The International Boundary Commission, Treaty Interpretation, and the President’s Removal Power

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I. INTRODUCTION ........................................................................................................... 41

II. THE INTERNATIONAL BOUNDARY COMMISSION AND ITS PLACE IN THE U.S. GOVERNMENT ...................................................................................... 45

A. The International Boundary Commission ..................................................................... 46

1. The Role of the International Boundary Commission Today ........................................... 47

2. The History of the International Boundary Commission .................................................. 49

B. The Removal of Commissioner Dennis Schornack ............................................................ 55

III. THE INTERNATIONAL BOUNDARY COMMISSION TREATIES AND REMOVAL POWER LIMITATIONS ........................................................................... 58

A. What is the Legal Character of the International Boundary Commission? .............................. 59

1. Is the International Boundary Commission Part of the U.S. Government? ............................... 60

2. Is the International Boundary Commission Commissioner an Officer of the United States? .............. 71

B. The Removal Power Jurisprudence ................................................................................. 82

C. The International Boundary Commission Commissioner is an Inferior Officer ......................... 90
IV. SELF-EXECUTING TREATIES AND THE INTERNATIONAL BOUNDARY COMMISSION: DID THE 1908 AND 1925 TREATIES LIMIT REMOVAL?
B. The 1908 and 1925 Boundary Treaties are Self-Executing Under the Medellín Analysis............................................ 97
C. The Removal Power and the Commissioner to the International Boundary Commission........................................ 103

V. WHAT IF THE PRESIDENT IGNORES HIS OBLIGATIONS UNDER THE INTERNATIONAL BOUNDARY COMMISSION TREATIES?
A. The Leu Litigation and Structural Concerns.......................... 108
B. Further Normative Considerations: Separation of Powers, Foreign Affairs, and International Law ....................... 113

VI. CONCLUSION.............................................................................. 117
“Good fences make good neighbors.”
— Robert Frost, *Mending Wall*.1

I. INTRODUCTION

If you gaze along the international boundary that separates the United States from Canada in any forested area, it will appear simply as a twenty-foot cleared swath of land stretching from horizon to horizon, “dotted in a regular pattern” with little white monuments.2 The scale of the boundary is immense. “Over mountains, down cliffs, along waterways and through prairie grasses, the line snakes . . . 5,525 miles across North America, tranquil, undefended but not uncared for.”3 The line is not merely symbolic; it is practical. “For the proper enforcement of customs, immigration, fishing, and other laws” of the United States and Canada, “[t]he boundary vista must be entirely free of obstruction and plainly marked.”4 The job of maintaining this cleared vista—the task of “mowing the grass”5—falls to the International Boundary Commission (“IBC” or “Commission”). A 1908 treaty created the Commission for one purpose: “the complete reestablishment and mapping” of the boundary from the Atlantic coast to the shores of the Pacific.6 The United States and Canada created the IBC during the era of Teddy Roosevelt and Progressive reforms as the age of Taylorism and scientific administration finally came to U.S.-Canadian relations with its focus on impartiality and expertise in bureaucratic decision-making.7

But, created to avoid controversies, the IBC has recently been at the center of one. Despite the undeniable success of the Commission as it enters its second century, a recent dispute over a small retaining fence in Washington State and President Bush’s subsequent removal of the U.S. Commissioner to the IBC have led to bold claims on both sides of the

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controversy. While the rhetoric over the Commissioner’s firing has not reached the level of that over the first U.S. commission on boundaries under the Jay Treaty, after which Republicans burned effigies of “that damned arch-traitor, John Jay,” both sides have claimed that the dispute touches upon the heart of the Constitution, foreign affairs, and international law. Defenders of President Bush’s firing of the Commissioner have cited the necessity of unitary government and the centrality of private property rights in American democracy. Advocates for the now unemployed Commissioner have successfully demonstrated that, for the first time in American history, the President has unilaterally removed a member of a bilateral, international treaty body. They have further claimed that this oversteps the President’s constitutional and statutory prerogative, in addition to undermining international U.S. commitments that have stood for more than a century. It seems that the Boundary Commission as lightning rod has become ungrounded.

At the root of the conflict is confusion about the role and structure of the IBC itself and a lack of readily-available information about the Commission’s history. Before this recent controversy there had never been an occasion for a court to decide whether the IBC was a part of the governments of the United States and Canada or an independent international organization. In addition, no book or journal article focusing on the IBC has been written in either legal or historical scholarship. So, while the history of the IBC and the treaties creating it are opaque, analyzing the present dispute provides an occasion to examine both the President’s removal power as well as questions of
international law and U.S. foreign policy relating to treaties and the President’s ability to unilaterally disregard them. The confluence of these questions also relates to theories of constitutional law and international law generally: whether and to what extent an expansive removal power is foundational and necessary to the unitary executive; why countries do or do not follow international legal norms and what are the reputational consequences of such decisions; whether it is desirable to have politically insulated, scientifically-grounded bureaucrats making administrative decisions that have an undeniable political component? These questions are particularly salient as they implicate the “increasingly topical intersection of international and constitutional law.”

It is a difficult question to ask whether there is cause for concern if the President invokes a broad removal power that seems contrary to a nearly century-old international commitment. As the first court to examine the IBC removal case bemoaned, “The Court is asked to decide these matters with little historical guidance: it appears that no President has ever attempted to fire the head of a treaty-based organization.” There is an obvious, unresolved tension between the United States’ ability to enter into and abide by its treaties that are the “supreme law of the land,” and the claim that the President must retain an unfettered ability to remove virtually anyone that he considers an officer in the U.S. Government. In broad terms, if a conflict between a constitutional command and the dictate of a treaty exists, the

14. Even the doctrine underlying this dispute, the removal power, is often contested in legal scholarship. See, e.g., Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 70 (1994) (“No one has suggested the President has [the power to divest state officers of powers], and we know of no example of any President purporting to exercise it.”); see also Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, The Unitary Executive in the Modern Era, 1945–2004, 90 IOWA L. REV. 601, 605–07 (2005) (discussing president’s role as a unitary executive). It is widely accepted that the President has broad removal authority; however, the Supreme Court has recognized outer-limits to the removal power. See discussion infra Part III.B.


16. Leu, 523 F. Supp. 2d at 1200.

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

18. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH passim (2008) (discussing a continuous debate in U.S. constitutional law regarding the scope of president’s power to remove his subordinates); CLINTON ROSSITER, THE AMERICAN PRESIDENCY 22 (2d ed. 1960) (“The President has the responsibility . . . for the personnel policies and the personnel management of the Federal Government. This leadership must be accepted and exercised by the President, if the business of the National Government is to be efficiently performed.”).
Constitution clearly wins.\textsuperscript{19} In other words, to the extent that the Constitution limits the President’s removal power, whatever a treaty says about the removal may matter for international law but is relatively unimportant as a matter of U.S. constitutional law. The tension remains present, however, when a limitation on the President’s removal power falls within the type of limitation that is arguably permissible under the Constitution.\textsuperscript{20}

This Article seeks to resolve the remaining tension. It claims that the 1908 and 1925 Treaties creating the IBC are self-executing international agreements that act as a limitation on unfettered presidential removal of the U.S. Commissioner. While it concedes that the President may be able to evade these limitations by terminating the Treaties, it claims that he cannot profess to follow an agreement that limits removal while simultaneously effecting a removal that violates the Treaties.\textsuperscript{21} More broadly, the Article uses the IBC and the removal issue to leverage two more far-reaching discussions. First, by claiming that the IBC Commissioner’s removal may violate U.S. law, thus exceeding the scope of the removal power, the Article reminds that the touchstone questions in removal power jurisprudence involve separation of powers—and accompanying values of accountability and independence—rather than dogmatic insistence on almost-unlimited removal power.\textsuperscript{22} Second, the practical rejection of the boundary treaties provides occasion for a normative discussion of U.S. policy on treaty commitments as well as a threat to agency independence more generally.\textsuperscript{23} To this end, the Article claims that the U.S. acting unilaterally to alter terms of a treaty—particularly by relying on a strained interpretation of the Article II power—weakens the international rule of law and damages U.S. “reputation” as that term is used in international legal scholarship.\textsuperscript{24}

\footnotesize{\textsuperscript{19} E.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 298 (2005).  
\textsuperscript{22} See infra notes 489–94, 499–503.  
\textsuperscript{23} See infra notes 495–500, 507–18.  
\textsuperscript{24} See generally ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008) (discussing compliance and effectiveness in international law).}
Part II recovers the history of the IBC before describing the President’s removal of the U.S. Commissioner. Part III uses removal power principles and Supreme Court jurisprudence to argue that insulation of the IBC from political removal, in favor of expertise in decisionmaking, can pass constitutional muster. It claims that the U.S. Commissioner could clearly be insulated from presidential removal if he is not an officer of the United States. It then argues that if the Commissioner is such an officer, which he likely is, he is an inferior officer for whom constitutionally permissible removal limitations can be created by treaty. Part IV further examines the history of the 1908 and 1925 Treaties and the Supreme Court’s pronouncements on self-executing treaties, including the recent decision in *Medellín v. Texas*, and concludes that the 1908 and 1925 Treaties establishing the IBC are self-executing and have the force of U.S. law. It then argues that the Treaties specifically insulate the IBC Commissioner from political removals to the extent that the Constitution allows such insulation. Part V concedes that the fired Commissioner, given the circumstances of his removal, may lack a cause of action to challenge his dismissal. However, in arguing that the firing highlights important structural, administrative, and constitutional issues, Part V reasserts that the treaty-limited interpretation of the removal power is faithful to the Constitution by serving values of separation of powers and prevention of both executive and congressional aggrandizement. Finally, Part V claims that such an interpretation simultaneously serves the normative goals of U.S. foreign policy as well as international law by promoting the international rule of law, respecting treaty commitments, and furthering a positive international “reputation.”

II. THE INTERNATIONAL BOUNDARY COMMISSION AND ITS PLACE IN THE U.S. GOVERNMENT

The IBC enjoys reporting that it has been “maintaining a peaceful boundary for more than a century.” While the U.S.-Canadian border was a source of disagreement and required frequent diplomatic efforts for many years, in recent decades there has been almost no conflict over the border. Even when the IBC was created, however, armed conflict appeared less likely than in previous years, and boundary issues were already starting to become less intractable. During the time period in

27. THOMPSON & RANDALL, supra note 7, at 73.
which the IBC was beginning to take shape, the British Ambassador in Washington, James Bryce, commented about a minor island along the Maine-New Brunswick boundary: “[A] century ago, it might conceivably have been . . . a spot on which to construct a small fort . . . . Today no use could be made of it except to erect a tiny summer cottage or perhaps an afternoon tea house.”

During the same three decades that it took the IBC to coalesce into its present form, diplomats, including Secretary of State Elihu Root, Canadian Governor General Earl Grey, and Ambassador Bryce, negotiated eight treaties and agreements to manage a number of contentious issues on cross-border water management, international borders, and boundary maintenance.

Specifically, along with the IBC, in the late nineteenth and early twentieth centuries the United States—as part of Theodore Roosevelt’s “wider vision of continental cooperation”—was involved in negotiating the creation of a separate IBC for the U.S.-Mexican border, the International Boundary and Water Commission, and the International Joint Commission, among others. These developments took place during a time of U.S. international political cooperation not seen again until the end of the Cold War. A frequent motivation for this cooperation was an effort to depoliticize boundary issues, relying instead upon technical expertise. Yet in 2007, the saga of the first-ever fired IBC Commissioner, Dennis Schornack, was rife with claims of politicization and party loyalty. Understanding the limits of the removal power over the U.S. Commissioner to the IBC requires an analysis of the intersection of these two divergent stories. Section II.A details the present structure of the IBC and its history in arguing that the U.S. Commissioner and his staff are a part of the U.S. Government. Section II.B discusses the story of Commissioner Schornack and the related litigation.

A. The International Boundary Commission

As described by former IBC Commissioner Schornack in referring to the IBC, “[I]t’s not glamorous. It’s not high-tech. It’s chain saws and weed whackers . . . . The boundary has been ignored for a very long

28. Id.
31. Id.
32. THOMPSON & RANDALL, supra note 7, at 74.
time . . . . I’m not even sure people know we exist.”33 While the people Commissioner Schornack was describing were neither legal nor historical academics, they could have been. Just as the IBC “gets lost” in national budgeting,34 there is little reference to the IBC and no substantive legal discussion of it in any published scholarship. In addition to describing the IBC as it functions today, this Section recovers, reports, and consolidates the history of the formation of the IBC.

1. The Role of the International Boundary Commission Today

The IBC is “a permanent international organization whose sole concern is the physical maintenance of a line that separates two national sovereignties,” a task which it undertakes through a variety of mechanisms. Demarcating and maintaining the boundary has been the IBC’s treaty mandate since 1908.35 The IBC primarily clears brush and builds small monuments, creating a physical border between the United States and Canada.36 The IBC performs operational, regulatory, advisory, and custodial tasks.37 Operational tasks include the actual clearing of the border and erecting of monuments, the vast majority of the IBC’s time and budget.38 The IBC’s regulatory tasks include regulating any construction that might affect the border vista and interpreting outstanding border questions that may arise.39 By presidential proclamation in the United States and statutory authority in Canada under the International Boundary Commission Act of 1960, a swath of land twenty feet across is under the control of the IBC.40 The advisory tasks are, for example, advising the respective governments on the minor, still unsettled border areas in the Gulf of Maine and along the Alaskan border.41 Finally, the IBC performs custodial tasks relating to

34. Id.
36. Id.
37. Id. at 4.
38. Id. Operational tasks may also include occasionally accompanying police operating near the border to confirm in which country a suspect was apprehended. Id.
39. Id.
41. See McEwen Address, supra note 35, at 5 (illustrating that either government may request that its own Commissioner provide it with confidential research concerning the offshore
the reports, maps, and positional data that define the boundary, which serve as “conclusive cartographic evidence for legal purposes.”

The organizational structure of the IBC that the 1925 Treaty finalized is essentially the same as its structure today. The IBC is a bilateral treaty organization that maintains separate headquarters in Ottawa and Washington, D.C. For administrative purposes, however, the IBC is in many ways located within federal agencies, which is a complication that the recent removal controversy has exposed as creating the IBC’s uncertain status. Canada appoints its commissioner by “order-in-council, although the incumbent is also a full-time employee of the federal public service.” The President appoints the U.S. Commissioner, and in recent years U.S. Commissioners have vacated the office soon after a change of presidential administration. However, more contemporaneously with the 1908 and 1925 Treaties, the commissioner typically remained in office much longer than one administration.

Administratively, the size and budget of the IBC is reflected in its relatively subdued management. The Commissioners meet twice each year at formal conferences to review the season’s operations and plan for the next year. They also have at least one field visit each year during which they inspect the IBC’s field work. The field work is normally allocated according to the Commission’s fifteen-year plans, which keep the boundary vista clear by scheduling maintenance. However, the field work is typically performed by only one party from a single national section of the Commission, though the two sides exchange survey data and office computations following each season.

42. Id.
43. Id. at 3.
44. Id. The Canadian commissioner is administratively “part of the Department of Natural Resources, from which it receives its accommodation, human resources, and budget . . . .” Id.
45. Id.
47. See INT’L JOINT COMM., FINAL REPORT OF THE INTERNATIONAL JOINT COMMISSION ON THE LAKE OF THE WOODS REFERENCE 140 & n.2 (1917) (describing that the boundary treaty of 1908 provided that commissioners would be charged with demarcation and marking of the boundary); THOMPSON & RANDALL, supra note 7, at 73 (stating that some commissioners have served lengthy terms in order to provide necessary continuity); Named on Boundary Commission, N.Y. TIMES, May 4, 1929, at 6 (naming a successor to the late E. Lester Jones who had served the International Boundary Commission for nineteen years.).
48. See McEwen Address, supra note 35, at 3 (stating that the commissioners meet twice a year with the senior officers to go over past season’s results and discuss future plans).
49. Id.
50. Id.
While the description above is necessary to understand the IBC as it operates today, to more closely examine the removal of Dennis Schornack and the President’s removal authority over the U.S. Commissioner, it is necessary to examine both the history and authority that underlies the IBC. While little controversy has arisen surrounding the IBC since the 1925 Treaty, which set it up as currently comprised, this may be a testament to the success of the design that the Treaty created. Certainly in the years, decades, and centuries preceding the current constitution of the IBC, issues and relationships were more acrimonious.

2. The History of the International Boundary Commission

The IBC can trace its history to a number of predecessor agreements and bodies that, eventually, led to the creation of the IBC itself. The first such agreement was the Jay Treaty of 1794.\footnote{See Treaty of Amity Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter The Jay Treaty] (regulating commerce and navigation between the two countries).} Following the Revolutionary War, U.S.-Great Britain relations were characterized by “old problems, aggravated by fresh grievances” arising from disputes over the implementation of the Treaty of Paris.\footnote{MONAGHAN, supra note 9, at 361.} The tensions over western and eastern borders, relations with the Indians and control of the fur trade, and Great Britain’s refusal to negotiate a commercial treaty with its former colony, created a tense backdrop for transatlantic relations.\footnote{See id. at 361–62 (discussing Great Britain’s refusal to negotiate any commercial treaty with the United States).} After multiple confrontations, it was clear to Federalist leaders in Philadelphia that a peaceful settlement was needed to avoid another war.\footnote{Id. at 363–64.} President Washington nominated John Jay as the treaty negotiator,\footnote{Id. at 367.} and in May 1794, Jay sailed for Britain, possessing nearly as much discretion as has been held by such an envoy in U.S. history.\footnote{Id. at 368, 370.} After more than four months of negotiation,\footnote{See id. at 373–80 (describing John Jay’s negotiations with the British officials).} the parties signed the treaty on November 19, 1794.\footnote{The Jay Treaty, supra note 51.} In addition to key strategic and commercial issues, the Jay Treaty, as it came to be known in the United States,\footnote{See WILLIAM WHITELOCK, THE LIFE AND TIMES OF JOHN JAY 264–68 (New York, Dodd, Mead, & Co. 1887) (describing difficulties John Jay faced in negotiating the treaty).} addressed a number of unresolved boundary issues from the
Revolutionary War. The Treaty created a three-person commission to identify the source of the St. Croix River, which still separates Maine from New Brunswick today. It also included the designation of three commissioners whose decisions would be “final and conclusive” on the two countries, essentially the first international boundary commission. The Treaty called for the commissioners to “be Sworn impartially to examine and decide” boundary issues. Many commentators regard the placement of these decisions in the hands of the commission as the first modern example of international adjudication.

The Jay Treaty was not, however, the only precursor to the IBC; there were at least three significant boundary commission agreements between it and the creation of the IBC. First, following the War of 1812, the United States and Great Britain signed the Treaty of Ghent, which set up a series of border commissions, this time with two commissioners, one appointed by his Britannic Majesty and one appointed by the President. The Treaty, which is typically referred to as the “treaty of boundaries,” used language modeled after the Jay Treaty, and the parties “agree[d] to consider [the commissioners’] decision as final and conclusive.”

Second, in the nineteenth century, a
number of ad hoc commissions were formed to address border issues with respect to the Passamaquoddy Bay (between Maine and New Brunswick), the St. Lawrence River, and the Great Lakes, and some of these commissions possessed the binding power to delimit the location of the border. Finally, only five years before the 1908 Treaty, the United States and Great Britain signed a treaty in an effort to tackle boundary issues related to Alaska. The treaty created a tribunal of “six impartial jurists of repute” who were—like the other agreements—empowered to weigh evidence and make decisions as to objects blocking the border.

It was against this backdrop of ad hoc commissions and more than fifty years of border disputes that the United States and Great Britain entered into a treaty in 1908 creating the IBC. The border disputes of the nineteenth century—in particular the Aroostook War in which thousands of American troops, mostly Mainers, marched on the Maine-New Brunswick border in response to a border altercation in that region—illustrated the threat, which almost certainly seemed more real in 1908 than today, that U.S.-Canadian border disputes had the potential to lead to real conflict. Even if all-out war was unlikely, delimiting a clear “buffer strip” had benefits for travel, commerce, and transportation and was an effort to settle an issue that had resulted in “frequent trouble.” While the Jay Treaty and its progeny had failed to finally settle the boundary, this “failure to define the line of demarcation” was due more to “inability” of the ad hoc commissions rather than the

under the treaty such as establishment of mixed courts).

70. *See* John Bassett Moore, *History and Digest of the International arbitrations to Which the United States Has Been a Party* 63–64 (1898) (explaining that although the commissioners were able to agree on a report “by which all the islands in the possession of each party before the late war have been decreed to it,” they did not make any determination to mark the water boundary).

71. *Id.*


73. *Id.*

74. *See* Treaty Between the United States of America and the United Kingdom Concerning the Boundary Between the United States and the Dominion of Canada From the Atlantic Ocean to the Pacific Ocean, U.S.-Gr. Brit., Apr. 11, 1908, 35 Stat. 2003 [hereinafter 1908 Treaty]; *see also* Burrage, *supra* note 61, at 304 (On the length of the disagreement over the border since the Treaty of Paris, Daniel Webster, then Secretary of State, remarked: “A very promising condition of things to exist fifty-seven years after the conclusion of the treaty!”).

75. *See* Aroostook War: Historical Sketch and Rosters of Commissioned Officers and Enlisted Men 3–8 (1904) (describing the Aroostook War).

“neglect” of the previous treaty framers to settle the boundary on paper.\textsuperscript{77}

The IBC itself began informally as a series of small agreements prior to 1908 to perform specific border work. In 1900 the Privy Council of Canada adopted a report, which proposed that the U.S. and Canadian governments “join in making an examination of and in re-marking the whole of the southern boundary of Canada, wherever it has been surveyed by the various commissions appointed for that purpose.”\textsuperscript{78} In 1901, when arrangements were made for demarcating New York’s northern boundary, the Canadian government expressed its interest in continuing the process along the northern New England borders.\textsuperscript{79} By 1903 the State Department was seeking appropriations for boundary work in the West.\textsuperscript{80} Simultaneously, officials of both governments reached an agreement providing for the demarcation of the boundary in a number of border states.\textsuperscript{81} After such projects in Vermont, the Secretary of State requested an additional $20,000 for border demarcation between the Rocky Mountains and the St. Croix River.\textsuperscript{82}

By 1907, it was clear that because of these considerable, though ad hoc, boundary activities, “the remainder of the northern land boundary should be remarked and that proper reference marks should be placed along the water boundary.”\textsuperscript{83} The government in Ottawa indicated that it was tiring of negotiating each border with ad hoc commissions or state governments,\textsuperscript{84} and the U.S. Government took steps to address the issue. In February 1908 the U.S. Ambassador to Great Britain, William Bryce, traveled to Canada to discuss a boundary treaty.\textsuperscript{85} The idea of a boundary treaty was part of a set of larger border-related issues that also included fisheries concerns and Great Lakes water issues.\textsuperscript{86} As the \textit{Washington Post} reported, if the British officials approved of Bryce’s

\textsuperscript{77} See Editorial, Fixing Our Northern Boundary, CHRISTIAN SCI. MONITOR, Dec. 12, 1908, at 8.
\textsuperscript{79} LAURENCE F. SCHMECKEBIER, INTERNATIONAL ORGANIZATIONS IN WHICH THE UNITED STATES PARTICIPATES 190–91 (1935).
\textsuperscript{80} H.R. DOC. NO. 58-454, at 1–2 (1904); H.R. DOC. NO. 58-50, at 1–2 (1903).
\textsuperscript{81} See SCHMECKEBIER, supra note 79, at 190–91 (describing that the Canadian government wanted to continue demarcation of the northern borders of Vermont, New Hampshire, and Maine along with arrangements to remark the northern boundary of New York).
\textsuperscript{82} H.R. DOC. NO. 59-328, at 1–2 (1906).
\textsuperscript{83} SCHMECKEBIER, supra note 79, at 191.
\textsuperscript{84} WILLIAM R. WILLOUGHBY, THE JOINT ORGANIZATIONS OF CANADA AND THE UNITED STATES 7 (1979).
\textsuperscript{85} Bryce Goes to Canada, N.Y. TIMES, Feb. 17, 1908, at 1.
\textsuperscript{86} Bryce Going to Canada, WASH. POST, Jan. 25, 1908, at 2.
efforts on these three fronts, “a treaty will be signed and submitted to the Senate soon after Mr. Bryce’s return to Washington.”

On April 11, 1908, the United States and Great Britain signed a “Convention . . . relating to the Canadian international boundary” (“1908 Treaty”) in Washington. As the Boston Daily Globe reported, the 1908 Treaty provided “for the more complete definition and demarcation of the boundary between the United States and Canada, but does not change in any way the understood existing line.” Unlike the bitter, party-line debate over the Jay Treaty, the Senate easily ratified the 1908 Treaty on May 4, 1908. The 1908 Treaty set the boundary from the Passamaquoddy Bay to the Pacific Ocean. Importantly, to settle detailed border issues, the 1908 Treaty was purposefully technocratic, depoliticizing the boundary and requiring the parties “to appoint, without delay, an expert geographer or surveyor to serve as Commissioners.”

For the purposes of this Article, the key portion of the 1908 Treaty was Article IX, which dealt with “General provisions” and included the set of situations for the replacement of Commissioners:

> In case a vacancy occurs in any of the Commissions constituted by this Treaty, by reason of the death, resignation, or other disability of a Commissioner, before the work of such Commission is completed, the vacancy so caused shall be filled forthwith by the appointment of another Commissioner by the party on whose side the vacancy occurs, and the Commissioner so appointed shall have the same powers and be subject to the same duties and obligations as the Commissioner originally appointed.

Article IX also explained that expenses were to be borne equally between the two parties, and if the Commissioners could not agree on the “location or demarcation of any portion of the boundary,” then a neutral arbitrator would decide the dispute.

The work of the Commissioners authorized under the 1908 Treaty was deemed a success, and by 1925 the parties recognized that the IBC needed to be established as a permanent body. While the issue of the U.S.-Canadian boundary was still controversial, the desire to establish

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87. Id.
88. See 1908 Treaty, supra note 74.
89. Boundary Treaty is Law, BOSTON DAILY GLOBE, May 5, 1908, at 9.
90. MONAGHAN, supra note 9, at 389–90.
91. 1908 Treaty, supra note 74, arts. I–VIII.
92. Id. arts. I–II.
93. Id. art. IX.
94. Id.
a permanent IBC reflected a sentiment that “[a]nything which tends to cause friction with our northern neighbor is to be deplored.”96 Thus, on February 24, 1925, Secretary of State Charles Evans Hughes and Ernest La Ponte, Minister of Justice of Canada, signed the “Treaty between the United States and Great Britain in respect of boundary between the United States and Canada” (“1925 Treaty”).97 On March 13, 1925, Senator William Borah announced that the Senate had ratified the Treaty in executive session.98 The 1925 Treaty dealt with the three remaining border issues that the 1908 Treaty had not settled.99 It also made the commission established by the 1908 Treaty permanent.100 As to the appointment and removal of Commissioners, it provided:

After the completion of the survey and demarcation of the boundary line between the United States and the Dominion of Canada . . . as provided for by the Treaty of April 11, 1908, the Commissioners appointed under the provisions of that Treaty shall continue to carry out the provisions of this Article, and, upon the death, resignation, or other disability of either of them, the Party on whose side the vacancy occurs shall appoint an Expert Geographer or Surveyor as Commissioner, who shall have the same powers and duties in respect to carrying out the provisions of this Article, as are conferred by this Article upon the Commissioner appointed under the provisions of the said Treaty of 1908.101

Finally, the 1925 Treaty required that the IBC issue periodic reports, mandated that its costs be split equally by the two governments,102 and allowed the parties to withdraw from the Treaty after six years upon giving notice to the other party, which would disband the IBC.103 By addressing the three major remaining border issues and establishing a permanent Commission to settle future disputes and maintain the border vista, the 1925 Treaty thus “complet[ed] the boundary one hundred and forty-two years—and four treaties—after the original delimitation.”104

99. See 1925 Treaty, supra note 97, arts. I–III. These three remaining disputes were, first, from the western shore of Lake Superior to the Lake of the Woods; second, from the Lake of the Woods to the summit of the Rocky Mountains; and third, in the area of Passamaquoddy Bay. Id.
100. See id. art. IV.
101. Id.
102. Id.
103. Id. art. V.
104. STEPHEN B. JONES, BOUNDARY-MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS 3 (1945).
B. The Removal of Commissioner Dennis Schornack

Dennis Schornack’s first six years as the U.S. Commissioner to the IBC were typical of the relatively harmonious Commission. President Bush appointed Schornack to the IBC in April 2001.105 Weeks later Bush also appointed him as a Commissioner to the International Joint Commission,106 an independent, binational treaty organization that the United States and Canada established under the International Boundary Waters Treaty of 1909.107 The first six years of Schornack’s time at the IBC were characterized by the usual work of the Commission, though perhaps with heightened attention and focus on border issues due to the desire for border integrity following the 9/11 terrorist attacks.

This period of tranquility at the IBC changed in January 2007 when the Royal Canadian Mounted Police alerted Schornack and his Canadian counterpart, Peter Sullivan, about a concrete wall—the wall was 4-feet high, 85-feet long, and U-shaped—that jutted 30 inches into the 10-foot vista on the U.S. side of the border.108 Shirley and Herbert Leu owned the wall, which was built to stop erosion at their home in Blaine, Washington. In February 2007, Schornack wrote the Leus a letter explaining that the wall encroached on the twenty-foot boundary vista and that it would have to be removed to comply with the 1908 and 1925 Treaties.109 The Leus refused to remove the wall, and according to Schornack, he and Commissioner Sullivan “couldn’t figure out how to grant an exception” to the vista intrusion without violating the Treaties.110 The IBC offered to pay for the removal,111 but when the Leus refused, Schornack sent them a letter stating that “the commission may itself cause the wall to be removed and the expenses for the removal will be invoiced to you.”112 The Leus again refused to remove the wall and instead threatened suit, causing the IBC to seek legal counsel.113

106. Id.
110. Green, supra note 105.
111. Id.
112. Tizon, supra note 108.
113. Leu, 523 F. Supp. 2d at 1201.
From the outset of the conflict it was not clear who should represent the IBC. In March 2007 Commissioner Schornack contacted the State Department’s Office of the Legal Advisor for representation but was told that “the IBC is independent of the State Department and that the State Department does not have authority to provide the IBC with legal advice.”\textsuperscript{114} Schornack then contacted the Department of Justice (“DOJ”) which agreed to defend the “United States on behalf of the Commission,” but it is after this that accounts of the conflict begin to diverge. Schornack claimed that the DOJ told him he would need “international legal advice,” and he thus retained Elliot Feldman of Baker & Hostetler.\textsuperscript{115} The DOJ, however, countered that it never authorized outside counsel, though this is questionable as both the government procurement office and the DOJ did not challenge the hiring or payment of Feldman at the time he was retained.\textsuperscript{116} In April, the Leus, represented by the Pacific Legal Foundation (“PLF”), became the first Americans to sue the IBC, filing in Federal District Court in Washington.\textsuperscript{117}

What happened between the Leus filing suit and Schornack’s removal is also disputed, though there is no question that the relationship between Schornack and the DOJ “quickly soured.”\textsuperscript{118} In June 2007, Acting Assistant Attorney General Ron Tempas threatened to keep Schornack out of substantive talks regarding the litigation unless Schornack fired Feldman, stating that only counsel that reported to the President could represent the IBC.\textsuperscript{119} According to Schornack, he was also warned that he risked “personal exposure” if the IBC refused to shed its private counsel.\textsuperscript{120} Shortly after Feldman filed to appear in Leu, an assistant to the President, Luis Reyes, contacted Schornack and questioned his commitment to the President, his patriotism, his devotion to the Republican Party, and his understanding of a “unitary” form of government.\textsuperscript{121} Reyes told Schornack that if he did not fire his private counsel, Reyes would recommend that the President fire Schornack.\textsuperscript{122} Schornack did not comply, and the next day Liza Wright, Assistant to

\begin{enumerate}
\item\textsuperscript{114} Id.
\item\textsuperscript{115} Id.
\item\textsuperscript{116} See id.
\item\textsuperscript{117} Id.; Green, supra note 105. Two suits have, however, been filed against the IBC in Canada. Leu, 523 F. Supp. 2d at 1201 n.1.
\item\textsuperscript{118} Leu, 523 F. Supp. 2d at 1201–02.
\item\textsuperscript{119} Declaration of Dennis Schornack in Support of Motion to Quash at 4, Leu, 523 F. Supp. 2d 1199 (No. C07-0510).
\item\textsuperscript{120} Leu, 523 F. Supp. 2d at 1202.
\item\textsuperscript{121} Id.
\item\textsuperscript{122} See id.
\end{enumerate}
the President for Presidential Personnel, notified Schornack of his removal under presidential authority.123

Schornack thus became the first person in U.S. history whom the White House unilaterally fired as head of a bilateral treaty-based organization.124 While it is impossible to know the exact decisionmaking behind the choice to fire Schornack, he has claimed political influence. Furthermore, Judge Marsha Pechman noted that the removal “kind of looks like politics, it smells like politics, [and] it talks like politics.”125 While some combination of the Bush Administration’s sympathy for private property rights,126 the PLF’s conservative influence and connection with “funding father of the Right,” Richard Scaife,127 and the Administration’s unprecedented commitment to unitariness in the Executive likely played a role in the removal,128 any political connection was denied by the DOJ under President Bush.129

After receiving the notice of his removal, Schornack responded by challenging the President’s power to remove him. Schornack sent a letter to Bush objecting to the authority for his removal, and he continued to pursue his case with the Feldman-led team despite the fact that the President appointed a new IBC Commissioner, David Bernhardt, who directed the Feldman-led lawyers to cease work on the case.130 On October 12, 2007, Judge Pechman ruled on whether the President could remove Schornack and whether the DOJ could defend the IBC.

Judge Pechman found for the Government. Though conceding that the IBC was a “binational organization that operates independently from the Canadian and American governments,” and acknowledging that resolving boundary disputes “surely warrants independence from each

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123. Schornack was simultaneously removed from his position as U.S. Chairman of the International Joint Commission. Tom Henry, Ohioan May Join Water Panel, THE BLADE (Toledo), Dec. 21, 2007. While Schornack’s position at the IBC was unpaid, he was receiving $145,000 in his Joint Commission role. Kart, supra note 10.

124. Leu, 523 F. Supp. 2d at 1200.

125. Transcript of Record at 41, Leu, 523 F. Supp. 2d 1199 (No. C07-0510).


127. See Robert G. Kaiser & Ira Chinoy, Scaife: Funding Father of the Right, WASH. POST, May 2, 1999, at A1. The PLF was one of the first conservative causes of Richard Scaife, who has been, perhaps, the most active donor to conservative causes and politicians since the 1970s, donating tens of millions of dollars to conservative think tanks, legal organizations, and education groups, including donations that “kept the PLF alive.” Robert G. Kaiser & Ira Chinoy, Decades of Contributions to Conservatism, WASH. POST, May 2, 1999, at A25.


129. Transcript of Record, supra note 125, at 42–43.

130. Leu, 523 F. Supp. 2d at 1203–04.
country’s political swings,” Judge Pechman found that Schornack was removable by the President.131 In so holding she discussed the canonical removal power cases,132 and she relied heavily on the 1903 Supreme Court case *Shurtleff v. United States*. In *Shurtleff*, an official that was clearly part of the executive branch, the General Appraiser of Merchandise, challenged President McKinley’s power to remove him.133 Judge Pechman particularly seemed to emphasize that *Shurtleff* “cautioned against assuming Congress intended to create a position with life tenure unless Congress ‘use[d] language that put that intention beyond doubt.’”134 After the ruling, Schornack stated that the implication of the ruling was that if private parties can agree with the DOJ on exceptions to the border vista, the authority of the IBC is diluted. Such an outcome, he reasoned, is contrary to the 1908 and 1925 Treaties, and the border becomes more difficult to protect as visibility along it decreases.135 Schornack appealed the ruling, and the appeal is currently before the Ninth Circuit with the parties disputing whether the President can remove the U.S. Commissioner and whether the IBC is a juridical entity with the authority to choose its own counsel.136

### III. THE INTERNATIONAL BOUNDARY COMMISSION TREATIES AND REMOVAL POWER LIMITATIONS

Whether the 1908 and 1925 Treaties have the force of domestic law is relevant to Commissioner Schornack’s firing if he argues that the Treaties collectively prohibit the President from removing him. Before examining whether the Treaties support this claim, it is necessary to unpack the constitutional boundaries of the removal power. Even if the Treaties sought to insulate the U.S. Commissioner from removal, they could not do so if such insulation was unconstitutional. Section III.A

131. *Id.* at 1204, 1207.
134. *Leu*, 523 F. Supp. 2d at 1208 (quoting *Shurtleff*, 189 U.S. at 318). Judge Pechman further supported her conclusion by noting that the commission signed by President Bush for Schornack’s appointment stated that he served “during the pleasure of the President,” as well as the general reluctance of the federal courts to delve into issues of foreign affairs. *Id.* at 1208–09.
136. *International Boundary Commission and Commissioner Schornack’s Response to DOJ’s Reply*, *Leu*, 523 F. Supp. 2d 1199 (No. C07-0510). While any of the substantive issues that the Ninth Circuit may reach are important, the purpose of this Article is not to forecast the outcome in *Leu*, but to step back, examine the IBC, and address the structural issues that the case raises about the intersection of the treaty and removal powers.
addresses two predicate issues. First, it is unclear if the IBC is a part of the U.S. Government or if the U.S. Commissioner is an officer of the United States. Next, if the Commissioner is an officer, no court has ever ruled on whether he is an inferior officer. Section III.A also addresses the legal character of the IBC, the U.S. Section of the IBC, and the U.S. Commissioner, concluding that while the IBC may have international character, the U.S. Section is a part of the U.S. Government, and the U.S. Commissioner is an officer of the United States. Section III.B addresses the history and breadth of the removal power, focusing on the constraints that the Supreme Court has allowed on the power. It claims that, while the Court has not addressed the ability to limit removal by treaty, under a plain reading of *Morrison v. Olson*, a treaty should be able to limit the removal power over inferior officers. Finally, Section III.C looks to the text, negotiation history, historical context, and subsequent understanding of the 1908 and 1925 Treaties to demonstrate that, in fact, one of the primary reasons for creating the IBC was to insulate boundary decisions from political pressure.

A. What is the Legal Character of the International Boundary Commission?

While it may seem odd to engage in a detailed inquiry about the legal character of the IBC—whether it is even part of the U.S. Government—answering such a question proves surprisingly complex as there is no clear authority. At first glance the IBC appears to be an international organization with only international legal character; however, a closer inspection reveals that this may not be the case. Section 1 examines the applicable treaty language, contemporaneous treaties creating similar bodies, and subsequent practice in claiming that the U.S. Section is part of the U.S. Government. Section 2 examines the nature of the office of the U.S. Commissioner and relies on Supreme Court precedent in concluding that because of the office’s duties, as well as Canada’s treatment of its Commissioner as part of its government, the U.S. Commissioner is likely an “Officer[] of the United States” for the purpose of the Appointments Clause and thus the removal power analysis as well.

137. There is some dispute about whether there is such an entity as the “U.S. Section” of the IBC, and Commissioner Schornack has claimed that any such designation is a fiction not supported by the 1908 and 1925 treaties. *See Counterclaim at 3, Leu*, 523 F. Supp. 2d 1199 (No. C07-0510). This Article uses “U.S. Section” for convenience simply to refer to the U.S. Commissioner and her staff and implies no conclusions from the term’s use.

1. Is the International Boundary Commission Part of the U.S. Government?

The legal character of the IBC is the threshold consideration of a larger series of questions as to whether the President’s removal power over the IBC Commissioner is limited. However, determining whether the IBC is an international organization or if it is part of the U.S. Government is a difficult question. What starts as an inquiry that would seem to allow a definite answer, quickly becomes a rabbit’s hole of circularity, ambiguity, and question-begging. The distinction matters for this Article’s purposes because the legal character of the IBC, and specifically the U.S. Section of the IBC, affects whether the removal analysis from the independent agency cases such as Humphrey’s Executor v. United States, discussed below, is directly precedential, indirectly instructive, or inapplicable.

Despite the seemingly straightforward question as to the IBC’s character, the Leu district court clearly was aware of the difficult inquiry and stated that it “need not resolve in the context of these motions the issue of whether the IBC is an agency . . . .” If the IBC were an international organization, entirely separate from the U.S. Government, then it is likely that the 1908 and 1925 Treaties do not create individual rights that would provide a fired commissioner with a cause of action, and it follows that the removal power jurisprudence does not strictly apply. Under such a scenario, the removal cases may provide a framework for thinking about the propriety of the President removing the Commissioner, but the only party that could protest the removal would be Canada, and its remedies would exist through international law and political channels. If, however, the U.S. Section of the IBC is a part of the U.S. Government, then it is possible that the removal power jurisprudence is directly applicable. While this Article concedes that the IBC lies close to the line separating the U.S. Government from

139. See infra Part III.B.
140. The distinction is relevant to the resolution of the Leu’s case because they claim that if the IBC is an international organization that it is not so defined under the International Organization Immunities Act (IOIA), 22 U.S.C. § 288a (2006), which, they argue, would mean Schornack could not sue on behalf of the IBC because an organization must either be designated by the IOIA or have capacity to sue be “expressly set forth by the terms of its chartering document.” Appellee-Plaintiffs’ Response Brief at 20–22, Leu v. Int’l Boundary Comm’n, No. 07-035949 (9th Cir. Sept. 18, 2008).
141. Leu, 523 F. Supp. 2d at 1212. The court also declined to decide whether Schornack was a “federal officer.” Id. It based this ruling on the questionable conclusion that because Schornack was removed and no longer was employed by the IBC, he was no longer a party to the litigation and thus the controversy was not live and failed on mootness grounds. Id. at 1212–13.
142. See Edye v. Robertson, 112 U.S. 580, 598 (1884) [hereinafter Head Money Cases].
international organizations, there are a number of indicia that make it more likely that the IBC is not a distinct international organization.143

For organization and employment purposes, the executive branch of the U.S. Government is divided into departments, each with its own duties.144 The executive departments and independent establishments are both considered “executive agencies.”145 The Government Manual, which describes the organization of the federal government, also lists “Quasi-Official Agencies” as part of the executive branch.146 Included in these “Quasi-Official Agencies” are “Selected Bilateral Organizations,” for which the Government Manual lists the IBC, along with the International Joint Commission (“IJC”) and the International Boundary and Water Commission (“IBWC”), among others.147

Thus, on its face, the IBC appears as though it may be an organization with international legal character, separate from the U.S. Government. One could simply look to the Government Manual and point out that the IBC is a bilateral treaty organization.148 While some commentators have failed to question the status of the IBC and instead referred to it—casually and often in passing—as a bilateral treaty organization or an international organization,149 other writers have noted the difficulty of categorizing the IBC but failed to address the substantive question.150 The fallacy of such quick-look analyses—as

143. While the only remedy for the removal may lie with Canada if the IBC were, in fact, an international organization, it remains doubtful that the President would have the authority to remove the U.S. Commissioner under this understanding of the IBC.


147. Id. at 589–90.

148. See supra note 144 and accompanying text.


150. See, e.g., John Kerr Rose, Geographical Record, North American: The Canada-Alaska Boundary, 44 GEOGRAPHICAL REV. 289, 290 (1954) (“Though the Commission reports yearly to the Department of State, it is otherwise listed as an independent agency.”). One careful and thorough study of the number of intergovernmental organizations listed the IBC as an intergovernmental organization, Michael Wallace & J. David Singer, Intergovernmental Organizations in the Global System, 1815–1964: A Quantitative Description, 2 INT’L ORG. 239, 252 (1970); however, such a designation need not mean that the IBC is outside of control of the executive branch. At least one commentator, in trying to make sense of the executive branch following the New Deal, categorized both the IBC and the IJC as part of the State Department.
well as the difficulty of classifying the IBC—can be quickly demonstrated by comparing the IJC, an organization founded by treaty that deals with water issues in the Great Lakes, to the IBWC, also created by treaties, which deals with water and boundary issues along the U.S.-Mexican border.

The IJC and IBWC, their histories, and their founding documents are discussed in greater detail below, but, for now, it is sufficient to consider that despite the fact that both organizations seem similar to each other and to the IBC, and despite the fact that the Government Manual, as well as various appropriations acts, treat the agencies as possessing equivalent legal character, the IJC is an independent international organization for which the Appointments Clause, the question of an “Officer[] of the United States,” and, to some degree the removal analysis, simply does not apply. A treaty governs those procedures of the IJC. The IBWC is different in that as a Commission it has the “status of an international body,” but the U.S. Commissioner and the U.S. Section are treated as a part of the U.S. Government, with all of the statutory and constitutional consequences that such classification entails. Thus, a more in-depth discussion is

L.F. Schmeckebier, Organization of the Executive Branch of the National Government of the United States: A Tabular View Showing Changes Made Between March 4 and November 1, 1933, 27 AM. POL. SCI. R. 942, 948 (1933) (noting the location in the executive branch of every agency that the author deemed federal). However, the Federal Court of Claims and the Eighth Circuit have rejected the claim that the IJC is part of the Government. See Erosion Victims of Lake Superior Regulation v. United States, 833 F.2d 297, 299–301 (Fed. Cir. 1987); see also Tex. State Bank v. United States, 423 F.3d 1370, 1377 (Fed. Cir. 2005). The two other courts to directly address the legal status of the IJC have determined that the IJC is a separate international body that is not part of the U.S. Government. Miller v. United States, 583 F.2d 857, 865 n.23 (6th Cir. 1978); Soucheray v. Corps of Engineers of U.S. Army, 483 F. Supp. 352, 354–55 (W.D. Wis. 1979). The Sixth Circuit has agreed that “the IJC and its subsidiary boards are international bodies, not agents of the United States, even though the members of the commission and its boards include United States citizens and employees of the Corps of Engineers.” Miller, 583 F.2d at 865 n.23. The Western District of Wisconsin court agreed. Soucheray, 483 F. Supp. at 355 n.3.


required to determine whether the IBC is more like the IJC or the IBWC.

Any discussion of the legal character of the IBC should begin with the text of the 1908 and 1925 Treaties that created it, and these Treaties indicate that there is a plausible textual reason to think that the IBC is a part of both the U.S. and Canadian governments. The Treaties do not actually set up any commission named the “International Boundary Commission.”155 In fact, neither the phrase “International Boundary Commission,” nor even “boundary commission,” is present in either treaty.156 Nor do the Treaties speak of the formation of a “Commission”; instead, they speak of the appointment of “Commissioners.”157 Tellingly, where under other similar treaties there is language regarding the formation of a “tribunal” or “a Commission,”158 the 1908 Treaty reads: “The High Contracting Parties agree that each shall appoint, without delay, an expert geographer or surveyor to serve as Commissioners for the purpose of more accurately defining and marking the international boundary line between the United States and the Dominion of Canada . . . .”159 Likewise, the 1925 Treaty, describing the work of the IBC, failed to mention the “Commission,” but instead stated:

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155. See 1925 Treaty, supra note 97, passim; 1908 Treaty, supra note 74, passim.
156. See 1925 Treaty, supra note 97, passim; 1908 Treaty, supra note 74, passim.
157. The 1908 Treaty references the “Commissioners” more than seventy times, and the only instances in which it references a “Commission” is in referring to the already-existing “International Waterways Commission,” now the IJC, which was concurrently created by treaty between the United States and Great Britain, Boundary Waters Treaty, supra note 152, art. VIII., as well as two separate “Joint Commissions” for demarcating the boundary along the Rocky Mountains, which were created by “joint action” between the parties in 1872 and 1858. See 1908 Treaty, supra note 74, arts. IV, VI–VII. In one instance, the 1908 Treaty does seem to refer to the IBC as a “Commission.” Id. art. IX. This statement is, however, much less explicit than the commissions created by both the Boundary Waters Treaty and the agreement creating the IBWC. See infra notes 170–81 and accompanying text.
158. See Boundary Waters Treaty, supra note 152, art. III (stating that the treaty was creating a “joint commission, to be known as the International Joint Commission” for the resolution of disputes and management of border issues); Alaska Boundary Treaty, supra note 72, art. I (requiring that “[a] tribunal shall be immediately appointed” to answer remaining Alaska boundary questions).
159. 1908 Treaty, supra note 74, art. I.
[The boundary should be located by] the Commissioners appointed under the said Treaty of April 11, 1908, and shall be marked by them on the chart . . . and a detailed account of the work done by the Commissioners in locating said point . . . shall be included in the report or reports prepared pursuant to the said Articles.160

It is possible that the distinction between naming an actual “Commission” and referring to “Commissioners” is insignificant, but other textual evidence within the Treaties suggests otherwise. For example, the portion of the 1908 Treaty that does speak of a “Commission” is not where the Treaty is describing what was to become the IBC—there the Treaty speaks of “Commissioners”—but when it describes two other “Joint Commission[s],” which were created in 1872 and 1856 to originally create maps.161 Since the 1908 Treaty does not refer to the boundary Commissioners it authorizes as being part of a “joint commission,” if there is to be a difference between a “Commissioner” and a “joint commission,” references to the 1872 and 1856 agreements might explicitly authorize a “commission”; in fact, they do.

The 1872 agreement, as enacted by Congress, authorizes the “appointment of a joint commission . . . for determining the boundary line,”162 and the 1856 congressional enactment, implementing the 1846 Treaty, speaks of “the proceedings of the said commission.”163 By the time the work of this later, less explicitly chartered “commission” was completed in 1870, the United States and Great Britain described it as the “Joint Commission of the Northwest Boundary” in a declaration signed by both States approving the Commission’s mapping work.164 This understanding of the U.S. and British governments in 1870 likely informed the conceptualization of the “commission” in the 1846 Treaty as a “Joint Commission” by the time the parties drafted the 1908 Treaty.165 Such a distinction is further supported by the fact that Article

160. 1925 Treaty, supra note 97, art. I.
161. 1908 Treaty, supra note 74, arts. VI–VII (mapping of the Boundary from the northwestern-most point of the Lake of the Woods to the summit of the Rocky Mountains).
165. This is likely true because the 1908 Treaty refers to this Joint Commission as follows: [A] Joint Commission organized in 1858 for that purpose and composed of two Commissioners appointed one by each Government, which charts, duly certified and authenticated in duplicate by said Commissioners, were approved and adopted by the two Governments, as appears from the declaration in writing to that effect signed on February 24, 1870.
1908 Treaty, supra note 74, art. VII. While this 1870 date is the exact date that U.S. Secretary of State and Sir E. Thorton, British Minister at Washington, signed the Declaration approving of the Joint Commission’s work, see Declaration Adopting Maps of Boundary, supra note 164, the
VIII of the 1908 Treaty departs from the “Joint Commission” language used in describing the 1872 and 1856 ad hoc boundary commissions and does not provide any proper noun for the “Commissioners” who, under the 1873 Northwest Water Boundary Protocol, were described simply as “commissioners” and who were not described as part of any specific commission.166 The “Commissioners” language is also used in a 1910 Treaty implementing the 1908 Treaty in Passamaquoddy Bay.167 In addition, the first draft of the 1908 Treaty required that one Commissioner from each State-party be appointed for the boundary task; however, the British objected and the final Treaty allowed different Commissioners to be appointed for different sections of the boundary, allowing a result that could have looked much less like an organized commission.168 Finally, the 1925 Treaty seems to use this distinction, referring to the actions taken under the 1908 Treaty only as those taken by “the Commissioners,” but referring to the actions of the body under the 1872 Treaty as taken by a “Joint Commission.”169

Such a textual distinction is more compelling when the language is compared to that used in the treaties that created other bodies that are similar to the IBC. The language of the 1909 Boundary Waters Treaty,170 which created the IJC, is thus relevant to the IBC questions. In giving authority to the IJC to define the boundary in the Great Lakes region, the Boundary Waters Treaty refers to itself as a “concurrent action of the United States and the Dominion of Canada” with the 1908 Treaty.171 This is key because the IJC is not deemed to be a federal agency but is instead “an independent international organization.”172

reference to 1858 is slightly imprecise because the treaty was signed in 1846, and Congress approved the “commission,” including funding, in 1856. Act of Aug. 11, 1856, ch. 87, 11 Stat. 42. However, it was not until 1858 that the Commissioners actually commenced operations because of delays in appointing the British Commissioner. See CHANDLER P. ANDERSON, U.S. DEPT. OF STATE, NORTHERN BOUNDARY OF THE UNITED STATES 69 (1906).

166. See Northwest Water Boundary Protocol, Mar. 10, 1873, 18 Stat. 369 (departing from previous treaty language by referring to commission as merely “commissioners”).


168. See Letter from Chandler P. Anderson to Sec. of State Elihu Root (Mar. 21, 1908) (on file with author). In addition, the draft Treaty that the United States proposed would have allowed the governments, together, to consolidate any of these “Commissions” with overlapping Commissioners into a single “Commission.” See Letter from Sec. of State Elihu Root to Ambassador of Great Britain James Bryce (Jan. 9, 1908) (on file with author).

169. 1925 Treaty, supra note 97, passim.

170. Boundary Waters Treaty, supra note 152.

171. 1908 Treaty, supra note 74, art. IV.

However, unlike the 1908 Treaty, the Boundary Waters Treaty explicitly creates not only “Commissioners” but a “Joint Commission”:

“It is agreed that . . . no further or other uses or obstructions or diversions . . . shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.”

Such language explicitly creating an “International Joint Commission,” distinct from the “Commissioner” language in the 1908 IBC Treaty, continues throughout the Boundary Waters agreement.

The treaties creating the IBWC further provide contrast to the 1908 and 1925 Treaties. In describing itself today, the IBWC states that it “is an international body composed of the United States Section and the Mexican Section, each headed by an Engineer-Commissioner appointed by his/her respective president.” It continues, “Each Section is administered independently of the other. The United States Section of the International Boundary and Water Commission is a federal government agency created in 1924 that is headquartered in El Paso, Texas. The IBWC operates under the foreign policy guidance of the Department of State.” As a U.S. agency, the Secretary of State has delegated the authority to “administer water rights between the United States and Mexico” to the Commissioner of the U.S. Section. The language in the convention that created what is now the IBWC—then known as the International Boundary Commission—is also noticeably different from the language creating the IBC. Whereas the 1908 and 1925 Treaties refer to the “Commissioners” and do not discuss the formation of an independent “Commission,” the 1889 convention between the United States and Mexico is explicit in its creation of a “Commission.”

Cir. 1986); Edison Sault Elec. Co. v. United States, 552 F.2d 326, 336 (Ct. Cl. 1977).
173. Boundary Waters Treaty, supra note 152, art. III.
174. E.g., id. art. VII; see also id. arts. IV, VI, VIII–XII (utilizing the term “International Joint Commission” or “Commission”).
179. 1925 Treaty, supra note 97, passim; 1908 Treaty, supra note 74, passim.
180. Convention Between the United States of America and the United States of Mexico to Facilitate the Carrying Out of the Principles Contained in the Treaty of November 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Bed of
language was used again in the 1945 Treaty that created the modern IBWC, despite that in the intervening years the 1908 and 1925 Treaties created only “Commissioners.”

Moving beyond text, other indicia of the U.S. Government’s conception of the IBC’s legal character further support the fact that the U.S. Section of the IBC is part of the U.S. Government. For payroll purposes, for example, the Office of Personnel Management (“OPM”) has considered field crew employees, including the “instrumentmen, foremen, recorders, packers, cooks, and axemen,” of the U.S. Section of the IBC as Schedule A employees in the Excepted Service and part of the State Department. In proposing construction of a U.S.-Canadian bridge, the State Department cited “the U.S. Office of the International Boundary Commission” as one of the “cooperating agencies” of the “U.S. Government.”

A further indicium of whether a body is an international organization or part of the U.S. Government is the list of international organizations in which the United States participates under the International Organization Immunities Act (“IOIA”). The IOIA “provides the legal framework within which international organizations operate in the United States.” In an impressive feat of circularity, the Act provides the following definition of international organizations:

the Rio Grande and that of the Colorado River, U.S.-Mex., art. I, Mar. 1, 1889, 26 Stat. 1512 [hereinafter IBWC Treaty]. The treaty states, “All differences or questions that may arise . . . shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions.” Id. This language built upon earlier U.S.-Mexican boundary agreements, which had explicitly and repeatedly referred to “a joint commission.” See, e.g., Convention between the United States of America and the United States of Mexico, Nov. 27, 1872, 18 Stat. 760.

181. See IBWC 1944 Treaty, supra note 153, art. I.


185. Appellee-Plaintiffs’ Response Brief, supra note 140, at 21 (quoting In re Hashim, 188 B.R. 633, 645 (Bankr. D. Ariz. 1995)).
For the purposes of this subchapter, the term “international organization” means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter.186

The list of eligible organizations that the President has so designated is “quite extensive” and includes more than eighty organizations.187 Interestingly, the list includes the IBWC,188 the IJC,189 and the Great Lakes Fisheries Commission (“GLFC”),190 as well as the Border Environment Cooperation Commission191 and the United States-Mexico Border Health Commission,192 but it does not include the IBC.193 The most likely explanation for the IBC being left off of this extensive list is that the Government has not traditionally viewed the IBC as an international organization.194

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194. Such a claim addresses the first condition of the IOIA, whether the IBC is “a public international organization in which the United States participates.” Id. Another possibility for the IBC’s exclusion, and the exclusion of eligible organizations in general, is under the second prong of Section 288. Such an argument contends that “it was not contemplated that all organizations in which the United States participate[s] would have the privileges enumerated in the [IOIA].” Note, The Status of International Organizations Under the Law of the United States, 71 HARV. L. REV. 1300, 1307 (1958). One making this claim could argue that “[f]ailure to designate an eligible organization might be interpreted as an executive determination that it should not be accorded any of the privileges specified in the act.” Id. Such a claim, however,
This is not to say that there are no suggestions that the IBC is separate from the U.S. Government; such evidence is simply less compelling. Unlike OPM, which treated the IBC employees as federal employees for use of government vehicles and resources, the General Services Administration has treated the IBC not like independent agencies such as the FCC and SEC, but as part of a group of “international organizations” like NATO, the American Red Cross, the IJC, and the International Boundary and Water Commission. The State Department has also included the IBC on a list of “International Organizations and Activities” to which the State Department has employees “assigned on reimbursable detail and/or for accounting or recording purposes.”

The most compelling pieces of evidence for the argument that the IBC is not part of the U.S. Government are a number of brief memos and letters in which the State Department determined that the IBC was not an “agency” for purposes of the Sunshine Act, the Competitive Civil Service, or the National Environmental Policy Act. However, the
fact that the IBC was not deemed an “agency” for specific statutory purposes is certainly not dispositive as to whether it is a component of the U.S. Government. Further, the documents were decades old, not rigorously reasoned or formalized in any policy or statute, and admitted to potential confusion and difficulty in their analyses.199

Most likely, these contrasting authorities demonstrate that there is simply confusion over the legal character of the IBC. The Plum Book, for example, is a listing of “presidentially appointed positions within the Federal Government” published by either the Senate Committee on Homeland Security and Governmental Affairs or the House Committee on Government Reform alternately every four years after a presidential election.200 Even the Plum Book, one of the most exhaustive accountings of federal employment,201 has shown confusion in how to define the IBC. The 2008 Plum Book categorizes the IBC as a division of the State Department,202 yet the 2000 and 2004 Plum Books listed the IBC as an independent agency analogous to, for example, the FCC.203

Finally, U.S. assessments that the IBC is part of the U.S. Government agree with the IBC’s conception of its own legal character. As explained in a paper presented by the Canadian Commissioner to the IBC, the Commission, though a “bilateral treaty organization,” is structurally a part of both the U.S. and Canadian governments.204 As he explained, “[t]he Canadian Commissioner,” who is “a full-time

199. Id. Ex. A (memo and letter concluding that the IBC is not an “agency” and is outside the scope of the Sunshine Act); id. Ex. B (1977 memos outlining the status of IBC and IJC Personnel).
201. The Plum Book lists the thousands of federal civil service positions in the legislative and executive branches that may be subject to noncompetitive appointment. Id.
204. McEwen Address, supra note 35, at 3.
permanent employee of the federal public service,” formally “reports directly to the Minister for Foreign Affairs.”\(^{205}\) In addition, “the Canadian section of the Commission is an administrative part of the Department of Natural Resources . . . .”\(^{206}\) Further, “[t]he United States section of the Commission reports to, and is administered by, the Department of State.”\(^{207}\) The report—one of the most detailed treatments of the IBC—explains that the U.S. and Canadian Sections each have a separate operational structure as well: “A field party of one section of the Commission works alone on both sides of the border in an area to which it is assigned, without any requirement for participation, supervision or scrutiny by the other section.”\(^{208}\) In addition, the IBC’s website asserts that the U.S. Commissioner “reports to the Secretary of State,”\(^{209}\) a statement with which commentators have agreed and upon which they have relied.\(^{210}\)

Thus, despite this competing—or confusing—authority, the evidence that the U.S. Section should be considered a part of the U.S. Government, particularly given the Treaty text,\(^{211}\) is more compelling than any other position, even if the issue has not been settled in court.

2. Is the International Boundary Commission Commissioner an Officer of the United States?

Determining the constitutional employment status of the U.S. Commissioner to the IBC must begin with the Constitution itself and the Supreme Court statements addressing who are “Officers of the United States.” The Appointments Clause of the Constitution vests the following power in the President:

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\text{[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in }\]

\(^{205}\) Id.
\(^{206}\) Id.
\(^{207}\) Id.
\(^{208}\) Id.
\(^{210}\) See, e.g., Daniel Gilman, Oy Canada! Trade’s Non-Solution to “the Problem” of U.S. Drug Prices, 32 AM. J.L. & MED. 247, 253 n.32 (2006) (noting as well the distribution of regulatory authority concerning the border).
\(^{211}\) See supra notes 155–60 and accompanying text.
the President alone, in the Courts of Law, or in the Heads of Departments.212

The leading Supreme Court case describing who are “Officers of the 
United States” is Buckley v. Valeo.213 The Court in Buckley, examining 
the office of Commissioner to the Federal Election Commission 
(“FEC”), reiterated that all “Officers” must be appointed in accordance 
with the Appointments Clause and explained that all persons 
“exercising significant authority pursuant to the laws of the United 
States” are officers of the United States.214 While the Court has emphasized that the strictures of the Appointments Clause are “among 
the significant structural safeguards of the constitutional scheme,”215 
and while it has elaborated that officers of the United States enjoy more 
than a merely “temporary” or “episodic” opportunity to act pursuant to 
or enforce federal law,216 the Court has not provided significant 
additional substance to flesh out the Buckley test.

Recognizing the lack of detail that the Supreme Court has provided 
as to who is an “Officer[] of the United States,” the Office of Legal 
Counsel (“OLC”) has addressed the issue in an attempt to provide 
guidance to the President. Its forty-one page memo devoted to the 
question, titled Officers of the United States Within the Meaning of the 
Appointments Clause, provides a useful framework for analyzing the 
officer question, and this Section relies on the framework set up in that 
memorandum.217 The basic conclusion of the OLC memo is as follows:

A position to which is delegated by legal authority a portion of the 
sovereign powers of the federal Government and that is “continuing” 
is a federal office subject to the Constitution’s Appointments Clause.

A person who would hold such a position must be properly made an 
“Officer[] of the United States” by being appointed pursuant to the 
procedures specified in the Appointments Clause.218

The memo thus concluded that a position, “however labeled,” is a 
federal office for which an officeholder “must be properly made an 
‘Officer[] of the United States’ by being appointed pursuant to the

212. U.S. CONST. art. II, § 2, cl. 2.
214. Id. at 126.
special trial judges from special masters who are hired by Article III courts on a temporary basis 
and whose duties are not statutorily delineated).
217. Memorandum Opinion from the Dept. of Justice Office of Legal Counsel for the General 
Counsels of the Executive Branch, Officers of the United States Within the Meaning of the 
Appointments Clause (Apr. 16, 2007) [hereinafter OLC, Officers of the United States], available 
218. Id. at 1.
procedures specified in the Appointments Clause” on two conditions: First, if the office is “invested by legal authority with a portion of the sovereign powers of the federal Government,” and, second, if the office is “continuing,” then Appointments Clause limitations are operative. While this is not an explicit test that the Supreme Court has endorsed, the analysis is drawn almost entirely from the Constitution and Supreme Court jurisprudence interpreting the phrase “Officers of the United States.” While any position of the OLC is necessarily “ever zealous of presidential prerogative,” it is a fair application of those cases, and as such it provides a way to parse the inquiry into whether the IBC Commissioner is an “Officer[] of the United States.”

The first of two necessary questions for finding someone an “Officer[] of the United States” is thus whether the office at issue “involves a position to which is delegated by legal authority a portion of the sovereign powers of the federal Government;” or put in the parlance of Buckley, whether an officer exercises “significant authority pursuant to the laws of the United States.” The grounds for requiring the delegation of sovereign powers of the federal Government derive from the Constitution’s command that the President “shall take Care that the Laws be faithfully executed,” along with the Supreme Court’s early recognition that the President’s power to appoint officers is “the means of fulfilling” that obligation. As Chief Justice Marshall described, “An office is defined to be ‘a public charge or employment,’

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219. Id.
220. See id. at 1–3, 5, 8, 12 (citing, among many others, Edmond, 520 U.S. at 659, 663; Freytag, 501 U.S. at 877, 881; Bowsher v. Synar, 478 U.S. 714, 733 (1986); Buckley v. Valeo, 424 U.S. 1, 125 (1976); Myers v. U.S., 272 U.S. 52, 133 (1926)).
222. The OLC and the AG have a strong record of interpreting the Appointments Clause. The Court’s holding in Buckley—that the Appointments Clause provides the exclusive method of appointment for anyone considered an “Officer of the United States”—was anticipated by a line of Attorney General opinions dating back to well before the Civil War.” OLC, Officers of the United States, supra note 217, at 2 (citing, as examples, Appointment and Removal of Inspectors of Customs, 4 Op. Att’y Gen. 162, 164 (1843); Civil Service Comm’n, 13 Op. Att’y Gen. 516, 518 (1871)).
223. OLC, Officers of the United States, supra note 217, at 4.
224. Buckley, 424 U.S. at 126.
225. U.S. Const. art. II, § 3.
226. See In re Neagle, 135 U.S. 1, 63 (1890). This conclusion is further supported by early debate on the Ratification and Madison’s argument that the Government is “administered by persons holding their offices during pleasure, for a limited period, or during good behavior,” The Federalist No. 39 (James Madison); as well as the common law at the time of the Founding, which described “an officer” as “simply one whom the King had charged with a duty . . . .” Edward S. Corwin, The President: Office and Powers 1787–1984, at 85 (5th rev. ed. 1984).
and he who performs the duties of the office, is an officer.” 227 Early commentators and cases focused on the fact that an “officer” had to receive some delegation of sovereign power and be able to bind the sovereign or the people with his decision, not merely make recommendations. 228 This understanding, only slightly varied, eventually became the command in Buckley that to be an “Officer” one had to exercise “significant authority pursuant to the laws of the United States.” 229

The first component of the “delegated power” 230 or “significant authority” 231 inquiry is easily met for the U.S. Commissioner. Despite a question about the meaning of “laws of the United States,” discussed below, 232 the U.S. Commissioner has significant authority to “bind third parties, or the Government itself, for the public benefit.” 233 The Commissioner does this under the authority of the 1908 and 1925 Treaties. 234 The IBC’s determinations can have dispositive legal effect in litigation even beyond creating a cause of action. 235 Like the FEC in Buckley, 236 the IBC has regulatory authority that allows it to define the boundary. 237 Further, the OLC has argued that “positions with authority” to “conduct . . . foreign negotiations” have the significant authority that the Court has required, 238 and the U.S. Commissioner clearly possesses this authority. These negotiations entail the precise definition of U.S. territory, and the power to define territory is a key component and powerful facet of a State’s sovereignty. 239 Finally, the Court has held that discretion is at least relevant to whether one is considered an “Officer.” 240 While the IBC Commissioners may not

228. See OLC, Officers of the United States, supra note 217, at 8–11 (citing, inter alia, Opinion of the Justices, 3 Greenl. (Me.) 481, 482 (1822)); ASHER C. HINDS, 1 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 604 (1907) (stating that “a commission created by law to investigate and report, but having no legislative, judicial, or executive powers” was not an “office”); FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 1 (1890).
230. See OLC, Officers of the United States, supra note 217, at 12.
231. See Buckley, 424 U.S. at 126.
232. See infra notes 261–83 and accompanying text.
233. OLC, Officers of the United States, supra note 217, at 12.
234. See supra notes 42–45, 94, 104, 160 and accompanying text; infra notes 397–401 and accompanying text.
235. Pettibone v. Cook County, Minn., 120 F.2d 850, 854–55 (8th Cir. 1941).
236. Buckley, 424 U.S. at 140–41.
237. See supra text and accompanying notes 35–42.
238. See OLC, Officers of the United States, supra note 217, at 15 (internal citation omitted).
240. See Buckley, 424 U.S. at 138.
have wide discretion on a number of issues, within the sphere created by the 1908 and 1925 Treaties they exercise discretion as to measuring and defining the boundary.\textsuperscript{241} Therefore, it seems that the U.S. Commissioner is an officer of the United States under this first test, as he enjoys considerable discretion, often over a term of many years, and makes decisions of significant import to which federal courts have given dispositive weight.\textsuperscript{242}

OLC’s second necessary question to determine if someone is an officer is whether an office is “continuing.”\textsuperscript{243} This idea of continuing authority stems from a number of Supreme Court decisions, including Chief Justice Marshall’s explanation in \textit{United States v. Maurice}, that “[a]lthough an office is ‘an employment,’ it does not follow that every employment is an office. A man may certainly be employed under a contract . . . to do an act, or perform a service, without becoming an officer.”\textsuperscript{244} The Supreme Court supported this distinction in \textit{United States v. Germaine} in holding that a surgeon appointed by the Commissioner of Pensions for the purpose of examining pension applicants was not an officer because he was “only to act when called on by the Commissioner of Pensions in some special case.”\textsuperscript{245} Such reasoning is further buttressed by the fact that presidents dating back to Washington have tapped members of Congress to serve on commissions and international delegations without creating problems with the Incompatibility Clause, which would have required those members to give up their seats in Congress if they took an “Office under the United States.”\textsuperscript{246} This understanding of a temporal aspect to one being an “Officer” is also reflected in early opinions of the Attorney General (“AG”) and Reconstruction-era Supreme Court cases,\textsuperscript{247} as well as later

\begin{itemize}
\item \textsuperscript{241} See 1908 Treaty, supra note 74, arts. II–VIII; 1925 Treaty, supra note 97, art. IV.
\item \textsuperscript{242} Pettibone v. Cook County, Minn., 120 F.2d 850, 854–55 (8th Cir. 1941) (emphasizing that once the Commission has formally demarcated the international boundary, it is “fixed as a matter of law” thereby affecting territorial claims).
\item \textsuperscript{243} See OLC, Officers of the United States, supra note 217, at 23–45. A discussion of whether OLC’s analysis is beyond \textit{Buckley}’s requirements is unnecessary here since the Commissioner has delegated authority that is continuing. See infra notes 249–55 and accompanying text.
\item \textsuperscript{244} United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Note that Marshall decided this case while sitting as a circuit judge. \textit{Id}.
\item \textsuperscript{245} United States v. Germaine, 99 U.S. 508, 512 (1878).
\item \textsuperscript{246} OLC, Officers of the United States, supra note 217, at 24–25. For an interesting take on the President and the Incompatibility Clause, see Seth Barrett Tillman, \textit{Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause}, 4 DUKE J. CONST. L. & PUB. POL’Y 107 (2009).
\item \textsuperscript{247} See, e.g., United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867) (emphasizing the importance of duration and tenure in “Officer” status); Authority of Lieutenant Colonel Commandant of Marine Corps, 2 Op. Att’y Gen. 77, 78–79 (1828). \textit{Hartwell} also focused on
\end{itemize}
Court statements on the Appointments Clause and duration of office in *Germaine* and *Auffmordt v. Hedden*.248

The temporal aspect of the *Buckley* analysis is easily met by the 1925 Treaty. OLC views the history at the founding and Supreme Court precedent as follows: “An office exists where a position that possesses delegated sovereign authority is permanent, meaning that it is not limited by time or by being of such a nature that it will terminate ‘by the very fact of performance.’”249 Under the temporal analysis above, the Commissioners under the 1908 Treaty were not “Officers” in the strictest sense because their appointment was essentially as ad hoc commissioners for whom the 1908 Treaty contemplated that their work could be “completed.”250 The 1908 Treaty included no clause regarding termination, suggesting that the parties considered the Commissioners’ work completed and the Treaty satisfied when the boundary was “laid down” and “marked.”251 The 1925 Treaty, on the other hand, recognized that “boundary monuments deteriorate and at times are destroyed or damaged,” and that “changing conditions require from time to time that the boundary be marked more precisely and plainly by the establishment of additional monuments or the relocation of existing monuments.”252 It thus provided that “the Commissioners appointed under the provisions of [the 1908] Treaty shall continue to carry out the provisions of this Article” after the completion of the first total marking of the boundary.253

Further evidence that the parties intended the position of Commissioners to be ongoing is that, unlike the 1908 Treaty, the 1925 Treaty specified that the parties could terminate “upon twelve months’ written notice given by either Contracting Party to the other, and following such termination the commissioners therein mentioned and their successors shall cease to perform the functions thereby

emolument as a critical factor for whether one is an officer; however, the current understanding of the Constitution and Court precedent is that emolument may be evidence of an office but is not a necessary condition. See OLC, Officers of the United States, *supra* note 217, at 38–40 (noting that early federal officers received no regular compensation from the government, but instead the authority to collect fees).

248. See *Auffmordt v. Hedden*, 137 U.S. 310, 326–28 (1890) (finding that an appraiser is not an “officer” because his “position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily”); *Germaine*, 99 U.S. at 512.

249. OLC, Officers of the United States, *supra* note 217, at 32 (quoting *Bunn v. Illinois*, 45 Ill. 397, 405 (1867)).

250. See *1908 Treaty*, *supra* note 74, art. IX.

251. See *Id. arts. II–VIII.*

252. 1925 Treaty, *supra* note 97, art. IV.

253. Id.
prescribed.” Tellingly, the termination provision only allowed the parties to terminate Article IV of the Treaty, which extended the Commissioners’ role indefinitely and provided for their replacement “upon the death, resignation, or other disability of either of them.”

This text, buoyed by the fact that Commissioners have been operating continuously for the eighty-four years since the 1925 Treaty, shows that for the purposes of the “continuing” prong of the “Officers of the United States” analysis, the U.S. Commissioner is an officer.

One fact that supports the hypothesis that the nature of the U.S. Commissioner changed with the passage of the 1925 Treaty is that, while Senate-ratified, the 1908 “Treaty” was captioned as a “Convention” in both the title of the agreement as well as the concluding signature paragraph. While too much weight cannot be given to the Treaty-Convention distinction because in other sections of the 1908 text it refers to itself as both a “Convention” and a “Treaty,” in contrast, the 1925 Treaty refers to itself only as a “Treaty.” Though the distinction today between a treaty and a convention is essentially obsolete, earlier in American history a distinction did exist, and the distinction was based on the temporal length of the agreement. In any case, if “continuing” is what matters for the Appointments Clause, the 1925 Treaty makes the U.S. Commissioner “continuing” and, in fact, seems to make the office permanent.

The final and most difficult question is whether the significant authority that the U.S. Commissioner possesses is “pursuant to the laws of the United States.” To put the question another way: Is the U.S.

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254. Id. art. V.
255. Id. arts. IV–V.
256. See 1908 Treaty, supra note 74.
257. Compare id. arts. I, IX, X (“Treaty”) with id. at the title and signature area, referring to the agreement as a “Convention.”
258. 1925 Treaty, supra note 97. Again, this point cannot be given too much weight as the 1925 Treaty refers to the 1908 agreement as a “Treaty.” Id.
261. See Buckley v. Valeo, 424 U.S. 1, 126 (1976) (“We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’”).
Commissioner something other than an officer because he is operating under the authority of a “treaty,” as distinct from a “law”? The short answer to this question is that it presents a novel issue for which there may be no clear answer. The OLC has noted that an office for which the Appointments Clause applies will “ordinarily” be established under the authority of a statute. But, in rejecting a formalistic approach to the inquiry, it has found that “whether an office has been established by law does not turn on whether Congress has formally created an ‘office’ by law, but rather on whether the two necessary elements of an office . . . [‘delegated’ and ‘continuing’ authority] are present ‘by law.’” It continued, “The Constitution requires an examination of ‘the nature of the functions devolved upon’ a position by legal authority, not the way or form in which they are devolved.” Thus, generally, a formal distinction between a statute and a treaty may not be required. The OLC has, however, alluded to the treaty issue and used the boundary commissioners under the Jay Treaty as examples of officials who were not officers. Specifically, some of the critics of the Jay Treaty attacked it on the grounds that “the Appointments Clause prohibited the creation of commissioners by treaty.” Hamilton responded to these criticisms in a series of essays, which included the following statement regarding the commissioner that the Jay Treaty empowered:

[They] are not in a strict sense OFFICERS. They are arbitrators between the two Countries. Though in the Constitutions, both of the U States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.

The OLC has thus concluded that “[a]t least where these [border commissions] are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II.”

262. See OLC, Officers of the United States, supra note 217, at 36 (stating that an office subject to the Appointment Clause will ordinarily have been “established by Law,” either by a statute or under the authority of a statute).
263. Id. at 37.
264. Id. (quoting State v. Kennon, 7 Ohio St. 546, 558 (1857)) (emphasis added).
265. See OLC, Officers of the United States, supra note 217, at 25 (stating that the commissioners appointed under the Jay Treaty serve as an example of positions that are not offices); The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 146–47 n.67 (1996) [hereinafter OLC, Separation of Powers].
266. Id. at 25.
268. See OLC, Separation of Powers, supra note 265, at 146–47 n.67 (emphasis added).
Such a view could be damaging to a claim that the U.S. Commissioner is an officer, yet there are other key features that distinguish the IBC Commissioner from those under the Jay Treaty. First, the primary Appointments Clause criticism directed at the Jay Treaty was not toward one of the three commissioners appointed by the President, but, instead, at the deciding commissioner who was appointed “by lot.” From an Appointments Clause perspective, such an appointment, essentially by the flip of a coin, is more troubling than that of a presidential appointment specified in a treaty. Second, the OLC has relied on this incident from the fallout of the Jay Treaty, not as part of its argument that an officer exercising delegated authority under U.S. law must be acting pursuant to a statute, but, instead, as a component of its argument that to be an “Officer[] of the United States” an official’s tenure must not be temporary. The incident thus cannot provide dispositive guidance as to how someone with continuing, delegated authority under a treaty—particularly a self-executing treaty—should be classified. Finally, Hamilton made these arguments as one whose “overriding concern was to ensure the respectability of the new nation in the eyes of the European powers of the day,” which “required a set of constitutional doctrines and institutions that would facilitate . . . the nation’s compliance both with the law of nations and with its treaty obligations.”

Another important fact in understanding the status of the U.S. Commissioner is that Canada treats its commissioner as a government officer and considers appointment and removal of the U.S. Commissioner a matter of U.S. law. The IBC has explained that “[t]he Canadian Commissioner” is “a full-time permanent employee of the federal public service,” who formally “reports directly to the Minister

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269. Yet, if the Commissioner is not an “Officer” and is instead part of an international body, it is unclear why the President would have the power to remove him at all. And, if the President lacked any removal power, this could create potentially unconstitutional delegation problems.

270. The Jay Treaty, supra note 51, art. V.

271. OLC, Officers of the United States, supra note 217, at 25; Separation of Powers, supra note 265, at 146–47 n.67.

272. David Golove, The Hamiltonian Constitution and Foreign Affairs, 95 AM. SOC’Y INT’L L. PROC. 107, 107 (2001). Hamilton’s statement was made in defense of constitutional attacks on the Jay Treaty, and it may be more accurately understood as political argument rather than constitutional interpretation. Republicans were so angered with the Jay Treaty, which they viewed as a political and diplomatic embarrassment to the recently victorious United States, see JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 136–37 (2002), that they found “constitutional infirmities in virtually every provision in the treaty,” an overreach “which Federalists were ultimately to use to devastating advantage.” See David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075, 1162–63 (2000).
for Foreign Affairs.”273 In addition, “the Canadian section of the Commission is an administrative part of the Department of Natural Resources.”274 While there is uncertainty as to how another country’s view of its own commissioner to an organization created by treaty should inform the U.S. view of “Officer” status,275 the fact that the Canadian Commissioner is an officer does advise in favor of similar treatment for the U.S. Commissioner. There is no evidence in either the 1908 or 1925 Treaty that the officials should be given different legal status in each country. Further, the Government of Canada has informed the State Department that it “considers the process of the appointment, tenure, and termination of the U.S. Commissioner of the IBC . . . to be a matter within the sole purview of the U.S. Government” and thus subject to U.S. law.276

Two final indicia support the notion that the U.S. Commissioner is an “Officer.” First, in a 1954 application of the Annual and Sick Leave Act of 1951, President Eisenhower exercised his discretion under the Act to provide a list of “officers in the executive branch of the Government” to whom the Act would not apply.277 Eisenhower included the IBC Commissioner as one of these “officers.”278 Second, the 1925 Treaty, in describing the IBC, speaks of “Commissioners” in all but one instance for which it references “commissioners.”279 The interesting aspect of this capitalization choice is that, while using the capitalized form nineteen times when describing the duties of what would become the IBC, the one time that the drafters used the uncapitalized “commissioner” was in the section of the Treaty on the relationship between the actual officer and his respective government:

The Contracting Parties further agree that each government shall pay the salaries and expenses of its own commissioner and his assistants, and that the expenses jointly incurred by the Commissioners in maintaining the demarcation of the boundary line in accordance with the

274. Id.
275. How one party to a treaty views its own officials is likely important under the VCLT, but following the Supreme Court’s decision in Medellín it is debatable how much practical significance a reviewing court would place on the VCLT analysis.
279. 1925 Treaty, supra note 97, art. IV.
provisions of this Article shall be borne equally by the two Governments.280

It is possible that an analysis parsing whether “commissioner” is capitalized, puts more weight on the text of the Treaty than it is able to bear.281 It is at least interesting, however, that the usage is different in Article IV of the 1925 Treaty, particularly given the use of the capitalized “Commissioners” in the same sentence when the Treaty is again referring to the officials’ acts that would be considered acts or duties of the IBC itself. It is also interesting that the 1908 Treaty’s corresponding language capitalized the word “Commissioners,” which supports the idea discussed above that the 1925 Treaty, in making the Commissioners permanent, changed their status to officers of their respective governments.282 Considering the U.S. Commissioner both a U.S. “officer” in his role promoting U.S. interests at the IBC but an agent of the internationally characterized IBC once the Commission has made a decision and is acting pursuant to the 1908 and 1925 Treaties, is a similar conceptual structure to the role of the U.S. Commissioner to the IBWC which existed—then as the International Boundary Commission—when the parties created the IBC.

After this analysis, it may be inescapable that whether the U.S. Commissioner is an “Officer[ ]” turns on whether a treaty is a “law” for purposes of the Appointment Clause analysis. If a treaty is not “law,” this might actually suggest that the President has even less authority to remove the Commissioner. This Article, however, argues that a treaty should be considered “law” for the Appointments Clause analysis, though the issue is likely an open question.283 However, regardless of

280. Id.
281. Outside the treaty context, Professors Amar and Pfander have counseled against attaching undue weight to punctuation or capitalization in textual interpretation, though both have noted that it is occasionally relevant and sometimes dispositive. See Akhil Reed Amar, Our Forgotten Constitution: A Bicentennial Comment, 97 YALE L.J. 281, 286 n.25 (1987) (arguing that punctuation and capitalization differences are unlikely to result in significantly different interpretations); Akhil Reed Amar, A Neo–Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 217 n.50 (1985) (contending that the comma following the word “fact” in the exceptions clause implies that the exception power applies to appellate jurisdiction); James E. Pfander, Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers, 101 COLUM. L. REV. 1515 (2001) (discussing Chief Justice Marshall’s opinion in Marbury v. Madison, where he declared the power of judicial review from the text of the Constitution); James E. Pfander, Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals, 78 TEX. L. REV. 1433, 1472 n.172 (2000) (cautioning that too much emphasis should not be placed upon capitalization when interpreting supervisory powers).
282. 1908 Treaty, supra note 74, art. IX (“Each Government shall pay the expenses of its own Commissioners and their assistants, and the cost of marking and monumenting the boundary shall be paid in equal moieties by the two Governments.”).
283. See supra notes 230–48, 261–91 and accompanying text; see also United States v.
one’s views, whether a treaty is deemed to be “law” may depend in
great part on whether the treaty is self-executing. Thus, this Article
engages in that necessary analysis below, determining that the 1908 and
1925 Treaties are self-executing.284

But even if a treaty is not law the removal power jurisprudence
remains important as a way to think about the President’s ability to
remove the U.S. Commissioner. If a self-executing treaty is not law, the
President would be unable to explicitly rely on his removal power if the
Commissioner were able to challenge his removal. Thus, the Leu
district court’s decision and its focus on Myers and Shurtleff would be
inappropriate if the Commissioner was not an “Officer[] of the United
States” because he was not acting pursuant to “laws of the United
States.”285 Without an officer, and with appointment and removal
problems aside, the issue would simply be a matter of treaty
interpretation: whether the treaties allowed the President to remove the
Commissioner as well as whether the treaties created a right by which
some party could challenge removal in a U.S. court. The removal
power could be applicable to this interpretive discussion in terms of
how the President and Congress understood the treaty or what
normative values the court should promote if evidence from the treaties
is insufficient.

In sum, the removal power jurisprudence remains informative if the
U.S. Commissioner is not an “Officer[] of the United States” because
the same normative considerations of presidential control, executive
delegation, and bureaucratic expertise are in play. If, however, the
Commissioner is such an “Officer,” as this Article concludes, the
removal power jurisprudence is directly authoritative.

B. The Removal Power Jurisprudence

Although the Constitution does not explicitly address the removal
power, the Supreme Court has acknowledged the constitutional
dimension of the power for more than two-hundred years. Whether a
limitation on the removal of the IBC Commissioner is constitutional is
critical because, regardless of what the 1908 and 1925 Treaties say, the

Ferreira, 54 U.S. 40 (1851) (declining to decide if a federal district court judge, sitting as a
“commissioner” hearing claims arising from the Spanish cession of Florida to the United States
pursuant to and so designated by the 1819 treaty was an officer of the United States, but finding
no problem with the fact that a treaty could so designate him).

284. See infra Part IV.
285. See Leu v. Int’l Boundary Comm’n, 523 F. Supp. 2d 1199, 1205, 1207–08, 1212 (W.D.
Wash. 2007) (cautioning that too much emphasis should not be placed upon capitalization when
interpreting supervisory powers).
Supreme Court recently reiterated that “the treaty-making power of the United States ‘does not extend so far as to authorize what the Constitution forbids.’”286 Though there has been exhaustive academic debate regarding the extent of unitarianism that the Constitution requires,287 there is general agreement that the removal power derives from the Vesting Clause: “The executive Power shall be vested in a President of the United States of America.”288 And, to varying degrees, scholars believe this argument is supported by the Take Care Clause: “[The President] shall take Care that the Laws be faithfully executed.”289 The First Congress, in what has come to be known as the Decision of 1789, concluded that the President held a constitutionally-vested power to remove executive officers,290 but it did not agree on a lone textual source for the power.291 Though there were more than two perspectives in the House debate, the crux of the argument focused on whether the President could remove officers by himself,292 James Madison’s view, or if he needed the advice and consent of the Senate, as originally advocated by Alexander Hamilton.293 The implications of


287. See Lessig & Sunstein, supra note 14, at 8–11, 23–32 (discussing the two viewpoints concerning a unitary executive: one which posits that the President has unlimited power over the execution of administrative functions, and another which argues Congress has a wide degree of authority to structure the government).


289. Id. § 3. Under a third theory, the removal power is derived from the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and “[t]he right to remove is an incident to the power of appointment.” Ex parte Hennen, 38 U.S. (13 Pet.) 230, 253 (1839). Commentators have explained that this theory, while symmetrical, is not supported constitutionally, practically, or historically. See, e.g., Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 161 (1994) (contending that the removal tied to appointment theory was implicitly discarded in Humphrey’s Executor); Saikrishna Prakash, Removal and Tenure in Office, 92 Va. L. Rev. 1779, 1834–36 (2006) (insisting that the President does not have the power to remove all of the officials that he appoints, given that entities who select officials do not necessarily have the authority to remove them because they appointed the officials). The Supreme Court and recent administrations have seemed more reluctant to abandon this view despite its deficiencies. See, e.g., Morrison v. Olson, 487 U.S. 654, 678–79 (1988) (stating that the Special Division’s power to appoint officials is derived from the Appointments Clause); 7 Op. Off. Legal Counsel 95, 97–100 (1983) (contending that the President’s removal power is based upon the presumption that the power to appoint implies the power to remove).


291. See Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545, 658 (2004) (stating that there was no consensus among proponents of the President’s removal power as to its source, given that some proponents believed the power arose from the Article II Vesting Clause, while others believed that the legislature could entrust the President with such power).

292. Myers, 272 U.S. at 119–33.

293. THE FEDERALIST NO. 77 (Alexander Hamilton). As secretary of the treasury in
the Decision of 1789 raise a number of important constitutional law issues, many of which are outside the scope of this Article. Yet, live issues in that debate, namely executive control, political accountability, and checks and balances, are relevant for a normative discussion of whether treaties can and should be able to provide outer limits to certain executive removals.

Fourteen years after the Decision of 1789, Chief Justice Marshall offered the first Supreme Court statement on the removal power in *Marbury v. Madison*.294 Though writing in dicta,295 Marshall viewed the power narrowly—perhaps very narrowly by modern unitarians’ standards—finding that an appointment created vested legal rights to an office.296 Despite the lack of precedential weight in Marshall’s statement, the Court has employed the reasoning behind it—that Congress may limit the removal power when the limitation does not infringe on the President’s Article II duties—in subsequent removal decisions.297

Though the cases arising out of twentieth century removals are most important for this Article’s analysis—partially because the earlier cases often operated under a flawed premise of the removal power based on the Appointment Clause298—there is at least one additional nineteenth century removal case that is relevant for analyzing the removal of the IBC Commissioner. In *Shurtleff v. United States*,299 the Court held that President McKinley did not violate a statutory, cause-based limit on the President’s removal of Ferdinand Shurtleff, an appraiser of merchandise under the Customs Administrative Act, when President McKinley fired him without providing cause for removal.300 Assuming that the Constitution allowed Congress to limit the removal power, the Court


294. 5 U.S. (1 Cranch) 137 (1803).


298. *See, e.g.*, Shurtleff v. United States, 189 U.S. 311, 314–15 (1903) (stating that the President can remove an officer by virtue of his power of appointment); *Parsons*, 167 U.S. at 331 (describing the power of removal as incident to the power of appointment); *Ex parte Hennen*, 38 U.S. (3 Pet.) 230, 253 (1839) (insisting that the power to remove is essential to the power to appoint).

299. 189 U.S. 311 (1903).

300. *Id.* at 317–19.
said that implying life tenure, as Shurtleff claimed, from the Customs Administrative Act, required “very clear and explicit language,” which was not present in the statute.301 In looking for a clear statement, the infrequency of life tenure and the absence of congressional intent to pick the office of appraiser of merchandise for special consideration drove the Court’s decision.302 While the so-called “presumption” in Shurtleff has been relied on by proponents of a strong unitary executive theory,303 after the later removal cases, discussed below,304 Shurtleff “appeared confined to its factual setting,”305 or was, perhaps, “implicitly revers[ed].”306

Continuing this view of expansive executive power, in Myers v. United States, the Court, with a former President at its head,307 addressed the scope of the President’s removal power more explicitly than Marbury and Shurtleff.308 Frank S. Myers, a First Class Postmaster in Portland, Oregon was removed as part of President Woodrow Wilson’s firing of Republican postmasters,309 notwithstanding a statute providing that a postmaster could only be removed before the end of his term with the advice and consent of the Senate.310 Chief Justice Taft spent considerable length analyzing the framers’ debates, finding that the constitutional structure supported the President’s exclusive removal power.311 Even Myers, however, implicitly conceded that Congress possessed the power to shield inferior officers, including those who served political functions, from plenary presidential removal.312

301. Id. at 315. The statute at issue, the Customs Administrative Act, read as follows: “[T]here shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise . . . . They . . . may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office . . . .” Id. at 313.

302. Id. at 315–18.

303. E.g., Yoo, Calabresi, & Colangelo, supra note 14, at 631.

304. See infra notes 313–22 and accompanying text.


306. See Yoo, Calabresi, & Colangelo, supra note 14, at 631 (stating that the Court in Weiner implicitly reversed the presumption in Shurtleff against construing statutes as limiting removal power).


308. 272 U.S. 52 (1926).


311. Id. at 106, 161.

312. See id. at 116, 173–74 (insisting that the Senate’s appointment of inferior offices prevents their classification into the merit system); see also Prakash, supra note 309, at 182 (“In
The high-water mark of the Supreme Court’s recognition of presidential removal power in *Myers* lasted only nine years, as the Court limited the scope of *Myers* in *Humphrey’s Executor v. United States*.

Unlike *Myers*, over which the Court was divided, in *Humphrey’s Executor* the Court unanimously upheld Congress’ authority to limit removal of a commissioner of the Federal Trade Commission (“FTC”) to cases of “inefficiency, neglect of duty, or malfeasance in office.”

The Court drew a key distinction between “purely executive officers,” such as the postmaster in *Myers*, for whom the President alone could make removal decisions, and “quasi-legislative” or “quasi-judicial” officers, like those at the FTC, for whom Congress was able to constrain the President’s removal power. Conceptually, this distinction responded to the concern that if Congress was unable to check the removal of “quasi-legislative” or “quasi-judicial” officers, the only check on removal would be through judicial review.

The Court has since clarified that an officer’s classification is not dispositive in determining whether Congress can limit the President’s removal power; however, the Court has not entirely abandoned its reasoning in *Humphrey’s Executor*. The Court deployed that reasoning in *Wiener v. United States*, the next major removal power case. *Wiener* expanded on *Humphrey’s Executor*, holding that even if no statutory limit on removal existed, the President may not be able to remove executive officers where independence from the President is desirable.

*Wiener* was a former member of the War Claims Commission. He was appointed by President Truman, but President Eisenhower removed him without cause. The statute creating and governing the War Claims Commission was silent on removal, but a unanimous Court held that the President’s removal authority over a “quasi-judicial” officer was not

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313. 295 U.S. 602 (1935).
314. *Myers*, 272 U.S. at 240 (Brandeis, J., dissenting); *id.* at 295 (Holmes, J., dissenting).
315. *Humphrey’s Ex’r*, 295 U.S. at 623. The Court referred to this standard as “for cause.” *Id.* at 629.
316. *Id.* at 629–32.
317. *Id.* at 629.
318. See *Morrison v. Olson*, 487 U.S. 654, 689–91 (1988) (stating that Congress’ ability to impose a restriction upon the President’s removal power does not depend on whether the official is “purely executive”).
2009] International Boundary Commission 87

plenary when there was reason that the officer should exert some independence and that Congress may have assumed such independence in drafting the statute.322

Following Myers, Humphrey’s Executor, and Wiener, it appeared as though the Court had reached equilibrium in the removal debate. The majority understanding of the removal power was that an officer attempting to show that his removal exceeded the removal power had to make two showings.323 First, he had to show that he did not exercise “purely executive” power because the President possesses “the unrestrictable power . . . to remove purely executive officers.”324 Second, if he was able to demonstrate that, like Humphrey’s Executor and Wiener, he possessed “quasi-legislative” or “quasi-judicial” power, he had to then show that Congress either explicitly limited the President’s removal power or that the Court could find such intent from a clear purpose such as establishing independence or insulation from direct executive oversight.325

This understanding was adjusted, and perhaps “wholly eviscerated,”326 by the Court’s most recent decision on the removal power. In Morrison v. Olson, the Court rejected a challenge to the constitutionality of the independent counsel (“IC”) provisions of the Ethics in Government Act.327 Assistant AG, Theodore Olson, and two other executive officers328 brought the challenge to the IC Act, which limited the Attorney General’s removal of the IC to situations where the AG had good cause.329 Further, the Act required that after the AG effected a removal, he would file a report with the House and Senate

322. Id. at 352, 354–56. The Court continued to rely on Wiener’s function as the key issue in the case, but Wiener remains important for its holding that where independence from the President is desirable, the Court is more willing to find a limit to the removal power. See id. at 352–56.
323. Chabal v. Reagan, 841 F. 2d 1216, 1219 (3d Cir. 1988); see Kalaris v. Donovan, 697 F.2d 376, 389–91 (D.C. Cir. 1983) (holding that the removed members failed to show that Congress had exercised its authority to limit the President’s power of removal by creating an Article III court).
324. See Humphrey’s Ex’r v. United States, 295 U.S. 602, 632 (1935) (stating that the Myers case sustains the unrestrictable power of the President to remove purely executive officers).
325. See Wiener, 357 U.S. at 356 (stating that by passing the War Claims Act of 1948, Congress did not want the President to have the ability to appoint Commissioners of his choosing to the War Claims Commission).
326. See Prakash, supra note 309, at 192.
328. The other officers joining Olson were Edward Schmults, Deputy Attorney General, and Carol Dinkins, Assistant AG for the Land and Natural Resources Division. Morrison, 487 U.S. at 665.
Judiciary Committees describing the grounds for removal. The Court conceded that *Humphrey’s Executor* rejected some of the reasoning in *Myers* by sanctioning removal limitations for officers performing “quasi-judicial” or “quasi-legislative” functions, finding such limits contrary to *Myers*. More specifically, *Myers* envisioned unfettered presidential removal of any officer performing some “purely executive” functions regardless of what other functions the officer performed.

The *Morrison* Court could have reconciled *Myers*, *Humphrey’s Executor*, and *Wiener* while eliminating any doubt that Congress could limit removal of certain officers, but instead the Court addressed the removal question from an entirely different approach. Chief Justice Rehnquist, writing for the *Morrison* majority, emphasized that the question of whether Congress can limit the removal of an officer cannot turn on the “rigid categories” of whether that officer is considered “executive.”

Rehnquist, taking a functional approach, instead explained that the critical inquiry contains two steps: first, whether an officer is a principal officer, for whom the Constitution requires unlimited presidential removal, or an inferior officer for whom Congress can create removal limitations. Second, if the officer falls into the latter category and Congress is able to impose removal limitations, the question becomes whether the limitation on the removal power with regard to that officer interferes with “the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article

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330. *See Morrison*, 487 U.S. at 687–91 (stating that Congress may fix the terms of quasi-legislative and quasi-judicial offices and forbid their removal without cause); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935).


332. *Morrison*, 487 U.S. at 659. Justice Scalia, alone, wrote an impassioned dissent that focused on what he viewed as the only relevant inquiry: whether the Independent Counsel’s exercise of prosecutorial power was “executive” power, and, if it was, whether the Ethics in Government Act deprived the President of any control over that power. *Id.* at 705 (Scalia, J., dissenting).

333. *Id.* at 689–90. The Leus claimed that the U.S. Commissioner “solely performs Executive functions” and does not engage in any activities that are “quasi judicial.” Plaintiff’s Response to Motion to Quash at 10, Leu v. Int’l Boundary Comm’n, 523 F. Supp. 2d 1199 (W.D. Wash. 2007) (No. C07-0510). However, there is a possible counterargument based on Hamilton’s claim that boundary commissioners are more like arbitrators than officers. *See supra* note 267 and accompanying text.

334. *See Morrison*, 487 U.S. at 689–90. It is worth noting that the *Morrison* analysis occurred in a purely domestic context and that interference of the executive power may be an easier threshold to meet in the foreign affairs context. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 445 (1998) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)) (stating that in relation to foreign affairs, the President has “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved”).
Thus, Congress could neither limit the President’s ability to execute the laws, nor actually participate in the removal itself or review the removal decision. The Court recognized that Congress could, however, create *ex ante* limits on the removal of inferior officers.

How this jurisprudence applies to removal limitations purportedly created by treaty is unclear, but there are reasons to be more comfortable with removal limitations for an inferior officer created by treaty than those in a typical statute. If a self-executing treaty, like a federal law or the Constitution itself, is the “supreme Law of the land,” a treaty should be able to limit removal of inferior officers, though no court has addressed this issue. While there is undoubtedly tension between the removal cases, the Court’s main concern has been with instances in which Congress used legislation preemptively to assert a role for itself in later removal confrontations. When Congress has, instead, created a situation in which a fired officer can challenge his removal, the Court has allowed the limitations because such limitations have not raised concerns with congressional aggrandizement.

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336. See *Bowsher* v. Synar, 478 U.S. 714, 726 (1986) (holding that Congress cannot remove an officer through means other than impeachment because such power would give Congress control over the execution of the laws).

337. This leaves the challenge for Congress, if it desires to create removal limitations, twofold: identify whether an officer is an inferior officer, and if she is, tailor removal limits that do not violate the principles from *Morrison*. Many commentators agree that Congress can provide such limits on the removal of inferior officers. See, e.g., Christian M. Halliburton, *The Constitutional and Statutory Framework Organizing the Office of the United States Attorney*, 31 *Seattle U. L. Rev.* 213, 215 (2008); Lessig & Sunstein, supra note 14, at 117–18 (stating that Congress may immunize four categories of officials from presidential control: (1) high-level officials who exercise foreign affairs powers; (2) officers who exercise adjudicative or ministerial functions; (3) officials who have conflicts of interest; and (4) domestic officials who can be controlled through policy directions of the President); see also Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 *Tenn. L. Rev.* 841, 861 (1993) (“Congress’s ability to fetter the President’s discretion in removing inferior officers has never been seriously doubted.”).

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

339. But see infra note 344 and accompanying text.

340. If one looks for a bicameralism problem similar to *INS v. Chadha*, 462 U.S. 919 (1983), that concern is less compelling here where the substantive issue comprises two areas—appointment (and removal) and treaty-making—for which the Senate is constitutionally-required to act without the input of the House of Representatives. Further, unlike *Chadha*, the issue in the present case is not that either house of Congress could act to constrain the President.

341. *See Bowsher*, 478 U.S. at 726 (holding that Congress cannot reserve the power to remove an officer by means other than impeachment, as such power would essentially permit Congress to execute laws); *Chadha*, 462 U.S. at 958–59 (stating that the one-House veto purporting to review Executive action essentially constituted a judicial act and therefore was unconstitutional); *Myers v. United States*, 272 U.S. 52, 161 (1926) (insisting that the Court has never held that Congress holds the power to remove); *Magill*, supra note 331, at 52 (stating that the Congress may indirectly limit the President’s removal power by providing tenure protection).

Second, normative concerns of bicameralism are not as much at issue when the position of the Commissioner to the IBC is one that is created without the approval of the House of Representatives. So, as long as the removal limitations created by a Senate-ratified treaty comport with the limitations set out in the cases above, the Article II power is retained.343

C. The International Boundary Commission Commissioner is an Inferior Officer

Having concluded that the U.S. Commissioner to the IBC is an “Officer[] of the United States,” this Section argues that he is an inferior officer. The Constitution uses but fails to define the term “inferior Officer,” and recognition of the difficulty in defining who is an inferior officer is not new.344 The Supreme Court has interpreted the Appointments Clause as creating two classes of executive officers.345 “Principal officers” are those who the President nominates “with the advice and consent of the Senate.”346 In contrast, Congress may vest the appointment of inferior officers in a department head or the President alone and Congress is thus empowered to limit the President’s removal power.347

In recent decisions, the Supreme Court created competing precedents that arguably muddy the waters as to which officers are inferior officers. In *Morrison*, the Court declined to provide a generally applicable line between principal and inferior officers in finding that the IC under the Ethics in Government Act was an inferior officer. The Court did, however, base its finding on the following factors: the IC held his office subject to removal by the AG;348 he possessed limited duties; his

Act does not serve as an attempt by Congress to remove officials, but instead places the power of removal in the hands of the Executive Branch); Wiener v. United States, 357 U.S. 349, 355–56 (1958) (holding that the War Claims Commission was a constitutionally permissible commission created by Congress to adjudicate the legal claims of those who had been removed); Humphrey’s Ex’r v. United States, 295 U.S. 602, 629–30 (1935) (holding that Congress has the authority to fix the terms of quasi-legislative and quasi-judicial offices).

343. *See* Kart, *supra* note 10 (quoting Elliot Feldman, “Those treaties have represented our security on the northern border for 100 years, and the president has chosen to side with a private property group over national security.”).

344. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 362 (Melville M. Bigelow ed., Boston: Little, Brown, and Company 5th ed. 1891) (stating that there is no exact line drawn between those who are inferior officers and those who are not).


346. Buckley v. Valeo, 424 U.S. 1, 132 (1976). Some inferior officers are appointed by advice and consent, but this is the result of Congress choosing to impose that method of appointment by statute. *See* id.


348. This factor is surprisingly circular: an officer may be inferior because the duration of her office can be limited through removal by another officer, but Congress can only attach removal limitations—temporal limits, for example—to an officer’s position if they are an inferior officer.
authority was tempered by DOJ policy; his jurisdiction was not plenary; and his tenure was temporally limited.349

After Morrison, the Supreme Court revisited its parsing of principal and inferior officers in Edmond v. United States.350 The Edmond Court upheld the Secretary of Transportation’s appointment of U.S. Coast Guard Court of Appeals judges, holding that such judges are inferior officers primarily because a politically accountable principal officer supervises the judges’ work. The Court focused not on whether there was an officer who was formally designated as superior to the alleged inferior officer. Instead, the Court explained the issue by stating that within “the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”351 Like many commentators, the DOJ opined that the Court failed to provide clear guidance for what constitutes an inferior officer.352 OLC also agreed with courts analyzing Morrison in light of Edmond in finding that the Morrison factors do not constitute an exclusive or exhaustive list of considerations as to the proper categorization of an officer.353

Under either a Morrison or an Edmond analysis, the U.S. Commissioner would be an inferior officer. Under the Morrison analysis, the IBC itself, and by extension its Commissioners, have authority over a very specific, limited subject, measured by substantive control, geography, or budget.354 While the power over territory is significant,355 the U.S. Commissioner’s authority is offset almost entirely by the narrow scope of the 1908 and 1925 Treaties.356

The question is closer under Edmond, however, because one could argue that the structure of the IBC makes it such that the U.S. Commissioner’s work is neither directed nor supervised by another politically accountable actor who was appointed by the President with

349. See Morrison, 487 U.S. at 671–72.
351. Id. at 663.
353. See OLC, Separation of Powers, supra note 265, at 150.
354. See supra notes 37–42 and accompanying text (describing the narrow scope of authority of the IBC).
355. See supra note 239 and accompanying text.
356. See supra notes 37–42, 91–103 and accompanying text.
the Senate’s advice and consent. On one hand, the U.S. Commissioner has as much if not more “supervision” than the Independent Counsel at issue in *Morrison*. However, within the *Edmond* analysis, the claim of supervision is questionable. In some ways, the U.S. Commissioner is able to act without supervision from the Secretary of State, which is, in fact, one of the purposes of the Treaties. However, in an important way, the 1925 Treaty retains supervision. If the State Department views the IBC Commissioner as a rogue actor who is not following the Treaty, then the Secretary of State can recommend that the President terminate the Treaty pursuant to its provisions. The same action may also occur where, as here, the executive branch makes a determination that the Commissioner is following the Treaty, but that it is nevertheless so opposed to the Commissioner’s actions that it is prepared to suffer any political fallout from terminating the Treaty. Of course, this has the effect of ending the Commissioner’s tenure. One cannot object to viewing this ultimate removal through Treaty termination as failing to “supervise” and “direct” without questioning the efficacy of the entire removal power, which is predicated on the fact that the power to remove is the power to control.

The inferior officer interpretation of the Commissioner is further supported by a potential reviewing court’s desire to interpret the 1908 and 1925 Treaties so as not to violate the Constitution. If the Commissioner is considered an officer with continuing, delegated authority—i.e., if he exercises “significant authority pursuant to the laws of the United States”—there may be an Appointments Clause issue with the President appointing the Commissioner without Senate advice and consent. Because courts should generally interpret a treaty to which the U.S. is a party as not violative of the Constitution if one plausible interpretation would render the treaty permissible, the

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358. See *1925 Treaty*, *supra* note 97, art. V. In the State Department’s own words from a 1977 memo, the IBC is subject to “ultimate overall review by the Secretary [of State],” see *Reply on Motion to Quash*, *supra* note 198, at 27, and the IBC has described the U.S. Commissioner as “report[ing] to the Secretary of State.” *Plaintiff’s Response to Motion to Dismiss* at 24, *Leu v. Int’l Boundary Comm’n*, 523 F. Supp. 2d 1199 (W.D. Wash. 2007) (No. C07-0510).
359. See *Lessig & Sunstein*, *supra* note 14, at 83 (citing 13 REG. DEB. 431–32 (1837) (Expunging Debate)).
preferable option is to recognize that the Commissioner is an inferior officer: (1) whose work is supervised by the Secretary of State, (2) whose scope is limited by the IBC Treaties, and (3) who remains politically accountable, not through direct intervention by the State Department but through the State Department’s ability to recommend that the President terminate the 1925 Treaty by giving notice to Canada, as the Treaty provides.363

IV. SELF-EXECUTING TREATIES AND THE INTERNATIONAL BOUNDARY COMMISSION: DID THE 1908 AND 1925 TREATIES LIMIT REMOVAL?

Despite early, eloquent statements from the Supreme Court, whether a treaty is self-executing remains a vexing yet necessary inquiry that complicates the analysis of the propriety of the removal of Commissioner Schornack.364 If the IBC Treaties are not self-executing it is much more difficult to claim that the U.S. Commissioner is an “Officer” exercising “significant authority pursuant to the laws of the United States.”365 Section III.A explains the Court’s current framework for determining whether a treaty is self-executing. Section III.B argues that under this framework the 1908 and 1925 Treaties are self-executing based on their text, negotiating history, and postratification understanding. That the only appellate court to consider the issue held that the Treaties are self-executing further supports this contention.366

362. “IBC Treaties” is used to describe the 1908 and 1925 Treaties collectively.
363. See 1925 Treaty, supra note 97, art. V.
365. Buckley, 424 U.S. at 126. Further, it would be more difficult to find any way to enforce the Treaties except through Canadian action at international law. Practically, such action, lacking something like the Draft Articles on State Responsibility, see Draft Articles on State Responsibility, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/RES/56/10 (Dec. 12, 2001), would have to occur through diplomatic channels.
366. See Pettibone v. Cook County, Minn., 120 F.2d 850 (8th Cir. 1941).
A. The Supreme Law of the Land, Self-Executing Treaties, and Medellín v. Texas

Although it is not clear from the text of the Constitution that there is a distinction between treaties that have automatic force in domestic law and those that do not, such a distinction has existed nearly since the Founding. The Supremacy Clause states that, like the Constitution and federal statutes, “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land.” In discussing—and really introducing—the distinction between treaties that have immediate application and those requiring legislative action to have binding effect domestically, Chief Justice Marshall wrote, “Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.” Marshall explained, however, that not all treaties were immediately the law of the land upon their ratification: “But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”

In the Supreme Court’s next attempt to address this distinction, the Head Money Cases, the Court emphasized the now frequently-quoted idea that “[a] treaty is primarily a compact between independent nations. It depends, for the enforcement of its provisions, on the interest and the honor of the governments which are parties to it.” The Court did, however, recognize the existence of self-executing treaties, and the primary holding was that there is nothing inherent to treaties that makes them supreme to federal legislation. Until 2008, these statements were some of the most authoritative guidance on whether a treaty was self-executing. One commentator summed up the resulting confusion, stating that “[t]he distinction between ‘self-executing’ and ‘non-self-executing’ treaties is more easily stated than applied.”

The Supreme Court recently addressed the confusion over the distinction between treaties that are self-executing and those that are not

367. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 171 (2d ed. 2006).
368. U.S. CONST. art. VI, cl. 2.
370. Id.
371. 112 U.S. 580, 598 (1884).
372. Id. at 599.
373. WESTON ET AL., supra note 364, at 244.
in Medellín v. Texas.\textsuperscript{374} In Medellín,\textsuperscript{375} the Court rejected the appeal of Jose Ernesto Medellín, who was convicted of murder in Texas and was one of fifty-one Mexican nationals named in the ICJ’s decision in Case Concerning Avena and Other Mexican Nationals.\textsuperscript{376} The Supreme Court granted certiorari to consider, \textit{inter alia}, whether “the ICJ’s judgment in Avena [is] directly enforceable as domestic law in a state court.”\textsuperscript{377} The Court held that Avena did not constitute “directly enforceable federal law that pre-empt[s] state limitations on [the] filing of successive habeas petitions” in part because neither the Optional Protocol to the Vienna Convention,\textsuperscript{378} the United Nations Charter,\textsuperscript{379} nor the ICJ Statute,\textsuperscript{380} created binding federal law without implementing legislation.\textsuperscript{381}

The Medellín Court first addressed the issue of self-executing treaties in broad terms. It explained that “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 those terms.’”\textsuperscript{382} The Court reiterated that “a treaty is ‘equivalent to an act of the legislature,’ and hence self-executing when it ‘operates of itself without the aid of any legislative provision.’”\textsuperscript{383} To the Medellín majority,\textsuperscript{384} a self-executing treaty was one that “has automatic

\textsuperscript{374} 128 S. Ct. 1346 (2008).
\textsuperscript{375} Medellín was one of the Court’s recent consular rights cases. See also Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (holding Vienna Convention on Consular Relations (“VCCR”) did not authorize remedy of suppression of evidence gathered in violation of right of consular notification and communication); Medellín v. Dretke, 544 U.S. 660 (2005) (dismissing certiorari of claim for violation of VCCR consular notification rights, where plaintiff had remaining recourse in state courts); Breard v. Greene, 523 U.S. 371 (1998) (denying habeas and certiorari petitions of plaintiff scheduled for execution, where plaintiff alleged violations of VCCR right of consular notification).
\textsuperscript{376} See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). In Avena, the ICJ had held that Medellín and others were entitled to judicial review of their sentences and state-court convictions. \textit{Id.}
\textsuperscript{377} Medellín, 128 S. Ct. at 1353.
\textsuperscript{379} See U.N. Charter art. 92.
\textsuperscript{381} Medellín, 128 S. Ct. at 1357.
\textsuperscript{382} \textit{Id.} at 1356.
\textsuperscript{383} \textit{Id.} at 1375 (Breyer, J., dissenting) (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 315 (1829)).
\textsuperscript{384} There has been significant reaction to Medellín, much of it negative, or at least calling for a narrow interpretation of the case. See, e.g., Carlos Manuel Vázquez, \textit{Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties}, 122 HARV. L. REV. 599, 602, 649 (2008); \textit{The Supreme Court, 2007 Term — Leading Cases}, 122 HARV. L. REV. 435
domestic effect as federal law upon ratification.”385 Thus, “a ‘non self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effects depends upon implementing legislation passed by Congress.”386

In order to remedy the Court’s overly vague definition of self-executing treaties, the Medellín majority laid down factors to consider when examining whether a treaty is self-executing. According to the Court, “[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text.”387 In addition to text, the Court cited two “aids to its interpretation” in deciding whether a treaty is self-executing: “the negotiating and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations.”388

Under the analytical framework that it created, the Court found that the text of the Optional Protocol was a “bare grant of jurisdiction” and neither spoke to the effect of ICJ decisions nor required State-parties to comply with them.389 The Court thus dismissed the domestic enforceability of the Optional Protocol, though it did not discuss it specifically in terms of self-execution. The Court did answer the self-executing question in the negative as to Article 94 of the U.N. Charter, relying on the language that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”390 The Court agreed with the Government’s interpretation of this language, finding that it was a “commitment on the part of U.N. members to take future action through their political branches to comply with an ICJ decision.”391 While the Court focused on its interpretation of this text, it supported its decision by noting that the executive branch, when it signed the U.N. Charter, understood that the United States could veto the enforceability of any ICJ judgment through its Security Council veto. The Court relied heavily on the “undertakes to comply” language,

(2008). Because this Article finds that the 1908 and 1925 Treaties are self-executing even under the majority’s reasoning in Medellín, it is even more likely that the treaties would be self-executing if the Medellín dissent were to prevail in a subsequent case. See Medellín, 128 S. Ct. at 1380–89 (Breyer, J., dissenting).

385. Medellín, 128 S. Ct. at 1356 n.2. In contrast, “[treaty] stipulations are not self-executing when they can only be enforced pursuant to legislation to carry them into effect.” Id. at 1356 (“[treaty]” is bracketed in the opinion language).
386. Id. at 1356 n.2.
387. Id. at 1357.
388. Id.
389. Id. at 1358. The text of the Optional Protocol at issue was as follows: “Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice.” Optional Protocol, supra note 378, art. I.
390. Medellín, 128 S. Ct. at 1357 (quoting U.N. Charter, supra note 379, art. 94(1)).
391. Id. at 1358 (quoting Brief for United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928)).
but it also used its second “aid to interpretation,” arguing that its conclusion was “confirmed by the ‘postratification understanding’ of the signatory nations.” Finally, the Court emphasized that Medellín did not identify any of the 171 State Parties to the Optional Protocol that viewed ICJ judgments as binding.393

B. The 1908 and 1925 Boundary Treaties are Self-Executing Under the Medellín Analysis

Applying the first part of the Medellín analysis—an examination of the text—to the 1908 and 1925 Treaties provides some evidence that they were intended to be self-executing. The Medellín Court placed significant weight on the fact that while the United States had submitted to the jurisdiction of the ICJ, it had not explicitly stated that it would be bound by the ICJ’s decisions. The 1908 and 1925 Treaties are easily distinguishable on their face. As to the Commissioners-created boundary line, the 1908 Treaty states that the line the Commissioners define will be “laid down” and “deemed to be the international boundary as defined and established” under the treaty. Further, unlike the Option Protocol at issue in Medellín, which was “silent as to any enforcement mechanism,” the 1908 Treaty provided that if the Commissioners could not agree on the boundary then the matter was to go to a neutral arbitrator, whose “decision shall be final, and the line shall be laid down and marked by said Commissioners in accordance therewith and as herein provided.” Finally, the Treaties are detailed as to how the IBC is supposed to work. The 1908 Treaty, for example, addresses minor issues such as the burden of proof of a party claiming that particular islands are under the jurisdiction of one sovereign or another.398

These clues from the text of the 1908 and 1925 Treaties that they were to be self-executing are further supported by the “aids to interpretation” that were relevant to the Court in Medellín. The first aid was the “negotiating and drafting history.” As a starting point, if the text clearly shows that the treaties are self-executing, why would the Senate or the negotiators spend a great deal of time discussing whether a treaty was self-executing? Despite this, in a letter to the Chairman of

392. Id. at 1363.
393. Id.
394. Id. at 1358.
395. 1908 Treaty, supra note 74, arts. I–VIII.
396. Medellín, 128 S. Ct. at 1358.
397. 1908 Treaty, supra note 74, arts. I–II.
398. Id. art. II.
the Senate Foreign Relations Committee, Senator Borah, Secretary of State Frank Kellogg, describing the 1925 Treaty, emphasized that one of the main “points dealt with” in the Treaty was that final boundary decisions were to be made by the Commissioners “appointed under the Treaty of 1908 and their successors in office as provided in the Treaty under consideration.”\footnote{399. 67 CONG. REC. 187-88 (1925) (letter from Sec. of State Frank B. Kellogg to Sen. William E. Borah).}

Further, the Court in \textit{Medellín} placed importance on the United States’ veto power over an ICJ decision, which had to be enforced by the Security Council through its veto.\footnote{400. \textit{Medellín}, 128 S. Ct. at 1360.}

In contrast, the 1908 and 1925 Treaties provided that if the Commissioners’ “final” determination did not result in consensus, then the matter would be referred to an arbitrator, who could be appointed by a third Power if the United States and Canada did not agree, whose decision “shall be final.”\footnote{401. 1908 Treaty, \textit{supra} note 74, arts. I–II (emphasis added).}

A relevant comparison for the backdrop to the negotiating history of the 1908 Treaty is, again, the 1909 Boundary Waters Treaty, which created the IJC.\footnote{402. Boundary Waters Treaty, \textit{supra} note 152.}

Though creating a bilateral commission similar to the IBC, the IJC has conceded that the Boundary Waters Treaty is likely not self-executing.\footnote{403. See Secretariat of the Commission for Environmental Cooperation, Devils Lake Case, \textit{Determination in Accordance With Article 14(1) of the North American Agreement for Environmental Cooperation}, SEM-06-002 (Aug. 21, 2006).}

A closer examination of the language of the Boundary Waters Treaty, indeed reveals that key differences between the language used in the 1908 IBC Treaty and 1909 Boundary Waters Treaty counsels that the drafters were attempting to do different things in each document. The IBC Treaty uses compulsory language in describing the Commissioners’ tasks, frequently invoking “shall” and “final,” in addition to providing that if the Commissioners cannot agree, the matter “shall” go to arbitration by a third party. In contrast, the Boundary Waters Treaty, in describing the IJC, omits such directives and leaves many questions open ended. It speaks primarily of the IJC’s reporting duties and prescribes that if the Commissioners split three-to-three in a vote, they will issue separate reports and the United States and Canada “shall thereupon endeavor to agree upon an adjustment of the question or matter of difference.”\footnote{404. Boundary Waters Treaty, \textit{supra} note 152, art. VIII.}

The Boundary Waters Treaty also states that any other issues “involving . . . the inhabitants . . . along the common frontier” are to be heard by the IJC; however, the report of the IJC on hearing the dispute “shall not be regarded as decisions of the
questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.”

Similarly, like the negotiating history, a comparison between the “postratification understanding” of the 1908 Treaty and the 1909 Boundary Waters Treaty illustrates the self-executing nature of the IBC Treaties. The “postratification understanding” of the treaties creating the IBC shows that the parties considered the treaties to be self-executing. In Article IX of the 1908 Treaty, the Commissioners are instructed to “proceed without delay” in fulfilling the requirements of the Treaty. Shortly after the ratification of the treaties, the Commissioners did in fact meet, and in 1908, the Commissioners reached agreements on the manner in which the boundary was to be marked, including the width of the boundary vista. They did not wait for implementing legislation. On the other hand, shortly after the ratification of the Boundary Waters Treaty, Secretary of State Philander Knox wrote to President Taft: “[L]egislation should be enacted that will enable the Government of the United States to meet and carry out its obligations under the treaty. . . . The legislation should provide the manner of appointment of three United States commissioners [on the IJC].” Congress obliged, quickly passing legislation relating to the IJC.

Further, in Article IV of the 1925 Treaty, the U.S. and Great Britain agreed that “the Commissioners appointed under the provisions of the Treaty of April 11, 1908, are hereby jointly empowered and directed: to inspect the various sections of the boundary line . . . to keep the boundary vistas open . . . .” The Treaty defined the line that the Commissioners had to keep open as the line “defined by the present

405. Id. art. IX. The IJC can issue binding decisions but only on referred matters under Article X and only if both parties consent; and further, this “binding” dispute resolution has never been invoked. Gov’t of Province of Manitoba v. Norton, 398 F. Supp. 2d 41, 56 (D.D.C. 2005).

406. A topically related but temporally distinct treaty that lends support is the U.S.-Canadian agreement that created the GLFC. See Fisheries Convention, supra note 190. The agreement, which, like the IBC treaties created a binational organization to regulate U.S.-Canadian border issues, includes the following language that is different from the 1908 and 1925 Treaties: “The Contracting Parties agree to enact such legislation as may be necessary to give effect to the provisions of this Convention.” Id. art. XI; see Great Lakes Fishery Act of 1956, ch. 358, 70 Stat. 242 (1956).

407. 1908 Treaty, supra note 74, art. IX.


411. 1925 Treaty, supra note 97, art. IV.
treaty and treaties heretofore concluded, or hereafter to be concluded.” There was no statement or expectation that any further implementing legislation was needed, and later changes were contemplated as “treaties.” The State Department has considered the IBC’s approval to be independent and necessary for construction along the boundary, noting that in addition to a “Presidential Permit” for construction along the U.S.-Canadian border, IBC approval “is required for all projects within 10 feet of the United States-Canadian boundary”.

In addition to this text, negotiating history, and postratification understanding, in *Pettibone v. Cook County, Minnesota*, the U.S. Court of Appeals for the Eighth Circuit rejected a taxpayer-plaintiff’s argument that the 1908 Treaty was not self-executing; rather, the court explicitly found that it was self-executing. In *Pettibone*, taxpayers had been paying property taxes on islands in a boundary lake to Cook County, mistakenly thinking that their land was located in that county. When they discovered that their property was in Canada, while attempting to sell it, they sued the county to recover the taxes. The county answered that the payments were voluntary and that the mistake was mutual. The court found for the county primarily on statute of limitations grounds. In so doing, the Eighth Circuit considered the question of self-execution to be clear: “The Treaty of 1908 had the force and effect of law.” The court further stated that the 1908 Treaty had “the same force and effect as an act of legislation [even] whenever the treaty operates of itself without legislative provisions.”

*Pettibone* is even more instructive when considered against the backdrop of the *Head Money Cases*. The Medellín Court relied on the language from the *Head Money Cases* that equated non-self-executing treaties to contracts between sovereigns providing no actionable right. However, in the same paragraph of the *Head Money Cases* that is often used to reject a claim that a treaty is self-executing, the

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412. *Id.*
415. *Id.* at 851.
416. *Id.* at 854–55.
417. *Id.* at 854.
418. See *id.* (citing United States v. *The Schooner Peggy*, 1 Cranch 103 (1801)).
Court reinforced that some treaties are self-executing and gave an example:

But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. . . . A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.420

This example, which the Court found paradigmatic enough to use as its primary example of a self-executing treaty, has significant similarities with the creation of the IBC under the 1908 and 1925 Treaties. The 1908 and 1925 Treaties have an effect on individual property rights, like municipal law, and have supplied the dispositive rule of decision for the one court, Pettibone, that has heard a challenge to property rights affected by the Treaties.421 To the extent that the language from the Head Money Cases is used to support the interpretation of a treaty as non-self-executing, the other language, quoted above, from the same paragraph as the more frequently cited instruction, should not be ignored.

Two final counterarguments are instructive but ultimately invalid. The first argument concedes that the majority of the 1908 and 1925 Treaties are self-executing, but that the portions covering removal are not. If one reads Medellín to require the extreme position that every provision in a treaty must include explicit language that it is self-executing, then this creates an almost impossible test for self-execution, particularly for older treaties which were rarely drafted at that level of specificity.422 More likely, and more appropriately, the correct approach is to view a treaty as a whole in determining whether an individual provision should be self-executing. Plainly, the 1908 and 1925 Treaties, taken whole, are drafted as self-executing agreements.

420. The Head Money Cases, 112 U.S. at 598–99.
421. See supra notes 414-18 and accompanying text.
422. See Medellín, 128 S. Ct. at 1361–62 (discussing the majority’s textual approach to self-execution).
Yet, even if *Medellín* is read to require textual clues in each article of a treaty that it is self-executing, the IBC Treaties can meet this high standard. The *Medellín* Court emphasized the language that each party to the U.N. Charter “undertakes to comply” with the decision of the ICJ if it is a party to that decision. 423 This Article has already distinguished the “final” setting of the boundary called for in the Treaties, 424 but the removal article is also distinguishable. In the 1908 Treaty, Article IX states that if there is a vacancy caused “by reason of death, resignation, or other disability” such vacancy “shall be filled forthwith . . . and the Commissioner so appointed shall have the same powers and obligations as the Commissioner originally appointed.” 425 There is no other reason for removal. The 1925 Treaty also states that after the survey is completed, “the Commissioners appointed under the provisions of the Treaty shall continue to carry out the provisions of this Article.” 426 The IBC Treaties thus use language of immediate commitment for which the *Medellín* Court was looking. As such, the IBC Treaties should be considered self-executing under even the most extreme reading of *Medellín*’s demanding textual approach. 427

Lastly, the potential counterargument to the conclusion that the 1908 and 1925 Treaties are self-executing is that Canada passed the 1960 International Boundary Commission Act (“IBCA”), 428 and one could potentially, though incorrectly, construe the IBCA as demonstrating that Canada considers the Treaties as not self-executing. Such a claim is initially dubious because whether a treaty is self-executing or not is a domestic law decision, and even if the IBC Treaties did not have the force of domestic law in Canada, that would not necessarily be the case in the United States. 429 One could, however, respond that Canada’s need to pass this legislation indicated postratification conduct that counseled against U.S. acceptance of the IBC Treaties as self-executing. 430 This response ignores Canada’s view that treaties “are not automatically the law of the land” and “a change in the law is required to implement a treaty obligation.” 431 In any case, the IBCA is a brief

423. Id. at 1358.
424. See supra notes 63, 69 and accompanying text.
425. 1908 Treaty, supra note 74, art. IX. (emphasis added).
426. 1925 Treaty, supra note 97, art. IV.
427. See Medellín, 128 S. Ct. at 1346, 1358.
429. See Medellín, 128 S. Ct. at 1381 (Breyer, J., dissenting).
430. See Shapiro, supra note 15, at 97 (stating that the “postratification understanding” inquiry is one of the “rare instances” after *Medellín* “where it is fully appropriate to query how foreign polities look at the law”).
431. *NATIONAL TREATY LAW AND PRACTICE* 92 (Duncan B. Hollis et al. eds. 2005).
Act addressing mostly minor issues. Such minor clarifications that neither approach the substance of the Treaties nor address any issue of the Commissioners’ appointment or removal, cannot be used to justify a claim that the IBC Treaties are not self-executing in the United States. This conclusion comports with Canada’s view that the IBC is a “permanent international organization whose sole concern is the physical maintenance of a line that separates two national sovereignties.”

C. The Removal Power and the Commissioner to the International Boundary Commission

If it is possible for the executive branch and Congress to agree to removal limitations as part of a treaty, for Commissioner Schornack and the IBC, the issue becomes whether the 1908 and 1925 Treaties did create such a limitation. The text of the Treaties is the most informative guide. For the purposes of this Article, however, the actual fate of Commissioner Schornack and his ability to challenge his removal is not the primary concern. The concern here is structural, specifically the relation between treaties and the removal power, and the bounds of the President’s removal power more generally.

In examining the 1908 and 1925 Treaties, Medellín, again, provides the Supreme Court’s most recent statement on treaty interpretation. The pivotal factor in this analysis is the treaty’s text. The Medellín Court conceded, however, that its approach might fall between what international law scholars would consider an “ordinary meaning textual approach” and an “ordinary meaning contextual approach,” which allows consideration of the “negotiation and drafting history of the treaty” in addition to “the post ratification understanding.” The Court approvingly cited Air France v. Saks in which the Court reaffirmed its earlier statement that “treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”

432. International Boundary Commission Act, R.S.C., c. I–16 (1985) (Can.). Such minor issues include that IBC workers may cross private property to reach the boundary and that except with express permission from the IBC parties cannot build within ten feet of the boundary in Canada. Id.
434. Medellín, 128 S. Ct. at 1357.
435. WESTON ET AL., supra note 364, at 100–01.
The Court is also informed in its treaty interpretation by the Vienna Convention on the Law of Treaties ("VCLT"). The VCLT provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Such a requirement is at least similar to the Court’s approach in *Medellín*, to look first at the text of the treaty, then at the circumstances of its negotiation and drafting (ordinary meaning in context), and finally at the postratification understanding (object and purpose).

In considering these questions the *Leu* district court did address the removal cases but only in dicta. Instead, the court focused on whether the 1908 and 1925 Treaties granted privately enforceable rights. Private enforceability is distinct from self-execution, and this issue grounded the court’s opinion that Commissioner Schornack did not have a cause of action to bring the case. Because the district court focused on the individual enforceability of treaty rights, it only mentioned in passing that under *Wiener* (and contrary to *Shurtleff*), it can be argued that for the small number of independent regulatory agencies for which Congress has not specified the grounds for removal, the President does not have the removal power for these officers, even in the face of congressional silence on the power of removal, because the commissioners and heads of these agencies are not “purely executive officers.” The district court also failed to reach the question of whether the treaties can or did limit removal because of its reliance on the individual rights limitation; however, the court noted that “the language and purposes of the 1908 and 1925 Treaties support Commissioner Schornack’s argument that he is insulated from the President’s removal power.”

Because this Article is focused on the structural interaction of the treaty power and the removal power, more so than the district court in *Leu*, it is important to look at what the treaties purported to do. It appears that the plain text of the treaties enable the President to remove

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439. VCLT, supra note 259, art. 31(1).
441. *See Medellín*, 128 S. Ct. at 1357 n.3 (distinguishing private enforceability and self-execution).
the U.S. Commissioner only in limited circumstances. Article IX of the 1908 Treaty provides for vacancies on the IBC “by reason of the death, resignation, or other disability of a Commissioner.”

Article IV of the 1925 Treaty clearly states that new commissioners are to be appointed “upon the death, resignation, or other disability” of the Commissioner. No other provision for removal is provided in either of the Treaties, and the principle of *expressio unium est exclusio alterius* counsels that other removals are, therefore, prohibited.

Though *Shurtleff* directs against using this maxim to infer life tenure, this Article has already noted the questionable applicability of *Shurtleff* as precedent. Yet even if *Shurtleff* were controlling, the claim is not that the Commissioner must have life tenure because, instead, a court could limit tenure for good behavior. In any case, removal could always be effected through the President’s termination of the Treaties, rendering a strict reliance on *Shurtleff* unnecessary and unjustifiable.

In addition, the Treaties are not “silent” on the issue of removal because they contemplate vacancies. Such contemplation is evident from comparison of the IBC Treaties to other contemporaneous U.S.-Canadian treaties regarding binational bodies. The 1903 Alaskan Boundary Treaty, for example, included a similar removal section to the IBC Treaties except that it also included a “refusal to act” provision, which is closer to an “at will” standard than the type of “good cause” standard that the 1908 and 1925 Treaties seem, at a minimum, to create.

Treaty negotiators and the ratifying Senate in 1908 and 1925 were thus aware of such an alternative.

In addition, the IJC, created by the 1909 Boundary Waters Treaty, provides relevant context for the 1908 Treaty. The structure of the IJC was similar to the IBC in that a board composed of an even number of representatives from the United States and Canada led the commission. However, whereas the IBC Treaty included the language discussed

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445. 1908 Treaty, *supra* note 74, art. IX.
446. 1925 Treaty, *supra* note 97, art. IV.
447. A possible counterargument is that the treaties do not address *removal*, that they instead address *appointment*. Such a counterargument is plausible for the 1908 Treaty alone, but the language of the 1925 Treaty is more certain and seems to contemplate a closed set of reasons of removal. *See supra* notes 97–103 and accompanying text.
448. *See supra* notes 303–06 and accompanying text (questioning the precedential power of *Shurtleff*).
449. *See supra* notes 303–06 and accompanying text (suggesting the weakness of *Shurtleff* as a precedent); *infra* notes 490–92 and accompanying text (discussing the President’s options besides firing Schornack).
above regarding the conditions under which a Commissioner to the IBC would be removed, no such conditions were included in the IJC, which discusses appointment procedures but is truly silent on removal. In effect, IJC Commissioners are removable by their respective governments. These other treaties existing alongside the IBC Treaties guide not only the textual inquiry but the inquiry into the “negotiation and drafting history of the treaty” as well.

The postratification understanding of the IBC Treaties, particularly the understanding contemporaneous with the Treaties entering into force, also shows that the commissioners were supposed to be insulated from removal. Otto H. Tittman, appointed by Theodore Roosevelt in 1909 as the first U.S. Commissioner to the IBC, served into a third administration until his retirement in 1915. E.L. Jones, who President Harding appointed, served under three presidents until his death in 1929. Even when commissioners were replaced at that time, the position was often not political; when Commissioner Jones died, for example, President Hoover replaced him with James H. Van Wagener, an engineer with the IBC for the previous nineteen years. Such an appointment demonstrated an understanding that, structurally and normatively, the IBC Commissioners were supposed to be independent experts making decisions insulated from politics.

Such an appointment furthers the conclusion that in considering the object and purpose of the treaty, arguably the entire reason that the United States and Canada entered into the Treaties was to depoliticize the border. At times, until the definitive settling of the boundary following the 1925 Treaty, the disputed boundary issue almost brought Canada and the United States to the “brink of war.” Historically, boundary commissioners were expected to perform their duties impartially, and this was the understanding of the President and the Senate at the times that the IBC Treaties were ratified. Such logic is not an anachronistic motivation; this is also a modern reason for delegating power—choosing expertise over politics. The choice to

452. See Wiloughby, supra note 84, at 18–19 (highlighting the history of political appointments to the IJC commissioner posts on both sides of the border).
454. Thompson & Randall, supra note 7, at 73.
457. The Treaty of Ghent, supra note 67; Alaska Boundary Treaty, supra note 72.
have an even number of Commissioners further reflects the desire to insulate Commissioners from politics and further cooperation.

The de-politicizing goal of the Treaties can also relate to the previously discussed question of self-execution. As the Court explained in *Medellín*, “[t]he point of a non-self-executing treaty is that it ‘addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.’”

Yet, the IBC Treaties are addressed precisely to move away from the political department, providing insulation from political pressures. This is what the Eighth Circuit in *Pettibone* recognized in using the boundary set by the IBC as a rule of decision.

Given the foregoing analysis, the 1908 and 1925 Treaties can serve as a theoretical limitation on the President’s power to remove the U.S. Commissioner to the IBC. The Treaties are self-executing and, therefore, directly enforceable as U.S. law. They contemplate a limitation on the removal of the U.S. Commissioner such that he can only be removed “by reason of . . . death, resignation, or other disability.” And because the Commissioner is an inferior officer, there is no constitutional malady with such a removal limitation, particularly given the understandable desire for independence from the executive.

**V. WHAT IF THE PRESIDENT IGNORES HIS OBLIGATIONS UNDER THE INTERNATIONAL BOUNDARY COMMISSION TREATIES?**

If the 1908 and 1925 Treaties operate as a limit on the President’s removal power over the U.S. Commissioner—in the same way that a congressional statute may limit the removal of a commissioner of an independent agency—what are the effects of this limit? Put another way, “so what”? Unlike a duly passed law with which the President must comply, though the Constitution does not speak to “the question of who has the power to suspend or terminate treaties . . . it is generally accepted that the President has such power, without the advice and consent of the Senate, based on the President’s established constitutional authority to conduct the foreign affairs of the United States.”

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460. *Pettibone v. Cook County*, Minn., 120 F.2d 850, 854–56 (8th Cir. 1941).
461. See discussion supra Part III.B (discussing removal power jurisprudence).
462. See supra notes 434–60 and accompanying text (considering the original treaty texts).
States," though this view is certainly not a consensus. Under such reasoning, perhaps the effect of the removal limitation is nil.

A. The Leu Litigation and Structural Concerns

One way in which a finding that the removal violated the 1908 and 1925 Treaties would have serious consequences is if Commissioner Schornack were able to successfully sue for reinstatement to his job at the IBC. Such a suit could have serious ramifications for notions of executive power, the removal power, treaties, and separation of powers. It could also serve as a deterrent for future administrations.

While it may seem that Commissioner Schornack’s removal would necessarily provide him with the ability to bring this suit, defining his cause of action may prove so difficult that it may ultimately prevent him from successfully challenging his removal. Assuming, as argued above, that the U.S. Commissioner is an inferior officer, Commissioner Schornack would be unable to challenge his removal through the procedure available to most federal employees: the Merit Systems Protection Board. A fired federal employee or officer could typically bring constitutional claims for a due process property interest in continued employment, or a due process liberty interest in remaining free from incorrect reputation damaging stigma. However, though such claims are potentially implicated on the facts of Schornack’s removal, they too are likely unavailable to the fired Commissioner.

Commissioner Schornack probably cannot bring a due process claim based on either a property or liberty interest in his former position as

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463.  WESTON ET AL., supra note 364, at 244.
464.  To the extent that Schornack also challenged his removal as a Commissioner to the IJC, it could also result in him garnering significant back pay.  See supra note 123 (noting Schornack’s pre-firing salary).
465.  See discussion supra Part III (considering the IBC treaties’ treatment of commissioners).
466.  In 1990 Congress passed the Civil Service Due Process Amendments, with the purpose of granting appeal rights in adverse personnel actions to most members of the excepted service.  See Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990) (codified at 5 U.S.C. § 7511 (2006)).  However, an officer like the Commissioner is still excluded from the CSRA and cannot bring an action to the Board challenging his removal.  See id. § 7511(b)(3).
467.  See infra notes 470–73 and accompanying text (outlining the Supreme Court’s approach to property and its deprivation).
468.  See supra Part II.B (outlining the facts of the Schornack case).
469.  A third type of claim that a fired federal employee could bring is a claim that her firing violated her First Amendment right to free speech. This path is, however, likely unavailable to a fired IBC Commissioner because she would likely not enjoy these protections as a “policymaking” employee.  See Branti v. Finkel, 445 U.S. 507, 518 (1980) (discussing when party affiliation is an appropriate consideration); Elrod v. Burns, 427 U.S 347, 367 (1980) (noting the difficulty of determining who is a “policymaker”).
IBC Commissioner. Property interests in employment are statutory, not constitutional, entitlements.470 The Supreme Court has broadly interpreted “property” protection,471 but a key distinction between the IBC Commissioner position and that of the cases in which the Court has found property protection is that the IBC Commissioner is unpaid. It would thus be difficult for Schornack to conceptualize exactly what “property” was taken from him through the wrongful firing. It would also be difficult for Schornack to show that his removal was so stigmatizing that his removal deprived him of a constitutionally protected “liberty” interest. A series of Supreme Court cases regarding liberty deprivation have created a standard that requires a former employee claiming a liberty violation to demonstrate damage to reputation coupled with loss of employment.472 Courts construing this requirement typically find that a performance-related dismissal is not enough to invoke “liberty” protections, and the plaintiff must show that the firing agency make publicly damaging statements that included charges such as dishonesty, immorality, or criminality.473 On the facts of the removal of Commissioner Schornack, which occurred with relatively little public comment, it is difficult to see how he could make these claims.

Finally, it is unlikely that Commissioner Schornack could ground his cause of action in the 1908 and 1925 Treaties. Though the Treaties create substantive removal protection,474 they do not provide a cause of action. This was the ground for the Leu district court’s decision.475 It stems from the Supreme Court’s statements that “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”476 The

471. See Bd. of Regents v. Roth, 408 U.S. 564, 576–78 (1972) (noting the procedural protections to property under the Fourteenth Amendment).
472. See Bishop v. Wood, 426 U.S. 341, 348 (1976) (noting that a privately communicated firing does not damage reputation); Paul v. Davis, 424 U.S. 693, 712 (1976) (discussing reputation as one of a number of interests); Roth, 408 U.S. at 573 (evaluating whether the discharge seriously damages petitioner’s standing in the community).
473. See, e.g., Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 630 (2d Cir. 1996) (outlining the type of statements that would invoke “liberty” protection); Portman v. County of Santa Clara, 995 F.2d 898, 908 (9th Cir. 1993) (finding no property right infringement).
474. See discussion supra Part IV.C (discussing how the Treaties insulate the IBC Commissioner from politics).
Treaties themselves are thus not strong candidates for a source for Schornack’s cause of action.

If Commissioner Schornack did possess a cause of action, the doctrinal problems with the President’s actions are particularly salient; however, even if Schornack did not possess a cause of action to challenge his removal, there are reasons to question the propriety of the Administration’s actions. The fact that the removal may have violated a treaty also has consequences for domestic statutory and constitutional law. In other words, considering the self-executing nature of the Treaties, it is inherently worthy of discussion if the President broke the law. Even conceding the executive power argument that the President has the unilateral power to terminate a treaty—and there is serious debate on this issue—the executive power theory claims that Article II, Section 1 gives the President this termination power unless another constitutional requirement says otherwise. Thus, again conceding broad executive power, with respect to unilateral termination that complies with the terms of a treaty, the President could terminate a treaty at will. By the terms of the 1925 Treaty, either State-party can terminate the authority of the Commissioners “upon twelve months’ written notice” to the other party. The issue that may constrain a President’s ability to terminate a treaty, however—even for subscribers to broad executive power—is if another constitutional constraint comes into play.

Article VI commands that self-executing treaties are the “supreme law of the land.” Further, as a result of the President’s Article II duty to “take Care that the Laws be faithfully executed,” the President cannot suspend the operation of a constitutionally valid law. The combination of the Supremacy Clause, a self-executing treaty, and the Take Care Clause, thus counsels that the President should not have the power to supersede self-executing treaties in violation of their terms.
This is one of the structural concerns that the Schornack firing implicates.

The other potential concern that the firing raises is a more general attack on domestic agency and commission independence. Neutrality and expertise in bureaucratic decisionmaking are themes of administrative law and classic justifications for delegating to independent agencies. So, while this Article details how the Administration’s actions are a threat to bilateral commissions and international agencies, of which there are relatively few, the threat may also extend to independent agencies housed in the executive branch, of which there are very many. Depoliticization is a classic good governance value for agencies whose missions necessarily require some separation from political decisionmaking. Politicization is not inherently bad and is, in fact, often expected. The problem is when the executive branch pretends and claims it is acting with some modicum of impartiality but instead politicizes traditionally independent agencies, organizations, or personnel. Such concerns do not exist only in the abstract as there are other examples—namely, U.S. attorney firings, politicization of science, and DOJ hiring—in which it could be argued that the Bush Administration deemphasized traditionally-important impartiality and expertise in favor of politicization.

There are actions that President Bush could have taken to allay these structural fears, particularly regarding the separation of powers value of accountability. Any one of a number of potential actions could have simultaneously complied with the Supremacy Clause, the Take Care Clause, and the IBC Treaties. The most straightforward action that the President could have taken would have been to comply with the terms of the 1925 Treaty and provide Canada with twelve-months notice that the United States intended to withdraw from the Treaty.


behavior may have had positive benefits from an international perspective.\textsuperscript{489} In addition, the political cost for such a decision would have been borne by the executive branch—where it belongs for a presidential decision to terminate a treaty—rather than the judicial branch, which is where it ends up when federal courts are forced to weigh in on issues that implicate both political and separation of powers concerns.

Second, President Bush could have gone through political channels and worked with Canada to apply pressure to Commissioner Schornack through the IBC itself. Indeed, if the IBC’s determination was beyond its treaty mandate as the Government subsequently claimed,\textsuperscript{490} perhaps by working through political channels the Canadian Section would have reconsidered its decision, as it has now done following Commissioner Schornack’s removal.\textsuperscript{491} Third, the executive branch could have announced that it would no longer fund the IBC and taken the political consequences of such a decision. Fourth, though more debatable, President Bush could have, perhaps, unilaterally withdrawn from the 1925 Treaty by providing only immediate notice. Such action may not satisfy the entire basket of Article II, Article VI, and Treaty concerns,\textsuperscript{492} but it would have more adequately supported the structural separation of powers issues that arise when the executive branch acts in a way to undermine the Senate’s treaty power without opening itself to political cost. Finally, the President could have applied political pressure to Schornack and then not fired him if he chose to do what he thought necessary to comply with the Treaties. This would have then forced the President to decide whether to withdraw from the Treaty altogether. Choosing between an openly political removal and acceptance of Schornack’s claims to independence is the more difficult and potentially damaging political choice that the Treaties may have been seeking to force political leaders to make.

Despite these possibilities, the course of action that the Administration chose is the most troubling. Unlike renouncing a treaty by acting in violation of the agreement, “it is critical to see the difference from termination in accordance with a treaty’s terms: that is

\textsuperscript{489} See infra notes 507–18 and accompanying text (considering the effect of respecting treaties on a nation’s international reputation).

\textsuperscript{490} Defendants’ Motion to Dismiss, \textit{supra} note 109, at 32.

\textsuperscript{491} Id. at 20.

\textsuperscript{492} See \textit{supra} notes 478–84 and accompanying text (discussing the constitutional issues implicated in treaty withdrawal). It is unlikely that such an action would be valid in international law because under the VCLT, the doctrine of \textit{rebus sic stantibus}, through which a treaty can be unilaterally terminated for changed circumstances, may not be invoked to terminate a boundary treaty. \textit{Treaties and Other International Agreements}, \textit{supra} note 361.
faithful execution, since nothing in the Treaty requires it to remain in
effect.”493 Structurally, the problems with the Administration’s actions
are readily apparent. Balance and accountability are core separation of
powers principles.494 To the extent that the President acted contrary to a
self-executing treaty and his Article II duties, this action threatens
balance between the executive branch’s broad power in foreign affairs
and the Senate’s constitutionally-explicit role in treaty-making. Further,
to the extent that Schornack was fi red without an admission that such
action was a renunciation or termination of the Treaty, this action
damages the value of accountability because the administration is
seeking to have it both ways: violate the Treaty but avoid the negative
consequences of ending a treaty that has proved valuable and is
prospectively desirable.

B. Further Normative Considerations: Separation of Powers, Foreign
Affairs, and International Law

Regardless of whether Commissioner Schornack retains a cause of
action, there are domestic, constitutional, and international reasons—
domestically, from a constitutional structure perspective, and
internationally—from the perspective of the rule of law and U.S.
commitment to its treaties, that we should be concerned if the
President removes an officer that he had agreed by treaty to leave in
office barring death, disability, or impeachable offense.

As a primary concern, the President’s removal of Commissioner
Schornack undermines the Senate’s understanding of the IBC—and by
extension the Supremacy Clause—by essentially changing the
Commission’s nature more than one hundred years after the Senate
approved its original form. Professor Kaikobad has noted that one of
the key reasons that the Jay Treaty was not only novel but successful,
was that the commissioners that it created had “the duty (and power) to
decide the dispute impartially and with reference to principles of law
and evidence.”495 “What was significant” about the beginning of the
period of U.S.-Canadian relations around 1908, “was the effort to
institutionalize and depoliticize the mechanisms of conflict
resolution.”496 The IBC, in fact, was the “first important initiative”
established to depoliticize certain aspects of Anglo-American
relations.497 As recently as 2002, two commentators reported that

493. Ramsey, supra note 478, at 1232.
495. KAIKOBAD, supra note 64, at 63 (emphasis added).
496. THOMPSON & RANDALL, supra note 7, at 72.
497. Id.
“[t]he IBC’s mandate has always been reasonably specific and technical in nature, a fact that kept its operation relatively free of controversy and public debate.” Additionally, “during Commissioner Schornack’s tenure, the U.S. Government had not exercised influence or control over the day-to-day operations of the Commission.” Thus, by dramatically altering the independent nature of the IBC, the executive branch is essentially operating under a treaty that is materially different from the treaty that the Senate ratified. This alteration undermines the importance of the Senate in the treaty-making structure that the Constitution requires, in addition to any questions related to efforts to focus on administrative politicization in favor of expert decisionmaking.

The President’s unilateral reinterpretation of the removal provisions of the 1908 and 1925 Treaties further affects the separation of powers value of balance. The constitutional value of balance between the branches is a central separation of powers concern. Many of the commentators that have praised Morrison have done so because of its functionalist, balancing approach to separation of powers that seems committed to the core Article II powers but is also concerned with executive aggrandizement. It is difficult to see how approving of the executive’s questionable reinterpretation of a treaty that has insulated the U.S. Commissioner from removal for more than one hundred years serves the value of balance. In the same way that the executive branch recently undermined congressional authority through its use of signing statements, this removal undercuts the historical understanding of the proper Article I role for the legislature by changing the terms of a political bargain to which the Senate agreed without any input from the legislature.

Finally, there are reasons to be particularly concerned that the President chose to remove the Commissioner but claimed that he was

498. Id. at 73.
500. See supra notes 485–88 and accompanying text (highlighting the breadth of recent politicization).
501. See Flaherty, supra note 494, at 1821, 1828–32.
doing so within the bounds of the 1908 and 1925 Treaties. The constitutional tenet of separation of powers was “deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people.” 504 The Supreme Court recognized as much in *Morrison.* 505 The purpose of such a public debate is to ensure that the primary check on the removal power, the political check, functions properly, which cannot occur if actions and decision-making processes are not subject to public scrutiny. 506 If the President assures the public, courts, and Canada that he is following the treaty, yet undermines the ability of courts to make that determination, it is doubtful that a “vigorous” debate will occur. The fate of Dennis Schornack will likely not activate the public in the same way that a unilateral withdrawal from a successful, one-hundred-year-old treaty with the United States’ closest ally could. That is precisely the constitutional concern.

In terms of international law, the implications of the subversion of the 1908 and 1925 Treaties are equally salient. It is neither accidental nor unimportant that a *treaty* created the IBC. A primary purpose of international law for international bodies is law’s institutionalization function. 507 The fact that treaties created the IBC institutionalizes the Commission. International law lends the IBC a “permanence and seriousness that reflects a commitment by the sides to peacefully settling future disputes about the border.” 508 As Professors Abram Chayes and Antonia Handler Chayes have explained in describing their “managerial model” of compliance with international law, one of the purposes of international bodies can be to monitor State-parties’ compliance with their agreements. 509 Managerial compliance is particularly compelling when thinking about international bodies that enforce borders. It is because of the concern that a boundary treaty will not conclusively settle a boundary dispute “that many coterminous States turn to arbitration and adjudication to resolve problems involving the meaning and scope of boundary provisions and treaties.” 510 In effectively rejecting the removal limitations in the Treaty—without explicitly rejecting them—the United States has undermined the expected benefits from the managerial model. To the extent that the

506. *Id.* at 711 (Scalia, J., dissenting).
508. *Id.* at 826.
510. Kaikobad, *supra* note 64, at 64.
IBC was able to independently monitor the State-parties’ compliance with the 1908 and 1925 Treaties, its ability to do that is now limited if the U.S. Commissioner knows that a determination adverse to the American political powers-that-be will result in removal.

While there are technical results that effectively renouncing the 1925 Treaty may have, another reason that it matters if the executive branch has changed the rules that the 1908 and 1925 Treaties created—again, without formally renouncing them, but instead by invoking broad presidential removal power—is for U.S. reputation. Andrew Guzman has emphasized the role of reputation in international law and the key role that a State’s reputational concerns can and should play in its decision to comply with international law. Under Professor Guzman’s reputation-based theory of compliance with international law, treaties between friendly powers when an informal agreement would serve the “coordination game” just as well may be for the purpose of creating additional certainty or predictability that informal agreements cannot provide. The boundary treaties may have simply been one of these coordination games; however, their emphasis on pre-commitment and de-politicization implies that they may have been something more. They were likely an effort to bring additional certainty to the U.S.-Canadian relationship regarding the border.

Looking at the Treaties through Guzman’s reputational lens, the Bush Administration’s efforts to undermine the 1925 Treaty are troubling. Just as there was concern following the often-cited U.S. termination of the Anti-Ballistic Missile Treaty, there are reputational harms if the United States is not seen as adhering to its treaty commitments. While such harm may be less for such a low profile issue as boundaries, it is arguably worse if the United States cannot even follow these basic commitments with one of its closest allies. It may also be worse for U.S. reputation if other countries view the United States as failing to follow a treaty to which it claims to be adhering rather than rejecting the treaty outright. This is particularly true because, according to the VCLT, the doctrine of rebus sic stantibus, through which a treaty can be unilaterally terminated due to changed circumstances, may not be invoked to terminate a boundary treaty. Thus reinterpreting a treaty

511. GUZMAN, supra note 24, at 27.
513. STAFF OF S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER
to effectively renounce it is even more problematic when the option of unilateral withdrawal at international law is not available.

In discussing reputation, Guzman describes the Antarctic Treaty, for example, as one that was drafted to solve a coordination game because the states’ desire to preserve Antarctica as a military-free research zone was an equilibrium that had already been reached.\textsuperscript{514} "Looking forward from the time of the signing, however, it is plausible that the parties had concerns about how the importance of Antarctica and therefore the payoffs to the parties might change."\textsuperscript{515} By establishing a treaty instead of more informal norms, the parties addressed the possibility that the Antarctic coordination game would become a prisoner’s dilemma. Just like environmental issues and their characteristics of a prisoner’s dilemma,\textsuperscript{516} one of the purposes of establishing the IBC was to take defecting choices away from politically influenced branches in each country. Such a treaty should have been, and was, easy to comply with for a long period of time. According to Professor Guzman, “[W]e can predict that a state’s decision to comply with a legal rule will enhance its reputation when the nonreputational payoffs counsel violation and the state’s existing reputation (as other states perceived it) is insufficient to cause observing states to expect compliance.”\textsuperscript{517} He continues, “A violation will harm a state’s reputation when the non-reputational payoffs, combined with the state’s existing reputation, predict compliance.”\textsuperscript{518} Thus, given the actual benefits to the United States of having an IBC that enforces a neutrally-administered border, Canada has likely expected U.S.-compliance, and the fact that the United States decided not to comply with the Treaty in removing Commissioner Schornack is likely a negative for U.S. reputation and further counsels against finding the removal allowable from a policy perspective.

\textbf{VI. CONCLUSION}

"There are no intrinsically good or bad boundaries. . . . A boundary, like the human skin, may have diseases of its own or may reflect the illnesses of the body."\textsuperscript{519} Like skin, however, a necessary condition for a “good” boundary is that it is intact. Two treaties established the IBC

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\textsuperscript{514} GUZMAN, supra note 24, at 57.  \\
\textsuperscript{515} Id.  \\
\textsuperscript{516} Id. at 58.  \\
\textsuperscript{517} Id. at 84.  \\
\textsuperscript{518} Id.  \\
\textsuperscript{519} JONES, supra note 104, at 3.
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a century ago to finally settle and maintain a border that had been a source of acrimony since the Revolutionary War. Perhaps the greatest testament to the IBC’s success was the scant attention that it received until recently.

The unprecedented removal of the U.S. Commissioner is prohibited by its founding treaties. Whether the Commissioner and his staff are a part of the U.S. Government is a difficult question, but it seems likely that they are; even if they are not, such a conclusion counsels even further against a presidential removal power over the Commissioner. Regardless, there are consequences in both constitutional and international law for the President’s actions. Domestically, on the constitutional front, we should be concerned when the executive branch advances its own, untenable treaty interpretation in a way that leads to executive aggrandizement at the expense of the Senate and the separation of powers value of independence, particularly when such actions threaten independence and expertise in delegated decisionmaking. At the international law level, we should be troubled by the fact that the executive branch has ignored its international obligations and done so in a particularly nefarious way, without owning up to its abandonment of its purported commitments. Given the IBC’s “grass-mowing” function, removing the U.S. Commissioner may truly be the highest-hanging fruit of executive branch politicization. Perhaps a simple change in Administration has already remedied this problem. If not, Congress could always enact a removal limitation on the Commissioner, settling any doubt that border decisions should be made removed from interest group politics.