

# Reasserting Its Constitutional Role: Congress' Power to Independently Terminate a Treaty

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## Introduction

WHO HAS THE AUTHORITY to terminate<sup>1</sup> a treaty? The Constitution's text is silent on the matter, and historical precedent has been anything but consistent.<sup>2</sup> Recently, this debate has focused on the President's authority to unilaterally terminate a treaty,<sup>3</sup> sparked by

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1. Some scholars differentiate between a treaty's "termination," which is done in accordance with international law, and a treaty's "abrogation," which is undertaken in violation of international law. See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 156 (2007). However, this Article uses the terms interchangeably because it focuses on the constitutional power of the legislature to end a treaty and not on whether those actions would be taken in compliance with international law. It would initially appear, however, that most of these legislative actions would qualify as terminations as the legislature has typically complied with an individual treaty's termination provisions, explicitly legalized in the Vienna Convention on the Law of Treaties ("VCLT") Articles 54–64. Vienna Convention on the Law of Treaties arts. 54–64, May 23, 1969, 1155 U.N.T.S. 331; Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 880 (1958). At the time of the 1979 treaty termination hearings, one noted scholar argued that the United States had only ever "abrogated" one treaty: the United States, "by an Act of Congress, signed by President Adams," unilaterally abrogated a treaty with France in 1798. *Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 310 (1979) [hereinafter *Treaty Termination Hearings*] (statement of Professor Abram Chayes, Harvard University School of Law).

2. See, e.g., DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 149–90 (1986) (analyzing the historical practice and concluding that there has been no consistent means by which treaties were terminated). This varied precedent will be discussed throughout the Article as it relates to each section.

3. See, e.g., Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 179, 205–07 (2003); Joshua P. O'Donnell, Note, *The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President's Authority To Terminate a Treaty*, 35 VAND. J. TRANSNAT'L L. 1601 (2002); Christopher C. Sabis, *Congress and the Treaty Power: An Originalist Argument Against Unilateral Presidential Termination of the ABM*

two Presidents acting upon an asserted unilateral termination authority.<sup>4</sup>

There has been comparatively little analysis of the converse question: does Congress have the unilateral power to terminate a treaty in the face of presidential opposition? While the question is in many ways academic, as historically the majority of treaty terminations have been undertaken by the legislature and executive acting cooperatively, it invokes strong separation of powers considerations. Is the President constitutionally required to consider legislative opposition to a treaty, or can he ignore it, continuing to bind the United States to its international obligations? Similarly, does the President have to consider congressional opposition to the United States signing, or leaving its signature on a treaty, binding the United States to abide by the treaty's "object and purpose"?<sup>5</sup> This Article will argue (1) that the President must consider congressional opposition, (2) that Congress does have the constitutional authority to terminate a treaty, and (3) that the President is thereby constitutionally bound to consider congressional objections.

As a background matter, it is necessary to distinguish between a treaty's domestic and international obligations. Domestically, there is no question that Congress "may abrogate or amend [a treaty] as a matter of internal law by simply enacting inconsistent legislation."<sup>6</sup> Under the last in time rule, if a treaty and a statute are in conflict, "the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."<sup>7</sup> However, inconsistent domestic legislation does not "relieve the United States of its interna-

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*Treaty*, 31 DENV. J. INT'L L. & POL'Y 223 (2002); David C. Scott, Comment, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447 (2002).

4. In 1979, President Carter unilaterally terminated U.S. involvement in a 1954 Mutual Defense Treaty with Taiwan, and in 2001, President Bush terminated U.S. involvement in the Anti-Ballistic Missile Treaty with Russia. See, e.g., *Goldwater v. Carter (Goldwater I)*, 481 F. Supp. 949, 951 (D.D.C.) (describing President Carter's action and assessing its constitutional validity), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979); *U.S. Quits ABM Treaty*, CNN, (Dec. 13, 2001), [http://articles.cnn.com/2001-12-13/politics/rec.bush.abm\\_1\\_abm-treaty-rogue-state-missile-attacks-anti-ballistic-missile-treaty?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2001-12-13/politics/rec.bush.abm_1_abm-treaty-rogue-state-missile-attacks-anti-ballistic-missile-treaty?_s=PM:ALLPOLITICS) (discussing President Bush's termination of the ABM Treaty).

5. See Vienna Convention on the Law of Treaties, *supra* note 1, art. 18., at 336 (discussing the circumstances under which "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty").

6. *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring).

7. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) ("In either case the last expression of the sovereign will must control."); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.").

tional obligation or of the consequences of a violation of that obligation.”<sup>8</sup> If Congress were to pass inconsistent domestic legislation, it would override domestic law, but leave international obligations unaffected. As a result, when this Article discusses Congress’ ability to terminate a treaty it is referring solely to termination of the United States’ international obligations, the forum in which congressional power is not as straightforward.

This Article argues that Congress’ independent constitutional role in the termination of treaties must be recognized. In contrast to other articles that have argued for a joint congressional-executive role in treaty termination, this Article argues that there are constitutional mechanisms by which Congress can terminate U.S. involvement in treaties despite presidential opposition. Part I of this Article will demonstrate that neither the Constitution’s text nor the Framers’ intent identifies, let alone clarifies, which branch has the authority to terminate treaties. Part II will analyze the ongoing debate regarding the President’s unilateral authority to terminate treaties. Building on this background, Part III will present the core of the argument, analyzing each of the possible means by which either house of Congress could influence the termination of a treaty. This Part will argue that Congress’ primary means of terminating a treaty is to enact legislation, over a presidential veto if necessary, directing the President to deliver to the foreign state or international depository the notice necessary to terminate the treaty. Nevertheless, as Part IV will show, Congress has limited means by which it can enforce this power, as it has few tools available to compel a recalcitrant President to comply with its directives. As a result, this Article will conclude by arguing that the House and Senate should take a number of *ex ante* steps in the treaty approval process to ensure they retain power in its possible termination.

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8. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115(1)(b) (1987) [hereinafter RESTATEMENT]; *see also* Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) (“[An act of Congress] would control in our courts as the later expression of our municipal law . . . [and] the international obligation [would] remain[ ] unaffected.”); RESTATEMENT, *supra*, § 115 cmt. b (1987) (“[A]lthough a subsequent act of Congress may supersede a rule of international law or an international agreement as domestic law, the United States remains bound by the rule or agreement internationally under the principle stated in §321 [pacta sunt servanda.]”); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 324, at 585 (2d ed. 1929) [hereinafter WILLOUGHBY, 2d ed.] (“The termination of a treaty as an international compact carries with it the annulment of the agreement as a law of the land; but its annulment as a law by Congress does not carry with it its annulment as an international compact.”).

## I. Textualism and the Framers' Intent

Any constitutional interpretation must begin with an analysis of the Constitution's text. Given the Constitution's limited coverage of treaties however, this section will also analyze the Framers' interpretation of the treaty power as well as the potentially analogous appointment power to better understand how the treaty termination power was originally understood.

### A. Direct Textualism

The Constitution's only language relating to treaties indicates that both the President and the Senate are required to create treaties,<sup>9</sup> but "it does not say who can unmake them."<sup>10</sup> The U.S. government's power to terminate its involvement in treaties is generally recognized under international law<sup>11</sup> and not expressly denied to the government by the Constitution;<sup>12</sup> however, the Constitution's text does not expressly indicate where that power resides. This oversight is unsurprising given the Constitution's consistent failure to indicate which branch of government has the power to reverse many of its affirmatively granted powers.<sup>13</sup>

### B. Framers' Intent

While an analysis of the Framers' intent can sometimes help clarify ambiguous constitutional provisions, "the Framers never directly discussed the power to terminate treaties in the *Federalist* or in the Convention,"<sup>14</sup> or even "in the state ratifying conventions that followed."<sup>15</sup> Examining the Framers' views of the treaty power more gen-

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9. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2.

10. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 211 (2d ed. 1996).

11. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 1, arts. 54–64, at 344–47 (discussing the conditions under which a treaty can be terminated in compliance with international law with the presumption that states have the ability to terminate their treaty commitments). The United States is not a signatory to the VCLT but has accepted many of its provisions as reflective of customary international law.

12. HENKIN, *supra* note 10, at 211.

13. Most obviously, the Constitution does not discuss who can exercise the necessary ability to overturn or repeal any constitutionally enacted laws.

14. Sabis, *supra* note 3, at 248.

15. James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 *CONN. J. INT'L L.* 123, 132 (1999); see also ADLER, *supra* note 2, at 89–111.

erally only further confuses the analysis. The initial draft of the treaty provision at the Constitutional Convention gave the Senate exclusive control over treaties: “The Senate of the United States shall have the power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court.”<sup>16</sup> However, within two weeks, a provision was amended to divide the power between the President and the Senate: “The President by and with the advice and consent of the Senate, shall have the power to make treaties . . . . But no Treaty (except Treaties of Peace) shall be made without the consent of two thirds of the Members present.”<sup>17</sup> While some scholars argue that the Framers’ decision to move the treaty power from Article I to Article II indicates an intent to grant the power to the Executive, “there is no direct evidence of why the Framers put the treaty power in Article II.”<sup>18</sup> In fact, one of the preeminent historians on the Convention argues that the placement was due as much to fatigue as to anything else:

It was evident that the convention was growing tired. The committee had recommended that the power of appointment and the making of treaties be taken from the senate and vested in the president “by and with the advice and consent of the senate.” With surprising unanimity and surprisingly little debate, these important changes were agreed to.<sup>19</sup>

Looking outside of the Convention, individual Founders viewed treaties as either a senatorial<sup>20</sup> or presidential<sup>21</sup> power, but no consensus view ever emerged.<sup>22</sup> Although authors from both ideological camps

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16. Draft of Constitution Reported by Committee of Detail (Aug. 6, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (Max Farrand ed., 1937).

17. *Id.* at 495 (citations omitted). The language was introduced by the Committee of Eleven on September 7, 1787.

18. Sabis, *supra* note 3, at 251.

19. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 171 (1913); see also Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 91–114 (1979).

20. See, e.g., Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 523, 524 (1867) (“That the contracting powers can annul the Treaty can not, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a Treaty.”).

21. See, e.g., Alexander Hamilton, *Pacificus* No. 1 (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42 (Harold C. Syrett et al. eds., 1969) (“[T]hough treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone.”).

22. In fact, several Founders appeared to have changed their views over time. When Jefferson had served as Secretary of State in 1793, he had viewed the President as having final authority over treaty termination. Sabis, *supra* note 3, at 244 (“[T]he Constitution, ‘had made the President the last appeal’ concerning the termination of treaties, since the legislature was supreme ‘in making the laws only.’”). However, later, when Jefferson was

attempt to utilize this uncertainty as support for their own positions,<sup>23</sup> the only unambiguously clear conclusion resulting from analyzing the Founders' views of the treaty process is that "[t]he intent of the Framers is thoroughly ambiguous."<sup>24</sup>

### C. Indirect Textualism

Given the Constitution's silence and the Framers' ambiguity, many scholars have tried to analogize the treaty power with the appointment power, relying upon a form of indirect textualism to determine which branch of government has the power to terminate a treaty. The treaty and appointment power are contained in the same constitutional sentence and textually are almost identical:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . .<sup>25</sup>

Neither clause contains instructions on how to reverse the actions it directs; the appointment clause contains no instructions for the removal of officials, while the treaty clause is silent on how treaties can be terminated.<sup>26</sup> However, unlike the question of treaty termination,<sup>27</sup> the Supreme Court has established substantial jurisprudence clarifying who has the power to remove presidential appointees, providing potentially useful indirect precedent.

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President of the Senate in 1801, he viewed the legislature as having the sole authority to terminate treaties. *See id.* ("Treaties being declared . . . to be the supreme law of the land, it is understood that an act of the legislature alone can declare them to be infringed and rescinded." (footnote omitted) (internal quotations omitted) (quoting THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES (1801)).

23. Compare J. Terry Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. LEGIS. 46, 49 (1978) ("[A]bsent any specific evidence that the Framers meant to confer an untrammelled power upon the President in repealing treaties, it must be concluded the legislative body continues to have a role in the abandonment of a treaty as it does in making the treaty."), with Nelson, *supra* note 1, at 887 ("In the absence of express limitations upon the power to remove and the power to terminate, there is a strong presumption that no such limitation was intended.").

24. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 151 (1990); accord *Goldwater I*, 481 F. Supp. 949, 958 (D.D.C. 1979) (describing President Carter's actions, assessing its constitutional validity, and finding no "definitive evidence of the intentions of the Framers"), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

25. U.S. CONST. art. II, § 2.

26. See Nelson, *supra* note 1, at 883 (citations omitted).

27. In its one opportunity to grapple with the question of who can terminate a treaty, eight members of a fractured Supreme Court avoided the constitutional question by ruling that the case was non-justiciable for a variety of reasons. See *Goldwater I*, 444 U.S. 996.

In *Myers v. United States*,<sup>28</sup> the Court was confronted for the first time with the question of whether the President has the “exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.”<sup>29</sup> The case arose out of President Wilson’s firing of a postmaster who had been appointed under a law that explicitly conditioned the President’s ability to remove an appointee on the “advice and consent of the Senate.”<sup>30</sup> After reviewing the history of the Constitutional Convention and the early Congresses, Chief Justice William Taft concluded that the power of removal lay with the President alone, arguing that “the fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended.”<sup>31</sup> Chief Justice Taft argued that the Senate’s involvement in the appointment process should be “strictly construed”; the Executive’s power is “given in general terms” and is only “limited by direct expressions where limitation was needed.”<sup>32</sup> In other words, the appointment and removal of officers is an executive function permitting Senate involvement only where explicitly provided for by the Constitution. While *Myers* was subsequently limited by a number of cases,<sup>33</sup> it still stands for the proposition that “unless a power granted to the executive by the Constitution is specifically circumscribed, it belongs to that branch alone.”<sup>34</sup> Some have argued that the same analysis can be applied to the treaty clause, “since the wording of the two powers is nearly identical.”<sup>35</sup>

Nevertheless, despite the textual similarities between the provisions, there are a number of reasons why the treaty termination ques-

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28. 272 U.S. 52 (1926).

29. *Id.* at 106.

30. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80.

31. *Myers*, 272 U.S. at 118.

32. *Id.*

33. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (limiting the sole Executive power of removal to those appointees who were engaged in executive and not “quasi judicial or quasi legislative” functions); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (seemingly relaxing the conditions from *Humphrey’s Executor*, stating that “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty”).

34. Sabis, *supra* note 3, at 239; see also Louis Henkin, Editorial Comment, *Litigating the President’s Power to Terminate Treaties*, 73 AM. J. INT’L L. 647, 652–53 (1979) (arguing that the Senate should not be given an implied termination right because it has never been granted an implied removal right); Nelson, *supra* note 1, at 887 (“In the absence of express limitations upon the power to remove and the power to terminate, there is a strong presumption that no such limitation was intended.”).

35. Sabis, *supra* note 3, at 239.

tion cannot be answered by reference to the Executive's removal power. First, the provisions are not identical. The Senate is granted more involvement in the treaty process than in the appointment process; the Constitution requires that treaties garner two-thirds acceptance of the Senators present while appointments require only a simple majority.<sup>36</sup> Furthermore, the President is given the "exclusive power to make nominations to office, whereas in treaty-making the Constitution does not set him apart in this special way from those who advise and share responsibility with him."<sup>37</sup> Textually, both provisions afford the Senate a greater role in the treaty process than it has in appointments.

Second, it is more appropriate to compare a ratified treaty to other duly enacted domestic legislation than it is to compare it to Executive appointments. Appointees help the President execute the law, but a ratified treaty becomes part of the "supreme Law of the Land."<sup>38</sup> As such, it has the same domestic importance (and typically greater international importance) as bills passed via the standard bicameralism and presentment legislative process. Terminating a treaty is therefore in many ways analogous to repealing a statute, a power that requires the involvement of both Congress and the President. While there are a number of important differences that caution against treating the repeal of statutes and the termination of treaties identically, once can make a strong argument that Congress should have a role in any action that involves "changing the law itself."<sup>39</sup>

Finally, the "fundamental separation of powers considerations, which underwrite the Court's narrow construction of congressional power over appointments, are entirely inapt when applied to the treaty power."<sup>40</sup> Unlike appointments, treaty-making is not "a core executive function"<sup>41</sup> and therefore does not invoke the same separation

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36. U.S. CONST. art. II, § 2, cl. 2.

37. *Treaty Termination Hearings*, *supra* note 1, at 32 (prepared statement of Professor Arthur Bestor, University of Washington).

38. See U.S. CONST. art. VI, cl. 2.

39. Sabis, *supra* note 3, at 240.

40. David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1847 (1998). For an in-depth critique of why the appointment rationale cannot be applied to treaties, see *id.* at 1846-60.

41. *Id.* at 1847; accord THE FEDERALIST NO. 75, at 365 (Alexander Hamilton) ("For if we attend carefully to its [treaty power] operation, it will be found to partake more of the legislative than of executive character, though it does not seem strictly to fall within the definition of either of them."). But see Nelson, *supra* note 1, at 887 ("Inasmuch as the making of treaties pertains to the conduct of foreign relations, distinctly an executive power, much of Chief Justice Taft's argument in *Myers* can be applied with equal cogency to support an unlimited power of treaty termination by the President."); Moriarty, *supra*



of powers concerns.<sup>42</sup> “Consequently, no emanation from the Treaty Clause can underwrite a *Myers*-like strict rule of construction, ruling out a priori any congressional participation in agreement-making as an infringement on the essential powers of the executive.”<sup>43</sup> Importantly, in *Goldwater v. Carter*, the seminal case on treaty termination, both the D.C. District Court<sup>44</sup> and the D.C. Circuit Court of Appeals<sup>45</sup> rejected the appellee’s argument that *Myers* should be controlling in deciding the treaty termination issue. None of the five separate opinions in the Supreme Court touched on the issue, though the Justices clashed over its relevance in oral argument.<sup>46</sup> While not binding, the district and appellate decisions in *Goldwater* are therefore the only two court decisions on the topic and both call into question the assumption that *Myers* would be controlling.<sup>47</sup>

Both a direct and indirect analysis of the Constitution’s text as well as an examination of the Framers’ intent leaves unresolved the question of whether Congress can unilaterally terminate a treaty. Therefore, one must turn to an analysis of how the issue has been understood by commentators and practitioners historically and today; “the Constitution, considered only for its affirmative grants of power . . . is an invitation to struggle for the privilege of directing American foreign policy.”<sup>48</sup> This Article focuses on a part of this struggle, analyzing the ways in which Congress might assert its role in the treaty termination process even in the face of Executive opposition.

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note 15, at 163 (“[T]he burden is on the President to show that the decision as to whether or not notice should be delivered is an area of sole executive authority.”).

42. In this way, congressional influence over the treaty process would be more analogous to its influence over quasi-legislative and quasi-judicial appointees which the Court upheld in *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

43. Golove, *supra* note 40, at 1847–48.

44. *Goldwater I*, 481 F. Supp. 949, 960 (D.D.C.) (“An attempt to justify a unilateral presidential power to terminate treaties by analogy to the Supreme Court’s treatment of the removal power in *Myers* is unpersuasive.”), *rev’d*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

45. *Goldwater v. Carter (Goldwater II)*, 617 F.2d 697, 704 (D.C. Cir.) (“Expansion of the language of the Constitution by sequential linguistic projection is a tricky business at best. Virtually all constitutional principles have unique elements and can be distinguished from one another.”), *vacated*, 444 U.S. 996 (1979).

46. See Sabis, *supra* note 3, at 240.

47. See *infra* Part IV.B (discussing the likelihood that a court would be willing to hear a treaty termination case today).

48. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1948, HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 208 (3d ed. 1948).

## II. The Recent Focus on the Executive Acting Unilaterally

For the last thirty years, the treaty termination debate has focused on whether a President can unilaterally terminate a treaty without congressional or senatorial approval. This Article inverts that question, but a brief discussion of the question of unilateral executive power is necessary to both inform and underpin this Article's discussion.

President Johnson controversially came within twenty-four hours of terminating U.S. participation in the Warsaw Convention in 1965,<sup>49</sup> but the debate about a President's power to terminate treaties did not begin in full until President Carter unilaterally terminated the Mutual Defense Treaty between the United States and Taiwan in 1978.<sup>50</sup> President Carter's claim to a unilateral termination power was grounded first in precedent; he cited both historical academic support<sup>51</sup> as well as real-world examples of a President's ability to unilaterally terminate treaties without congressional consent.<sup>52</sup> However, a number of scholars have persuasively argued that none of the precedent cited by President Carter support a President's unilateral termination power.<sup>53</sup>

President Carter's reliance on a historical tradition of broad executive power in foreign affairs was more widely accepted.<sup>54</sup> The Su-

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49. See, e.g., Comment, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580 (1967) [hereinafter *Presidential Amendment and Termination of Treaties*].

50. Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, 2 PUB. PAPERS 2264 (Dec. 15, 1978).

51. See Memorandum from Herbert J. Hansel, Legal Adviser, to Cyrus Vance, Sec'y of State, Re: President's Power to Give Notice of Termination of U.S.-R.O.C. Mutual Defense Treaty (Dec. 15, 1978), in STAFF OF S. COMM. ON FOREIGN RELATIONS, 95TH CONG., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER 395, 395-97 (Comm. Print. 1979).

52. See *id.* at 397-98.

53. See Jonathan York Thomas, *The Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination*, 6 YALE STUD. WORLD PUB. ORD. 27, 79 (1979) (arguing that none of the thirteen examples support a claim for presidential power); David J. Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931, 979-86 (1978) (same). Even Professor Henkin, a strong supporter of the President's power to terminate treaties unilaterally has cautioned against reliance on these precedents. See Henkin, *supra* note 34, at 651 ("But looking to the precedents alone is misleading, especially since many of them are old, antedating the development of clear lines of constitutional authority in foreign affairs.").

54. See, e.g., *Charlton v. Kelly*, 229 U.S. 447, 476 (1913) (upholding unilateral presidential power to determine when a treaty has been breached by the other side). *But see In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 75 (1821) (holding that a President cannot unilaterally amend a treaty).

preme Court has recognized that “the President alone has the power to speak or listen as a representative of the nation.”<sup>55</sup> Furthermore, the President is the “sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”<sup>56</sup> While this argument was initially controversial, over the last thirty years it has been widely accepted by academic commentators,<sup>57</sup> the Restatement of Foreign Affairs,<sup>58</sup> the executive branch,<sup>59</sup> as well as the Senate.<sup>60</sup>

The Supreme Court also appears sympathetic. In 1979, eight members of the U.S. Senate, one former Senator, and sixteen Congressmen sued President Carter in federal court to enjoin his termina-

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55. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

56. *Id.* at 320.

57. See, e.g., John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2242 (1999) (“[T]oday most commentators, courts and government entities accept that the President unilaterally may terminate treaties.”); Henkin, *supra* note 34, at 652 (“Termination of a treaty is an international act, and the President, and only the President, acts for the United States in foreign affairs.”).

58. RESTATEMENT, *supra* note 8, § 339 (“Under the law of the United States, the President has the power (a) to suspend or terminate an agreement in accordance with its terms; (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or (c) to elect in a particular case not to suspend or terminate an agreement.”). Michael Glennon argues that this provision should be read to uphold a presidential power to terminate treaties in compliance with international law and not to abrogate them in violation thereof. See GLENNON, *supra* note 24, at 158–59. However, the Restatement does not directly distinguish between terminating treaties in compliance with or in violation of international law.

59. See, e.g., Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees at 12, n.36 (Jan. 22, 2002), available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (“[T]he President’s power to terminate treaties . . . has been accepted by practice and considered opinion of the three branches . . .” (citing Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Authority of the President to Denounce the ABM Treaty (Dec. 14, 2001))).

60. S. REP. NO. 96-119, at 9–10 (1979) (upholding President’s power to terminate a treaty if it is in accordance with international law and the Senate has not expressed a contrary position); *Treaties: The Senate’s Role in Treaties*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5> (last visited Mar. 22, 2012); see also CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 201 (Comm. Print 2001) [hereinafter CRS TREATY TERMINATION] (“Although the Congress can effectively terminate a treaty’s domestic effect by passage of a superseding public law . . . the termination of the outstanding international obligation seems to reside with the President since he alone is able to communicate with foreign powers.”).

tion of the Mutual Defense Treaty.<sup>61</sup> In a fractured set of opinions, the Supreme Court dismissed the case, predominantly based on political question<sup>62</sup> and ripeness grounds.<sup>63</sup> However, one Justice did reach the merits: Justice Brennan's opinion stated that he would have affirmed the D.C. Circuit and upheld President Carter's unilateral termination of the treaty. As the only available data point regarding the Supreme Court's view of the President's claim to a unilateral right to terminate treaties, this case offers some persuasive, though nonbinding, support for a President's unilateral termination authority.<sup>64</sup>

There is thus support for the view that the President has the unilateral authority to terminate a treaty. However, this support does not help to answer this Article's inquiry for a variety of reasons. First, even if one were to accept that the executive has a unilateral termination right, which as demonstrated above remains controversial, "the President has never been accorded an *exclusive* power to terminate treaties."<sup>65</sup> For example, the Restatement only indicates that "the President has the power . . . to suspend or terminate an agreement" without giving any indication that another body might not also have the same right.<sup>66</sup>

Second, the only Justice to reach the merits of the termination issue in *Goldwater* based his decision on the President's power to recognize and derecognize other governments,<sup>67</sup> an alternative presidential power not likely to be relevant in many termination settings.

Finally, most commentators who argue that a President's right to terminate is exclusive base their opinions on the President's recog-

61. *Goldwater I*, 481 F. Supp. 949, 950 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

62. *Goldwater v. Carter (Goldwater III)*, 444 U.S. 996, 1002 (1979) (mem.) (Rehnquist, J., concurring).

63. *Id.* at 997 (Powell, J., concurring).

64. *Id.* at 1006 (Brennan, J., dissenting) ("[Termination is] a necessary incident to Executive recognition of the Peking government. . . . Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes.").

65. Nelson, *supra* note 1, at 888 (emphasis in original).

66. RESTATEMENT, *supra* note 8, § 339(a).

67. *Goldwater III*, 444 U.S. at 1006 (Brennan, J., dissenting). The language in the D.C. Circuit's opinion affirming the President's unilateral authority was more general than that used by Justice Brennan. *See Goldwater II*, 617 F.2d 697, 708 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) ("[T]he power of the President to terminate may appear theoretically absolute"). However, the court explicitly limited its holding to the facts before it, reserving the question of a President's authority to terminate other treaties. *Id.* at 699 ("The constitutional issue we face, therefore, is solely and simply the one of whether the President *in these precise circumstances* is, on behalf of the United States, empowered to terminate the Treaty in accordance with its terms." (emphasis added)).

nized role as the sole representative of the United States in foreign affairs.<sup>68</sup> However, as the next section of this Article will endeavor to show, while this argument might limit Congress' ability to directly deliver notice of the United States' withdrawal, it does not necessarily preclude Congress from passing legislation that directs the President to give the requisite notification. Thus, there remains an open question of whether Congress has the authority to unilaterally terminate treaties. The following sections of this Article address this gap.

### III. Congress' Independent Options to Influence the Termination of Treaties

This section will analyze each of the conceivable ways by which either house of Congress, acting separately or together, might independently influence the termination of a treaty.

#### A. Introduction

The varied practice of the United States in terminating treaties over its history provides precedent for several of these methods.<sup>69</sup> This section will argue that the only defensible means by which Congress could independently terminate a treaty without infringing on the President's constitutional authority is by passing legislation, presumably over a presidential veto, directing the President to give the requisite notice of termination. All other methods either require presidential involvement or are patently unconstitutional.

As an initial matter, two of the theoretically possible avenues by which either the House or Senate could act can be quickly disposed of. First, as opposed to the Senate, to which the Constitution grants several independent powers regarding foreign affairs, the House of Representatives acting independently has no constitutional authority. Independently, the House can only pass a House resolution, which "is

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68. See, e.g., Henkin, *supra* note 34, at 652 ("Termination of a treaty is an international act, and the President, and only the President, acts for the United States in foreign affairs."); CRS TREATY TERMINATION, *supra* note 60, at 201 ("Although the Congress can effectively terminate a treaty's domestic effect by passage of a superseding public law . . . the termination of an outstanding international obligation seems to reside with the President since he alone is able to communicate with foreign powers.").

69. See, e.g., *Goldwater III*, 444 U.S. at 1005 n.1 (Rehnquist, J., concurring) (noting the varied historical practice of the U.S. in treaty termination); HENKIN, *supra* note 10, at 211 ("At various times, the power to terminate treaties has been claimed for the President, for the President-and-Senate, for President-and-Congress, [and] for Congress."); Moriarty, *supra* note 15, at 129 ("Treaties have been terminated throughout the history of the United States in many different ways . . .").

not binding upon the President” and the President may therefore “comply with or ignore the resolution as he sees fit.”<sup>70</sup> While the House has from time to time argued for a greater role in foreign affairs, its exclusion was deliberate on the part of the Framers, who believed that the quick turnover of Representatives would not be conducive to successful foreign policy.<sup>71</sup>

Second, a concurrent resolution, passed by both houses of Congress but not signed by the President, has no constitutional authority.<sup>72</sup> While such an action would presumably be sufficient to demonstrate either Congress’ support for the President<sup>73</sup> or its opposition, thereby creating a case or controversy “ripe” for judicial determination,<sup>74</sup> the President can “heed or ignore a concurrent resolution of the two Houses.”<sup>75</sup> A concurrent resolution is therefore a constitutionally insufficient mechanism for Congress to terminate a treaty.

### B. Two-thirds of the Senate Acting Independently

A strong argument can be made that treaties should be terminated in the same way as they are made: by a two-thirds vote of the Senate.<sup>76</sup> Historically, this method has been relied upon several times. The first instance appears to have been in 1855 when the Senate unanimously passed a resolution authorizing President Pierce to give Denmark notice of U.S. withdrawal from the Treaty of Friendship,

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70. Nelson, *supra* note 1, at 892.

71. See, e.g., THE FEDERALIST NO. 64 (John Jay) (“They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute.”).

72. See *INS v. Chadha*, 462 U.S. 919, 956–58 (1983) (reaffirming the constitutional requirement that legislation must pass through bicameralism and presentment before it has the force of law).

73. The Senate Committee on Foreign Relations has argued that if both Houses of Congress demonstrate their support for termination, which could be accomplished by concurrent resolution, the President has the constitutional capacity to unilaterally terminate a treaty. S. REP. NO. 96-119, at 9–10 (1979).

74. In *Goldwater III*, Justice Powell voted to dismiss the case and vacate the District Court’s decision on ripeness grounds, because Congress had yet to take any “official action.” Presumably therefore, if each branch were to take “action asserting its constitutional authority” thereby creating an “actual confrontation between the Legislative and Executive Branches” there would be a justiciable case or controversy. *Goldwater III*, 444 U.S. at 997–98 (Powell, J., concurring).

75. Nelson, *supra* note 1, at 892.

76. U.S. CONST. art. 2, §. 2, cl. 2.

Commerce, and Navigation with Denmark.<sup>77</sup> President Pierce subsequently gave “the notice ‘in pursuance of the authority conferred’ by the Senate Resolution.”<sup>78</sup> After the House complained of its exclusion, arguing that its constitutional role in the creation of law had been bypassed, the Senate Committee on Foreign Relations studied the issue and issued a report concluding:

[T]he Committee are clear in the opinion that it is competent for the President and Senate, acting together, to terminate in the manner prescribed by the 11th article, without the aid or intervention of legislation by Congress, and that when so terminated, it is at an end to every intent, both as a contract between the governments, and as a law of the land.<sup>79</sup>

This method was again used when President Wilson sought to terminate the International Sanitary Convention of 1903, and also sought, and received, support from two-thirds of the Senate.<sup>80</sup> In the 1979 dispute over President Carter’s termination of the 1954 Mutual Defense Treaty, the Senate appeared to reaffirm its support for this method, introducing at least two resolutions calling for the President to refrain from acting until he received the Senate’s advice and consent to the treaty’s termination.<sup>81</sup> Furthermore, there is historical support for this approach from the courts (in dicta),<sup>82</sup> several of the

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77. S. REP. NO. 34-97, at 2 (1856); *see also* General Convention of Friendship, Commerce, and Navigation, U.S.-Den., Apr. 26, 1826, 8 Stat. 340.

78. Emerson, *supra* note 23, at 54.

79. S. REP. NO. 34-97, at 3. Two years later, the Senate went further, changing a Joint Resolution passed by the House into a simple Senate Resolution authorizing the President to withdraw from a commercial treaty with Hanover. Emerson, *supra* note 23, at 55.

80. *See* CRS TREATY TERMINATION, *supra* note 60, at 205 (“By a resolution adopted by a two-thirds majority on May 26, 1921, the Senate gave its advice and consent to the denunciation of the convention; and the Secretary of State communicated notice of the denunciation to the convention’s depositary.”).

81. *See* S. Con. Res. 2, 96th Cong., 125 CONG. REC. 474 (1979) (“Resolved by the Senate (the House of Representatives concurring), That, in accordance with the separation of powers under the Constitution, the President should not unilaterally abrogate, denounce or otherwise terminate, give notice of intention to terminate, alter, or suspend any of the security treaties comprising the post-World War II complex of treaties, including mutual defense treaties, without the advice and consent of the Senate, which was involved in their initial ratification, or the approval of both Houses of Congress.”); S. Res. 15, 96th Cong., 125 CONG. REC. 475 (1979) (“Resolved, That it is the sense of the Senate that approval of the United States Senate is required to terminate any Mutual Defense Treaty between the United States and another nation.”). The Resolution was approved in committee but never received a vote on the Senate floor as a result of the objection of Senator Robert C. Byrd. *Id.*

82. *See, e.g.,* Clark v. Allen, 331 U.S. 503, 509 (1947) (“[The] President and Senate may denounce the treaty, and thus terminate its life.” (quoting *Techt v. Hughes*, 128 N.E. 185, 192 (1920))); *In re* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821) (“[T]he obligations of the treaty could not be changed or varied but by the same formalities with

Founders,<sup>83</sup> the State Department,<sup>84</sup> as well as from a number of modern commentators.<sup>85</sup>

Despite this widespread support, a number of counterarguments have been raised. First, most of its apparent support is derived from juridical dicta and academic commentators, offering little in precedential value. Practically speaking, this termination method does not appear to have been used in an actual treaty termination in over fifty years. Relying only on the previous precedents “is misleading, especially since many of them are old, antedating the development of clear lines of constitutional authority in foreign affairs.”<sup>86</sup> Second, the Constitution provides very few powers directly to the Senate, leading scholars not to infer “any powers for the Senate (as distinguished from Congress) other than those specified.”<sup>87</sup> Third, as discussed above, in the executive appointment context the Supreme Court has explicitly rejected the argument that the constitutional authority to take an action necessarily implies the power to repeal or reverse that action.<sup>88</sup> The Court has granted the Executive almost untrammelled authority to remove executive officials, despite the role the Senate is granted in their confirmation. Given the textual similarities between the appoint-

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which they were introduced, or at least by some act of as high an import, and of as unequivocal an authority.”).

83. See, e.g., THE FEDERALIST NO. 64 (John Jay) (“[T]hey who make treaties may alter or cancel them.”); RAMSEY, *supra* note 1, at 159 (“It is a general principle in law, as well in reason, that there shall be the same authority to remove as to establish.” (quoting Roger Sherman)).

84. 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 509, at 316 (1927) (“[T]he power that makes the treaty can likewise revoke it; in other words, that the President, acting in conjunction with the Senate of the United States, would be authorized to terminate a treaty to which the United States is a party.” (quoting Memorandum of Scott, Solicitor, Dep’t of State (June 12, 1909))).

85. See, e.g., Bestor, *supra* note 19, at 135 (reviewing the history of the treaty clause in order to conclude that “treatymaking was to be a cooperative venture from the beginning to the end of the entire process. This, the evidence shows, was the true intent of the framers.”); Moriarty, *supra* note 15, at 132–33; Nelson, *supra* note 1, at 888 (“Practice and opinion in the United States also supports the view that treaties should be terminated as they are made, *i.e.*, by the President and the Senate acting as the ‘treaty-making’ power of the United States.”); Scheffer, *supra* note 53, at 1008–09 (“Given the peculiar design of the United States Constitution, whereby the Senate and President share in the treaty-making power, there is much to be said for a court-approved procedure requiring Senate participation in the termination process.”).

86. Henkin, *supra* note 34, at 651.

87. *Id.* at 652–53; accord RAMSEY, *supra* note 1, at 159 (“[T]he text gave the Senate a role in treaty-making. It did not give the Senate a role in treaty withdrawal, so that power remained part of the President’s executive power.”).

88. See *supra* Part I.C (discussing the Supreme Court’s holding in *Myers* that the Senate’s authority to provide its advice and consent for appointments did not imply an equal authority in removals).



ment and termination provisions, it is thus questionable whether a court would ever uphold a Senate role in the termination of a treaty simply because the Constitution granted them authority over ratification.

Finally, and most importantly in the context of this Article, the Senate can make no claim that it could force a recalcitrant President to terminate a treaty even with a two-thirds majority.<sup>89</sup> Any role that the Senate independently might possess is inferred from its power over treaty ratification, a power that itself requires presidential approval. Presidential opposition to a treaty's termination would render precatory any resolution supporting such an action passed only by a Senate supermajority.

### C. Both Houses of Congress Acting Jointly to Independently Notify Foreign States of a Treaty's Termination

Congress has no constitutional authority to independently terminate a treaty when it acts through a concurrent resolution or through either house individually. The only means by which Congress can constitutionally enact legislation is by acting jointly and passing legislation through the rigors of bicameralism and presentment, thereby incorporating the president's support or overcoming his veto.

Congress has two potential means of acting jointly to terminate a treaty. The first, and seemingly simplest option, would be to pass legislation purporting to terminate the United States' treaty involvement. This may have been the option at the forefront of the Founders' minds, as the first treaty termination in U.S. history was accomplished solely by congressional joint resolution. On July 7, 1798, the fifth Congress passed an act entitled "An act to declare the treaties heretofore concluded with France no longer obligatory on the United States," whose operating paragraph<sup>90</sup> read in full:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States are of*

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89. See, e.g., Moriarty, *supra* note 15, at 137–38.

90. The prefatory language of the Act read:

Whereas, the treaties concluded between the United States and France have been repeatedly violated on the part of the French government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with indignity; And whereas, under authority of the French government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation . . . .

Act of July 7, 1798, ch. 67, 1 Stat. 578.

right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.<sup>91</sup>

While President Adams signed the act, the bill's language indicates that Congress itself was terminating U.S. involvement in a series of four commercial treaties with France. The bill does not direct the President to notify France of the United States' termination, it simply assumes that Congress' action alone is sufficient to end the United States' international obligations. While this might have been interpreted as an anomaly of the founding, almost one hundred years later the Supreme Court upheld Congress' actions, declaring that "[i]n 1798 the conduct towards this country of the government of France was of such a character that Congress declared that the United States were freed and exonerated from the stipulations of previous treaties with that country."<sup>92</sup> France did, however, refuse to recognize Congress' abrogation.<sup>93</sup>

Despite its assertive beginning, Congress does not appear to have passed a bill repeating its 1798 efforts. Several such bills were proposed during the debates over the Yalta Agreement in 1953, but none of them passed the House of Representatives.<sup>94</sup> In the judicial branch, there is some obscure language in several court opinions that could be read as an affirmation of the constitutionality of such an approach,<sup>95</sup> though the precedential value of such historical dicta is low.

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91. *Id.*

92. *Chae Chan Ping v. United States*, 130 U.S. 581, 601 (1889); *see also Hooper v. United States*, 22 Ct. Cl. 408, 418 (1887) ("The annulling act issued from competent authority and was the official act of the Government of the United States. So far as it was within the power of one party to abrogate these treaties it was indisputably done by the Act of July 7, 1798."); *see also Sabis*, *supra* note 3, at 235 ("In rendering its decision, the court of claims [in *Hooper*] held Congress was the correct U.S. authority to abrogate a treaty and had properly issued the terminating act, apparently on the grounds that a treaty was the supreme law of the land and thus, a legislative Act was needed for its termination.")

93. *See* CRS TREATY TERMINATION, *supra* note 60, at 207 (citing 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 608 *et seq.* (1906)).

94. *See* Nelson, *supra* note 1, at 895 n.72 (listing the various bills that were introduced and what would have been the effect of their language).

95. In dicta, the Supreme Court has referred affirmatively to a congressional authority to terminate U.S. international commitments. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("We think that some affirmative expression of *congressional intent to abrogate* the United States' international obligations is required in order to construe the word 'treaty' in §106 as meaning only Art. II treaties." (emphasis added)); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) ("If Congress, therefore, (who, I conceive, alone have such authority under our Government) shall make such a declaration, in any case like the present, I shall deem it my duty to regard the treaty as void . . ."); *see also Ropes v. Clinch*, 20 F. Cas. 1171,

Nevertheless, while Congress' actions in 1798 were widely accepted at the time, the consensus has quickly shifted to supporting the President as the exclusive representative of the United States in foreign countries. Indeed, this view had developed as early as 1816, when the Senate Foreign Relations Committee ("SFRC") indicated that "[t]he President is the constitutional representative of the United States with regard to foreign nations."<sup>96</sup> By 1911, the Chairman of the SFRC, Senator Henry Cabot Lodge, conceded that Senate and Congress should "remember that it does not lie in our hands alone to give this notice to a foreign Government. We can not give the notice."<sup>97</sup> In 1929, a prominent academic commentator applied this consensus to the treaty termination debate, concluding that "Congress has no means whereby it may itself give a notice of termination of a treaty to the foreign government concerned, for, under the Constitution, Congress has no power to communicate directly with foreign Powers."<sup>98</sup> Today, the "President alone has the power to speak or listen as a representative of the nation . . . . 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'"<sup>99</sup> As such, Congress cannot independently communicate with foreign nations, nor can it purport to drive policy by any means other than through the President. Foreign states themselves are presumed to know that only the President and his representatives<sup>100</sup> are authorized to speak on behalf of the United States.<sup>101</sup> Modern com-

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1174 (C.C.S.D.N.Y. 1871) ("There are three modes in which congress may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once, by express terms . . . .").

96. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

97. 48 CONG. REC. 480 (1911) (statement of Sen. Henry Cabot Lodge).

98. 1 WILLOUGHBY, 2d ed., *supra* note 8, § 324, at 587.

99. *Curtiss-Wright Export Corp.*, 299 U.S. at 319 (quoting 10 ANNALS OF CONG. 613 (1800)).

100. Representatives are those individuals to whom the President has delegated constitutional authority, e.g., members of the Executive branch. The clearest examples would be the Secretary of State and the U.S. ambassadors. For the purposes of concluding an international agreement, the Restatement provides that only persons who "produce[ ] full powers" are authorized to represent a state. *See* RESTATEMENT, *supra* note 8, § 311(2)(a) & cmt. b. The U.S. practice with respect to the delegation of authority was originally laid out in "Circular 175," a 1955 U.S. State Department Circular that "prescrib[ed] a process for prior coordination and approval of international agreements." *See Circular 175 Procedure*, U.S. DEP'T ST., <http://www.state.gov/s/1/treaty/c175/> (last visited May 14, 2012). The current practice is codified at 22 C.F.R. § 181.4 and described on the State Department's website. *Id.*

101. *See* RESTATEMENT, *supra* note 8, § 311(2)(b) & cmt. b.

mentators have almost universally come to accept this view.<sup>102</sup> Through this lens, Congress' action in 1798 is the anomaly. Professor Henkin explains this discrepancy by noting that Congress has previously justified independent action through a different conception of the relationship between treaty abrogation and the likelihood of war than exists today. "In earlier times . . . the maintenance or termination of treaties" was seen as "intimately related to war or peace for which Congress has primary responsibility."<sup>103</sup> Indeed, Congress' actions in 1798 were subsequently interpreted by the courts as having amounted to a declaration of war against France.<sup>104</sup> If treaty terminations are seen as declarations of war, then Congress can justify an independent role based on its express constitutional delegation of power in the declaration of war.<sup>105</sup> Today, Congress likely has the constitutional authority to give "the requisite notice to a foreign nation that it is terminating a treaty when it is doing so pursuant to its power to declare war,"<sup>106</sup> an authority even the Executive Branch concedes.<sup>107</sup>

However, the creation and abrogation of treaties is no longer considered to be as intimately connected with matters of war and peace as it was in 1798. For example, in 2001, President Bush terminated the Anti-Ballistic Missile ("ABM") Treaty, a bilateral arms control treaty that had served as one of the foundations of peace during

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102. See, e.g., HENKIN, *supra* note 10, at 213 ("Congressional resolutions have no effect internationally unless the President adopts and communicates them; some Presidents have chosen to comply with Congressional wishes, but others have disregarded them."); Moriarty, *supra* note 15, at 148 ("The vast majority of commentators who have spoken on the subject have concluded that Congress has no independent power to give foreign nations notice of termination, if the President refused to do so."); Scheffer, *supra* note 53, at 991 ("There is no dispute as to which authority is to actually deliver notice of termination . . . it is the President. A Senate or congressional attempt to deliver the notice of termination would risk severe constitutional censure.").

103. HENKIN, *supra* note 10, at 213. Professor Henkin cites to Congress' 1798 termination, discussed *supra* Part III.C, as one of his examples. See *id.* at 213 n.143.

104. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

105. U.S. CONST. art. I, § 8, cl. 11.

106. Moriarty, *supra* note 15, at 148; accord *Presidential Amendment and Termination of Treaties*, *supra* note 49, at 600 ("[Congress'] . . . right to give notice of denunciation to other countries . . . has since been restricted to declarations pursuant to war."). But see ADLER, *supra* note 2, at 157 (arguing that even this power no longer exists).

107. *Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 396 n.17 (1996) ("A declaration of war is a legislative act that can have the effect of abrogating a treaty in whole or in part. . . . Accordingly, it is at least arguable that Congress' war power enables it to enact legislation, other than a formal declaration of war, that authorizes the President to vary the United States' obligations under disarmament or other political-military treaties.").

the Cold War.<sup>108</sup> Its termination was controversial, but no one in either country construed it as a possible declaration of war. If terminating the ABM Treaty did not produce such a reaction, there are few treaties that would. Congress today would thus not be able to justify a treaty termination power based on its war declaration power.<sup>109</sup>

As discussed above, the only means by which Congress can constitutionally compel action is through legislation constitutionally enacted through bicameralism and presentment. Yet, even via such legislation, Congress cannot independently communicate with foreign states as the President is the only authority constitutionally empowered to do so. This precludes Congress from directly notifying foreign governments of the United States' termination, but it leaves open one final possibility for action, discussed in the next section.

#### **D. Both Houses of Congress Acting Jointly to Direct the President to Deliver the Notification of Termination to Foreign States**

While the previous section demonstrated that Congress cannot itself directly communicate with foreign states, this section will analyze “whether Congress has the right to legislate that a treaty shall be terminated, and by such legislation . . . demand that the President deliver notice of termination pursuant to his duty to see that the laws are faithfully executed.”<sup>110</sup>

##### **1. Argument in Favor of a Congressional Power to Direct a President to Terminate a Treaty with a Foreign State**

Historically, legislation authorizing or directing the President to terminate a treaty “has been the most common method employed by the Congress and acted upon by the President.”<sup>111</sup> While most of these terminations have been cooperative, with both Congress and the President supporting the treaty's termination, this section will en-

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108. Remarks Announcing the United States Withdrawal from the Anti-Ballistic Missile Treaty, 37 WEEKLY COMP. PRES. DOC. 1783 (Dec. 13, 2001).

109. The D.C. Circuit went further in *Goldwater II*, arguing that treaty terminations should be treated as a singular power and not differentiated based on the subject of the treaty, thereby rejecting a congressional argument for termination power only in war settings. See *Goldwater II*, 617 F.2d 697, 707 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) (“There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards. We know of no standards to apply in making such distinctions.”).

110. Moriarty, *supra* note 15, at 156.

111. Scheffer, *supra* note 53, at 997; accord Moriarty, *supra* note 15, at 140 n.87.

deavor to show that Congress has the constitutional capacity to direct even a recalcitrant President to deliver the notification of a treaty's termination.

The principle justification for this argument is the President's constitutional duty to "take Care that the Laws be faithfully executed."<sup>112</sup> As the head of the Executive Branch, the President is charged with executing the laws enacted by Congress. While the President has the ability to veto legislation, if that legislation is subsequently passed over his veto,<sup>113</sup> he is constitutionally required to enforce it. The Constitution's text permits no discretion; the President is required to enforce all enacted legislation equally and cannot do so piecemeal, discriminating between those provisions he wishes to execute and those he does not.

In the context of the treaty termination debate, if Congress passes legislation requiring the President to deliver termination notification to a foreign state, "the President may actually be required to terminate a treaty in order to uphold his constitutional duty."<sup>114</sup> As Professor Henkin has written, when enacted legislation is clearly intended to be mandatory on the President "it is difficult to build a persuasive argument that 'He shall take Care that the Laws be faithfully executed' gives him discretion not to execute them."<sup>115</sup> Nor is there any reason to believe that this duty is "weaker, or different, in respect of laws that govern or impinge on foreign relations."<sup>116</sup>

The first apparent instance of Congress acting via this procedure was on April 27, 1846 when Congress authorized President Polk, in response to President Polk's request for such authority, to provide notice of U.S. withdrawal from a treaty with Great Britain granting shared occupancy of the Oregon Territory.<sup>117</sup> The second was in 1883 when Congress directed President Arthur to terminate a treaty with Britain using language representative of that used throughout the nineteenth century: "the President be, and he hereby is, directed to give notice to the Government of Her Britannic Majesty that the provi-

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112. U.S. CONST. art. II, § 3.

113. For the purposes of this section, assume that any reference to legislation that has been passed in an attempt to force an opposed President to act, was duly enacted into law, whether over a presidential veto or his unwilling signature.

114. Nancy J. Murray, Comment, *Treaty Termination by the President Without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 Sw. L.J. 729, 743 (1979).

115. HENKIN, *supra* note 10, at 118 (quoting U.S. CONST. art. II, § 3).

116. *Id.*

117. H.R.J. Res. 4, 29th Cong., 9 Stat. 109 (1846) (enacted); *see also* Emerson, *supra* note 23, at 53.

sions . . . will terminate and be of no force on the expiration of two years next after the time of giving such notice.”<sup>118</sup>

While the Supreme Court seemed to uphold the practice several times in passing during the nineteenth century,<sup>119</sup> in 1936 it directly addressed the constitutionality of Congress’ attempt to terminate a treaty.<sup>120</sup> *Van Der Weyde v. Ocean Transport Company* arose out of a challenge to a statute passed by Congress in 1915, which “expressed ‘the judgment of Congress’ that treaty provisions in conflict with the provisions of the act ‘ought to be terminated,’ and the President was ‘requested and directed’ to give notice to that effect to the several governments concerned.”<sup>121</sup> In compliance with the Act’s direction, President Wilson terminated a number of treaties between 1915 and 1918 that conflicted with its provisions.<sup>122</sup> The Court was confronted with the limited issue of whether the Executive had the authority to terminate the treaty in question, and ultimately held that the President had a duty to abide by the dictates of the congressional statute:

In this instance, the Congress requested *and directed* the President to give notice of the termination of the treaty provisions in conflict with the Act. From every point of view, *it was incumbent upon the President*, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law.<sup>123</sup>

While one contemporaneous scholar argued that the *Van Der Weyde* Court “did not state squarely that Congress could direct the President to terminate a treaty,”<sup>124</sup> the Court’s argument that “it was incumbent

118. H.R.J. Res. 22, 47th Cong., 22 Stat. 641 (1883) (enacted).

119. See *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 599 (1884) (“[W]e are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, *or repeal*.” (emphasis added)); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) (“Congress by legislation . . . could abrogate a treaty . . .”).

120. As was true throughout the nineteenth century, the treaty terminations in question were supported by both the legislative and executive branches working cooperatively. As such, the courts were not confronted with the question at issue in this paper, and subsequently addressed in *Goldwater III*, regarding which branch had the constitutional authority to terminate the treaty when the other branch stood in opposition. See *Goldwater III*, 444 U.S. 996 (1979) (mem.).

121. *Van der Weyde v. Ocean Transp. Co.*, 297 U.S. 114, 116 (1936) (quoting Seamen’s Act, ch. 153, § 16, 38 Stat. 1164, 1184 (1915)).

122. *Id.* at 116 & n.3.

123. *Id.* at 117–18 (emphasis added).

124. Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 647 (1937).

upon the President” prescribes an unambiguous duty to abide by Congress’ directive.<sup>125</sup>

More recently, Justice Rehnquist’s concurring opinion in *Goldwater* noted that Congress has “resources available to protect and assert its interests” against Executive encroachment,<sup>126</sup> and cited as an example the lower court’s discussion of Congress’ practice of initiating “the termination of treaties by directing or requiring the President to give notice of termination.”<sup>127</sup> While Justice Rehnquist’s decision was non-binding, presumably, if Congress’ practice of so directing the President was unconstitutional, Justice Rehnquist would not have affirmatively cited to it. As a result, while Rehnquist’s citation is insufficient to establish the practice’s constitutionality, especially given that the cases to which he cites involved Congress and the President working in cooperation,<sup>128</sup> it does serve as evidence that congressional direction is not patently unconstitutional.

## 2. Arguments Against a Congressional Power to Direct a President to Terminate a Treaty with a Foreign State

Several commentators have however raised a number of counterarguments, grounded in either historical precedent or constitutional authority, to a congressional authority to direct the President to act. This section will introduce, and then rebut, a series of these counterarguments.

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125. *Van der Weyde*, 297 U.S. at 118.

126. *Goldwater III*, 444 U.S. at 1004 (Rehnquist, J., concurring).

127. *Id.* at n.1 (quoting *Goldwater I*, 481 F. Supp. 949, 958 (D.D.C. 1979) (Wright, C.J., concurring)).

128. Chief Judge Wright cited three resolutions in his concurring opinion in *Goldwater II*: H.R.J. Res. 6, 38th Cong., 13 Stat. 566 (1865) (enacted) (“[P]roviding for the Termination of the Reciprocity Treaty of fifth June, eighteen hundred and fifty-four, between the United States and Great Britain.”); H.R.J. Res. 10, 43d Cong., 18 Stat. 287 (1874) (enacted) (“[P]roviding for the termination of the treaty between the United States and His Majesty the King of the Belgians, concluded at Washington, July seventeenth, eighteen hundred and fifty-eight.”); H.R.J. Res. 22, 47th Cong., 22 Stat. 641 (1883) (enacted) (“[P]roviding for the termination of articles numbered eighteen to twenty-five, inclusive, and article numbered thirty of the treaty between the United States of America and Her Britannic Majesty, concluded at Washington, May eighth, eighteen hundred and seventy-one.”). *Goldwater II*, 617 F.2d 697, 715 n.21 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979). These statutes were arguably incorporated by reference by Justice Rehnquist when he cited Chief Judge Wright’s opinion. See *Goldwater III*, 444 U.S. at 1004 n.1 (Rehnquist, J., concurring) (citing *Goldwater II*, 617 F.2d at 715–16 (Wright, J., concurring)).



### a. Historical Examples

Despite this apparent support, a number of commentators have argued that “the President cannot be forced by Congress or by the Senate to perform the international act of giving notice.”<sup>129</sup> These commentators begin their arguments by citing to historical practice in which several Presidents have refused to deliver termination notices to foreign countries after Congress had directed them to do so. However, none of the examples typically cited supports the claim that a President can ignore congressional directives.

The chronologically first example, cited by Professor Henkin, is when “[President] Lincoln ignored Congressional directions to terminate the Rush-Bagot Agreement disarming the Great Lakes.”<sup>130</sup> At first, this example appears to support Professor Henkin’s claim. On February 9, 1865, Congress passed a resolution directing the President to notify Great Britain of the United States’ desire to terminate the Rush-Bagot Agreement regulating the use of naval forces on the Great Lakes.<sup>131</sup> President Lincoln never delivered the notification and the Rush-Bagot Agreement exists to this day,<sup>132</sup> seemingly demonstrating a President’s effort to ignore a congressional directive.

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129. Jesse S. Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT’L LAW 33, 38 (1921); see also 1 WILLOUGHBY, 2d ed., *supra* note 8, § 324, at 587; Scheffer, *supra* note 53, at 981 (“The allocation of treaty termination powers has always recognized the President’s discretion to refuse to deliver notice of termination to a foreign country.”); HENKIN, *supra* note 10, at 214 n.\* (“[A] President who wishes to maintain a treaty will doubtless treat a Congressional denunciation or directive to terminate it as only a hortatory ‘sense resolution.’”). This claim is difficult to reconcile, a task Henkin leaves unaddressed, with a claim he makes earlier in the same book:

[O]ther laws . . . [a]re clearly intended to be mandatory and, as to these, it is difficult to build a persuasive argument that ‘He shall take Care that the Laws be faithfully executed’ gives him discretion not to execute them. There is little to support the view that the President’s duty is weaker, or different, in respect of laws that govern or impinge on foreign relations. Presidential authority not to execute some Congressional mandates would have to be found in some other constitutional power: the argument might be that Congress cannot impose foreign policy on the President, and that the President’s ‘primacy’ in foreign relations gives him special discretion as to whether and how to execute laws or spend money relating to foreign affairs. The argument goes against explicit, unambiguous constitutional text; it is not persuasive.

*Id.* at 117–18 (footnotes omitted).

130. HENKIN, *supra* note 10, at 491 n.143.

131. H.R.J. Res. 18, 38th Cong., 13 Stat. 568 (1865) (enacted); see also Henry Sherman Boutell, *Is the Rush-Bagot Convention Immortal?*, 173 N. AM. REV. 331, 340–41 (1901).

132. See, e.g., *U.S. Puts Machine-Guns on Great Lakes Coast Guard Vessels*, CBC NEWS (Mar. 15, 2006), <http://www.cbc.ca/news/canada/story/2006/03/15/coastguard-060315.html> (discussing how the U.S. and Canada had agreed to reinterpret the “antiquated” Rush-Bagot treaty to permit limited armaments for customs purposes).

However, Congress' action in February 1865 was not the first step in the process. Earlier, President Lincoln had endeavored to unilaterally terminate the treaty.<sup>133</sup> Congress' action was meant as an *ex post* ratification of the earlier presidential action:

*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the notice given by the President of the United States to the Government of Great Britain and Ireland to terminate the treaty of eighteen hundred and seventeen, regulating the naval force upon the lake, is hereby adopted and ratified as if the same had been authorized by Congress.*<sup>134</sup>

President Lincoln's six-month notice had been delivered on November 23, 1864 and would therefore have taken effect in the middle of May 1865.<sup>135</sup> However, by March of 1865, after General Sherman's successful March to the Sea, the Battle of Nashville, and the encirclement of General Lee's forces at Petersburg, the Union's position in the Civil War had changed dramatically. With victory almost certain, President Lincoln now saw the continuation of the treaty as in the United States' best interests, and on March 8, 1865 Secretary of State Seward notified Great Britain that the United States was withdrawing its notice of termination.<sup>136</sup> As a result, the episode is not an example of a presidential refusal to abide by a congressional directive. Not only were Congress' actions only a *post hoc* ratification of the President's actions, but the President's subsequent retraction of the notification was motivated by drastically changed international circumstances and not by any view as to his constitutional authority to ignore Congress.

A second example occasionally cited as proof that Presidents have refused to abide by congressional directives to terminate treaties is President Hayes' 1897 veto of an act requiring him to terminate two articles of the Burlingame Treaty of 1868 with China.<sup>137</sup> President Hayes' veto was constitutionally based, as he argued that the power is "not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate . . . ."<sup>138</sup> Nevertheless, this example also does not support the thesis. First, this was only a presidential veto, which can be exercised on any grounds. The legisla-

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133. Emerson, *supra* note 23, at 55.

134. H.R.J. Res. 18, 38th Cong., 13 Stat. 568 (1865) (enacted); *see also* Boutell, *supra* note 131, at 339-42.

135. Boutell, *supra* note 131, at 340.

136. *Id.* at 341.

137. Rutherford B. Hayes, Veto of An Act to Restrict the Immigration of Chinese to the United States, 8 CONG. REC. 2275 (Mar. 1, 1879) [hereinafter Hayes Veto]; *see also* Emerson, *supra* note 23, at 56-57.

138. Hayes Veto, *supra* note 137.

tion was never enacted and cannot thus represent evidence of a President having ignored a duly-enacted obligation. Second, and more importantly, President Hayes viewed the congressional legislation as amounting to an amendment of a treaty, a power he believed to lie only in the President and Senate acting together.<sup>139</sup> In fact, the President went so far as to argue that the “authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is . . . free from controversy under our Constitution.”<sup>140</sup> This example thus supports, not undermines, this Article’s thesis: that Congress has the power to direct the President to terminate a treaty.

Finally, the most recent example, again cited by Professor Henkin, is President Wilson ignoring “a directive in the Jones Act to terminate certain conventions on customs and tonnage duties.”<sup>141</sup> Section 34 of the Merchant Marine Act, better known as the Jones Act, passed by Congress on June 5, 1920, directed the President to give notice that the provisions of treaties that impose “any such restriction on the United States will terminate on the expiration of such periods as may be required for the giving of such notice.”<sup>142</sup> President Wilson refused to implement the provision, viewing it as an unconstitutional overreach by Congress; as his State Department explained, President Wilson “does not deem the direction contained in Section 34 of the so-called Merchant Marine Act an exercise of any Constitutional power possessed by the Congress.”<sup>143</sup>

However, just like the previous example, a closer reading indicates that President Wilson believed the “law was not an effort to terminate treaties . . . but to modify them, which Congress could not do.”<sup>144</sup> As the State Department Bulletin indicated, the congressional action amounted to a termination of specific treaty provisions despite the fact that the obligations were “mutual” and that “the treaties contain no provisions for their termination in the manner contemplated

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139. Emerson, *supra* note 23, at 57.

140. Hayes Veto, *supra* note 137.

141. HENKIN, *supra* note 10, at 213 n.143.

142. Merchant Marine Act of 1920, ch. 250, § 34, 41 Stat. 988, 1007.

143. Statement by State Department: Announcing President Wilson’s Refusal to Carry Out the Section of the Jones Merchant Marine Act of June 5, 1920 (Sept. 24, 1920) [hereinafter Statement by State Department], in 18 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1929, at 8871 (James D. Richardson ed., Bureau of Nat’l Literature 1929) .

144. Emerson, *supra* note 23, at 59 (citations omitted).

by Congress.”<sup>145</sup> As a result, the episode is unrelated to the question of treaty termination and again focuses merely on treaty modification.

None of these three examples provide evidence to support a claim that a President has the discretion to ignore a congressional directive requiring him to deliver notification to a foreign government of treaty termination. With no reliable past practice, supporters of a President’s discretion must rely solely on an ambiguous textual analysis of the Constitution, to which this Article now turns.

**b. The President’s Constitutional Authority to Refuse to Enforce Unconstitutional Statutes**

The second and more persuasive argument against Congress’ ability to direct the President to deliver the notice of a termination of a treaty is the view that the “take care” clause does not obligate the President to enforce unconstitutional statutes.<sup>146</sup> The argument here is predominantly practical; two-thirds of Congress should not be able to force the President to execute an unconstitutional provision until such time as he can challenge it in court. Judge Easterbrook makes the point most clearly by example: If Congress were to enact a statute, over a presidential veto, requiring the President to “execute the CEO of Apex Missile Corporation,” the Constitution cannot reasonably be read to require the President to carry out the action before he can challenge it in court.<sup>147</sup> Judge Easterbrook’s example does establish that there may be “circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.”<sup>148</sup> The difficulty is in defining the scope of this authority; how can one grant the President discretion not to enforce unconstitutional statutes without granting him authority to independently adjudicate a statute’s constitutionality?

Historically, Presidents have refused to enforce what they have viewed as unconstitutional enactments. When signing bills, many Presidents have attached signing statements indicating their unwillingness to enforce provisions they viewed to be unconstitutional.<sup>149</sup> In the foreign affairs context, every President since Richard Nixon has main-

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145. Statement by State Department, *supra* note 143.

146. See generally Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919–22 (1989–90) (arguing that the President is not constitutionally obligated to enforce unconstitutional enactments).

147. *Id.* at 922.

148. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994).

149. See *id.* at 202.

tained the view that the 1973 War Powers Resolution represents an unconstitutional infringement on Executive power, though most have “voluntarily” complied with its terms for political reasons.<sup>150</sup> The Supreme Court has indirectly upheld this practice several times. In *Myers*, the majority opinion did not challenge the constitutionality of President Wilson’s decision not to abide by the initial congressional resolution, which he viewed as an unconstitutional infringement on his rights, a position which the Supreme Court ultimately upheld.<sup>151</sup> Similarly, in *INS v. Chadha*, the Court affirmatively cited to the presidential practice of objecting to the constitutionality of provisions of a broader piece of legislation they signed into law.<sup>152</sup>

Despite this apparent support, there are strong arguments against a presidential power to independently assess a law’s constitutionality. First, such a power would place the President in the role of both legislator and judge. By claiming a power of constitutional review, the President could freely choose which statutes to enforce, usurping the judiciary’s function until such time as he was challenged in court. The House of Representatives has explained this problem in its analysis of whether President Reagan had the constitutional authority to not apply provisions of the “Competition in Contracting Act”:

To adopt the view that one’s oath to support and defend the Constitution is a license to exercise any available power in furtherance of one’s own constitutional interpretation would quickly destroy the entire constitutional scheme. Such a view, whereby the President pledges allegiance to the Constitution but then determines what the Constitution means, inexorably leads to the usurpation by the Executive of the others’ roles.<sup>153</sup>

Granting the President authority to refuse to enforce a law is equivalent to granting him the authority to suspend laws; both amount to a “constitutionally impermissible absolute veto power.”<sup>154</sup>

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150. James A. Baker III & Warren Christopher, *Put War Powers Back Where They Belong*, N.Y. TIMES (July 8, 2008), <http://www.nytimes.com/2008/07/08/opinion/08baker.html?pagewanted=all>.

151. *Myers v. United States*, 272 U.S. 52 (1926).

152. *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983); see also *Freytag v. Comm’r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (“[I]t was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including . . . the power to veto encroaching laws, or even to disregard them when they are unconstitutional.” (citation omitted)).

153. H.R. REP. NO. 99-138, at 11 (1985).

154. *Id.* at 13.

Only the legislature has the authority to suspend laws.<sup>155</sup> Textually, there is no discretion in the “take care” clause.<sup>156</sup>

The Court has occasionally taken a similar view. In the 1830s, Congress passed an act directing the President to pay a postal employee a certain amount of money to settle a wage dispute. The President, through the Postmaster General, refused to do so. When the employee sued, the President argued that Congress could not direct the Postmaster General’s actions and he therefore retained discretion not to make the payment. The Supreme Court disagreed: “To contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.”<sup>157</sup> More recently, the Supreme Court has found that the President is required to spend the amount Congress appropriated for a particular action.<sup>158</sup> The President “appears to have lost the argument” regarding his authority to “impound” funds which Congress has already appropriated.<sup>159</sup> If the President can’t limit a congressional directive, it follows *a fortiori* that the President can’t ignore one.

Even assuming, *arguendo*, that the Executive retains some discretion in analyzing a law’s constitutionality in order to protect its position before the courts can intervene, such discretion would need to be sharply limited. While drawing such a line is inescapably controversial, importing a “clearly established” principle provides the most defensible framework. As even the Executive Branch’s own lawyers have rec-

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155. Memorandum to from Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service, to the House Committee on Government Operations, Re: The Executive’s Duty to Enforce the Laws (Feb. 6, 1985) [hereinafter CRS ENFORCEMENT], reprinted in *Constitutionality of GAO’s Bid Protest Function: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong. 544 (1985) (“The refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power.”); accord 2 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 767, at 1307 (1st ed. 1910) [hereinafter WILLOUGHBY, 1st ed.] (“Here the President has to deal not with a measure in the process of enactment, as in the case when the veto is exercised, but with a bill that has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure.”).

156. HENKIN, *supra* note 10, at 118 (arguing that the take care clause contains discretion “goes against explicit, unambiguous constitutional text [and thus] is not persuasive”).

157. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838).

158. See *Train v. N.Y.C.*, 420 U.S. 35, 44–46 (1975).

159. HENKIN, *supra* note 10, at 117 (discussing presidential acceptance of the Budget and Impounding Control Act, “which requires legislative approval of Executive decisions to reduce or terminate programs for which Congress ha[s] authorized funds”); see *Train v. N.Y.C.*, 420 U.S. 35; *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136 (1975).

ognized: “Unless the unconstitutionality of a statute is clear . . . [the President] should not decline to enforce it unless he is compelled to do so under the circumstances.”<sup>160</sup> Judge Easterbrook’s hypothetical compelled murder statute fits these requirements. Relying on this principle, the President would not be required to comply. However, in the more common ambiguous case, “[t]he President should presume that enactments are constitutional,” giving “great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation.”<sup>161</sup> In the context of treaty termination, this Article has demonstrated that Congress has a strong claim to an independent power to terminate treaties under certain circumstances. Such a power is not “clearly unconstitutional,” and as a result even under this standard, the President would be required to abide by the congressional mandate, before potentially challenging the action in court.

### **3. The Anti-Apartheid Act of 1986: A Congressional Dictate Prevailing over Presidential Opposition**

In order to demonstrate how these arguments have played out in reality, this section uses Congress’ most recent attempt to terminate a treaty in the face of presidential opposition as a case study. In 1986, in opposition to the apartheid regime in South Africa, Congress enacted sanctions legislation over presidential veto. As a component of that legislation, Congress directed the President to terminate a tax treaty<sup>162</sup> and an air services treaty<sup>163</sup> with South Africa.<sup>164</sup> As the following discussion will show, not only was the constitutionality of that directive never challenged by either branch, but the President promptly complied with the enacted legislation despite his original veto.

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160. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 204 (1994) (quoting Memorandum from John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, to Hon. Robert J. Lipshutz, Counsel to the President (Sept. 27, 1977)).

161. *Id.* at 200.

162. Convention for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance with Respect to Taxes of Income, U.S.-S. Afr., Dec. 13, 1946, 3 U.S.T. 3821 (entered into force July 15, 1952) [hereinafter Convention for the Avoidance of Double Taxation].

163. Agreement Relating to Air Services Between Their Respective Territories, U.S.-S. Afr., May 23, 1947, 61 Stat. 3057.

164. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 306(b)(1), 313, 100 Stat. 1086, 1100, 1104.

The draft of the Anti-Apartheid Act that was passed in the House did not contain a provision for the termination of either treaty.<sup>165</sup> The provision terminating the Air Services Agreement was added by the Senate Foreign Relations Committee,<sup>166</sup> and the provision relating to the Tax Treaty was added as a floor amendment.<sup>167</sup> In both cases, while subsequent discussion reiterated that the provisions would mandate the termination of their respective treaties,<sup>168</sup> there was no discussion regarding their constitutionality, or any concern about the included directive to the President.<sup>169</sup>

President Reagan opposed the bill throughout its drafting because he believed that sanctions represented too drastic a measure,<sup>170</sup> ultimately vetoing the bill when it reached his desk.<sup>171</sup> His veto message never directly discussed the sections requiring him to deliver notification of the two treaties' terminations to South Africa, but he did state cryptically, "I am also vetoing the bill because it contains provi-

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165. See 132 CONG. REC. H3861 (daily ed. June 18, 1986).

166. 132 CONG. REC. S11,548 (daily ed. Aug. 13, 1986) ("Sec. 306 (a)(1) The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, in accordance with the provisions of that agreement.").

167. 132 CONG. REC. S11,629 (Aug 14, 1986) ("Sec. 314. The Secretary of State shall terminate immediately the following convention and protocol, in accordance with its terms, the Convention Between the Government of the Union of South Africa for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance With Respect to Taxes on Income, done at Pretoria on December 13, 1946, and the protocol relating thereto.").

168. See S. REP. NO. 99-370, at 13-14 (1986) ("The Secretary of State is to terminate the bilateral air services agreement now in effect with South Africa."); 132 CONG. REC. S11,631 (daily ed. Aug. 14, 1986) (statement of Sen. Weicker) ("Because the committee language terminates a treaty relating to air travel between the United States and South Africa, no flights would be allowed between the two countries once this amendment is adopted."); *id.* ("This amendment would terminate the treaty entitled 'convention between the Government of the United States of America and the Government of the Union of South Africa for the avoidance of double taxation and for establishing rules of reciprocal administrative assistance with respect to taxes of income.'").

169. The bill's constitutionality was implicitly assumed by the chair of the National Bar Association's tax committee in a 2002 article discussing its impact on the apartheid regime. Calvin J. Allen, *The Effective Role of United States International Tax Law in Dismantling 'Apartheid' in the Union of South Africa and in Rebuilding the Union of South Africa after the Demise of 'Apartheid,'* 27 T. MARSHALL L. REV. 165, 171-73 (2002).

170. Ronald Reagan, Veto of the Comprehensive Anti-Apartheid Act of 1986, 2 PUB. PAPERS 1278, 1279 (Sept. 26, 1986) ("This, then, is the first and foremost reason I cannot support this legislation. Punitive economic sanctions would contribute directly and measurably to the misery of people who already have suffered enough. Using America's power to deepen the economic crisis in this tortured country is not the way to reconciliation and peace.").

171. *Id.*



sions that infringe on the President's constitutional prerogative to articulate the foreign policy of the United States."<sup>172</sup> However, this is most likely a reference to President Reagan's belief that by sanctioning South Africa, "the legislation discards our economic leverage, constricts our diplomatic freedom, and ties the hands of the President of the United States in dealing with a gathering crisis in a critical subcontinent where the Soviet Bloc . . . clearly sees historic opportunity."<sup>173</sup> Thus, there is no indication President Reagan objected to the constitutionality of the two congressional directives.

Soon thereafter, Congress reconvened and with little debate, and no mention of the treaty terminations, overrode the President's veto.<sup>174</sup> Despite his previous objections, President Reagan indicated that "our administration will, nevertheless, implement the law."<sup>175</sup> Without objecting to the constitutionality of the direction, President Reagan's Secretary of State George Schultz duly notified South Africa of the United States' intention to terminate the tax treaty<sup>176</sup> and the air services treaty.<sup>177</sup> The notification language is neutral, giving no indication as to whether President Reagan believed he was acting to terminate the treaties based on a congressional dictate or inherent Executive authority.<sup>178</sup>

When the dust settled, Congress had prevailed. It had successfully directed the President to terminate two treaties over his initial opposi-

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172. *Id.* at 1279.

173. *Id.*

174. H.R. 4868, 99th Cong. (1986).

175. President's Statement on the Comprehensive Anti-Apartheid Act of 1986, 2 PUB. PAPERS 1321 (Oct. 2, 1986).

176. *See Treaties: Current Actions*, DEP'T ST. BULL., Dec. 1986, at 87 ("Convention for the avoidance of double taxation and for establishing rules of reciprocal administrative assistance with respect to taxes on income. Signed at Pretoria Dec. 13, 1946. Entered into force July 15, 1952. T.I.A.S. 2510. Notification of termination given by U.S.: Oct. 15, 1986; effective July 1, 1987.").

177. *See id.* ("Agreement relating to air services, with annex and exchange of notes, as amended. Signed at Cape Town May 23, 1947. Entered into force May 23, 1947. T.I.A.S. 1639, 2870, 6512. Notice of termination given by U.S.: Oct. 8, 1986; effective Oct. 10, 1987.").

178. 2 CUMULATIVE DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1981-88, at 2185 (Marian Nash ed., 1994) (quoting Note from Jeffrey N. Shane, Deputy Assistant Sec'y of State for Transp. Affairs, to Johannes Hermanus Albertus Beukes, South African Ambassador (Oct. 8, 1986)) ("On behalf of the Government of the United States of America, I hereby request consultation pursuant to paragraph (B) of Article XI of the [Air Services] Agreement and hereby give notice pursuant to paragraph (D) of Article XI to terminate the Agreement. The Agreement shall terminate one year after the date of receipt of this notice, which is being simultaneously communicated to the International Civil Aviation Organization.").

tion. There is no indication in the record that any member of either branch questioned the constitutionality of Congress' action. Furthermore, despite the initial policy disagreement, once Congress overrode his veto President Reagan duly complied with the congressional directives in less than a week.

As this section has shown, it appears that while Congress cannot independently terminate a treaty, it has a well-established—though not perfect—claim to the right to enact legislation directing the President to deliver notice of the United States' termination of a treaty.<sup>179</sup> While Presidents may claim the discretion to not enforce unconstitutional statutes, such a right is by no means established, nor is it clear that it would apply to treaty terminations if it did exist. Nevertheless, as the next section will show, if a President does not comply with a termination notification directive contained in a duly-enacted statute, Congress has very few tools to compel his compliance.

#### **IV. The Empty Toolkit: *Ex Post* Means by Which Congress Can Compel Presidential Compliance with a Termination Requirement**

As the previous sections have demonstrated, while Congress cannot itself deliver the notification necessary for termination of a treaty, it has a strong constitutional claim that it has the power to direct the President to deliver such notice. This then begs the question: if the President refuses to abide by the directive, what tools does Congress have to compel his compliance? Unfortunately for Congress, the answer is very few.

##### **A. Express Constitutional Powers: Appropriation and Impeachment**

Congress could try and use its spending power to cut off funding for the implementation of the treaty. However, there are two problems with this solution. First, a number of treaties require no express appropriation for their implementation. For example, the Tax Treaty, referenced in the Anti-Apartheid Act discussed above, merely called for reciprocal standards to prevent double taxation and therefore required little to no appropriated money.<sup>180</sup> Second, for those

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179. See, e.g., Moriarty, *supra* note 15, at 166 (“[Congress appears to] have a solid claim, while no means a settled one, for the right to pass legislation that calls for the termination of a treaty and the concomitant delivery of termination notice by the President.”).

180. Convention for the Avoidance of Double Taxation, *supra* note 162.

treaties that do require funding, cutting off those funds can be politically infeasible. For example, cutting off funding for any treaty that required U.S. personnel would render Congress liable for charges of not supporting U.S. citizens, soldiers, or employees. When taken together, these two problems present large enough political obstacles that Congress has never cut off appropriations for a treaty's implementation, no matter how seriously they opposed its provisions.<sup>181</sup>

The only other explicit constitutional power Congress might use to enforce compliance is impeachment.<sup>182</sup> Congress could argue that the President, by failing to deliver the treaty termination notification, had violated his constitutional duty under the take care clause, and had thereby committed an impeachable "high crime[ ] and misdemeanor[ ]."<sup>183</sup> President Andrew Johnson was impeached for failing to implement duly-enacted legislation in 1867, "which it was contended constituted a violation of the constitutional duty to 'take care that the laws be faithfully executed.'"<sup>184</sup> More recently, Senator Goldwater wrote a op-ed in which he threatened President Carter with impeachment proceedings over the treaty termination.<sup>185</sup> Nevertheless, it is unlikely that Congress would resort to such an extreme option over a single treaty termination dispute.<sup>186</sup> Given that only two Presidents have ever been impeached—only one on constitutional grounds—initiating an impeachment proceeding is likely to prove too extreme a step to serve as a credible threat to deter presidential noncompliance.

## B. Challenging the Executive in Court

Congress might try and use the legal system to enjoin the President to comply with the terms of the legislation. However, while it is

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181. Nelson, *supra* note 1, at 891–92; *see also* HENKIN, *supra* note 10, at 118 n.\* ("Congressional 'weapons' to see to it that the President does his duty to execute the laws are not always effective, and sometimes Congress is reluctant to use them.").

182. U.S. CONST. art. I, §§ 2–3; *see also* Nelson, *supra* note 1, at 893 ("[T]here is no constitutional or other governmental machinery short of impeachment whereby the President could be forced to obey the statute.").

183. U.S. CONST. art. II, § 4.

184. CRS ENFORCEMENT, *supra* note 155, at 551.

185. Barry M. Goldwater, *Abrogating Treaties*, N.Y. TIMES, Oct. 11, 1977, at 35 ("Any President who would violate the Constitution on such a major matter as breaking faith with the nation's treaty obligations would run the risk of impeachment."); *see also* Scheffer, *supra* note 53, at 987 ("This presumably might make [the President] liable to impeachment as Senator Goldwater has threatened.").

186. *See* 2 WILLOUGHBY, 1st ed., *supra* note 155, § 767, at 1306, 1309 ("As an instrument of checking unconstitutional action on the part of the President, impeachment has been found too cumbersome.").

true that the Supreme Court has never “invalidated an act of Congress because it impinged upon the President’s sole power under the Constitution,”<sup>187</sup> courts have traditionally been unwilling to mediate foreign affairs disputes between the political branches. When the *Goldwater* Court was confronted with the opposite side of this same issue—whether a President could unilaterally terminate a treaty—the Court relied upon a variety of prudential doctrines to dismiss the case, leaving the issue to the political branches.<sup>188</sup>

Nevertheless, if Congress were to challenge the President in court to compel compliance with its legislation, several of the objections raised by the *Goldwater* Court could be overcome. First, the legislators here would have standing, because “courts have upheld the standing of legislators when the effectiveness of their votes is at stake.”<sup>189</sup> When the President’s action rises to the “nullification” of a Congressman’s vote, the Congressman has standing to challenge the action.<sup>190</sup> In this case, the presidential noncompliance would serve to nullify votes cast by Congress in favor of the statute.<sup>191</sup> Second, the controversy would be ripe for judicial review. By taking formal action, Congress will have “assert[ed] its constitutional authority.”<sup>192</sup> While the courts have been hesitant to involve themselves when the political branches remain uncommitted, both Congress, through the statute, and the President, through his noncompliance, would have formalized their positions creating a quintessential “constitutional impasse,”<sup>193</sup> necessitating judicial review.

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187. GLENNON, *supra* note 24, at 13.

188. *Goldwater III*, 444 U.S. 996 (1979) (mem.). Justice Powell held the complaint was not ripe for review. *Id.* at 997 (Powell, J., concurring). Justices Rehnquist, Stewart, Stevens and Chief Justice Burger held the case to be non-justiciable. *Id.* at 1002 (Rehnquist, J., joined by Stewart, Stevens, & Burger, JJ., concurring). Justice Brennan would have affirmed the Court of Appeals and upheld the President’s discretion. *Id.* at 1006 (Brennan, dissenting). Only Justices Blackmun and White would have set the case for oral argument. *Id.* (Blackmun, J., joined by White, J., dissenting in part).

189. Scheffer, *supra* note 53, at 969; *see also* JAY R. SHAMPANSKY, CONG. RESEARCH SERV., RL 30280, CONGRESSIONAL STANDING TO SUE: AN OVERVIEW (2011) (providing a background of the various situations in which Congressmen have been found to have standing).

190. *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

191. Moriarty, *supra* note 15, at 146 (arguing that if Congress enacted a statute, it would meet the standing requirements). By enacting the statute, this case could be distinguished from *Goldwater* where Congress never established a formal position. *Goldwater III*, 444 U.S. at 997 (a memorandum opinion in which five statements were issued); *see also* *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (dismissing a challenge to President Bush’s termination of the ABM treaty on both standing and political question grounds).

192. *Goldwater III*, 444 U.S. at 997 (Powell, J., concurring).

193. *Id.*

Despite these differences, this case would still face a substantial challenge in convincing the Court not to dismiss the dispute on political question grounds. Especially in foreign affairs, courts have traditionally been willing to leave decisions to the coequal political branches, “each of which has resources available to protect and assert its interests.”<sup>194</sup> In the treaty termination context, Justice Rehnquist has argued that “[i]n light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case in my view also ‘must surely be controlled by political standards.’”<sup>195</sup>

There are several factors that might work in the legislators’ favor in avoiding such a dismissal however. Doctrinally, the legislators might argue, as Justice Brennan did in *Goldwater*, that the political question doctrine is aimed at keeping the Court from resolving foreign policy disputes: “the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decision[-]making power.”<sup>196</sup> While that argument is doctrinally strong, it failed to persuade any of the other eight Justices in 1979. It might, however, fare better today. The Court has been somewhat less willing to exclude cases on political question grounds, potentially opening the door for a future challenge in which the Court might adjudicate the separation of powers question.<sup>197</sup> Finally, even in *Goldwater*, a majority of the Court decided the case on non-political question grounds, opening up the possibility that a modern Court might be convinced to hear the case on its merits.

Ultimately, there is no *ex ante* way to predict whether the judicial system would involve itself in this dispute between the political branches. However, given that a failure to intervene to compel compliance would effectively uphold the status quo, granting the President the *de facto* authority to ignore a congressional directive,

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194. *Id.* at 1004 (Rehnquist, J., concurring); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (finding that the validity of Congress’ purported termination of the treaty with France in 1798 was a political question); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001) (holding that the determination of what constitutes a treaty is a political question).

195. *Goldwater III*, 444 U.S. at 1003 (Rehnquist, J., concurring) (citation omitted).

196. *Id.* at 1007 (Brennan, J., dissenting) (emphasis in original).

197. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); see also GLENNON, *supra* note 24, at 315–25.

Congress should seek additional tools to protect its constitutional standing.

**C. *Ex Ante* Control: What Congress Can Do Ahead of Time to Expand its Influence**

Realizing that it may be difficult to compel a President to comply with the terms of its directives after the fact, Congress should take several steps during the treaty ratification process in order to insure itself a role in a possible termination. First, any executive agreement which is concluded by the President under an authorizing statute can be controlled by the terms of that statute: "To the extent that the agreement in question is authorized by statute or treaty, its mode of termination likely could be regulated by appropriate language in the authorizing statute."<sup>198</sup> While Congress, after *Chadha*, is no longer constitutionally capable of reserving the right to revoke that authorization by concurrent resolution,<sup>199</sup> a provision retaining the right to terminate the agreement by duly-enacted legislation would presumably be constitutional.

Second, many of the "executive agreements to which the United States is a party" already contain provisions providing "for termination in the event Congress should fail to make the necessary appropriations or should pass contrary legislation."<sup>200</sup> For example, the 1951 Agreement for a Cooperative Program of Agriculture with Honduras provided that the agreement shall only become effective "subject to the availability of appropriations of both parties for the purposes of the program."<sup>201</sup> Such a provision is typically included at the request of foreign states that do not want to be bound by an agreement that the U.S. Congress has no intention of implementing through appropriations. As such, Congress might be able to combine these practices, and insert a provision in every authorizing statute indicating that if appropriations for an agreement concluded under its provisions are not made in a designated period of time, the agreement is terminated.

These procedures do not, however, help Congress retain control over most treaties, which are concluded without the aid of an author-

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198. CRS TREATY TERMINATION, *supra* note 60, at 208.

199. See, e.g., Nelson, *supra* note 1, at 893 n.63 (listing several authorizations in which Congress retained control to terminate/revoke by concurrent resolution).

200. *Id.* at 894.

201. Agreement for a Cooperative Program of Agriculture, U.S.-Hond., Jan. 30, 1951, 2 U.S.T. 577, 591.

izing statute. The only means by which Congress, acting through the Senate, can increase its control over the termination of these treaties is through the advice and consent process. According to the Restatement, if the Senate conditions its consent to the treaty to require “that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty.”<sup>202</sup> Conditions attached by the Senate in the ratification process are seen as valid if they have a “plausible relation to the treaty, or to its adoption or implementation” and if the President then “proceeds to make the treaty he is bound by the condition.”<sup>203</sup> In the debate over the Versailles Treaty, the Senate followed this practice and attached a condition that would have authorized the Treaty’s denunciation by concurrent resolution.<sup>204</sup>

The power of the Senate to attach a termination condition is limited in several ways. First, the Supreme Court has struck down several attempts by Congress to prescribe constitutionally novel procedures for the enactment of law.<sup>205</sup> Most recently, the Supreme Court ruled that congressional vetoes that did not abide by the requirements of bicameralism and presentment were unconstitutional.<sup>206</sup> Therefore, a condition reserving the termination right to the Senate, or to both houses by concurrent resolution, “would presumably be unconstitutional under *Chadha*.”<sup>207</sup> However, a condition that required that the President abide by legislation enacted over his veto would be in “conformity with the express procedures of the Constitution’s prescription

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202. RESTATEMENT, *supra* note 8, § 339 cmt. a.

203. *Id.* § 303 cmt. d; *see also* HENKIN, *supra* note 10, at 184 n.\*\* (“But if, as a condition of its consent to a treaty, the Senate should serve special powers to interpret or terminate the treaty, a President might have to accord it that role or refuse to ratify the treaty because he cannot meet its conditions.”); Henkin, *supra* note 34, at 654 (“[A] condition applicable to the treaty before it and having a plausible relation to it might pass.”); Sabis, *supra* note 3, at 263 (“[I]t is of vital importance that when the Senate ratifies future treaties it requires congressional consent of some form in their termination.”).

204. 59 CONG. REC. 5423 (1919) (“Notice of withdrawal by the United States [from the League of Nations] may be given by concurrent resolution of Congress of the United States.”); *see also* Quincy Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121, 127–34 (1920) (finding the proposed condition invalid because treaties cannot be denounced by concurrent resolution, not because the Senate can’t condition termination on a prescribed procedure).

205. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding that Congress cannot legislate that the Senate should be involved in the removal of appointments when such a provision is not included in the Constitution).

206. *INS v. Chadha*, 462 U.S. 919, 956–58 (1983).

207. Moriarty, *supra* note 15, at 140.

for legislative action: passage by both Houses and presentment to the President.”<sup>208</sup> Attaching such a condition would reinforce Congress’ claim to an independent role in treaty termination and potentially provide an extra incentive for judicial involvement.

#### D. The Most Reliable Means: Relying upon Political Pressure

Nevertheless, even if the Senate has attached a condition requiring congressional participation in treaty termination, as the previous section has illustrated, Congress has few tools it can use to reliably compel compliance from a recalcitrant President; Congress is politically constrained from over-reliance on its appropriations authority, an impeachment proceeding is typically too extreme, and the judiciary is unlikely to get involved. However, Congress can still resort to what has traditionally been its most potent tool—political pressure. “As a matter of political reality, the President still is often obligated to respect the wishes of Congress, even if Congress is unable politically or legally to force the President to obey the law and deliver notice.”<sup>209</sup> In the rare instance in which two-thirds of both houses of Congress agree on foreign policy, Congress would be able to bring enormous political pressure to bear on the President.<sup>210</sup> Presumably, a congressional override of a presidential veto would require widespread bipartisan and public support, an influential combination as evidenced by President Reagan’s ultimate decision to abide by the provisions of the Anti-Apartheid Act.<sup>211</sup>

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208. *Chadha*, 462 U.S. at 958.

209. Moriarty, *supra* note 15, at 151; *accord* Nelson, *supra* note 1, at 891 (“Moreover, it must always be remembered that the President’s constitutional power to act is curtailed by political considerations. No President can long determine national policy without the support of Congress and party.”).

210. HENKIN, *supra* note 10, at 214 n.\* (“Politically of course, the President could not lightly disregard the sense of Congress, especially if both houses joined, asserted constitutional power, and publicly proclaimed a call for radical action.”).

211. This pattern was also followed in 1951, when Congress passed the Universal Military Service and Training Act, Pub. L. No. 82-51, 65 Stat. 75 (1951), whose provisions were in conflict with the Treaty of Friendship, Commerce, and Consular Rights, U.S.-Ger., Art. VI, Dec. 8, 1923, 44 Stat. 2132, 2136. Over time, the political pressure to reconcile the domestic statute with the U.S.’s international noncompliance grew, eventually resulting in the delivery of a notice of termination on June 2, 1953. *See also* Goldwater II, 617 F.2d 697, 715 (Wright, J., concurring) (citing several statutes that had the practical effect of nullifying a treaty and which ultimately resulted in presidential delivery of termination).



## Conclusion

The Constitution is famously vague in allocating foreign affairs powers between the Legislative and Executive Branches. Yet, in today's era of divided government, where coordinated cooperative action between the branches often appears impossible, it is more important than ever to identify the proper constitutional allocation of power.

The Constitution explicitly allocates the power to enter into treaties, but is silent regarding their termination. Recent scholarship, spurred by several real-world examples, has focused on evaluating the President's independent authority to terminate treaties. While this debate is far from settled, most scholars appear to have accepted that as a practical matter, the President may have a unilateral termination power.

Yet, there is no reason to believe that this authority—if it exists—is exclusive. Using a direct and indirect textual analysis of the Constitution, a review of historical practice and an analysis of existing case law, this Article has demonstrated how Congress can constitutionally claim an independent termination power of its own. By enacting legislation, presumably over a President's veto, there is a strong constitutional argument that Congress has the authority to direct the President to deliver the requisite termination notification.

This analysis may seem highly academic; after all how often is a President going to oppose the combined will of a veto-proof majority of both houses of Congress? Nevertheless, in today's polarized world, these possibilities have become more plausible. It is not inconceivable that a President, especially a second-term President unconstrained by an impending election, would stand up to a united majority in Congress and refuse to terminate a treaty. Without an independent termination authority for Congress, a recalcitrant President could unilaterally continue U.S. obligations under international law, despite opposition from a super-majority in Congress.

Even more troubling would be the President's authority to unilaterally bind the United States to new international obligations without the prospect of review. Under U.S. law, a President's signature on a treaty generates no domestic obligations. However, under international law, the United States would be "obliged to refrain from acts which would defeat the object and purpose" of the treaty.<sup>212</sup> For example, the United States has signed the Comprehensive Nuclear Test

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212. Vienna Convention on the Law of Treaties, *supra* note 1, art. 18., at 336.

Ban Treaty (“CTBT”), and while it is not bound by the procedural provisions in the treaty, it is likely under an international law obligation not to conduct a nuclear test; it is hard to see how conducting a nuclear test would not violate a comprehensive test ban.<sup>213</sup> Can the President bind the United States to an international obligation so critical to national security as a cessation of nuclear testing without review? President Clinton asserted such a right in 1999, when he indicated that the United States was still bound by the “object and purpose” requirements, even after the Senate explicitly rejected ratification of the CTBT.<sup>214</sup>

This seeming immunity from review could be overcome however if Congress had the authority to direct the President to terminate U.S. involvement in a treaty; if Congress has the authority to direct delivery of U.S. withdrawal from a ratified treaty, it should logically have the authority to direct the President to remove his signature from a treaty, thereby unbinding the United States from the international obligation.

The President is the United States’ representative overseas and has been constitutionally entrusted with a number of enumerated foreign affairs powers. These powers have only grown in recent decades, through congressional acquiescence or support, most notably through the centralization of power in the war on terror. Congress must therefore act to reassert its constitutional role in the treaty termination debate. By protecting at least this minimal authority it can ensure that it retains at least some role in the formulation of U.S. foreign policy, as the Framers originally intended.

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213. See RESTATEMENT, *supra* note 8, § 312 cmt. i (“Testing a weapon in contravention of a clause prohibiting such a test might violate the purpose of the agreement, since the consequences of the test might be irreversible.”).

214. Bill Gertz, *Albright Says U.S. Bound by Nuke Pact; Sends Letters to Nations Despite Senate Vote*, WASH. TIMES, Nov. 2, 1999, at A1 (“The administration believes it is still bound to legally abide by the test-ban treaty because it has not given up on ratification in the future . . .”).