

CONSTITUTIONAL HARDBALL YES,
ASYMMETRIC NOT SO MUCH

*David E. Bernstein**

This Response addresses Professors Joseph Fishkin and David Pozen’s Asymmetric Constitutional Hardball. Fishkin and Pozen argue that Republicans have engaged in “asymmetric constitutional hardball” since 1993. This Response accepts the authors’ contention that Republicans have increasingly engaged in constitutional hardball but casts doubt on the purported asymmetry.

Part I questions whether one of the authors’ primary examples of Republican constitutional hardball—government shutdowns resulting from tensions over spending and other matters between Presidents Obama and Clinton on the one hand and congressional Republicans on the other—supports the authors’ thesis, especially given that the shutdowns could at least as easily be blamed on the Presidents as on Congress.

Part II highlights important examples of Democratic constitutional hardball, especially hardball by the Obama Administration, that are omitted from the authors’ analysis. Part II also briefly reviews reasons why Democrats have been increasingly inclined toward constitutional hardball.

Part III discusses in some detail a particularly important example of Obama Administration constitutional hardball—its efforts to reach and implement, over significant opposition in Congress, a nuclear agreement with Iran. These efforts circumvented Congress and involved lying to the public, engaging in legally aggressive lifting of sanctions on Iran, and even spying on the agreement’s domestic opponents.

INTRODUCTION

Professors Joseph Fishkin and David Pozen (“the authors”) recently wrote an intriguing essay on “constitutional hardball.”¹ As a result of

* University Professor, Antonin Scalia Law School, George Mason University. The author thanks Jack Goldsmith, David Pozen, David Schleicher, and Ilya Somin for their helpful comments and suggestions.

1. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 *Colum. L. Rev.* 915 (2018). The authors provide a lengthy and complex explanation of what constitutes constitutional hardball. See *id.* at 920–22. This can fairly be summarized as actions by government officials that deviate from widely accepted norms of official behavior and strain formal or informal constitutional convention for partisan, ideological,

increased political polarization, the authors posit, government officials—defined to include elected members of Congress—from both parties are increasingly playing constitutional hardball.² The authors add, “For a quarter of a century, Republican officials have been more willing than Democratic officials to play constitutional hardball.”³

The authors provide a compelling look at the ways in which Republicans have engaged in constitutional hardball over the past twenty-five years.⁴ They also provide an engaging and generally persuasive explanation of why hardball tactics have gained traction among Republican officeholders.⁵ The authors admit uncertainty as to how and whether one can accurately measure if one party’s officials have been greater practitioners of constitutional hardball.⁶ The authors also acknowledge that their “political location,” presumably on the left, may make them “more attuned to examples of hardball practices [they] see on the right.”⁷

This Response contends that it is not clear that Republicans have outpaced Democrats in playing constitutional hardball.⁸ Indeed, the opposite conclusion may be warranted. This Response will not attempt a comparison of dubious empirical validity of the levels of Democratic and

or political advantage. Whether this is in fact the best, or even a good, definition of constitutional hardball is beyond the scope of this Response. Rather, this Response is a rebuttal to the authors on their own terms.

2. See *id.* at 918.

3. *Id.*

4. See *id.* at 930–34.

5. See *id.* at 943–75.

6. See *id.* at 927.

7. *Id.* at 928 (internal quotation marks omitted) (quoting Mark Tushnet, *Constitutional Hardball*, 37 *J. Marshall L. Rev.* 523, 524 n.4 (2004)).

8. The authors allege “a rough consensus . . . among analysts of Washington politics that Republicans have a decided edge in constitutional hardball.” *Id.* at 936. But the authors cite Jonathan Bernstein, Jacob Hacker, Paul Pierson, Thomas Mann, and Norman Ornstein, who are all on the progressive side of the American political spectrum. *Id.* at 936 nn.89–91. Ornstein defines himself as a moderate, but he is widely thought of as the conservative American Enterprise Institute’s “house liberal.” See Norman Ornstein, *McConnell’s Own Words on Senate Gridlock*, Roll Call (July 24, 2012), <http://www.rollcall.com/news/McConnells-Own-Words-on-Senate-Gridlock-216401-1.html> [<https://perma.cc/5W7Q-ETAW>] (calling himself “a raging moderate” and not “ultra, ultra liberal”). Indeed, the authors cite two articles that were published in the progressive journal *American Prospect*. Fishkin & Pozen, *supra* note 1, at 936 nn.89–90 (citing Jonathan Bernstein, *Playing Constitutional Hardball with the Electoral College*, *Am. Prospect* (Jan. 7, 2013), <https://prospect.org/article/playing-constitutional-hardball-electoral-college/> [<https://perma.cc/6H3N-CJ8Y>]; Jacob S. Hacker & Paul Pierson, *No Cost for Extremism*, *Am. Prospect* (Apr. 20, 2015), <http://prospect.org/article/no-cost-extremism> [<https://perma.cc/452X-YF63>]). That doesn’t make the analysts wrong, but it does raise the question as to whether this “rough consensus” is actually a consensus among Democratic partisans subject to the biases the authors delineate. See Fishkin & Pozen, *supra* note 1, at 927–28.

Republican constitutional hardball.⁹ Rather, it will delineate some important omissions and questionable assertions in the authors' essay. Taken together, these observations, while accepting the authors' thesis that Republican officials have increasingly engaged in "constitutional hardball," cast doubt on the purported asymmetry.

Part I of this Response discusses one of the authors' primary examples of Republican constitutional hardball—government shutdowns resulting from tensions over spending and other matters between Presidents Obama and Clinton on the one hand and congressional Republicans on the other.¹⁰ It begins by discussing whether these shutdowns are properly described as constitutional hardball by the Republicans. Part I also notes that congressional Democrats engaged in similar tactics, albeit to increase rather than limit government spending, during the Reagan and George H.W. Bush Administrations.

Part II highlights important examples of Democratic constitutional hardball, especially hardball by the Obama Administration, that are omitted from the authors' analysis. It disputes the authors' claim that when Democrats have engaged in constitutional hardball, they have been more diffident and apologetic about doing so.¹¹ Part II also briefly reviews reasons why Democrats have been increasingly inclined toward constitutional hardball, ranging from the felt need to achieve progressive goals during the Obama Administration to the dramatically increased percentage of consistent liberals among Democratic voters.

Part III discusses in some detail a particularly important example of Obama Administration constitutional hardball: its efforts to reach and implement, over significant opposition in Congress, a nuclear agreement with Iran. These efforts circumvented Congress and involved lying to the public, engaging in legally aggressive lifting of sanctions on Iran, and even spying on the agreement's domestic opponents.

9. Even if one could agree on which incidents count as constitutional hardball, it's not at all clear how to measure the significance of each instance, or who is to blame. For example, how does one weigh the Democrats denying a D.C. Circuit confirmation vote to Miguel Estrada versus the Republicans subsequently denying Merrick Garland a Supreme Court confirmation vote? Compare Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, *Wall St. J.* (Jan. 3, 2017), <https://www.wsj.com/articles/President-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952> (on file with the *Columbia Law Review*), with Sean Loughlin, *GOP Fails to End Democratic Filibuster on Estrada*, *CNN* (Mar. 6, 2003), <http://www.cnn.com/2003/ALLPOLITICS/03/06/estrada/index.html> [<https://perma.cc/JCU2-TG83>]. Is the Garland example more significant because the Supreme Court is more important, or is the Estrada example more significant because it happened first and weakened the norms that might have prevented the Garland situation? The author thanks David Schleicher for this example.

10. See, e.g., Fishkin & Pozen, *supra* note 1, at 933, 961 & n.183, 963 & nn.189–194.

11. *Id.* at 936.

I. "SHUTTING DOWN THE GOVERNMENT"

A. *Who to Blame for a "Shutdown"*

So-called shutdowns and threatened shutdowns of the government by Republicans in Congress loom large in the authors' analysis. These shutdowns are mentioned frequently in both the text and footnotes.¹² The authors seem to believe that shutting down the government is something Republicans—but not Democrats—are inclined to do. Indeed, the authors suggest that until recently, Democrats shutting down the government to get leverage in a policy dispute was "unthinkable."¹³ The authors also seem to believe that government shutdowns and threats thereof were a more or less novel invention of Speaker Newt Gingrich and House Republicans after the GOP took control of Congress in 1995.¹⁴ Both of these beliefs are false.

Before elaborating on why those beliefs are false, it is worth pausing to examine the proposition that when Congress refuses to accede to the President's budgetary demands, as occurred in the showdown between the Gingrich-led Republicans and President Clinton in 1995,¹⁵ it means that Congress and not the President is shutting down the government. From a purely constitutional perspective, if Congress passes a spending bill that would keep the government open and the President vetoes it, then the President—not Congress—has shut down the government. At a minimum, if the President and Congress are unable to reach a compromise that would lead the President to sign a spending bill passed by Congress, both the President and Congress played constitutional hardball to shut down the government.

Let us assume, however, as the authors apparently do, that if Congress refuses to agree to the President's demands and the President in turn vetoes legislation that would keep the government open, it means that Congress is shutting down the government. If so, there were several shutdowns (a) orchestrated by Democrats and (b) that preceded the Gingrich–Clinton confrontation. Contrary to the authors' narrative, not only was it never "unthinkable" for Democrats to shut down the government

12. See, e.g., *id.* at 933, 961 & n.183, 963 & nn.189–194.

13. *Id.* at 919 n.13 ("In January 2018, Senate Democrats took the once-unthinkable (for Democrats) step of shutting down the government . . .").

14. See *id.* at 927 & n.48.

15. See Alison Mitchell, Clinton, Gingrich and Dole Pledge a Deal on Budget, *N.Y. Times* (Dec. 20, 1995), <http://www.nytimes.com/1995/12/20/us/clinton-gingrich-and-dole-pledge-a-deal-on-budget.html> (on file with the *Columbia Law Review*).

to pursue a policy objective, congressional Democrats did so almost as soon as it became possible.¹⁶

B. *Examples of Democratic Shutdowns*

Before 1980, gaps in government funding did not necessarily result in cessation of any government operations. In 1980, federal officials determined that under the Anti-Deficiency Act,¹⁷ a funding gap legally required a full or partial shutdown of the portions of government that had run out of funding.¹⁸ In 1981, the Democrat-controlled House refused to agree to President Reagan's budget demands, resulting in a four-day shutdown when Reagan vetoed a compromise bill that passed the House and Senate.¹⁹ During the remaining Reagan and Bush years, the government shut down eight times after congressional Democrats refused to agree to the budgetary or policy demands of the Republican President.²⁰ During the Reagan years, the media often portrayed these incidents as Reagan shutting down the government.²¹ For the sake of consistency, however, if congressional Republicans shut down the government when they refused to pass spending bills acceptable to Presidents Clinton and Obama, then the Democrats in Congress shut down the government when they declined to pass spending bills acceptable to Presidents Reagan and Bush. This undermines the notion that congressional Republicans beginning in 1995 have played a uniquely rough and novel game of political hardball by threatening and occasionally following through with government shutdowns.²²

16. See *infra* section I.B. Additionally, Professor Peter Shane notes that in 1973, Senate Majority Leader Mike Mansfield told President Nixon he would block passage of all major appropriations bills unless Nixon agreed to a ban on any further funding for military operations in Southeast Asia. Peter M. Shane, When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups," 12 *Cornell J.L. & Pub. Pol'y* 503, 519 (2003).

17. 31 U.S.C. §§ 1341, 1342, 1349–1351, 1511–1519 (2012) (originally enacted as Anti-Deficiency Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251).

18. Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation, 4A *Op. O.L.C.* 16 (1980); see also Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 *Op. O.L.C.* 1, 10 n.12 (1981).

19. Dylan Matthews, Government Shutdown 2018: All 18 Previous Government Shutdowns, Explained, *Vox* (Jan. 19, 2018), <https://www.vox.com/policy-and-politics/2018/1/19/16905584> [<https://perma.cc/7KBP-YGG9>].

20. *Id.*

21. See, e.g., David Shribman, Federal Offices Shut Down as Workers Are Sent Home, *N.Y. Times* (Nov. 24, 1981), <https://www.nytimes.com/1981/11/24/us/federal-offices-shut-down-as-workers-are-sent-home.html> (on file with the *Columbia Law Review*) (describing "the first time the Government had ever begun to shut down its operations" and Reagan's pressure on Congress to act as "[t]he Reagan move").

22. Shane argues that Gingrich's efforts were novel because the prior shutdowns did not last as long and were not accompanied by as much partisan bluster. See Shane, *supra*

Two caveats are in order. First, the 1995 shutdown was unusual in that some congressional Republicans, including Speaker Gingrich, made public statements essentially welcoming a shutdown.²³ That may make the 1995 shutdown different in degree if not in kind from earlier shutdowns and is evidence that could reasonably be used to shift significant responsibility for the shutdown away from the President. Second, the authors' focus is on the twenty-five-year period beginning in 1993. While that does not excuse ignoring the Reagan and Bush shutdowns, it leaves open the possibility that in the relevant time period congressional Republicans were significantly more likely to play hardball with shutdowns than were the Democrats.²⁴

II. EXAMINING DEMOCRATIC CONSTITUTIONAL HARDBALL

The authors' claim of asymmetry depends on two assertions. First, during the relevant period, Republicans were more likely to engage in constitutional hardball. Second (and secondarily), when Democrats did engage in constitutional hardball, they typically did so diffidently and apologetically, more as a desperate reaction to Republican intransigence than as a willful strategy. This Part critically examines these assertions.

A. *Democratic—Especially Obama Administration—Constitutional Hardball*

The authors acknowledge several “arguable examples of Democratic constitutional hardball.”²⁵ These include the Clinton Administration's assertions of executive privilege from 1995 to 1999, filibusters of

note 16, at 518–20. The first point may simply reflect Reagan's and Bush's greater willingness to compromise relative to Clinton. The second point seems superfluous to the issue of whether Democrats were also willing to shut down the government. Of course, as a rule, the Democrats shut down the government to try to get more spending, while the Republicans attempted to get a reduction in spending. That, however, goes only to motive, not to whether each side was willing to play constitutional hardball in pursuit of its objectives.

23. Fishkin & Pozen, *supra* note 1, at 963.

24. There are two other rather obvious alternative explanations for the absence of government shutdowns during the George W. Bush Administration. First, Republicans controlled the House for the first six years of Bush's presidency, and they controlled the Senate for approximately four and a half of those six years. Russell D. Renka, *Party Control of the Presidency and Congress, 1933–2010*, Se. Mo. State Univ. (Jan. 13, 2010), <http://cstl-cla.semo.edu/rdrenka/ui320-75/presandcongress.asp/> [<https://perma.cc/QWT9-7Z96>]. Second, unlike Reagan and to a lesser extent George H. W. Bush, George W. Bush did not govern as a fiscal conservative, and thus there was less opportunity for acrimony over the budget. See David Lightman, *Bush Is the Biggest Spender Since LBJ*, McClatchy DC Bureau (Oct. 24, 2007), <http://www.mcclatchydc.com/news/article24471073.html> [<https://perma.cc/7J4H-FRKC>] (“George W. Bush, despite all his recent bravado about being an apostle of small government and budget-slashing, is the biggest spending president since Lyndon B. Johnson.”).

25. Fishkin & Pozen, *supra* note 1, at 934.

President Bush's first-term circuit court nominations, and the use of pro forma sessions to block President Bush's recess appointments in 2007 and 2008.²⁶ During the Obama Administration, these include using the reconciliation process to amend the Affordable Care Act (ACA) without the standard opportunity for Republicans to filibuster in the Senate, "repeatedly test[ing] the limits of executive authority in implementing the ACA," making recess appointments to the Consumer Financial Protection Bureau and National Labor Relations Board, eliminating the filibuster for non-Supreme Court nominees, and implementing Deferred Action for Childhood Arrivals (DACA) in the face of congressional inaction on immigration reform.²⁷

The authors' examples include extremely significant policies, arguably more significant than any given policy the Republicans have played constitutional hardball with.²⁸ For example, passing the ACA via reconciliation led to the regulatory overhaul of almost twenty percent of the American economy, the signature legislative achievement of President Obama's first term, without a single favorable vote from a Republican in Congress.²⁹ Repeated deviations from the text of the ACA allowed the Administration to continue to enforce the Act without needing to reach any compromises with Republicans who captured first the House and then the Senate after the enactment of (and in partial reaction to the enactment of) the ACA.³⁰ DACA gave indefinite immunity from deportation and the ability to be employed legally to millions of undocumented immigrants.³¹ This allowed President Obama to satisfy

26. *Id.*

27. *Id.* at 934–35 (alteration in original) (internal quotation marks omitted) (quoting Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. Pa. L. Rev. 1715, 1715–16 (2016)).

28. The Senate's refusal to vote on the Garland Supreme Court nomination in 2016 would be the strongest counterexample.

29. Final Vote Results for Roll Call 165, Office of the Clerk of the U.S. House of Representatives (Mar. 21, 2010), <http://clerk.house.gov/evs/2010/roll165.xml> (on file with the *Columbia Law Review*); Roll Call Vote 111th Congress—1st Session, U.S. Senate (Dec. 24, 2009), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396 [<https://perma.cc/SJ3A-BJTK>].

30. Paul Demko & Rachana Pradhan, *Trump, GOP Rediscover Familiar Campaign Foe: Obamacare*, Politico (Oct. 25, 2016), <https://www.politico.com/story/2016/10/trump-gop-rediscover-familiar-campaign-foe-obamacare-230311/> [<https://perma.cc/9KAL-FQRF>] ("Republicans capitalized on the Affordable Care Act's unpopularity in 2010 and 2014 to retake both houses of Congress.").

31. See Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 13 (2016) ("[S]ince 2010, more than two million undocumented individuals have been granted indefinite immunity from deportation under [DACA]."). This is often referred to as "de facto legal status," see, e.g., Robert Verbruggen, *Two Points About DACA*, Nat'l Rev. (Sept. 5, 2017), <https://www.nationalreview.com/corner/two-points-about-daca/> [<https://perma.cc/42LY-XBNR>], though technically the beneficiaries still lack legal authorization to reside in the United States, see

important Democratic political constituencies without having to make compromises with conservative congressional Republicans regarding future immigration limitations or bolstered enforcement of existing immigration laws.³²

The authors' list leaves out other significant examples of constitutional hardball played by Democrats during the Obama Administration, many of which are discussed in *Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law*.³³ Several Obama Administration initiatives constituted constitutional hardball as defined by the authors in the sense that they were political maneuvers that "violate[d] or strain[ed] constitutional conventions for partisan ends."³⁴ Constitutional conventions, the authors explain, are "unwritten norms of government practice."³⁵ While the exact boundaries of what constitutes constitutional hardball are fuzzy,³⁶ examples of this sort of constitutional hardball neglected by the authors arguably include:

- Refusing to defend the Defense of Marriage Act (DOMA) in the Supreme Court, on the spurious grounds that no legitimate legal

Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. Citizenship & Immigration Services, <http://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/PQ2J-87T3>] (last updated Feb. 14, 2018) (noting that "[d]eferred action does not provide lawful status").

32. Some argue that the President's hardball on immigration was a natural response to Republican constitutional hardball, in particular the so-called Hastert Rule. See, e.g., Bruce Lesley, Gun Safety, Gridlock, and the Demise of Congress, *HuffPost* (Apr. 22, 2013), https://www.huffingtonpost.com/bruce-lesley/gun-safety-gridlock-and-t_b_3133220.html [<https://perma.cc/N66C-UZB6>] (last updated June 22, 2013) (arguing that President Obama's DACA directive was a positive outcome of congressional gridlock). The House Republican leadership applied that informal rule to prevent any bill from reaching the House floor that did not have majority support among House Republicans. *Id.* This likely prevented a majority of the House from acting favorably on immigration reform. See Ginger Gibson, Boehner: No Vote on Senate Immigration Bill, *Politico* (July 8, 2013), <https://www.politico.com/story/2013/07/john-boehner-house-immigration-vote-093845> [<https://perma.cc/UN62-PFKQ>]. That DACA was in part a response to the constitutional hardball of the Hastert Rule is a fair point, but hardball in response to hardball is still hardball.

33. David E. Bernstein, *Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law* (2015) [hereinafter Bernstein, *Lawless*]. The authors note charges of "lawlessness" directed at the Obama Administration and cite *Lawless* as developing that case "most fully." Fishkin & Pozen, *supra* note 1, at 937 n.95. However, the authors claim that the "gravamen" of such charges "is not so much that President Obama violated constitutional conventions . . . but rather that he violated the big-C Constitution by exceeding legally binding limits on executive power." *Id.* That may be true of some critiques of the Obama Administration, but it is not an accurate characterization of *Lawless*. See *infra* notes 38–45 and accompanying text.

34. Fishkin & Pozen, *supra* note 1, at 921.

35. *Id.* (internal quotation marks omitted) (quoting David E. Pozen, *Constitutional Bad Faith*, 129 *Harv. L. Rev.* 885, 930 (2016)).

36. *Id.* at 922.

arguments could be made in its defense.³⁷ The majority and dissenting opinions both criticized the Justice Department for its refusal to defend DOMA.³⁸

- Ignoring Office of Legal Counsel (OLC) opinions that a pending presidential action would be illegal when the opinions conflicted with the Administration's political or strategic goals, including in the very consequential example of U.S. participation in the military campaign against Qaddafi's Libya.³⁹
- Engaging in obviously politicized hiring in the Civil Rights Division of the Justice Department to ensure that the division pursued progressive priorities and interpreted relevant laws consistent with the Obama Administration's favored outcomes.⁴⁰
- Entering into consent decrees with environmental groups to enact policies that Congress would never agree to through the tactic known as "sue and settle."⁴¹
- Taking over the day-to-day operations of General Motors without any statutory authority to do so and imposing a bankruptcy deal

37. Bernstein, Lawless, *supra* note 33, at 28–29. It was an obviously spurious argument because the Department of Justice previously defended DOMA in the lower courts on assumedly legitimate legal grounds. *Id.* at 28. Furthermore, there were reasonable arguments as to DOMA's constitutionality, as witnessed by the fact that the ultimate decision invalidating DOMA attracted four dissenting votes. *Id.*; see also Ed Whelan, DOMA Ruling Did Not "Vindicate" Eric Holder, *Nat'l Rev.* (Sep. 5, 2017), <http://www.nationalreview.com/benchmemos/doma-ruling-did-not-vindicate-eric-holder-ed-whelan> [<https://perma.cc/D3X6-H8TX>].

38. Justice Kennedy, for the majority, noted that Holder's "failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma" and warned that such behavior "poses grave challenges to the separation of powers." *United States v. Windsor*, 570 U.S. 744, 762 (2013). In dissent, Justice Scalia wrote, "There is no justification for the Justice Department's abandoning the law in the present case." *Id.* at 783 n.2 (Scalia, J., dissenting); see also Whelan, *supra* note 37.

39. Bernstein, Lawless, *supra* note 33, at 36–37 (discussing the Administration's refusal to heed OLC's view that military action in Libya was subject to the War Powers Resolution); see also *id.* at 16–17 (discussing the Administration's refusal to heed OLC's views that giving the District of Columbia's representative a vote in Congress would be unconstitutional).

40. *Id.* at 25–27; see also Charlie Savage, In Shift, Justice Department Is Hiring Lawyers with Civil Rights Backgrounds, *N.Y. Times* (May 31, 2011), <https://www.nytimes.com/2011/06/01/us/politics/01rights.html> (on file with the *Columbia Law Review*) ("[D]uring the first two Obama years, none of the new hires listed conservative organizations [on their resumes], while more than 60 percent had liberal credentials.").

41. Bernstein, Lawless, *supra* note 33, at 27; see also William Murray, EPA Ends 'Sue and Settle' Era, *R St.* (Oct. 17, 2017), <https://www.rstreet.org/2017/10/17/epa-ends-sue-and-settle-era> [<https://perma.cc/Z5TX-MFGV>].

on Chrysler that benefited labor unions that provide support for the Democratic Party at the expense of secured creditors.⁴²

- Appointing various policy “czars” to evade the Senate confirmation process.⁴³
- Using an extremely aggressive interpretation of Title IX to strip college students accused of sexual misconduct of basic due process protections through a “Dear Colleague” letter, without ever starting the formal notice and comment process.⁴⁴

The authors identify a second type of constitutional hardball: actions “reasonably viewed by the other side as attempting to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner.”⁴⁵ As *Lawless* discusses, the Obama Administration made the unusually aggressive argument to the Supreme Court that the ministerial exemption to ordinary legislation—a doctrine accepted by every federal court that had previously considered the issue—should be rejected.⁴⁶

The authors, in their defense, might argue that they are primarily telling a story about asymmetry in playing constitutional hardball at the

42. Bernstein, *Lawless*, supra note 33, at 50–55; see also James Sherk & Todd Zywicki, Heritage Found., *Backgrounder: Auto Bailout or UAW Bailout? Taxpayer Losses Came from Subsidizing Union Compensation 2* (June 23, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/bg2700.pdf (on file with the *Columbia Law Review*) (arguing “[t]he auto bailout was actually a UAW bailout”); Todd Zywicki, *The Auto Bailout and the Rule of Law*, *Nat’l Aff.*, Spring 2011, at 66, 67 (criticizing the bailout and bankruptcy as “executive overreach”).

43. Bernstein, *Lawless*, supra note 33, at 65–79; see also Mitchel A. Sollenberger & Mark J. Rozell, *The President’s Czars: Undermining Congress and the Constitution* 146–62 (2012) (describing Obama’s appointment of czars). But see Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *Fordham L. Rev.* 2577, 2590–91 n.70 (2011) (noting that while avoidance of the Senate appointment process is an “incomplete” explanation for Obama’s appointment of czars in his first term, it “became a stronger motivation” later in his presidency).

44. Bernstein, *Lawless*, supra note 33, at 122–30. The authors acknowledge in a footnote that this could be considered an example of constitutional hardball. Fishkin & Pozen, supra note 1, at 935 n.85. Not only is it such an example, it constituted one of the Obama Administration’s most egregious abuses of power. Even if one (dubiously) believed that the legal content of the Dear Colleague letter was correct, there is no plausible nonhardball rationale for the failure over a period exceeding five years to commence a formal regulatory process. See David E. Bernstein, *The Abuse of Executive Power: Getting Beyond the Streetlight Effect*, 11 *Fla. Int’l. U. L. Rev.* 289, 293–97 (2016).

45. See Fishkin & Pozen, supra note 1, at 923 (emphasis omitted).

46. Bernstein, *Lawless*, supra note 33, at 118–22; see also Transcript of Oral Argument at 37–39, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 4593953 (denying that the ministerial exception can be extrapolated from the Free Exercise Clause or the Establishment Clause, but suggesting that other constitutional doctrines may protect church autonomy).

congressional level, rendering the presidency something of a sideshow.⁴⁷ If so, however, the asymmetry they document may not flow from the Republicans more aggressively adopting hardball tactics. During the period the authors studied, Republicans controlled one or both houses of Congress under a Democratic president for twelve years, while the Democrats controlled one or both houses of Congress under a Republican president for only three and a half years.⁴⁸ Congressional leaders are likely much more inclined to play constitutional hardball when confronted with a political opponent in the White House, and that may be sufficient to explain any asymmetry. Similarly, a President is more likely to play constitutional hardball when confronted by a hostile Congress, and it seems to be stacking the deck to focus on Congress's hardball and not the President's when divided government prevailed.

Congressional Democrats nevertheless did sometimes play constitutional hardball during the Obama years. In addition to passing the ACA through the reconciliation process and abolishing the filibuster for judicial nominations below the Supreme Court level,⁴⁹ in 2014 every Democratic Senator who cast a vote did so in favor of a constitutional amendment that would subject any spending, by any corporation or individual, to "reasonable limits" if the goal of the spending was to "influence elections."⁵⁰ The American Civil Liberties Union declared that, if passed, the bill would "fundamentally 'break' the Constitution and endanger civil rights and civil liberties for generations."⁵¹

B. *President Obama Was Not "Diffident and Apologetic" About Constitutional Hardball*

The authors acknowledge that many of President Obama's unilateral executive actions may appropriately be described as constitutional hardball.⁵² According to the authors, however, unlike Republicans, "when Democrats have played hardball, they have been more diffident and apologetic about it."⁵³

47. See Fishkin & Pozen, *supra* note 1, at 937 n.95.

48. See Renka, *supra* note 24.

49. See *supra* note 27 and accompanying text.

50. S. Rep. No. 113-223, at 2 (2014); On the Cloture Motion S.J.Res. 19, GovTrack (Sept. 11, 2014), <https://www.govtrack.us/congress/votes/113-2014/s261/> [<https://perma.cc/C8WC-NEAU>] (last visited Oct. 8, 2018).

51. Laura W. Murphy, "Fixing" *Citizens United* Will Break the Constitution, ACLU (June 28, 2012), <http://www.aclu.org/blog/free-speech/fixing-citizens-united-will-break-constitution> [<https://perma.cc/3WQD-SFSU>].

52. Fishkin & Pozen, *supra* note 1, at 924-25.

53. *Id.* at 936. In 2012, Senate Majority Leader Harry Reid announced on the floor of the Senate that GOP presidential candidate Mitt Romney had not paid federal taxes for the past decade. Reid simply lied. When asked later about his lie, Reid was far from

In January 2014, President Obama told his cabinet during the first meeting of the year:

We're not just going to be waiting for legislation in order to make sure that we're providing Americans the kind of help they need. I've got a pen and I've got a phone

. . . And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward in helping to make sure our kids are getting the best education possible, making sure that our businesses are getting the kind of support and help they need to grow and advance, to make sure that people are getting the skills that they need to get those jobs that our businesses are creating.⁵⁴

Two weeks later, Obama proclaimed during his State of the Union Address:

But what I offer tonight is a set of concrete, practical proposals to speed up growth, strengthen the middle class, and build new ladders of opportunity into the middle class. Some require Congressional action, and I'm eager to work with all of you. But America does not stand still—and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do.⁵⁵

Congressional Democrats responded with a standing ovation.⁵⁶ There are many possible ways to describe these statements and congressional Democrats' reaction. "Diffident" and "apologetic," however, are not among them. Nor was Obama diffident and apologetic when he made such pronouncements as, "But if Congress won't act soon to protect future generations [from climate change], I will."⁵⁷ Or, with regard

contrite, responding, "Romney didn't win, did he?" Chris Cillizza, *Harry Reid Lied About Mitt Romney's Taxes. He's Still Not Sorry*, Wash. Post: The Fix (Sept. 15, 2016), <http://www.washingtonpost.com/news/the-fix/2016/09/15/harry-reid-lied-about-mitt-romneys-taxes-hes-still-not-sorry> (on file with the *Columbia Law Review*). This may not count as "constitutional" hardball, but it certainly belies the notion that Democrats have had strong compunctions about violating norms of political behavior.

54. Obama on Executive Actions: 'I've Got a Pen and I've Got a Phone,' CBS DC (Jan. 14, 2014), <http://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone> [<https://perma.cc/XM5E-XGH4>] (internal quotation marks omitted).

55. President Barack Obama, State of the Union Address, The White House (Jan. 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> [<https://perma.cc/5GSZ-3BX5>].

56. Editorial, *Downsize the Imperial Presidency*, Chi. Trib. (Nov. 15, 2016), <http://www.chicagotribune.com/news/opinion/editorials/ct-executive-bush-obama-trump-congress-overreach-edit-1116-md-20161115-story.html> (on file with the *Columbia Law Review*).

57. Ryan Grim, *State of the Union Speech Promises Climate Change Executive Action*, HuffPost (Feb. 13, 2013), http://www.huffingtonpost.com/2013/02/13/state-of-the-union_n_2673983.html [<https://perma.cc/2GSZ-ZK8F>].

to immigration reform, “[T]he American people don’t want me just standing around twiddling my thumbs and waiting for Congress to get something done.”⁵⁸

Professor Pozen, in common with many defenders of the Obama Administration, has suggested that Obama’s rhetoric and unilateral actions can best be seen as reactions to congressional Republicans’ obstructionism and that his rhetoric often reflected the theme that he was forced into unilateralism by that obstructionism.⁵⁹ I don’t read the rhetoric transcribed above as being so modest. But in any event, the “obstructionism” defense relies on the premise that Congress is obligated to cooperate with the President’s agenda.⁶⁰ While this is a common perspective among laypersons, especially when a President they approve of is in office, the Constitution is designed to place primary lawmaking authority with Congress. A Republican Congress pursuing its own agenda at a Democratic President’s expense should be considered a normal exercise of congressional authority that requires presidential compromise, not a justification for the President to respond with hardball unilateralist tactics.⁶¹

58. Anita Kumar, *Obama Vows to Act on Issues if Congress Won’t*, McClatchy DC Bureau (Aug. 6, 2014), <https://www.mcclatchydc.com/news/politics-government/white-house/article24771547.html> [<https://perma.cc/EY4X-F629>].

59. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 7–8 (2014) [hereinafter Pozen, *Separation of Powers*].

60. As Professor Will Marshall argues:

[T]he contention that Congress acts outside its bounds when it thwarts the executive seems particularly weak in the context of legislation. The Constitution, after all, places the primary role in promulgating legislation with the Congress; the role of the President, by contrast, is merely to recommend legislation. The contention that Congress obstructs (or can obstruct) a President when it blocks her legislative agenda is therefore arguably misplaced because Congress is the key movant in the legislative process.

William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 *Yale L.J. Forum* 95, 104–05 (2014), https://www.yalelawjournal.org/pdf/MarshallForumPDF_hbv5vja.pdf [<https://perma.cc/87KN-7Z6N>] (footnotes omitted). Marshall adds that more generally, even “maximalist obstructionism” by Congress “is not so easily characterized as outside the bounds of permissible congressional behavior[;] [r]ather, congressional prerogative to block executive action is an essential component of the constitutional design.” *Id.* at 101–02 (quoting Pozen, *Separation of Powers*, *supra* note 59, at 7); see also Jonathan Turley, *Opinion, Obama’s Irresponsible Taunt: President Increasingly Willing to Go at It Alone*, *N.Y. Daily News* (July 6, 2014), <http://www.nydailynews.com/opinion/obama-irresponsible-taunt-article-1.1854252> [<https://perma.cc/BZP7-CELT>] (“In our system, there is no license to go it alone. Rather, the Republic’s democratic architecture requires compromise. The process is designed to moderate legislation and create a broader consensus in support of these laws.”).

61. *Cf.* Pozen, *Separation of Powers*, *supra* note 59, at 78 (suggesting a President may engage in extralegal exercises of authority when there is a “failure of congressional lawmaking”).

C. *Why Democrats Engage in Constitutional Hardball*

The authors detail a variety of ideological and practical political reasons why Republican officials play constitutional hardball. Among other things, they point to academic literature strongly suggesting that Republican federal officeholders moved further to the right in the relevant time period than Democrats moved to the left.⁶² Moreover, Republicans have a self-image as insurgents against a monolithic liberal establishment, which makes them less invested in existing norms.⁶³ Additionally, many political scientists see the Republican Party as more ideological and the Democratic Party as more of a coalition of interest groups.⁶⁴ Such factors might indeed disproportionately incline Republicans toward constitutional hardball.

The authors, however, neglect the forces pushing, and that have pushed, Democrats to engage in constitutional hardball. In particular, Democrats tend to support social and economic reform through government action.⁶⁵ This may incline them toward impatience with obstacles, including constitutional obstacles, to activist government. Liberal Democrats, at least, considered themselves to be out of power nationally from at least the Nixon Administration until the Obama Administration, making them particularly eager to seize any available opportunity to pursue their ideological goals.⁶⁶ Meanwhile, since the rise of critical legal

62. Fishkin & Pozen, *supra* note 1, at 940.

63. *Id.* at 954.

64. *Id.* at 941; see also Matt Grossmann & David Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats* 5 (2016) (“The events of the mid-1990s effectively illustrate the distinct nature of the two major parties, with a Republican Party that is primarily motivated by abstract ideology opposed by a Democratic Party that is dedicated to the defense of group interests.”).

65. See Lydia Saad, *Support for Active Government Up in U.S.*, Gallup (Oct. 2, 2017), <https://news.gallup.com/poll/220058/support-active-government.aspx/> [<https://perma.cc/N4H6-CVX4>] (“74% of Republicans currently think government is doing too much that should be left to individuals and businesses; just 22% want it to do more. In contrast, 67% of Democrats think government should be doing more . . . while 26% say more should be left to the private sector.”).

66. Democrats had control of the presidency and both houses of Congress during the Carter Administration and the first two years of the Clinton Administration. See *Party Divisions of the House of Representatives*, History, Art & Archives: U.S. House of Representatives, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions> [<https://perma.cc/3Q2F-4L2L>] (last visited Oct. 8, 2018); *Party Division*, U.S. Senate, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/WW8P-HHA3>] (last visited Oct. 8, 2018). Both Presidents, however, ran and to some extent governed as moderate southern Democrats, not as liberals. See, e.g., Tim Funk, *Bill Clinton’s Centrist Legacy Becomes an Issue as His Wife Courts the Left*, McClatchy DC Bureau (Feb. 25, 2016), <http://www.mcclatchydc.com/news/politics-government/article62540067.html> [<https://perma.cc/PZ8U-SWEF>] (stating that Clinton won in 1992 and 1996 “by moving the Democratic Party closer to the center and co-opting the Republicans’ agenda by taking the lead on everything from welfare reform to get-tough crime legislation”); Victor Davis Hanson, *Will 2020 Be*

studies in the 1970s, many left-leaning legal scholars have derided the very notion of the rule of law, which has surely had some effect on the overall left legal culture.⁶⁷ These factors could easily combine to incline Democrats toward constitutional hardball, especially when they control the executive branch.

Finally, while the authors pay a great deal of attention to radicalization and uniformity of opinion among Republicans, they neglect a later, countervailing, more consistent, and even stronger trend among the Democratic base, undoubtedly pushing their party toward constitutional hardball.⁶⁸ According to Pew Research, in 1994 thirteen percent of Republicans held consistently conservative political positions.⁶⁹ That went down to six percent in 2004, only to rise to twenty percent in 2014.⁷⁰ Meanwhile, only five percent of Democrats had consistently liberal views

Another 1972 for Democrats?, Real Clear Politics (Apr. 27, 2017), https://www.realclearpolitics.com/articles/2017/04/27/will_2020_be_another_1972_for_democrats_133718.html [<https://perma.cc/BLM9-RARR>] (noting that “Jimmy Carter ran a winning Humphrey-like campaign as a centrist populist outsider from the South”). Moreover, the failure of Democrats to achieve any long-term progressive goals, such as national health care, during either Administration surely motivated Democrats to push hard during the early Obama Administration and then to defend gains made. And given the economic crisis of 2008–2009, plus President Obama’s charismatic persona, many progressives thought that Obama would prove to be a new FDR, pushing American politics permanently to the left. See Obama and FDR: Similar Challenges, NPR (Nov. 1, 2009), <https://www.npr.org/114376732> [<https://perma.cc/8BZA-3LCX>] (“There were a lot of comparisons made between President Obama and Franklin Delano Roosevelt after the election and after President Obama’s first hundred days in office.”). The conservative counterreaction in the 2010 elections was a rather bitter pill for those looking forward to a new era of progressive dominance to swallow, and not surprisingly, it provoked a hardball reaction.

67. As law professor Charles Barzun explains, critical legal studies (CLS) adherents “argue[] that the rule of law [is] both impossible in practice and, in any event, undesirable in theory.” Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 *Va. L. Rev.* 1, 12 (2013). CLS informed two additional movements: radical legal feminism and critical race theory. Radical legal feminists believe the concept of the rule of law legitimizes and reinforces a status quo of male domination. Critical race theorists, meanwhile, believe that supposedly objective, neutral standards like the rule of law and adherence to legal precedent mask a system that replicates and entrenches white racial dominance. See Bernstein, *Lawless*, *supra* note 33, at 5–6.

68. See Fishkin & Pozen *supra* note 1, at 940 (“Social scientists have shown convincingly that since the 1970s, Republicans have moved further to the right than Democrats have moved to the left. This is true for rank-and-file voters as well as party elites; it can be observed in public polling data as well as congressional voting patterns.” (footnotes omitted)).

69. Pew Research Ctr., *Political Polarization in the American Public* 16 (2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/5JCA-Q7KA>].

70. *Id.*

in 1994.⁷¹ This rose to thirteen percent in 2004 and twenty-three percent in 2014.⁷²

Even more significantly, among “politically engaged Republicans,” the percentage of consistent conservatives has waxed and waned since 1994, ultimately rising from twenty-three percent to thirty-three percent.⁷³ Among politically engaged Democrats, meanwhile, there was a steady upward march in the percentage of consistent liberals, from only eight percent in 1994 to thirty-eight percent in 2014.⁷⁴ One does not need to be a political scientist, meanwhile, to observe that the mainstream of the Democratic Party is to the left of where it was during the Clinton presidency.⁷⁵

III. THE IRAN DEAL AS AN EXAMPLE OF CONSTITUTIONAL HARDBALL

In determining whether constitutional hardball has been asymmetric, one must examine the importance, and not just the volume, of various examples of Democratic constitutional hardball. The Obama Administration’s efforts to sign and implement a nuclear agreement with Iran with limited if any congressional input, and at times in violation of federal law, is a particularly important example of Democratic constitutional hardball. This particular example failed to make it into books and essays critical of the Obama Administration, including *Lawless*, because it played out toward the end of the Administration, and many of the details of the Administration’s hardball tactics became matters of public knowledge and controversy only after President Obama had left office.

71. *Id.*

72. *Id.*

73. *Id.* at 25.

74. *Id.* But see *id.* at 8 (noting that, while “[t]he change among Republicans since [1994] appears less dramatic[,] . . . a decade ago, just 10% of politically engaged Republicans had across-the-board conservative attitudes”). A more recent Pew study shows Democratic and Republican voters continuing to move to the ideological extremes, with the move more pronounced among Democrats on key social issues. Pew Research Ctr., *The Partisan Divide on Political Values Grows Even Wider* 3, 8 (2017), <http://www.people-press.org/2017/10/05/1-partisan-divides-over-political-values-widen/> [<https://perma.cc/97V6-XGCF>]. However, the greater Democratic trend is in part an artifact of Pew still using tolerance of homosexuality, a view which is now widespread in American society, as a “liberal” data point. See *id.* at 8 (“In a few issue areas, notably views of homosexuality and of immigrants, public opinion in both parties has clearly shifted in a more liberal direction over the past several decades.”).

75. See, e.g., Alexander Burns & Jonathan Martin, *Warren Is Preparing for 2020. So Are Biden, Booker, Harris and Sanders.*, N.Y. Times (July 15, 2018), <https://www.nytimes.com/2018/07/15/us/politics/democratic-presidential-candidates-2020.html> (on file with the *Columbia Law Review*) (referring offhandedly to the Democratic Party’s “turn to the left”).

The ultimate result of the Obama Administration's efforts to reach an agreement with Iran was the Joint Comprehensive Plan of Action (JCPOA), an international agreement signed by the United States meant to limit Iran's nuclear capacities in exchange for relief from international sanctions.⁷⁶ The authors mention JCPOA only in passing in a noncommittal footnote,⁷⁷ but the Administration's actions deserve far more scrutiny than that. JCPOA is worth reviewing in detail here because the deal was the Obama Administration's signature foreign policy achievement, and there appears to be no other source that tries to comprehensively describe all the mechanisms through which the Obama Administration played constitutional hardball to reach and effectuate the agreement.

By the time the Obama Administration was concluding its first term, President Obama and his team were intent on rapprochement with Iran.⁷⁸ Signing a nuclear deal with Iran was key to this rapprochement because without a deal the U.S. government was legally obliged to enforce major sanctions on Iran.⁷⁹ Successfully negotiating and implementing this deal was arguably the Obama Administration's highest second-term priority.⁸⁰

To sell the deal, the Administration found it necessary to lie to the American public about its origins. The Administration began secret

76. Joint Comprehensive Plan of Action 2 (2015), <http://www.state.gov/documents/organization/245317.pdf> [<https://perma.cc/8F79-K44C>].

77. Fishkin & Pozen, *supra* note 1, at 935 n.85 ("The examples listed in the main text strike us as the most significant and salient acts of constitutional hardball by the Obama Administration and its congressional supporters, assuming one does not view the Iran nuclear deal or the Paris climate agreement as such."). Elsewhere, Professor Pozen noted that the Obama Administration "increasingly bypassed Congress through 'stealth multilateralism,' pursuing nonbinding international agreements that do not need legislative approval and participating in international institutions tied to treaties that the Senate will not ratify." Pozen, *supra* note 59, at 43.

78. Michael Doran, *Obama's Secret Iran Strategy*, *Mosaic* (Feb. 2, 2015), <https://mosaicmagazine.com/essay/2015/02/obamas-secret-iran-strategy> [<https://perma.cc/85BJ-2THF>]; David Samuels, *The Aspiring Novelist Who Became Obama's Foreign-Policy Guru*, *N.Y. Times Mag.* (May 5, 2016), <https://www.nytimes.com/2016/05/08/magazine/the-aspiring-novelist-who-became-obamas-foreign-policy-guru.html> [<https://perma.cc/G7NE-LMEQ>].

79. See S.C. Res. 1929 (June 9, 2010) (reaffirming existing sanctions and imposing additional measures on Iran that the United States would be obliged to enforce).

80. Obama's most influential foreign policy aide, Ben Rhodes, told a group of progressive activists in January 2014: "Bottom line is, this is the best opportunity we've had to resolve the Iranian issue diplomatically . . . This is probably the biggest thing President Obama will do in his second term on foreign policy. This is healthcare for us, just to put it in context." Matthew Continetti, *The Coming Détente with Iran*, *Wash. Free Beacon* (Oct. 31, 2014), <http://freebeacon.com/columns/the-coming-detente-with-iran> [<https://perma.cc/3CRY-MUXQ>] (internal quotation marks omitted).

negotiations with Iran in mid-2012.⁸¹ When reporter James Rosen asked at a press conference about rumors regarding these negotiations, the State Department spokesperson lied and denied that “government-to-government” talks were underway.⁸²

Administration officials told the public that engagement with Iran began in 2013. The Administration claimed that it was “tak[ing] advantage of a new political reality in Iran, which came about because of elections that brought moderates to power in that country.”⁸³ As David Samuels reported in the *New York Times Magazine*, this story of nascent moderation in the Iranian government “was largely manufactured for the purpose for selling the deal.”⁸⁴

The most significant obstacle facing the Administration was the Republican-controlled Congress. Congress was more sympathetic than the Administration to Israel’s security concerns regarding Iran and was much more skeptical that Iran was a trustworthy, or just worthy, partner.⁸⁵ Even in October 2014, when Democrats still controlled the Senate, the Administration concluded it would lose a majority, much less a supermajority, vote there.⁸⁶ The Obama Administration, therefore, planned from the get-go to circumvent Congress.⁸⁷ Ben Rhodes later acknowledged that the Administration affirmatively didn’t want congressional involvement: “I’d prefer a sober, reasoned public debate, after which

81. Samuels, *supra* note 78.

82. Carol Morello, *It Wasn’t a ‘Glitch’: State Department Deliberately Cut Embarrassing Questions from Press Briefing Video*, *Wash. Post* (June 1, 2016), <https://www.washingtonpost.com/68ab3664-2837-11e6-b989-4e5479715b54/> [<https://perma.cc/DN3G-2PYF>]. Remarkably, someone in the Administration later had a staff member delete a portion of a video of a news conference showing Rosen asking a spokesperson whether the Administration had lied about the Iran negotiations. *Id.*

83. Samuels, *supra* note 78.

84. *Id.*

85. See Zack Beauchamp, *The Real Reason Netanyahu and the GOP Hate This Iran Deal*, *Vox* (Apr. 6, 2015), <http://www.vox.com/2015/4/6/8354057> [<https://perma.cc/32F2-EPCL>] (describing criticisms of the Iran Nuclear Deal held by members of Congress, including concerns that the deal would undermine Israel’s security); Benjy Sarlin, *2016 Republicans Bash Iran Nuclear Deal*, *MSNBC* (July 14, 2015), <http://www.msnbc.com/msnbc/2016-republicans-bash-iran-nuclear-deal> [<https://perma.cc/T9YZ-VTLS>] (detailing reactions to the deal from members of Congress, including criticisms about the deal’s effect on Israeli security).

86. David E. Sanger, *Obama Sees an Iran Deal that Could Avoid Congress*, *N.Y. Times* (Oct. 19, 2014), <http://www.nytimes.com/2014/10/20/us/politics/obama-sees-an-iran-deal-that-could-avoid-congress.html> (on file with the *Columbia Law Review*).

87. Obama foreign policy aide Ben Rhodes told progressive activists at an October 2014 meeting, “We’re already kind of thinking through, how do we structure a deal so we don’t necessarily require legislative action right away And there are ways to do that.” Continetti, *supra* note 80 (internal quotation marks omitted). A senior Administration official told the *Times* that the Administration would not seek legislation approving an agreement with Iran “for years.” Sanger, *supra* note 86 (internal quotation marks omitted).

members of Congress reflect and take a vote,” he said, shrugging. ‘But that’s impossible.’”⁸⁸

By early 2015, some speculated that the Obama Administration’s plan was to get the United Nations Security Council to endorse a deal and then present the deal to Congress and the public as binding international law.⁸⁹ This provoked Senator Tom Cotton to write an open letter signed by forty-seven Senators informing the Iranian government that any deal signed by Obama but not approved by Congress would not be binding U.S. law.⁹⁰

The Obama Administration consistently denied that the agreement would be a treaty that required a two-thirds majority in the Senate, even though the agreement had at least some indicia of a treaty.⁹¹ In fact, the

88. Samuels, *supra* note 78.

89. See Curtis A. Bradley & Jack L. Goldsmith, Presidential Control over International Law, 131 *Harv. L. Rev.* 1201, 1242 (2018).

90. Open Letter from Senate Republicans, U.S. Senate, to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015) (on file with the *Columbia Law Review*).

91. Professors Samuel Estreicher and Steven Menashi comment:

The text of the agreement provides that Iran and the other signatories “will take the following voluntary measures within the timeframe as detailed in this JCPOA,” which simultaneously describes its provisions as voluntary and obligatory. The “U.S. Administration,” meanwhile, is obliged to “refrain from re-introducing or re-imposing the sanctions . . . that it has ceased applying under th[e] JCPOA” and to “refrain from imposing new nuclear-related sanctions” for the fifteen-year life of the agreement, which extends beyond President Obama’s tenure in office. So the agreement purports not simply to explain how the Obama administration intended to act in response to Iranian activities but to govern the actions of succeeding administrations—that is, to treat President Obama’s waivers of sanctions enforcement as an ongoing obligation of the United States.

Samuel Estreicher & Steven Menashi, Taking *Steel Seizure* Seriously: The Iran Nuclear Agreement and the Separation of Powers, 86 *Fordham L. Rev.* 1199, 1203 (2017) (alterations in original) (footnotes omitted) (quoting Joint Comprehensive Plan of Action, *supra* note 76, at 6, 13).

For a brief argument that JCPOA was an evasion of the treaty power, see David B. Rivkin Jr. & Lee A. Casey, The Lawless Underpinnings of the Iran Nuclear Deal, *Wall St. J.* (July 26, 2015), <https://www.wsj.com/articles/the-lawless-underpinnings-of-the-iran-nuclear-deal-1437949928> (on file with the *Columbia Law Review*). For the contrary argument, see Jack Goldsmith, More Weak Arguments for the Illegality of the Iran Deal, *Lawfare* (July 27, 2015), <https://www.lawfareblog.com/more-weak-arguments-illegality-iran-deal> [<https://perma.cc/4QSR-43QT>].

For the argument that the JCPOA is simply a “nonbinding political agreement,” see Marty Lederman, Congress Hasn’t Ceded Any Constitutional Authority with Respect to the Iran JCPOA, *Balkinization Blog* (Aug. 8, 2015), <https://balkin.blogspot.com/2015/08/congress-hasnt-ceded-any-constitutional.html> [<https://perma.cc/J9GZ-DXJK>].

For what it’s worth, the Iranian government’s public position was that the JCPOA was not simply a “nonbinding political agreement,” but binding international law. Iranian foreign minister Javad Zarif stated that any attempt by Congress to change the agreement

Administration consistently maintained that Congress did not have to approve the deal in any way, as it was merely an informal political commitment.⁹² For purposes of this Response, whether the Administration's position was legally sound is beside the point; even one of the staunchest defenders of JCPOA's legality, Professor Jack Goldsmith, acknowledges that "agreements of this significance and scope would typically require approval by two-thirds of the Senate through the domestic treaty process."⁹³ Evading the treaty process through what Bradley and Goldsmith call "a significant constitutional innovation" constituted constitutional hardball.⁹⁴

In April 2015, Senator Bob Corker introduced legislation giving Congress thirty to sixty days to review and vote on any nuclear agreement with Iran.⁹⁵ The Administration initially opposed this legislation but eventually gave in when it recognized that Corker had the votes to override a presidential veto.⁹⁶ While "[t]he Review Act represented an attempt to reclaim a congressional role, not to authorize unilateral executive action,"⁹⁷ it also represented "a recognition that the President was determined to conclude the deal without Congress."⁹⁸ In practice, then,

as approved by the U.N. would constitute a "blatant violation of international law." Jake Miller, Iran: GOP Letter on Nuclear Negotiations a "Propaganda Ploy," CBS News (Mar. 9, 2015), <https://www.cbsnews.com/news/iran-gop-letter-on-nuclear-negotiations-a-propaganda-ploy> [<https://perma.cc/99XQ-F83A>].

92. The Administration even denied that JCPOA constituted an "executive agreement." See Letter from Julia Frifield, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to Mike Pompeo, U.S. Rep. from Kan. 1 (Nov. 19, 2015), http://web.archive.org/web/20160310175929/http://pompeo.house.gov/uploadedfiles/151124_-_reply_from_state_regarding_jcpoa.pdf (on file with the *Columbia Law Review*) ("The Joint Comprehensive Plan of Action (JCPOA) is not a treaty or an executive agreement, and is not a signed document. The JCPOA reflects political commitments between Iran, the P5+1 (the United States, the United Kingdom, France, Germany, Russia, China), and the European Union."); Jen Psaki, Spokesperson, U.S. Dep't of State, Daily Press Briefing (Mar. 10, 2015), <http://2009-2017.state.gov/r/pa/prs/dpb/2015/03/238718.htm> [<https://perma.cc/48QB-4B3B>] (describing the JCPOA as involving "a multilateral understanding between many countries" and "political commitments").

93. Jack Goldsmith, The Contributions of the Obama Administration to the Practice and Theory of International Law, 57 *Harv. Int'l L.J.* 455, 464 (2016).

94. See Fishkin & Pozen, *supra* note 1, at 920–22 (defining constitutional hardball). According to Bradley and Goldsmith, JCPOA represented "a significant constitutional innovation," in which "the Obama Administration established a new form of unilateral international lawmaking when it married international political commitments with preexisting statutory delegations to forge deep international cooperation without the approval or even involvement of Congress." Bradley & Goldsmith, *supra* note 89, at 1219.

95. Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (2015) (codified as amended at 42 U.S.C. § 2160e (Supp. III 2016)).

96. See Sen. Bob Corker (@senbobcorker), Twitter (Apr. 14, 2015), <https://twitter.com/senbobcorker/status/588082114861621249> [<https://perma.cc/6E6G-QWWQ>].

97. Estreicher & Menashi, *supra* note 91, at 1243.

98. *Id.* at 1244.

the Corker legislation was a significant victory for Obama Administration constitutional hardball because it represented implicit recognition by Congress that JCPOA would not have to be approved as a treaty. Instead of the Obama Administration needing two-thirds of the Senate to approve a treaty, or even majorities of both houses to approve an executive agreement, opponents of the bill would need at least sixty votes in the Senate to disapprove the agreement and overcome a filibuster by deal supporters. Opponents would then need a two-thirds vote in each house to overcome a presidential veto.⁹⁹

The Administration pushed forward with a U.N. vote in July 2015.¹⁰⁰ The U.N. resolution legally only abrogated international sanctions, not U.S. sanctions.¹⁰¹ Administration officials publicly insisted that Congress would still have an opportunity to weigh in. Secretary of State John Kerry stated that “[n]o ability of the Congress has been impinged on.”¹⁰² After the vote, however, the Administration emphasized that the world considered the JCPOA a done deal and that it would undermine U.S. standing if Congress proceeded to reject the agreement.¹⁰³

To undermine opposition to the JCPOA, the Administration withheld various important documents related to the Iran deal from

99. See Jack Balkin, *The Iran Deal and Regime Change (in the United States)*, Balkinization Blog (Aug. 6, 2015), <https://balkin.blogspot.com/2015/08/the-iran-deal-and-regime-change-in.html> [<https://perma.cc/DG8Q-BWQC>] (“Merely agreeing to that mechanism meant that party leaders on both sides effectively agreed not to insist that the deal be treated as a treaty or a congressional-executive agreement. In doing so, they essentially conceded Obama’s constitutional framing of the deal.” (emphasis omitted)).

100. Michael R. Gordon & David E. Sanger, *U.N. Vote on Iran Nuclear Deal Irks Congress*, N.Y. Times (July 19, 2015), <https://www.nytimes.com/2015/07/20/world/middleeast/un-vote-on-iran-nuclear-deal-irks-congress.html> (on file with the *Columbia Law Review*).

101. Bradley & Goldsmith, *supra* note 89, at 1242.

102. Julian Hattem, *White House on Defense After Security Council Vote on Iran*, Hill (July 20, 2015), <http://thehill.com/policy/national-security/248536-white-house-on-defense-after-security-council-vote-on-iran> [<https://perma.cc/Q6WA-TPEU>] (internal quotation marks omitted).

103. Energy Secretary Ernest Moniz argued that the Security Council vote, “in and of itself, constituted ‘a major outcome of the negotiation. And that cohesion, of course, really ups the ante in the current congressional discussion if we were to undermine this agreement at this stage. We would have significant problems with other major powers.’” Michael Wilner, *UN Cohesion ‘Ups the Ante’ in Congress Battle over Iran, Moniz Says*, Jerusalem Post (July 26, 2015), <http://www.jpost.com/Middle-East/Iran/UN-cohesion-ups-the-ante-in-Congress-battle-over-Iran-Moniz-says-410234> [<https://perma.cc/6DLT-EPYA>]. U.N. Ambassador Samantha Power similarly argued that “if the United States rejects this deal, we would instantly isolate ourselves from the countries that spent nearly two years working with American negotiators to hammer out its toughest provisions.” Samantha Power, *Congress, Don’t Isolate America Again over Iran*, Politico (Aug. 26, 2015), <https://www.politico.com/magazine/story/2015/08/samantha-power-iran-deal-121770> [<https://perma.cc/7SMC-4FY3>].

Congress by mixing classified and unclassified documents and then claiming they were all highly sensitive classified documents that could not be released.¹⁰⁴ This violated the spirit of a provision of the Iran Nuclear Agreement Review Act intended to ensure congressional and public access to relevant unclassified documents.¹⁰⁵

Putting aside Administration misrepresentations about the deal's constraints on Iran's nuclear abilities, which are too complex and detailed to get into here,¹⁰⁶ the Administration lied about or covered up various benefits that Iran was going to get from the deal. For example:

- The Obama Administration issued a special license permitting Iran partial access to U.S. financial institutions, breaking a promise to Congress that it would deny Iran such access, and despite the fact that sanctions were still in place prohibiting such access.¹⁰⁷ The Administration then unsuccessfully attempted to pressure U.S. banks to do business with Iran and later lied about it to Congress.¹⁰⁸ In internal emails, the Administration admitted that these efforts went beyond what the U.S. was required to do under the nuclear deal.¹⁰⁹ Finally, Administration officials attempted to pressure foreign financial institutions to do business with Iran, while assuring these institutions that they would likely not receive more than a warning letter for violating U.S. sanctions.¹¹⁰

104. Tim Mak, *The Iran Nuke Documents Obama Doesn't Want You to See*, Daily Beast (July 30, 2015), <https://www.thedailybeast.com/the-iran-nuke-documents-obama-doesnt-want-you-to-see> (on file with the *Columbia Law Review*).

105. *Id.*

106. For a brief look at some examples, see Stephen F. Hayes, *The Iran Deal, Then and Now*, Weekly Standard (July 6, 2015) <https://www.weeklystandard.com/stephen-f-hayes/the-iran-deal-then-and-now> [<https://perma.cc/JNV8-UY6B>].

107. A State Department official told his Iranian counterpart that the transactions in question “are prohibited by U.S. sanctions that are still in place, and which we were clear we would not be removing as part of the JCPOA. Nevertheless, as a gesture of support for Iran’s getting access, we helped on this as we will on other cases.” U.S. Senate, Permanent Subcommittee on Investigations Majority Report: Review of U.S. Treasury Department’s License to Convert Iranian Assets Using the U.S. Financial System 33 (2018) [hereinafter *Iranian Assets Report*] (internal quotation marks omitted), <http://www.hsgac.senate.gov/imo/media/doc/2018-06-06%20PSI%20Majority%20Staff%20Report.pdf> [<https://perma.cc/C7JP-E6LY>].

108. Marc A. Thiessen, *Opinion, Obama Took Lying to New Heights with the Iran Deal*, Wash. Post (June 8, 2018), https://www.washingtonpost.com/opinions/obama-took-lying-to-new-heights-with-the-iran-deal/2018/06/07/b75f72d2-6a7c-11e8-9e38-24e693b38637_story.html (on file with the *Columbia Law Review*).

109. *Id.*

110. *Iranian Assets Report*, supra note 107, at 2, 7; Thiessen, supra note 108.

- The U.S. government made a \$1.7 billion cash payment to Iran, which some commentators argue violated U.S. law.¹¹¹ Regardless of legality, to many observers, including some within the Obama Administration,¹¹² the payment “appear[ed] to have been a ransom, just as an Iranian general claimed it was at the time—a huge cash payment to accompany the lopsided exchange of 21 Iranians, duly charged or convicted under American law, for five American hostages who had been seized by Iran and held on fabricated charges in secret proceedings.”¹¹³ The Administration claimed that the money was paid in cash not to cover up the payment but because the U.S. government did not have the ability to wire money to Iran. President Obama said, “[W]e do not have a banking relationship with Iran[,] . . . and [so] we could not wire the money.”¹¹⁴ In fact, the U.S. government secretly wired money to Iran before and after the cash payment.¹¹⁵ This suggests that the payment was in cash to hide it from Congress and the public. The Administration evaded oversight by stalling and refusing to publicly answer questions about the payment.¹¹⁶
- President Obama lifted sanctions imposed via executive order by repealing those executive orders.¹¹⁷ When it came to nuclear-related

111. Compare Glenn Kessler, Was Obama’s \$1.7 Billion Cash Deal with Iran Prohibited by U.S. Law?, *Wash. Post* (Mar. 1, 2018), <http://www.washingtonpost.com/news/fact-checker/2018/03/01/was-obamas-1-7-billion-cash-deal-with-iran-prohibited-by-u-s-law> [<https://perma.cc/6JJU-K44Q>] (concluding that the payment was legal), with Lee Smith, The Obama Administration’s \$1.7 Billion Iranian Deception, *Tablet: The Scroll* (Feb. 21, 2018), <https://www.tabletmag.com/scroll/255932/the-obama-administrations-1-7-billion-iranian-deception> [<https://perma.cc/DDR3-XP9R>] (concluding that the payment was illegal).

112. See Kessler, *supra* note 111 (reporting that some Obama Administration officials objected to the payment because it looked like a ransom).

113. Rick Richman, The Story of Obama’s Ransom Payment to Iran Gets Worse, *Mosaic* (Nov. 1, 2016), <https://mosaicmagazine.com/observation/2016/11/the-story-of-obamas-ransom-payment-to-iran-gets-worse> [<https://perma.cc/BK8Y-RZ4A>].

114. Eric B. Lorber, Don’t Give Iran Cash, *Foreign Pol’y* (Sept. 20, 2016), <https://foreignpolicy.com/2016/09/20/dont-give-iran-cash> [<https://perma.cc/4CFW-YLZC>] (internal quotation marks omitted).

115. Jenna Lifhits, The Tehran Two-Step, *Weekly Standard* (Apr. 28, 2017), <https://www.weeklystandard.com/jenna-lifhits/the-tehran-two-step> [<https://perma.cc/7TR9-4WKU>].

116. Adam Kredo, Obama Admin Stalling Investigation into U.S. ‘Ransom Payment’ to Iran, *Wash. Free Beacon* (Mar. 17, 2016), <https://freebeacon.com/national-security/obama-admin-stalling-investigation-us-ransom-iran/> [<https://perma.cc/9BHK-MG7H>]; Letter from Julia Frifield, Assistant Sec’y, Legislative Affairs, U.S. Dep’t of State, to Edward R. Royce, Chairman, House Comm. on Foreign Affairs, U.S. Dep’t of State (Mar. 17, 2016), <https://foreignaffairs.house.gov/wp-content/uploads/2016/08/03.17.16-DOS-Response-Concerns-re-1.7-Billion-Payout-to-Iran.pdf> [<https://perma.cc/43LD-AM6R>] (“It would not be in the interest of the United States to discuss further details of the settlement of these claims in an unclassified letter . . .”).

117. Exec. Order No. 13,716, 3 C.F.R. 425 (2017).

sanctions, he issued national security waivers required by statute all at once, even though the clear intent of these statutes was for them to be lifted one-by-one in response to specific Iranian behavior.¹¹⁸ The Administration dubiously redefined almost all Iran sanctions as “nuclear-related” so they could be lifted.¹¹⁹

- The Obama Administration consistently maintained that once a nuclear deal with Iran was signed, it would only lift nuclear-related sanctions and not those related to terrorism or human rights.¹²⁰ Iran Air had been sanctioned in 2011 under an executive order allowing sanctions against proliferators of weapons of mass destruction.¹²¹ At the time, the Obama Administration stated that these sanctions were a result of Iran Air’s material support to Iranian government entities tied to terrorism and because it “facilitated proliferation-related activities.”¹²² When the JCPOA was signed, the United States lifted these sanctions. At a press conference, a State Department spokesperson was asked why the sanctions were lifted—Iran Air seemed to still be involved in terrorist activities and had not promised to stop.¹²³ The spokesperson responded, “Iran Air was never actually sanctioned under [terrorism-related sanctions]. That said, they were designated, as you said, in June of 2011 pursuant to an executive order, 13382, which is an authority aimed at freezing the assets of proliferators of weapons of mass destruction and their supporters”¹²⁴ This implies that the Administration’s rationale for lifting the sanctions is that they were “nuclear-related” because they had been imposed under an executive order aimed at nuclear proliferation and were aimed in part at proliferation-related activities.¹²⁵ The reporter followed up by asking whether there was any indication that Iran Air had ceased

118. See Estreicher & Menashi, *supra* note 91, at 1203.

119. *Id.* at 1238–39; Omri Ceren, *Can the Iran Deal Be Fixed?*, *Commentary* (Mar. 15, 2018), <https://www.commentarymagazine.com/articles/can-iran-deal-fixed/> [<https://perma.cc/VTE5-HN8F>].

120. Bradley Klapper & Matthew Lee, *Boeing’s Historic Deal with Iran Rests on Shaky Foundations*, AP (June 23, 2016), <http://apnews.com/215f5320f51e4caa9e4977aefea6028c> [<https://perma.cc/47FH-EZKD>].

121. See Exec. Order No. 13,382, 3 C.F.R. 170 (2006).

122. U.S. Dep’t of Treasury, *Joint Statement of Secretary Geithner and Secretary Clinton on Iran Sanctions* (June 23, 2011), <https://www.treasury.gov/press-center/press-releases/Pages/tg1218.aspx> [<https://perma.cc/HY8K-U554>].

123. John Kirby, Spokesperson, U.S. Dep’t of State, *Daily Press Briefing* (June 23, 2016), <http://2009-2017.state.gov/r/pa/prs/dpb/2016/06/259015.htm> [<https://perma.cc/P3WP-8LES>].

124. *Id.*

125. *Id.*

engaging in the activities that had resulted in the sanctions being put in place in 2011. The spokesperson responded, “I’m not at liberty to go into the reasons behind the fact that it was removed from the [Specially Designated Nationals and Blocked Persons] list. All I could tell you is that we wouldn’t have done that if we weren’t comfortable doing so.”¹²⁶ In fact, Iran Air had continued engaging in sanctionable activity, something the Administration likely hid from Congress.¹²⁷

- The Administration secretly and arguably illegally waived sanctions on Iran’s state-owned propaganda outlet, the Islamic Republic of Iran Broadcasting.¹²⁸ The Trump Administration is once again enforcing those sanctions.¹²⁹

The Obama Administration also spied on U.S. opponents of the Iran deal, both in Congress and in private pro-Israel organizations.¹³⁰ Pro-Israel activists reported that the Administration seemed to know exactly what they were saying and doing, and acted accordingly.¹³¹ There have also been serious allegations that the Obama Administration undermined

126. Id.

127. See Adam Kredo, Obama Admin Hid Intel on Iranian Militants in Syria to Push Nuclear Deal, Wash. Free Beacon (Aug. 29, 2017), <http://freebeacon.com/national-security/obama-admin-hid-intel-iranian-militants-syria-push-nuclear-deal> [<https://perma.cc/P7DL-LN3F>].

128. See Adam Kredo, Congress Concerned Another Obama ‘Secret Deal’ with Iran Derailed New Sanctions on Tehran, Wash. Free Beacon (Jan. 17, 2018), <http://freebeacon.com/national-security/congress-concerned-another-obama-secret-deal-with-iran-derailed-new-sanctions-on-tehran> [<https://perma.cc/5BVD-3486>].

129. See Saeed Kamali Dehghan, Trump Plans to Enforce Sanctions Against Iran State TV, Says Source, Guardian (Jan. 8, 2018), <https://www.theguardian.com/world/2018/jan/08/trump-plans-to-enforce-sanctions-against-iran-state-tv-says-source> [<https://perma.cc/34V6-Y24Z>] (reporting that “Trump is planning not to sign the waiver in regards to the state broadcaster when it comes up for renewal at the end of January”); Ian Talley, U.S. Sanctions Iran’s Evin Prison, Broadcasting Chief and Others, Alleging Human Rights Abuses, Wall St. J. (May 30, 2018), <http://www.wsj.com/articles/u-s-sanctions-irans-evin-prison-broadcasting-chief-and-others-alleging-human-rights-abuses-1527705343> (on file with the *Columbia Law Review*) (reporting that the Treasury Department “imposed sanctions on several Iranian groups and officials it accused of human rights abuses”); Press Release, U.S. Dep’t of Treasury, Treasury Targets Human Rights Abuses, Censorship, and Enhanced Monitoring by the Iranian Government (May 30, 2018), <https://home.treasury.gov/news/press-releases/sm0397/> [<https://perma.cc/V45A-ZHFX>] (targeting certain Iranian individuals and entities for human rights abuses and censorship).

130. See Adam Entous & Danny Yadron, U.S. Spy Net on Israel Snares Congress, Wall St. J. (Dec. 29, 2015), <https://www.wsj.com/articles/u-s-spy-net-on-israel-snares-congress-1451425210> (on file with the *Columbia Law Review*); Lee Smith, Did the Obama Administration’s Abuse of Foreign-Intelligence Collection Start Before Trump?, Tablet (Apr. 5, 2017), <http://www.tabletmag.com/jewish-news-and-politics/229062> [<https://perma.cc/2DRC-ACFG>] [hereinafter Smith, Abuse of Foreign-Intelligence Collection].

131. Smith, Abuse of Foreign-Intelligence Collection, supra note 130.

federal law enforcement efforts against the Hezbollah terrorist group to placate Hezbollah's Iranian backers.¹³²

Debates about the soundness of the JCPOA as policy and the extent to which the executive branch can and should (within legal boundaries) circumvent Congress with regard to agreements with foreign powers are likely to continue indefinitely. But there seems little doubt that the Obama Administration's aggressive efforts to sign and implement JCPOA despite congressional opposition and legal impediments involved a rather vigorous game of constitutional hardball.

CONCLUSION

In the age of President Trump, American norms of political and legal behavior are being challenged as never before.¹³³ It's important to recognize, however, that Trump's flouting of longstanding conventions of political discourse and his verbal attacks on the press and the rule of law are at least in part the culmination of a broader decline in norms that has been underway for some time. This decline, in turn, can be attributed in significant part to political polarization, in which both parties have shifted toward their ideological extremes and in which politically involved Americans see their partisan opposites not as well-meaning fellow citizens but as the enemy.¹³⁴ These factors have been the primary drivers of the constitutional hardball described by the authors.

The authors place disproportionate blame for the rise of constitutional hardball on Republicans. This Response shows that the case for such blame is not nearly as clear-cut as the authors suggest. Regardless, it seems undeniable that both parties are engaged in tit-for-tat constitutional

132. See Josh Meyer, *The Secret Backstory of How Obama Let Hezbollah Off the Hook*, Politico (Dec. 18, 2017), <http://www.politico.eu/obama-hezbollah-the-secret-backstory-of-how-let-off-the-hook> [<https://perma.cc/6WU6-6T5U>].

133. See, e.g., Max Boot, *Opinion, Let's Count the Ways Donald Trump Has Gone Where No President Has Gone Before*, L.A. Times (Apr. 4, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-boot-trumps-broken-norms-20170404-story.html> (on file with the *Columbia Law Review*); David Leonhart, *Opinion, Trump Keeps Breaking the Rules*, N.Y. Times (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/michael-cohen-trump.html> (on file with the *Columbia Law Review*); Tom McCarthy, *Donald Trump and the Erosion of Democratic Norms in America*, Guardian (June 2, 2018), <https://www.theguardian.com/us-news/2018/jun/02/trump-department-of-justice-robert-mueller-crisis> [<https://perma.cc/92AH-L52K>]; Brendan Nyhan, *Norms Matter*, Politico Mag. (Sept.–Oct. 2017), <https://www.politico.com/magazine/story/2017/09/05/why-norms-matter-politics-trump-215535> [<https://perma.cc/AQ75-PLJE>].

134. See Ilya Somin, *The Disturbing Growth of Partisan Bias*, Wash. Post: Volokh Conspiracy (Dec. 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/09/this-is-your-brain-on-politics-the-disturbing-growth-of-partisan-bias> (on file with the *Columbia Law Review*) (noting that “partisan prejudice is far more common than racial prejudice by whites against blacks, or the reverse”).

hardball which shows no signs of diminishing. While constitutional hardball is not always inappropriate, the increased level of hardball is gradually undermining extraconstitutional norms that underpin the American political and legal system. If that trend continues, the American people will be the inevitable losers.