

PUSHING BACK: REASSERTING A ROLE FOR CONGRESS IN THE WITHDRAWAL FROM INTERNATIONAL AGREEMENTS

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As the power of the Executive has grown throughout the last century, a doctrine of judicial and congressional acquiescence has emerged, giving the President singular dominance in the direction of foreign affairs. Yet, in the modern world—where the boundary between domestic and foreign affairs is increasingly blurred—the question arises as to whether deference to the Executive in foreign affairs has entered potentially dangerous territory. While in recent decades some controversies have arisen over the extent of the Executive’s unilateral authority in this area, fundamental norms such as an ardent commitment to free trade principles and political restraints have consistently guided the relationship between Congress and the Executive, serving as backstops and preventing chaotic departures from the norm. Specifically, while Congress, the Executive, and commentators have historically disagreed about the mechanisms of withdrawal from international agreements, certain fundamental precepts, such as adherence to the proliferation of free trade and a belief in the necessity of multilateral agreements for the stability of the post-World War II order, consistently guided the conversation. President Trump’s efforts to leverage the power of the Executive as a unilateral threat to this order are not only alarming but potentially catastrophic. This Note addresses whether any potential impediments exist to prevent the President from unilaterally withdrawing from the international agreements that have guided the United States and the general global community for the past seventy years. Further, it offers an alternative framework for viewing the Executive’s power to withdraw from such agreements and provides perspective on the immediate path forward.

I. INTRODUCTION	495
II. THE CURRENT FUNCTIONING OF INTERNATIONAL AGREEMENTS	500
A. <i>Traditional Article II Treaties</i>	501
1. <i>Role of Implementing Legislation for Article II Treaties</i>	502
2. <i>Decline of Traditional Article II Treaties</i>	503

* New York University School of Law, J.D. 2018. I would like to thank Professor Samuel Estreicher and Professor Thomas Lee whose critical insight and instruction made this Note possible. I would also like to thank the staff of the *NYU Journal of International Law and Politics* whose tireless efforts helped refine my writing and crystallize my ideas on a topic of great importance to the current state of affairs. All mistakes are entirely my own.

B.	<i>Executive Agreements</i>	504
1.	<i>Sole Executive Agreements</i>	504
2.	<i>Treaty-Executive Agreements</i>	507
3.	<i>Congressional-Executive Agreements</i>	508
C.	<i>Choosing Among Types of International Agreements</i>	510
III.	MEANS OF WITHDRAWING FROM INTERNATIONAL AGREEMENTS	511
A.	<i>Effects of Withdrawal from International Agreements</i>	511
1.	<i>International Effects</i>	511
2.	<i>Domestic Effects</i>	512
B.	<i>Reexamining the Historical Precedent for Expansive Unilateral Withdrawal Power</i>	514
C.	<i>Rethinking the "Sole Organ" Theory of Curtiss-Wright</i>	520
D.	<i>Reconsidering a Role for Congress</i>	524
IV.	PUSHING BACK AND BALANCING OUT: A POTENTIAL FRAMEWORK TO REASSERT A ROLE FOR CONGRESS IN THE TERMINATION OF INTERNATIONAL AGREEMENTS	526
A.	<i>Concerns of Unconstitutional Encroachment</i>	528
B.	<i>Areas of Potential Expansion for Congressional Influence</i>	530
C.	<i>Remaining Role for Sole Executive Authority</i>	532
D.	<i>Concerns of Judicial Intervention</i>	532
V.	LOOKING FORWARD: STEPS FOR REASSERTING A ROLE FOR CONGRESS	534
A.	<i>Actively Combat Doctrine of Congressional Acquiescence</i>	535
B.	<i>Codify International Agreements as Domestic Law</i>	536
C.	<i>Pass Preemptive Legislation to Give Congress a Role in Negotiating Agreements</i>	537
D.	<i>Restrict Executive Funds Through the "Power of the Purse"</i>	537
E.	<i>Congressional Condemnation of Unilateral Executive Withdrawal</i>	538
F.	<i>Use Potential Veto Threat to Heighten Public Awareness of Issues</i>	539
VI.	CONCLUSION	539

Some commentators have mentioned my actions as part of what is known as the re-emergence of Congress in foreign affairs. This is a correct interpretation as far as it goes. But I would look at it more as an effort to return to the letter and the intent of the Constitution. I am not at all interested in an aggrandizement of Senatorial power. What I am interested in is preventing the executive branch from committing our country to significant and often irrevocable courses of action without approval of the Congress and ultimately the people. Checks and balances are what our system is all about.

—Sen. Clifford Case (R-NJ)¹

I. INTRODUCTION

Donald Trump's ascent to the presidency over seasoned political veteran Hillary Clinton sent shockwaves throughout the political establishment in Washington and around the world. Though the precise combination of factors that enabled President Trump's victory remains unsettled, few question the important role that his bombastic assertions of American decline and insistence on American retrenchment from world affairs² played in establishing the loyal base that propelled him into power. While many initially claimed Trump's rhetoric would temper as he settled into the White House and assumed the mantle of presidential leadership,³ his presidency has proven anything but subdued.

Recent actions by the White House retrenching America from the post-World War II order based on free trade and multilateral agreements undermine the cautious optimism of those who hoped President Trump would leave his nationalist

1. *Cong. Oversight of Exec. Agreements: Hearing Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary on S. 3475*, 92d Cong. 107 (1972) (statement of Sen. Clifford Case) (supporting the bill to restrain the unilateral authority of the Executive with regard to international agreements).

2. See Jessica Durando, *Donald Trump's Big 10 Foreign Policy Pledges—Will He Stick to Them?*, USA TODAY (Nov. 17, 2016, 3:10 PM), <https://www.usatoday.com/story/news/world/2016/11/17/trump-foreign-policy-campaign-promises/93802880/> (outlining Donald Trump's foreign policy pledges during the campaign).

3. See, e.g., Scott Detrow, *Show's Over? Trump Pledges to Be 'So Presidential You Will Be So Bored'*, NPR (Apr. 21, 2016, 12:48 PM), <http://www.npr.org/2016/04/21/475126907/shows-over-trump-pledges-to-be-so-presidential-you-will-be-so-bored>.

rhetoric on the campaign trail. Threats to withdraw from the proposed Trans-Pacific Partnership materialized shortly after his inauguration.⁴ The President swiftly translated his so-called Muslim ban into several subsequent bans on immigrants from Muslim-majority nations.⁵ Even campaign-trail promises to simply “pull the United States out” of the World Trade Organization if the organization’s agreement could not be renegotiated to better suit the interests of the United States continue to gain traction in the administration.⁶ Alarmingly, President Trump’s consistent threats to withdraw from the North American Free Trade Agreement (NAFTA) allegedly prompted the drafting of an executive order in April 2017 to immediately terminate the agreement, without any acknowledgement of the vast geo-political and global economic ramifications that would follow.⁷ Ultimately the NAFTA framework was largely preserved under the since rebranded United States-Mexico-Canada Agreement (USMCA),⁸ but not without the President’s

4. E.g., Mireya Solís, *Trump Withdrawing from the Trans-Pacific Partnership*, BROOKINGS (Mar. 24, 2017), <https://www.brookings.edu/blog/unpacked/2017/03/24/trump-withdrawing-from-the-trans-pacific-partnership/>.

5. E.g., Laura Jarrett & Elise Labott, *Travel Ban 2.0 in Effect, Court Challenges Begin*, CNN (June 30, 2017, 5:09 AM), <http://www.cnn.com/2017/06/29/politics/revise-travel-ban-thursday/index.html>.

6. Edward Helmore, *Trump: US Will Quit World Trade Organization Unless It ‘Shapes Up’*, GUARDIAN (Aug. 30, 2018, 9:10 PM), <https://www.theguardian.com/us-news/2018/aug/30/trump-world-trade-organization-tariffs-stock-market> (discussing the President’s continued attacks on the WTO); *Meet the Press* (NBC television broadcast July 24, 2016) (describing then-candidate Trump’s intentions).

7. Tara Palmeri, *White House Readies Order on Withdrawing from NAFTA*, POLITICO (Apr. 26, 2017, 5:44 PM), <http://www.politico.eu/article/trump-trade-white-house-readies-order-on-withdrawing-from-nafta/>.

8. E.g., Shawn Donnan, *Trump’s New Nafta Pact Looks More Like a Rebranding than a Revolution*, BLOOMBERG BUSINESSWEEK (Oct. 1, 2018, 8:11 AM), <https://www.bloomberg.com/news/articles/2018-10-01/trump-s-new-nafta-pact-looks-more-rebranding-than-revolution> (describing the paucity of substantive changes in the new trade agreement); John W. Schoen, *Here Are Some Key Differences Between Trump’s New Trade Deal and NAFTA*, CNBC (Oct. 1, 2018, 11:59 AM), <https://www.cnbc.com/2018/10/01/new-trump-trade-deal-leaves-nafta-largely-intact.html> (noting how the “new trade deal with Canada and Mexico leaves much of the old North American Free Trade Agreement intact”).

heightened rhetoric leading to noticeably protracted negotiations and strained relations with long-standing allies.⁹

As already evident, threatened withdrawals from foundational international agreements are far more than speculative—the Trump administration has already demonstrated a willingness to unilaterally terminate international agreements. For example, in August 2017, the President announced his plan to withdraw from the Paris Agreement,¹⁰ an international accord on climate change negotiated by former President Obama and signed by 175 countries in April 2016.¹¹ While the agreement’s own terms restrict the immediate withdrawal of the United States as a signatory, President Trump’s expansive ability to unilaterally undermine international agreements through use of executive power may threaten the agreement’s very foundation.¹² While some caution that complete with-

9. E.g., *Mulrone Says He’s ‘Never Seen Anything’ like Trump Surrogates’ Attacks on Trudeau*, CBC (June 11, 2018, 6:17 PM), <https://www.cbc.ca/news/politics/mulroney-trudeau-trump-nafta-1.4701799> (discussing the strained relationship between the United States and Canada due to President Trump’s rhetoric).

10. Andrew Restuccia, *Trump Administration Delivers Notice U.S. Intends To Withdraw from Paris Climate Deal*, POLITICO (Aug. 4, 2017, 12:40 PM), <http://www.politico.com/story/2017/08/04/trump-notice-withdraw-from-paris-climate-deal-241331>. For reasons discussed in Part IV of this note, the President is unable to immediately withdraw from the agreement, as the terms of withdrawal stipulate that “[a]t any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.” Paris Agreement to the United Nations Framework Convention on Climate Change art. 28, Dec. 12, 2015, 55 I.L.M. 743 (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].

11. Press Release, United Nations Framework Convention on Climate Change, 175 States Sign Paris Agreement (Apr. 22, 2016), <https://unfccc.int/index.php/news/175-states-sign-paris-agreement>. Notably, under the terms of the Agreement itself, the United States cannot officially withdraw until November 4, 2020. Restuccia, *supra* note 10. However, the Trump Administration’s announcement of its intent to withdraw is potentially indicative of its stance on many other international agreements that it finds adverse to its “America First” policy. For more information on this policy, see *President Donald J. Trump’s Foreign Policy Puts America First*, WHITEHOUSE.GOV (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-foreign-policy-puts-america-first/>.

12. Recent conclusions in the media that President Trump likely has the power to unilaterally eliminate such agreements as NAFTA serve to underscore the importance of these questions. See, e.g., Zeeshan Aleem, *We Asked 6 Experts if Congress Could Stop Trump from Eliminating NAFTA*, VOX (Oct. 26,

drawal from such agreements is unlikely, and that the Trump Administration is more likely to modify or renegotiate agreements in an “aggressive manner,”¹³ any potential for unilateral agreement terminations undoubtedly raises serious economic and constitutional questions for the United States and the global economic order at large.¹⁴

As the power of the Executive¹⁵ has grown throughout the last century, a doctrine of judicial and congressional acquiescence has emerged, giving the President singular dominance in the direction of foreign affairs.¹⁶ However, in the modern world—where the boundary between domestic and foreign affairs is increasingly blurred—the question arises as to whether deference to the Executive in foreign affairs has entered potentially dangerous territory. While in recent decades some controversies have arisen over the extent of the Executive’s unilateral authority in this area,¹⁷ certain principles have consistently guided the relationship between Congress and the Executive, serving as backstops and preventing chaotic departures from the norm.¹⁸ Specifically, while Congress, the Executive, and commentators have historically disagreed about the

2017, 1:40 PM), <https://www.vox.com/policy-and-politics/2017/10/26/16505508/nafta-congress-block-trump-withdraw-trade-power> (concluding “probably”). *But see* Julian Ku & John Yoo, *Trump Might Be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016, 4:00 AM), <http://www.latimes.com/opinion/oped/la-oe-yoo-ku-trump-nafta-20161129-story.html> (concluding “[t]he Constitution requires that the president *and* Congress must jointly agree whether to leave NAFTA.”). The level of disagreement on whether the President has the power to unilaterally terminate even this one international agreement should sound alarms and speaks to the legal ambiguity in this area.

13. *See* WILLIAM CLINTON ET AL., *WHITE & CASE, IMPLICATIONS OF THE 2016 US PRESIDENTIAL ELECTION FOR TRADE POLICY* 3–4, 6 (3d ed. 2017) (discussing likely decisions to modify or terminate international agreements by the Trump Administration).

14. *Id.* at 25.

15. Throughout this Note, the terms Executive and President will be used interchangeably to refer to the power claimed by the executive branch of government. President is used when referring to the individuals who have held this office while Executive is used to refer to the institution of the presidency.

16. *See infra* Part IV. *See generally* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (Mariner Books 2004) (1973) (discussing the increasing accumulation of power in the Executive throughout the twentieth century).

17. *See infra* Part IV.

18. For example, with free trade agreements, an assumption unquestioned in previous disputes was that “the primary goal [of all parties involved

mechanisms of withdrawal from international agreements,¹⁹ certain fundamental precepts, such as adherence to the proliferation of free trade and a belief in the necessity of multilateral agreements for the stability of the post-World War II order, remained largely unquestioned. President Trump's efforts to leverage the power of the Executive as a unilateral threat to this order are not only alarming but potentially catastrophic.

While the President may have the prerogative to challenge the status quo of international agreements, a key question this Note addresses is whether any potential impediments exist to prevent the President from unilaterally withdrawing from the international agreements that have guided the United States and the general global community for the past seventy years. In other words, this Note discusses the consequences of the President upending the prevailing order of economic and global integration by unilaterally withdrawing the United States from international agreements on which many other States rely.²⁰ Further, it considers the potential impact of a circumstance where Congress and the American public do not support such efforts. As such, this analysis presents important considerations for both the United States and the broader international community.

Given past extensive discussions on the limits and extents of presidential power in foreign affairs, the primary concerns

was] trade liberalization, and that the President would seek to liberalize trade." CLINTON ET AL., *supra* note 13, at 17.

19. See *infra* Part IV, Section B.

20. President Trump remarked at the 2018 World Economic Forum in Davos, Switzerland, that "my administration has not only been present but has driven our message that we are all stronger when free, sovereign nations cooperate towards shared goals and they cooperate toward shared dreams." Donald J. Trump, U.S. President, Address at the World Economic Forum at Davos, Switzerland (Jan. 26, 2018), *available at* <https://www.politico.com/story/2018/01/26/full-text-trump-davos-speech-transcript-370861>. However, he still maintained a notable hostility to current international agreements, noting:

As the United States pursues domestic reforms to unleash jobs and growth, we are also working to reform the international trading system so that it promotes broadly-shared prosperity and rewards to those who pray [sic]—play by the rules. We cannot have free and open trade if some countries exploit the system at the expense of others.

Id.

of this Note are (1) reevaluating the ability of the Executive to unilaterally terminate international agreements from both an historical and contemporary perspective, and (2) examining possible avenues of reform by which Congress can strengthen its role in enforcing and structuring international agreements.²¹ While the controversial rhetoric of the Trump administration and its stark departure from the policies of other administrations most immediately prompt concerns in this area, the issues considered herein extend beyond the current administration and speak to the larger institutional power of the Executive in a world where domestic and international concerns are increasingly blurred.

To address these issues, this Note proceeds in four parts. Part II analyzes the current role of Congress in approving and giving domestic effects to different types of international agreements. Part III examines the alleged power of the Executive to withdraw unilaterally from international agreements from an historical perspective, and offers considerations for rethinking the extent of Executive authority in this area, particularly when such agreements concern foreign trade and Congress' enumerated power "[t]o regulate Commerce with foreign Nations."²² Part IV provides an alternative framework for viewing the Executive's power to withdraw from international agreements. Specifically, Part IV advocates for enhanced use of Congressional-Executive agreements with more restrictive withdrawal mechanisms. Through these mechanisms, Congress may assert a greater role for itself in foreign affairs for those international agreements that implicate the legislature's Article I powers. Part V offers a perspective on the immediate path forward towards implementing some of the proposals discussed.

II. THE CURRENT FUNCTIONING OF INTERNATIONAL AGREEMENTS

Before evaluating means of terminating international agreements, it is necessary to recognize the prevailing mechanisms by which they are put in place. In the broadest sense,

21. For purposes of this paper, the term international agreements will include: (1) traditional Article II treaties, (2) sole executive agreements, and (3) congressional-executive agreements. *See infra* Part II.

22. U.S. CONST. art. I, § 8, cl. 3.

the term “international agreement” refers to “an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.”²³ Accordingly, international agreements take on a variety of forms. In the United States, they are most commonly associated with two distinct mechanisms: (1) traditional Article II treaties and (2) executive agreements.²⁴ Executive agreements can be further subdivided into three different types: (a) sole executive agreements, (b) treaty-executive agreements, and (c) Congressional-Executive agreements.²⁵ Each type of agreement develops in a unique manner and requires different mechanisms for approval and domestic effect. This Part briefly explores the differences among these types of agreements.

A. *Traditional Article II Treaties*

Article II treaties exemplify the traditional paradigm of international agreements. The President negotiates the agreement with his or her international counterparts²⁶ and submits to the Senate the final text of the agreement, which is subject to approval of “two thirds of the Senators present.”²⁷ Only an international agreement that goes through this constitutionally prescribed process is considered a “treaty.”²⁸ If approved, treaties become the “supreme Law of the Land,”²⁹ though im-

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301 (AM. LAW INST. 1987).

24. See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 265, 367 (5th ed. 2014); Nigel Purvis, *Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority* 7–18 (Res. for the Future, Discussion Paper No. 08-09, 2008), <http://www.iff.org/files/sharepoint/WorkImages/Download/RFF-DP-08-09.pdf>.

25. Purvis, *supra* note 24, at 13–15. See generally BRADLEY & GOLDSMITH, *supra* note 24, at 367–89 (discussing various types of executive agreements).

26. U.S. CONST. art. II, § 2, cl. 2.

27. *Id.* For a helpful chart illustrating the details of this process, see CONG. RESEARCH SERV., S. PRT. 106-71, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 8–9 (2001) [hereinafter 2001 SENATE FOREIGN RELATIONS REP.].

28. 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 1.

29. U.S. CONST. art. VI, cl. 2.

plementing legislation approved by both houses of Congress is often necessary to give treaties full domestic effect.³⁰

1. *Role of Implementing Legislation for Article II Treaties*

Whether or not implementing legislation is required to codify Article II treaties as domestic law depends on whether the treaties themselves are considered self-executing or non-self-executing. Since *Medellín v. Texas*, the U.S. Supreme Court has upheld the presumption that a treaty is not binding domestic law unless the treaty is self-executing and ratified as such, or unless Congress independently passes implementing legislation.³¹ While this determination constituted a departure from previously held assumptions about self-execution,³² the *Medellín* decision indicates the Court's desire to preserve an important role for Congress in foreign affairs.

Missouri v. Holland most clearly recognizes Congress' broad control over the domestic effects of international agreements. In *Missouri*, the Court stated, "[i]f the treaty is valid there can be no dispute about the validity of the statute [implementing the treaty] under Article I, § 8, as a necessary and proper means to execute the powers of the Government."³³ *Medellín* further affirmed this power as belonging exclusively to Congress, finding that "the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress, not the Executive."³⁴ Considering the increasing power of the Executive Branch in

30. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW—TREATIES § 110 (AM. LAW INST., Tentative Draft No. 2, 2017) (describing the role of implementing legislation).

31. *Medellín v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)) ("In sum, while treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.'")

32. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmts. h–i (AM. LAW INST. 1987) (describing the general presumptions regarding self-execution before *Medellín*).

33. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

34. *Medellín*, 552 U.S. at 495; see also *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979) ("The recognized powers of Congress to implement (or fail to implement) a treaty by an appropriation or other law essential to its effectuation, or to supersede

foreign affairs over the past century,³⁵ it is hard to understate the significance of this implied limit on presidential power to afford domestic effect to international agreements.

2. *Decline of Traditional Article II Treaties*

Securing treaty approval from two-thirds of the Senate under the traditional Article II process is a “daunting task” for any President.³⁶ The fact that the Senate does not determine or influence many of the details concerning the terms and parameters of negotiation of the treaty complicates this process. Renowned foreign relations scholar Louis Henkin once remarked, “[i]n a word, ‘advice and consent’ has effectively been reduced to ‘consent.’ The Senate does not formally advise on treaties before or during negotiations.”³⁷

Due to the unwieldy—and increasingly ineffective—system described in the Treaty Clause, a strong movement away from traditional Article II treaties has emerged, particularly in the past century.³⁸ According to Curtis Bradley, professor of international law at Duke Law, “[t]he vast majority of international agreements concluded by the United States in the modern era do not go through this process and are instead concluded as [executive agreements].”³⁹ A 2001 study by the Senate Committee on Foreign Relations notes that from 1939 to 1989, there were a total of 11,698 executive agreements and

for all practical purposes the effect of a treaty on domestic law, are legislative powers, not treaty-making or treaty termination powers.”).

35. See *infra* Part III.

36. Purvis, *supra* note 24, at 10.

37. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 177 (2d ed. 1996). Henkin further notes that “[a]lmost from the beginning, however, Presidents found . . . the Senate’s function uncongenial, perhaps unworkable; the Senate, for its part, also rejected it, seeking to deliberate and pass judgment later and independently, rather than to advise. Once, President Washington talked to the Senate as a body about a forthcoming treaty, but since then no President has done so, nor has advice often been sought or given by exchange of messages.” *Id.* (citations omitted).

38. Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1307 (2008) (nothing that “[t]he Treaty Clause has been steadily losing influence and importance over the course of the century.”).

39. Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 *TEX. L. REV.* 773, 779 (2014).

only 702 Article II treaties.⁴⁰ This finding stands in stark contrast to the first hundred years under the U.S. Constitution (1789–1889) where there were a comparable number of Article II treaties to executive agreements: 275 to 265 respectively.⁴¹ To understand the implications of this shift in the predominant type of international agreements, the distinguishing aspects of the different forms of executive agreements are discussed below.⁴²

B. *Executive Agreements*

Executive agreements illustrate another means by which the United States can constitutionally enter into an international agreement.⁴³ As illustrated above, executive agreements “constitute the vast majority of the United States’ international agreements.”⁴⁴ One recent estimate finds that such agreements “now represent well over 90 percent of all of the United States’ international agreements.”⁴⁵ Because the term executive agreement can apply to many different types of agreements, this Note further subdivides executive agreements into the three different subcategories outlined below.

1. *Sole Executive Agreements*

Sole executive agreements are “negotiated, concluded, and approved *without* the explicit authorization of Congress,”⁴⁶

40. 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 39.

41. *Id.* Notably from 1789–1839, there were sixty Article II Treaties compared to twenty-seven Executive Agreements. The trend in increasing reliance began during the late eighteenth and early twentieth centuries where from 1889–1939, Executive Agreements outweighed Article II treaties 917 to 524. *Id.*

42. Note that the data presented in the 2001 SENATE FOREIGN RELATIONS REP. does not distinguish between Sole Executive Agreements and Congressional-Executive Agreements.

43. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(4) (AM. LAW INST. 1987); *see also* 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 4–6 (discussing the status of executive agreements).

44. Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1616, 1616–17 (2018) (footnote omitted).

45. *Id.* at 1626 (citing Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1212–13 (2018) (documenting how executive agreements came to represent approximately 94 percent of international agreements entered into by the United States)).

46. Purvis, *supra* note 24, at 13 (emphasis added).

and thereby do not require the traditional advice and consent of the Senate associated with Article II treaties. Though former treaty negotiator in the State Department's Office of the Legal Advisor Nigel Purvis noted these agreements "must rest squarely within the President's own constitutional authorities,"⁴⁷ the contours of the President's authority remain unclear. For example, Henkin noted that "there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but . . . [no one] has told us which are which."⁴⁸ Thus, a lingering question remains as to what extent the Executive can claim authority to enter into binding agreements without the involvement of Congress.

Over the past century there have been a few attempts to limit the subject matter of sole executive agreements,⁴⁹ yet the Executive prerogative to utilize sole executive agreements for a wide variety of issues in foreign affairs has gone largely unchallenged.⁵⁰ One example of Congress' attempts to limit un-

47. *Id.* at 18.

48. HENKIN, *supra* note 37, at 222.

49. For an example of a line of reasoning that greatly restricts Presidential power in this area, see *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), stating:

The answer is that while the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress. It cannot be upheld as an exercise of the power to see that the laws are faithfully executed, for, as said by Mr. Justice Holmes in his dissenting opinion in *Myers v. United States*, 272 U.S. 52, 177, 47 S.Ct. 21, 85, 71 L. Ed. 160, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."

50. For a discussion of instances where Congress opposed unilateral action by the President, see *infra* Part III. For a discussion of how Presidents have used various types of executive agreements to promote their policy agendas in foreign affairs, see Kiki Caruson & Victoria A. Farrar-Myers, *Promoting the President's Foreign Policy Agenda: Presidential Use of Executive Agreements as Policy Vehicles*, 60 POL. RES. Q. 631, 632 (2007) (finding that there is greater use of "agreement activity in areas that correspond to presidential initiatives.").

bridled executive authority is the Case-Zablocki Act of 1972,⁵¹ which states:

The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter.⁵²

However, this obligation is mostly for informational purposes and does not present a realistic check on executive authority. The Act does not authorize any additional congressional involvement other than its requirement that Congress receive up-to-date information about international agreements. For his part, Professor Henkin observed that “[t]he President’s power to make sole executive agreements is not without limits, but its limits are difficult to determine and to state.”⁵³

The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW similarly affirms the difficulty of placing an exact limitation on the subject matter of sole executive agreements, noting:

Congress has not enacted restrictions on sole executive agreements generally, but some statutory restrictions on Presidential authority would forbid some sole executive agreements. For example, the War Powers Resolution of 1973, 50 U.S.C. § 1541–48, inhibits the President from making agreements that commit the United States to introduce armed forces into hostilities or into situations where involvement in hostilities is likely, or to increase or redeploy United States combat forces abroad The validity of such restrictions on Presidential powers, and of attempts to control and limit sole executive agreements generally, has not been authoritatively determined and may differ according to the character of the restriction and the circumstances of its application.⁵⁴

51. Case-Zablocki Act of 1972, 1 U.S.C. § 112b (2018).

52. *Id.* § 112b(a).

53. HENKIN, *supra* note 37, at 222.

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. i (AM. LAW INST. 1987).

This potential ambiguity typically resolves itself in favor of broad executive authority. Indeed, “Presidents from Washington to Clinton have made many thousands of agreements, differing in formality and importance on matters running the gamut of U.S. foreign relations.”⁵⁵ As a result, Presidents, claiming broad authority to conduct foreign affairs, have used wide latitude to affect global relations through sole executive agreements.⁵⁶ Moreover, courts consistently refuse to set parameters for the use of unilateral Executive power, finding generally that the decision “whether to classify an international agreement as a treaty or executive agreement is a ‘political question’ to be made *solely* by the President and Congress.”⁵⁷

2. *Treaty- Executive Agreements*

Treaty-executive agreements are those agreements “explicitly or implicitly authorized by a treaty previously ratified by the United States” and are “somewhat rare” in practice.⁵⁸ According to Purvis, very few treaties “authorize the President to negotiate executive agreements that do not require further congressional review.”⁵⁹ However, “[i]n the exceptional cases where treaties do delegate negotiating authority to the President, many times that authority is implied in the text rather

55. HENKIN, *supra* note 37, at 219. Note that the latest edition of Henkin’s book was published in 1996. Since then, Presidents George W. Bush, Barack Obama, and Donald Trump have likewise participated in Sole Executive Agreements.

56. For further discussion on the extent and sources of this claimed power, see *infra* Part III.

57. Purvis, *supra* note 24, at 26 (footnote omitted). *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319–20 (11th Cir. 2001) (“[I]n the context of international commercial agreements such as NAFTA . . . the issue of what kinds of agreements require Senate ratification pursuant to the Art. II, § 2 procedures presents a nonjusticiable political question.”). Notably, this latter case concerned whether or not NAFTA should have been submitted as a congressional-executive agreement—which are discussed *infra* Part II, Section B, Subsection 3—or as a traditional Article II treaty.

58. Purvis, *supra* note 24, at 14.

59. *Id.*

than explicitly stated.”⁶⁰ Due to their many similarities with sole-executive agreements, treaty-executive agreements are often classified as a subset of the former. For the purposes of this Note, the concerns lurking within the claimed implicit power of the Executive authorized by treaty-executive agreements are synonymous with the concerns associated with sole-executive agreements.

3. *Congressional-Executive Agreements*

Congressional-Executive agreements typically refer to “executive agreement[s] for which domestic legal authority derives from a preexisting or subsequently enacted statute.”⁶¹ As noted previously, these agreements play an increasingly prominent role in the modern era. The Restatement (Third) notes, under this framework, “Congress may enact legislation that requires, or fairly implies, the need for an agreement to execute the legislation. Congress may authorize the President to negotiate and conclude an agreement, or to bring into force an agreement already negotiated, and may require the President to enter reservations.”⁶² As such, Congressional-Executive agreements can take on either an *ex ante* or *ex post* quality in what they require of the Executive. Under *ex ante* agreements, Congress merely “delegate[s] to presidents the authority to conclude agreements about a certain subject, and presidents have done so without returning to Congress for approval, sometimes long after the statute is enacted.”⁶³ Under *ex post* agreements, Congress votes to approve such agreements “after they have been negotiated.”⁶⁴ Though there seemingly remains ample room for Congress to dictate the structure of these agreements to the Executive, the Restatement clearly notes that “Congress cannot itself conclude such an agree-

60. *Id.*

61. STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 4 (2017) (footnote omitted); see also 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 78–86 (describing further Congressional-Executive agreements).

62. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (AM. LAW INST. 1987).

63. Bradley, *supra* note 44, at 1626 (footnote omitted).

64. *Id.*

ment.”⁶⁵ Though there has been some disagreement among scholars about the constitutionality of Congressional-Executive agreements, “it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.”⁶⁶

Congressional-Executive agreements have become popular because they allow preemptive notification by the President and authorization from both chambers of Congress for negotiation of an international agreement. The agreement itself passes through the normal legislation process instead of the Senate-only treaty ratification process.⁶⁷ Moreover, agreements created this way often appear more democratic—in that voters can express their potential views on the agreement through both their senators and representatives, of which the latter are typically believed to be more responsive to constituent concerns.⁶⁸ From a political perspective, the structure of Congressional-Executive agreements may enhance a President’s ability to get Congressional approval of an international agreement because approval only requires a simple majority of both houses,⁶⁹ as opposed to the two-thirds requirement of the Treaty Clause.⁷⁰ Finally, for purposes of domestic implementation, Congressional-Executive agreements typically eliminate the distinction noted above between self-executing and non-self-executing agreements that often arises under traditional Article II treaties.⁷¹

65. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (AM. LAW INST. 1987).

66. HENKIN, *supra* note 37, at 217 (footnote omitted). For further discussion about the constitutionality of congressional-executive agreements, see *id.* at 493 n.153, 494–95 n.157.

67. *E.g.*, Bruce Ackerman & David Golove, *Can the Next President Repudiate Obama’s Iran Agreement?*, ATLANTIC (Sept. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/09/can-the-next-president-repudiate-obamas-iran-agreement/404587/> (discussing factors contributing to the increasing popularity of these instruments).

68. *Id.*

69. HENKIN, *supra* note 37, at 217.

70. U.S. CONST. art. II, § 2, cl. 2.

71. HENKIN, *supra* note 37, at 217. For a discussion of self-executing and non-self-executing treaties, see *infra* Part II.A.1. Though seemingly untested in the courts, Congress did indeed put in place a restriction mandating that the President seek ratification of the Rome Statute establishing the International Criminal Court “only through the Article II process.” Bradley, *supra* note 39, at 780 n.28 (citing 22 U.S.C. § 7401(a) (2012)). The implications of

C. *Choosing Among Types of International Agreements*

Politics often drive the type of international agreement selected for any particular issue. Purvis notes that Presidents often use sole executive or treaty-executive agreements when they want to avoid congressional review requirements. However, for international agreements that require explicit congressional approval, Presidents must turn to Congressional-Executive agreements or the traditional Article II treaty process.⁷² Further, the Restatement on Foreign Relations finds that “[s]ince any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty . . . either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”⁷³ Given the flexibility involved in selecting which form of international agreement to use, political calculations and understandings between Congress and the Executive often drive the final decision. The mechanism selected has important consequences for the Executive’s ability to terminate an agreement later on. Without sufficient oversight by Congress, there remains a lurking concern that the Executive can accumulate vast amounts of authority and single-handedly determine the fate of many the fundamental agreements that undergird the post-World War II order based on free trade and stable multinational agreements.

this decision are hard to ascertain as Congress ultimately refused to approve the Rome Statute and join the International Criminal Court.

72. Purvis, *supra* note 24, at 26.

73. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (AM. LAW INST. 1987). While this presumption of constitutionality of Congressional-Executive agreements is widely acknowledged in the field today, during the 1990s, there was a widespread debate about the interchangeability of traditional Article II treaties and Congressional-Executive agreements. Compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (defending the constitutionality of Congressional-Executive agreements as alternatives to traditional Article II treaties), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (questioning the constitutionality of congressional-executive agreements). See also HENKIN, *supra* note 37, at 217 (“[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, *even general use*, and is a complete alternative to a treaty . . .”) (emphasis added) (footnote omitted).

III. MEANS OF WITHDRAWING FROM INTERNATIONAL AGREEMENTS

The power to withdraw from international agreements cannot be understated; yet compared to other topics in foreign relations law, discussions concerning the mechanisms of withdrawal from various forms of international agreements have not kept pace with the current political landscape. This is perhaps because Congress and the Executive have disagreed over a decision to withdraw from an international agreement only in a few instances.⁷⁴ However, given President Trump's bombastic rhetoric against free trade agreements and the United States' strategic place in global affairs,⁷⁵ a renewed sense of urgency should emerge in these discussions. This Part will briefly explore the implications of withdrawal from various international agreements and then examine the alleged power of the Executive to withdraw unilaterally from such agreements, ultimately challenging this presumption of implied power.

A. *Effects of Withdrawal from International Agreements*

International agreements function legally within two spheres—the international and the domestic—and withdrawal from an agreement carries different implications in each.

1. *International Effects*

Under international law, either the terms of the agreement itself or the default rules contained within the Vienna Convention on the Law of Treaties (VCLT)⁷⁶ establish the guidelines for withdrawal from treaties. For example, the current Paris Agreement on climate change contains binding

74. See *infra* Part III Section B.

75. See, e.g., *Meet the Press*, *supra* note 6.

76. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331. As Professor Bradley has noted, “[a]lthough the United States is not a party to the Convention, Executive Branch officials have stated at various times that they regard the Convention as largely reflective of binding rules of international custom, and U.S. courts also regularly refer to the Convention.” Bradley, *supra* note 39, at 777 (footnotes omitted); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. 3, introductory cmt. (AM. LAW INST. 1987) (discussing the types and proliferation of international agreements since World War II).

terms for withdrawal in the international sphere. That treaty restricts withdrawal to “any time after three years from the date on which this Agreement has entered into force for a Party.”⁷⁷ Thus, should the President wish to withdraw from this agreement, under international law he could not diverge from these agreement terms as agreed to by the United States.⁷⁸ As “the only channel of communication between [the United States] and foreign nations,”⁷⁹ the Executive is uniquely entitled, as a default mechanism, to communicate the country’s intention to withdraw from international agreements. As long as no restrictions are put in place by the terms of the agreement itself, this assertion holds true for treaties and various types of executive agreements. However, as Oona Hathaway, professor of international law at Yale Law School, notes, “that well-settled rule tells us nothing about withdrawal from treaties as a matter of *domestic law*—nor about the allocation of power among the branches of government in the decision to withdraw.”⁸⁰ Thus, a decision by the Executive to publicly terminate an international agreement cannot wholly eliminate the domestic effects of such an agreement.

2. *Domestic Effects*

From a domestic perspective, the implications of withdrawal from various types of international agreements remain unclear because, as discussed below, historical precedent in this area remains sparse. In the case of traditional Article II treaties, if Congress passed legislation implementing an international agreement from which the Executive later withdraws, an argument exists that such legislation loses its legal force as a matter of domestic law.⁸¹ However, this line of reasoning

77. Paris Agreement, *supra* note 10, art. 28; *see supra* note 10 and accompanying text.

78. *See supra* note 10 and accompanying text (explaining the terms of withdrawal from the Paris Agreement).

79. H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 53 (2002) (quoting letter from Thomas Jefferson to Edmond Charles Genet (Nov. 22, 1793)).

80. Hathaway, *supra* note 38, at 1324.

81. Jacob L. Shapiro, *The American President’s Power over NAFTA*, *GEOPOLITICAL FUTURES* (Sept. 9, 2016), <https://geopoliticalfutures.com/the-american-presidents-power-over-nafta/> (“[S]ome have argued that the statutes Congress legislated into law . . . would become zombie statutes.”).

seems to contrast the strong role for Congress in foreign affairs that the Court apparently recognized in *Medellín*.⁸² Moreover, such strong assertions of Executive power are particularly troubling in cases where Congress passes implementing legislation under authority of one of its enumerated powers.⁸³ These same concerns are reflected in the case of Congressional-Executive agreements where Congress stipulates the terms and conditions of international agreements.

In the case of sole executive agreements—and relatedly treaty-executive agreements—it is generally accepted that “presidents can conclude [these types of] executive agreements relating to matters within their independent constitutional authority”⁸⁴ However, as Henkin observes, “[a]t least some sole executive agreements . . . can be self-executing and have some status as law of the land.”⁸⁵ Consequently, “a self-executing [sole] executive agreement would surely lose its effect as domestic law in the face of an inconsistent subsequent act of Congress.”⁸⁶ In this manner, Congress can essentially undo any domestic effects that a sole executive agreement might carry with it through appropriate legislation.⁸⁷

82. *Medellín v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)) (“In sum, while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.’”).

83. See *infra* Part IV.

84. Bradley, *supra* note 44, at 1624.

85. HENKIN, *supra* note 37, at 228 (footnote omitted).

86. *Id.* See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. j (AM. LAW INST. 1987) (describing effects of sole executive agreements).

87. See Bradley, *supra* note 44, at 1641–42 (“But this is because, in the U.S. domestic legal system, both treaties and federal statutes are types of law—and, as the domestic lawmaker for the United States, Congress can alter the controlling law.”); see, e.g., *Edey v. Robertson* (Head Money Cases), 112 U.S. 580, 599 (1884) (“The Constitution gives [a treaty] no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date.”); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889) (“If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.”). Because there is little debate remaining about the power of Congress to overturn the domestic effects of

If all of this sounds increasingly muddled, that is because there is little understanding of the exact bounds of the Executive's authority to withdraw unilaterally from some forms of international agreements. The subsequent domestic effects of such decisions are also unclear. This confusion is especially alarming in the context of the current administration's threats of withdrawal from various types of international agreements. Thus, the initial query of this Note again rises to the forefront: if the President unilaterally terminates international agreements, is there anything that Congress can do to stop him? Given that the rise of Executive power in general has effectively been a function of the twentieth and twenty-first centuries,⁸⁸ any analysis of the balance of power between Congress and the Executive in the realm of foreign affairs must mobilize a broader historical perspective to form an adequate response.

B. *Reexamining the Historical Precedent for Expansive Unilateral Withdrawal Power*

The level of autonomy that the Framers of the Constitution intended for the Executive to have in withdrawing from international agreements remains unclear. This is notably complicated by the fact that the Constitution does not provide a mechanism for withdrawing from traditional Article II treaties, and the Framers did not foresee the emergence of Congressional-Executive agreements.⁸⁹ As Congressional-Executive agreements are largely a creation of the twentieth century, much of the historical discussion regarding Congress' role in the termination of international agreements focuses on traditional Article II treaties—though these discussions provide lessons that inform the general role Congress has in foreign relations.

The development of historical practice and constitutional theory of the withdrawal power has ebbed and flowed along

sole executive agreements or treaty-executive agreements, this Note will not focus on these issues.

88. See, e.g., CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007) (charting the development of the imperial presidency in the twenty-first century); SCHLESINGER, *supra* note 16 (charting the development of the imperial presidency in the twentieth century).

89. As noted above, because Congress does not have a role in implementing sole executive agreements, such agreements will not be treated in detail.

with political disputes throughout U.S. history. In his piece on treaty termination, Professor Bradley aptly charts this development:

[T]he center of gravity of the debate over treaty termination has shifted substantially over time, from whether the full Congress or merely the Senate needs to *approve* a termination to whether Congress or the Senate can even *limit* the President's unilateral authority to terminate. One can identify a pattern of change First there is a consensus, both among the governmental actors and in the scholarly community. Then deviations take place with a potentially limited scope. The Executive Branch proceeds to articulate broader theories of the deviations. Congress's resistance is intermittent, depending on whether it objects to the deviations on policy grounds. Practice then builds up around low-stakes examples. Eventually a more controversial example arises and the President pushes forward successfully, thereby consolidating the changed understanding.⁹⁰

Historical practice then, not Constitutional mandates, have defined the contours of the Presidential termination power. In fact, according to Bradley's research:

90. Bradley, *supra* note 39, at 775 (emphasis in original). Even the official website of the United States Senate recognizes the ambiguity of the power of unilateral executive withdrawal, stating:

The Constitution is silent about how treaties might be terminated. The breaking off of two treaties during the Jimmy Carter administration stirred controversy. In 1978 the president terminated the U.S. defense treaty with Taiwan in order to facilitate the establishment of diplomatic relations with the People's Republic of China. Also in 1978 the new Panama Canal treaties replaced three previous treaties with Panama. In one case, the president acted unilaterally; in the second, he terminated treaties in accordance with actions taken by Congress. Only once has Congress terminated a treaty by a joint resolution; that was a mutual defense treaty with France, from which, in 1798, Congress declared the United States "freed and exonerated." In that case, breaking the treaty almost amounted to an act of war; indeed, two days later Congress authorized hostilities against France, which were only narrowly averted.

Treaties, U.S. SENATE, <https://www.senate.gov/artandhistory/history/mon/briefing/Treaties.htm> (last visited Nov. 5, 2018).

[A] nineteenth-century understanding of treaty-termination authority that has largely been lost from modern considerations of the issue, pursuant to which the termination of treaties, like the making of treaties, was generally understood by both Congress and the President as a shared power. Most modern accounts acknowledge vaguely that treaty terminations have been accomplished in a variety of ways throughout U.S. history but fail to appreciate the sharp contrast between the modern presidential unilateralism and the nineteenth-century practices and understandings.⁹¹

Quite notably, the Restatement of Foreign Relations Law lost this understanding of a shared conception of the termination power.⁹² Even Henkin, whose work largely supports the claims of wide Executive authority in this area, notes that history is replete with examples of Congress instructing that the President terminate certain treaties,⁹³ although the Executive sometimes ignored these in situations where the President had broad political support.

As Professor Bradley writes, President McKinley's partial termination of a treaty with Switzerland in 1899 is the first indication of "unilateral presidential termination authority."⁹⁴ Yet, even that action was "only a partial termination and was arguably part of an effort to implement congressional policy."⁹⁵ Despite this innocuous precedent, later Presidents seized upon this incident as justification of their own claims to unilateral termination authority. In an internal memorandum during the Taft Administration, the State Department claimed that while presidential action pursuant to a congressional directive might be the "most effective and unquestionable method" for terminating a treaty, the President had the option under U.S. law either of acting in conjunction with the Senate or operating solely by "notice given by the President upon his own initiative without either a resolution of the Senate or the

91. Bradley, *supra* note 39, at 775.

92. *Id.*

93. HENKIN, *supra* note 37, at 490–91 n.143.

94. Bradley, *supra* note 39, at 800.

95. *Id.*

joint resolution of the Congress.”⁹⁶ In support of the latter, the memorandum noted that there had been only one instance of unilateral presidential termination of a treaty to date, namely the 1899 termination of the provisions in the Swiss treaty.⁹⁷ The memorandum concluded that the choice of termination method “would seem to depend either upon the importance of the international question or upon the preference of the Executive.”⁹⁸ Notably, the memorandum gave no consideration to the domestic effects of treaty termination, such as the effect on implementing legislation.

Despite these claims of unilateral authority by the Executive, the question of the proper allocation of power between Congress and the Executive remained disputed throughout the early twentieth century. During the debate over the ratification of the Treaty of Versailles through the Article II process, Senator Jones inquired “whether or not the President could give such notice [of termination] without authorization from Congress” to which Senator Walsh replied, “I think not; clearly not. I cannot believe that anybody could entertain any serious doubt as to that.”⁹⁹

Despite this hesitancy from Congress, subsequent Presidents strengthened their claims of unilateral withdrawal power by establishing historical practice. In 1927, the “Coolidge Administration withdrew the United States from a smuggling convention with Mexico without authorization or subsequent approval from Congress or the Senate,” marking the first time in the twentieth century that a President unilaterally withdrew from a treaty.¹⁰⁰ Building upon this tenuous foundation of unilateral Executive power, President Franklin Roosevelt made broader use of the claimed withdrawal power, unilaterally withdrawing from several agreements during his twelve years in office—although, as Professor Bradley acknowledges, “some of these terminations, like McKinley’s 1899 termination of pro-

96. *Id.* at 801–02 (quoting Memorandum from James Brown Scott, Solicitor, U.S. Dep’t of State, to President Wilson 1–2 (June 12, 1909) (on file with Professor Bradley)).

97. *Id.* at 802.

98. *Id.* (quoting Memorandum from James Brown Scott, Solicitor, U.S. Dep’t of State, to President Wilson 1–2 (June 12, 1909) (on file with Professor Bradley)).

99. *Id.* at 803 (quoting 58 CONG. REC. 8074 (1919)).

100. *Id.* at 805.

visions in the Swiss treaty, were because of potential conflicts with trade legislation.”¹⁰¹

Even though the withdrawal power seemed to track the augmentation of Executive power during the Roosevelt era and beyond, the acceptance of the President’s authority to act unilaterally remained in flux. A 1936 State Department memorandum advised President Roosevelt that while the position of the department was that “unilateral action was constitutional”—citing yet again the 1899 “precedent” by President McKinley—“[t]he question as to the authority of the Executive to terminate treaties independently of the Congress or of the Senate is in a somewhat confused state” and that “[n]o settled rule or procedure has been followed.”¹⁰² It remains unclear how much of this assertion the Department based on legal scholarship or a need to formulate a legal opinion that satisfied the prerogative of Executive power that President Roosevelt sought. Even into the Cold War era, doubts remained about the unilateral power of the President to withdraw from international agreements. A 1958 State Department memorandum cautioned that “matters of policy or special circumstances may make it appear to be advisable or necessary to obtain the concurrence or support of the Congress or the Senate” when considering unilateral withdrawal.¹⁰³

Despite this uncertain context and dubious precedent, scholars dedicated little attention to the power of unilateral Executive withdrawal until the 1970s and President Carter’s decision to nullify the Sino-American Mutual Defense Treaty. This action, which diplomatically recognized the People’s Republic of China and withdrew recognition from the Republic of China (Taiwan), prompted a lawsuit by Senator Barry Goldwater and others over the President’s actions.¹⁰⁴

The dearth of scholarship until the 1970s is not wholly surprising, for, as Henkin notes, “[c]ontroversy as to who has

101. *Id.* at 806.

102. *Id.* at 807 (quoting Memorandum from R. Walton Moore, U.S. Sec’y of State, U.S. Dep’t of State, to President Roosevelt 5 (Nov. 9, 1936) (on file with Professor Bradley)).

103. *Id.* at 809 (citing Memorandum from William Whittington, Deputy Assistant Legal Adviser, U.S. Dep’t of State, Termination of Treaties: International Rules and Internal United States Procedure 5–6 (Feb. 10, 1958) (on file with Professor Bradley)).

104. *Goldwater v. Carter*, 444 U.S. 996 (1979).

authority to terminate treaties has been infrequent, if only because the United States has not often been disposed to terminate treaties.”¹⁰⁵ Despite the Supreme Court’s refusal to issue a decision on the merits of the case in *Goldwater*, many scholars at the time agreed with Henkin that “[e]specially with the changed character of war and its place in international relations, Congress will probably be unable to claim plausibly that the maintenance or termination of treaties is intimately related to war or peace,” and thus, as an original matter, may be beyond the Congress’ control.¹⁰⁶ This same debate resurfaced in 2001 when Representative Kucinich and others sued to prevent President George W. Bush from terminating the 1972 Anti-Ballistic Missile Treaty with Russia.¹⁰⁷ Following the same logic of *Goldwater*, the federal court dismissed the case as a political question to be handled by the political branches,¹⁰⁸ relying on the prevailing background assumption that political constraints would eventually force the feuding branches to find a workable solution.¹⁰⁹ Such historical developments underscore Professor Bradley’s assertion that “treaty termination illustrates not only how a constitutional gloss on governmental authority can develop but also how it can change.”¹¹⁰

As the analysis of withdrawal from international agreements over the past two centuries shows, much of the modern conception of this power centers upon perceived historical foundations and Congressional acquiescence, as opposed to strict constitutional structures. This key understanding leaves open the possibility for shifting some of this power back to Congress in deciding whether the United States should withdraw from existing international agreements. Before turning to the process of retooling the framework of shared power,

105. HENKIN, *supra* note 37, at 213.

106. *Id.* at 214 n.*.

107. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002).

108. *Id.*

109. One of the key reasons that Congress has not adamantly opposed unilateral Executive termination apart from the fact that the United States rarely withdraws from international agreements as noted above, *supra* note 105, is that in most cases Congress has not substantially disagreed with the President’s decision to terminate the agreements in question. See 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 171–76 (describing the “amendment or modification, extension, suspension, and termination of treaties and other international agreements” by the United States).

110. Bradley, *supra* note 39, at 775.

however, attention must be given to the authority upon which the expansive conception of the Executive's power in foreign relations currently rests.

C. *Rethinking the "Sole Organ" Theory of Curtiss-Wright*

The first issue in redefining a greater role for Congress in foreign affairs is the augmented authority of the Executive to act on behalf of the United States in relations with other nations. *Curtiss-Wright* provides the traditional foundation for the assertion that the President acts as the "sole organ of the federal government in the field of international relations."¹¹¹ Writing for the Court, Justice Sutherland claimed that the President's power in foreign affairs "does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."¹¹² Moreover, such "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."¹¹³ Without question, *Curtiss-Wright* epitomizes the zenith of Presidential power in foreign affairs and is widely cited as justification for a powerful Executive. According to Louis Fisher, a Constitutional Law specialist at the Library of Congress, "[c]ourts repeatedly have cited *Curtiss-Wright* favorably, not only to sustain delegations of legislative power but also to support the existence of inherent and independent presidential power in foreign affairs."¹¹⁴

Presidents have cited this power over foreign affairs throughout the twentieth and twenty-first centuries, from President Truman's decision to send troops into Korea in 1950 to the Bush Administration's justification for intercepting communications for purposes of preventing support to ter-

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

112. *Id.*

113. *Id.*

114. LOUIS FISHER, LAW LIBRARY OF CONG., STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS: STUDY NO. 1: THE "SOLE ORGAN" DOCTRINE 23 (2006).

rorists.¹¹⁵ Despite the so-called sole organ doctrine's frequent elicitation, Fisher draws issue with Justice Sutherland's reasoning in the decision, particularly his conception of the Founding period as the supposed basis for this inherent presidential power. Fisher points out that the idea of one individual functioning as the sole organ in foreign affairs has its roots in the prerogative of the British King and that the Founders "could not have . . . meant to incorporate the powers of the British king" into the Executive—a historical consideration that Justice Sutherland ignores when justifying broad Executive power.¹¹⁶ To sustain his argument, Fisher points directly to Federalist No. 75 in which Hamilton argues:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.¹¹⁷

Hamilton's admonition clearly stands in stark contrast to Justice Sutherland's claim of the long-standing need for the accumulation of the foreign affairs power in one individual.

Moreover, Fisher draws issue with Justice Sutherland's citation to a quote by John Marshall to justify the "sole organ" doctrine. Marshall, a member of the House of Representatives in 1800, claimed that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹¹⁸ Fisher points out that this quote is entirely out of context. Only a few paragraphs later in the same speech, then Congressman Marshall stated that "Congress, unquestionably, may prescribe the mode [of developing a treaty], and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the

115. *Id.* at 1–2.

116. *Id.* at 3–4.

117. *Id.* at 5 (citation omitted).

118. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800)).

Executive department to execute the contract by any means it possesses.”¹¹⁹

Fisher is not alone in questioning Sutherland’s assertion. Historian Leonard W. Levy writes that the sole organ idea in Marshall’s speech “meant nothing more than that only the president communicates with foreign nations.”¹²⁰ Moreover, as Harold Koh, a leading expert in international law and professor at Yale Law School, recognizes, Marshall’s remarks “were uncontroversial, not because Congress had accepted a broad presidential monopoly over all foreign relations, but because it had largely acquiesced in the president’s narrower dominance over diplomatic communications.”¹²¹ Drawing on a historical analysis, Fisher concludes that the Framers intended a strong role for Congress in foreign affairs:

Whenever Congress and the President act jointly to formulate foreign policy, it is the President who communicates, transmits, and explains that policy to other nations. Presidents may initiate foreign policies of their own, such as the Monroe Policy, but those executive statements of national policy survive only with congressional acquiescence. Through authorizations, appropriations, and other powers, Congress can revoke or modify presidential initiatives in foreign policy.¹²²

From this standpoint, Fisher reasons that not only did Justice Sutherland misunderstand history, but also that “in extensive dicta, the decision . . . discussed extra-constitutional powers of the President,”¹²³ far beyond the issue before the Court (i.e., “whether Congress could delegate legislative power more broadly in international affairs than it could in domestic affairs).”¹²⁴ Fisher further notes that “[t]he district court decision was taken directly to the Supreme Court, where none of the briefs on either side discussed the availability of indepen-

119. FISHER, *supra* note 114, at 8 (quoting 10 ANNALS OF CONG. 611 (1800)).

120. *Id.* at 9 (quoting LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 52 (1988)).

121. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 81 (1990) (endnote omitted).

122. FISHER, *supra* note 114, at 10.

123. *Id.* at 15.

124. *Id.* at 14.

dent or inherent powers for the President.”¹²⁵ From this perspective, Sutherland simply misconstrued history as a means of pursuing his own prerogative of increasing the power of the Executive—a line of thinking he had pursued since his time as a Senator from Utah and in his 1919 book *Constitutional Power and World Affairs*.¹²⁶

Even shortly after the *Curtiss-Wright* decision, members of the Court and legal critics remained hesitant to embrace Justice Sutherland’s conception of Executive power in foreign affairs. Writing to prominent law professor Edwin M. Borchard, Justice Stone, who was ill at the time of the case and thus did not participate, stated that he “should be glad to be disassociated” with the opinion.¹²⁷ For his part, Professor Borchard noted in a letter to Justice Stone that *Curtiss-Wright* “has attributed to the Executive far more power than he had ever undertaken to claim.”¹²⁸

Subsequent assessments of the proposition are equally skeptical. In his famous 1952 *Youngstown* concurrence on the balance of power between Congress and the President, Justice Jackson notes that “the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress” and that “[m]uch of the Court’s opinion [in *Curtiss-Wright*] is dictum.”¹²⁹ A 1981 D.C. Circuit Court decision goes even further, noting, “[t]o the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characteriza-

125. *Id.*

126. *Id.* at 15–16.

127. *Id.* at 19 (quoting Letter from Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court, to Edward M. Borchard, Sterling Professor of Int’l Law, Yale Law Sch. (May 13, 1937) (on file in Container No. 6, Manuscript Room, Library of Congress)).

128. *Id.* (quoting Letter from Edward M. Borchard, Sterling Professor of Int’l Law, Yale Law Sch., to Harlan Fiske Stone, Assoc. Justice, U.S. Supreme Court (Feb. 9, 1942) (on file in Container No. 6, Manuscript Room, Library of Congress)).

129. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 n.2 (1952) (Jackson, J., concurring). Justice Jackson’s concurrence in most famously cited for establishing the tripartite *Youngstown* framework through which the balance of power between Congress and the President is judged by modern courts.

tion.”¹³⁰ This is all to say that there remains substantial distance between the supposed role of the President as the “sole organ” in foreign affairs as envisioned in Justice Sutherland’s opinion and the dictates of the Constitution as enlightened by historical practice and analysis.

D. *Reconsidering a Role for Congress*

As detailed above, the ability of the Executive to act unilaterally in foreign affairs has gradually shifted over the past two centuries and is due for another reorientation in the globalized world of the twenty-first century where domestic and international concerns are increasingly intertwined. The twentieth and twenty-first centuries have for the most part—save for the challenges by Senator Goldwater in the 1970s and by Representative Kucinich in the early 2000s¹³¹—seen a doctrine of Congressional acquiescence emerge in the context of foreign relations.¹³² Congress has not adequately asserted its own authority to affect foreign relations, which has subsequently permitted the augmentation of Executive power. This dereliction of the duty to play a vital role in international agreements by Congress has resulted in a common belief that Congress has diminished power to push back against unilateral termination of such agreements.¹³³

Accordingly, many scholars now presume “presidents can legally withdraw the United States from Article II treaties” without Congressional input,¹³⁴ and current debate surrounds whether this power should extend to Congressional-Executive agreements.¹³⁵ When such assumptions are coupled with the wide-ranging ability of presidents to enter into sole executive

130. *Am. Int’l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

131. *See supra* Part III Section B.

132. Bradley, *supra* note 44, at 1621–22 (“The practice of unilateral presidential treaty termination has continued. Since *Goldwater*, presidents have unilaterally terminated dozens of treaties . . . [and] most of these terminations have not generated controversy.”) (footnote omitted).

133. Aleem, *supra* note 12.

134. Bradley, *supra* note 44, at 1644.

135. *See supra* note 12 and accompanying text (discussing the scholarly controversy surrounding the congressional-executive agreement, NAFTA).

agreements,¹³⁶ there emerges a model of nearly unchecked power for Executive unilateral withdrawal from international agreements. This accumulation of power presents vivid concerns in a world where international affairs increasingly blur into domestic ones. Even in 1991, President George H.W. Bush recognized the emergence of this globalizing trend when he remarked, “I guess my bottom line . . . is you can’t separate foreign policy from domestic.”¹³⁷ President Clinton echoed his predecessor’s remarks only two years later in 1993, noting, “[t]here is no longer a clear division between what is foreign and what is domestic.”¹³⁸

Presumably, political considerations should provide a check on the accumulation of too much power in the hands of the Executive. Professor Henkin, in his defense of unilateral Executive authority to withdraw from international agreements, notes, “[p]olitically, of course, the President could not lightly disregard the sense of Congress, especially if both houses joined, asserted constitutional power, and publicly proclaimed a call for radical action.”¹³⁹

While we are not yet in a situation where a united Congress opposes a President’s unilateral action, that world seems less far-fetched in an era where President Trump continuously threatens to unilaterally withdraw the United States from foundational agreements that ungird global economic and political integration. Whether or not these withdrawals will actually come to pass is beside the point, as the mere threat posed by President Trump’s rhetoric should raise questions about the currently presumed power of the President in foreign affairs. Much of the historical analysis above illustrates that the power of negotiating and terminating international agreements has

136. See *supra* Part II, Section B, Subsection 1. The blurring of the appropriate roles for sole executive agreements and treaties has been noted for quite some time. See S. REP. NO. 91–129, at 20 (1969) (“The traditional distinction between the treaty as the appropriate means of making significant political commitments and the executive agreement as the appropriate instrument for routine, nonpolitical arrangements has substantially broken down.”).

137. FISHER, *supra* note 114, at 23 (quoting Interview by Harold Green of KABC-TV with President George H.W. Bush, in L.A., Cal., 1991 PUB. PAPERS 1629 (Dec. 17, 1991)).

138. *Id.* (quoting Inaugural Address, 1993 PUB. PAPERS 2 (Jan. 20, 1993)).

139. HENKIN, *supra* note 37, at 214 n.*.

varied throughout American history. Jean Galbraith, an expert in separation of powers and professor at University of Pennsylvania School of Law, calls this variation “practice-based constitutional development.”¹⁴⁰ In this vein, the norms that guide withdrawal from international agreements are subject to revision. Given the current political situation, where political restraints may not seem as confining as they once were, current scholarship and the law require a new framework for reassessing the proper balance between Congress and the President.

IV. PUSHING BACK AND BALANCING OUT: A POTENTIAL FRAMEWORK TO REASSERT A ROLE FOR CONGRESS IN THE TERMINATION OF INTERNATIONAL AGREEMENTS

In general, Congress should reassert its role in the withdrawal process by insisting on its Article I enumerated powers to influence the development and approval of international agreements. As detailed above, not only does historical precedent support Congress’ claim to power in this area, but the current doctrine of congressional acquiescence has allowed the dangerous accumulation of power in the hands of the Executive—resulting in the present-day situation where one President can plausibly threaten unilateral withdrawal from key international agreements. Specifically, Congress should actively work on drafting Congressional-Executive agreements containing specific withdrawal mechanisms requiring Congressional approval. By elevating Congressional-Executive agreements over other types of international agreements, Congress can both combat the Executive’s accumulation of power through increased use of sole executive agreements and can avoid the laborious nature of the traditional Article II treaty process. Moreover, as opposed to the reservations, understandings, and declarations—collectively known as “RUDs”—often attached to approval of traditional Article II treaties,¹⁴¹ under Congressional-Executive agreements, Congress plays a stronger role in

140. Jean Galbraith, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. 121, 129 (2014).

141. For a fuller discussion of RUDs and their effects on the terms of treaties, see BRADLEY & GOLDSMITH, *supra* note 24, at 301–19; *see also* 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 7, 11 (discussing in greater detail the use of RUDs).

shaping the contours of the agreement itself in either an *ex ante* or *ex post* fashion.¹⁴²

As Congressional-Executive agreements take the form of normal legislation passed through both houses of Congress and signed by the President, Congress maintains wide flexibility in establishing its role in termination of the agreements. As Professor Hathaway notes, “Congress may impose conditions under which the President may withdraw [under Congressional-Executive agreements]. Congress may grant the President full discretion to withdraw, may permit withdrawal when the conditions giving rise to the agreement change, or may limit withdrawal only to circumstances specified in the agreement itself.”¹⁴³ Further, “Congress can even require that withdrawal from an agreement occur only if Congress passes a statute permitting it or prohibit withdrawal altogether”¹⁴⁴

This suggestion, however, does not mean the role of the Executive in developing and withdrawing from international agreements should necessarily be subservient to Congress’ role. As the sole organ of communication of the foreign policy of the United States, the President still maintains the authority to “communicat[e] with foreign governments about the termination of a congressional-executive agreement (as long as the termination is consistent with the terms of the statute that created the agreement).”¹⁴⁵ Thus, as Professor Hathaway recognizes, the President has the ability to *communicate* the United States’ intention to withdraw from international agreements, but not the sole authority to terminate all of the domestic effects and obligations of such agreements.¹⁴⁶

Not only does this framework mitigate the concerns inherent in the potential “zombie statute” status of implementing legislation passed by Congress in furtherance of a subse-

142. See *supra* Part II, Section B, Subsection 3.

143. Hathaway, *supra* note 38, at 1332.

144. *Id.*

145. *Id.* at 1334.

146. *Id.* Hathaway further notes that “[u]nlike self-enforcing treaties that cease to have either domestic or international legal effect once the agreement is dissolved, congressional-executive agreements have a domestic role independent of their international one.” *Id.* at 1334 n.286.

quently terminated traditional Article II treaty,¹⁴⁷ but it also preserves a balance of powers more in line with the original conception of a shared power between Congress and the President in the realm of foreign relations.¹⁴⁸ Moreover, Professor Hathaway writes that a Congressional-Executive agreement is, in fact, “a more reliable commitment than an Article II treaty,” notably because the former has greater staying power.¹⁴⁹ Particularly:

[The] President is on the whole likely to find it more difficult to withdraw unilaterally from a congressional-executive agreement than an Article II treaty. . . . [B]ecause Congress can, as part of the legislation authorizing the agreement, commit the country to a certain course of action even in the absence of a formalized international commitment.¹⁵⁰

A. *Concerns of Unconstitutional Encroachment*

Inherent in this proposal that Congress channel as many international agreements as possible into the Congressional-Executive mechanism with carefully defined parameters for withdrawal is the lurking question of separation of powers. Within the famous *Youngstown* framework, as outlined in Justice Jackson’s concurrence in the *Steel Seizure* case,¹⁵¹ there exist three categories in which the President can exert power. In the often termed *Youngstown III* scenario, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”¹⁵² In these situations, the President “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁵³ With this judicial backstop in mind, Congress may condition approval of international agreements that implicate one of its Article I enumerated powers, poten-

147. See Shapiro, *supra* note 81 (discussing how some statutes may potentially remain in effect even after the international agreement upon which they are based is terminated).

148. See *supra* Part III on the historical development of this shared power.

149. Hathaway, *supra* note 38, at 1336.

150. *Id.*

151. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

152. *Id.* at 637.

153. *Id.*

tially by insisting that such agreements take the form of Congressional-Executive agreements. Under this *Youngstown III* scenario, Congress should seek a strong hand in drafting these agreements in a manner analogous to drafting statutes. According to the Congressional Research Service:

Under Supreme Court precedent, the repealing of statutes must conform to the same bicameral process set forth in Article I that is used to enact new legislation. Accordingly, when Congress has passed legislation implementing an international pact into domestic law, the President would appear to lack the authority to terminate the domestic effect of that legislation without going through the full legislative process for repeal. Even when the President may have the power under international law to withdraw the United States from an international pact and suspend U.S. obligations to its pact counterparts, that withdrawal likely would not, on its own accord, repeal the domestic effect of implementing legislation.¹⁵⁴

Professor Bradley takes issue with this comparison, claiming that “even though congressional-executive agreements are connected to statutes, they are not statutes” because these “agreements accomplish something that Congress alone lacks the power to accomplish”—they “bind the United States to international commitments.”¹⁵⁵ As such, these agreements, Professor Bradley argues, “reflect a *combination* of congressional and presidential authority” more analogous to Article II treaties.¹⁵⁶ If this were the case, under the current presumption of unilateral Executive power to terminate Article II treaties outlined above, Congress could not stop unilateral withdrawal.

However, Professor Bradley overstates his analogy, omitting the distinction between the domestic and international effects of Congressional-Executive agreements. If Congress asserts more control over the terms of Congressional-Executive agreements, it will not encroach upon the Article II prerogative of the President to “communicate assent to the agreement on behalf of the United States.”¹⁵⁷ Rather, Congress will oper-

154. MULLIGAN, *supra* note 61, at 16 (citations omitted).

155. Bradley, *supra* note 44, at 1632–33 (footnote omitted).

156. *Id.* at 1633 (footnote omitted).

157. Hathaway, *supra* note 38, at 1336.

ate within its constitutional authority to enact legislation based on its Article I powers.¹⁵⁸ As a matter of international law, the President could indeed withdraw from the treaty in his role as the sole organ of communication for the United States, but such withdrawal would not remove the obligations stemming from a Congressional-Executive agreement duly negotiated and enacted into law by Congress.¹⁵⁹ This shared power of Congress, however, is not without its limits, for as Professor Hathaway recognizes, “unlike agreements concluded under the Treaty Clause, congressional-executive agreements are limited in scope by the powers enumerated in Article I.”¹⁶⁰

B. *Areas of Potential Expansion for Congressional Influence*

As noted throughout, Article I’s enumerated powers provide Congress’ constitutional basis of authority for stipulating the terms of withdrawal in Congressional-Executive agreements. For purposes of this Note, the most prominent of these powers is the authority “[t]o regulate Commerce with foreign Nations.”¹⁶¹ Congress’ power to implement trade deals as Congressional-Executive agreements under the Commerce Clause is nothing new, and as Professor Julian Ku of Hofstra Univer-

158. *See id.* (discussing the power of Congress to authorize international agreements and particularly to “condition its consent to a congressional-executive agreement through detailed legislation”).

159. *See id.* at 1327 (“In fact, treaties and congressional-executive agreements are *defined* by their procedural differences. The full interchangeability argument, moreover, is incoherent if it holds that congressional-executive agreements operate like ordinary federal legislation *before* ratification but like treaties *after* ratification.”).

160. *Id.* at 1339. Professor Hathaway notes as well that “[w]ere there an international agreement that required the federal government to exercise powers beyond those granted to Congress, it could (and should) be ratified through the Treaty Clause just as it would be today.” *Id.* at 1343. In fairness to Professor Bradley, he does acknowledge later in his article that

Congress can probably limit presidential termination authority if it wishes. For a congressional-executive agreement, such a limitation could be included in the legislation authorizing or approving the agreement. For Article II treaties, the Senate could include it in its resolution of advice and consent. . . . Under Justice Jackson’s canonical framework in *Youngstown* . . . for analyzing presidential power, these limitations would be binding on the president unless they invaded an exclusive presidential power.

Bradley, *supra* note 44, at 1642–43 (footnotes omitted).

161. U.S. CONST. art. I, § 8, cl. 3.

sity Law School and Professor John Yoo of the University of California, Berkeley, School of Law, note, “all modern trade pacts . . . [are] congressional-executive agreement[s] created by statute”¹⁶²

In fact, both NAFTA and the WTO were negotiated as Congressional-Executive agreements. However, this Note asserts that instead of merely using Congressional-Executive agreements as the preferred form for international agreements, Congress should rely on its inherent authority and more directly stipulate the terms of these agreements with regard to withdrawal provisions. For NAFTA in particular, the restraints on withdrawal are quite weak, with the codified terms of the agreement stating merely that in the case of withdrawal from the agreement, “[d]uties or other import restrictions . . . 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.”¹⁶³ For most other free trade agreements, Professor Bradley notes that the language is even more vague, stating simply that “[o]n the date on which the Agreement ceases to be in force, the legislation ‘shall cease to be effective.’”¹⁶⁴ This lack of requirements or even guidance from Congress or agreement text on the terms of withdrawal exemplifies a dangerous form of acquiescence which unnecessarily results in the accumulation of power in the Executive and enables unilateral termination of such agreements. In response, Congress should adopt more aggressive terms for conditioning withdrawal from Congressional-Executive agreements.¹⁶⁵ In fact, Congress modeled these terms before. One such example occurred upon Congress’ condi-

162. Ku & Yoo, *supra* note 12.

163. 19 U.S.C. § 2135(e) (2018).

164. Bradley, *supra* note 44, at 1634–35 (citing 9 U.S.C. § 3805 note (2018) (Termination of the Agreement)).

165. Though not the immediate concern of this Note, this line of reasoning could extend to many other of Congress’ Article I, Section 8 powers, including but not limited to the authority to dictate the terms of withdrawal for international agreements related to immigration (power to “establish a uniform Rule of Naturalization”), taxation (power to “lay and collect Taxes”), and perhaps more controversially, even climate change through the power to “promote the Progress of Science.” U.S. CONST. art. I, § 8. For an illustrative proposal to use Congressional-Executive agreements to implement climate change agreements, see Purvis, *supra* note 23, at 39–45.

tioning of approval of the United States' membership in the WTO with a requirement that "[t]he approval of the Congress . . . of the WTO Agreement shall cease to be effective if, and only if, a joint resolution described . . . is enacted into law"166

C. *Remaining Role for Sole Executive Authority*

Expanding Congress' powers to stipulate the terms of withdrawal from international agreements formed through Congressional-Executive agreements does not—and should not—completely overtake the prerogative of the Executive. If the Executive pursues a sole executive agreement as the vehicle for an international agreement, no one will seriously question the unilateral ability of the President to withdraw or modify the agreement in the international arena.¹⁶⁷ The same logic holds for non-binding political commitments in global affairs, as the President must have ample leeway in negotiations with world leaders. The proposed alteration to the current framework centers on Congressional-Executive agreements when the subject-matter of the international agreement invokes a power of Congress enumerated in the Constitution.¹⁶⁸ In this arena, from a historical and practical perspective, Congress should lay claim to a greater role in the shared power over foreign affairs.

D. *Concerns of Judicial Intervention*

While there is a sufficient constitutional argument supporting a shared power for Congress in developing and restricting the terms of withdrawal of certain international agreements, it is unclear whether the U.S. Supreme Court would intervene. As seen above, the Court typically side-steps the disputes between Congress and the President that arise over these issues, citing the political questions doctrine.¹⁶⁹ In line with this doctrine, the Court is most likely to let the feuding branches settle the matter themselves by means of the typical political process.¹⁷⁰ The unique threats posed by President

166. 19 U.S.C. § 3535(b)(1) (2018).

167. MULLIGAN, *supra* note 61, at 6.

168. U.S. CONST. art. I, § 8.

169. *See supra* pp. 24–25.

170. According to Justice Jackson:

Trump, however, might inspire the Court to take on the question. It is likely that opportunities for the Court to rule on the issue will arise, especially in the context of free trade agreements. As one analysis finds:

Given the lack of express grants of authority to the President to take certain actions and ambiguity of the relevant legal texts, as well as the serious economic and constitutional questions at issue here, the actions mentioned above would, if pursued unilaterally by the Trump administration without congressional consent, very likely encounter opposition from Congress, the US business community and US trading partners, thus leading to numerous court challenges. . . . It is unclear whether the courts would enjoin the Executive Branch and President Trump from acting while any such litigation is pending.¹⁷¹

Despite its traditional approach in classifying disputes between Congress and the Executive as political questions beyond its purview, the Court does recognize a potential role for itself in this arena, should the typical political constraints prove ineffective. As Justice Brennan noted in *Baker v. Carr*:

[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

171. CLINTON ET AL., *supra* note 13, at 25.

the specific case, and of the possible consequences of judicial action.¹⁷²

Moreover, he continues, “[I]f there has been no conclusive ‘governmental action’ then a court can construe a treaty and may find it provides the answer.”¹⁷³ Whether Justice Brennan’s assertion extends to Congressional-Executive agreements is unclear.

However, as Professor Bradley recognizes, there is a non-zero chance that judicial review could occur in resolving a matter of treaty termination.¹⁷⁴ Should a case come before the Court, it is likely to “take account of longstanding practices when interpreting the separation of powers.”¹⁷⁵ While proponents of a shared power for Congress in certain international agreements would hope that the Court will assess contemporary and historical accounts of the distribution of this power, Congressional acquiescence in recent decades and the resulting strengthening of the Executive in this realm may tip the scales towards concentrating the power in the President. In order to thwart a potentially adverse decision for Congressional power, Congress should begin taking practical steps now and staking its claim against broad Executive authority to unilaterally modify and withdraw from certain international agreements that appertain to the enumerated powers of Congress.

V. LOOKING FORWARD: STEPS FOR REASSERTING A ROLE FOR CONGRESS

While previous Parts of this Note discussed the theoretical and historical underpinnings that justify an enlarged role for Congress in stipulating the terms of withdrawal in international agreements, this Part presents concrete steps that Congress can take to reassert its ability to push back against unilateral executive withdrawal in the immediate future. Such efforts include actively combatting the doctrine of congressional acquiescence, codifying international agreements as domestic law, passing preemptive legislation to give Congress a role in negotiating agreements, exercising their *power of the purse* to limit executive funds, and publicly condemning unilateral ex-

172. *Baker v. Carr*, 369 U.S. 186, 211–12 (1962).

173. *Id.* at 212.

174. Bradley, *supra* note 39, at 832.

175. *Id.* (footnote omitted).

ecutive withdrawal. Even in the face of a potential presidential veto, increased action would at minimum increase public awareness and give symbolic significance to Congress' attempts to prevent further encroachment by the Executive into the constitutional role of the legislative branch in foreign affairs.

A. *Actively Combat Doctrine of Congressional Acquiescence*

Above all else, Congress must take an active role in developing and conditioning international agreements, most notably by insisting that agreements within Congress' enumerated powers be concluded as Congressional-Executive agreements. As Professor Hathaway observes, "[a] near-exclusive reliance on congressional-executive agreements would, moreover, end the artificial divide between international and domestic law-making that belongs to a different time."¹⁷⁶ These concerns—of pushing back against Congress' increasingly diminished role in foreign relations—are not new.¹⁷⁷ Nevertheless, renewed, concerted action is necessary to avoid cementing the trend of greater deference to the Executive.

The lurking concern, as mentioned throughout this Note, is that Congress' continued inaction will lead to a further calcifying of the norm that the Executive is entitled to deference in deciding when and how to terminate all international agreements. As Justice Jackson notes in *Youngstown*, "[o]nly Congress itself can prevent power from slipping through its fingers."¹⁷⁸ In the case of Congressional-Executive agreements, this concern is prominent, with Professor Bradley finding that "Congress has consented to withdrawal clauses in these agreements without ever indicating that that [sic] presidents must return to Congress to invoke the clauses, despite a long history of presidents unilaterally invoking similar clauses in Article II treaties."¹⁷⁹ This leads to surprisingly weak Congressional-Executive agreements notably in the area of international trade, where many agreements contain implicit presumptions that

176. Hathaway, *supra* note 38, at 1356.

177. In outlining the objectives of the aforementioned Case-Zablocki Act, Senator Case noted that the Act was "designed to restore the constitutional role of Congress in the making of this country's foreign policy." 118 CONG. REC. 4090 (1972) (statement of Sen. Case).

178. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

179. Bradley, *supra* note 44, at 1639–40.

Presidents may act unilaterally with regard to modification and implementation.¹⁸⁰ Thus, should the courts ever find the question of unilateral termination of international agreements justiciable, they would likely “give significant weight to longstanding government practice”¹⁸¹—a grave concern for advocates of a strong role for Congress in conditioning such terminations.

B. *Codify International Agreements as Domestic Law*

Congress can address the domestic effects of agreements already in place by passing additional legislation further codifying certain agreements as domestic law and perhaps imposing “congressional sanction for their termination.”¹⁸² While there is not direct precedent from past practice to guide such action, in 1986 “Congress enacted legislation over President Reagan’s veto, directing the secretary of state to terminate two agreements with South Africa—an Article II tax treaty and a congressional-executive agreement relating to air services—and the secretary of state did so.”¹⁸³ If Congress can thus enact legislation and cause Executive withdrawal from an international agreement, then it should likewise be able to impose an *ex post* condition defining the terms of withdrawal from an international agreement. This recommendation may be of particular use in the context of free trade agreements under the Trump administration and could potentially head off the potential “huge legal morass” that could result “if the president were to unilaterally send a notice of withdrawal.”¹⁸⁴

180. *Id.* at 1640.

181. *Id.* at 1622 (footnote omitted); *see also* Nat’l Labor Relations Bd. v. Canning, 134 S. Ct. 2550, 2564 (2014) (“[T]hree-quarters of a century of settled practice is long enough to entitle a practice to ‘great weight in a proper interpretation’ of the constitutional provision.”) (quoting *Okanogan v. United States (The Pocket Veto Case)*, 279 U.S. 655, 689 (1929)).

182. Galbraith, *supra* note 140, at 130.

183. Bradley, *supra* note 44, at 1643 (citing Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, 1100, 1104).

184. David Lawder, *Trump Could Use NAFTA Withdrawal Letter as Negotiating Leverage*, REUTERS, Jan. 10, 2018, <https://www.reuters.com/article/us-trade-nafta-canada-trump/trump-could-use-nafta-withdrawal-letter-as-negotiating-leverage-idUSKBN1F000B> (quoting Georgetown professor and former WTO appellate judge Jennifer Hillman).

C. *Pass Preemptive Legislation to Give Congress a Role in Negotiating Agreements*

Congress also should preemptively assign a larger role for itself in forthcoming agreements. Though not in the context of agreement termination, Congress recently asserted a stronger role for itself in foreign relations through passage of the Iran Nuclear Agreement Review Act of 2015 (INARA), which required that President Obama transmit any “agreements relating to Iran’s nuclear program” to Congress for “consideration of a joint resolution of disapproval.”¹⁸⁵ Though the joint resolution of disapproval eventually failed and saved President Obama’s agreement, the *National Review* correctly asserted, “[t]he fact that 98 members of the U.S. Senate and 400 members of the House voted to force President Obama to submit the Iran nuclear deal to congressional review was a significant defeat”¹⁸⁶ Previously, “there would have been no requirement to submit the deal to Congress . . . the deal would have simply been a *fait accompli*.”¹⁸⁷ Thus, while INARA passed in the context of relieving sanctions already put in place by Congress, the law gives credence to Congress’s ability to constrict the Executive’s free hand to unilaterally alter international agreements, particularly when those agreements were originally put in place by Congress itself.¹⁸⁸

D. *Restrict Executive Funds Through the “Power of the Purse”*

In line with the traditional bounds of political constraints, Congress could use its power over the national budget to

185. Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114–17, 129 Stat. 201, 203 (2015).

186. Lester Munson & Jamil Jaffer, *Setting the Record Straight on Congress’s Review of the Obama-Iran Nuclear Deal*, NAT’L REVIEW (Nov. 17, 2016, 5:37 PM), <http://www.nationalreview.com/article/442281/iran-nuclear-deal-congress-review-obamas-deal-was-important-inara>.

187. *Id.*

188. In their article on the Iran Nuclear agreement, Professors Estreicher and Menashi follow a similar line of reasoning, acknowledging that when “Congress has developed a legislative framework for a subject matter, that framework occupies the field; the President’s role becomes one of a responsible agent.” Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1200 (2017). In this manner, the President “can be viewed . . . as a co-principal with Congress” in international agreements in which the subject matter speaks directly to an enumerated power of the Legislature. *Id.*

strongly influence presidential decisions and thereby express its will regarding the implementation of certain international agreements that invoke Congress' enumerated powers.¹⁸⁹ In theory, Congress could withhold—or threaten to withhold—funds from agreements unilaterally renegotiated by the President. Or, conversely, in order to prevent the unilateral termination of an agreement, Congress could tie up the entire budget process and block funding for otherwise unrelated political priorities of the administration. As a 2001 report the U.S. Senate Committee of Foreign Relations recognized, “[w]hen an international agreement requires funding, Congress is in a strong position to influence the extent to which that agreement will be implemented.”¹⁹⁰ This situation could have been used by Congress in 2001 when, as noted above, President Bush terminated the ABM Treaty with Russia. However, in that context, “[d]espite complaints by select members of Congress, there was no formal effort by Congress as a body to oppose the termination . . . and Congress ultimately approved funding for Bush’s missile defense plan.”¹⁹¹ This example evinces the need for strong and unified opposition as an effective counter to executive power.

E. *Congressional Condemnation of Unilateral
Executive Withdrawal*

While utilizing the power of the purse epitomizes a traditional political constraint through which Congress may act, Congressional condemnation of Presidential action with regard to withdrawing from international agreements would be a novel step in asserting a role for Congress in foreign affairs—notably because Congress has never officially and explicitly opposed unilateral withdrawal by the Executive. In their opinions in *Goldwater v. Carter*, Justices Powell and Brennan envisioned a scenario where Congress could condemn or directly challenge a presidential decision concerning withdrawal from an international agreement. Powell noted that while “prudential considerations persuade[d] [him] that a dispute between Con-

189. See U.S. CONST. art. I, § 8, cl. 1 (recognizing Congress’s power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”).

190. 2001 SENATE FOREIGN RELATIONS REP., *supra* note 27, at 240.

191. Bradley, *supra* note 39, at 816.

gress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority,” in the case of a “constitutional impasse” between the President and Congress, the Judicial Branch may decide issues “affecting the allocation of power between the President and Congress.”¹⁹² For Justice Brennan, such an impasse could have occurred “[i]f the Congress, by appropriate formal action, had challenged the President’s authority to terminate the treaty with Taiwan”¹⁹³ While direct Congressional condemnation of Executive action might not prompt an intervention by the courts, at bare minimum it would give a voice to Congress’ opposition and likely exemplify a *Youngstown III* situation where Executive power would be at its “lowest ebb.”¹⁹⁴

F. *Use Potential Veto Threat to Heighten Public Awareness of Issues*

Most of the proposals outlined above rely on Congress passing legislation to counter the growing influence of the Executive over the termination of international agreements. However, all such legislation is subject to a presidential veto. Even if Congress were not able to overcome this barrier, its actions would not be in vain. Such efforts would be indicative of a concerted effort to address the congressional acquiescence that has rapidly consumed the field of agreement termination. At the very least, the emergent conflict between Congress and the Executive would heighten public awareness of the President’s attempts to resist the will of the Legislative branch.

VI. CONCLUSION

As detailed throughout, a constant presumption in the contest between Congressional and Executive power in foreign affairs is the steadfast belief that political restraints will influence, if not check, unilateral presidential action contrary to the will of Congress. With the Trump Administration’s recent threats and tentative actions concerning withdrawal from critical international agreements,¹⁹⁵ however, such political con-

192. *Goldwater v. Carter*, 444 U.S. 996, 996 (1979).

193. *Id.* at 1002.

194. *See supra* Part IV, Section A.

195. *See, e.g.*, Lawder, *supra* 184.

straints may no longer suffice. Should President Trump or future presidents translate their threats into further action, Congress is not powerless. While political restraints are certainly still possible, Congress' best solution for immediate recourse is legislative action.

Within the realm of international agreements that implicate one of its enumerated powers, Congress should reclaim its authority and should resolutely push back against the policy of acquiescence to Executive control over agreement termination. In effect, Congress should develop a new, or perhaps revitalized, historical "gloss" in this area¹⁹⁶—a gloss suited for the demands of the global era in which it now operates, an era in which the distinction between domestic and foreign affairs is increasingly diminished.

196. As Justice Frankfurter contended in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power'

Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). In a sense, renewed Congressional action is demanded in order to prevent the increasing deference to unilateral Executive power to withdraw from international agreements that has emerged in recent decades from becoming "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." *Id.*