
NOTES

CONGRESSIONAL CONTROL OF FOREIGN
ASSISTANCE TO POST-COUP STATES

I. INTRODUCTION

On July 3, 2013, General Abdul Fattah al-Sisi, head of the Egyptian Armed Forces, announced that he had removed Mohamed Morsi — Egypt’s first-ever democratically elected president — from power.¹ In the following days, the Egyptian military installed a new government, arrested Morsi supporters, and drastically restricted the civil liberties of Egyptian citizens.² These events triggered a conundrum in Washington, D.C. The U.S. government provides approximately \$1.5 billion in foreign assistance to Egypt each year³ as part of a strategic partnership that began after the Camp David Accords in 1978. However, the government is also subject to section 7008 of the Consolidated Appropriations Act, 2014,⁴ which forbids most kinds of direct foreign assistance to countries in which a democratically elected government has been deposed by a military coup.⁵ How would the U.S. government balance its obligation to comply with the law, its commitment to assist Egypt, and its commitments to human rights and democratic rule that the al-Sisi coup seemingly threatened?

The Obama Administration’s dilemma in Egypt was the latest example of the choices the executive branch regularly makes in connection with congressional restrictions on foreign assistance to post-coup states. For many years, Congress has included, in its appropriations acts funding U.S. foreign assistance operations, a provision now known as section 7008.⁶ In its most recent iteration, section 7008 provides that:

¹ David D. Kirkpatrick, *Army Ousts Egypt’s President; Morsi Is Taken into Military Custody*, N.Y. TIMES, July 3, 2013, <http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>.

² See Robert F. Worth & Rick Gladstone, *Military Continues Crackdown in Egypt*, N.Y. TIMES, July 29, 2013, <http://www.nytimes.com/2013/07/30/world/middleeast/egypt.html>.

³ Brad Plumer, *The U.S. Gives Egypt \$1.5 Billion a Year in Aid. Here’s What It Does*, WASH. POST (July 9, 2013, 11:43 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/09/the-u-s-gives-egypt-1-5-billion-a-year-in-aid-heres-what-it-does>.

⁴ Pub. L. No. 113-76, § 7008, 128 Stat. 5, 494.

⁵ *Id.*

⁶ Section 7008 has been known by a variety of other names in previous appropriations acts, including section 608, section 508, and section 513. See Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 608, 121 Stat. 1844, 2315 (2007); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 508, 113 Stat. 1501, 1501A-83 (1999); Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, § 513, 99 Stat. 1185, 1305 (1985).

None of the funds appropriated or otherwise made available pursuant to titles III through VI of this Act shall be obligated or expended to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup d'état or decree or, after the date of enactment of this Act, a coup d'état or decree in which the military plays a decisive role⁷

The language and location of this provision (the “coup provision”) have changed slightly over the years, but some version has been included in foreign assistance appropriation bills since 1986, and it has been reauthorized numerous times.⁸ Put simply, the coup provision prevents many (though not all) forms of “direct” foreign assistance after a democratically elected government is deposed by a coup in which the military has played a decisive role.⁹ Unlike many other restrictions on U.S. foreign assistance, the coup provision does not include a waiver; if the provision applies, aid must be cut.

Although issues related to the coup provision frequently arise, there has been little scholarship on how the law is applied and how it is affecting the Executive’s conduct of U.S. foreign policy. Aiming to answer these questions, this Note proceeds in four parts. Part II examines a number of recent case studies involving states receiving U.S. foreign assistance that experienced military coups, and it identifies an unexpected trend in recent U.S. responses to such coups: increasingly, the U.S. government complies either fully or partially with the coup provision’s requirements in situations that implicate the statute, but does so only after asserting that it is not required to make a determination as to whether the coup provision applies. Part III explains that this trend of statutory avoidance is actually a logical response from the Executive, given the differences between the incentives the Executive faces when choosing whether to comply with and whether to invoke the coup provision. Part IV argues that this discrepancy is normatively undesirable. Although the coup provision has likely had positive effects on executive conduct of U.S. foreign policy, the statute could be improved if it were modified to include a requirement that the Executive make a conclusive

⁷ See Consolidated Appropriations Act, 2014 § 7008.

⁸ See *supra* note 6.

⁹ Various forms of aid — such as funding for certain human trafficking prevention programs — are typically appropriated through other statutes and are thus not subject to the strictures of the coup provision. See, e.g., Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1201–1208, 127 Stat. 54, 136–42. Additionally, in each appropriations act, certain allocations that would otherwise be subject to section 7008 include “notwithstanding” language that exempts them from funding restrictions. See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7043(c), 125 Stat. 786, 1227 (2011) (providing “notwithstanding” authority for funds allocated to HIV prevention efforts).

determination as to whether the statute applies, as well as a “fast track” mechanism for waiver requests. Part V concludes.

II. CHARACTERIZING EXECUTIVE COMPLIANCE WITH POST-COUP AID RESTRICTIONS

The Executive’s relationship with the coup provision is deeply complicated, and misconceptions about the nature of this relationship are common among commentators.¹⁰ This section traces the recent history of the provision — and foreign assistance law in general — and attempts to draw broad-stroke conclusions about how the executive branch interprets, uses, and chooses to comply with the statute. In recent years, at least one clear trend has emerged: increasingly, in cases that implicate the coup provision, the executive branch *does* choose to comply with the statute but does so as a matter of discretionary policymaking, while avoiding an admission that it is actually bound by the coup provision. This pattern is apparent in the U.S. response to at least three recent coups: the 2009 coups in Madagascar and Honduras, and the 2013 coup in Egypt.

Modern U.S. foreign assistance policy began with the passage of the Foreign Assistance Act of 1961,¹¹ a comprehensive law designed to advance U.S. national security interests by making the foreign-assistance system more transparent and reactive.¹² Yet despite the 1961 Act’s activist spirit, the Executive dominated foreign assistance policy throughout the 1960s, retaining broad discretionary authority to waive congressional restrictions on foreign aid.¹³ Congress’s approach to foreign assistance began to change in the early 1970s, when the legislature — in response to Vietnam — began attempting to increase its control over foreign policy. Starting with the Foreign Assistance Act of 1971,¹⁴ Congress strengthened executive certification requirements and

¹⁰ See, e.g., *Coup-lío: America’s Response to Coups*, THE ECONOMIST (July 23, 2013, 1:55 PM), <http://www.economist.com/blogs/democracyinamerica/2013/07/americas-response-coups> (basing a harsh assessment of U.S. compliance with the coup provision on the erroneous claim that the provision was first instituted in 1961); Max Fisher, *U.S. Has Spotty Record on Law Requiring It to Cut Aid After Coups*, WASH. POST (July 5, 2013, 1:04 PM), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/07/05/u-s-has-spotty-record-on-law-requiring-it-to-cut-aid-after-coups>.

¹¹ Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C.).

¹² See generally DIANNE E. RENNACK & SUSAN G. CHESSER, CONG. RESEARCH SERV., R40089, FOREIGN ASSISTANCE ACT OF 1961: AUTHORIZATIONS AND CORRESPONDING APPROPRIATIONS (2011) (describing the purposes of the Act).

¹³ See Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 73 (1988) (“[F]oreign aid restrictions [from 1961 to 1972] gave wide powers to the President to avoid their application and left Congress with few tools to control executive action.”).

¹⁴ Pub. L. No. 92-226, 86 Stat. 20 (1972).

made it more difficult for the President to exercise waiver authority.¹⁵ However, these moves met with limited success.¹⁶

A second reform period emerged in the late 1980s, after the Iran-Contra Affair revealed that the executive branch had funded the Nicaraguan Contras in violation of Congress's prohibition on such assistance. Iran-Contra catalyzed a new round of soul-searching about Congress's proper role in foreign assistance,¹⁷ and academics proposed new methods of constraining the Executive in the foreign affairs realm.¹⁸ It was from these circumstances that formal post-coup restrictions emerged. When drafting the 1986 foreign assistance appropriations bill, the House Appropriations Committee included a provision that prohibited the Executive from providing foreign assistance to Guatemala's military regime,¹⁹ which had recently overthrown a democratically elected civilian government.²⁰ When the Senate considered this legislation, it broadened the Guatemala restriction to apply to all states in which a democratic government had been overthrown by military coup.²¹ This new language survived in the final version of the law.²² Post-coup foreign assistance restrictions were born.

Since the passage of the 1986 Act, the post-coup foreign assistance restriction has proven remarkably durable. The restriction has been repassed numerous times,²³ and the statute's language — though it has

¹⁵ *Id.* at 76–82; see also Clair Apodaca, *U.S. Human Rights Policy and Foreign Assistance: A Short History*, 3 RITSUMEIKAN INT'L AFF. 63, 65 (2005) (discussing the Humphrey-Cranston Amendment in the Foreign Assistance Act of 1974, which restricted security-related foreign assistance to countries that grossly violated human rights).

¹⁶ See Michael Stohl et al., *Human Rights and U.S. Foreign Assistance from Nixon to Carter*, 21 J. PEACE RES. 215, 224 (1984) (noting that foreign aid to regimes with higher levels of human rights violations increased during the Nixon and Ford Administrations).

¹⁷ See, e.g., Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1326–35 (1988).

¹⁸ See John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379 (1988) (proposing structural changes to the War Powers Act of 1973); Koh, *supra* note 17, at 1318–41 (proposing new methods to limit executive control, including, inter alia, increased interagency review processes and specialized congressional subcommittees); see also Alex Whiting, Note, *Controlling Tin Cup Diplomacy*, 99 YALE L.J. 2043, 2059–62 (1990) (claiming Congress may prohibit funding systems that incent third parties to assist states the U.S. government is barred from supporting).

¹⁹ See DIANNE E. RENNACK ET AL., CONG. RESEARCH SERV., R40557, FOREIGN OPERATIONS APPROPRIATIONS: GENERAL PROVISIONS 3 (2011).

²⁰ See *Guatemalan Army Topples President in a Brief Battle*, N.Y. TIMES, Aug. 9, 1983, <http://www.nytimes.com/1983/08/09/world/guatemalan-army-topples-president-in-a-brief-battle.html>.

²¹ See RENNACK ET AL., *supra* note 19, at 3.

²² See Foreign Assistance and Related Programs Appropriations Act, 1986, Pub. L. No. 99-190, § 513, 99 Stat. 1185, 1305 (1985).

²³ See, e.g., Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 608, 121 Stat. 1844, 2315 (2007); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 508, 119 Stat. 2172, 2197–98 (2005); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508, 118 Stat. 2809, 2992–93 (2004); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 508, 113 Stat. 1501, 1501A–83 (1999).

been loosened slightly since the original act²⁴ — has remained largely consistent. Attempts to modify the restriction to include a presidential national security waiver have failed.²⁵ In general, the Executive's record of complying with the restrictions has been mixed. Shortly following the (generally uncooperative) Reagan Administration, U.S. foreign policy was rocked by the end of the Cold War²⁶ and interest increased in the idea that U.S. foreign policy should reflect "American values" like the rule of law and human rights.²⁷ This shift may have generated new respect for post-coup foreign assistance restrictions. In 1991, after the Algerian military forced from power President Chadli Bendjedid,²⁸ the George H. W. Bush Administration quickly cut foreign assistance to that country,²⁹ and the Clinton Administration did the same after Pakistan's 1999 coup.³⁰

After September 11, 2001, revealed new security challenges for the United States, compliance patterns shifted. After the attacks, the George W. Bush Administration unilaterally restored assistance to Algeria and sought and received specific congressional authorization to restore aid to Pakistan.³¹ Since that time, executive compliance with the coup provision has oscillated between complete compliance and subversion of the restrictions. After Fiji's coup in 2006 and Mali's coup in 2012, the U.S. government cut aid and referenced the statute as the reason for the assistance cuts.³² In the wake of Thailand's 2006

²⁴ *Compare* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, Pub. L. No. 107-115, § 508, 115 Stat. 2118, 2140 (applying the provision to the "government of any country"), *with* Foreign Assistance and Related Programs Appropriations Act, 1986, Pub. L. No. 99-190, § 513, 99 Stat. 1185, 1305 (1985) (applying the provision to "any country").

²⁵ On two occasions, in 2003 and 2005, members of Congress introduced bills that would have granted the President authority to waive post-coup foreign assistance restrictions, but each failed. *See* Foreign Affairs Authorization Act, Fiscal Years 2006 and 2007, S. 600, 109th Cong. § 2212 (2005) (failed after being reported by committee); Foreign Assistance Authorization Act, Fiscal Year 2004, S. 1161, 108th Cong. § 213 (2003) (same).

²⁶ *See generally* Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23 (1990) (discussing the role of the United States in the post-Cold War international order); *see also generally* FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 287-339 (1992) (arguing that liberal democracy may be the final form of human government).

²⁷ *See* ROBERT W. MCELROY, *MORALITY AND AMERICAN FOREIGN POLICY* 168-84 (1992) (arguing that morality plays a larger-than-expected role in U.S. foreign policy); John W. Dietrich, *U.S. Human Rights Policy in the Post-Cold War Era*, 121 POL. SCI. Q. 269, 272 (2006) (discussing the renewed emphasis on human rights in U.S. foreign policy after the Cold War).

²⁸ *See* Hicham Yezza, *What Algeria 1992 Can, and Cannot, Teach Us About Egypt 2013*, OPENDEMOCRACY (July 23, 2013), <http://www.opendemocracy.net/hicham-yezza/what-algeria-1992-can-and-cannot-teach-us-about-egypt-2013>.

²⁹ Fisher, *supra* note 10.

³⁰ *See* PETER R. BLOOD, CONG. RESEARCH SERV., IB94041, *PAKISTAN-U.S. RELATIONS* 6 (2002).

³¹ *See* Fisher, *supra* note 10.

³² On the Fiji coup, *see The Impact of Coup-Related Sanctions on Thailand and Fiji: Hearing Before the Subcomm. on Asia, the Pac., & the Global Env't of the H. Comm. on Foreign Affairs*,

coup, however, the United States suspended approximately \$24 million in military aid,³³ but maintained select forms of security assistance³⁴ on the ground that doing so served “a U.S. national interest.”³⁵

A. 2009 Coup in Madagascar: A New Trend Emerges

A new trend first became apparent in the U.S. government’s response to Madagascar’s 2009 coup. Beginning in late 2008, Madagascar entered a period of political instability stemming from elected President Marc Ravalomanana’s perceived failure to spur economic growth, reduce corruption, and respect the rule of law.³⁶ This period culminated in March 2009 when Madagascar’s military forced President Ravalomanana to cede power.³⁷ The military subsequently installed opposition leader Andry Rajoelina as President.³⁸ The facts of the Madagascar coup left little doubt that the coup provision was meant to apply.³⁹ The U.S. response to these events was in some respects typical, but also curious. The day after the coup, the State Department announced the suspension of all nonhumanitarian assistance⁴⁰ and subsequently began the process of winding down affected programs,⁴¹ thereby placing the government in compliance with the statute. Yet the official announcement of the foreign assistance cuts

110th Cong. 21 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37066/pdf/CHRG-110hhrg37066.pdf> (statement of Glyn T. Davies, Deputy Assistant Service [sic], Australia, New Zealand, and the Pacific Islands, Bureau of East Asian and Pacific Affairs, U.S. Department of State). On the Mali coup, see ALEXIS ARIEFF, CONG. RESEARCH SERV., R42664, CRISIS IN MALI 15–16 (2013); Press Statement, U.S. Dep’t of State, U.S. Lifts Restrictions on Bilateral Assistance to Mali (Sept. 6, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/09/213910.htm>.

³³ Fisher, *supra* note 10; *U.S. Suspends Some Aid to Thailand Over Coup*, NBC NEWS (Sept. 28, 2006, 4:18 PM), http://www.nbcnews.com/id/15049899/ns/world_news-asia_pacific/t/us-suspends-some-aid-thailand-over-coup.

³⁴ *The Impact of Coup-Related Sanctions on Thailand and Fiji: Hearing Before the Subcomm. on Asia, the Pac., & the Global Env’t of the H. Comm. on Foreign Affairs*, 110th Cong. 19 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37066/pdf/CHRG-110hhrg37066.pdf> (statement of Eric G. John, Deputy Assistant Secretary, Southeast Asia, Bureau of East Asian and Pacific Affairs, U.S. Department of State).

³⁵ See *U.S. Suspends Some Aid to Thailand Over Coup*, *supra* note 33.

³⁶ See LAUREN PLOCH & NICOLAS COOK, CONG. RESEARCH SERV., R40448, MADAGASCAR’S POLITICAL CRISIS 9–10 (2012).

³⁷ See *id.* at 11–12.

³⁸ *Id.*

³⁹ Madagascar was a clear case in which the coup provision should have applied because Ravalomanana was democratically elected and the coup was performed exclusively by the military. See *id.* (discussing the military’s role in the coup).

⁴⁰ Press Statement, U.S. Dep’t of State, U.S. Condemns Coup d’Etat in Madagascar and Suspends Non-Humanitarian Assistance (Mar. 20, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/03/120714.htm>.

⁴¹ See U.S. AGENCY FOR INT’L DEV., MADAGASCAR: U.S. FOREIGN ASSISTANCE PERFORMANCE PUBLICATION, FISCAL YEAR 2009, at 2 (2009), available at <http://www.state.gov/documents/organization/159126.pdf>.

did not reference the coup provision at all; rather, it described the cuts as a response to a process that was “undemocratic and contrary to the rule of law.”⁴² Although later government documents suggest the coup provision does apply to Madagascar,⁴³ the State Department does not appear to have made any formal announcement to that effect. Whether the original cuts to assistance enacted in the wake of the crisis were made pursuant to a determination under the coup provision thus remains somewhat ambiguous.

B. 2009 Coup in Honduras: Further Development

The phenomenon of coup provision compliance without explicit application of the statute developed further in the United States’ response to Honduras’s 2009 coup, which occurred only a few months after the Madagascar incident. In 2009, Honduras was wracked by a political and constitutional crisis after President Manuel Zelaya initiated a plan to rewrite the country’s constitution.⁴⁴ On June 25, shortly after Zelaya dismissed several powerful generals from the military, Honduras’s Supreme Court approved an arrest warrant for Zelaya based on charges that his proposed referendum was illegal.⁴⁵ Three days later, Honduran military personnel removed Zelaya from power and transferred him to Costa Rica.⁴⁶ Honduras’s National Congress subsequently ratified Zelaya’s removal from power and Roberto Micheletti, next in line for the presidency, became interim president.⁴⁷

Unlike Madagascar, Honduras has had a historically strong relationship with the United States based on mutual security interests. In the 1980s, Honduras was the base for many of the United States’ anti-leftist activities in Latin America,⁴⁸ and in recent years the United States has used Honduras as a base for regional anti-drug trafficking and counter-terrorism operations.⁴⁹ The potential foreign policy consequences of cutting off assistance were thus more serious than in Madagascar. Additionally, because Zelaya had been removed pursuant to a judicial directive — and may have previously acted in an unconstitutional manner — there was some legal ambiguity about whether a

⁴² Press Statement, *supra* note 40.

⁴³ See U.S. AGENCY FOR INT’L DEV., *supra* note 41, at 1.

⁴⁴ See PETER J. MEYER, CONG. RESEARCH SERV., RL34027, HONDURAN-U.S. RELATIONS 5–6 (2009).

⁴⁵ NOAH FELDMAN ET AL., REPORT TO THE COMMISSION ON TRUTH AND RECONCILIATION OF HONDURAS: CONSTITUTIONAL ISSUES 14–16 (2011), available at <http://ssrn.com/abstract=1915214>.

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* at 17–19.

⁴⁸ See MARK P. SULLIVAN, CONG. RESEARCH SERV., RS21103, HONDURAS: POLITICAL AND ECONOMIC SITUATION AND U.S. RELATIONS 4 (2006).

⁴⁹ MEYER, *supra* note 44, at 13.

“coup” had occurred and whether the military had played a “decisive” role within the meaning of the statute.⁵⁰

The initial U.S. government response to the Honduras coup was muted. The U.S. government refrained from cutting aid to Honduras, and in a public press briefing Secretary of State Hillary Clinton refused to state a position on whether the coup provision applied.⁵¹ About a week later, the State Department suspended \$20 million in aid,⁵² thereby placing the government in partial compliance with the provision. However, the State Department cut funding on an interim basis and made clear that it was not acting pursuant to a legal obligation.⁵³ The U.S. government’s strategy appeared to be one of using foreign assistance as leverage to push the Micheletti regime into negotiations with Zelaya.⁵⁴ Relatively few changes were made to foreign assistance until two months after the coup. In September 2009, after negotiations to restore Zelaya to power encountered difficulties,⁵⁵ the U.S. government officially cut all nonhumanitarian assistance to Honduras.⁵⁶ This move appears to have placed the United States in compliance with the coup provision. At the time of the cut, however, the State Department

⁵⁰ The legal question of whether a “coup” has occurred within the meaning of the statute is unclear. The text of the coup provision provides no guidance on what constitutes a coup. Merriam-Webster defines a coup d’état as “a sudden attempt by a small group of people to take over the government usually through violence.” *Coup D’État Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/coup%20d'etat> (last visited May 10, 2014). However, Professor Ozan O. Varol has identified as a distinct category of analysis the “democratic coup d’état,” wherein the military overthrows an authoritarian government to facilitate a democratic process and, typically, administers a caretaker government until elections are held. See Ozan O. Varol, *The Democratic Coup d’État*, 53 HARV. INT’L L.J. 291, 295 (2012).

⁵¹ See Press Briefing by Hillary Rodham Clinton, Sec’y, U.S. Dep’t of State, in Wash., D.C. (June 29, 2009), available at <http://www.state.gov/secretary/20092013clinton/rm/2009a/06/125487.htm> (noting, in response to a question about whether the coup provision was triggered by events in Honduras, that “we are withholding any formal legal determination”).

⁵² Lorenzo Piccio, *How Have Recent Coups Affected US Aid?*, DEVEX (July 8, 2013), <https://www.devex.com/en/news/how-have-recent-coups-affected-u-s-aid/81390>.

⁵³ See Press Briefing by Ian Kelly, Dep’t Spokesman, U.S. Dep’t of State, in Wash, D.C. (July 2, 2009), available at <http://www.state.gov/r/pa/prs/dpb/2009/july/125599.htm#HONDURAS> (noting, in response to a question about aid cutoff to Honduras, that “legal review [wa]s ongoing” when the State Department made the decision to suspend aid). In spite of the government’s position that a determination under the coup provision need not be made, the State Department apparently believed that the situation in Honduras could be described as a coup. See Press Briefing by Hillary Rodham Clinton, *supra* note 51 (noting that “we do think that this has evolved into a coup” before declaring that “we are withholding any formal legal determination”).

⁵⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-9R, REVIEW OF U.S. RESPONSE TO THE HONDURAN POLITICAL CRISIS OF 2009, at 6 (2011), available at <http://www.gao.gov/assets/590/585824.pdf>.

⁵⁵ See Alexander Main, *‘A New Chapter of Engagement’: Obama and the Honduran Coup*, in NACLA REPORT ON THE AMERICAS 15, 18 (2010) (describing the Micheletti government’s refusal to accede to the stipulations of a third-party mediator’s plan).

⁵⁶ See *U.S. Cuts Aid to Honduras*, CBS NEWS (Sept. 3, 2009, 1:19 PM), <http://www.cbsnews.com/news/us-cuts-aid-to-honduras>.

again made clear that its actions were not taken pursuant to a finding under the provision that a military coup had occurred.⁵⁷

C. 2013 Coup in Egypt: Statutory Avoidance in Full Flower

The “statutory avoidance” trend that was first evident in U.S. responses to the Madagascar and Honduras coups manifested fully in the U.S. response to the 2013 coup in Egypt. The 2011 Egyptian Revolution marked the beginning of a period of political instability in Egypt.⁵⁸ Although President Mohamed Morsi had been chosen in elections that were generally considered free,⁵⁹ his pro-Islamist policies and attempts to arrogate power caused controversy and deepened instability in Egyptian society.⁶⁰ This instability culminated on July 3, 2013, following four days of massive public protests against Morsi, when Egypt’s army chief removed Morsi from power and appointed an interim government.⁶¹ The Egypt coup placed the U.S. government in a deeply uncomfortable position. Although Morsi’s actions in the lead-up to the coup were arguably undemocratic, his removal was extraconstitutional and the military was the only arm of the government that played a significant role in the ouster.⁶² The Egypt case thus seemed like a candidate for swift application of the coup provision.⁶³

⁵⁷ *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 54, at 7–8.

⁵⁸ See *After Jubilation in Egypt as Mohamed Morsi Wins Election, the Real Challenge Begins*, THE INDEPENDENT (June 25, 2012), <http://www.independent.co.uk/voices/editorials/leading-article-after-jubilation-in-egypt-as-mohamed-morsi-wins-election-the-real-challenge-begins-7879706.html>.

⁵⁹ See, e.g., *id.*

⁶⁰ See David D. Kirkpatrick & Mayy El Sheikh, *Citing Deadlock, Egypt’s Leader Seizes New Power and Plans Mubarak Retrial*, N.Y. TIMES, Nov. 22, 2012, <http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html>.

⁶¹ See Kirkpatrick, *supra* note 1.

⁶² The 2012 elections that brought Morsi to power were “consistent with international standards,” making Morsi “democratically elected,” as required by the statute. See FREEDOM HOUSE, FREEDOM IN THE WORLD 2013: EGYPT, available at <http://www.freedomhouse.org/report/freedom-world/2013/egypt>; see also Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7008, 125 Stat. 1195 (2011).

⁶³ At least one commentator has argued that the Egypt coup did not necessarily trigger the coup provision because it was a “democratic coup” performed in response to popular protests. See Clare Goslant, *Orwell and the Perils of Egyptian Politics*, HARV. INT’L REV. (Sept. 8, 2013, 10:01 PM), <http://hir.harvard.edu/blog/clare-goslant/orwell-and-the-perils-of-egyptian-politics>; cf. Varol, *supra* note 50, at 295 (identifying a distinct category of “[d]emocratic military coups”). Though this argument is not without merit, the most reasonable conclusion is that the 2013 coup did fall under the terms of the provision because the drafters of the post-coup restrictions were likely unaware of the concept of a “democratic coup,” particularly given the term’s modern vintage, and, at any rate, made no attempt to exclude such coups from the statute. See *id.* (noting that democratic coups may be particularly prevalent in the post–Cold War era). The specific actions of the coup also likely fall within the common meaning of “coup.” Cf. *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

However, such an action would likely have had significant political and diplomatic consequences. The United States delivers roughly \$ 1.5 billion in foreign assistance to Egypt annually.⁶⁴ The Egyptian military is dependent on this aid,⁶⁵ and the United States considers Egypt a linchpin in its strategy for maintaining security in the Middle East.⁶⁶

The executive branch's initial strategy for addressing foreign assistance to Egypt reflected these deep foreign policy concerns. The U.S. government did not cut foreign assistance and in official reports it made no reference to the coup provision.⁶⁷ In public appearances, U.S. officials scrupulously avoided use of the word "coup" when referring to events in Egypt.⁶⁸ In late July, reports surfaced that the Obama Administration was relying on an undisclosed legal opinion — apparently furnished by the State Department and other agencies — indicating that the government was not required under the coup provision to make a determination as to whether a coup took place.⁶⁹ As a senior official anonymously explained: "We will not say it was a coup, we will not say it was not a coup, we will just not say."⁷⁰ Unlike in the Madagascar and Honduras cases, the high-profile nature of the U.S. relationship with Egypt led to extensive, and critical, media coverage of the U.S. decision not to cut foreign assistance during this period.⁷¹ Meanwhile, coup-related unrest continued in Egypt; the new military regime initiated a number of crackdowns against dissidents.⁷² Eventually, in October 2013, the U.S. government announced that it was cutting significant amounts of foreign assistance to Egypt, which in-

⁶⁴ Plumer, *supra* note 3.

⁶⁵ See Sahar Aziz, *U.S. Foreign Aid and Morsi's Ouster*, MIDDLE E. INST. (July 31, 2013), <http://www.mei.edu/content/us-foreign-aid-and-morsis-ouster> (noting that, under some estimates, U.S. assistance covers more than 80% of the Egyptian military's procurement costs).

⁶⁶ See JEREMY M. SHARP, CONG. RESEARCH SERV., RL33003, EGYPT: BACKGROUND AND U.S. RELATIONS 8–9 (2013).

⁶⁷ See, e.g., Press Release, The White House, Statement by President Barack Obama on Egypt (July 3, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/07/03/statement-president-barack-obama-egypt>.

⁶⁸ See Press Briefing by Jen Psaki, Spokesperson, U.S. Dep't of State, in Wash., D.C. (July 3, 2013), available at <http://www.state.gov/r/pa/prs/dpb/2013/07/211535.htm> (describing the situation in Egypt as "extremely tense and fast-moving" and calling it a "current crisis" and a "very fluid situation").

⁶⁹ Mark Landler, *Aid to Egypt Can Keep Flowing, Despite Overthrow, White House Decides*, N.Y. TIMES, July 25, 2013, <http://www.nytimes.com/2013/07/26/world/middleeast/aid-to-egypt-can-keep-flowing-despite-overthrow-white-house-decides.html>.

⁷⁰ *Id.*

⁷¹ See, e.g., Noah Feldman, *Call Egypt's Coup a Coup*, BLOOMBERG VIEW (July 8, 2013, 12:00 PM), <http://www.bloomberg.com/news/2013-07-08/call-egypt-s-coup-a-coup.html>.

⁷² See David D. Kirkpatrick, *Egypt Widens Crackdown and Meaning of 'Islamist'*, N.Y. TIMES, Aug. 25, 2013, <http://www.nytimes.com/2013/08/25/world/middleeast/egypt-widens-crackdown-and-meaning-of-islamist.html>.

cluded cash assistance and “large-scale military systems.”⁷³ However, after the announcement, U.S. government officials made clear that the decision to cut aid was not made on the basis of a legal obligation under the coup provision.⁷⁴ The executive branch’s position was that it is not obligated to determine whether the statute applies at all. The question of the provision’s application to Egypt was resolved in January 2014 when Congress passed a special exemption waiving the coup provision’s requirements with respect to only Egypt.⁷⁵

III. EXPLAINING STATUTORY AVOIDANCE AND THE COUP PROVISION

The executive branch’s behavior in the aftermath of the coups in Madagascar, Honduras, and Egypt seems curious upon initial inspection. In each instance, the Executive took steps that amounted to full or partial compliance with the coup provision’s substantive requirements, but in at least two of the three cases the executive branch bent over backward to avoid making a determination under the statute — either by ignoring the statute’s existence or by actively arguing that it was not obligated to make a determination. Why would the Executive deny that it needs to make a determination under a law, but then comply with the law’s requirements as if such a determination had been made? This Part contends that the executive branch’s evasive behavior with respect to the coup provision is, in fact, readily explainable through rationalist and normative models of executive behavior. Though the Executive has strong incentives impelling it to adhere to the provision’s substantive requirements, a desire to preserve its interpretive authority may be driving the Executive’s reluctance to make determinations under the statute.

A. *The Decision to Comply with the Statute’s Requirements*

The decision of whether to comply with the coup provision’s substantive requirements is, like any consequential foreign policy decision,

⁷³ Sharanbir Grewal, *The Logic of Partially Suspending Aid to Egypt*, WASH. POST (Oct. 12, 2013, 9:33 AM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/12/the-logic-of-partially-suspending-aid-to-egypt> (internal quotation marks omitted).

⁷⁴ Briefing by Senior Administration Officials, U.S. Dep’t of State, in Wash., D.C. (Oct. 9, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/10/215262.htm> (quoting one senior administration official as stating that “[n]othing has changed in terms of approaching what you call the coup restriction; didn’t make a determination, haven’t made a determination, don’t think we need to make a determination, are acting consistent with the provisions of the law and we’ll continue to do so”).

⁷⁵ See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7401(a), 128 Stat. 5, 522–24.

the product of multiple influences.⁷⁶ Perhaps the most obvious reason for executive compliance with the provision is that the actions needed to comply with the provision are also attractive to the Executive, independent of their status as legal requirements. This explanation certainly has weight, and it is particularly useful in helping explain the Executive's behavior in the Honduras and Egypt cases.⁷⁷ However, the foreign policy-based explanation for post-coup cuts to foreign assistance does not fully explain modern executive behavior in this area. First, the foreign policy explanation has difficulty accounting for the generally high level of executive compliance in situations where the provision likely applies. Since the end of the Cold War, there has been only one instance of blatant executive defiance of the coup provision: the George W. Bush Administration's post-9/11 distribution of military assistance to Algeria.⁷⁸ In virtually every other case in which a democratic government has been deposed by the military since 1991, the United States has cut at least *some* foreign assistance.⁷⁹ It seems likely that in some instances such cuts harm larger U.S. foreign policy goals more than they help them. (Consider, for example, that after the United States cut military assistance to Thailand following the 2006 coup, the Thai government quickly accepted \$49 million in military aid from China, the United States' major strategic competitor in the region.⁸⁰) Second, the foreign policy-based explanation cannot fully account for the structuring of foreign assistance cuts made after coups. In most recent cases, post-coup foreign assistance cuts have focused on military assistance and other forms of "direct" assistance to the government — the forms of assistance most clearly within the ambit of the provision.⁸¹ Again, it seems unlikely that the cuts prescribed by the

⁷⁶ See generally GRAHAM T. ALLISON, *ESSENCE OF DECISION* (1971) (explaining, through a case study, that foreign policy decisions are products of multiple competing influences).

⁷⁷ As discussed in section II.B, the U.S. government in the Honduras case determined that it would use escalating cuts to foreign assistance as a device to pressure the military regime into dealing with the opposition, and the fact that aid was cut soon after reconciliation talks broke down suggests that the cut might have been intended to penalize the military government for its failure. See *supra* p. 2506–07. Similarly, at the time the State Department announced significant cuts to U.S. foreign aid to Egypt, it stated that the cuts were in part a response to the worsening human rights situation inside Egypt and were intended to push Egypt's military leaders to move more aggressively toward transitioning the country to democracy. See *supra* p. 2508–09.

⁷⁸ See Fisher, *supra* note 10.

⁷⁹ See *id.* (noting no instances, aside from the Algeria case, in which aid was not cut following a military coup); see also *supra* p. 2501–09 (describing cuts to foreign assistance following military coups in Algeria, Pakistan, Thailand, Fiji, Madagascar, Honduras, Mali, and Egypt).

⁸⁰ WALTER LOHMAN, HERITAGE FOUND., *REINVIGORATING THE U.S.-THAILAND ALLIANCE 3* (2011), available at http://thf_media.s3.amazonaws.com/2011/pdf/bg2609.pdf.

⁸¹ For instance, the recent cuts to Egypt's foreign assistance followed this pattern, and the cuts in the Madagascar case were precisely tailored to the coup provision's requirements, even though the statute was not invoked. See *supra* p. 2504, 2509. The post-coup cuts of assistance to Mali, Fiji, and Thailand also appeared generally to track the kinds of assistance most clearly prohibited

coup provision are inevitably the most useful kinds of cuts for U.S. foreign policy goals across the board.⁸²

Executive compliance with the coup provision — including in situations in which it is not actually invoked — makes more sense when one accounts for the normative and rationalist commitments of actors within the executive branch. H.L.A. Hart first posited that law is experienced as normatively binding⁸³ — individuals comply with the law in part because they believe they have a prima facie duty of compliance. In recent years, a significant number of scholars have appropriated this “Hartian assumption” to explain why the Executive at least sometimes complies with congressionally imposed limitations on its power that cannot be enforced.⁸⁴ Executive branch lawyers and policymakers, the argument goes, have normative commitments to complying with the law that interact with policy preferences to produce outcomes that reflect the law’s substantive content.

There is good reason to think that normative precommitments of executive branch actors may also be helping to generate compliance with the coup provision’s substantive requirements. The Office of the Legal Adviser at the State Department, which leads the analysis of whether post-coup sanctions must be applied, has developed strong norms of independent, apolitical analysis.⁸⁵ Though it is doubtful that

under the statute (principally military assistance). See *The Impact of Coup-Related Sanctions on Thailand and Fiji*, *supra* note 32, at 21 (statement of Glyn T. Davies, Deputy Assistant Service [sic], Australia, New Zealand, and the Pacific Islands, Bureau of East Asian and Pacific Affairs, U.S. Department of State); ARIEFF, *supra* note 32, at 15–16; EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RL32593, THAILAND: BACKGROUND AND U.S. RELATIONS 10 (2010).

⁸² For example, if a goal of foreign assistance is to build security in a war-torn state to allow for economic and democratic development, then military assistance — the kind of assistance most clearly prohibited under the coup provision — would be highly desirable.

⁸³ See generally H.L.A. HART, *THE CONCEPT OF LAW* 151–208 (1961); see also generally Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559 (2007) (applying Hartian notions of normative constraint to the executive power context); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 *CORNELL L. REV.* 67, 72 (2005) (applying Hartian legal norms in an academic analysis of executive power, which advises executive branch lawyers to “do right with regard to the law”); Manik V. Suri, Note, *Reorienting the Principal-Agent Frame: Adopting the “Hartian” Assumption in Understanding and Shaping Legal Constraints on the Executive*, 7 *HARV. L. & POL’Y REV.* 443 (2013).

⁸⁴ See Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *COLUM. L. REV.* 1097, 1132–38 (2013) (identifying “norm internalization” as a constraint on executive power); Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 *U. CHI. L. REV.* 777, 789–804 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010)); Richard H. Pildes, *Law and the President*, 125 *HARV. L. REV.* 1381, 1404–08 (2012) (reviewing POSNER & VERMEULE, *supra*) (criticizing purely consequentialist analysis of executive behavior).

⁸⁵ Harold Hongju Koh, Remarks, *The State Department Legal Adviser’s Office: Eight Decades in Peace and War*, 100 *GEO. L.J.* 1747, 1756 (2012) (explaining, based on the author’s experience as State Department Legal Adviser, that one of the “core canons” of the Adviser’s office is that the Adviser “should act as an independent, nonpartisan expert on and scholar of international law”).

the final decision of whether to cut foreign assistance always lies with the Legal Adviser, it seems likely that the semiautonomous, legalistic character of the Legal Adviser's analysis and recommendations influences policy decisions about whether to take actions tantamount to complying with the provision. The U.S. foreign policy establishment has also defined foreign assistance cut-offs as desirable after coups, and in so doing has shaped the normative commitments of executive actors. For example, U.S. development agencies have detailed procedures in place to cut off foreign assistance pursuant to the coup provision's requirements,⁸⁶ and State Department personnel discuss the statute as a matter of course after a coup occurs.⁸⁷ These sorts of systems combine to create a "reflexive" response to foreign coups within the executive branch to take steps mirroring the coup provision's requirements. Thus, even when the provision is not explicitly applied, its shadow may result in executive actions that come close to compliance.

Even without the Hartian assumption, there is still good reason to think that executive actions will tend toward conduct tantamount to coup provision compliance. First, a risk-averse executive is likely to avoid confrontations with Congress, as such confrontations have the potential to damage executive priorities in other areas.⁸⁸ Additionally, numerous scholars have applied rational-actor models to conclude that the Executive is constrained by public opinion and the media.⁸⁹ Recent history demonstrates that once a coup has occurred, the Executive will come under public pressure to cut off aid to the country in which the coup occurred.⁹⁰ Rational executive actors therefore have significant incentives to suspend foreign assistance to post-coup states.

⁸⁶ See generally MILLENNIUM CHALLENGE CORP., REPORT ON COUNTRIES THAT ARE CANDIDATES FOR MILLENNIUM CHALLENGE ACCOUNT ELIGIBILITY FOR FISCAL YEAR 2011 AND COUNTRIES THAT WOULD BE CANDIDATES BUT FOR LEGAL PROHIBITIONS 4-6 (2010); U.S. AGENCY FOR INT'L DEV., AUDIT OF USAID COMPLIANCE WITH MILITARY COUP D'ETAT-RELATED PROGRAM SUSPENSION REQUIREMENTS OF SECTION 508 AND OTHER RELATED SECTIONS OF THE FOREIGN OPERATIONS APPROPRIATION ACTS — COTE D'IVOIRE 4-11 (2002).

⁸⁷ See, e.g., Press Briefing by Philip J. Crowley, Assistant Sec'y, U.S. Dep't of State, in Wash., D.C. (Sept. 3, 2009), available at <http://www.state.gov/r/pa/prs/dpb/2009/sept/128656.htm> (explaining that suspension of aid to Honduras was "consistent with U.S. legislation").

⁸⁸ A single Senator, for example, can disrupt the confirmation of the President's nominees.

⁸⁹ See, e.g., JACK GOLDSMITH, POWER AND CONSTRAINT 51-82 (2012).

⁹⁰ Consider, for example, the criticism of U.S. foreign aid to Egypt after the 2013 coup. See, e.g., Feldman, *supra* note 71; see also Steven Aiello, *Reforming the FAA Section 508*, JURIST (July 29, 2013, 10:45 AM), <http://jurist.org/dataline/2013/07/steven-aiello-legislation-reform.php> ("It is reasonable to call for reduced military aid (as one example) to a country which has undergone a coup.").

B. The Decision to Determine Whether the Coup Provision Applies

The discrepancy between executive compliance with the coup provision's substantive requirements and actual application of the provision begins to make sense when one unbundles the incentives and disincentives influencing the two decisions. This section posits that the Executive has distinct incentives to refrain from deciding whether the coup provision applies, and that these incentives inhere even in situations where the Executive has taken actions *toward* meeting the statute's requirements. Furthermore, many of the normative and rationalist forces discussed in section III.A do not apply with the same weight to the decision of whether to make a determination under the statute.

Declining to decide under the coup provision is attractive to the Executive — even when it is taking steps to comply with the statute's requirements — because doing so allows the Executive to preserve its interpretive authority over close questions of law that inhere in the statute. As discussed in Part II, whether a change of leadership in a country falls under the ambit of the provision is often unclear.⁹¹ Each time the Executive makes a determination under the provision, it contributes to a body of public precedent that will constrain the Executive's ability to make subsequent difficult interpretive decisions under the statute.⁹² For example, if the Executive has previously determined that a particular situation falls within the ambit of the coup provision, the political consequences of declining to cut aid in a future analogous situation may be increased. Or, if U.S. foreign policy interests change in the country under consideration and providing some form of assistance becomes a priority, a previous statutory determination would make it much more difficult for the Executive to change the country's assistance level without going back to Congress.⁹³

Though none of the Executive's recent actions directly evince this concern, executive determinations under the coup provision may also

⁹¹ For example, a leadership change may not be a coup if the leader in question has been constitutionally removed but refuses to leave office. See Varol, *supra* note 50, at 295. Similarly, whether the military has played a "decisive" role may be in question if the military is acting pursuant to the urging of other actors within the government.

⁹² Cf. Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 859 (2013) (arguing that "the permissibility of abstention as a matter of statutory interpretation depends on historical practice and the assumptions that historical practice reflected").

⁹³ For example, if the Clinton Administration had not invoked the coup provision in response to Pakistan's 1999 coup, the Bush Administration would not have been forced to go to Congress to seek an exemption from the statute after 9/11. See BLOOD, *supra* note 30, at 11. A rational executive might want to avoid such situations by declining formally to apply the coup provision in the first instance, particularly for countries like Egypt that cooperate with the United States in national security initiatives.

bolster Congress's constitutional authority to control foreign assistance. Some scholars have argued that the Executive's inherent authority does not leave room for a congressional role in foreign affairs, even in the appropriations context;⁹⁴ executive acquiescence to the post-coup restriction would establish a practice of congressional control and would thus make it more difficult for the Executive to assert broad constitutional authority with respect to other foreign assistance statutes.⁹⁵

In addition to these structural concerns, declining to decide under the coup provision can be useful to the Executive because application of the statute constrains executive discretion with respect to the state in question. When the Executive makes a determination that the provision applies, it obligates itself to cut all aid subject to the statute's requirements. In many cases when the executive branch is responding to a coup it desires flexibility in how and when it removes aid, even if it ultimately intends to make cuts to assistance.⁹⁶ Declining to decide whether the statute applies thus allows the executive branch additional flexibility in calibrating its response to coups.

Separately, many of the factors that drive compliance with the coup provision's substantive requirements, discussed in section III.A, do not apply with the same weight to the decision of whether to make determinations under the provision. To start, it is not clear that the normative obligation to comply with the law experienced by executive actors extends to the decision of whether to make a determination under a law. Indeed, there is a substantial tradition within the executive branch of deferring legal determinations for long periods of time.⁹⁷

⁹⁴ See J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1163 (“[T]he President, without violating the Constitution or statutory law, may obligate the Treasury provided that Congress has failed to appropriate the minimum amount necessary for him to perform the duties and exercise the prerogatives given him by article II of the Constitution.”); Connie Ferguson Bryan, Note, *Limiting the Use of Funds Appropriated for Executive Functions: Is the 1984 Boland Amendment Constitutional?*, 13 OKLA. CITY U. L. REV. 569, 605 (1988) (“Tying the hands of the President in his direction of foreign policy by absolutely limiting an appropriation for intelligence activities is unconstitutional as a violation of separation of powers.”).

⁹⁵ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–18 (2012) (explaining that historical practice and acquiescence is commonly invoked in disputes about the scope of presidential power).

⁹⁶ Frequently after a coup, the U.S. government prefers to preserve crucial programs or cut aid in a particular way. For example, after Pakistan's 1999 coup the Executive prioritized maintaining forms of security assistance, given Pakistan's position as a hub of Islamic extremism. See Colin Cookman & Bill French, *The Pakistan Aid Dilemma: Historical Efforts at Conditionality and Current Disputes Converge in the U.S. Congress*, CENTER FOR AM. PROGRESS (Dec. 16, 2011), <http://www.americanprogress.org/issues/security/report/2011/12/16/10823/the-pakistan-aid-dilemma>.

⁹⁷ See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1377–79 (2013) (detailing instances of executive agency inaction motivated by strategic concerns); see also *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (“[A]n agency's refusal to institute rulemaking proceedings is at the high end of

The institutional self-interest that helps compel post-coup foreign assistance cuts is also less relevant to the invocation decision. The existence of the coup provision is unlikely to be well known among the public, and in general the public is less concerned with whether the Executive is complying with the law in the abstract than it is with whether the Executive is taking actions that are substantively objectionable. The same theory may hold true for Congress.⁹⁸ Finally, because of bars to reviewability like standing and the political question doctrine, it is unlikely that a lawsuit could successfully be brought challenging government inaction under the coup provision, so the legal system provides few disincentives for the Executive with respect to invoking the provision.⁹⁹

IV. IMPLICATIONS OF POST-COUP STATUTORY AVOIDANCE

This Note has established that (1) the U.S. government is increasingly following a pattern of statutory avoidance with respect to the coup provision, wherein it cuts foreign assistance to countries in situations that may implicate the provision but declines to make determinations under the statute, and (2) this behavior is rational, given what we know about the incentives and preferences of executive actors. The question remains: is this trend desirable, or is it troubling? This Note answers the above question by proceeding from two normative assumptions. The first is that a congressional role in foreign assistance policy is constitutionally and practically desirable. Although some scholars have argued that the Executive's preeminent role in foreign affairs should preclude Congress from playing a significant role,¹⁰⁰ the weight of scholarship suggests that Congress has a constitutionally

the range' of levels of deference we give to agency action under our 'arbitrary and capricious' review." (quoting *Am. Horse Prot. Ass'n v. Lyng*, 821 F.2d 1, 4-5 (D.C. Cir. 1987)).

⁹⁸ Cf. JOHN HART ELY, *WAR AND RESPONSIBILITY* 47-67 (1993) (discussing Congress's tendency to evade its constitutional duty to declare war); Koh, *supra* note 17, at 1297-98, 1304-05 (arguing that Congress typically fails to check executive power in the foreign affairs realm, in part because of "legislative myopia," *id.* at 1297, and a lack of political will).

⁹⁹ See Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT'L L. & POL. 217, 245-52 (1999) (discussing the difficulty of a plaintiff establishing standing regarding the Executive's decision that another country has violated internationally recognized human rights). Moreover, even if a party did have standing, the question of whether a military coup has occurred is likely a nonjusticiable political question. See *Campbell v. Clinton*, 203 F.3d 19, 24-28 (D.C. Cir. 2000) (Silberman, J., concurring) (arguing that a challenge to the President's authority under the War Powers Act presented a nonjusticiable political question); see also Koh, *supra* note 17, at 1305, 1317 (arguing that courts have proven hesitant to become involved in questions of executive authority over foreign affairs when individual rights are not at stake).

¹⁰⁰ See sources cited *supra* note 94.

sanctioned role in foreign policymaking¹⁰¹ — and further, that Congress's foreign affairs authority is at its height in the appropriations realm.¹⁰² Such a congressional role in foreign assistance policy is valuable because members of Congress are more closely connected to citizens than is the Executive, and are thus better positioned to amalgamate citizens' ethical preferences into background norms of conduct.¹⁰³

The second assumption is that, insofar as the coup provision sets substantive limits on the Executive's conduct of foreign policy, the Executive should comply with those limits. This vision of the provision — as a statute with which the Executive was meant to comply — accords with the likely intent of the statute's drafters: to limit executive lawlessness in the foreign assistance realm after Iran-Contra revealed the extent to which the Executive was ignoring previous congressional attempts at constraint.¹⁰⁴ The assumption is also valid because in high-profile situations, the image of an executive branch failing to comply with either the letter or the spirit of a law designed to constrain it may sully perceptions of the U.S. government. As scholars have explained in analogous contexts, one result of executive subversion of congressional attempts at constraint is “the impression that the President runs roughshod over the law, with Congress unable to exercise its prerogatives in foreign affairs.”¹⁰⁵ Internationally, this kind of impression has significant potential to harm U.S. prestige.¹⁰⁶ Additionally, in the domestic context, high-profile instances of avoidance may render the government as a whole less capable of tackling foreign policy problems because their effect may be to reduce public trust in the government to make good choices.¹⁰⁷

¹⁰¹ See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941 (2008) (arguing that Congress has constitutional authority to be an active participant in the conduct of war).

¹⁰² See Meyer, *supra* note 13, at 89 (“Congress retains ample constitutional authority to control foreign assistance.”); see also Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350 (1988) (“Although the Constitution's appropriations requirement is not a typical grant of authority to the legislative branch, we may nonetheless usefully conceive of it as a ‘power.’”); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1390 (1994) (book review) (noting that “[a]s a structural matter, Congress has the first and last word” in deciding whether to commit U.S. armed forces to battle, given its appropriations power); Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1816 (2006) (characterizing appropriations as Congress's principal war power).

¹⁰³ Cf. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 215–24 (2009) (arguing that unilateral presidential power over international lawmaking damages democratic accountability).

¹⁰⁴ See *supra* p. 2502.

¹⁰⁵ Chinen, *supra* note 99, at 272.

¹⁰⁶ Indeed, the image of U.S. officials vacillating over whether Egypt had undergone a coup may have already had such an effect in the Middle East.

¹⁰⁷ Admittedly, this argument is in tension with the conclusion expressed in Part III that the public's disinterest in executive compliance frees the executive to engage in statutory avoidance of

Given these assumptions, it is fair to conclude that the coup provision's effect has been largely positive, but that the recent statutory avoidance trend is undesirable. The provision's impact has been mostly positive because the Executive's rate of compliance is reasonably high and the provision does, on occasion, drive the executive branch into communication with Congress when the Executive requires waiver authority. However, statutory avoidance in high-profile situations like the Egypt coup results in precisely the sort of misalignment between executive behavior and general perceptions of what constitutes lawfulness that erodes faith in the U.S. government — both domestically and abroad. This problem is only exacerbated by the fact that executive branch decisions declining to make determinations under the coup provision may themselves be illegal.¹⁰⁸ With these concerns in mind, this Note proposes two changes to improve the coup provision: (1) the provision's language should be amended to require a conclusive determination of whether the statute applies within a specific time frame after any regime change, and (2) Congress should install a fast-track mechanism to consider expeditiously executive requests for waiver of the provision.

A. Proposal 1: Mandatory Determination of Statute's Applicability

The easiest improvement to the coup provision would be to modify the statute's language to make clear that executive inaction — that is, failure to determine whether the provision does or does not apply — is impermissible. A bill pending in Congress, the Egypt Assistance Reform Act of 2013,¹⁰⁹ proposes just such a change. The proposed text requires the Secretary of State to transmit to Congress a determination under the provision and a justification for that determination “not later than 30 days after receiving credible information that the democratically elected head of a national government may have been deposed by a coup d'état or decree in which the security services of that country played a decisive role.”¹¹⁰ Obligating the Executive to make a decision about whether the provision applies, as this bill does, would mitigate the deleterious effects of statutory avoidance described

post-coup provisions. However, statutory avoidance may still have harmful effects on domestic perceptions of government in high-profile cases where the Executive's decision to avoid invoking the provision becomes a matter of public discussion. See, e.g., *The Daily Show* (Comedy Central television broadcast July 18, 2013), available at <http://www.thedailyshow.com/watch/thu-july-18-2013/everybody-coups---egypt---semantics> (mocking the U.S. government's refusal to make a determination under the coup provision as a “climax of meaninglessness”).

¹⁰⁸ See Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions* (Harvard Pub. Law Working Paper No. 14-08, 2013), available at <http://papers.ssrn.com/abstract=2355493> (arguing that agency inaction — including inaction under the coup provision — may be impermissible if it “circumvents” the statute).

¹⁰⁹ S. 1857, 113th Cong. (2013).

¹¹⁰ *Id.* § 101(a).

earlier in this Part. Additionally, the required disclosures the Executive would make in justifying its determination might foster communication between Congress and the Executive, thereby furthering the coup provision's original goals.¹¹¹

However, a weakness of the proposed determination-forcing amendment is that it provides little guidance on when precisely the Executive must make a decision. The provision's requirement that the Executive transmit a determination to Congress upon the receipt of "credible information" leaves open the question of what kind of information qualifies as "credible." It is entirely possible that this ambiguity would simply move the locus of congressional-executive conflict from the substantive question of whether a military coup has occurred to the second-order question of whether the Executive has received credible information suggesting that such a coup has occurred. Given Congress's probable inability to enforce the statute in court,¹¹² the statutory mechanism that triggers when the Executive must make a determination should be as clear as possible, so as to maximize the political costs of executive evasiveness. Thus, a better potential trigger for coup analysis might be whenever there is a change in the head of state of a given country. Although some legal ambiguity likely exists in the question of who constitutes a "head of state," in virtually all of the case studies discussed in this Note it has been very clear when a new head of state assumed office.¹¹³ Admittedly, requiring the government to produce a coup provision opinion each time a head-of-state change occurs would be overinclusive, and would require disclosures in cases where the transition was obviously democratic. The benefits of this proposal may outweigh the administrative costs, however.

B. Proposal 2: Fast-Track Procedure for Congressional Consideration of Executive Waiver Requests

One of the risks associated with the requirement discussed in section IV.A is that the Executive will begin making coup provision determinations as required, but in cases like Egypt that implicate critical

¹¹¹ Adding mandatory disclosures to the coup provision would also be valuable because by increasing the amount of information available to Congress, such disclosures could potentially reduce the risk of congressional apathy in the face of particularly questionable executive decisions under the statute. See Koh, *supra* note 17, at 1328. A system of disclosure requirements would also help Congress wield its most potent foreign assistance-related power: its power to threaten the Executive with funding cut-offs for specific tranches of aid. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84–85 (2006) (discussing Congress's power of the purse and the Appropriations Clause); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 839 (1994) ("We . . . reject the proposition that appropriations have less force and effect than 'substantive' legislation.").

¹¹² See Sunstein & Vermeule, *supra* note 108, at 6.

¹¹³ See *supra* p. 2501–09.

national security concerns, it will either engage in flawed legal analysis to conclude that the provision does not apply, or conclude that the provision does apply but then not comply. Such an outcome might be worse than the current equilibrium because it would increase the level of executive noncompliance and potentially generate conflict between the political branches. To prevent these outcomes, the provision likely requires a “safety valve” to allow the Executive to fund select assistance programs even after a military coup. One possibility — which has been proposed at various times in the past¹¹⁴ and is currently pending in Congress¹¹⁵ — would be to permit waiver of the coup provision if the Executive certifies that waiver is in the interest of U.S. national security. Though this option is appealing, the lessons of this Note demonstrate that it should not be pursued. First, as this Note has shown, the Executive can and does comply with the coup provision — at least partially — the vast majority of the time, and in cases where it cannot it seeks and receives conditional waivers from Congress.¹¹⁶ Thus, a standing waiver mechanism is probably unnecessary. Second, clarifying that the provision is not a firm rule would reduce its normative force. Accepting this Note’s conclusion that coup provision compliance is driven by the Executive’s perceived obligation to obey the law, the result of adding waiver authority might be lower rates of compliance or overuse of the waiver, as executive actors no longer feel bound to cut assistance after coups occur.¹¹⁷

The core problem associated with the provision’s current structure is not that it fails to provide a safety valve, but rather that the executive branch cannot access the safety valve that is available (going back to Congress) quickly enough to use it, given the fast-moving nature of foreign policymaking in post-coup states. Thus, instead of adding waiver authority to the provision, Congress should consider instituting a “fast-track” procedure to allow it expediently to consider executive waiver requests. Fast-track procedures emerged in the 1970s as a way for Congress to maintain influence over international trade agreements.¹¹⁸ The procedures typically allow select bills to reach the Sen-

¹¹⁴ See *supra* note 25.

¹¹⁵ S. 1857, § 101(a).

¹¹⁶ See *supra* Part II, TAN 10–75.

¹¹⁷ Scholars have shown that executive certification and waiver requirements are easily manipulated and evaded by the Executive and do little to constrain executive branch policymaking. See, e.g., Chinen, *supra* note 99, at 233–57 (arguing that certification requirements are ineffective at constraining the Executive); Scott Horton & Randy Sellier, Commentary, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 WIS. L. REV. 825 (arguing that certification requirements did not prevent the Reagan Administration from providing legally impermissible foreign assistance to El Salvador).

¹¹⁸ See Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT’L L. & ECON. 687, 697–707 (1996); Koh, *supra* note 17, at 1332.

ate and House floors without extensive (or any) discussion in committee, limit the amount of time allocated for floor debate, and prohibit amendments.¹¹⁹ Modified fast-track procedures have also been included in other kinds of foreign affairs legislation, including the War Powers Resolution.¹²⁰ A coup provision fast-track procedure would have much in common with these previous efforts. Like the War Powers Resolution's fast-track provision, it could stipulate that any executive request for waiver of post-coup restrictions be passed to each chamber's Foreign Relations Committee and reported to the full chamber within a specific time frame. The procedure could also provide for expedited voting and limited debate. Although the fast-track option would likely not eliminate all instances of noncompliance with the coup provision, it would reduce the likelihood of extended noncompliance in situations where cutting off aid would harm national interests.

V. CONCLUSION

Recent developments in the executive branch's relationship with the coup provision exemplify problems that have plagued foreign affairs law since the post-Watergate era. How does one balance the need of the President and State Department to conduct foreign affairs expeditiously with Congress's constitutional obligation to constrain the Executive? What kind of mechanisms should exist to maintain a workable equilibrium between the two political branches in the foreign affairs realm? The executive branch's propensity to refrain from making post-coup determinations demonstrates that the executive branch still faces myriad disincentives against accepting formal congressional restraints. However, the coup provision's broader success in establishing norms for foreign assistance to post-coup states — norms that appear to be generating at least some executive compliance with the statute's substantive requirements — suggests that Congress may still exert influence in the foreign affairs realm by shaping the preferences, norms, and goals of executive branch actors. This power does not dissipate when the legal constraints Congress institutes are unenforceable. Congress's experience with post-coup restrictions thus holds broader lessons for those who wish to constrain presidential behavior in areas of traditional executive control. Instead of focusing on the ability of a statute to limit the Executive's possible choices, lawmakers should craft statutory schemes designed to push the political branches into interpretive dialogue about political and legal controversies.

¹¹⁹ See Eli J. Kirschner, Note, *Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements*, 44 CORNELL INT'L L.J. 385, 386 (2011).

¹²⁰ War Powers Resolution, Pub. L. No. 93-148, § 7, 87 Stat. 555, 557-58 (1973).