UNILATERAL EXECUTIVE WITHDRAWAL FROM CONGRESSIONAL-EXECUTIVE AGREEMENTS

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I.
INTRODUCTION AND SUMMARY

Congressional-executive agreements are strange things. They are statutes, yet they are also something more: a synergistic combination of Article I and Article II powers. Moreover, they are commonplace—only about six percent of the international agreements that the United States has entered into since 1990 are formal Article II treaties.[1] Given the ubiquity of congressional-executive agreements, it is imperative that the President and Congress agree on a set of stable expectations vis-à-vis who may communicate withdrawal from congressional-executive agreements and who may terminate statutory provisions. I seek to provide a theoretical basis for unilateral executive withdrawal from congressional-executive agreements and articulate a framework that addresses the implications of statutory abrogation.

The President enjoys a monopoly on communicating withdrawal from congressional-executive agreements to foreign governments. This power, however, is *purely* communicative. Generally, no possibility of unilateral executive lawmaking via the abrogation of statutory provisions inheres in it. Congress's role is that of a ratchet—it may provide Article I sanction to statutory abrogation—a result the President alone cannot accomplish—but it may not unduly curtail the executive monopoly on communicating withdrawal. Thus, the executive monopoly on communicating withdrawal is as robust and exclusive as Congress's monopoly on sanctioning executive lawmaking. The President is powerless to engage in lawmaking, and Congress is equally powerless to impinge on the Article II communicative monopoly. Nonetheless, two exceptions to the general proposition that the President may not abrogate statutes merit consideration. First, unilateral executive communication of withdrawal from congressional-executive agreements pertaining to the settlement of private claims against foreign governments carries with it a

1. *About Treaties: Historical Overview*, UNITED STATES SENATE, https://www.senate.gov/about/powers-procedures/treaties/overview.htm [https://perma.cc/5QDJ-XPL5].

highly circumscribed Article II power to terminate certain provisions of an agreement. Second, a narrow Article II lawmaking power may exist where mere executive communication of withdrawal renders a statute entirely moot.

Part II briefly discusses the views of two leading academics. Part III frames the question by distilling these competing perspectives into two boundary conditions, namely that the President *must* enjoy an exclusive Article II power to communicate unilateral withdrawal even absent a concomitant power to unilaterally abrogate statutory provisions. Part IV traces the development of the exclusive Article II power to communicate withdrawal and its limits. Part V discusses Congress's potential role in sanctioning executive lawmaking via unilateral executive withdrawal, as well as Congress's relative powerlessness in curtailing the Article II communicative power—the congressional "ratchet." Finally, Parts VI and VII discuss the two exceptions to the general proposition that the President's communicative monopoly entails no lawmaking power: the claims settlement context and the special case of statutes that would be rendered entirely moot merely upon executive communication of withdrawal.

II.
BACKGROUND

Professor John Yoo rejects the constitutionality of unilateral executive withdrawal as a "negative act of terminating the law," which can be done only by Congress and the President enacting a later law.[2] He notes that while a lack of unilateral executive withdrawal from congressional-executive agreements would constitute a "serious curtailment of the executive's foreign affairs powers," the idea that the President may enjoy a "heretofore unknown power of executive termination of statutes" renders unilateral executive withdrawal dead on arrival, insofar as the President would then be exercising "legislative" power.[3] Yoo's objection does not distinguish between ex ante and ex post congressional-executive agreements, as he takes a

2. John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 Cornell L. Rev. 1, 37 (2011).

3. John Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 Mich. L. Rev. 757, 815 (2001). *Contra* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140, 209 (2009) (grounding a power of unilateral executive withdrawal in the President's "sole power to communicate on behalf of the nation on the international stage"). Ex ante congressional-executive agreements are negotiated by the President pursuant to an existing statutory authorization. Ex post congressional-executive agreements are first negotiated by the President and passed by Congress.

narrow view of the permissible scope of ex ante authorizations—they involve an executive factfinding role, but not an implied authorization to unilaterally withdraw.[4]

Professor Oona Hathaway begins to distinguish between the executive's *communicative* power to effectuate withdrawal, rooted in Article II, and an impermissible "cancellation" of a statute. On this view, the President's "sole power to communicate on behalf of the nation on the international stage" delineates the scope of an exclusively Article II power to effectuate withdrawal via communication to foreign parties.[5] Hathaway ascribes to this power an "absolute veto power over international lawmaking," which the President may exercise by merely refusing to negotiate an international agreement.[6] This affirmation of a power of unilateral executive withdrawal from congressional-executive agreements is more practical than theoretical—the President may withdraw simply because of an executive monopoly on communicating with foreign parties. I begin by elaborating a similar view that instead grounds the Article II communicative power in materials from the Founding as well as contemporary case law to explain the communicative monopoly rather than merely accept it as given.

III.
BOUNDARY CONDITIONS

The goal of the above discussion is to frame the debate with a set of boundary conditions, or conditions that delineate the minimum and the maximum of presidential power in the realm of congressional-executive agreements. I briefly summarize only Yoo's and Hathaway's positions because other theories, such as reliance on broader ex ante authorizations in the foreign affairs context[7] or an

4. *See* Yoo, *supra* note 3, at 801 ("As mentioned earlier, Congress had provided ex ante authorizations to the President to engage in reciprocal tariff reduction or other trade measures. These measures, however, involved congressional delegation of factfinding powers to the President, in which certain trade restrictions were reduced once the President had found that another nation had ended its discrimination against American goods.").

5. Hathaway, *supra* note 3, at 209.

6. *Id.*

7. Professor Curtis Bradley attempts to address the argument against unilateral executive withdrawal based on *Clinton v. City of New York*, namely that "Congress cannot delegate to the president the authority to cancel statutes," by relying on the extra "leeway" regarding congressional delegations of authority in the area of foreign affairs and on congressional acquiescence to unilateral executive withdrawal, a long-standing modification to the boundary between Article I and Article II powers. *See* Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615,

a fortiori argument based on *Goldwater v. Carter*, may be more easily dispensed with.[8] Justifications for unilateral withdrawal from congressional-executive agreements, as well as a near-plenary foreign

1635–37 (2018). This argument applies only to ex ante, not to ex post, congressional-executive agreements, as Congress can only specify the scope of the authorization if it does so before the executive engages in the agreement-making process. *See* Yoo, *supra* note 3, at 774 ("The case involved a different kind of mechanism, in which Congress provided the President with ex ante authorization to reach trade agreements, within specified criteria, with different nations."). *Contra* Clinton v. City of New York, 524 U.S. 417, 445 (1998) ("The cited statutes all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has a 'degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936))). Bradley contends that congressional-executive agreements are not statutes because they embody a combination of the President's Article II recognition power and an exercise of legislative power pursuant to the Article I, Section 8 enumerated powers. Bradley's mistake is that the President's Article II power is an *addition* to Congress's exercise of its enumerated powers, which constitutes a statute duly passed in accordance with Article I procedures. *See* Bradley, *supra*, at 1633. That Congress and the President "embody the sovereignty of the United States in international relations and can exercise all the powers inherent in such sovereignty" does not lead to the conclusion that congressional-executive agreements are not statutes at all. *See* Louis Henkin, Foreign Affairs and the United States Constitution 217 (2d ed. 1996) (arguing that all congressional-executive agreements are self-executing and have clear status as law of the land insofar as they repeal prior inconsistent statutes); *see also* Made in the USA Found. v. United States, 56 F. Supp. 2d 1226, 1316 (N.D. Ala. 1999) ("[I]t is reasonably arguable that the Foreign Commerce Clause and related enumerated powers in Article II, coupled with the President's foreign relations powers, provided the exclusive authority for completing NAFTA.").

8. The *a fortiori* argument posits that the mere location of the treaty power in Article II suggests that "[s]enatorial confirmation of a treaty . . . does not obligate the President to go forward with a treaty if he concludes that it is not in the public interest to do so," and that therefore "[i]t would take an unprecedented feat of judicial construction to read into the Constitution an absolute condition precedent of congressional or Senate approval for termination of all treaties." Goldwater v. Carter, 617 F.2d 697, 705 (D.C. Cir. 1979). This argument then transposes that logic onto the realm of congressional-executive agreements. However, it is vulnerable on two grounds. First, congressional-executive agreements, by involving the House of Representatives, may be more democratically legitimate in light of an unrepresentative Senate. *See* Hathaway, *supra* note 3, at 261. Critics of a "senatorial monopoly over treaty-making," on this view, should be more, not less, concerned about unilateral executive withdrawal undermining the handiwork of a properly representative and democratic process. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 807 (1995). Second, congressional-executive agreements do not merely embody the *consent* of both houses of Congress but are themselves their own implementing legislation. *See* Henkin, *supra* note 7, at 217 ("[A]ll such agreements are 'executed' by Congress, every agreement has Congressional sanction, and clearly [a] joint resolution approving it can repeal any inconsistent statutes.").

Commerce Clause as an argument *against* unilateral withdrawal,[9] may be more easily dispensed with.

The first boundary condition, based on Yoo's objection, is that the President may not, by virtue of unilateral executive withdrawal from a congressional-executive agreement, impermissibly impinge on Congress's Article I enumerated powers by cancelling the underlying statute. It is worth noting at this point that I accept as given Professor Louis Henkin's view that all congressional-executive agreements are their own implementing legislation (the legislation which accompanies treaties to give them binding force of law domestically), and therefore are statutes.[10] Other commentators distinguish between congressional-executive agreements and implementing legislation, particularly for ex post congressional-executive agreements, in which Congress passes the implementing legislation only after the executive negotiates the agreement.[11] But regardless of whether the

9. Professor Joel Trachtman juxtaposes the dormant Commerce Clause onto the Article II foreign affairs power by theorizing that the foreign Commerce Clause, by way of negative inference, "denies the President power over interstate and international commerce." Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements*, 51 Int'l Law. 445, 448 (2018). This theory, grounded in a muscular conception of Congress's Article I, Section 8 enumerated powers in the realm of foreign affairs, would seem to leave no room for a purely Article II power to communicate unilateral executive withdrawal, insofar as Trachtman's analogy to the domestic Commerce Clause suggests a plenary power analogous to the type of power contemplated in *Wickard v. Filburn*. *Id.* at 447 ("[A]llocation of the power to terminate trade agreements to the President, acting alone, would be inconsistent with the substance of the Constitution's allocation to Congress of control over both international and domestic commerce under the Commerce Clause of the Constitution."); *see* Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."). This theory ignores that the "powers of the President in the conduct of foreign relations include the power, without consent of the Senate, to determine the public policy of the United States" in the realm of foreign affairs. United States v. Pink, 315 U.S. 203, 229 (1942). It is for this reason that the *Belmont* Court asserted that it "may not be doubted" that "negotiations . . . and agreements and understandings in respect thereof" pertaining to the "establishment of diplomatic relations" fall "within the competence of the President." United States v. Belmont, 301 U.S. 324, 330 (1937). Therefore, Congress's Article I, Section 8 prerogatives are not so sweeping as to preclude executive exercise of an exclusively Article II power to determine public policy, a power which, I shall demonstrate, includes a communicative power of unilateral executive withdrawal from congressional-executive agreements.

10. *See* Henkin, *supra* note 7, at 217 ("[A]ll such agreements are 'executed' by Congress, every agreement has Congressional sanction, and clearly [a] joint resolution approving it can repeal any inconsistent statutes.").

11. Jean Galbraith, *The President's Power to Withdraw the United States from International Agreements at Present and in the Future*, 111 Am. J. Int'l L. Unbound 445, 447 (2018) (noting that "ex post congressional-executive agreements" are

term "agreement" encompasses merely the executive negotiation role or both the negotiated agreement and the implementing legislation, it is clear that there is no such thing as a congressional-executive agreement without accompanying legislation.[12]

The second boundary condition is that the President must enjoy a purely Article II power to effectuate withdrawal via *communication* to foreign parties. This condition elaborates on Hathaway's bare acceptance of an executive monopoly on communication as a justification for unilateral executive withdrawal by explaining where such an exclusive Article II power stems from. This advances the discourse beyond the tautology of accepting an executive communicative monopoly simply because the President is empowered to speak.

Fusing both boundary conditions requires explaining how the President simultaneously enjoys a purely Article II *communicative* power sufficient to effectuate withdrawal (by virtue of informing foreign parties) *without* any concomitant power to abrogate the underlying statute. Accordingly, I seek to advance the discourse by firmly grounding the communicative withdrawal power in Article II. This shields that power from Article I limitations while countenancing Article I expansions of termination authority to enable executive lawmaking only through congressional consent. As noted above, I shall also explain two narrow exceptions to the general proposition that the President may not abrogate statutes, namely the special case of the claims settlement context and instances in which the statutory text of a congressional-executive agreement is so dependent on continued international participation that presidential communication of withdrawal renders the statute moot.

IV.
THE ARTICLE II COMMUNICATIVE POWER

Materials from the Founding and from the nascent Republic, as well as later case law, firmly support a minimum executive power to unilaterally *communicate* withdrawal from international agreements to foreign parties. President George Washington, in a 1796 address to the House of Representatives, asserted that "[t]o admit, then, a right in the House of Representatives, to demand, and to have, as a matter of course, all the papers respecting a negotiation with

"negotiated by executive branch actors," then "approved by Congress with accompanying implementing legislation").

12. *See id.* ("Assuming that the President does have this power [of withdrawal], a further question is under what circumstances withdrawal will automatically suspend or terminate implementing legislation.").

a foreign power, would be, to establish a dangerous precedent."[13] Washington cited "[t]he necessity of . . . caution and secrecy" and the possibility of "danger and mischief" that might arise if "caution and secrecy" were not heeded in negotiations with foreign powers to conclude that "the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate."[14] Per Washington, this executive primacy in matters of "caution and secrecy" is how "the treaty-making power has been understood by foreign nations."[15] While Washington was addressing a request by the House of Representatives, not the Senate, for documents pertaining to the negotiation of the Jay Treaty,[16] he supplied an exclusively *executive* rationale for withholding the documents. It is hard to entertain the proposition that the Senate's role in the Article II treaty-making process somehow renders that body less cumbersome and better suited to avoid the disclosure of matters involving "caution and secrecy" as compared to the House of Representatives.[17] Similarly, the Supreme Court in *United States v. Curtiss-Wright Export Corp.* notes that "[t]he marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information. . . . In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information 'if not incompatible with the public interest.'"[18] There is thus no intelligible distinction to be drawn in this regard between the Senate's advice and consent role in Article II treaties and the House of Representatives' lack of any role at all.

Washington's conception of executive primacy in the realm of negotiations is universal—it applies to Article II treaties and to congressional-executive agreements alike, as it is rooted in considerations peculiar to executive power, described by Alexander Hamilton as those pertaining to "[d]ecision, activity, secrecy and dispatch."[19] In supporting the assertion that "[e]nergy in the Executive is a leading character in the definition of good government," Hamilton first

13. President George Washington, Address to the House of Representatives (Mar. 30, 1796), *in* 19 The Papers of George Washington, Presidential Series 635, 636 (David R. Hoth & Jennifer E. Stertzer eds., 2016).

14. *Id.*

15. *Id.*

16. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

17. *See* President George Washington, *supra* note 13 (explaining the practical necessity of unilateral executive action in the foreign affairs arena).

18. Curtiss-Wright, 299 U.S. at 321.

19. The Federalist No. 70 (Alexander Hamilton).

stated that this energy is "essential to the protection of the community against foreign attacks."[20] John Jay echoed this sentiment in writing that "perfect SECRECY and immediate DESPATCH are sometimes requisite" in the negotiation of treaties.[21] Thomas Jefferson, in a 1793 letter to Edmond-Charles Genet, described the President as "the only channel of communication between this country and foreign nations," noting that "it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation."[22]

The above discussion supports a conception of executive power in the realm of foreign affairs grounded in considerations of practicality and adaptability. Contingencies such as the "loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to [the country's] wishes."[23] As such, a muscular executive branch must have at its disposal the full panoply of foreign affairs powers conducive to negotiating on matters that "usually require the most secrecy and the most despatch."[24] In the treaty context, the President therefore enjoys a reserve of responsive, flexible Article II power entirely independent of senatorial consent.

Washington's view of executive "caution and secrecy" supports withholding sensitive information from *both* houses of Congress. Transposing this conclusion to the context of congressional-executive agreements clarifies that the President's Article II foreign affairs power encompasses a power to communicate unilateral withdrawal to foreign nations.[25] One need not accept the proposition that the President has sole authority over foreign affairs to conclude that the President has sole *communicative* responsibility,[26] and that any number of exigencies, not limited to the "death of a prince" or "removal

20. *Id.*

21. The Federalist No. 64 (John Jay).

22. Letter from Thomas Jefferson to Edmond-Charles Genet (Nov. 22, 1793), *in* 27 The Papers of Thomas Jefferson 414 (John Catanzariti ed., 1997).

23. The Federalist No. 64 (John Jay).

24. *Id.*

25. *See* Hathaway, *supra* note 3, at 209 ("[T]he sole power to communicate on behalf of the nation on the international stage is not to be underestimated. . . . It carries with it an absolute veto power over international lawmaking. . . . The power to communicate on behalf of the United States arguably also entails the sole power to withdraw from international agreements.").

26. *See id.* at 208 ("Yet to say that the President has the 'power to speak or listen as a representative of the nation' or that he is the 'sole organ' of the federal government in international relations does not mean that the President has exclusive authority over the nation's foreign affairs.").

of a minister"[27] may warrant a communication of withdrawal to foreign parties. To suggest otherwise is to undermine the rationales of expediency, efficiency, and responsiveness which imbue the materials from the Founding and from the early Republic.

Accepting that the President has sole communicative authority in the realm of foreign affairs, and thus enjoys an Article II power of communicating unilateral withdrawal to foreign parties, does not imply that the President may abrogate agreement provisions passed pursuant to Congress's enumerated powers.[28] Broadly stated, "the President's responsibility to 'take care that the Laws be faithfully executed'" is an authority that "allows the President to execute the laws, not to make them."[29] Therefore, while the President's constitutional role to conduct foreign policy and to "resolve . . . sensitive foreign policy decisions" is broad, any concomitant power to create law that binds domestic parties based on an exercise of an exclusively Article II power must be highly limited.[30] An exercise of this power to create binding law "must stem either from an act of Congress or from the Constitution itself," and since no such broad power to affect private rights domestically can be read into the Article II foreign affairs power, any such power must stem from Article I.[31] That clear limits on executive lawmaking may be difficult to delineate does not warrant turning a blind eye to impermissible Article II impingements on Congress's Article I enumerated powers.[32] The *Curtiss-Wright* Court did not hold, for instance, that the President is "free from Congress' lawmaking power in the field of international relations."[33] The Court in *Zivotofsky v. Kerry* (*Zivotofsky II*) is thus correct in concluding that "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law."[34] Moreover, the *Zivotofsky II* Court noted that the *Curtiss-Wright* "sole organ" dicta, which suggested a broader, near-plenary Article II foreign affairs

27. The Federalist No. 64 (John Jay).

28. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1334 (2008) (arguing that while the President may be able to unmake the international commitment created by a congressional-executive agreement, the President may not unmake the *legislation* on which the agreement rests).

29. Medellin v. Texas, 552 U.S. 491, 532 (2008) (quoting U.S. Const. art. II, § 3).

30. *Id.* at 523–24.

31. *Id.* at 524 (quoting Dames & Moore v. Regan, 453 U.S. 654, 668 (1981)); *see* Henkin, *supra* note 7, at 222 (noting that the "President's power to make sole executive agreements is not without limits").

32. *See* Medellin, 552 U.S. at 524.

33. Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

34. *Id.*

power—expansive enough, perhaps, to support executive lawmaking—was not necessary to the holding of that case.[35]

Yet despite sharp limitations on executive lawmaking, the Article II foreign affairs power nonetheless "include[s] the power, without consent of the Senate, to determine the public policy of the United States" with respect to matters of recognition.[36] This is because any meaningful power of recognition necessarily includes not only "a determination of the government to be recognized," but also determinations as to the "underlying policy."[37] The language in *United States v. Pink*, which confirms the President's competence to determine questions of recognition, provides strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate. This is a power broad enough to encompass, for example, determinations as to whether to engage in negotiations or whether to withdraw from a congressional-executive agreement,[38] even if this power does not extend to executive lawmaking.

The materials from the Founding and the contemporary case law support two dueling propositions. The first is a broad conception of an Article II communicative power to effectuate unilateral executive withdrawal. The second is a near-total prohibition on executive lawmaking. Yet such executive lawmaking absent Article I sanction is only generally, not universally, prohibited. This caveat is important, as I shall later illustrate that Article II lawmaking is permissible only under narrow circumstances: in the claims settlement context and in cases in which unilateral executive withdrawal renders the underlying statute moot.

V.
THE ARTICLE II COMMUNICATIVE POWER AND THE ARTICLE I "RATCHET"

The key to understanding the interplay between congressional action and the broad executive communicative power to effectuate withdrawal from congressional-executive agreements is that congressional action operates as a sort of ratchet. Congress may not unduly impinge on the exclusively Article II communicative power—which does not by itself entail any lawmaking power—by limiting unilateral executive withdrawal beyond imposing mere procedural

35. *Id.* at 20–21.
36. United States v. Pink, 315 U.S. 203, 229 (1942).
37. *Id.*
38. Hathaway, *supra* note 3, at 208–09.

requirements, such as those pertaining to notice. Yet Congress may condition the exercise of its own Article I enumerated powers on executive withdrawal by specifying what occurs to the statute in such an event, thereby allowing for *congressionally sanctioned* executive lawmaking in the form of abrogating statutes.

Because I have identified the executive communicative power as one which resides entirely in Article II, congressional interference with this power must remain purely procedural, and cannot substantively curtail the President's unilateral power to communicate withdrawal. For example, in future congressional-executive agreements, Congress may include procedures modeled on the State Department's C-175 Procedure, which suggests the Secretary of State "take[] into account the views of the relevant government agencies and interested bureaus within the Department" before signing off on initiating termination of an international agreement.[39] Similarly, Congress could model a withdrawal provision of a congressional-executive agreement on an existing statutory provision governing communication of withdrawal to foreign parties.[40] These types of provisions are best exemplified by trade agreements entered into as congressional-executive agreements under trade promotion authority (formerly "fast track" authority) that contain provisions permitting each sovereign party to withdraw upon six months' notice.[41] Requiring executive communication of withdrawal to Congress rather than to foreign parties would not unduly impinge on that exclusive Article II power. There remains a distinction between a procedural hurdle, such as mere notice, and an Article I usurpation of the communicative function. Notice procedures would not prevent the President from determining the public policy of the United States by communicating withdrawal because they would not be tantamount to a congressional veto—the President would retain a communicative monopoly. In the treaty context, the Restatement (Third) of the Foreign Relations Law of the United States maintains that Article I "condition[s] applicable to the treaty . . . and having a plausible relation to its adoption . . . would presumably be valid."[42] But what limits must there be on such conditions?

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39. U.S. Dep't of State, 11 Foreign Affairs Manual § 724.8 (2006); Galbraith, *supra* note 11, at 445–49.

40. *See* 19 U.S.C. § 2135 (providing that member states may withdraw from trade agreements, generally upon six months' notice); *see also* Trachtman, *supra* note 9, at 446.

41. Trachtman, *supra* note 9, at 462.

42. Restatement (Third) of the Foreign Rels. L. of the U.S. § 339 reporter's note 3 (Am. L. Inst. 1986).

Zivotofsky II counsels against any further Article I interference, beyond mere notice requirements, in the President's exclusive communicative withdrawal power. The *Zivotofsky II* Court observed that Congress could not "aggrandiz[e] its power at the expense of another branch" in an area of exclusive executive authority.[43] *Zivotofsky II* involved a "formal recognition determination," an Article II power which the Court determined to be "exclusive."[44] The parallel to the Article II communicative power is obvious. The *Zivotofsky II* Court cited the "various ways in which the President may unilaterally effect recognition," as well as "functional considerations," to establish the exclusivity of the recognition power.[45] The Court also noted that "[r]ecognition is a topic on which the Nation must 'speak. . . with one voice.'"[46] The Court's insistence on an executive monopoly on recognition determinations is itself grounded in the executive monopoly on communication. It is this latter exclusive power that the Court alluded to in its discussion of "functional considerations," since "[f]oreign countries need to know, before entering into diplomatic relations or commerce with the United States," *inter alia*, "whether their ambassadors will be received."[47] The *Zivotofsky II* Court relied on the executive communicative monopoly to establish an executive monopoly on recognition—it took the former power as given.

Zivotofsky II thus broadly stands for the proposition that Congress may not impose *substantive* limitations on the President's communication of unilateral withdrawal from a congressional-executive agreement. Indeed, the Court in *United States v. Belmont*, in recognizing an Article II power which includes executive "authority to speak as the sole organ of [the] government,"[48] countenanced executive exercise of the communicative power free from congressional interference. This is particularly so in light of the *Zivotofsky II* Court's affirmation of the recognition power (which, like the communicative power, resides exclusively in Article II due to "functional considerations" that require that the nation "speak . . . with one voice"[49]) in the face of congressional opposition.[50]

43. Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015) (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

44. *Id.* at 32.

45. *Id.* at 14.

46. *Id.* (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003)).

47. *Id.*

48. United States v. Belmont, 301 U.S. 324, 330 (1937).

49. Zivotofsky v. Kerry, 576 U.S. 1, 14 (2015).

50. *See id.* at 10 ("In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power . . . . In so doing the Secretary acknowledges the President's power is 'at its lowest ebb.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

The opposite scenario, namely a congressional *expansion* of executive termination authority beyond a communicative power, presents no separation of powers issues insofar as any executive "cancellation" of statutes in such a case would enjoy Article I sanction. In at least some instances, Congress has chosen to address the possibility of executive termination by expressly conditioning the termination of the agreement on the possibility of unilateral executive withdrawal.[51] I assume that congressional-executive agreements and their implementing legislation are one and the same.[52] The North American Free Trade Agreement (NAFTA), for example, is governed by a provision in the Trade Act of 1974 which addresses the possibility of termination by providing that duties and import restrictions "shall not be affected . . . and shall remain in effect after the date of such termination or withdrawal for 1 year, unless the President by proclamation provides that such rates shall be restored to the level at which they would be but for the agreement."[53]

Express congressional sanction for executive termination of statutes may exist both for ex ante and for ex post congressional-executive agreements. With regard to the former, the solution is simple: Congress must merely specify such a power in the ex ante authorization. With regard to the latter, an ex post congressional-executive agreement may be governed by a unilateral statutory termination provision in an *earlier* statute. This is the case with NAFTA.[54] Even for ex post congressional-executive agreements, however, the timing of the authorization is of little concern. Assuming, counterfactually, that NAFTA had *first* been enacted as an ex post congressional-executive agreement and Congress had only *later* passed a provision

51. Bradley, *supra* note 7, at 1634 ("In the trade area, Congress has actually addressed the continuing effect of its implementing legislation in the event of a termination of the underlying agreement, and it has done so in a way that seems to accept a presidential termination authority.").

52. Henkin, *supra* note 7, at 217 ("The Congressional-Executive agreement also eliminates issues about self-executing and non-self-executing agreements, and about the consequences of inconsistency between international agreements and statutes: all such agreements are 'executed' by Congress, every agreement has Congressional sanction, and clearly the joint resolution approving it can repeal any inconsistent statutes.").

53. 19 U.S.C. § 2135(e); *see also* Bradley, *supra* note 7, at 1635 ("This legislation appears to assume that these agreements may be terminated without congressional approval. If such approval were required, Congress could simply address the continuing effect of its implementing legislation and any presidential proclamations enacted thereunder at that time rather than needing to address it in advance.").

54. 19 U.S.C. § 2135(e); *see* Bradley, *supra* note 7, at 1634 (describing NAFTA as an "ex post congressional-executive agreement . . . where Congress enacts legislation approving an agreement after it has been negotiated").

enabling unilateral executive abrogation of NAFTA's statutory text, the President would enjoy the same Article I sanction to "cancel" NAFTA as a statute. This is because Congress may condition its exercise of its own Article I lawmaking powers on the extrinsic event of executive withdrawal at any time prior to the actual executive *communication*, since the communication is the triggering event.

Express congressional authority to terminate implementing statutes is an exception to the general principle that the President may not abrogate a statute via unilateral executive withdrawal because Congress is merely conditioning the exercise of its Article I, Section 8 powers on an extrinsic event. That this event may be unilateral executive withdrawal is of little import, because Congress could have conditioned the termination of its own legislation on any number of events—or on no event at all. Simply put, this type of provision is a self-imposed limitation on Congress's Article I, Section 8 authority. These provisions therefore serve to functionally expand the Article II communicative power, which does not otherwise allow for executive lawmaking except, as I shall demonstrate, in the claims settlement context or when the statute would be rendered entirely moot.

While express congressional expansions of executive termination authority remain uncontroversial, there exists a real danger in reading an executive power to terminate law into broad yet vague ex ante authorizations. On this view, an ex ante congressional authorization may be so sweeping, on account of some esoteric notion of executive leeway in the realm of foreign affairs, as to countenance executive termination of statutes without *express* Article I sanction. The Court in *Clinton v. City of New York*, for example, admonished the government's reliance on "cited statutes [that] all relate to foreign trade" because "in the foreign affairs arena, the President has a 'degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'"[55] The *Clinton* Court confuses the existence of broader congressional authorizations in the realm of foreign affairs with an independent Article II power that encompasses executive lawmaking.

A power of unilateral executive withdrawal may indeed inhere in ex ante congressional authorizations, since Congress is free to confer authority in such sweeping terms. As noted above, Congress may even explicitly allow for unilateral executive termination of

55. Clinton v. City of New York, 524 U.S. 417, 445 (1998) (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

statutes.[56] Yet when the President considers vague ex ante authorizations to determine whether communication of withdrawal from congressional-executive agreements entails a power to terminate statutes, a healthy dose of caution is needed.

The Iran Nuclear Agreement vividly illustrates the dangers of presidential expansions of congressional authorizations beyond what the text of the authorizations can sustain and the impermissible Article II lawmaking that may result. The Obama administration described the Agreement as a nonbinding political commitment,[57] but the lesson on avoiding executive aggrandizement of congressional authorizations rings true for ex ante congressional-executive agreements as well. For example, President Obama's across-the-board lifting of sanctions imposed on the Islamic Republic of Iran constituted an over-characterization of certain waiver provisions.[58] Transposing this lesson onto the context of ex ante congressional-executive agreements highlights the danger of executive over-reliance on circumscribed congressional authorizations, such as those providing for statutory termination strictly contingent on certain factual findings or policy determinations. Specifically, the danger is that the President may eschew the requisite findings or determinations and instead use such authorizations as cover for imbuing the exclusive Article II power to communicate withdrawal with a unilateral power to abrogate statutes—a result only Congress can accomplish.

More generally, absent an express congressional authorization, even good-faith efforts on the part of the President to determine whether the exclusive Article II power to communicate withdrawal from congressional-executive agreements also entails a lawmaking power to terminate statutes may falter. The reason is that such a process requires the President to look in every instance to the murky language of a given ex ante congressional authorization. This is an unstable and weak solution due to the possibility of subjectivity in statutory interpretation, including an executive tendency to read such authorizations more broadly than the text would otherwise support. Furthermore, there remains the possibility of congressional gamesmanship, as may arise if Congress were to amend an ex ante authorization in order to preclude statutory termination upon some

56. 19 U.S.C. § 2135(e); *see also* Bradley, *supra* note 7, at 1635 ("This legislation appears to assume that these agreements may be terminated without congressional approval.").

57. Samuel Estreicher & Steven Menashi, *Taking* Steel Seizure *Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1202 (2017).

58. *See id.* at 1204 (noting that "Congress did not intend the waiver provisions to authorize a comprehensive lifting of sanctions").

indication that the President planned to communicate withdrawal. However, provided that an ex ante authorization is sufficiently clear even if it does not *expressly* grant the President statutory termination authority, it resolves any possible objections relating to presidential "cancellation" of statutes, insofar as Congress has at least implicitly conditioned its exercise of its Article I powers on the extrinsic event of unilateral executive withdrawal. The key is caution, not abstention.

VI.
THE CLAIMS SETTLEMENT EXCEPTION

Despite the general prohibition on Article II lawmaking, the President enjoys a highly circumscribed Article II power to unilaterally abrogate statutory provisions settling claims by U.S. nationals against foreign governments merely by communicating withdrawal. While the relevant case law pertains to sole executive agreements, I shall explain that the Article II claims settlement power would allow the President to unilaterally abrogate the claims settlement provisions of congressional-executive agreements, were such a situation to arise. Identifying this exception is thus a task less practical than it is theoretical, although it harmonizes the general prohibition on Article II lawmaking via unilateral executive withdrawal that I have vigorously defended with the oft-forgotten claims settlement case law.

It may be tempting to proclaim that the President's unilateral power to communicate withdrawal from congressional-executive agreements entails no Article II power to engage in lawmaking under any circumstances. And while this interpretation may indeed be the most avoidant of separation of powers questions, it ignores two important propositions. The first is that congressional-executive agreements are not *mere* statutes (even though they are their own implementing legislation),[59] but rather a synergistic combination of Article I and Article II power that allows the President and Congress to "together . . . embody the sovereignty of the United States in international relations."[60] The second is that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."[61]

Therefore, ascribing *no* Article II lawmaking power whatsoever to the President in the claims settlement context exalts legislative

59. *See* HENKIN, *supra* note 7, at 216.
60. *Id.*
61. THE FEDERALIST No. 64 (John Jay).

lawmaking over a limited form of executive lawmaking despite the equal status of both types of lawmaking as "constitutional acts of power" with equivalent "legal validity and obligation."[62] The theory essentially confuses the highly limited nature of executive lawmaking in the foreign affairs arena with a form of lesser law. This constitutes a major interpretive mistake. Even though the Article II lawmaking power in the claims settlement context is highly limited in its *scope*, executive-made law is wholly equal to its legislative counterpart where it exists within its bounds. Therefore, while the *Zivotofsky II* Court is largely correct that "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law,"[63] the claims settlement case law illustrates that the President has some very narrow yet entirely Article II power to make domestic law in limited circumstances.

It follows that in unilaterally withdrawing from a congressional-executive agreement, the President may cancel those provisions intertwined with the narrow Article II lawmaking power, rooted in the recognition power and delineated by the claims settlement case law. In this sense, the President is carving out of the congressional-executive agreement those provisions that could not have been enacted absent executive reliance on an exclusively Article II power. By acting contrary to the express wishes of the enacting Congress (absent implied or express congressional authorization to withdraw), the President is no longer in agreement with Congress, such that the two branches can no longer "embody the sovereignty of the United States in international relations."[64] What is left in the wake of withdrawal from a congressional-executive agreement with a claims settlement component are provisions passed in accordance with Congress's Article I, Section 8 enumerated powers and provisions that find their basis exclusively in the Article II recognition power. The President may not carve out of the agreement those provisions rooted in the former power but may eliminate those provisions rooted in the latter power. This view ensures that claims settlement provisions based on the very narrow Article II power enjoy the status of having "legal validity and obligation" equal to the legislative power[65] without veering into an impermissible executive encroachment on the statute that inheres in every congressional-executive agreement.[66]

62. *Id.*
63. Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015).
64. Henkin, *supra* note 7, at 216.
65. The Federalist No. 64 (John Jay).
66. Henkin, *supra* note 7, at 216.

In sum, when the President unilaterally withdraws from a congressional-executive agreement, the possibility of congressional authorization notwithstanding, the President is necessarily acting against the express or implied intent of the enacting Congress. The President's power is thus at its "lowest ebb," and the President may rely "only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[67] The President may nonetheless rely on the recognition power to abrogate certain claims settlement provisions of congressional-executive agreements even in the face of congressional opposition because that power remains an independent source of Article II authority even when the President's action is "incompatible with the expressed or implied will of Congress . . . ."[68] For example, the *Pink* Court grounded the authority to negotiate the Litvinov Agreement squarely in the recognition power,[69] a power the *Zivotofsky II* Court recognized as exclusive.[70]

At the outset, it is worth noting that *Dames & Moore v. Regan* is unhelpful in ascertaining the scope of an Article II power to terminate claims settlement provisions in a congressional-executive agreement. First, the *Dames & Moore* Court relies on the justification that sufficient authority for executive action to settle claims existed between the penumbras or interstices of various statutory authorizations.[71] The above discussion on the dangers of executive reliance on murky ex ante authorizations, illustrated by the Iran Nuclear Agreement,[72] is a cautionary tale that applies with equal force to *Dames & Moore*. The risk of executive exaggeration of such authorizations, which may result in executive lawmaking without Article I sanction, militates against relying on cases that do not ground the highly circumscribed Article II lawmaking power in the claims settlement case law *exclusively* in Article II. For example, while the *Dames & Moore* Court

67. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

68. Zivotofsky v. Kerry, 576 U.S. at 10 (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).

69. United States v. Pink, 315 U.S. 203, 229 (1942) ("The power to formulate policy may also be rested on the President's power to enter related agreements for the settlement of outstanding questions affecting the determination of the question of recognition. . . . The authority of the President to enter into executive agreements with foreign nations without the consent of the Senate is established.").

70. Zivotofsky v. Kerry, 576 U.S. at 10 ("In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power . . . . In so doing the Secretary acknowledges the President's power is 'at its lowest ebb.'" (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring))).

71. *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) ("President Carter cited five sources of express or inherent power.").

72. Estreicher & Menashi, *supra* note 57, at 1202.

refers to "specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets"[73] based on the statutory authorization provided by the International Emergency Economic Powers Act (IEEPA),[74] the Court *itself* admits that "neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims."[75]

Moreover, the *Dames & Moore* Court, seemingly hedging its bets, emphasized that the decision did not purport to "lay down . . . general 'guidelines'" and that the opinion was "confine[d] . . . only to the very questions necessary to the decision of the case."[76] The Court went on to note that it did not "decide that the President possesses plenary power to settle claims, even as against foreign governmental entities."[77] Yet the question of whether a *plenary* Article II lawmaking power exists in the claims settlement context is entirely distinct from the question of whether an Article II lawmaking power exists in that context at all. The *Dames & Moore* Court was equally "not prepared to say that the President lacks the power to settle such claims."[78] But a plenary Article II lawmaking power is not necessary since the President only needs *some* exclusive Article II claims settlement power to unilaterally abrogate certain claims settlement provisions upon withdrawal. Such a power, predicated on a very narrow understanding of Article II lawmaking, would allow the President to abrogate *certain* claims settlement provisions—those inextricably bound to the recognition power—without seizing from Congress plenary power over all claims settlement (which would entail an Article II power to abrogate all claims settlement provisions, irrespective of their relationship to the recognition power). *Belmont* and *Pink* delineate a *narrow*, not plenary, Article II power to abrogate certain claims settlement provisions. Unlike in *Dames & Moore*,[79] in neither *Belmont* nor *Pink*[80] did the President hide behind one or more statutory authorizations—these decisions better encapsulate the scope of the Article II lawmaking power in the claims settlement context.

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73. 453 U.S. at 675.

74. Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626–29 (1977) (codified as amended at 50 U.S.C. §§ 1701–06).

75. Dames & Moore, 453 U.S. at 677; Estreicher & Menashi, *supra* note 57, at 1222 ("There was not, however, specific statutory authorization to suspend claims.").

76. 453 U.S. at 661.

77. *Id.* at 688.

78. *Id.*

79. *See id.* at 677.

80. *See generally* United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

Therefore, *Belmont* and *Pink* are a useful starting point for ascertaining the scope of a truly exclusive Article II power to abrogate certain agreement provisions pertaining to claims settlement. *Belmont* recognizes that matters of "recognition [and] establishment of diplomatic relations" extend to "parts of one transaction" that pertain to "an international compact between . . . two governments."[81] This description does not suffer from the infirmity of the more famous *Belmont* language regarding the President's role as the "sole organ" in the realm of foreign affairs.[82] That language is too similar to the *Curtiss-Wright* dicta criticized in *Zivotofsky II* as impermissibly suggestive of a plenary foreign affairs power not rooted in the recognition power. It is also unnecessary to the holding of *Curtiss-Wright* in light of the existence of "congressionally authorized action."[83] And because *Belmont* involved a sole executive agreement not based on any express congressional authorization,[84] its delineation of the scope of executive lawmaking authority pursuant solely to the Article II recognition power in the claims settlement context is legally sound and more true to the scope of that power. This is particularly so given the *Zivotofsky II* Court's affirmation of the recognition power in cases in which the executive acts in the face of congressional opposition.[85] *Pink* lends further support to the *Belmont* test regarding the extent to which the President may issue decisions with binding force of law solely pursuant to the Article II recognition power. The *Pink* Court recognized that even claims that "did not arise out of transactions with this Russian corporation" fall within this power insofar as they were "claims against Russia or its nationals" and therefore constituted "one of the barriers to recognition of the Soviet regime by the Executive Department."[86] The *Pink* Court went on to assert that

81. Belmont, 301 U.S. at 330.

82. *Id.* ("Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.").

83. Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015).

84. *See* Belmont, 301 U.S. at 330 ("We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the Government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence.").

85. *See* 576 U.S. at 10 ("In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power . . . . In so doing the Secretary acknowledges the President's power is 'at its lowest ebb.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

86. United States v. Pink, 315 U.S. 203, 227 (1942).

"[n]o such obstacle can be placed in the way of rehabilitation of relations between this country and another nation," and that the "Litvinov Assignment [was] interdependent" with recognition.[87] Moreover, *Pink* is authoritative for precisely the same reason as *Belmont*: it grounds a limited executive lawmaking power in an agreement negotiated pursuant entirely to that power.[88]

Despite some obvious similarities, the *Belmont* and *Pink* decisions actually articulate two differing conceptions of the scope of an exclusive Article II lawmaking power in the claims settlement context. The *Belmont* Court links matters of "recognition [and] establishment of diplomatic relations" to all the "parts of one transaction, resulting in an international compact."[89] This language suggests not merely a close nexus between separate negotiations, but something more demanding: a requirement that the limited executive lawmaking power rooted in the recognition power extend only to those private claims encompassed by negotiations that are mere *parts* of *one* overarching diplomatic transaction. *Belmont* thus contemplates the possibility of executive lawmaking rooted in the Article II recognition power extending to sequential private claims arising out of negotiations that constitute "one" diplomatic transaction,[90] but not private claims pertaining to separate negotiations if these separate negotiations do not ultimately constitute one overarching international agreement. By contrast, the *Pink* Court contemplates executive lawmaking vis-à-vis all "obstacle[s] . . . placed in the way of rehabilitation of relations . . . ."[91] On this view, the outer bound of Article II lawmaking pursuant to the recognition power extends beyond those claims pertaining to negotiations between sovereigns that constitute "parts of one transaction, resulting in an international compact,"[92] but rather all claims that impair a diplomatic goal embodied in an international agreement. So long as the international agreement is "interdependent" with the recognition power, all claims that present an "obstacle" to the effectuation of the agreement's purpose fall

87. *Id.* at 230.

88. *Id.* at 206 ("The Executive Department, in recognizing the Soviet Government and accepting the Litvinov Assignment, has established as the policy of the Nation that, in order to settle all questions outstanding between the two governments . . . no objection should be asserted to the Soviet nationalization of the property. . . . [T]he Executive Department had constitutional power to adopt [this policy].").

89. Belmont, 301 U.S. at 330.

90. *Id.*

91. Pink, 315 U.S. at 230.

92. Belmont, 301 U.S. at 330.

within the purview of a limited Article II lawmaking power.[93] For example, the *Pink* Court interpreted the Litvinov Assignment as directed broadly toward full recognition of the Soviet government[94] in noting that the Assignment "was . . . part and parcel of the new policy of recognition."[95]

While the *Belmont* Court's delineation of the Article II lawmaking power in the claims settlement context may appear more avoidant of separation of powers concerns, it is actually self-defeating. Hewing to this language may ensure that the President's power to abrogate provisions of congressional-executive agreements remains confined to the core of the recognition power in the claims settlement context—matters in which the executive must be nimble and responsive to "circumstances intervening to change the present posture and aspect of affairs."[96] But tacit agreements, if not memorialized, may not be a "part"[97] of the diplomatic transaction—at least not in the record, even if the claims settlement provisions of a congressional-executive agreement capture these aims *by implication*. Therefore, the *Belmont* definition as to what claims settlement provisions the President may unilaterally abrogate requires the President to wastefully negotiate over matters that fall clearly within the ambit of the agreement and further its aims. This alone ensures that these matters are "parts of one"[98] transaction to satisfy the *Belmont* test. Otherwise, the President would forfeit the opportunity to abrogate those claims settlement provisions upon unilateral withdrawal. A functionalist test akin to the *Pink* Court's articulation based solely on aims of the resulting agreement is therefore appropriate. In sum, a limited executive lawmaking power rooted in the recognition power should be delineated by the stated or implied diplomatic aims of a given agreement, *not* by the interrelatedness of negotiations or the separateness of diplomatic transactions.

The President's power to abrogate provisions of a congressional-executive agreement pursuant to the Article II recognition power in the claims settlement context thus rests on whether those claims settlement provisions are *necessary to further some executive act of recognition*, embodied either expressly or by implication in the final agreement between sovereigns. On this view, there is no need to

93. *See* Pink, 315 U.S. at 230.

94. *Id.* at 227 (noting that "claims against Russia or its nationals" were "one of the barriers to recognition of the Soviet regime by the Executive Department").

95. *Id.*

96. The Federalist No. 64 (John Jay).

97. Belmont, 301 U.S. at 330.

98. *Id.*

inquire into the minutiae of negotiations or their necessity to the final agreement. The diplomatic aims of the congressional-executive agreement are themselves sufficient to delineate the scope of the President's highly limited lawmaking power, pursuant to the recognition power. Any provisions of a congressional-executive agreement which fall within this power are necessarily grounded entirely in Article II authority, a reserve of power which remains even when the President's power is at its "lowest ebb."[99] As such, they cease to exist when the sole authority on which they rest ceases to exist—when the President unilaterally withdraws from a congressional-executive agreement. The act of unilateral executive withdrawal renders these claims settlement provisions mere surplusage without binding effect—in other words, no longer good law.

Yet the Article II lawmaking power in the claims settlement context must remain sharply delimited. Broadly stated, this power pertains only to the *actual settlement of claims that impair a diplomatic goal*, such as those held by American nationals against the Soviet government in *Belmont*, which the sole executive agreement "embraced."[100] The Article II power of terminating certain provisions of congressional-executive agreements would not extend, for example, to trade provisions relating to the normalization of trade relations, as the authority for such provisions can be found not only in the recognition power, but also in the Commerce Clause.[101] And this power would certainly not extend to provisions pertaining to intellectual property, criminal law, or other matters clearly within the purview of

99. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). It is worth noting that the President's power in *Pink* and *Belmont* was not actually at its lowest, insofar as the President was not acting *counter* to the express or implied wishes of Congress. However, as noted above, the *Zivotofsky II* Court recognized a recognition power even in the face of congressional opposition. *See* Zivotofsky v. Kerry, 576 U.S. 1 (2015). Thus, while *Pink* and *Belmont* are not a *perfect* approximation of the scope of presidential lawmaking in accordance with the recognition power, *Zivotofsky II* suggests that the difference between congressional silence and congressional opposition in this area may be of little import, as in any event recognition lies at the core of the Article II foreign affairs power.

100. Belmont, 301 U.S. at 326.

101. *See, e.g.*, United States v. Pink, 315 U.S. 203, 240–41 (1942) (Frankfurter, J., concurring) ("The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia. That the power to establish such normal relations with a foreign country belongs to the President is equally indisputable."). *But see* Zivotofsky v. Kerry, 576 U.S. at 16 ("It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may 'regulate Commerce with foreign Nations' . . . ." (quoting U.S. Const. art. I, § 8, cl. 3)).

Congress's Article I, Section 8 authority.[102] These provisions would remain good law with binding domestic effect unless Congress were to condition the termination of such provisions on unilateral executive withdrawal.[103]

VII.
THE MOOT STATUTE EXCEPTION

A second exception to the general prohibition on unilateral executive abrogation of agreement provisions pertains to provisions that simply have no binding force of law absent continued participation in a given congressional-executive agreement. In some cases, mere executive communication of withdrawal, a power I have defended as plenary, renders certain provisions surplusage.

The most salient example of such a statute is not a congressional-executive agreement, but rather the implementing statute of an Article II treaty. For purposes of this analysis, the distinction between the former and the latter is irrelevant. The focus here is on text and structure, irrespective of whether the implementing legislation is separate (as is the case with Article II treaties) or whether the agreement and the implementing legislation are one and the same (as is the case with congressional-executive agreements).[104] The Court in *Bond v. United States* notes that the 1998 Chemical Weapons Convention Implementation Act "closely tracks the text of the treaty."[105] This is a bit of an understatement. The Act's substantive provisions describe both civil and criminal penalties for violations of the treaty.[106] But the

102. *See* Yoo, *supra* note 3, at 823 ("Congressional-executive agreements preserve Congress's Article I, Section 8 authority over matters such as . . . intellectual property, criminal law, and appropriations, by requiring that regardless of the form of the international agreement, Congress's participation is needed to implement obligations in those areas.").

103. Bradley, *supra* note 7, at 1634 ("In the trade area, Congress has actually addressed the continuing effect of its implementing legislation in the event of a termination of the underlying agreement, and it has done so in a way that seems to accept a presidential termination authority.").

104. *See* Henkin, *supra* note 7, at 217 ("[A]ll such agreements are 'executed' by Congress, every agreement has Congressional sanction, and clearly [a] joint resolution approving it can repeal any inconsistent statutes.").

105. 572 U.S. 844, 851 (2014).

106. 18 U.S.C. § 229A(a)(1) ("Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both."); 18 U.S.C. § 229A(b)(1) ("The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.").

Act also contains provisions pertaining to inspections and reporting requirements in accordance with the terms set forth by the treaty.[107] Presidential communication of withdrawal from such an agreement would vitiate the underlying international obligation.

This situation presents a conundrum. It appears that one must either accept executive lawmaking beyond the very narrow claims settlement circumstances or else deny an executive communicative power, which I have established as plenary and free from Article I interference beyond mere procedural requirements, such as notice. Yet the answer is deceptively simple. Implementing statutes that closely track agreement provisions actually embody constructive congressional consent to statutory abrogation upon unilateral executive withdrawal. They are no different from express termination provisions, such the provision in the Trade Act of 1974, which governs NAFTA.[108] Congress, after all, could have included any number of standalone substantive provisions in a congressional-executive agreement of this type, and unless they pertained to claims settlement, the President would have been powerless to render such provisions moot upon communication of unilateral withdrawal.[109] If Congress has chosen to legislate in a manner so appurtenant to the Article II foreign affairs power, it has implicitly consented to conditioning its legislation on unilateral executive withdrawal, based on such contingencies as the "loss of a battle, the death of a prince, [or] the removal of a minister."[110] To be sure, unilateral executive withdrawal in such cases is a form of Article II lawmaking, but it enjoys Article I sanction. This situation is therefore more analogous to the earlier discussion on congressional consent to statutory abrogation—the congressional "ratchet"—than to the later discussion on claims settlement, insofar as the claims settlement power is a *truly* Article II lawmaking power.[111]

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107. 22 U.S.C. §§ 6721–45.

108. 19 U.S.C. § 2135(e); *see* Bradley, *supra* note 7, at 1635 ("This legislation appears to assume that these agreements may be terminated without congressional approval. If such approval were required, Congress could simply address the continuing effect of its implementing legislation and any presidential proclamations enacted thereunder at that time rather than needing to address it in advance.").

109. *See* Yoo, *supra* note 3, at 823 ("Congressional-executive agreements preserve Congress's Article I, Section 8 authority over matters such as . . . intellectual property, criminal law, and appropriations, by requiring that regardless of the form of the international agreement, Congress's participation is needed to implement obligations in those areas.").

110. The Federalist No. 64 (John Jay).

111. United States v. Belmont, 301 U.S. 324, 330 (1937) (recognizing that matters of "recognition [and] establishment of diplomatic relations" extend to "parts of one transaction" that pertain to "an international compact between . . . two governments").

VIII.
CONCLUSION

By defending with equal vigor both an executive monopoly on communicating withdrawal from congressional-executive agreements and a general prohibition on executive lawmaking, I seek to explain how and why, as a matter of necessity, the President must enjoy the former power without any concomitant lawmaking power. The advantages of such a conception are several. First, this theory is not reliant on congressional delegations of authority. Congressional authorizations are additive, insofar as they imbue the communicative power with a power to abrogate statutes. However, Congress may not *detract* from the President's monopoly on communicating withdrawal. Second, this theory responds directly to the objection that the President may not "cancel" statutes via unilateral executive withdrawal by taking seriously the proposition that congressional-executive agreements *are* statutes—a conclusion, as I have demonstrated, that is impossible to avoid. Third, this theory promotes the stability of congressional, executive, and judicial expectations in the realm of congressional-executive agreements by answering an all-important question: What happens to the provisions of an agreement when the President unilaterally withdraws? Key stakeholders, such as federal agencies, must be apprised as to what remains binding law and what becomes mere surplusage when the President unilaterally withdraws from a congressional-executive agreement. Separating the communicative monopoly from any form of Article II lawmaking power, while explaining two special cases in which the President enjoys some power to abrogate agreement provisions, explains when unilateral presidential abrogation of implementing statutes is constitutional. This sketches at least the beginnings of an answer that takes seriously the separation of powers and ensures a nimble, responsive, and vigorous executive role in the realm of foreign affairs.