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THE PRESIDENT AS LAWMAKER: MODERATING EXECUTIVE AUTHORITY IN WARTIME

Daniel Silverberg¹

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;”

- Article VI, Section 2, U.S. Constitution

INTRODUCTION

In 2008, the Supreme Court in *Medellin v. Texas* refused to set aside the execution of a Mexican national, even though the President personally ordered Texas to ‘stand down’ in light of international legal concerns.² Embedded in the Supreme Court’s decision was a subtle, yet deeply impactful commentary on the President’s role as lawmaker – the authority of the President to set aside state law based on the Executive’s “exclusive” role in foreign affairs.³ This article will examine judicial mediation of the President’s independent authority to conduct foreign affairs.⁴ I will specifically examine why the Supreme Court gave the President wide berth to preempt state law based on the foreign affairs preemption doctrine in the 2003 *American Insurance Ass’n v. Garamendi*⁵

1 Daniel Silverberg is a lawyer in the House of Representatives. The views expressed in this article are his own and do not represent the views of the U.S. House of Representatives, any committees therein, or the U.S. Government generally. The author wishes to thank Gaurav Laroia for his ceaseless insight and assistance on this paper.

2 *Medellin v. Texas*, 552 U.S. 491 (2008).

3 See Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 295 (2009), for an overview of the authority of the President in Foreign Affairs (citing LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972) (discussing modern jurisprudence of presidential powers in foreign affairs)). See also HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIRS* (2009), for a discussion on the restraints of the President’s execution of foreign affairs.

4 For an extraordinarily timely and systematic review of legal constraints on Presidential authority, see Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013). See also *Ex parte Milligan*, 71 U.S. 2 at 139 (1866) (Chase, C.J. dissenting) (“The power to make the necessary laws is in Congress; the power to execute in the President.”). For recent case law citing the President’s foreign affairs power, see *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003) (discussing case law citing the President’s foreign affairs power.); *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009) (“*Movsesian P*”). For an academic discussion, see Carolyn A. Pytynia, *Forgive Me, Founding Fathers for I Have Sinned: A Reconciliation of Foreign Affairs Preemption After Medellin v. Texas*, 43 VAND. J. TRANSNAT’L L. 1413, 1420 (2010); Celeste Boeri Pozo, *Foreign Affairs Power Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 VAL. U. L. REV. 591 (2007); Amir M. Tikriti, *Beyond The Executive Agreement: The Foreign Policy Preference Under Movsesian and the Return of the Dormant Foreign Affairs Power in Norton Simon*, 38 PEPP. L. REV. 755, 760 (2011).

5 *Garamendi*, 539 U.S. 396.

decision, but cabined that authority a mere five years later in *Medellin v. Texas*.⁶ I will conclude that the Court -- influenced by detainee litigation in the ensuing years between *Garamendi* and *Medellin* -- sought to narrow a potentially open-ended reading of *Garamendi* with respect to executive power and limit the President's role as lawmaker.⁷

The two cases involve an inverted fact pattern – in *Garamendi*, the Court determined that California infringed on executive foreign policy, whereas in *Medellin*, the Court concluded that the executive infringed on state law. Nonetheless, the legal argument underlying both cases was the same: the Executive may preempt state law based on longstanding claims settlement authority and Executive preeminence in foreign affairs.⁸ In fact, the United States in *Medellin* relied on *Garamendi* to assert the President's authority to set aside state law based on foreign policy considerations.⁹ These cases are important because they serve as bookends for a subtle shift in power between the political branches since September 11, 2001. The decisions are not about federalism— even though both cases involved federal policy pitted against state law – but rather about the scope of executive authority to “make law,” either in the form of preempting state statute or, in the case of *Medellin*, enforcing a non-self-executing treaty.¹⁰ In fact, the Court explicitly deferred addressing questions of federalism in *Medellin* and instead focused on the narrow issue of executive lawmaking.¹¹ The Court, echoing its holdings in the detainee cases, made clear that the President impermissibly crosses a line into lawmaking when he acts outside his constitutional or congressionally delegated authority.¹²

I will describe the *Garamendi* and *Medellin* decisions in depth in Part I, but I want to outline the basic narrative here to highlight the Court's contrasting approach on the scope of the President's foreign affairs power. The *Garamendi* decision involved a California state statute – the Holocaust Victim Insurance Relief Act of 1999 -- that required insurance companies doing business in the

6 *Medellin*, 552 U.S. at 525 (“Indeed, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

7 *Id.* (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 591) (“[t]he power to make the necessary laws is in Congress; the power to execute in the President.”). The Court in *Medellin* specifically referenced *Hamdan* and *Ex parte Milligan* to stress that lawmaking authority rests exclusively with the legislative branch. For a discussion on concerns regarding *Garamendi*'s expansion of the scope of federal power, see Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 950 (2004), cited in Cindy Galway Buys & Grant Gorman, *Monsesian v. Victoria Verischerung and the Scope of the President's Foreign Affairs Powers to Preempt Words*, 32 N. ILL. U. L. REV. 205, 214 (2012).

8 *Medellin*, 552 U.S. 491.

9 *Id.* at 523.

10 See *Medellin*, 552 U.S. at 525 n.13 (“The dissent refrains from deciding the issue, but finds it ‘difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can never take action that would result in setting aside state law.’ *Post*, at 564, 170 L. Ed. 2d, at 247. We agree. The questions here are the far more limited ones of whether he may unilaterally create federal law by giving effect to the judgment of this international tribunal pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case. Those are the only questions we decide.”).

11 *Id.* at 525.

12 *Id.* at 524 (“Such considerations, however, do not allow us to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’”).

state to disclose the names of Holocaust-era insurance policies.¹³ The case stemmed from the alleged failure of European companies to pay out the policies of Holocaust victims.¹⁴ The insurance association representing the key litigant – *Generali* – argued the law interfered with a federal foreign policy of negotiation, since the U.S. had backed a claims settlement process and signed executive agreements with several European countries on the matter.¹⁵

The court assessed two doctrines – conflict preemption and field preemption – to determine whether the statute interfered with the federal government’s exclusive responsibility for foreign affairs.¹⁶ The former – conflict preemption – involves a state law in direct conflict with an express foreign policy. The latter, more controversial doctrine, posits that even in the absence of any express federal policy, a state law may still be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility.¹⁷

The Court ultimately concluded that the statute was preempted because of a direct conflict with an express federal policy of negotiation in the insurance cases.¹⁸ To the extent the statute intruded on the President’s authority to conduct foreign affairs as he sees fit, with no traditional state responsibility, the State of California had to step aside.¹⁹ However, the Court inferred the ‘express’ policy from the executive agreements and from Administration officials’ statements.²⁰ It made clear that no express congressional action was necessary to provide a basis for preemption when the state law conflicts with executive foreign policy.²¹

Five years later, in *Medellin v. Texas*, the Supreme Court backtracked from this approach. It insisted on a statutory basis for the President to preempt state law based on an exercise of the President’s authority to conduct foreign affairs or, in the alternative, longstanding claims settlement authority.²² Texas intended to execute a Mexican national who alleged that the state failed to inform

13 *Garamendi*, 539 U.S. at 409.

14 *Id.*

15 *Id.* at 406 n.2.

16 *Id.* at 419.

17 *Id.* at 420 (“The principal support for this claim of preemption is *Zschernig v. Miller*. . . . In invalidating an Oregon statute, the *Zschernig* majority relied on statements in previous cases that are open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.”).

18 *Id.* at 399-400.

19 *Id.* at 421; *see also* Reinstein, *supra* note 3, at 332-334 (“ . . . the California law was nullified because it interfered with the President’s ability to conduct foreign affairs as he saw fit—that is, the President’s policy was to settle the claims through voluntary means and not through litigation.”).

20 *Id.* at 422 (“This position, of which the agreements are exemplars, has also been consistently supported in the high levels of the Executive Branch, as mentioned already.”).

21 *See id.* at 423 n.14 (“It is true that the President in this case is acting without express congressional authority But . . . the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.”).

22 For a discussion on the divergent conclusions of the two cases, *see* Tikriti, *supra* note 4 at 783-84, citing Reinstein, *supra* note 3, at 333 (“In effect, *Medellin* narrowed the scope of the *Garamendi* decision despite the fact that ‘*Medellin* was a much stronger case . . . for the invalidation of a state law.’”); Pytynia, *supra* note 4, at 1429 (“Four short years later, in *Medellin* the Supreme Court seemed to completely undermine its rationale in *Garamendi*.”). *See also* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1799 (2008-09) (highlighting inconsistent

him of his consular rights under the Vienna Convention on Consular Relations. President Bush subsequently issued a Memorandum – self-described as “unprecedented” in subsequent court briefs -- to the State of Texas requiring that Texas reexamine *Medellin’s* sentence in light of an International Court of Justice decision on the matter.²³ Texas refused. The decision rose to the Supreme Court, before which the United States argued that the President’s preeminent role in foreign affairs militated a reading of applicable treaties as “delegating” authority to the President to implement those agreements, even if the treaties were not self-executing on their face.²⁴

The Court concluded that only Congress could convert a non-self executing treaty into a self-executing one – not the President.²⁵ The court expressly rejected the claim that the President could unilaterally preempt state law – in effect, legislating - based on the President’s “unique” foreign policy responsibilities:

The United States maintains that the President’s constitutional role “uniquely qualifies” him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and “to do so expeditiously”... Such considerations, however, do not allow us to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, “must stem either from an act of Congress or from the Constitution itself.”²⁶

The Court also rejected the President’s secondary argument – that the memorandum was justified in light of the executive’s claims settlement authority. It refused to infer congressional acquiescence from congressional inaction.²⁷ In the process, the Court limited the *Garamendi* decision to the context of claims settlement, specifically where the President had signed an executive agreement.²⁸

conclusions of the two cases) (“Simply put, the reasoning of *Medellin v. Texas* refutes the false claims of *Dames & Moore* and *Garamendi*. If the President may not unilaterally make a non-self-executing treaty into a binding U.S. domestic law obligation, he surely may not unilaterally make an executive agreement into a binding U.S. domestic law obligation.”).

23 See 552 U.S. at 498 (“After the *Avena* decision President George W. Bush determined ... that the United States would ‘discharge its international obligations’ under *Avena* ‘by having State courts give effect to the decision.’”).

24 See Reply Brief for Petitioner at 12, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984) (“Because the President was unquestionably in the best position to weigh the strength of those competing considerations, and to balance them in light of global foreign policy concerns, the applicable treaties are logically understood as delegating to the President the authority to strike the appropriate balance for the nation.”).

25 See *Medellin*, 552 U.S. at 525-26 (“The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”).

26 *Id.* at 529 (“The United States also directs us to the President’s “related” statutory responsibilities and to his ‘established role’ in litigating foreign policy concerns as support for the President’s asserted authority to give the ICJ’s decision in *Avena* the force of domestic law. Congress has indeed authorized the President to represent the United States before the United Nations, the ICJ, and the Security Council, 22 U.S.C. § 287, but the authority of the President to represent the United States before such bodies speaks to the President’s international responsibilities, not any unilateral authority to create domestic law.”).

27 See *id.* at 531-32 (“Past practice does not, by itself, create Executive power”).

28 See *id.*; see also Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L.A. INT’L & COMP.

Why in the *Garamendi* case did the Majority defer to the “independent constitutional authority” of the President to preempt state law based on foreign affairs concerns, and then expressly reject that rationale in the *Medellin* case? In fact, critics argue *Medellin* “was a stronger case for the invalidation of a state law” because the state law was in direct conflict with a treaty obligation (not an executive agreement), and the President’s policy was explicit rather than implied from a series of agreements and statements.²⁹ After all, the policy was spelled out in a Presidential memorandum, not cobbled together through sub-Cabinet level statements and executive agreements, as was the case in *Garamendi*.³⁰ Why, in two cases involving similar factors – an executive foreign policy in conflict with state law and a lack of express congressional action -- did the Supreme Court reach entirely different conclusions?

The simple answer is that one decision involved state criminal law – the inner sanctum of state jurisdiction -- the other a vague compilation of Executive statements.³¹ One might also posit that the decision was a result of the changed composition of the Court since 2004, and, as proposed by Professor Noah Feldman, that the decision was a “sovereignist” reaction, or perhaps a compromise, to the liberal-oriented *Boumediene* decision.³² However, the fact that the Majority focused on executive lawmaking rather than federalism – notwithstanding the addition of two new justices – indicates that the Majority, particularly Justice Kennedy, had something else on their minds besides states’ rights and sovereignty.³³

In part I of this article I will argue that after struggling in the intervening four years with the President’s claims of inherent authority in the detainee cases, the Majority was more resistant to arguments of executive lawmaking authority than it had been in *Garamendi*, and it sought to

L. REV. 19, 35-36 (2010) (“[T]he Court in *Medellin* (per Chief Justice John Roberts) limited *Garamendi* to its facts (and indeed, to a somewhat recast version of its facts). *Garamendi*, Roberts’ opinion began by saying, was one of ‘a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement.’ ‘The claims-settlement cases,’ the Court continued, ‘involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.’”).

29 See Tikriti, *supra* note 4 at 783-84, citing Reinstein, *supra* note 3, at 333, on why *Medellin* was a stronger case for preemption. Justice Ginsburg in her dissent in *Garamendi* lamented the ambiguous nature of the executive agreements upon which the Majority relied to preempt. She observed that the executive agreements were silent on preemption and in no way indicated that litigation would be shelved as a consequence of the agreements. In contrast, the Presidential Memorandum in the *Medellin* case was explicit regarding Executive policy. See *Garamendi*, 539 U.S. at 441 n.5 (Ginsburg, J. dissenting) (“[N]othing in the executive agreements suggests that the Federal Government supports the resolution of Holocaust era insurance claims only to the extent they are based upon information disclosed by ICHEIC. The executive agreements do not, for example, prohibit recourse to ICHEIC to resolve claims based upon information disclosed through laws like the HVIRA.”).

30 See *Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (“We should not [point to the same statements that the majority did]. . . lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch. Executive officials of any rank may of course be expected ‘faithfully [to] represen[t] the President’s policy,’ ante, at 156 L Ed 2d, at 401 n 13, but no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive’s views on matters of federal policy. The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.”).

31 See *id.* at 532 (characterizing criminal law as “the heart of the State’s police powers.”).

32 See generally Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sep. 25, 2008, available at http://www.nytimes.com/2008/09/28/magazine/28law-t.html?pagewanted=all&_r=0.

33 See *Medellin*, 552 U.S. at 523.

foreswear a more robust interpretation of *Garamendi* proffered by the United States – that the President could rely on his “unique” constitutional responsibilities or executive agreements to preempt state law.³⁴ From 2004 to 2008 – shortly after *Garamendi* -- the court considered and rejected the President’s claims of inherent executive authority to amend federal statute. The apex of the Court’s rejection appeared in *Hamdan*, in which the Court reaffirmed the distinct authority of Congress to make law: “The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress. . . .”³⁵

The Majority in *Medellin* specifically referenced *Hamdan* for the proposition that the President cannot unilaterally enforce a non-self-executing treaty.³⁶ The court’s narrowing of *Garamendi* constituted either an expression of exhaustion with the President’s claims of lawmaking power, or a deliberate effort to rein in the President after the detainee cases. In short, *Medellin* should be read as an extension of *Hamdan*³⁷ - that “[the President] may not disregard limitations that Congress has, in proper exercise of its own powers, placed on his powers.”³⁸

This wariness reflects a historical pattern of the Court seeking cooperation among the political branches during wartime, when the executive may be inclined to overreach its authority. According to Trevor Morrison, “it is now commonplace to observe that in times of national security crisis, the Court tends to privilege the joint actions of the political branches.”³⁹ The Judicial branch may countenance the passage of legislation that it might otherwise find objectionable, but it will not uphold unilateral Executive action (or invalidate such assertions on civil libertarian grounds) unless the Executive “has involved the legislature in the equation” and remained within the bounds of that legislation.⁴⁰ In this case, after four years of rejecting unilateral assertions of Presidential power, the court demanded the President to partner with Congress rather than uphold the *Garamendi* precedent of unilateral preemption of state law.

In parts II and III, I will focus on two related concerns in the *Garamendi* decision. First, I will argue that the Majority in *Garamendi* misread congressional silence as acquiescence, an issue manifest

34 The *Medellin* decision was decided two years after the decision in *Hamdan v. Rumsfeld*, 548 U.S. 557, (2006), and less than two months before the decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which capped a litany of detainee-related litigation. For a discussion on *Medellin* in the context of the detention decisions, particularly the Court’s response to a novel assertion of presidential power, see Trevor Morrison, *Book Review: Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1705 (2011). Morrison examines the specific issue of the President’s memorandum.

35 *Hamdan*, 548 U.S. at 591 (citing *Ex Parte Milligan*, 79 U.S. 2, 139-40 (1866)) (“The Constitution makes the President the ‘Commander in Chief’ of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to ‘declare War . . . and make Rules concerning Captures on Land and Water,’”); see also *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

36 See *Medellin*, 552 U.S. at 526.

37 This article focuses on the Administration’s conception of Executive power, not the underlying views of international law or detainee operations. See Curtis A. Bradley, *The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*, DUKE J. CONST. LAW & PUB. POL’Y 57, 61 (2009), (regarding the distinction).

38 *Hamdan*, 548 U.S. at 593 n.23.

39 Trevor W. Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453, 453 (2009).

40 *Id.* at 454.

in numerous decisions related to foreign affairs.⁴¹ The court failed to appreciate that congressional silence – particularly in the foreign affairs context – often stems from profound ambivalence on a policy or, possibly, disengagement on a matter that lacks political urgency. The subsequent controversy that surrounded *Garamendi*, including multiple failed efforts to pass legislation to reverse the decision, highlights how congressional inaction may reflect an interest in preserving the status quo or deep policy disagreement, not acquiescence to an Executive policy. To the extent the court in *Medellin* favored cooperation among the political branches, it narrowed *Garamendi*'s implication that Congress need not approve executive action where the President exercises his foreign affairs power, possibly even beyond the claims settlement arena.

Second, the *Garamendi* decision rendered further unclear how to discern an executive policy from the universe of executive actions on a given subject, and the standards under which a court should find preemption given the existence of a stated executive policy. The *Garamendi* decision reflects a splintered test for how to formalize executive policy, and, based on subsequent decisions, it remains unclear what exactly constitutes the kind of ‘executive policy’ that may provide the basis for preemption.⁴² The court could have clarified the ambiguity in *Movsesian* but opted not to review the case.⁴³

The legacy of these cases extends beyond the claims settlement context. Some posit the *Garamendi* decision created a new *Youngstown* test,⁴⁴ with Congress no longer the fulcrum of executive authority.⁴⁵ If true, then *Medellin* constituted realignment – perhaps even a strengthening – of congressional authority in foreign affairs – where “power is most implied and concurrent between the branches.”⁴⁶ The Supreme Court dealt with these questions against the backdrop of the Korean War in the *Youngstown* decision, and the *Garamendi* and *Medellin* decisions constitute similar cases in which the court made clear it wants the Executive Branch to collaborate with Congress rather than proceed unilaterally, at least outside of the most narrow of claims settlement cases.⁴⁷

41 E.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

42 See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 (2001) (“The Supreme Court’s preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear. And the decisional outcomes are difficult to cohere.”).

43 See *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, (9th Cir. 2012) (“*Movsesian* II”); see also, Petition for Writ of Certiorari at 28, *Arzoumanian v. Munchener*, 133 S.Ct. 2795, (2013) (No. 12-9) (arguing that the federal intent to preempt an entire field should not “be inferred lightly” and that “preemption is appropriate where the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it’” (quoting, inter alia, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

44 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, (1952) (Jackson, concurring) (arguing Presidential authority can be evaluated in three ways: first, at its maximum acting in accordance with Congressionally granted authority; secondly, under concurrent authority with Congress where both Congress and the President have overlapping responsibilities; and thirdly, at its weakest, either without or in defiance of Congressional authorization).

45 See Michael J. Turner, *Fade to Black: the Formalization of Jackson’s Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U.L. REV. 665, 668 (2009) (“The recently decided case of *Medellin v. Texas* is the latest Supreme Court case to affirm Justice Jackson’s three-part test as the appropriate framework to analyze executive power.”).

46 *Id.* at 694.

47 See Ramsey, *supra* note 28 at 24-25 (“the constitutional problem in *Youngstown* was not that the President independently formulated policy (something the President does all the time) but that the President tried to make that policy superior to existing law...The President, like the eighteenth-century English monarch, cannot use the executive

This expectation is particularly relevant in light of discussions to amend the 2001 Authorization for the Use of Military Force (AUMF). In light of expected U.S. withdrawal from Afghanistan, there are questions regarding the ongoing legal basis of U.S. counterterrorism and detention operations currently conducted pursuant to the AUMF.⁴⁸ Justice O'Connor indicated in *Hamdi* that detention authority pursuant to the AUMF is contingent on combat operations in Afghanistan.⁴⁹ If forces are no longer involved in active combat in Afghanistan, there is a question whether there is legal authority to detain:

[W]e understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.⁵⁰

At some point, the Judiciary may insert itself into the discussions regarding the continued relevance of the AUMF.

Likewise, *Medellin* could inform how Congress views the scope of its authority in the Iran nuclear negotiations. In March 2014, 395 Members of the US House of Representatives sent a letter to the President insisting that he "consult closely" with Congress before finalizing a nuclear agreement with Iran.⁵¹ Several senators followed up with legislation requiring Congress to approve any deal,⁵² and numerous Members expressed frustration after the New York Times reported that the Administration might implement an agreement based on existing authority, with no immediate input from Congress.⁵³ To the extent there is a strong disagreement between the branches regarding

power to issue decrees with the force of law?").

48 See *Hamdi*, 542 U.S. at 521; see also, Karen DeYoung, *Afghan war's approaching end throws legal status of Guantanamo detainees into doubt*, WASH. POST, Oct. 18, 2013, available at http://www.washingtonpost.com/world/national-security/afghan-wars-approaching-end-throws-legal-status-of-guantanamo-detainees-into-doubt/2013/10/18/758be516-2d0a-11e3-97a3-ff2758228523_print.html ("In the words of the Supreme Court, the authority to detain — if you're detaining based on someone being a belligerent — can unravel as hot wars end. And I think that's a real question," Brig. Gen. Mark Martins, chief prosecutor for military commissions at Guantanamo, said in a recent interview.>").

49 *Hamdi*, at 521 ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF?").

50 *Id.*; see also Curtis Bradley, *The Death of Bin Laden and the AUMF*, (May 3, 2011), available at <http://www.lawfareblog.com/2011/05/the-death-of-bin-laden-and-the-aumf/>.

51 Letter from Majority Leader Eric Cantor and Minority Whip Steny H. Hoyer to President Barack Obama, (Mar. 5, 2014) available at <http://www.democraticwhip.gov/sites/default/files/2014-03-05-letter-to-the-president-re-iran-sanctions.pdf>.

52 See e.g., S.2650, 113th Cong. (2014). The bill is best described in a press release from Senator Corker, Press Release, Sen. Bob Corker, Senators Seek Congressional Review and Enforcement of Any Final Iran Nuclear Agreement, available at <http://www.corker.senate.gov/public/index.cfm/2014/7/senators-seek-congressional-review-and-enforcement-of-any-final-iran-nuclear-agreement>.

53 See David E. Sanger, "Obama Sees an Iran Deal that Could Avoid Congress," N.Y. TIMES, Oct. 19, 2014, available at

the role of Congress in approving any deal, *Medellin* could inform how Congress defines the scope of its authority.

On a personal note, this article constitutes an effort to understand when and in what manner Congress should play an active role in foreign affairs. Practically, the *Garamendi* and *Medellin* decisions highlight the urgency and accompanying pitfalls of congressional deference to the Executive branch in foreign affairs. During my service as counsel on the House Foreign Affairs Committee, Members and their staffs struggled to balance the interests of Holocaust survivors dismayed by the *Garamendi* decision, and the serious foreign policy implications of state laws that potentially undermine federal policies. I also observed the increasing frustration among Members of Congress regarding unilateral Executive exercise of authority in foreign affairs – and judicial deference to that authority.⁵⁴ There was particular frustration on any given foreign policy matter regarding the Executive's failure to adequately consult with Congress, which reinforced the sense that the Legislative branch failed to exercise its foreign affairs powers. This article will hopefully shed light on the inner dynamics of the Legislative Branch when it is confronted with a unilateral assertion of executive authority in a shared area of power.

PART I. THE PRESIDENT'S FOREIGN AFFAIRS PREEMPTION POWER

A. BACKGROUND

The foreign affairs preemption power at issue in *Garamendi* and *Medellin* pits two constitutional principles against each other. On one hand, the Supremacy Clause of the Constitution expressly grants Congress alone the authority to preempt state law that intrudes on or is incompatible with the federal government's legislative powers.⁵⁵ Further, Article II of the constitution vests the power to negotiate and enter into treaties with the President and ratification authority in the Senate. This requirement, according to numerous scholars, was driven by the Founders' interest in protecting state interests, checking executive power, and limiting the number of international commitments into which the United States entered.⁵⁶

Simultaneously, the Constitution vests in the Executive the authority to conduct foreign affairs.⁵⁷ This was a deliberate effort by the Founders to avoid the pitfalls of the Articles of

<http://www.nytimes.com/2014/10/20/us/politics/obama-sees-an-iran-deal-that-could-avoid-congress-.html>

54 The starkest example rests in the war powers context, in which members voiced concerns regarding the President's reliance on inherent executive authority to commence military operations, including in Libya and Yemen.

55 See U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"); Ramsey, *supra* note 28.

56 See generally Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 320 (2007) ("Hamilton further contended that, 'however proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust the treaty power to an elective magistrate of four years' duration."); Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. AM. HIST. 233, (1984).

57 See *United States v. Pink*, 315 U.S. 203, 233 (1942) (describing the inability for States in this country to decide foreign policy.) ("To permit it would be to sanction a dangerous invasion of Federal authority?"); see also *Mosesian II*,

Confederation and establish a unified diplomatic instrument.⁵⁸ Article II, §2 of the Constitution authorizes the Executive branch to engage in key diplomatic functions, including treaty implementation and receipt of ambassadors.⁵⁹ The Supreme Court in the 20th Century gave wide berth to the Executive as the sole purveyor of foreign affairs, to the dismay of some experts.⁶⁰ The Court made the point bluntly: “the Constitution gives the federal government the exclusive authority to administer foreign affairs.”⁶¹

What happens, however, when states seek to legislate on a matter that touches on foreign affairs, or when the President seeks to commit the United States to an agreement, without approval from Congress, in a matter of foreign affairs?⁶² The Supreme Court over the last century fashioned a doctrine – “the foreign affairs doctrine” – to address exactly these scenarios. The origins of doctrine emerged in *United States v. Curtiss-Wright*,⁶³ and specifically took shape with respect to claims settlement in *United States v. Belmont*, in which the Supreme Court upheld the President’s authority to bind the United States to an international agreement – outside the treaty process.⁶⁴ The Court in *Belmont* concluded that the “complete power over international affairs is in the national government . . . and cannot be subject to any curtailment or interference on the part of the several states.”⁶⁵ The authority was modest at that point – merely the authority for the President to commit the United

supra note 44 at 1071 (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, countries and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”); *Pytynia*, *supra* note 4 at 1414.

58 See Denning, *supra* note 7 at 843 (“The natural effect of making federal law supreme is that it overrides inconsistent state law.”); see also Buys, *supra* note 7, at 211 (describing a thorough history of the foreign affairs preemption power).

59 U.S. Constitution. Art. II, § 2, (“ . . . he shall receive ambassadors and other ministers . . . ”).

60 See *United States v. Curtiss-Wright*, 299 U.S. 304, (1936) (granting the President sweeping executive powers to handle the external business of the United States); see also *Pink*, 315 U.S. at 233 (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”). *Contra* *KOH*, *supra* note 3, at 117 (criticizing this precedent).

61 See *Movsesian II*, *supra* note 43, at 1062 (“The power to conduct diplomatic relations and negotiations, like the war powers, is vested exclusively with the federal government. U.S. Const. art. I, § 8; *id.* at art. II, § 3. Absent explicit authorization, states may not modify or alter the nation’s foreign policy.”).

62 *Id.* at 1072 (“ . . . [T]he Supreme Court has made clear that, even in the absence of any express federal policy, a state law still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility.”).

63 *Curtiss-Wright*, 299 U.S. at 319. This case is cited frequently for the principal that the President’s foreign relations authority is exclusive and not subject to the limitations of other branches. (“Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”).

64 See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (the United States’ recognition of the Soviet Union, even absent a ratified treaty, trumps state law). For general background on judicial views of the President’s foreign affairs power, see Bradley & Morrison, *supra* note 4, at 1098 (discussing the differential role taken by courts in assessing presidential power), and Reinstein, *supra* note 3, at 295 (assessing the scope of Executive authority in terms of “royal prerogative of foreign affairs” viewed by the Founding Fathers).

65 *Belmont*, 301 U.S. at 331.

States via an executive agreement with a foreign government where there was either an independent constitutional power of the president, a clear and unambiguous history of congressional acquiescence, or clear statutory authority.⁶⁶ Subsequent cases affirmed the power of the President to settle claims via executive agreement, based on the federal government's "exclusive" power in foreign affairs.⁶⁷ In *Youngstown*, the Supreme Court made clear that the President can "act in external affairs without congressional authority".⁶⁸ In *Dames & Moore* (1981), the Court upheld the President's claims settlement with Iran based on the "character" of legislation and "acquiescence" of Congress.⁶⁹

The Court's deference to the Executive's claim settlement authority traditionally involved the signing of an agreement,⁷⁰ but one controversial case – *Zschernig v. Miller* – involved the preemption of state law based on interference with the President's "exclusive" ability to conduct foreign affairs, not based on an executive agreement, explicit federal action, or congressional approval.⁷¹ The Supreme Court in that case struck down an Oregon statute on grounds that the law was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."⁷² The court concluded that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law.⁷³ The decision was controversial because it suggested the President could preempt

66 See Bradley, *supra* note 50, at 308. Bradley argues that unilateral executive authority is in tension with the Article II process for making treaties, which requires the advice and consent of two-thirds of the Senate. Until *Garamendi*, courts rationalized that tension by linking the agreements to specific statutory schema rather than general policy. ("The sole executive agreement power must be significantly narrower than the power to enter into Article II treaties.")

67 See *Pink*, 315 U.S. at 233 ("We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."). For a detailed history of other supporting cases, see generally Tikriti, *supra* note 4.

68 See *Youngstown*, 343 U.S. at 710, n.2, (citing *Curtis-Wright*). Several commentators argue that because executive agreements are not approved by Congress, they fall into a lower category of Presidential power under Justice Jackson's *Youngstown* framework. See Bradley, *supra* note 50 at 323. For purposes of this article, Bradley's point is moot – the Court affirmed that the President has authority to sign agreements *sans* congressional action, which had led to extensive discussion in Holocaust context.

69 See *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981). The key for the Court in *Dames & Moore* was that Congress had acted on a similar issue and had acquiesced in face of Presidential assertion of power in the realm of foreign affairs ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."). The Court relied most heavily on *Pink*, 315 U.S. at 203 and passage of the International Claims Settlement Act of 1949. *Dames*, 315 U.S. at 680.

70 See, e.g., *Pink* 315 U.S. at 233, *Belmont* 301 U.S. at 326, and, according to the Majority in *Dames & Moore*, numerous other cases. See *Dames & Moore*, 453 U.S. at 682 ("In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.")

71 See *Zschernig v. Miller*, 389 U.S. 429, 440-441 (1968) (even without a direct confrontation between federal and state law, such as a treaty, the state may not take action that could affect foreign relations); see also Reinstein, *supra* note 3, at 332 ("The other reading of *Garamendi* is that the California law was nullified because it interfered with the President's ability to conduct foreign affairs as he saw fit...This reading of the decision is based on Souter's reliance on *Zschernig v. Miller*").

72 *Zschernig*, 389 U.S. at 432.

73 *Id.*, cited in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 398 (2003) ("In invalidating an Oregon statute, the *Zschernig*

state law merely based on the inference of a federal policy, in violation of the Supremacy Clause:⁷⁴ *Zschernig* provided the basis for a preemption test, which, perhaps because it was controversial, lay dormant, until *Garamendi*.⁷⁵

B. EXECUTIVE PREEMPTION POWER: *GARAMENDI*

The *Garamendi* decision fused the federal government’s power to sign executive agreements in the claims settlement context – affirmed in *Dames & Moore*, *United States v. Pink*, and *United States v. Belmont* – with *Zschernig*’s principle of preempting state law even where there is no explicit federal policy.⁷⁶ Indeed, it remains unclear whether the Court invalidated California’s law because of a longstanding Executive practice of claims settlement, or, more controversially, because the law interfered with a “dormant” foreign affairs power.⁷⁷

The *Garamendi* decision involved a California law intended to provide relief to Holocaust-era insurance policyholders and their heirs. The “*Garamendi*” statute – named for the state’s insurance commissioner and lead defendant – specifically required any insurer doing business in the state to disclose information about Holocaust-era insurance policies that had been sold, by the insurer or “any related company,” to persons in Europe and that had been in effect between 1920 and 1945.⁷⁸

Insurance companies sued on grounds that the statute intruded on the federal government’s exclusive authority in foreign affairs.⁷⁹ They specifically argued that the federal government had

majority relied on statements in previous cases that are open to the reading that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.”).

74 See Reinstein, *supra* note 3, at 333 (“No one doubts that Congress, in exercising its legislative powers over foreign affairs, can create new legal obligations and preempt state laws that stand in the way of its objectives. But unexercised congressional power does not create power in the President.”).

75 See Ramsey, *supra* note 28, at 33-34 (President Clinton could only request Virginia to grant a stay of execution for a Paraguayan sentenced to death while his case was pending at the International Court of Justice.).

76 *Id.* at 34 (“Prior to *Garamendi* . . . there was little textual or precedential support for executive preemption aside from executive agreements implicitly approved by Congress. *Garamendi* seemed to go much further . . .”).

77 *Id.* The Majority references the President’s policy of negotiation and characterizes the agreements as mere “exemplars” of that policy, which indicates that the court rendered its decision based on the President’s policy, not the agreements. See also Reinstein, *supra* note 3, at 332. Reinstein indicates that there are two ways to read the decision, “The first is that [*Garamendi*] is an extension of *Dames & Moore*...The other reading of *Garamendi* is that the California law was nullified because it interfered with the President’s ability to conduct foreign affairs as he saw fit—that is, the President’s policy was to settle the claims through voluntary means and not through litigation.”.

78 See *Garamendi*, 539 U.S. at 410 (“HVIRA was meant to enhance enforcement of both the unfair business practice provision (§790.15) and the provision for suit on the policies in question (§354.5) by “ensur[ing] that any involvement [that licensed California insurers] or their related companies may have had with insurance policies of Holocaust victims are [*sic*] disclosed to the state.”).

79 *Garamendi*, 2002 U.S. Briefs 722, 17 (2003) (“The statute invades the foreign affairs power of the federal government. The text and history of the Constitution, as well as necessary concomitants of national sovereignty, require that ‘the whole subject’ of ‘relations’ with ‘foreign nations’ be entrusted exclusively to the federal government.”); see also *Garamendi*, 539 U.S. at 412 (“After this ultimatum, the petitioners here, several American and European insurance companies and the American Insurance Association (a national trade association), filed suit for injunctive relief against respondent insurance commissioner of California, challenging the constitutionality of HVIRA.”).

backed the prevailing international process for settling such claims⁸⁰, and that even though the U.S. Government did not formally voice an opinion in the litigation, it clearly had a policy to settle rather than litigate claims. Various government officials also argued that enforcement of the statute would undermine international agreements signed by the Executive branch to seek relief for policyholders through voluntary processes, although the U.S. Government did not offer a formal statement of interest in the case.⁸¹

To the extent the agreements made clear that the Executive opted for a policy of negotiation to address the highly difficult challenge of compensating Holocaust-era policy holders, the Court concluded that the California law must step aside: “The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.”⁸²

The Court did so even though (1) the agreements in question said nothing about preemption; (2) the United States declined the opportunity to weigh in formally in the litigation (in contrast to subsequent lawsuits); and (3) the specific company involved – *Generali* – was not formally covered by the executive agreements.⁸³ Nonetheless, the Majority concluded that the President’s foreign affairs authority preempted state law.⁸⁴

To get there, the Majority revived the field preemption test in *Zschernig* and concluded that state action with more than incidental effect on foreign affairs is preempted. The Majority first looked at whether the general subject area of the statute falls within an area of traditional state responsibility, and it concluded that it did not. Once that analysis was complete, the court turned to the question whether the statute intruded on a power expressly or impliedly reserved to the federal government.⁸⁵ The Court then distilled a federal policy from the agreements and from statements of officials.⁸⁶

The Majority dismissed concerns regarding the lack of congressional approval of the agreements by citing the principle that “the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.”⁸⁷ It viewed congressional silence in the lens of a “historical gloss” of acquiescence.⁸⁸ In a footnote, the

80 *Garamendi*, 539 U.S. at 396. Such claims were settled via the International Commission on Holocaust Era Insurance Claims (ICHEIC).

81 *Id.* at 411. Deputy Secretary Eizenstat and Chairman Eagleburger expressed this view.

82 *Id.* at 427.

83 *Id.* at 396. The principal defendant, *Generali Assoncioni*, fell under the jurisdiction of Italy, which had no executive agreement with the US. Subsequent decisions characterized the executive agreement referenced in *Garamendi* as an “exemplar” of U.S. policy but not dispositive given the lack of any executive agreement. It is possible that the Supreme Court simply overlooked this detail, or the lack of an agreement specifically with Italy was inconsequential given the Court’s overall conclusion that a federal foreign policy preempts state law.

84 *Id.* at 401. (“The issue here is whether HVIRA interferes with the National Government’s conduct of foreign relations. We hold that it does, with the consequence that the state statute is preempted.”).

85 *Garamendi*, 539 U.S. at 413 (the power to set foreign policy and make executive agreements).

86 *Id.* at 422 (“This position, of which the agreements are exemplars, has also been consistently supported in the high levels of the Executive Branch...”).

87 *Id.* at 424, n. 14.

88 *Id.* at 413 (“There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the “concern for uniformity” in this country’s dealings

Majority conceded that Congress had not acted, but it did not regard further congressional action as necessary given the extensive history of congressional deference to the executive in the claims settlement arena.⁸⁹

The dissent, led by Justice Ginsburg, objected to the decision on grounds that it upheld preemption based on sub-Cabinet officials' statements and executive agreements that contain no preemption clauses.⁹⁰ In summary, the *Garamendi* decision sowed much uncertainty regarding the scope of executive authority. It left open the possibility that the President could preempt state law – thereby engage in lawmaking – based merely on a statement of policy, mostly because it was unclear on what basis the Majority actually made its decision.

C. CABINING *GARAMENDI*: *MEDELLIN* AND THE LIMITATIONS ON EXECUTIVE LAWMAKING

Five years later, in *Medellin v. Texas*, the Supreme Court narrowed the *Garamendi* decision to the context of claims settlement, where there is an executive agreement.⁹¹ In *Medellin*, Texas intended to execute a Mexican national who alleged that the state failed to inform him of his right to notify the Mexican Consulate of his arrest under the Vienna Convention on Consular Relations.⁹² President Bush subsequently issued a memorandum to the State of Texas requiring that Texas reexamine *Medellin's* sentence in light of an International Court of Justice (ICJ) decision on the matter.⁹³ Texas resisted, resulting in a legal confrontation with the President before the Court.

The United States made two arguments: first, the relevant treaties give the President the authority to implement the ICJ judgment and that Congress had acquiesced in the exercise of that authority.⁹⁴ This argument was premised on the notion that the President could effectively convert a non-self executing treaty into a self-executing one based on the Supremacy, Treaty, and Take Care Clauses.⁹⁵ As an alternative, the United States pointed to the President's memorandum as a lawful exercise of independent presidential power to enforce treaty obligations.⁹⁶

with foreign nations”); (“President possesses in his own right certain powers conferred . . . as the Nation’s organ in foreign affairs.”).

89 *Id.* at 424 n. 14.

90 *Id.* at 444 (“[N]o authoritative text accords such officials [the power to invalidate state law simply by conveying the Executive’s views on matters of federal policy. The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.”).

91 See Tikriti, *supra* note 4, at 783, (citing Reinstein, *supra* note 3) (“In effect, *Medellin* narrowed the scope of the *Garamendi* decision despite the fact that “*Medellin* was a much stronger case . . . for the invalidation of a state law.”); Pytnia, *supra* note 4, at 1429 (“Four short years later, in *Medellin* the Supreme Court seemed to completely undermine its rationale in *Garamendi*.”); see also Reinstein, *supra* note 3, at 333 (“The Supreme Court recently adopted the narrower reading of *Garamendi* [i]n *Medellin v. Texas*.”).

92 For extensive case history, see Tikriti, *supra* note 4, at 780.

93 *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, I.C.J. 2004 17 (March 31).

94 *Medellin v. Texas*, 2006 U.S. Briefs 984, 10, n.2 (2007).

95 *Medellin v. Texas*, 2006 U.S. Briefs 984, 1 (*Reply Brief for Petitioner*) (“[E]ven if the obligation to comply were non-self-executing, so that some further action were necessary to make it judicially enforceable, the President, who has authority under Article II to ‘take Care that the Laws be faithfully executed,’ has taken it.”).

96 For a thorough discussion of self-executing treaties and the *Medellin* decision, see Curtis A. Bradley, *Medellin: Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 547-550 (2008).

In relying on the memorandum, the President's legal team explicitly asserted two strands of the *Garamendi* decision.⁹⁷ First, they made a *Zschernig*-like argument—the President could impose a non self-executing treaty on the states based on the inherent authority of the Executive. Second, the United States explicitly made a claims settlement argument, namely that the President's Memorandum constituted a valid exercise of the President's foreign affairs authority to resolve claims disputes with foreign nations.⁹⁸ To the extent there was a conflict between Mexico and the United States regarding interpretation of the Vienna Convention, the President had wide berth to settle that claim, even if it required preemption of state law.⁹⁹ To support this view, the United States highlighted the President's unique role in foreign affairs and characterized the memorandum as an exercise of that authority. For example:

- “The President is constitutionally charged with making and is uniquely qualified to make the prompt and sensitive determinations involved [in foreign affairs].”¹⁰⁰
- “Because the President was unquestionably in the best position to weigh the strength of those competing considerations, and to balance them in light of global foreign policy concerns, the applicable treaties are logically understood as delegating to the President the authority to strike the appropriate balance for the nation.”¹⁰¹
- “The President's determination that state courts give effect to the *Avena* decision... reflects the President's considered judgment that the United States' foreign policy interests in meeting its international obligations and protecting Americans abroad require the United States to comply with the ICJ's decision.”¹⁰²
- “The President was best positioned to balance the harm from complying with a decision with which he disagreed against the adverse consequences to the conduct of foreign affairs and to American citizens abroad that would attend defiance of the decision.”¹⁰³

Just as the Executive argued in *Garamendi* that state law should step aside if it intrudes on the President's foreign affairs power, the President's team in *Medellin* argued that the President's decision-

97 *Medellin*, 2006 U.S. Briefs 984, 5 (2007). The government cited *Garamendi* and *Dames and Moore* for the proposition that “...the President has recognized authority to resolve disputes with foreign nations over individual claims, and to establish binding rules of decision that preempt contrary state law.”

98 *Medellin*, 552 U.S. at 530. The United States relied on cases where the Court has upheld executive actions in the face of congressional acquiescence.

99 *Medellin*, 2006 U.S. Briefs 984, 5 (2007) (“[T]he President has recognized authority to resolve disputes with foreign nations over individuals claims, and to establish binding rules of decision that preempt contrary state law. *See, e.g., American Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003)”).

100 *Id.*

101 Brief for the United States as Amicus Curiae Supporting Petitioner, at 4, *Medellin v. Texas*, 552 U.S. 491 (2008).

102 *Id.* at 9.

103 *Id.* at 12.

making power in foreign affairs should preempt state criminal statutes that frustrate Presidential policy in foreign affairs. This was no theoretical battle – the President issued the Memorandum precisely because he believed Texas was frustrating his implementation of foreign policy.

The Majority rejected these arguments. The Court first concluded that the *Avena* judgment was not enforceable as domestic law in state court because the relevant treaty sources – the Optional Protocol, the U.N. Charter, or the ICJ Statute -- were not self-executing and Congress had taken no action to implement them.¹⁰⁴ The court observed that although a treaty may constitute an international legal obligation on the part of the United States, the Constitution required Congress to act to impose the treaties on the states. Because there was no implementing legislation, there was no State requirement.¹⁰⁵

Assessing the claims settlement argument, the Majority rejected the President's *Garamendi*-based arguments that the memorandum was implicitly authorized by the Optional Protocol and that it constituted a valid exercise of the President's foreign affairs authority to resolve claims disputes.¹⁰⁶ The court observed that the power to make law rests in the Congress, and that by definition the President lacks authority to give unilateral domestic effect to a non-self executing treaty ("A non-self executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.")¹⁰⁷

The Court also made clear that it did not view a sufficient nexus between the President's dispute with Mexico and the Executive's claims settlement authority: "[t]he President's Memorandum is not supported by a 'particularly longstanding practice' of congressional acquiescence, but rather is what the United States itself has described as 'unprecedented action.'¹⁰⁸

Citing *Dames & Moore*, the court pointed out that "[p]ast practice does not, by itself, create power," and that the President's Memorandum was not supported by any history of congressional acquiescence given its unprecedented nature. The claims settlement authority could allow for preemption of state law, but not for reaching "deep into the heart of the State's police powers and compel[] state courts to reopen final criminal judgments and set aside neutrally applicable state laws."¹⁰⁹

104 See *Medellin*, 552 U.S. at 506 ("Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment [which the President sought to enforce through a Memorandum] is not automatically binding domestic law.").

105 The Dissent argued that no further congressional action was needed, since accession to the relevant treaties constituted sufficient congressional action. See *Medellin* 552 U.S., at 538-539 ("The United States has signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. . . . Under these circumstances, I believe the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind the courts no less than would 'an act of the [federal] legislature.'").

106 *Id.* at 531 ("[W]e find that our claims-settlements cases do not support the authority that the President asserts in this case.").

107 *Id.* at 527 (citing *Hamdan*, 548 U.S. 557).

108 *Id.* at 532.

109 *Id.*

D. RECONCILING *GARAMENDI* AND *MEDELLIN*: THE INTERIM DETAINEE CASES.

Whereas the Majority in *Garamendi* sought no express role for Congress when approving Executive preemption of state law, the Majority in *Medellin* made Congressional action a prerequisite to approve preemption. The decision also deviated from the Court's continuing diminishment of congressional authority in the domestic context.¹¹⁰ Why in the *Garamendi* case did the Majority defer to the "independent constitutional authority" of the President to preempt state law based on foreign affairs concerns, and then expressly reject that power in the *Medellin* case?

The simplest answer is that the Majority perceived federal preemption of criminal law as a different, more intrusive action than preemption of the *Garamendi* statute, one with a vague nexus to a state's insurance regulatory responsibility.¹¹¹ Further, the nexus between the US-Mexico dispute and the constitutional question in *Medellin* was weak, and reliance on a memorandum to preempt state law had no precedent, even by the President's admission.¹¹²

However, there were broader forces as well. My key contention is that the decision paralleled – and was likely influenced by – the court's conclusions in the detainee context, namely that assertions of executive lawmaking power will be invalidated during periods of national security crisis absent involvement from the legislature.¹¹³ Whereas in *Garamendi* the court was willing to stomach congressional silence, by the time *Medellin* was decided, it insisted on a more involved role for Congress given the detainee litigation over the previous four years.

This explanation is based on a "middle ground" theory articulated by Professor Trevor Morrison. According to Morrison, during war and periods of national security crisis, courts will resist both executive unilateralism and civil libertarian maximalism, in favor of encouraging joint cooperative action between the legislative and executive branches, particularly with regard to exercise of war powers and other shared responsibilities.¹¹⁴ Instead of deferring to unilateral assertions of

110 Critics point out that *Medellin* was an unexpected result for a conservative Court given that the Court had been continuing a trajectory of diminishing congressional authority in the domestic context. The *Medellin* decision followed on the heels of a series of cases striking down legislation related to the Commerce Power, near unprecedented in the previous century. If the Court were rolling back congressional authority in an area dead center in its constitutional mandate, *a fortiori* one might expect the court to exercise deference to the Executive in a contested sphere of foreign affairs. See generally Irwin Chermersky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763 (2006).

111 *Medellin*, 552 U.S. at 532. The Majority focused on the unprecedented nature of the federal government overriding state police powers via presidential directive ("Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.>").

112 *Id.* ("The President's Memorandum is not supported by a 'particularly longstanding practice' of congressional acquiescence, see *Garamendi*, . . . but rather is what the United States itself has described as 'unprecedented action[.]'").

113 See Morrison, *supra* note 40, at 454. ("[P]rivileging the joint action of the political branches means being more prepared to uphold the executive's assertion of detention authority when the executive can point to legislative authorization for its actions.>").

114 See Morrison, *supra* note 34, at 1703. Morrison applies the framework articulated by Professor Issacharoff and Pildes to the war on terror detention cases. See Samuel Issacharoff & Richard Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1 (2004) (articulating the basic theory that, in times of national security crisis, courts encourage joint cooperative action between

Executive authority or striking down sweeping government actions on civil libertarian grounds, the Court “has favored a middle path focused on “whether the executive has involved the legislature in the equation, and...whether the executive has remained within the bounds of the power granted it by the legislature.”¹¹⁵

According to Morrison, the Court will resist deferring to the Executive Branch if it believes the Executive has failed to adequately involve Congress and has deviated from the “core characteristics” of a “three-branch constitutional structure.”¹¹⁶

Morrison observes that the detainee decisions between 2004 and 2008 correspond to the court’s historical reluctance to support unilateral assertions of executive power during wartime.¹¹⁷ In *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004), the Court accepted the President’s contention that detention of individuals who fought against the U.S. in Afghanistan is an “exercise of the ‘necessary and appropriate force’” pursuant to the AUMF, but it rejected the President’s argument that the Executive could eliminate the role of the Judicial branch and insisted on cooperation among the branches: “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”¹¹⁸

In *Rasul v. Bush*, 542 U. S. 466, 473 (2004), the court rejected the President’s argument that Guantanamo Bay is outside the jurisdiction of the US, and it concluded that statutory habeas jurisdiction extends to the prison there. In the case decided before *Medellin -- Hamdan v. Rumsfeld* -- the court rejected the President’s argument that he has the authority to expand military commissions to try and punish captured enemy combatants outside of the laws of war in the absence of any statutory authorization.¹¹⁹ Finally, in *Boumediene v. Bush* – decided immediately after the Medellin decision – the Majority put a stake in efforts to strip detainees of habeas rights and remove the court from the determination of applicability of the constitution.¹²⁰

These cases highlight that the court will not just “privilege” cooperation during periods of

the legislative and executive branches).

115 *Id.*

116 *Id.* (“The leading judicial articulation of this approach is Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*. His familiar three-tiered framework provides that the President’s authority is at its ‘maximum’ when he acts with implied or express congressional authorization, at its ‘lowest ebb’ when he acts contrary to congressional prohibition, and in a ‘zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain’ when Congress has neither authorized nor prohibited the action”).

117 *Id.* at 1704 (“Precedents [like *Youngstown*] do not guarantee the Court will reject all presidential ‘power grabs’ that exceed legislative limits, but they do give the Court a robust basis for resisting”).

118 *Hamdi*, 542 U.S. 507, cited in Morrison, *supra* note 40, at 456-460 (“*Hamdi* and *Hamdan* both reveal that in war-on-terror cases pitting executive power against individual liberty, the Court has looked in particular to Congress. When the executive’s actions seem to the Court to fall within the scope of authority conferred by Congress, as in *Hamdi*, the Court has been inclined to sustain the actions; when the executive acts alone, as in *Hamdan*, the Court has been less inclined to defer.”); see also Morrison, *supra* note 34, at 1699-1700.

119 See *Hamdan*, 548 U.S. at 595-596 (“Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether *Hamdan*’s military commission is so justified.”). The court refused to address the President’s assertion that he has the “inherent authority” to convene military commissions.

120 See *Boumediene v. Bush*, 553 U.S. at 727, cited in syllabus at 3 (“To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say ‘what the law is.’”).

national security crises, but insist on it.¹²¹ The court will be more resistant to inferring congressional approval, and, according to Morrison's theory, less inclined to defer to the Executive during wartime, when the President "acts alone."¹²² *Medellin*, decided in the midst of the detainee decisions, could have been influenced by the court's hesitation to accommodate "unprecedented" assertions of presidential power without an express role of Congress.¹²³ *Hamdan*, described below, provides the key evidentiary link.

E. APPLYING *HAMDAN* TO *MEDELLIN*

Applying Morrison's theory to *Medellin*, one may argue that the Court in that case was unsettled with the President's unilateral effort to enforce a self-executing treaty based on a memorandum. The Court looked to Congress to see if it had ratified the Executive action in a way it had not prior to the detainee cases, because it had not yet fully grappled with the President's broad assertions of lawmaking authority. Where Congress had not authorized the President's actions, the court followed its pattern in the detainee cases and rejected unilateral claims of Executive authority.¹²⁴

Hamdan for our purposes is particularly important, because it was very much on mind of the Court in *Medellin*. To establish the principle the executive is the implementer of law, not maker of law, the Majority in *Medellin* cited *Hamdan*: "[T]he power to make the necessary laws is in Congress; the power to execute in the President."¹²⁵ Likewise, the court embraced the argument made by the Solicitor General of Texas, who specifically referenced *Hamdan* in oral argument: "I think a powerful parallel is the decision of this Court last year in *Hamdan*. In *Hamdan* the President was at the height of his war powers authority. And nonetheless, this Court concluded that he could not act contrary to the will of Congress."¹²⁶

In both *Hamdan* and *Medellin*, the United States argued that no role for Congress was necessary. In *Hamdan*, the Government argued that the President has "inherent authority to convene military commissions"¹²⁷ based on the President's authority as Commander-in-Chief¹²⁸ and the President's war powers under Article II, Section 2.¹²⁹ Without explicitly rejecting the President's

121 See Morrison, *supra* note 34, at 1704.

122 See Morrison, *supra* note 40, at 460.

123 *Id.*

124 See Morrison, *supra* note 34, at 1705 for specific application of *Youngstown* to *Medellin*.

125 See *Hamdan*, 548 U.S. at 592 (referring to question whether the President has inherent authority to convene military commissions "without the sanction of Congress").

126 Transcript of Oral Argument at 65-66, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-984.pdf.

127 See Brief for Respondents at 8, *Hamdan v. Rumsfeld*, 548 U.S. 557, (2006) (No. 05-184), 2006 WL 460875 ("Even if Congress's support for the President's Military Order were not so clear, the President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime--even in the absence of any statutory authorization.").

128 *Id.* at 20 ("the first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States.").

129 *Id.* ("The President's war power under Article II, Section 2, of the Constitution includes the inherent authority to

argument regarding inherent authority, the court in *Hamdan* concluded that “he may not disregard limitations that Congress has, in proper exercise of its own powers, placed on his powers.”¹³⁰ The Court required congressional authorization for the President to authorize charges such as conspiracy outside of the laws of war.¹³¹

Likewise, in *Medellin*, the President asserted unilateral authority -- based on *Garamendi* -- to preempt state law. The United States’ brief before the Court advanced strong unilateral assertions of executive power. For example, the United States argued that “[t]he President has authority to establish binding rules of decision that preempt contrary state law”¹³² and “[t]he President’s memorandum is sufficient to create a binding legal rule.”¹³³

The Court viewed *Medellin* in the same context as *Hamdan* -- it wanted to see active congressional assent to the imposition of a non-self-executing treaty on the states, particularly during a period of war, and it wanted to blunt the role of the President as lawmaker.¹³⁴ As Morrison observes, “in refusing to defer to the presidential memorandum, the Court reemphasized the centrality of historical practice in its analysis. In that respect, *Medellin* is a reaffirmation of a doctrine that resists unprecedented assertions of executive power.”¹³⁵

Perhaps the result would have been different had the United States signed an executive agreement with Mexico, which would have strengthened the ‘historical gloss’ argument. But because *Medellin* was decided at the exact moment the court was at its apex in looking for cooperation among the political branches, the President’s unilateral assertions of executive authority rang hollow before the court.

A reappraisal of executive lawmaking power in light of Morrison’s theory accounts for the different result in *Medellin* and *Garamendi*. The Court sought legislative participation in *Medellin*, whereas in *Garamendi* -- decided before the major detention cases -- it was prepared to countenance a more unilateral approach. According to one expert, the Court’s reading of *Garamendi* in *Medellin* “indicates that it had come to appreciate the fundamental threat to constitutional structure posed by a broad reading of *Garamendi* that gave preemptive effect to mere presidential policy.”¹³⁶ With the pattern of detainee cases established following *Garamendi*, the Court in *Medellin* resisted an unprecedented assertion of power. It also tightened application of the ‘historical gloss’ argument to

create military commissions even in the absence of any statutory authorization, because that authority is a necessary and longstanding component of his war powers.”).

130 *Hamdan*, 548 U.S.at 593.

131 *Id.*

132 *Presidential Power and Federalism, a Panel Discussion*, 6 GEO. J.L. & PUB. POL’Y 160, 173 (2008) (comments of Michael Ramsey) (discussing Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Medellin v. Texas*, 552 U.S. 491, No. 06-984, (2007) WL 1909462) (“On page five, it is asserted that the President has the authority to establish binding rules of decision--this is a quote: ‘The President has authority to establish binding rules of decision that preempt contrary state law.’ On page six, ‘The President’s memorandum is sufficient to create a binding legal rule.’ On page eighteen, ‘The Executive Branch is supplying the rule of decision in litigation implicating sensitive foreign policy.’”).

133 *Id.* at 173.

134 *See id.* (“[W]hat is happening here is the President is making law; that is, the President seeks, by his own authority, to take something that is not federal law and to make it federal law and thereby displace inconsistent state law.”).

135 Morrison, *supra* note 34, at 1706.

136 Ramsey, *supra* note 28, at 36.

justify unilateral executive action. After *Medellin*, courts may seek more than Congressional silence to affirm a “historical gloss.”

PART II: CONGRESSIONAL SILENCE AND *GARAMENDI*

The *Garamendi* opinion raises two other related but distinct issues, which I will address in parts II and III of this article. First, the *Garamendi* majority’s interpretation of congressional silence as assent raises questions regarding how to interpret legislative inaction. At a minimum, it constitutes a problematic view of the legislative process. Second, the decision left unclear how to formalize executive policy, which, in turn, leaves ambiguous the standards upon which to measure whether a state law intrudes on the President’s foreign affairs authority to resolve claims.

A. *GARAMENDI* AND THE COURT’S VIEW OF ACQUIESCENCE

A key factor for the Court’s approval of the President’s preemption of state law in *Garamendi* was the ‘historical gloss’ of congressional acquiescence to claims settlement. The Court concluded that unexercised congressional authority gives the president power to preempt state law: “[i]n sum, Congress has not acted on the matter addressed here. Given the President’s independent authority in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval.”¹³⁷

The Court relied extensively on *Dames & Moore*, which gave wide berth to executive based on character and acquiescence of legislation:

We cannot ignore the general tenor of Congress’ legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially . . . in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive.¹³⁸

This approach places less emphasis on the political dynamics of Congress and more on what Congress actually produces in the foreign policy area; it is a flawed approach. Congress is silent in the foreign affairs arena for any number of reasons. According to Koh, Congress is often silent on the President’s actions in foreign affairs because of “legislative myopia, inadequate drafting,

137 See *Garamendi*, 539 U.S. at 414, 429 (stating that the President has independent constitutional authority to act in some areas without need of congressional action); see also Denning, *supra* note 7, at 886 (“Employing scanty analysis, the Court found neither statute material to its resolution.”).

138 *Dames & Moore*, 453 U.S. at 678; see also Bradley, *supra* note 4, at 1103-1109 (providing an historical overview of judicial reliance on a doctrine of the historical gloss on executive power); KOH, *supra* note 3, at 117 (citing multiple reasons for congressional failure to oppose the actions of the Executive in the arena of foreign policy).

ineffective legislative tools, or sheer lack of political will.”¹³⁹ Unexercised congressional power should not create power in the President or be interpreted as acquiescence, according to Koh.¹⁴⁰

In more positive terms, Congressional silence is a political prerogative of the legislative branch. Congress often will not speak on issues of great controversy or that are not yet resolved in courts, particularly when there is minimal political benefit in doing so or ambiguous constitutional authority to act. This is particularly true in the foreign affairs realm, where there is often little political benefit and high cost for Congress to act. For example, Congress frequently fails to pass a Foreign Relations Authorization bill as a result of budgetary and political sensitivities regarding the State Department’s budget, and it has not passed a foreign assistance authorization bill since 1985. Congressional inaction should not be viewed here as acquiescence, but rather quite the opposite – the issues involved in the legislation are sufficiently complex to render Congress silent in the matter.¹⁴¹

Empirically, the *Garamendi* court’s analysis of congressional acquiescence in *Dames & Moore* was simply wrong. The Court reasoned that there is a ‘historical gloss’ of congressional acquiescence to private claims adjudicated by the Foreign Claims Settlement Commission. Yet more than half of cases addressed by claims settlement commission stem from legislation, not Executive referral. The Commission has completed seven programs pursuant to executive agreement between the U.S. and a foreign government and fourteen claims programs pursuant to specific legislation.¹⁴²

139 See KOH, *supra* note 3, at 117, 139. Koh criticizes the Court’s reliance in *Dames & Moore* on a “disturbing three-part technique of statutory construction,” the heart of which is a flawed reading of congressional acquiescence. According to Koh, the three flaws of Rehnquist’s opinion in *Dames & Moore* are as follows: first, Justice Rehnquist did not demand a “clear statement” that Congress had authorized the president to suspend individual claims, “despite the undeniable impact of the president’s act on individual rights.” This mistake is all the more glaring, according to Koh, given that Congress had legislated in the claims settlement context. Second, the Court interpreted IEEPA as unambiguously authorizing the Executive’s proposed action, notwithstanding legislative history to the contrary. Third, rather than interpreting congressional silence on the suspension of claims as a check on the President’s power to unilaterally act, Rehnquist reconfigured congressional silence as acquiescence.

140 See *id.* at 140 (“*Dames & Moore* also sent the *president* the wrong message. In responding to perceived national crises, the Court suggested, the president should act first, then search for preexisting congressional blank checks, rather than seek specific prior or immediate subsequent approval of controversial decisions.”); see also Reinstein, *supra* note 3, at 333 (“unexercised congressional power does not create power in the President.”). Koh’s critique highlights that judicial inference of congressional silence is not a new issue. This dynamic is present even in the Steel Seizure cases of *Youngstown*, in which the Court inferred from Congressional omission of proposals to amend the Labor Act to include seizure remedies that Congress opposed such remedies.

141 Regrettably, Congressional silence or, at times, dysfunction, has been used by the Executive Branch as an excuse to press forward with policies ultimately inconsistent with a separation of powers framework. For example, Oliver North justified funding the Contras on grounds that Congress simply was too dysfunctional to pass a budget bill to proceed with funding for the Contras. Colonel North overlooked the fact that in that instance (a) Congress had spoken unambiguously on the issue; and (b) Congressional “paralysis” actually reflected deep ambivalence on policy matters. See National Security Council Memorandum from Oliver L. North to Robert C. McFarlane, “Fallback Plan for the Nicaraguan Resistance,” TOP SECRET, March 16, 1985, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB210/4-North%20Fallback%20memo%203-16-85%20%28IC%2000952%29.pdf>.

142 See Foreign Claims Settlement Commission, 2011 ANNUAL REPORT section V, available at <http://www.justice.gov/fcsc/annrep11.pdf>. The Commission has jurisdiction to administer programs under Title I of the International Claims Settlement Act, 22 U.S.C. 1623(a)(1)(B) for claims arising out of nationalization or other taking of property that are

In “converting legislative silence into consent,” the Majority misconstrued congressional silence as acquiescence.

In the claims context, congressional silence tells us little about the intended preemptive effects of agreements or policies or overall congressional intent.¹⁴³ Regarding Holocaust insurance, Congress held two oversight hearings before 2003. Because the international claims commission to settle Holocaust-era insurance claims was just starting its work, few Members had defined views on the issues. Congressional “silence” was likely the result of unfamiliarity with the insurance issue and uncertainty regarding how to handle the insurance claims of Holocaust-era policy holders, not acquiescence to the Administration’s policy.

In fact, extensive congressional debate post *Garamendi* reveals a highly divided Congress. Insurance policy holders sought legislation to overturn the *Garamendi* decision and sue European insurance companies. On one side were survivors who sought legislation to authorize a cause of action. On the other side were Jewish groups concerned about the impact of the legislation on ongoing reparations and who questioned the premise of unpaid policies. The House Foreign Affairs and Financial Services Committees held hearings on the bill in 2008 and marked up conflicting texts. The bill stalled again in the 111th Congress and, despite a markup in the House Foreign Affairs Committee, never reached the House floor in the 112th. Far from acquiescing to the Administration’s policies, Members sought to avoid a highly controversial issue that split the Jewish community and, in practical terms, attracted protesters at fundraising events and congressional functions. House Members were particularly sensitive to the possibility of a fight among Jewish organizations that would manifest itself on the House floor. Given conflicting congressional action following *Garamendi*, the notion that Congress ‘never questioned’ the Executive action or wholly supported the Executive practice, is misplaced.

The result of the Court’s reliance on congressional “silence” in *Garamendi* was that Congress ended up the loser in the decision.¹⁴⁴ The Court took a different approach in *Hamdan*. It conducted a close reading of the Detainee Treatment Act and concluded that congressional silence regarding the Administration’s proposed amendment to the UCMJ generated a negative inference:

A familiar principle of statutory construction, relevant both in *Lindb* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. ... (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the

included within the terms of a claims agreement (executive agreement) between the U.S. and a foreign government.

143 See Denning, *supra* note 7, at 889 (highlighting the level of activity and prior knowledge Congress held before the passage of the Holocaust Commission Act, but was unaware of the full extent of the plans of the Executive regarding the same issue the law was passed to address).

144 See *id.* at 905 (“The President’s ability to pursue a unilateral foreign policy agenda is enhanced and Congress’ role in deciding foreign policy priorities is diminished by the constitutional innovation of executive preemption”); see also Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 147 (2009) (“Effective international lawmaking requires not just an unfettered negotiator but also widespread political support for the deal the negotiator strikes. When an agreement is concluded behind closed doors, with little or no input from Congress or the public at large, it can be difficult to build political support for the agreement that results.”).

same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).¹⁴⁵

The Court went so far as to characterize the Government’s explanations of congressional inaction on the proposed amendment as “straining credulity”. It analyzed congressional consideration of the reaches of the proposed amendments and determined that Congress’ rejection of “the very language that would have achieved the result the Government urges” undermined the Government’s rationale. In short, it read congressional silence as rejection, not as approval, of the President’s approach.

The Court in *Medellin* narrowed *Garamendi*’s extension of *Dames & Moore*, a decision which, according to Harold Koh, “championed unguided executive activism and congressional acquiescence in foreign affairs over the constitutional principle of balanced institutional participation.”¹⁴⁶

Given the court’s interest in *Medellin* to ensure cooperation among the political branches, the Majority may have been unwilling to view congressional silence regarding the memorandum or the specific treaties in question as acquiescence.

III. STANDARDS FOR IMPLEMENTING THE FOREIGN AFFAIRS PREEMPTION DOCTRINE

A final criticism of *Garamendi* rests in its unclear approach towards preemption. Specifically, the Court in *Garamendi* left little clarity regarding what exactly constitutes an “express executive branch policy,” and it did not articulate a clear standard for foreign affairs preemption.¹⁴⁷ As a result, courts have applied the conflict preemption test unevenly since *Garamendi*.¹⁴⁸ This corresponds to a pattern of ill-defined preemption tests proffered by the Court.¹⁴⁹

The Majority’s decision in *Garamendi* was premised on a conflict preemption test revived from *Zschernig*, which requires a state law to “yield when it conflicts with an express federal foreign

145 *Hamdan*, 548 U.S. at 578.

146 KOH, *supra* note 3, at 140.

147 *See* Pytnia, *supra* note 4, at 1429 (“The court failed to clarify the scope of the dormant foreign affairs preemption doctrine, and it relied on a fact-specific balancing test rather than articulating a clear standard for foreign affairs preemption cases.”); *see also* Buys, *supra* note 7, at 207 (“While the Ninth Circuit corrected this problem upon rehearing, there still exists much uncertainty as to what actions by the federal government are sufficient to preempt state law and what room, if any, is left for states to act, and especially to express opinions on U.S. foreign policy issues.”).

148 *See* Petition for Writ of Certiorari, *Arzoumanian*, *supra* note 44, at 17 (“[the Movsesian decision] presents this Court with a perfect vehicle to clarify the foreign affairs preemption doctrine.”). The petition highlights that the status of the foreign affairs doctrine remains unsettled after *Garamendi*. Courts interpret it differently, with some explicitly rejecting *Medellin*’s core rationale that foreign policy preemption applies where there is an executive agreement. Likewise, petitioner’s writ of certiorari in *Garamendi* flags uneven application of *Medellin*’s requirement for an executive agreement. *See, e.g.,* Central Valley Chrysler-Jeep v. Witherspoon, 456 F.Supp.2d 1160, 1179 (E.D. Cal 2006) (“[i]f the Executive Branch statements are competent evidence of what our foreign policy is, the court sees no reason to limit preemption to foreign policy as expressed in statutes or executive agreements”); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72-73 (2d Cir. 2005); *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10, 16 (D.D.C. 2005).

149 *See* Goldsmith, *supra* at note 43, at 3 (“[t]he Supreme Court’s preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear. And their decisional outcomes are difficult to cohere.”).

policy.”¹⁵⁰ The Court relied on an intricate multi-step test to determine whether a state law conflicts with federal policy, and the policy may be manifest through “a treaty, federal statute, or express executive branch policy.”¹⁵¹

The Majority in *Garamendi* concluded there is a federal policy based on statements from Deputy Secretary of the Treasury Stuart Eizenstat, along with signings of executive agreements on Holocaust compensation.¹⁵² Justice Ginsburg in her dissent argued the Majority was too quick to find an executive policy based on the statements of lower-level officials, and she lamented the Majority’s refusal to conduct a textual analysis of the executive agreements at hand, all of which were devoid of a preemption clause.¹⁵³

Medellin likewise did not articulate a standard to formalize an Executive policy, nor did it need to, since the memorandum in *Medellin* made the President’s policies quite explicit. The Majority simply limited *Garamendi* and the exercise of the President’s preemption authority to claims settlement cases, where there is an executive agreement.¹⁵⁴ The decision implies that an executive agreement is a prerequisite for purposes of preemption, but given its limited purpose in invalidating the President’s reliance on his foreign affairs authority, the court did not elaborate on the specific test for preemption.

The result of silence regarding what actually constitutes a “federal policy” is uncertain implementation of the *Garamendi* and *Medellin* decisions. The 2nd Circuit, for example, relegated *Medellin* to a footnote in upholding a district court decision preempting litigation against *Generali* where no executive agreement exists.¹⁵⁵ The Court – noting that Italy had not signed an executive agreement with the United States in the case at hand -- characterized the executive agreements as a “product” of the federal policy, not as the definition of it.¹⁵⁶ Nonetheless, to “erase any doubt”

150 *Movsesian II*, *supra* note 44.

151 American International Law Cases 1961 (4th Ser., Oceana 2009); *see also* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010) (explaining that under field preemption, a state law may be preempted if it intrudes on the Executive’s foreign affairs power without addressing a traditional state responsibility); *Movsesian*, 670 F.3d at 1072 (“The existence of this general foreign affairs power implies that, even when the federal government has taken no action on a particular foreign policy issue, the state generally is not free to make its own foreign policy on that subject.”).

152 *Garamendi*, 539 U.S. at 422-23.

153 *See id.* at 441-42.

154 *See Medellin* 552 U.S. at 531. (As discussed in part II, the Majority concluded that the preemption authority affirmed in *Garamendi* is limited to “narrow set of circumstances,” where there is an executive agreement to settle civil claims between American citizens and foreign governments or foreign nationals, and where Congress has never questioned the executive exercise of authority).

155 *See Weiss v. Assicurazioni Generali*, 592 F.3d 113, 119 (2nd Cir. 2010) (holding that a foreign affairs policy – even without an executive agreement – is sufficient to preempt a lawsuit against an insurance company, and it dismissed *Medellin*’s language in a mere footnote (“We find nothing inconsistent . . . in the reference in *Medellin v. Texas*, 552 U.S. 491 . . . to ‘cases in which [the Supreme Court] has upheld the authority of the President to settle foreign claims pursuant to an executive agreement.’”). The 2nd Circuit observed that executive agreements were merely exemplars– but not dispositive – of a federal policy according to the Court in *Garamendi*).

156 *See Generali*, at 118 (“Rather, the Court viewed the executive agreements as the product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it.”).

regarding executive policy given uncertainty regarding the executive agreements, the court solicited a statement from the Secretary of State on the foreign policy of the United States: “The Government has twice made perfectly clear that ‘[i]t has been and continues to be the foreign policy of the United States that the [ICHEIC] should be regarded as the exclusive forum and remedy for claims within its purview,’ and that this policy applies to claims against Generali.”¹⁵⁷

In *Morsesian*, the Ninth Circuit concluded that foreign affairs power may trump state law, but the court relied on Presidential speeches, various press statements, and letters to divine a foreign policy, not on an executive agreement.¹⁵⁸ In that case, California passed a statute similar to *Garamendi* to provide relief for Armenian insurance policy-holders.¹⁵⁹ The Ninth Circuit first invalidated the law based on the *Garamendi* decision, even though there was no executive agreement, statute, or explicit statement of Administration policy.¹⁶⁰ The decision left open the possibility that statements by the White House could be sufficient to preempt state law.¹⁶¹

In a subsequent en banc review, the Ninth Circuit reaffirmed its original decision. It concluded that the California statute “expresses a distinct point of view on a specific matter of foreign policy” and, as a result, “intrudes on the federal government’s exclusive power to conduct and regulate foreign affairs.”¹⁶² To reach that conclusion, the Ninth Circuit evaluated Turkey’s ongoing concern regarding use of the term “genocide” and reviewed articles regarding the Administration’s cautious avoidance of that term.¹⁶³ It made no mention of a requirement for an executive agreement in claims settlement, nor did it identify a uniform test for preemption.

Finally, in the *Von Saher* case, the 9th Circuit explicitly rejected an executive agreement as a prerequisite for preemption in claims settlement. In that case, the court invalidated a California statute extending the statute of limitations on Holocaust-era art claims on grounds that the statute intruded on federal authority “to negotiate and establish” settlements to recovery Holocaust-era assets.¹⁶⁴ The court dismissed arguments that World War II-era agreements were sufficient to

157 *Id.* at 119.

158 *See Mosesian I*, 578 F.3d at 1061 (“The Executive Branch chose to address the issue through the medium of presidential speeches, not legislation: ‘The President believes that the proper way to address this issue and express our feelings about it is through the presidential message and not through legislation What [President Bush] wants is for the presidential message to be the thing that stands for the American response to this, not legislation passed by the House of Representatives.’ *See* Press Release, White House Office of the Press Secretary, Press Briefing by Dana Perino (Oct. 11, 2007). California has done what Congress declined to do: it has defied the President’s foreign policy preferences, and has undermined the President’s diplomatic power.”).

159 *Morsesian I*, 578 F.3d at 1054-55.

160 *Id.* at 1062 (“As in *Garamendi*, the express presidential foreign policy and the clear conflict raised by § 354.4 are ‘alone enough to require state law to yield.’”).

161 *See Buys, supra* note 7, at 224-227 (analyzing “whether presidential policy alone could have the power to preempt state law.”).

162 *See Mosesian II*, 670 F.3d at 1076-77 (“Section 354.4 has ‘more than some incidental or indirect effect’ on foreign affairs. . . . The statute expresses a distinct political point of view on a specific matter of foreign policy. It imposes the politically charged label of ‘genocide’ on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and expresses sympathy for ‘Armenian Genocide victim[s].’”).

163 *Id.*

164 *See Von Saher*, 592 F.3d at 967 (“The recovery of Holocaust-era art affects the international art market, as well as foreign affairs. Many have called for the creation of an international registration system, and a commission to settle

preempt state law and instead relied on the broad principle that only the federal government is capable of reaching international settlements related to Holocaust assets. There was no mention of *Medellin's* requirement of a "longstanding practice" of claims settlement or congressional acquiescence.

Bottom line, courts rely on a variety of interpretive tools to infer an executive policy, including lower-level officials' statements, statements of interest from the executive branch, Presidential speeches, and executive agreements. The absence of a formal test might not be problematic, since flexibility in formalizing an executive policy could be useful. Nonetheless, lack of uniformity means that state laws could be preempted based on differing standards.

CONCLUSION

This article constitutes an effort to examine the scope of the Executive's power to preempt state law where Congress has taken no action. In the realm of foreign affairs, where both Congress and the President share power, at what point does Congress take the "lead role," or at least play a critical function, in the Executive's implementation of foreign policy?

Medellin reveals that the answer may be highly contextual. To the extent the U.S. continues to play a superpower role globally, the Executive will likely continue to play an outsized role in foreign affairs.¹⁶⁵ However, during periods where the Executive is operating with a strong hand, such as a period of armed conflict, the Court may want to see greater congressional involvement in foreign policy matters, including preemption of state law.¹⁶⁶

Similarly, the Court may read congressional inaction contextually. Congress has a tough time legislating in foreign affairs, particularly where a problem lacks an easy solution, such as in the Holocaust insurance context. The Court, as it did in *Garamendi*, may not allow congressional refusal or inability to take action, to inhibit claims settlement for a large group of individuals.¹⁶⁷ Yet where there is a pattern of Executive efforts to bypass Congress, or where the Executive claims an outsized role in foreign affairs, the Court may take a more stringent view of the President as lawmaker, as it did in *Medellin*.

These cases remain important as the Court takes on cases implicating Executive prerogative in foreign affairs. For example, the Supreme Court ruled in 2012 on the justiciability of a case involving legislative constraints on the President's authority to issue passports, and it recently heard oral arguments in the same case. The *Zivotofsky* case involved a U.S. citizen born in Jerusalem who sought to enforce statutory provisions regarding designation of his birthplace as Israel. Although the decision will focus on the President's recognition power, at heart it involved questions regarding

Nazi-looted art disputes. Only the federal government possesses the power to negotiate and establish these or other remedies with the international community.").

165 See David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 534 (2012) ("The growing power of the President in foreign relations reflects the emergence of powerful doctrines that interpret the world and seek to justify unilateral action as essential to preserving security.").

166 See Morrison, *supra* note 34.

167 See *Von Saber*, 592 F.3d at 967 ("[T]he federal government, 'representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.'").

Congressional authority to legislate in foreign affairs.¹⁶⁸

Beyond the judicial context, recent incidents involving Presidential use of force highlight questions regarding the lawfulness of unilateral executive action abroad. For example, many Members expressed frustration with the President's reliance on the 2001 AUMF to wage armed conflict against ISIL, *sans* explicit congressional approval.¹⁶⁹ Likewise, the Iran nuclear negotiations will also constitute a key friction point between executive and legislative prerogative in foreign affairs. An outstanding question remains under what circumstances Congress may take the lead in foreign policy.

Finally, in a globalized world, the notion of a clean division between federal and state activity in foreign affairs – first articulated in *Curtiss Wright* and reaffirmed in *Garamendi*—may no longer be feasible.¹⁷⁰ The Court simply cannot expect states to refrain from regulation of matters that touch on foreign affairs given the far commercial reach of businesses into states. The practical and constitutional line between State and Federal, executive and legislative responsibilities in foreign affairs remains unclear, but the two decisions discussed in this article provide a preview of the inevitable conflicts to come as both states and the Executive seek to shape the United States' external affairs.

168 See *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012); see also Note, *Political Question Doctrine – Designation of Passport Applicant's Birthplace: Zivotofsky ex rel Zivotofsky v. Clinton*, 126 HARV. L. REV. 307 (2012).

169 See Sen. Tim Kaine, *Obama Must Get Congress's Backing for the Fight Against ISIS*, N.Y. TIMES, Sept. 15, 2014, available at http://www.nytimes.com/2014/09/16/opinion/obama-must-get-congresss-backing-for-the-fight-against-isis.html?_r=0. Members raised similar concerns following the President's use of force in Libya. See Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES, (Mar. 21, 2011), available at <http://www.nytimes.com/2011/03/22/world/africa/22powers.html> (“Some Democratic [and Republican] lawmakers . . . complained . . . that Mr. Obama had exceeded his constitutional authority by authorizing the attack without Congressional permission.”).

170 See Petition for a Writ of Certiorari, *Arzoumanian*, *supra* note 44, at 26 (“This rule has dangerous implications in today's exceedingly globalized and interconnected world. . .”).