound by the statute, it would be "more difficult for the Executive to assert broad constitutional authority with respect to other foreign assistance statutes,"<sup>68</sup> without discussing which constitutional authorities would be affected by section 7008. It is therefore imperative that we analyze the Obama administration's position and seek to understand the legal basis for its refusal to make a determination under section 7008.

### B. Debating What Constitutes a Coup

To the extent that scholarship has addressed the legality of the Obama administration's response to the Morsi ouster, it has focused

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64. See *id.* at 2513 ("Each time the Executive makes a determination under the provision, it contributes to a body of public precedent that will constrain the Executive's ability to make subsequent difficult interpretive decisions under the statute.").

65. See *id.*; see also *id.* at 2513–14 (noting that being bound by congressionally enacted post-coup sanctions would "bolster Congress's constitutional authority to control foreign assistance").

66. See Psaki Daily Press Briefing (July 26, 2013), *supra* note 22.

67. Harvard Note, *supra* note 13, at 2517.

68. *Id.* at 2514. See generally *id.* at 2513–14 ("Though none of the Executive's recent actions directly evince this concern, executive determinations under the coup provision may also bolster Congress's constitutional authority to control foreign assistance. Some scholars have argued that the Executive's inherent authority does not leave room for a congressional role in foreign affairs, even in the appropriations context.").

largely on questions of statutory interpretation: it asks whether the events in Egypt constituted a “military coup” and assumes that if they did, the United States would have been required to cut off aid to Egypt.<sup>69</sup> Typical of this approach is a student note written by Eric Schmitz, which offers a lengthy overview of U.S. foreign assistance policy.<sup>70</sup> Schmitz discusses whether the Morsi ouster met the statutory definition of a “coup” and summarily concludes that “[t]he United States’ continued support of the Egyptian military subsequent to Mohamed Morsi’s ouster is likely to be considered lawful by courts from the Supreme Court of the United States to the International Court of Justice.”<sup>71</sup> This reasoning rests in part upon the author’s belief that the Morsi ouster closely resembled the Zelaya ouster.<sup>72</sup> Both Zelaya and Morsi arguably had been acting undemocratically while in office, and the ousters had widespread support among the Honduran and Egyptian publics, respectively. This, the author argues, meant that Morsi was “not the democratic leader” of Egypt.<sup>73</sup>

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69. See, e.g., *A Coup by Any Other Name*, ON THE MEDIA (July 12, 2013), <http://www.onthemedia.org/story/306428-coup-any-other-name/transcript/> (interview with Noah Feldman, in which Feldman stated: “Congress passed a law called the Foreign Assistance Act which, as amended, says that if a duly elected president or head of state of a country is removed by a military coup or a military decree, we have to stop immediately all aid to that country, Egypt gets about 1.55 billion dollars of U.S. aid a year. Almost all of that money goes to the Egyptian military. They’re totally dependent on our aid.”).

70. Eric Schmitz, Note, *Foreign Aid in Egypt: The Legality of Continued Financial Support to the Egyptian Military After Mohammed Morsi’s Removal from Power*, 21 U. MIAMI INT’L & COMP. L. REV. 349 (2013). Another example of this mode of analysis is presented in an essay by Mohamed Arafa. See Mohamed A. Arafa, *Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup D’État?*, 24 IND. INT’L & COMP. L. REV. 859 (2014). Arafa assesses whether the Morsi ouster constituted a coup through the lens of Egyptian law in effect at the time, and concludes—in light of the popular support for the military’s actions—that “this sort of impeachment cannot be described as a ‘coup d’etat’ in a technical and traditional legal sense.” *Id.* at 876.

71. Schmitz, *supra* note 70, at 373.

72. *See id.* at 372–74 (noting factual similarities between the Morsi and Zelaya ousters).

73. *Id.* at 374. However, as discussed *supra* Part I.C., the legislative history of section 7008 indicates that Congress likely intended the law to apply in situations similar to the Zelaya ouster. The revisions suggest that Congress intended for aid to be cut off whenever a country’s military ousts its democratically elected leader, regardless of how much popular support the military had in effecting an extra-constitutional change of power or how autocratic the leader may have been. Accordingly, Morsi’s undemocratic tendencies and the popular support for his ouster probably do not have any bearing on whether his ouster was a statutory coup. *See* Harvard Note, *supra* note 13, at 2507 (arguing that the Morsi ouster probably satisfied the section 7008 definition of a “coup”).

However, in light of the Obama administration's response to the Morsi ouster, it appears that the critical inquiry is not whether the Morsi ouster was a "coup" within the meaning of section 7008: the State Department's refusal to make a determination mooted the question of whether a coup had occurred.<sup>74</sup> Instead, the question ought to be whether Congress could require the President to make a statutory determination in the first place.

### C. *Tempering Expectations*

This Note does not intend to conclusively reconstruct the Obama administration's legal position with regards to the Morsi ouster. There are a number of significant epistemological obstacles that would thwart such an undertaking, and trying to get inside the minds of the State Department lawyers who made this determination would be a highly speculative (and therefore imprecise) endeavor.<sup>75</sup> Instead, this Note seeks to highlight and address a gap in the existing scholarship—that is, that there have been no serious attempts to identify or evaluate the constitutionally problematic aspects of section 7008 that would justify statutory avoidance.

## III.

### IS THE EXECUTIVE BRANCH QUESTIONING THE CONSTITUTIONALITY OF SECTION 7008?

In seeking to understand how the executive branch could justify its strained reading of section 7008 (or, in effect, disregard it altogether), we ought to consider one intuitively plausible hypothesis: namely, that it is constitutionally problematic for Congress to require the President to make determinations as to whether a coup d'état has occurred.

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74. For example, Schmitz does not analyze the actual position taken by the Obama administration and does not examine what could have motivated the executive branch to adopt this position. *See* Schmitz, *supra* note 70.

75. Notwithstanding the statements from State Department spokespeople and the occasional mention of section 7008 at congressional hearings, executive-branch officials have been remarkably silent with respect to how they actually interpret section 7008. There are no signing statements or publicly available memoranda from the Office of Legal Counsel concerning that provision or its predecessors, and there is therefore scant public record to guide our inquiry.

### A. Constitutional Avoidance: How the Executive Branch Responds to Problematic Statutes

It is well established that Congress cannot interfere with the President's inherent constitutional powers by compelling him to act (or abstain from acting) in a given manner.<sup>76</sup> This view is all but taken for granted by executive-branch lawyers, and the President has consequently been advised to ignore statutes that impermissibly intrude upon his powers.<sup>77</sup> Thus, if compelling the executive branch to make section 7008 determinations is an intrusion upon the President's Article II powers,<sup>78</sup> the President would be justified in disregarding the statute.

In addition, executive-branch lawyers often practice a form of constitutional avoidance, whereby they interpret constitutionally questionable statutes in a way that avoids implicating problematic constitutional issues.<sup>79</sup> The executive branch need not conclude that the statute

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76. See, e.g., President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the Nat'l Sec. Act, 10 Op. O.L.C. 159, 164 (1986) ("[S]tatutes infringing the President's inherent Article II authority would be unconstitutional."); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.").

77. See, e.g., Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Joan E. Donoghue, Acting Legal Adviser, U.S. Dep't of State, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act (June 1, 2009), <http://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054.pdf> (arguing that the executive branch would "be justified in disregarding" a congressional law that interfered with its constitutional authority); see also Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189, 198 (1996) ("Because section 609 is, in our view, invalid, we regard it as being without legal force or effect.").

78. As discussed *infra* Part IV, the likeliest authority upon which this law infringes is the President's recognition power.

79. For instance, presidential lawyers have used this canon to argue that the Non-Detention Act—which, by its plain terms, categorically bans the detention of U.S. citizens “except pursuant to an Act of Congress,” 18 U.S.C. § 4001(a) (2013)—should not be interpreted as prohibiting the President from detaining U.S. citizens as enemy combatants, pursuant to his powers as commander in chief. See Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Daniel J. Bryant, Assistant Att'y Gen., U.S. Dep't of Justice (June 27, 2002), <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memodetentionuscitizens06272002.pdf>; see also id. at 9 (“Our conclusion that section 4001(a) does not interfere with the President’s constitutional authority as Commander in Chief is compelled by the well established canon of statutory construction that statutes are not to be construed in a manner that presents constitutional difficulties so long as a reasonable alternative construction is available.”). For a comprehensive explanation of presiden-

is actually unconstitutional—rather, avoidance may be justified even if “an otherwise acceptable construction of a statute would raise *serious constitutional problems*.<sup>80</sup> The executive branch will sometimes invoke constitutional avoidance if a statute presents a constitutional question but does not unambiguously indicate that Congress intended for the executive branch to address the underlying constitutional question.<sup>81</sup>

As discussed in Part I, the text of section 7008 does not expressly require the President to make a particular determination (besides the one necessary to restore aid to sanctioned country).<sup>82</sup> If a statutory requirement for an executive determination presented sufficiently serious constitutional issues, section 7008 might be an ideal candidate for constitutional avoidance. That is, the lack of a clear signal from Congress that it wanted the executive branch to reach those underlying issues gives the executive branch leeway to avoid the question of the statute’s constitutionality<sup>83</sup> and, therefore, shirk the determination contemplated by section 7008.

### B. Executive Avoidance with Respect to Foreign Affairs

These practices are especially relevant in the context of foreign affairs, given that the executive branch possesses a great deal of authority in that field.<sup>84</sup> Throughout U.S. history, Presidents have claimed the exclusive power to control key aspects of foreign policy and have strenuously resisted congressional attempts to limit, interfere with, or attach conditions to the exercise of those powers.<sup>85</sup> The Office

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tial constitutional avoidance in theory and in practice, see generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

80. See Morrison, *supra* note 79, at 1203 (emphasis added) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 & n.47 (1988)). This form of constitutional avoidance, known as “modern avoidance,” differs from what is deemed “classical avoidance” insofar as the latter entails “[reaching] the issue whether the doubtful version of the statute is constitutional [and concluding that it is not] before adopting the construction that saves the statute from constitutional invalidity.” *Id.* & n.46 (alterations in original) (quoting Clark v. Martinez, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting)).

81. See *id.* at 1227 (explaining that the OLC often declines to interpret a statute as limiting the President’s discretion or actions unless Congress has made a “clear statement” that it intends to do so).

82. See *supra* Part I.C.

83. See Morrison, *supra* note 79, at 1227.

84. Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (characterizing the President “as the sole organ of the federal government in the field of international relations”).

85. Indeed, the historical record is replete with such occurrences. See, e.g., Veto of the War Powers Resolution, 311 PUB. PAPERS 893 (Oct. 24, 1973) (vetoing legislation

of Legal Counsel has even suggested that—considering the President’s expansive powers regarding international relations—constitutional avoidance will likely apply whenever Congress attempts to legislate with respect to U.S. foreign policy.<sup>86</sup> Unsurprisingly, then, there have been many high-profile cases in which the executive branch disregarded or reinterpreted laws that it deemed to intrude upon the President’s constitutional authority to set and implement U.S. foreign policy.<sup>87</sup> As section 7008 determinations implicate foreign policy, this would arguably be sufficient reason to justify constitutional avoidance.

### C. President Bush and Section 7008

There is some evidence that President Bush also questioned the constitutional validity of Congress’s post-coup sanctions regime. In the wake of the 9/11 terrorist attacks, Congress enacted a waiver to allow the President to resume aid to Pakistan,<sup>88</sup> which had been suspended in the wake of a military coup.<sup>89</sup> Although President Bush had

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that would strengthen congressional oversight over the President’s foreign policy decisions because “the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous”); *cf.* ROBERT A. CARO, THE PASSAGE OF POWER 397–99, 424–25, 501–02 (2012) (describing how President Lyndon Johnson thwarted congressional attempts to defeat a foreign-aid initiative proposed by the executive branch).

86. See *The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the Nat’l Sec. Act*, 10 Op. O.L.C. 159, 170 (1986) (“[A]ny statute that touches on the President’s inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow.”); *see also id.* (“Because the President’s constitutional authority in international relations is . . . virtually as broad as the national interest . . . almost *any* congressional attempt to curtail his discretion raises questions of constitutional dimension.”).

87. See, e.g., Press Release, Office of the White House Press Sec’y, Statement by the President (Sept. 30, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/print/20020930-8.html> (“Section 214, concerning Jerusalem, impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.”).

88. See *An Act to Authorize the President to Exercise Waivers of Foreign Assistance Restrictions with Respect to Pakistan Through September 30, 2003, and for Other Purposes*, Pub. L. No. 107-57, § 1(b)(1), 115 Stat. 403 (2001) (authorizing the executive branch to waive sanctions against Pakistan).

89. See Harvard Note, *supra* note 13, at 2503 (noting that the Clinton administration suspended aid to Pakistan in 1999).

apparently requested this waiver,<sup>90</sup> he noted that aid been restored “pursuant to the authority vested in me by *the Constitution* and laws of the United States, including section 1(b)(1) of the Pakistan Waiver Act.”<sup>91</sup> The President does not invoke constitutional authority in every single presidential determination;<sup>92</sup> in other contexts, scholars have noted that a President’s invocation of his constitutional authority in pursuing a course of action can indicate a belief that the executive branch has the authority to act unilaterally and in spite of congressional disapproval.<sup>93</sup> The fact that President Bush invoked his constitutional powers with respect to post-coup sanctions may express a similar view: that he was free to act even without a congressional waiver, as the statute does not limit his expansive powers in the realm of foreign affairs.

Of course, whether the President has the power to resume the provision of economic assistance to a nation that underwent a coup d’état is an entirely distinct inquiry from whether the President has the power to avoid making a determination in the first place. Nevertheless, this episode highlights the fact that previous administrations have questioned the constitutionality of section 7008 and have indicated that the law may not be binding on the executive branch.

Thus, the Obama administration’s treatment of section 7008 ought to rouse our suspicion that the administration is practicing statutory avoidance in order to avoid a potentially serious constitutional issue, particularly when viewed against a long history of similar behavior in this realm.<sup>94</sup>

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90. Cf. 147 CONG. REC. S9811 (daily ed. Sept. 25, 2001) (statement of Sen. Brownback) (“[T]he administration is asking for this important assistance.”).

91. Waiver of Coup-Related Sanctions for Pakistan, 68 Fed. Reg. 13,803 (Mar. 21, 2003) (emphasis added) (announcing waiver of post-coup sanctions by presidential determination).

92. Compare *id.*, with, e.g., Determination Under Subsection 402(d)(1) of the Trade Act of 1974, as Amended—Continuation of Waiver Authority for the Republic of Belarus, 69 Fed. Reg. 32,431 (June 9, 2004) (invoking waiver “pursuant to the authority vested in me under the Trade Act of 1974”).

93. This can be seen by comparing, for example, the respective rationales advanced by the Bush and Obama administrations regarding the legal authority to detain enemy combatants. Whereas the Obama administration relied only on relevant statutes in claiming the relevant powers, the Bush administration also drew upon the President’s Article II powers, suggesting that it possessed the authority to detain enemy combatants even without express congressional authorization of this practice. See Jack Goldsmith, *Detention, the AUMF, and the Bush Administration—Correcting the Record*, LAWFARE BLOG (Sept. 14, 2010, 3:06 PM), <http://lawfareblog.com/detention-aumf-and-bush-administration-correcting-record>.

94. See *supra* Part III.B.

## IV.

IDENTIFYING THE POTENTIAL DEFECT WITH SECTION 7008:  
CONFLICT WITH THE RECOGNITION POWER

In light of the fact that the executive branch might be practicing constitutional avoidance, it behooves us to analyze what, specifically, would justify adopting its strained reading of section 7008. This question is underscored by the fact that executive-branch lawyers do not categorically deny Congress's ability to require the President to make certain determinations with respect to foreign policy.<sup>95</sup> Thus, we must consider why the determination contemplated by section 7008 is more problematic than other determinations.

The reason may relate to the so-called "recognition power." As the Supreme Court has recently affirmed, the President has exclusive

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95. See, e.g., Presidential Discretion to Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306 (1995) (discussed *supra* notes 34–40 and accompanying text). Moreover, the Supreme Court itself suggested that there is nothing *per se* problematic about requiring the executive branch to make certain determinations—even ones that may implicate foreign policy. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *see also id.* at 249–50 (Marshall, J., dissenting). In *Japan Whaling*, the Court considered the reasonableness of the executive branch's interpretation of the Pelly and Packwood-Magnuson Amendments, which provided, in relevant part, that "[w]hen the Secretary of Commerce determines" that foreign nationals had been acting in a manner as to "diminish the effectiveness of an international fishery conservation program, the Secretary shall certify such fact to the President." *Id.* at 242 (quoting the Pelly Amendment to the Fishermen's Protective Act of 1967). Despite the fact that Japanese nationals were acting in a manner that violated the terms of an international fishery conservation program, the Secretary of Commerce did not issue a certification to the President. *See id.* at 232–33 (majority opinion). Although a majority of the closely divided Court upheld the legality of the Secretary's actions, the Court tacitly suggested that there was nothing problematic about Congress requiring the executive branch to make a certification, evincing skepticism toward the contrary argument. *See id.* at 233 ("We do not understand the Secretary to be urging that he has *carte blanche* discretion to ignore and do nothing about whaling in excess of IWC Schedules. He does not argue, for example, that he could refuse to certify for any reason not connected with the aims and conservation goals of the Convention, or refuse to certify deliberate flouting of schedules by members who have failed to object to a particular schedule."). Additionally, Justice Marshall—on behalf of four dissenting Justices—argued that the Secretary's actions were clearly unlawful, and took for granted that Congress could compel the executive branch to issue certifications. *Id.* at 249 (Marshall, J., dissenting). As he noted:

[T]he Secretary has exceeded his authority by using his power of certification . . . as a means for evading the constraints of the Packwood Amendment. . . . I am troubled that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress' pointed response to a question long pondered . . . .

*Id.* at 249–50.

authority to recognize foreign states and governments<sup>96</sup> pursuant to his constitutional power to appoint and “receive Ambassadors and other public Ministers.”<sup>97</sup> In recent years, the executive branch has argued that this power also includes the authority to decide a number of issues relating to the sovereignty of foreign nations, such as a country’s borders.<sup>98</sup> Moreover, as the Solicitor General of the United States recently argued before the Supreme Court, the recognition power prevents Congress from “[compelling] the Executive to issue diplomatic communications that contradict the official position of the United States on a matter of recognition.”<sup>99</sup> Thus, might a requirement that the President issue a declaration concerning the occurrence of a coup d’état implicate the President’s recognition power?

#### A. Recognition Generally

The recognition of foreign sovereigns is a well-established diplomatic institution that some have traced as far back as the Middle Ages.<sup>100</sup> Recognizing a state essentially declares “that it fulfills the conditions of statehood as required by international law.”<sup>101</sup> Recogni-

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96. See generally *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (holding that the executive branch has the exclusive “power to recognize foreign nations and governments”); *Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988) (noting the President’s “exclusive authority to recognize or refuse to recognize a foreign state or government”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 (AM. LAW INST. 1987) (“Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government . . . .”). Some, however, have argued that this power is not exclusive to the executive branch, and that Congress shares in it to a certain extent. See generally Brief for the Petitioner at 27–57, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_pet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_pet.authcheckdam.pdf) (arguing that the recognition power is shared between the executive and legislative branches).

97. U.S. CONST. art. II, § 3; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 cmt. a (AM. LAW INST. 1987) (“The authority . . . is implied in the President’s express constitutional power to appoint Ambassadors . . . and to receive Ambassadors . . . and his implied power to conduct the foreign relations of the United States.”).

98. See generally Brief for the Respondent at 27–31, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_resp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_resp.authcheckdam.pdf) (describing past instances in which the executive has made recognition decisions concerning the territory of nations, and authorities supporting this practice).

99. Transcript of Oral Argument at 45, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628).

100. See P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 1 (1994) (“[Recognition’s] earliest use appeared to be in the Middle Ages when a political entity, in order to become an independent member of the family of Christian nations required *papal recognition*.”).

101. H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385 (1944).

tion of a foreign government, in turn, concerns whether a regime “is entitled to act on behalf of the State concerned.”<sup>102</sup> Conversely, as the Supreme Court has put it, withholding recognition from a regime “signifies this country’s unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control.”<sup>103</sup>

Recognition of a foreign government can have significant legal and political effects. Whether a government is recognized may affect a wide range of issues under international law, including, for example:

the validity of treaties and commercial contracts entered into on behalf of the state by the putative government, as well as the validity of title to any state property that the government may have transferred to foreign persons or any private property that it may have expropriated from subjections and transferred (in whole or part) to foreign persons.<sup>104</sup>

Recognition similarly has implications with respect to the laws of armed conflict,<sup>105</sup> and may even affect the applicability of those laws. For instance, some have argued that the United States’ decision to withhold recognition from the Taliban contributed to the Bush administration’s initial position that the Geneva Conventions did not apply, as a matter of law, to the Taliban.<sup>106</sup> Critically, recognition also has implications vis-à-vis the standing of a regime within the global com-

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102. MENON, *supra* note 100, at 61.

103. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

104. BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 122 (2000); *see also* M.J. Peterson, *Recognition of Governments Should Not Be Abolished*, 77 AM. J. INT’L L. 31, 36 (1983) (observing that non-recognition affects “a new government’s ability to sue in foreign courts, suits involving governmental acts having extraterritorial effect, and possession of state property located abroad”). Some scholars, however, dispute that recognition is substantively important, insofar as governments can (and do) “deal with each other, sometimes extensively, without recognizing one another.” *See* L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 10–12 (1978).

105. It has been argued that if a third-party nation intervenes militarily in a state at the invitation of that state’s illegitimate or unrecognized government, the intervener’s actions may even constitute aggression. *Cf.* ROTH, *supra* note 104, at 122 (2000).

106. *See, e.g.*, Aya Gruber, *Who’s Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1023 (2007) (“[T]he Administration initially argued that because the United States never recognized the Taliban as a legitimate government, Taliban fighters were not subject to Geneva protections.”).

munity,<sup>107</sup> and—in some cases—serves to express “the recognizing state’s values and priorities in international affairs.”<sup>108</sup>

The question of whether to recognize a foreign government only arises in unusual situations; given an ordinary transfer of power from one government to the next, other states have no need to recognize the successor.<sup>109</sup> Thus, recognition becomes an issue if there is doubt as to whether a given regime is governing the state or if the regime’s legitimacy is in question. To this end, the manner in which a regime came to power may be important in determining whether to recognize that regime. Indeed, as many scholars have noted, the question of recognition often arises if a regime assumes power extra-constitutionally or illegitimately: that is, via a coup d’état.<sup>110</sup>

There is, accordingly, a strong argument to be made that determinations about whether a regime seized power via a military coup implicate the recognition power: announcing that a government came to power via a coup d’état may—in effect—be tantamount to withholding recognition of the regime, or might otherwise affect the executive branch’s ability to recognize that regime. If so, there would be grounds to call the constitutionality of section 7008 into question. Accordingly, we must delve into the relationship between that statute and the Constitution, and consider whether requiring a factual determination about the existence of a coup d’état implicates the President’s power to recognize foreign governments and states.

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107. See GALLOWAY, *supra* note 104, at 11 (“[T]he importance attached to recognition derives in part . . . from the sense of legitimacy recognition confers.”); see also *id.* (“The main importance of recognition . . . has been political.”).

108. See *id.* at 12. But see *United States Recognition of Foreign Governments: Hearing Before the S. Comm. on Foreign Relations on S. Res. 205*, 91st Cong. 2 (1969) (statement of Sen. Cranston) (distinguishing between recognition of a government and approval of that government).

109. See M.J. PETERSON, RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE 1815–1995, at 13 (1997) (“No government or legal scholar has ever asserted that every change of government raises the need for recognition.”); see also GALLOWAY, *supra* note 104, at 3 (“For example, Great Britain does not recognize a new government in the United States whenever a new President is elected.”).

110. See, e.g., GALLOWAY, *supra* note 104, at 3 (“[U]nder established principles of international law, the legal relationship between two states is affected if a government assumes power in a manner that violates domestic law. When such a change of government occurs, the question of recognition of the new government is said to arise.”); see also *id.* at 4 (noting that it is “common” for the question of recognition to arise with respect to a “military coup d’etat,” or a situation in which the military forces a political transition).

### B. Historical Evidence Linking Post-Coup Sanctions to the Recognition Power

The hypothesis that there is a connection between the recognition power and section 7008 is bolstered by two little-known statements: one by President Kennedy (as reported by Senator Wayne Morse),<sup>111</sup> and another in an *amicus curiae* brief filed on behalf of several dozen members of Congress in the case *Zivotofsky v. Kerry*.<sup>112</sup> As will be discussed herein, both sources mention the possibility that post-coup sanctions might intrude upon the President's recognition power. While these statements do not conclusively establish that section 7008 actually violates the separation of powers, they invite us to inquire about the constitutionality of section 7008 in light of the recognition power.

#### 1. H.R. 7885

In 1963, Congress considered H.R. 7885, a bill that would have amended the Foreign Assistance Act of 1961 and dramatically affected U.S. foreign-aid programs. The bill passed the House of Representatives on August 23, 1963,<sup>113</sup> and was substantially amended in the Senate over the following months.<sup>114</sup> One of the changes made by the Senate Foreign Relations Committee is particularly relevant for our present purposes. The Senate sought to add a new section ("section 254"), which was shockingly similar to what later became section 7008, into the Foreign Assistance Act of 1961. The proposed section 254 would have applied only to aid for Latin-American countries,<sup>115</sup> and provided, in relevant part:

None of the funds made available under authority of this Act may be used to furnish assistance to any country covered by this title in which the government has come to power through the forcible overthrow of a prior government which has been chosen in free and democratic elections unless the President determines that withholding such assistance would be contrary to the national interest.<sup>116</sup>

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111. See 109 CONG. REC. 21,563 (1963) (statement of Sen. Morse).

112. Brief for Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 9, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-628\\_pet\\_amcu\\_ushr.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-628_pet_amcu_ushr.authcheckdam.pdf).

113. See 109 CONG. REC. 15,676–78 (1963) (roll call votes on H.R. 7885).

114. See generally STAFF OF CONFERENCE COMM., 88TH CONG., COMPARING H.R. 7885 (FOREIGN ASSISTANCE ACT OF 1963) WITH THE SENATE AMENDMENT THERETO (Comm. Print 1963).

115. See *id.* at 34 (explaining that the proposed section 254 would apply only to Latin America).

116. See *id.* (quoting the Senate's proposed amendment to H.R. 7885). Indeed, the original version of section 513 (i.e., the first globally applicable post-coup sanctions

During the lead-in to a final vote on H.R. 7885, Senator Wayne Morse of Oregon introduced an amendment that would have made section 254 even more restrictive, making a presidential waiver of post-coup sanctions subject to legislative veto.<sup>117</sup>

The executive branch noted the popularity of this proposal,<sup>118</sup> but its concern proved to be for naught. The Morse Amendment was defeated by a decisive margin,<sup>119</sup> and though the Senate passed H.R. 7885 (which included section 254),<sup>120</sup> the post-coup sanctions appear to have been removed during conference.<sup>121</sup> Nevertheless, the debate surrounding the proposal provides a great deal of insight into the issues presently at stake, the full measure of which has—until now—been entirely overlooked.<sup>122</sup>

Although the Kennedy administration vociferously opposed the proposed section 254 on policy grounds,<sup>123</sup> it also criticized this early

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law) is almost a word-for-word copy of the proposed section 254. *Compare id.*, with Pub. L. No. 99-190, § 513, 99 Stat. 1185, 1305 (1985) (“None of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to finance directly any assistance to any country whose duly elected Head of Government is deposed by military coup or decree.”). While the similarity between the two provisions is incredibly striking, research has not revealed any sources regarding whether the authors of section 513 were aware of section 254.

117. 109 CONG. REC. 21,867 (1963) (reprint of the Morse amendment, which would make waiver of post-coup sanctions contingent on Congress’s not “[adopting] a concurring resolution disapproving the continuance of such assistance within thirty days after the President notifies to the two Houses of his determination”).

118. See Memorandum from Lawrence F. O’Brien, Special Assistant to the President for Cong. Relations, to President John F. Kennedy 4 (Oct. 7, 1963), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-053-009.aspx> (“Senator Morse has said he will offer an amendment to cut off aid to any government which comes to power through military forces. Support continues to build in the Senate for such an amendment.”).

119. The amendment’s supporters were outvoted eleven to seventy-eight, with eleven senators not voting. See 109 CONG. REC. 21,870 (1963).

120. See 109 CONG. REC. 21,981 (1963) (showing that H.R. 7885 passed by a vote of sixty-three to seventeen, with twenty Senators not voting).

121. See Foreign Assistance Act of 1963, Pub. L. No. 88-205, § 201–202, 77 Stat. 379, 384 (showing lack of section 254 language).

122. Research on Westlaw has not revealed any mention of the Morse Amendment or section 254 in any secondary literature.

123. A comprehensive explanation of the Kennedy administration’s opposition to this provision can be found in a Conference Committee print comparing the House and Senate versions of H.R. 7885 (which included commentary from the executive branch on relevant sections). See STAFF OF CONFERENCE COMM., 88TH CONG., COMPARING H.R. 7885 (FOREIGN ASSISTANCE ACT OF 1963) WITH THE SENATE AMENDMENT THERETO 34 (Comm. Print 1963). In this document (printed the day before the assassination of President Kennedy), the executive branch set forth several reasons as to why it opposed the proposal, despite being “in great sympathy for the objective of the amendment.” *Id.* For example, the executive branch was concerned that requiring the president to “determine publicly that it is in the U.S. national interest not to with-

attempt at enacting a post-coup sanctions regime on constitutional grounds. On November 12, 1963, Senator Morse took the floor to defend his proposed amendment against attacks from the executive branch: President Kennedy, the senator reported, had “expressed . . . concern that my so-called juntas amendment *would interfere with his right to extend diplomatic recognition to a given government.*”<sup>124</sup> Senator Morse emphatically rejected this concern, and suggested that this law—which merely concerned the disbursement of moneys—would in no way intrude on the President’s constitutional prerogatives.<sup>125</sup> He reiterated this defense two days later, again asserting that his proposed amendment “would not in any way interfere with the diplomatic recognition power of the President of the United States.”<sup>126</sup>

If we take Senator Morse’s characterization of President Kennedy’s concerns at face value, it is clear that the administration believed post-coup sanctions could be constitutionally problematic. Notwithstanding Senator Morse’s protestations to the contrary, the executive branch viewed such sanctions as undermining the President’s ability to recognize foreign governments. Though there is little else that sheds light on the Kennedy administration’s position, this debate is a valuable clue that ought to guide our analysis of the Obama administration’s reaction to the Morsi ouster.

## 2. Zivotofsky and Section 7008

More than forty years after President Kennedy explained his concerns to Senator Morse, a group of legislators again hinted at the connection between section 7008 and the recognition power. The Supreme Court recently issued a decision in *Zivotofsky v. Kerry*,<sup>127</sup> a case concerning whether Congress acted within its powers when it passed a statute requiring the executive branch to list “Jerusalem, Israel” on a U.S. passport.<sup>128</sup> The executive branch had refused to im-

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hold assistance” would provide “the junta government a possible claim of support for reasons of U.S. policy.” *Id.*

124. 109 CONG. REC. 21,563 (1963) (statement of Sen. Morse) (emphasis added).

125. *See generally id.* (“Therefore, my amendment dealing with juntas would not cover the constitutional right of the President to recognize governments; it only seeks to restrict his power to spend money on military juntas . . . . Congress might pass all the legislation we [sic] desired about recognizing a government. However, the President has the constitutional right to recognize a government if he thinks it should be recognized.”).

126. *Id.* at 21,868 (statement of Sen. Morse).

127. 135 S. Ct. 2076 (2015).

128. *See Brief for the Respondent, supra* note 98, at I (citing Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002)).

plement this law, arguing that it unconstitutionally interfered with the President's recognition power.<sup>129</sup> The parents of a young U.S. citizen then sued the executive branch, seeking to have "Jerusalem, Israel" written on their son's passport.<sup>130</sup>

In anticipation of oral argument in that case, over forty members of the U.S. House of Representatives (including both Democrats and Republicans)<sup>131</sup> jointly submitted an amicus brief with the Supreme Court to urge it to rule in favor of the petitioner. The representatives' brief criticized the President's expansive interpretation of the recognition power, and specifically argued that the executive's broad understanding of that power called the constitutionality of section 7008 into question: "Congress regularly prohibits or conditions foreign assistance to particular countries, and in accordance with substantive requirements, that, given the Executive's expansive position on recognition, may now be viewed as intruding upon its recognition power."<sup>132</sup>

It is telling that these representatives singled out section 7008. Members of Congress, including individuals who were in office during the fallout from the Morsi ouster and who subsequently voted to reauthorize section 7008,<sup>133</sup> publicly connected the executive branch's broad construction of the recognition power with the possibility (or, perhaps, reality) of presidential disregard for section 7008, thereby suggesting that the constitutionality of post-coup sanctions is being called into question.

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129. See Adam Liptak, *Justices Take Case on Status of Jerusalem in Passports*, N.Y. TIMES (Apr. 21, 2014), <http://www.nytimes.com/2014/04/22/us/supreme-court-case-on-status-of-jerusalem-in-american-passports.html>.

130. See *id.*

131. See generally Brief for Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner, *supra* note 112, app. 1–3 (listing members of Congress and their political affiliations).

132. *Id.* at 9 (citing the Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 494, 500, 502, 509–11, which "prohibit[s] financial assistance to the government of any country whose 'duly elected head of government is deposed by military coup d'état,' unless 'the President determines and certifies to the Committee on Appropriations that . . . a democratically elected government has taken office'").

133. For example, Representatives Ed Royce, Ileana Ros-Lehtinen, and Brad Sherman each signed onto the amicus brief and voted for the so-called "Cromnibus" (which reauthorized section 7008). Compare *id.* app. 1 (signatories to amicus brief), with 160 CONG. REC. H9286, H9290, (daily ed. Dec. 11, 2014) (roll call vote on the Cromnibus).

## V.

## DOES SECTION 7008 VIOLATE THE RECOGNITION POWER?

That politicians separated by more than four decades have suggested a relationship between the recognition power and post-coup aid cut-offs is certainly significant.<sup>134</sup> However, we ought not end our analysis there, but rather ought to consider the substantive question not fully addressed by Senator Morse, President Kennedy, or the *amici* in *Zivotofsky*—that is, whether section 7008 sanctions actually intrude upon the President’s power to recognize foreign governments.

*A. How to Analyze the Relationship Between Section 7008 Determinations and the Recognition Power: Formalism and Functionalism*

As the President has the exclusive power to recognize foreign sovereigns, the Supreme Court has held that Congress can neither “pass a law, speaking in its own voice, that effects formal recognition”<sup>135</sup> nor “force the President himself to contradict his earlier statement”<sup>136</sup> of recognition. This resembles the Court’s jurisprudence regarding other issues relating to the separation of powers. As Thomas Merrill has noted:

[T]he Court has employed two very different conceptions of separation of powers . . . . On the one hand, there is the formal understanding, emphasizing that the Constitution sought to divide the delegated powers of the new Federal government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. On the other hand, there is functional understanding, stressing that the three branches do not operate with absolute independence, and that the Constitution requires only that the proper balance between the coordinate branches be maintained.<sup>137</sup>

That is, separation-of-powers cases, including those that implicate the recognition power, are analyzed using either a formalist or a functionalist approach. This invites us to analyze section 7008 from both points of view.

A formalist analysis is concerned primarily with the nature of the power that is exercised. That is, formalism posits that the different

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134. See *supra* Part IV.

135. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015).

136. *Id.*

137. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225–26 (footnotes omitted).

branches of the federal government are vested with different constitutional powers: Congress wields the legislative power, for example, and the President and his officers have the power to execute the laws. Moreover, formalists often assume that a branch cannot exercise a power that it has not been given<sup>138</sup> or control another branch's exercise of its constitutionally committed powers.<sup>139</sup> Applying a formalist framework to the present case, we might ask whether the actions contemplated by section 7008 are exercises of the President's recognition power. If so, ordering the President to make these determinations would likely violate the separation of powers principle, insofar as Congress is attempting to control the exercise of a power granted to the President alone.

By contrast, a functionalist analysis asks whether the law effectively burdens the President's exercise of a power granted to him by the Constitution.<sup>140</sup> Using a functional approach in this case, we would consider whether requiring the President to determine if a coup d'état has occurred unduly restricts his ability to recognize foreign governments. The Supreme Court has held that this happens when Congress passes a law that "directly contradicts"<sup>141</sup> a President's formal recognition determination and thereby prevents the United States from "speak[ing] with one voice"<sup>142</sup> with respect to the recognition of foreign sovereigns.<sup>143</sup>

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138. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (accepting the argument that a presidential order violated the separation of powers because it "amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President").

139. A good example of this type of formalism can be seen in Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting); see also *id.* at 724 n.4 ("What I do assert—and what the Constitution seems plainly to prescribe—is that the President must have control over all exercises of the executive power.").

140. The functionalist approach to separation-of-powers jurisprudence can be seen in the majority opinion in *Morrison*. See *id.* at 693–96 (assessing whether Congress had "unduly [interfered] with the role of the Executive Branch").

141. *Zivotofsky*, 135 S. Ct. at 2095.

142. *Id.* at 2086. By implication, this leaves open the possibility that Congress can legislate with respect to a President's decision to recognize a foreign sovereign, so long as it does not actually contradict the decision itself. Cf. *id.* at 2095 (noting that Congress can "express its disagreement" with a presidential recognition decision by "enact[ing] an embargo, declin[ing] to confirm an ambassador, or even declar[ing] war"). This accordingly suggests that Congress's decision to sanction a military junta would not infringe on the President's power to recognize that regime.

143. The Supreme Court also suggested that Congress could not constitutionally enact laws that could be understood as contradicting the executive branch's foreign policy decisions. See *id.* at 2095–96 (noting that the law at issue in *Zivotofsky* was "interpreted . . . as altering United States policy regarding Jerusalem—which led to protests across the region" (emphasis added)). As Chief Justice John Roberts observed, a majority of the Court in *Zivotofsky* placed "controlling weight" on the fact

## B. The Mechanics of Recognizing Foreign Governments

In order to assess the formal and functional scope of the recognition power, we must familiarize ourselves with the mechanics of recognition: what guides a nation in deciding whether or not to recognize a foreign government, and how does it effectuate its recognition decisions? In undertaking this analysis, we will draw upon international law and past practice within the United States.

### 1. What Guides a Nation's Recognition Policy?

Although a variety of doctrines guide nations' respective recognition decisions,<sup>144</sup> Robert Sloane has argued that these varying approaches can be abstracted to two simple categories: "Governmental recognition, reduced to its skeletal features . . . appears to be a two-part inquiry: first, does the regime exercise effective control over the territory it aspires to govern (and perhaps also the volition to fulfill international obligations on its behalf); and second, is it legitimate?"<sup>145</sup> That is, according to Sloane's theory, all recognition deci-

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the statute created a "*perceived* contradiction based on a *mistaken* understanding of the effect of" the statute at issue. *Id.* at 2115 (Roberts, C.J., dissenting).

144. Indeed, the extant literature identifies three paradigms of recognition policy: (1) the Tobar Doctrine, (2) the traditional approach, and (3) the Estrada Doctrine. Under the Tobar Doctrine, nations withhold recognition from any government that came to power extra-constitutionally. See GALLOWAY, *supra* note 104, at 10. The traditional approach employs a multifactor analysis in approaching the question of recognition, asking whether the government maintains effective control, is sufficiently stable, rules with the consent of the people, and will honor its international obligations. See GALLOWAY, *supra* note 104, at 5–8; MENON, *supra* note 100, at 65–74. Finally, under the Estrada Doctrine, nations recognize only the de facto government of a country. See MENON, *supra* note 100, at 79 (characterizing the Estrada Doctrine as "an extreme form of de factoism"). See generally *id.* at 64–79 (discussing the particulars of each of these approaches); GALLOWAY, *supra* note 104, at 5–12.

145. Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 125 (2002). This is a more helpful way to conceptualize recognition policy than the standard tripartite framework discussed *supra* note 144, as there is some confusion as to how these policies differ. For example, the traditional approach has been framed as an inquiry that focuses solely on whether the regime is the de facto government of a state (which would make it difficult to distinguish from the Estrada Doctrine). Cf. Press Release, Int'l Criminal Court, The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt (May 8, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx) (characterizing the traditional approach as an inquiry into a regime's "effective control").

Indeed, there is not a strong consensus as to what the traditional approach even entails. See GALLOWAY, *supra* note 104, at 8 (suggesting that the traditional approach "is somewhat ad hoc"). Thus, rather than getting sidetracked by the fact that scholars do not always agree about what these policies mean, this Note will adopt a more streamlined understanding of recognition policy, per Sloane.

sions can be subsumed into inquiries regarding a regime's effectiveness and its legitimacy.

Virtually every authority considers government effectiveness to be a necessary condition for recognition.<sup>146</sup> As such, different approaches to recognition policy differ primarily in terms of the respective weight they accord to a regime's legitimacy.<sup>147</sup> Legitimacy encompasses a broad set of criteria, including whether a regime enjoys democratic support, whether it came to power via extra-constitutional means, and other considerations such as "the degree of violence it employs to seize power, whether it originates by procedures in conformity with international law, and the degree to which it respects international human rights."<sup>148</sup> As we shall see, international law and past U.S. practice have employed a variety of approaches to the recognition of foreign governments. At times, nations appear to be wholly unconcerned with the legitimacy of different regimes when deciding whether to recognize them. At other points, legitimacy has been a clearly relevant (and even dispositive) factor.

These approaches, in turn, have significant ramifications for the constitutionality of post-coup sanctions. If, for example, a regime's legitimacy has no bearing on the question of recognition, then it is clear that a determination about whether a coup has taken place does not, in any way, implicate the recognition power. By contrast, if international law requires that nations only recognize legitimately constituted regimes, then the determinations contemplated by section 7008 (which are basically determinations about the legitimacy of a regime's origins) may very well intrude upon the President's power to recognize foreign governments. Thus, determining whether section 7008 actually offends the separation of powers depends largely on regime legitimacy's place in recognition policy, and which approach to recognition policy predominates.

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146. See generally PETERSON, *supra* note 109, at 36–39.

147. Indeed, based on Sloane's insight, we can accordingly reimagine the standard tripartite division regarding recognition policy as spectrum: at one extreme (viz., the Tobar Doctrine and its variants), the legitimacy of a regime is a *dispositive* factor with respect to recognition—it is not enough that the regime be effective, it must also be legitimate. At the other extreme (viz., the Estrada Doctrine), legitimacy is entirely *irrelevant* thereto and a regime's effectiveness is the only criterion to be considered vis-à-vis recognition. There is then a multiplicity of intermediate approaches wherein the legitimacy of a regime can, but need not, affect its recognition: that is, legitimacy is a *relevant* factor. See Sloane, *supra* note 145.

148. Sloane, *supra* note 145, at 125.

*i. International Law*

The Supreme Court has previously relied on international law in order to interpret statutory and constitutional provisions concerning foreign affairs;<sup>149</sup> thus, international authorities may help clarify our understanding of the recognition power.<sup>150</sup> There is intense debate as to whether governmental legitimacy is a relevant factor with respect to the recognition of foreign governments. The international community as a whole has not embraced legitimacy-based recognition policies,<sup>151</sup> and many states recognize whatever entity happens to be the de facto government of a state.<sup>152</sup> Some scholars have even argued that assigning weight to a regime's legitimacy is inconsistent with international law.<sup>153</sup>

A recent decision from the International Criminal Court Prosecutor, issued in the wake of the Morsi ouster, provides some support for

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149. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 521–22 (2004) (citing international laws of war to establish that the executive branch has the authority to detain enemy combatants).

150. Indeed, scholars have even argued that the executive branch's original understanding of the recognition power was largely influenced by international law. See generally Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1009 (2013) ("Starting immediately after the Framing, international law played a role in leading U.S. constitutional interpreters to conclude that the President *could* exercise the power of recognition."); *id.* at 1009–19 (surveying how international law informed U.S. recognition policy).

151. See MENON, *supra* note 100, at 76 ("[T]he Tobar Doctrine has never enjoyed widespread acceptance."); see also GALLOWAY, *supra* note 104, at 130 (noting that, as of 1978, "no country today follows the Tobar . . . Doctrine"); PETERSON, *supra* note 109, at 76 (noting, as of 1997, that "recognition policy is more effectivist now that it has been at any time since the mid-nineteenth century").

152. In a 1978 study surveying the recognition policies of the international community, for example, L. Thomas Galloway observed that a large number adhere to the legitimacy-as-irrelevant paradigm. At least thirty had adopted the Estrada Doctrine, whereas many—while they do not adhere to it as such—nonetheless are "in effect close to the Estrada Doctrine." GALLOWAY, *supra* note 104, at 129 (surveying states' recognition policies).

153. See HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 103 (1947) (citing authorities for the proposition that "the doctrine of legitimacy" has "no place in international law"). Indeed, it has been argued that the Tobar Doctrine unduly restricts the right of revolution and "sanctions the practice of intervention by one State in the internal affairs of another State." MENON, *supra* note 100, at 77 (characterizing the Tobar Doctrine as departing "from fundamental principles of international law"). In a similar vein, authorities have suggested that withdrawing recognition from an otherwise effective government (i.e., because it has lost its perceived legitimacy) may contradict international law. Cf. Stefan Talmon, *Recognition of the Libyan National Transitional Council*, ASIL INSIGHTS (Am. Soc'y of Int'l Law, Wash., D.C.), June 17, 2011, [http://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council#\\_ednref19](http://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council#_ednref19) (suggesting that withdrawing recognition of Qaddafi's regime was inconsistent with international law).

this view. In early 2014, the Muslim Brotherhood filed a petition with the International Criminal Court, urging it to investigate crimes committed by the Egyptian military following the Morsi ouster.<sup>154</sup> The question of governmental legitimacy was critical to its petition: because Egypt was not a party to the treaty establishing the ICC and the United Nations had no interest in referring the matter to the Court, the only feasible way by which the ICC could be induced to investigate the alleged offenses was if Egypt's "government issue[d] a declaration recognizing the court's jurisdiction over an investigation."<sup>155</sup> Reasoning that the post-Morsi government was illegitimate, the Muslim Brotherhood asserted that it had the authority to confer jurisdiction on the ICC, as Morsi's supporters and representatives.<sup>156</sup> The ICC, however, roundly rejected this argument, opining that as a matter of international law, the Morsi government was no longer the recognized government of Egypt: a determination from the Office of the Prosecutor was issued in May 2014, noting that the global community no longer recognized the Morsi government.<sup>157</sup> Critically, the Prosecutor appears to have considered legitimacy irrelevant with respect to government recognition. Citing what it deemed "the legal test of 'effective control,'"<sup>158</sup> the Prosecutor declared that the Morsi government was no longer the government of Egypt:

[T]he entity which is in fact in control of a State's territory, enjoys the habitual obedience of the bulk of the population, and has a re-

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154. See Paul Waldie, *Egypt's Muslim Brotherhood Appeals to World Criminal Court*, GLOBE & MAIL (Jan. 6, 2014), <http://www.theglobeandmail.com/news/world/lawyers-file-claim-in-icc-against-egypts-military-backed-regime/article16204039/>; see also Mark Kersten, *A Snowball's Chance in Cairo: The ICC to Intervene in Egypt?*, JUST. CONFLICT (Jan. 9, 2014), <http://justiceinconflict.org/2014/01/09/a-snowballs-chance-in-cairo-the-icc-to-intervene-in-egypt/>.

155. See Waldie, *supra* note 154.

156. Cf. *id.* ("The lawyers say officials of the deposed Morsi government have made that declaration and that it should be recognized because it remains the legitimate, democratically elected government."); see also Kersten, *supra* note 154.

157. Cf. Press Release, *supra* note 145 ("The UN Protocol List indicates that a new Head of State (Mr Adly Mansour), Head of Government (Mr Hazem El Beblawi) and Minister of Foreign Affairs (Mr Nabil Fahmy) were appointed in July 2013. Furthermore, on 5 December 2013, the UN General Assembly accepted without a vote, the credentials of the Egyptian delegation, led by current Foreign Minister, Mr Nabil Fahmy. This is a clear indication that none of the UN Member States considered representatives of Dr Mohamed Morsi to be the representatives of the State of Egypt at the UN in lieu of the delegation whose credentials were recognized."). Although the Prosecutor noted that the African Union had suspended Egypt in the wake of the coup, it maintained that this was not sufficient to show "continued recognition of Dr Morsi as the Egyptian Head of State." See *id.*; see also *infra* notes 163–66 and accompanying text.

158. Press Release, *supra* note 145.

sonable expectancy of permanence, is recognized as the government of that State under international law. Application of that test, on both the date that the purported declaration was signed and the date it was submitted, lead to the conclusion that Dr Morsi was no longer the governmental authority with the legal capacity to incur new international legal obligations on behalf of the State of Egypt.<sup>159</sup>

It appears that the overriding inquiry was whether the government exercised control over its territory, not whether a de facto government was legitimate as such. Though the full implications of this decision have yet to be explored, it may indicate that states and international institutions should look only to whether a regime exercises de facto control in determining whether to recognize that regime.<sup>160</sup> This suggests that governmental legitimacy is not a criterion upon which states may rely when exercising their power to recognize a foreign regime. A declaration that a coup d'état has taken place would accordingly have no bearing on the recognition of a de facto government.

Nevertheless, there are numerous examples of states considering a regime's legitimacy in determining whether to recognize that regime. Jean d'Aspremont, for example, has argued that "since the end of the Cold War, recognition of governments that have overthrown a democratically elected government is nearly always systematically refused,"<sup>161</sup> and cited the international community's "reactions following coups in Sierra Leone, Haiti, Burundi, Niger, Ivory Coast, Guinea-Bissau, and Togo,"<sup>162</sup> in support of his claim. Moreover, the African Union (A.U.) passed a 2010 resolution calling upon member states to withhold recognition from any regime that came to power in a coup d'état,<sup>163</sup> expressly adopting the legitimacy-as-dispositive approach.

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159. *Id.*

160. See Eugene Kontorovich, *More on Morsi's Shadow on Palestine's ICC Efforts*, OPINIO JURIS (Aug. 7, 2014, 4:03 PM), <http://opiniojuris.org/2014/08/07/guest-post-morsis-shadow-palestines-icc-efforts/> ("One question that arose is whether the effective control test for a government would not bar the acceptance of jurisdiction by governments in exile. I think it clearly would, and indeed, Morsi's government is effectively in internal exile.").

161. Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 901 (2006).

162. *Id.* at 901–02.

163. *Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations*, Assembly of the African Union, Fourteenth Ordinary Session, Assembly/AU/Dec.269(XIV) (Feb. 2, 2010), <http://www.peaceau.org/uploads/assembly-au-dec-269-xiv-e.pdf> ("Member States should, upon the occurrence of an unconstitutional change of Government, not recognize the *de facto* authorities."). See generally Eki Yemisi Omorogbe, *A Club of Incumbents? The African Union and Coups D'État*, 44 VAND. J. TRANSNAT'L L. 123, 137 (2011) (summarizing the Declaration).

Thus, it has been argued that “the AU policy is to systematically refuse to recognize regimes that come to power through coups, irrespective of the precise circumstances.”<sup>164</sup> There are several examples of African nations refusing to recognize such regimes in accordance with this policy,<sup>165</sup> including the A.U.’s decision to suspend Egypt’s membership following the Morsi ouster.<sup>166</sup>

Additionally, during the 2011 Libyan Civil War, a number of governments de-recognized the Qaddafi government that had ruled Libya for more than forty years and formally recognized the Libyan National Transitional Council, a group of anti-government insurgents, in its stead.<sup>167</sup> Similarly, several Middle Eastern and European countries recently declared that a group of Syrian rebels would be recognized “as the legitimate representative of the Syrian people,” rather than the Assad regime against which they were fighting.<sup>168</sup> Notably, these recognitions came in the midst of ongoing civil wars, during which the rebels could not plausibly claim to exercise control over the entirety of their respective nations.<sup>169</sup> Indeed, it would appear that these recognitions were driven in large part by appreciation for the legitimacy of the recognized regimes, in contrast to the illegitimacy of their predecessors.<sup>170</sup>

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164. Omorogbe, *supra* note 163, at 154.

165. See, e.g., *Body Strips Mali Coup Leader of Head of State Status*, USA TODAY (July 5, 2012, 12:12 PM), <http://usatoday30.usatoday.com/news/world/story/2012-07-04/mali-coup-leader/56020590/1> (citing a regional bloc’s decision to withhold recognition from a military junta that deposed the government of Mali).

166. See Aaron Maasho, *African Union Suspends Egypt*, REUTERS (July 5, 2013), <http://www.reuters.com/article/2013/07/05/us-egypt-protests-africa-idUSBRE9640EP20130705>. This decision, however, was uncharacteristically reversed by the A.U. approximately one year after the Morsi ouster, and the organization now appears to have recognized the post-coup government as legitimate. See Solomon Dersso, Opinion, *Egypt vs. African Union: A Mutually Unhappy Ending?*, AL JAZEERA (July 14, 2014), <http://www.aljazeera.com/indepth/opinion/2014/07/egypt-vs-african-union-mutually-u-2014714687899839.html>.

167. See *Fourth Meeting of the Libya Contact Group Chair’s Statement*, 15 July 2011, ISTANBUL, REPUBLIC TURK. MINISTRY FOREIGN AFF. (July 15, 2011), [http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair\\_s-statement\\_15-july-2011\\_istanbul.en.mfa](http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_15-july-2011_istanbul.en.mfa) (declaration from working group of over thirty countries that “the Qaddafi regime no longer has any legitimate authority in Libya . . . . Henceforth and until an interim authority is in place, participants agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya”); see also Talmon, *supra* note 153.

168. Michael N. Schmitt, *Legitimacy Versus Legality Redux: Arming the Syrian Rebels*, 7 J. NAT’L SECURITY L. & POL’Y 139, 153 (2014).

169. See, e.g., Talmon, *supra* note 153 (noting that the rebels controlled only limited parts of Libya).

170. See Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT’L L.J. 499,

*ii. U.S. Practice*

The Supreme Court recently reaffirmed that it is proper to “*put significant weight upon historical practice*”<sup>171</sup> when considering the scope of the President’s constitutional powers. Executive-branch lawyers also draw on historical practice in order to clarify constitutional questions.<sup>172</sup> Thus, our analysis will be rooted in a broad survey of the recognition policy of the United States.<sup>173</sup>

A historical survey of U.S. recognition policy reveals that the United States has not had a consistent approach to the recognition of foreign governments.<sup>174</sup> However, while it is difficult to identify a single U.S. recognition policy, there is clear historical precedent for the proposition that governmental legitimacy matters for recognition purposes.

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547–48 (2013) (discussing how the Qaddafi regime’s violations of human rights factored into the international community’s decision to de-recognize it).

171. NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) (interpreting the President’s power to make recess appointments with reference to longstanding historical practices).

172. See, e.g., The President’s Constitutional Authority to Conduct Military Ops. Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188, 201 (2001), [http://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/olc-v025-p0188\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/olc-v025-p0188_0.pdf) (“The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled.”). See generally Memorandum from David J. Barron, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to the Attorneys of the U.S. Dep’t of Justice Office of Legal Counsel 2 (July 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (“On any issue involving a constitutional question . . . [p]articularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of Government, precedent and historical practice are often of special relevance.”).

173. As the history of U.S. recognition policy is fairly well documented, a comprehensive recapitulation thereof would serve little purpose. What follows is accordingly a brief summary thereof. For an extensive and in-depth treatment of U.S. recognition policy, see generally JULIUS GOEBEL JR., THE RECOGNITION POLICY OF THE UNITED STATES 71–219 (2009) (analyzing the United States’ recognition policy through 1915); GALLOWAY, *supra* note 104, at 13–126 (detailing the United States’ recognition policy through the Nixon administration).

174. Indeed, there have been numerous instances in which Presidents reversed the specific decisions of their predecessors. See, e.g., G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 V.A. L. REV. 1, 77–78 (1999) (describing President Franklin Roosevelt’s reversal of his predecessors’ refusal to recognize the USSR). Some administrations have even applied their own policies inconsistently. For example, as discussed below, the Wilson administration occasionally cited a government’s illegitimate origins as a basis for withholding recognition, and yet was content to recognize other governments that came to power via coups d’état. See generally GALLOWAY, *supra* note 104, at 27–29.

(a) *Early History*

Initially, the United States placed primary emphasis on whether a government exercised effective control over its territory; legitimacy was not a particularly relevant factor.<sup>175</sup> This approach, of which Thomas Jefferson was the chief proponent,<sup>176</sup> dominated U.S. recognition policy for the first few decades of the new country's existence.<sup>177</sup> However, beginning with Abraham Lincoln's presidency (and under the auspices of his Secretary of State, William Seward), the United States began inquiring into the legitimacy of foreign regimes in determining whether to recognize them.<sup>178</sup> With the advent of the Civil War and the Confederacy's attempts to secure international recognition, the United States shifted away from its effectiveness-based recognition policy and began denying recognition to regimes deemed to be illegitimate.<sup>179</sup>

Although inquiries into a regime's legitimacy fell out of favor in subsequent decades,<sup>180</sup> this approach was enthusiastically revived by President Wilson,<sup>181</sup> and also factored prominently into President Kennedy's recognition policy. Kennedy's administration, in particular, "utilized recognition to promote constitutional government, especially

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175. This unwillingness to take a regime's legitimacy into account vis-à-vis its recognition was due in part to the United States' own origins: "[q]uite clearly, the United States, born of revolution, could not invoke legitimacy to prevent popular changes of government in foreign states." GALLOWAY, *supra* note 104, at 13–14. Accordingly, as Galloway has argued, U.S. recognition policy originally "turn[ed] solely on a question of fact—did the new government have effective control?" *Id.* at 15.

176. See GOEBEL, *supra* note 173, at 111 ("[Jefferson] conceived recognition to be an independent act . . . conditioned solely by the governmental stability of the new organization, he laid down the doctrine of de facto recognition in its purest form.").

177. See GALLOWAY, *supra* note 104, at 15 ("During the early nineteenth century the United States became the foremost champion of the de facto theory of recognition.").

178. There are, to be certain, other examples of U.S. presidents evincing concern for the legitimacy of a regime with respect to recognition. See *id.* at 19, 21 (examples of the United States conditioning recognition on the legitimacy of the regime).

179. See Gregory Weeks, *Almost Jeffersonian: U.S. Recognition Policy Toward Latin America*, 31 PRESIDENTIAL STUD. Q. 490, 494 (2001) (discussing the Lincoln administration's unwillingness to recognize regimes it perceived as illegitimate). See generally GOEBEL, *supra* note 173, at 171–92 (summarizing the recognition policy of President Lincoln and his Secretary of State).

180. See GALLOWAY, *supra* note 104, at 21 ("Later administrations did not adopt the Seward view wholeheartedly.").

181. Indeed, the Wilson administration even went so far as to treat a regime's origins as a dispositive factor with respect to the question of recognition. President Wilson effectively invoked the Tobar Doctrine on several occasions, refusing—for example—to recognize a Mexican government that overthrew its predecessor in a military coup. See PETERSON, *supra* note 109, at 58–59. See generally GALLOWAY, *supra* note 104, at 27–29.

in Latin America,”<sup>182</sup> and accordingly refused to recognize a number of regimes that came to power via coups d’état or threatened to withhold recognition in order to extract concessions—namely, the “return to constitutional government through elections.”<sup>183</sup>

(b) *Recognition in the Late Twentieth Century*

In the decades following the Kennedy administration, the United States placed less emphasis on governmental legitimacy in its recognition decisions. As Galloway notes in his seminal survey of U.S. recognition policy, since the presidency of Lyndon B. Johnson, even though “the United States continued to seek commitments by new regimes to constitutional government . . . [r]ecognition was withheld less often to extract this concession.”<sup>184</sup> This trend of “deemphasizing recognition,”<sup>185</sup> particularly with respect to governments that came to power extra-constitutionally, continued throughout the Nixon and Ford presidencies,<sup>186</sup> and eventually culminated in the Carter administration’s decision to forego the recognition of governments.<sup>187</sup> For many of the following years, it appears that the United States adhered to this approach and did not “declare[ ] its recognition of any new governments.”<sup>188</sup> Thus, Edwin L. Fountain, writing in 1989, was able to conclude that “in general, recognition is no longer a meaningful element of U.S. diplomacy, and the State Department typically states only: ‘The question of recognition does not arise; we are conducting our relations with the new government.’”<sup>189</sup>

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182. See GALLOWAY, *supra* note 104, at 139.

183. See *id.* at 70. See generally *id.* at 43–60 (detailing U.S. responses to Latin American coups during the Kennedy administration).

184. See *id.* at 71.

185. See *id.* at 103.

186. See *id.* at 103–04, 125.

187. Indeed, the Carter administration’s stated recognition policy has been described as being “similar to the Estrada Doctrine.” Michael E. Field, *Liberia v. Bickford: The Continuing Problem of Recognition of Governments and Civil Litigation in the United States*, 18 MD. J. INT’L L. & TRADE 113, 122–23 (1994).

188. *Id.* at 124. This characterization of U.S. policy was corroborated by John B. Bellinger III, Legal Adviser to the State Department under George W. Bush. Jason Ukman, *U.S. Recognition of New Libyan Government Raises Tough Legal Questions*, WASH. POST: CHECKPOINT WASH. (July 19, 2011, 8:56 AM), [http://www.washingtonpost.com/blogs/checkpoint-washington/post/us-recognition-of-new-libyan-government-raises-tough-legal-questions/2011/07/19/gIQAb9BdNI\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/us-recognition-of-new-libyan-government-raises-tough-legal-questions/2011/07/19/gIQAb9BdNI_blog.html) (“For the last several decades, for the United States and indeed most other states, the practice has been to recognize only new states but not new governments.”).

189. Edwin L. Fountain, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT’L L. 473, 499 (1989).

Nevertheless, there were several instances during this period in which the U.S. government withheld recognition from regimes that came to power illegitimately and via coups d'état—mostly notably following General Manuel Noriega's 1989 attempt to rig a Panamanian election.<sup>190</sup> There could be no plausible suggestion that Noriega and his allies did not effectively control Panama: they firmly controlled the country.<sup>191</sup> Accordingly, even though the origins of particular regimes were not as important to U.S. recognition policy as they were during the Lincoln, Kennedy, and Wilson administrations, the perceived illegitimacy of a government remained a valid basis for withholding recognition.

### (c) *The Obama Administration's Recognition Policy*

The Obama administration appears to have departed from its predecessors in considering legitimacy highly relevant with respect to the President's recognition power. Not only has the Obama administration revived the practice of recognizing new governments,<sup>192</sup> it also has assigned significant weight to the legitimacy of a new regime when deciding whether to recognize it. For instance, in recognizing the Somali government headed by Hassan Sheikh Mohamud, then-Secretary of State Hillary Clinton made clear that U.S. recognition was contingent on receiving “assurances that the Government of Somalia will respect human rights in accordance with international law and ensure democratic, just, and transparent governance in Somalia.”<sup>193</sup> Similarly, over the past several years, the executive

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190. See Statement on Panama-United States Relations, 2 PUB. PAPERS 1131 (Sept. 1, 1989) (presidential statement announcing that “the United States will not recognize any government installed by Gen. Noriega”). The White House alleged that General Noriega and his allies had attempted to consolidate their rule through widespread election fraud. See, e.g., Bernard Weinraub, *Bush Warns Panama on Election Fraud*, N.Y. TIMES (May 3, 1989), <http://www.nytimes.com/1989/05/03/world/bush-warns-p panama-on-election-fraud.html> (“Today a White House spokesman . . . said the United States had received evidence of ‘manipulation of voters lists,’ the printing of false voter lists, ‘manipulation of individual identity cards which invalidates cards needed to vote for opposition supporters,’ the issuance of additional cards to Government supporters to allow ‘multiple voting,’ intimidation of public employees and coercion of anti-Government supporters to prevent them from voting.”).

191. See Weinraub, *supra* note 190 (characterizing Noriega as the de facto leader of Panama).

192. See U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 254 (2013), <http://www.state.gov/documents/organization/226352.pdf>; see also *id.* (announcing U.S. recognition of Somali government “upon confirmation of the following arrangements for the conduct of relations between the United States of America and Somalia”). Indeed, such issues—per Sloane—are entirely separate

branch has denied recognition to governments that seized de facto control militarily or by way of coups d'état, such as the Seleka regime in the Central African Republic,<sup>194</sup> and the post-Zelaya government in Honduras.<sup>195</sup> Thus, while it is difficult to say that the Obama administration considers governmental legitimacy to be dispositive vis-à-vis recognition, it seems clear that the administration has moved away from the effectiveness-only approach favored by some of its predecessors and views governmental legitimacy as relevant to exercising the recognition power.

## 2. How Is Recognition Effected?

Having now explored what drives a government's decision to recognize another regime, we must turn our attention to the way in which recognition is practiced. Generally, states can recognize a foreign government expressly or implicitly.<sup>196</sup>

### i. Express Recognition

When expressly recognizing a regime as the de facto or legitimate government of a state, the recognizing power can make a "definitive and conclusive" declaration to that effect.<sup>197</sup> Such announcements, however, need not adhere to a precise formula—indeed, scholars have noted that traditionally, "actual use of the word 'recognition' was not necessary" when expressly recognizing a new regime.<sup>198</sup> Express recognition is often accomplished by communications to the newly recognized government, although it could also be

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from whether the government effectively controls its territory, and are properly understood as factors about the government's legitimacy. Cf. Sloane, *supra* note 145, at 125 ("[A] government's military independence [sic], the degree of violence it employs to seize power, whether it originates by procedures in conformity with international law, and the degree to which it respects international human rights—all of these considerations depend in the main on normative postulates about legitimacy.").

194. Cf. U.S. Doesn't Recognize Seleka Leadership, UNITED PRESS INT'L (Apr. 1, 2013), [http://www.upi.com/Top\\_News/Special/2013/04/01/US-doesnt-recognize-Seleka-leadership/UPI-75021364830451/](http://www.upi.com/Top_News/Special/2013/04/01/US-doesnt-recognize-Seleka-leadership/UPI-75021364830451/) (quoting the State Department's position that the ousted regime was the "only legitimate government" of the Central African Republic).

195. See Ukman, *supra* note 188; see also *supra* notes 45–50 and accompanying text (describing the events concerning the Zelaya ouster).

196. PETERSON, *supra* note 109, at 86; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 n.2 (AM. LAW INST. 1987) ("The President may exercise his power of recognition either expressly or by implication.").

197. See MENON, *supra* note 100, at 141.

198. PETERSON, *supra* note 109, at 86.

accomplished by way of public statements.<sup>199</sup> Although this practice fell out of favor in the United States in the late twentieth century,<sup>200</sup> the Obama administration appears to have revived it, publicly announcing its recognition of new regimes on a number of occasions.<sup>201</sup>

### *ii. Implied Recognition*

In addition to making express declarations of recognition, some authorities suggest that states can tacitly or implicitly recognize a new regime through diplomatic actions that signal “the intention of recognizing the new State/Government.”<sup>202</sup> Such implicit indicia of recognition can include signing treaties with the new entity, exchanging representatives, or participating in an international conference or organization with the new entity.<sup>203</sup> Thus, for example, the United Nations’ decision to allow the post-Morsi regime to represent Egypt could plausibly be taken as an implicit act of recognition of that regime.<sup>204</sup>

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199. *See id.* at 87 (“Though most governments preferred communication recognition decisions directly to the regime concerned, the pressure of domestic political debate sometimes forced them to state attitudes publicly first.”); *see also* MENON, *supra* note 100, at 142 (“In large majority of cases [sic], the recognizing State communicates its decision directly to the new State/Government or makes its decision known by way of a public announcement.”); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204 n.2 (AM. LAW INST. 1987) (“Recognition of a state has been effected by express official declaration, by the conclusion of a bilateral agreement with the state, by the presentation of credentials by a United States representative to the authorities of the new state, and by receiving the credentials of a diplomatic representative of that state.”).

200. Indeed, for much of the past fifty years, the United States has tended to avoid making express declarations concerning the recognition of new governments. *See* GALLOWAY, *supra* note 104, at 145–46 (discussing how the executive branch came to rarely issue public declarations concerning the recognition of governments).

201. *See* Uzman, *supra* note 188 (quoting John B. Bellinger III, former Legal Adviser to the State Department) (“[F]or a number of decades, the United States has decided as a matter of diplomatic practice that it does not want to get into the business of having to recognize a new government every time there is a change of government. So if there’s a coup or if there’s a dispute over who’s in power or if there’s an insurgent group that claims to be the government, U.S. practice and the practice of most states is just not get into it [sic]. It’s just difficult. This recognition last Friday of the Libyan National Transitional Council is a departure from that practice . . .”). Besides recognizing the Libyan National Transitional Council, *see id.*, the Obama administration recently recognized a government in Somalia, *see supra* notes 192–93 and accompanying text.

202. MENON, *supra* note 100, at 143–44.

203. *Id.*

204. *Cf.* Press Release, *supra* note 145 (“[O]n 5 December 2013, the UN General Assembly accepted without a vote, the credentials of the Egyptian delegation, led by current Foreign Minister, Mr. Nabil Fahmy. This is a clear indication that none of the UN Member States considered representatives of Dr Mohamed Morsi to be the repre-

*iii. Non-Recognition*

Scholars have not delved into the question of how non-recognition of a government can be effectuated; after all, it feels somewhat odd to discuss acts of non-recognition, as recognition often requires affirmative actions by the recognizing state. Indeed, as Galloway notes, in the wake of a 1963 coup d'état in the Congo, the Kennedy administration "waited three months before extending recognition to the new regime,"<sup>205</sup> and during the interim period of non-recognition warned the embassy to "avoid any action which implies recognition."<sup>206</sup> Thus, it seems that non-recognition of a regime can be accomplished by simply doing nothing. However, non-recognition also appears to entail more than mere omissions: nations (including the United States) have expressed non-recognition of a regime through a variety of declarations and actions.

For instance, it is common for nations to make statements denying the legitimacy of a regime or announcing that they have withdrawn recognition from a particular regime.<sup>207</sup> Moreover, the suspension of Egypt from the A.U., and the A.U.'s (initial) unwillingness to meet with representatives of the post-Morsi government was construed as evincing A.U. members' unwillingness to recognize the new regime.<sup>208</sup> Additionally, following a 1962 military coup in Peru, President Kennedy "suspended diplomatic relations, cut off economic aid, and stopped military assistance"<sup>209</sup> to the new, unrecognized regime. Comparable actions were undertaken with respect to the Dominican Republic and Honduras: in both situations, assistance was suspended and the State Department issued public communications "indicating that there would be no opportunity for [the] normalization

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sentatives of the State of Egypt at the UN in lieu of the delegation whose credentials were recognized.").

205. GALLOWAY, *supra* note 104, at 61.

206. *Id.* (quoting Cablegram from U.S. Dep't of State to Embassy (Aug. 17, 1963)).

207. This was done, for example, with respect to the Qaddafi regime in Libya. See *Fourth Meeting of the Libya Contact Group Chair's Statement, 15 July 2011, Istanbul*, *supra* note 167; see also John B. Bellinger III, *Legal Questions in U.S. Nod to Libyan Opposition*, COUNCIL ON FOREIGN REL. (July 18, 2011), <http://www.cfr.org/libya/legal-questions-us-nod-libyas-opposition/p25489> (citing the Libya Contact Group's statement as an indication of non-recognition of the Qaddafi regime). The administration of George H.W. Bush made a similar declaration with respect to Panama under Noriega. See Statement on Panama-United States Relations, 2 PUB. PAPERS 1131 (Sept. 1, 1989) ("[T]he United States will not recognize any government installed by Gen. Noriega.").

208. Cf. *supra* note 166 and accompanying text.

209. GALLOWAY, *supra* note 104, at 48.

of diplomatic relations under the existing circumstances.”<sup>210</sup> Thus, a public statement indicating non-recognition of a new regime or the severance of relations with that regime are arguably within the scope of the recognition power.

### C. Application

Having examined how the recognition of governments is practiced, we may return to our initial questions: is it problematic for Congress to require the executive branch to make a determination as to whether the Morsi ouster constituted a coup d’état? Do historical practice and international law suggest that this is a formal act of recognition or a functional intrusion on the President’s authority?

If regime legitimacy is a relevant, important, or dispositive factor with respect to the recognition of foreign governments (and the foregoing analysis certainly suggests that it is), then the answer to these questions seems to follow quite naturally. Notwithstanding the United States’ approach to recognition during its early years and under the Carter administration, and the recent decision from the ICC regarding the Morsi ouster, international law and longstanding U.S. historical practice suggest that the legitimacy of foreign governments is intimately connected to the question of recognition. This, in turn, suggests that the determinations arguably required by section 7008 formally and functionally violate the separation of powers.

#### 1. Formalism

It appears that determinations regarding the existence of a coup d’état involve a formal exercise of the recognition power. Publicly proclaiming a regime to be the legitimate government of a nation would likely be an express act of recognition, as a regime’s legitimacy is often linked to whether it is recognized and statements characterizing a regime as illegitimate have been used to signal non-recognition. Accordingly, then, a determination that a regime came to power via a coup d’état and is therefore presumptively illegitimate could be seen as a formal signal of nonrecognition.<sup>211</sup> This is underscored by the fact that the determination of illegitimacy required by section 7008 triggers the termination of assistance to the new government—an action that has been used to signal U.S. non-recognition of a regime. Thus, when Congress commands the executive branch to make a public statement

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210. *Id.* at 55. See generally *id.* at 53–55 (describing the Kennedy administration’s response to coups d’état in Honduras and the Dominican Republic).

211. See *supra* notes 197–201 and accompanying text.

concerning whether a regime came to power in a coup d'état, it seeks to control what appears to be the recognition power. The statute, therefore, is likely unconstitutional under a formalist approach.

Moreover, even if this statute is not outright unconstitutional, the foregoing analysis suggests that it at least raises serious constitutional questions. Indeed, section 7008 undoubtedly implicates the recognition power, which would justify the executive branch's practice of constitutional avoidance with respect to that law.

## 2. *Functionalism*

While public determinations concerning a regime's legitimacy do not always implicate the recognition power, international law and historical practice indicate that requiring such determinations could interfere with the executive branch's ability to recognize a government. A public statement by the executive branch suggesting that a regime came to power illegitimately or extra-constitutionally might contradict the President's recognition of that regime, or prevent the President from later recognizing that regime.

The validity of these functionalist concerns would be weakened if the United States expressly adopted a policy by which the question of whether to recognize a regime were entirely divorced from the regime's legitimacy, or if international law eschewed inquiries into a regime's origins for the purposes of recognition. In such a case, Congress might have considerably more latitude in dealing with military juntas abroad: an insistence that the President publicly determine whether a coup has transpired would not necessarily contradict the executive branch's recognition policy and thus would presumably be constitutional.<sup>212</sup>

However, as this Note has argued, legitimacy remains a relevant consideration within the United States and the global community.<sup>213</sup> Accordingly, then, there is a strong argument to be made that section 7008 is unconstitutional insofar as it burdens the executive branch's ability to recognize foreign sovereigns. At the very least, the law presents serious constitutional issues that would justify avoidance.

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212. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015).

213. See *supra* Part V.B.1.

## VI.

## THE FUTURE OF POST-COUP SANCTIONS: RECENT DEVELOPMENTS AND POSSIBLE REFORMS

Although the constitutionality of section 7008 could surely be questioned on other grounds, this Note has suggested that the strongest argument against it is that it infringes upon the President's power to recognize foreign governments. There is historical evidence suggesting that the executive branch has previously recognized the problematic link between the recognition power and post-coup sanctions, as well as a legal basis to support such a claim. Thus, it behooves us to consider the future of post-coup sanctions to determine whether section 7008 can be made less constitutionally problematic, particularly in light of the Supreme Court's recent decision in *Zivotofsky v. Kerry*.

#### A. *Zivotofsky and the Future of the Recognition Power*

As discussed in this Note, members of Congress have already identified that *Zivotofsky* could have broad implications for the viability of congressionally mandated post-coup sanctions insofar as they implicate the President's recognition power. Indeed, during oral arguments before the Supreme Court, the parties and Justices engaged in the sort of analysis that animated this Note. The case turned, in essence, on whether printing "Jerusalem, Israel" (as opposed to simply "Jerusalem") on a passport was an act of recognition that formally violated the separation of powers principle,<sup>214</sup> and whether it impermissibly intruded into the executive's authority even if it did not constitute a formal act of recognition.<sup>215</sup> The Supreme Court answered the former question in the negative,<sup>216</sup> but struck down the law on the ground that it was "a mandate that the Executive contradict his prior recognition determination,"<sup>217</sup> and thus functionally violated the separation of powers. While the full implications of *Zivotofsky* remain to be understood, it is clear that much is at stake because of this decision: the Supreme Court has begun to clarify the scope of the recognition power<sup>218</sup> and the degree to which Congress can act without intruding

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214. See Brief for the Respondent at 48–50, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628) (arguing that information contained in a passport expresses the recognition policy of the United States).

215. Cf. *id.* at 54–55 (describing the consequences of Congress's attempt to interfere with the President's recognition decisions).

216. See *Zivotofsky*, 135 S. Ct. at 2095 ("[T]he statement required by § 214(d) would not itself constitute a formal act of recognition . . .").

217. *Id.*

218. See *supra* Part V.A (discussing *Zivotofsky*'s functionalist test for assessing whether a statute violates the separation of powers); see also *supra* notes 142–43.

on this power, which will surely impact future understanding of section 7008.

### B. Proposed Reforms

If Congress wishes to ensure that it will not subsidize military juntas, how might it reach its desired goal without intruding into constitutionally problematic territory? Two reforms have recently been debated, which we will examine before exploring two novel possibilities.

#### 1. Foreclosing Avoidance

One of the more intuitively appealing suggestions for reforming section 7008 is set forth in the Harvard Note. It argues that Congress should revise section 7008 so as to make it more difficult for the executive branch to claim it is not bound by the statute, by requiring the executive to make statutory determinations in any potentially applicable situation.<sup>219</sup> Indeed, Congress recently considered (but rejected) two pieces of legislation that would have required the President to make a determination as to whether a coup had occurred.<sup>220</sup>

Rewriting the statute to explicitly require a determination certainly would make it harder for the President to practice constitutional avoidance when interpreting section 7008.<sup>221</sup> However, while such a revision may force executive-branch lawyers to reach the underlying constitutional questions posed by section 7008, it may not result in the President actually implementing section 7008, since—as this Note has argued—there is a plausible case to be made that compelling the exec-

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219. See Harvard Note, *supra* note 13, at 2517 (suggesting that the law ought to require presidential determinations about the applicability of post-coup sanctions).

220. The House of Representatives' version of the annual appropriations bill covering foreign aid, sought to revise section 7008 so as to require “[t]hat, not later than 30 days after an elected head of government is deposed through force or other undemocratic processes, the Secretary of State shall determine and report to the appropriate congressional committees if the events described in the matter preceding this proviso have transpired.” H.R. 5013, 113th Cong. § 7008 (2013). A similar provision appeared in Senator Robert Menendez's Egypt Assistance Reform Act of 2013. See Egypt Assistance Reform Act of 2013, S. 1857, 113th Cong. (2013). However, the final version of the annual appropriations bill did not contain either of these provisions. See Pub. L. No. 113-235, § 7008, 128 Stat. 2130, 2603 (2014).

221. See Editorial, *Don't Pass the "Coup Clause" with a National Security Waiver*, WASH. POST (Aug. 17, 2014), [http://www.washingtonpost.com/opinions/dont-pass-the-coup-clause-with-a-national-security-waiver/2014/08/17/5d65e2b0-1be9-11e4-ae54-0cfe1f974f8a\\_story.html](http://www.washingtonpost.com/opinions/dont-pass-the-coup-clause-with-a-national-security-waiver/2014/08/17/5d65e2b0-1be9-11e4-ae54-0cfe1f974f8a_story.html) (“There’s one change in the bill that we favor: The secretary of state would have to notify Congress within 30 days whether a coup has occurred. That would help avoid a repeat of the Obama administration’s prevarication on Egypt.”).

utive branch to make these triggering determinations is unconstitutional.

## 2. Waiver

Another proposed solution is to give the President the authority to waive section 7008 cutoffs if doing so is in the national security interests of the United States.<sup>222</sup> A waiver might be desirable from a policy standpoint insofar as it gives the President flexibility in deciding whether to apply post-coup cutoffs. It would thus lower the stakes of a presidential determination with respect to whether a coup has taken place, since an aid cutoff need not automatically flow from such a determination. It could also be argued that a waiver makes the law less problematic from a constitutional standpoint: that is, when withholding recognition from a regime, the United States has often suspended aid to that regime.<sup>223</sup> If section 7008 contained a waiver, even though the executive branch would still be compelled to make a determination about whether a coup had transpired, it could still continue to provide aid to the new regime, signaling that the United States was not withholding recognition.

But while the executive branch might appreciate the flexibility afforded by a waiver for policy reasons, a waiver does not rectify the fact that the law likely violates the principle of separation of powers. For example, allowing the executive branch to provide aid to a regime that came to power in a coup d'état would not necessarily show that the United States had chosen to recognize that government: even though the United States has withheld aid to signal its non-recognition of a regime in the past, the U.S. government has provided financial assistance to political entities that it does not recognize as well.<sup>224</sup>

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222. Both the House and Senate recently considered (and rejected) provisions to this effect. Compare H.R. 5013 § 7008 (containing waiver), and S. 1857 (containing waiver), with § 7008, 128 Stat. at 2603 (omitting waiver). Congress did, however, pass legislation giving the President waiver authority specifically with respect to Egypt. See generally *supra* note 31. The Harvard Note has made a similar proposal. See Harvard Note, *supra* note 13, at 2519 (“[I]nstead of adding waiver authority to the provision, Congress should consider instituting a ‘fast-track’ procedure to allow it expediently to consider executive waiver requests.”).

223. See *supra* note 104 and accompanying text.

224. The United States, for example, provides millions of dollars in aid to the Palestinian Authority, despite the fact that the United States recognizes neither a Palestinian government nor a state—a position recently reaffirmed by Secretary of State John Kerry, who was quoted as saying “the US does not recognize a government with respect to Palestine because that would recognize a state and there is no state.” *Kerry: US to Monitor Hamas-Backed Palestinian Unity Government*, TIMES OF ISR. (June 4, 2014, 8:21 PM), <http://www.timesofisrael.com/kerry-defends-us-decision-to-support-hamas-backed-palestinian-unity-government/>.

Moreover, the foregoing analysis suggests that the current inability to waive sanctions does not itself render the statute constitutionally problematic. Rather, there are serious concerns with regard to the triggering determination's implication of the President's recognition power. That is, making a public determination as to whether a coup has transpired may itself be a formal act of recognition. Similarly, a waiver does not resolve the separation-of-powers issues under a functionalist analysis: a determination about whether a government came to power via a coup d'état would undermine the government's legitimacy, and thus whether the government could (or should) be recognized. Post-coup sanctions implicate the recognition power with respect to the initial triggering determination; whether the United States continues to supply aid to such a regime does not remedy the defect. Thus, while it remains to be seen whether this proposed reform will be enacted, and while there is good reason to support its passage, it is by no means certain that it will render the statute any less problematic from a constitutional standpoint.

### 3. *Disclaimer*

Another possible solution was broached by Justice Kennedy during oral arguments in *Zivotofsky*, when he asked opposing counsels whether Congress could include a statement in a passport that printing "Jerusalem, Israel" therein "is neither an acknowledgment nor a declaration by the Department of State or the President of the United States that Jerusalem is within the borders of the State of Israel."<sup>225</sup> Including the suggested formula or language similar to it would disavow any congressional designs on usurping the recognition power.<sup>226</sup>

An analogous proposal could perhaps work with respect to section 7008; that is, Congress could add language stipulating that the law in no way calls for the executive branch to make a decision regarding recognition of the new regime. In this manner, it would be clear that Congress only wants the President to make a narrow, factual

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225. Transcript of Oral Argument at 3–4, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628); *see also id.* at 28–29. As Eugene Kontorovich explained, the effect of such a disclaimer indicates that the printing of "Jerusalem, Israel" in a passport does not constitute a foreign policy decision. *See* Eugene Kontorovich, *The Origins of the Zivotofsky Disclaimer*, WASH. POST: VOLOKH CONSPIRACY (Nov. 4, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/04/the-origins-of-the-zivotofsky-disclaimer/>.

226. Cf. Kontorovich, *supra* note 225 ("[T]he disclaimer is a known tool . . . to enable talking about places in descriptively convenient ways without making it into a recognition issue.").

judgment in order to enable Congress to exercise its constitutionally committed appropriations power.

This would likely solve formalist objections to section 7008, insofar as it would suggest that the determinations contemplated by the law should not be viewed as an act of recognition. However, it is not clear whether such language would remedy functionalist issues with the statute, as the executive branch would still be required to publicly state a fact that has relevance to its recognition decisions, in accordance with longstanding historical practice. In fact, Solicitor General Donald B. Verrilli, Jr. rejected Justice Kennedy's suggestion that such a disclaimer would render the statute in *Zivotofsky* any less objectionable, as it would not change the essence of the message arguably conveyed by the passport—that the United States recognizes Jerusalem as being the capital of, and located within, Israel.<sup>227</sup>

Ultimately, the viability of such a proposal is uncertain in light of the Supreme Court's decision in *Zivotofsky*: Justice Scalia, on behalf of three dissenting justices, expressed the position that a disclaimer would render the law at issue constitutional.<sup>228</sup> However, the majority opinion was completely silent with respect to the disclaimer.<sup>229</sup> It therefore remains an open question as to whether a disclaimer could rescue a statute that otherwise infringes on the President's recognition power.

#### 4. *Dramatically Overhauling the Law*

A fourth and final way to reform post-coup sanctions would be to dramatically overhaul the triggering mechanism. Instead of appropriating funds and suspending them only if the President determines that a coup has taken place, Congress could write the law as follows:

No funds shall be obligated or expended to a foreign government unless the President first certifies that said government has not

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227. Cf. Transcript of Oral Argument at 28–29, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628) (“It doesn’t solve the problem because the issuance of the disclaimer is a credibility hit.”).

228. See *Zivotofsky*, 135 S. Ct. at 2122 (Scalia, J., dissenting) (“To the extent doubts linger about whether the United States recognizes Israel’s sovereignty over Jerusalem, § 214(d) leaves the President free to dispel them by issuing a disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition.”).

229. This silence seems particularly interesting considering that Justice Kennedy (who wrote the majority opinion in *Zivotofsky*) broached the subject of a disclaimer during oral arguments. See *supra* notes 225–26 and accompanying text.

come to power via a coup d'état or decree in which the military plays a decisive role.<sup>230</sup>

Thus, rather than requiring the executive branch to make a determination, Congress would leave it entirely to the President's discretion. Under this model, the President can choose whether to state publicly that a given regime is legitimate, and is under no obligation to make such a determination; Congress, however, will not provide assistance to that regime until the President has done so. That is, Congress waits for the President to act first: it reserves its power until certain conditions are met, rather than attempting to manage the President's exercise of his constitutionally granted powers. This proposal, of course, may be objectionable on other grounds,<sup>231</sup> but does not compel the executive branch to make determinations that implicate the executive's ability to recognize foreign governments.

## CONCLUSION

The debate over the Morsi ouster and section 7008 implicated important and unsettled questions of both U.S. constitutional law and international law, and had significant importance for U.S. national security and foreign policy. Whereas most understand the controversy surrounding the Morsi ouster as a narrow question of statutory interpretation (was the ouster a *military coup*?) or a case of the executive branch defying congressional statutes and ignoring human-rights abuses in order to practice realpolitik in the Middle East, this Note has attempted to show that the Obama administration's response to the Morsi ouster is rooted in important, unresolved questions of constitutional law.

It is clear that this debate over an obscure appropriations law has broad ramifications for separation-of-powers doctrine and U.S. foreign

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230. Congress could, of course, exempt certain types of assistance and vital allies from this provision, so that the failure to make the requisite certification doesn't result in a suspension of aid to important programs. It could also—as with the proposed section 254—make it only applicable to certain regions. *See supra* Part IV.A (discussing the history of section 254 and the Morse Amendment).

231. The executive branch has, for example, argued that certain restrictions on spending are themselves unconstitutional. *See, e.g.*, Memorandum from Virginia A. Seitz, Assistant Att'y Gen., U.S. Dep't of Justice, to Rachel Leonard, Gen. Counsel, Office of Sci. & Tech. Policy 1 (Sept. 19, 2011), <http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/conduct-diplomacy.pdf> (arguing that congressional limits on certain appropriations prevent the President from exercising his “constitutional authority to conduct the foreign relations of the United States”). This, of course, is distinct from the objection this Note has identified with respect to section 7008; that is, arguing that requiring a triggering determination is unconstitutional is separate from saying that the effects of that determination are problematic.

policy as a whole. That is, in light of the foregoing, how can Congress successfully harness the power of the executive branch in order to exercise its own powers?<sup>232</sup> How can Congress continue to require presidential determinations and certifications with respect to foreign policy? Are there meaningful limits to the President's recognition power? These matters will undoubtedly be brought more clearly into focus as Congress continues to grapple with section 7008 and as we explore the full implications of the *Zivotofsky* decision. Although the Morsi ouster has faded from the front pages and the urgency of the debate over aid to Egypt has dissipated, the issues presented by this episode are unlikely to recede into the background.

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232. See Presidential Discretion to Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306, 308–09 (1995) (“It is often the case that ‘Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive.’”).