Congressional and Supreme Court Restraints on Treaty Termination Carried Out at the President's "Lowest Ebb" of Authority

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In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. . . It is not for the President alone to determine the whole content of the Nation's foreign policy.[1]

Introduction

Can a U.S. President withdraw from a treaty ratified with the advice and consent of the Senate in the face of congressional opposition to withdrawal? Does a President maintain exclusive authority on the process and procedures of treaty termination? Consider the following hypothetical scenario, based upon recent events.

Assume the year is 2026, and the President of the United States claims that the United States is tired of being taken advantage of by North Atlantic Treaty Organization (NATO) partners.[2] NATO allies have been unwilling to increase their defense spending up to the level demanded by the United States: 25% of each country's Gross Domestic Product (GDP). The United States declares that this refusal is a "material breach" of the alliance's underlying accord (the North Atlantic Treaty) and is cause for the termination of U.S. participation in the mutual defense agreement.[3] Members of Congress point out that there is no evidence to show that failing to meet the high U.S. demand is a material breach. Without paying any heed to the bipartisan uproar in Congress, the President announces that the United States will seek to end its commitment to NATO by providing a

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1. Zivotofsky *ex rel*. Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015).

2. *See* Michael Crowley, *Allies and Former U.S. Officials Fear Trump Could Seek NATO Exit in a Second Term*, N.Y. Times (Sept. 3, 2020), https://perma.cc/PKZ9-PAJL.

3. *See generally* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. The treaty itself does not specify that a reason needs to be provided for ending participation. *Id*. at art. 13.

notice of denunciation and ceasing participation after the one-year period specified by the treaty.[4]

Members of Congress point to passed legislation prohibiting the use of funds by the President to announce a denunciation of NATO.[5] The executive branch responds that such legislation and mandates are inconsistent with "the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs."[6] The Congress and the President have now fallen into a clear instance of the President functioning at the office's "lowest ebb" in the face of contested constitutional authority to take action. Is there any recourse for Congress to stop or even limit the treaty termination where the President has asserted an "exclusive" authority to do so?[7]

While the NATO example is hypothetical, there is a not-too-far-off parallel to recent events. The Donald Trump administration alone withdrew from at least 12 major international agreements, of which five were Article II ratified treaties.[8] The Trump administration was politically able to terminate Article II treaties as if they were non-binding political agreements. Such terminations highlight three key theoretical issues. First, the debate on treaty termination powers and Congress's ability to impose limits on that power vividly demonstrate important separation of powers tensions between the President and Congress in the field of foreign affairs. Second, when the President and Congress reach a constitutional impasse on treaty termination, institutional and individual stakeholders may want to argue that Congress could turn to the Supreme Court as a potential arbiter between the branches, even though the Supreme Court appears to have ruled already on the issue of treaty termination. Finally, the practical policy consequences of an exclusive presidential treaty termination power which disables any congressional action upon future terminations are important enough to be highlighted and considered as a functional form of constitutional interpretation to explain why the President should not have an exclusive treaty termination authority in all cases.

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4. *Id.* at art. 13 (noting "any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America").

5. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1242, 133 Stat. 1656 (2019) [hereinafter FY2020 NDAA] (including Sec. 1242, a provision which prohibited the use of funds to suspend, terminate, or provide notice of denunciation of the North Atlantic Treaty).

6. Similar language was released in the FY2020 NDAA presidential signing statement in response to provisions on the Open Skies Treaty and North Atlantic Treaty. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2019 Daily Comp. Pres. Doc. DCPD201900880 (Dec. 20, 2019) [hereinafter 2019 Presidential Statement].

7. *See* Curtis Bradley & Jack Goldsmith, *Constitutional Issues Relating to the NATO Support Act*, LAWFARE BLOG (Jan. 28, 2019), https://perma.cc/9QTB-4WAL (arguing that while Presidents may unilaterally withdraw from treaties in the face of congressional silence, "his authority to do so would be much less certain if Congress were to bar such withdrawal, whether in the NATO Support Act or other legislation."). Bradley and Goldsmith also contend that a treaty withdrawal after the passing of legislation such as the NATO Support Act might "substantially increase the likelihood that courts would adjudicate the merits of a presidential treaty termination." *Id.*

8. Oona Hathaway, *International Agreements (Part I): President Donald Trump's Rejection of International Law*, JUST SEC. (Oct. 2, 2020), https://perma.cc/N27J-75C8.

Analysis has been done on how Congress should pass legislation or creatively reassert its authority on treaty terminations, especially when controversial unilateral treaty terminations by the President occur.[9] As some scholars have noted, there may be no one exact way for Congress to limit the President's ability to terminate treaties.[10] The way that Congress can or should impose limits may depend upon substantive factors, such as treaty topic, or on procedural matters, such as the extent of express congressional limitations during the advice and consent process, or whether any limitations are passed as law after entry-into-force.[11] However, not many scholars have focused on what would theoretically happen after the Congress acts to impose restrictions or oversight mechanisms on treaty termination but yet the President still refuses to comply with duly-enacted legal requirements.[12] In such legal or political stalemates, one recourse for Congress could be to pursue judicial review and resolution by the Supreme Court.

This article aims to fill in the gap in recent research by focusing not on recommended congressional actions, but on the legal analysis of the relevant law and practice, with an emphasis on Supreme Court doctrine.[13] Would the Supreme Court be going against legal precedent if it heard a treaty termination case after *Goldwater v. Carter*?[14] By focusing on the Supreme Court analysis, this article aims to still encourage Congress to act (and spend the time and political capital in

9. *See, e.g.*, Kristen Eichensehr, *Treaty Termination and the Separation of Powers,* 53 VA. J. INT'L L. 247, 281 (2013) (arguing that Congress can impose a "for cause" restriction on the President's treaty termination power based on an analogy to the Appointments Clause and removal power); Cormac Broeg, *Leaving the Twilight Zone: A Congressional Check on Treaty Termination*, UNI. NEB. L. REV. (Nov. 15, 2020), https://perma.cc/SA34-VDAR. *See also* Curtis Bradley, Jack Goldsmith, & Oona Hathaway, *Congress Mandates Sweeping Transparency Reforms for International Agreements*, JUST SECURITY (Dec. 23, 2022), https://perma.cc/A9SV-ESVJ.

10. Catherine Amirfar & Ashika Singh, *The Trump Administration and the "Unmaking" of International Agreements*, 59 HARV. INT'L L.J. 443, 451 (2018) ("[T]he President's power to withdraw from international agreements exists on a continuum, like any other presidential power pursuant to the *Youngstown* framework."). *See, e.g.*, Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432, 436 (2018), (arguing for a "mirror principle" where the degree of legislative approval to exit treaties must parallel the degree of legislative approval needed to enter it). *See also, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (Powell, J., concurring) ("[D]ifferent termination procedures may be appropriate for different treaties.").

11. *See* Amirfar & Singh, *supra* note 10, at 443. *See also Art.II.S2.C2.1.10 Breach and Termination of Treaties,* in *Constitution Annotated*, LIBR. OF CONG., https://perma.cc/2NQW-C42P ("Regardless of whether constitutional disputes over treaty termination are resolved in federal courts or through the political process, the power of treaty termination may depend on the specific features of the treaty at issue.").

12. *See Interpretation and Termination of Treaties as International Compacts*, JUSTIA, https://perma.cc/8FWG-46EG (noting that "[d]efinitive resolution of this argument appears only remotely possible. Historical practice provides support for all three arguments and the judicial branch seems unlikely to essay any answer").

13. Note that this article will be focusing on withdrawal from Article II treaties specifically, not congressional-executive agreements, sole executive agreements, or political agreements.

14. In *Goldwater v. Carter*, 444 U.S. 996 (1979), the Supreme Court dismissed a case where Members of Congress sued the executive branch for withdrawing from a U.S.-Taiwan mutual defense treaty without congressional authorization. This case and its implications are discussed further in the article. *See* discussion *infra* Section III.C.

reasserting its constitutional authority) by showing a way forward for judicial resolution of a treaty termination separation of powers dispute.

In defending the argument for both (1) a constitutional authority for Congress to limit presidential treaty termination and (2) that the Supreme Court should hear a separation of powers dispute on its merits and rule that there is no "exclusive" presidential authority on all matters regarding treaty termination, this article will proceed in the following manner. Part I will briefly examine relevant international law to determine whether there is a required method of treaty termination under customary law that may be brought up during a Supreme Court case. This is because treaty law is inextricably linked to international law, and international law is occasionally considered by the Supreme Court during the Court's decision-making process, even if it is not a dispositive consideration.[15]

Part II will discuss relevant constitutional principles to weigh the allocation of authority between political branches regarding treaty termination. This section will first point to textual evidence and interpretation within the Constitution to support congressional authority to provide limits on treaty terminations. Next, as with matters of constitutional interpretation where text is silent regarding the exact issue at hand, the article will examine past historical practice on treaty terminations. The history will show an initial practice of requiring or soliciting congressional approval for treaty termination. This practice only gradually changed to the modern-day standard and practice of unilateral presidential termination. This means that there has been no single procedural standard for how treaties should be terminated in the broad course of U.S. history.

Part III will analyze relevant Supreme Court decisions on the question of treaty terminations to show that the Supreme Court has not ruled decisively on the issue of treaty termination and that the door is still open to further litigation. This section will broadly cover the foundational background doctrines of: *Youngstown Sheet & Tube Co. v. Sawyer* (*Youngstown*)'s tripartite framework for separation of powers tensions; the "sole organ" dicta from *United States v. Curtiss-Wright Export Corp*; and, the Supreme Court's revisitation of the sole organ doctrine in *Zivotofsky v. Kerry* (*Zivotofsky II*).[16] This section will then engage in an analysis of the plurality and concurring opinions from *Goldwater v. Carter*, the only Supreme Court case to date on treaty termination.[17] This section will also include a brief discussion on the current Supreme Court.

Finally, Part IV will conclude the article with a brief discussion on the key functional and policy reasons why an exclusive treaty termination authority by the President is not in the best interest of the United States, for similar reasons as

15. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432–33 (1964); Bond v. United States, 134 S. Ct. 2077, 850-52 (2014).

16. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-29 (1936); Zivotofsky v. Kerry, 576 U.S. 1, 18–21 (2015).

17. Goldwater v. Carter, 444 U.S. 996, 1003 (1979).

to why the nation's framers did not appear to interpret treaty termination as an exclusive presidential prerogative.

Based on the foregoing, the article concludes with two key points. First, the President's authority with regard to treaty termination is not exclusive and Congress can impose restrictions on that termination power.[18] Second, should Congress attempt to legally limit the President's treaty termination powers but the President ignores Congress, then the Supreme Court should hear the case of what may be called a *Youngstown* "category three" controversy (where the President is acting in his "lowest ebb" of authority),[19] such as in the example of a presidential withdrawal from NATO in the face of express congressional opposition.

I. TREATY TERMINATION IN INTERNATIONAL LAW

Should the Supreme Court decide to consider international law either for their own legal analysis or to have a better understanding of the Constitution's drafters' intent, it would be evident that principles of international law show that treaties are not supposed to be easily abrogated. A foundational principle of international treaty law is *pacta sunt servanda*. The Latin phrase translates generally into the phrase "agreements must be kept." This principle was enshrined within the Vienna Convention on the Law of Treaties (VCLT), which notes that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[20] Before the negotiation of the VCLT, the *pacta sunt servanda* principle led to a disfavoring of treaty terminations except for specific circumstances, such as material breach.[21]

The VCLT has codified some aspects of treaty termination, but has done so in generally broad terms without defining a specific internal procedural requirement for nations to follow.[22] Though the United States has not ratified the VCLT, the United States has generally accepted many of its provisions as reflecting customary international law, even on treaty termination.[23] Therefore, it is still helpful to note provisions of interest and relevance within the VCLT on treaty terminations as reflective of U.S. obligations.

When determining whether a nation is abiding by its international law commitments when it begins a process of treaty termination, article 42 of the VCLT says

18. *See, e.g.*, Restatement (Fourth) of Foreign Relations Law § 313, reporters' n.6 (AM. L. INST. 2018) (If treaty termination is a concurrent, rather than exclusive, power, it is possible that it could be limited by the Senate in its advice and consent to a particular treaty, and possibly also by Congress through statute.).

19. *See* discussion *infra* Section III.A.

20. Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

21. Curtis Bradley, *Treaty Termination and Historical Gloss*, 93 TEX. L. REV. 773, 778–79 (2014) (describing that the principles for terminating treaties were underdeveloped at the time of the United States' founding).

22. *See* VCLT, *supra* note 20, at 346.

23. *See, e.g.*, OFF. OF LEGAL ADVISER, U.S. DEP'T OF STATE, 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 154 (2016).

that "termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention."[24] In the North Atlantic Treaty, article 13 provides some guidance on termination, but is not very detailed: "After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation."[25] In reading the text alone, it appears that such notice of denunciation can be given for any reason, so long as twenty years has passed (which would have been 1965). The United States could then potentially announce a denunciation to terminate its NATO commitment easily, without reason, and the denunciation would take effect one-year after such notification.

What if, however, the North Atlantic Treaty did not have a withdrawal provision at all? Where a treaty termination provision is unclear, or non-existent, states may then turn to the rest of the VCLT for further guidance, per VCLT article 42.[26]

As far as international law is concerned, what matters for treaty termination is not which internal state actor initiated or internally approved the process of treaty termination, but which representative of the state has signed the relevant communicative instrument to other treaty parties.[27] On this regard, the VCLT has clearly identified the official notification as needing to come from either a representative of the state or one who has been given full powers by a representative of the state.[28] For the United States, that means either the President, the Secretary of State, or someone granted full powers by either of those two officials to effectuate the termination. While some may claim then that this provision means that Congress should not have a role in treaty termination, what it actually means is that Congress (or members of Congress) cannot, for international law purposes, be the representative of the state for treaty termination notification purposes—unless such "full powers" were granted to that representative by the President or Secretary of State. The VCLT does not, however, deprive Congress of the ability to impose limits upon the President during the internal debate of the treaty termination process.[29]

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24. VCLT, *supra* note 20, at 342.

25. North Atlantic Treaty, *supra* note 3, at art. 13.

26. VCLT, *supra* note 20, at 342.

27. VCLT, *supra* note 20, at 348 (art. 67).

28. *Id.*

29. The VCLT contains other detailed sections on overall termination, which may be relevant for the President and Congress to consider, especially if any provisions may require passing law or any amending any laws in advance of termination. For example, article 56 notes that if a treaty does not contain a withdrawal or termination clause, then the treaty is not subject to denunciation or withdrawal unless there was an established intent of the parties to admit the possibility of withdrawal or that the right of withdrawal was implied by the nature of the treaty. *Id.* at 345. The VCLT further notes that termination may be permissible in instances of a superseding treaty, a material breach, supervening impossibility of performance, a fundamental change of circumstance, a severance of diplomatic or consular relations, or the emergence of a new peremptory norm. *Id.* at 344-47. For more on the analysis

Furthermore, the international community has shown its reticence to allow treaty terminations, illustratively setting a high bar for non-procedurally permissible treaty terminations in the 1997 case concerning the *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) at the International Court of Justice (ICJ).[30] In *Gabčíkovo*, Hungary tried to terminate a 1977 treaty with Slovakia's predecessor state of Czechoslovakia. Hungary wanted to be released from a river project it felt was no longer economically or politically viable due to the irreparable environmental damage which would occur.[31] The treaty had no withdrawal provisions, so Hungary relied on the VCLT provisions outlining impossibility and fundamental changes in circumstance to argue that it should be able to terminate the treaty.[32]

The ICJ however, ruled against Hungary's arguments for treaty termination on those bases. The court said that Hungary's failure to invest responsibly in the project in the first place was their own responsibility, and "impossibility of performance" stemming from a state's own actions invalidated the option.[33] Furthermore, the ICJ ruled that the change in circumstance was not so "fundamental" that the treaty obligations of the parties would be "radically transformed" as a result.[34] Developments in environmental law were not "completely unforeseen," said the court.[35] Therefore, the bar for treaty termination with Hungary was set high, and Hungary was bound to maintain its treaty commitments to Slovakia.[36]

Should the Supreme Court consider the international law implications of treaty termination in a future separation of powers case, it's clear that international law would bear no obstacle against Congress in having a say on termination because (1) for international law purposes, termination is effectuated by a representative of the state with full powers submitting a formal notice of action, regardless of prior internal debate, and (2) international law has a preference for maintaining international commitments and the durability of treaties (outside of a pre-determined termination process) short of extreme circumstances.

II. CONSTITUTIONAL INTERPRETATION OF TREATY TERMINATION AUTHORITY

Unlike the VCLT, the Constitution is silent on the subject of treaty termination. In modern history, presidents have seemed to exert an exclusive treaty termination

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of the VCLT and internal state procedures in effectuating treaty terminations, see Hannah Woolaver, *From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal*, 30 EUR. J. INT'L L. 73 (2019).

30. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, 8 (Sept. 25).

31. *Id.*

32. *Id. See also* VCLT, *supra* note 20, at 346–47.

33. Hung. v. Slovk., 1997 I.C.J. Rep. 7, ¶ 103 (Sept. 25).

34. *Id.* ¶ 104.

35. *Id.*

36. For a more in-depth treatment of the VCLT and treaty termination, see Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634–49 (Duncan Hollis ed., Oxford University Press, 2012).

authority.[37] However, two methods of constitutional interpretation are particularly instructive to show that Congress does have constitutional authority to impose limits and weigh in on treaty terminations: textual interpretation and historical review. Combined, these two sections will show that Congress has a concurrent authority on treaty termination to at least impose limits upon the President's ability to withdraw from treaties through its oversight power, even if the President maintains a unilateral (but not exclusive) authority on treaty termination.

The text of the Constitution will show that the President does not have an exclusive foreign affairs role, and that the Constitution does not prohibit Congress from authorizing or disapproving treaty terminations. Historical precedent on the matter of treaty termination has varied, stemming from the executive seeking congressional authorization before treaty termination, to today's modern practice of unilateral presidential treaty termination. But even in modern history, at no point has congressional silence meant that it lacks authority to limit or disapprove termination.

A. Textual Evidence

The text of the Constitution does not definitively resolve the issue of treaty termination. However, Congress's authority to weigh in on matters of treaty terminations can be derived from four other portions of constitutional text. First, the Supremacy Clause elevates treaties to the supreme law of the land, and legislative prerogatives are within the purview of the legislative branch.[38] Second, the Supremacy Clause can be read with the Take Care Clause to oblige the President to allow congressional input into treaty termination, similar to how a legislative act is needed to terminate positive law.[39] Third, analogizing the Treaty Making Power Clause with the Appointments Clause can provide guidance on the authority of Congress to place limits upon treaty termination, the way the Supreme Court has ruled that Congress may impose some limits upon executive officers.[40] Finally, an analysis of express foreign affairs related powers enumerated to Congress can be a helpful way to view congressional authority over treaties of related subject matter, such as peace treaties in relation to the congressional power to declare war.

37. This article will aim to make clear the distinction between an "exclusive" presidential authority on treaty termination (which insinuates that Congress may not impose limits on terminations because the power is for the President alone) and a "unilateral" presidential authority on treaty terminations (which means that the President may act under his own authority without needing Congress,). Even under a unilateral presidential authority to act, Congress still has concurrent authority to oversee terminations and may still impose limits on the President's ability to act, even if the President does not need Congress's approval to act.

38. U.S. CONST. art. VI, § 2, cl. 2.

39. U.S. CONST. art. II, § 3.

40. U.S. CONST. art. II, § 2, cl. 2.

1. Treaties as Supreme Law of the Land

"[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . ." Since treaties are the supreme law of the land, and because there is some congressional involvement in their enactment (at the very least through Senate advice and consent) it follows that they should be treated in their termination more similarly to laws enacted by the legislature. This means either in the broadest sense that in the same way the President cannot unilaterally terminate duly-enacted statute either through repeal or amendment, the Congress should also be involved in the termination of treaties. In the alternative, even if Congress is not necessary for treaty termination, Congress should not be excluded from the treaty termination province completely, because it would be akin to saying that Congress no longer has a role in the termination of statutes in the U.S. Code.[41]

Beyond requiring congressional action to both ratify treaties and enact laws, there are other similarities between laws and treaties which support the theory that treaties should be treated more like a law in an instance of treaty termination. First, when a treaty is amended, the President receives new Senate advice and consent for that treaty's amendment, similarly to how a law is amended. For example, when a new country was added to NATO, the Senate voted to approve that addition as a protocol to the North Atlantic Treaty. This includes most recently North Macedonia[42] and Montenegro.[43]

Second, treaties are constitutionally listed in the Cases-and-Controversy Clause as a type of case to which judicial power would extend: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[44] Again, as with the Supremacy Clause, treaties have been listed alongside laws and the Constitution, elevating its importance within the nation's founding document.

Third, whether a treaty is self-executing or non-self-executing, the treaty still maintains legal force, even if the treaty is not actionable in court. For an example of an easy case of a non-self-executing treaty, we can look at the Chemical Weapons Convention (CWC) which has a statutory counterpart of the Chemical Weapons Convention Implementation Act (CWCIA). According to the courts, the CWCIA merely makes the CWC enforceable domestically (executing it).[45] Even without the CWCIA, the CWC would still be the "supreme law of the

41. Treaties are raised to the level of federal law in the Supremacy Clause: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2, cl. 2.

42. S. TREATY DOC. NO. 116-1 (2019).

43. S. TREATY DOC. NO. 114-12 (2017).

44. U.S. CONST. art. III, § 2, cl. 1.

45. *See* Bond v. United States, 572 U.S. 844, 850-51 (2014) (discussing the limits and effects of implementing legislation for the non-self-executing treaty of the Chemical Weapons Convention).

land."[46] That the CWCIA does, in fact, exist strengthens the relationship between that treaty and Congress.[47]

To summarize this section, the legislature has been involved during the process of treaty ratification, such as the formal Senate Advice and Consent process, as well as treaty amendments—just as it does for other laws. And because termination of treaties is akin to changing laws, Congress should have the option available to decide how the legislature wishes to amend, limit, or terminate such laws and treaties.[48]

2. Treaties and the Take Care Clause

Treaties are "the supreme law of the land," whether they are self-executing or non-self-executing, and the President is constitutionally bound to "take Care that the Laws be faithfully executed."[49] Some commentators have recognized that in reading these two clauses together, it is possible to extrapolate that the President is thus bound to treat treaties as laws in terms of the treaty's faithful execution.[50] To faithfully execute a law can also be read to follow the proper procedures for their amendment, suspension, and termination, should the President chose to do so.[51] Therefore, a President may also be bound to treat treaty termination similarly to the procedures necessary to terminate laws, which fundamentally requires congressional action.[52] Even if congressional action to authorize termination is not necessary to enact treaty termination given historical practice,[53] should the Congress choose to impose limitations upon treaty termination, that would be permissible and should be upheld, because it would be similar to a legislative act by the Congress which the President has vowed to take Care be faithfully executed.[54]

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46. *See* Medellín v. Texas, 552 U.S. 491, 516 (2008).

47. The reverse may also be true. Suppose that the President decided to withdraw from the CWC as soon as possible, without the involvement of Congress. The CWIA would still be on the books, and that could not change until Congress amended or repealed that specific law. It would be functionally better in these cases for the President to work with Congress through the treaty termination to ensure that all legal concerns are adequately addressed.

48. *See generally* Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter*, 105 CORNELL L. REV. 1809, 1828–63 (2020) (describing treaties as "laws" through textual analysis, framing and interpretation by the founding generation, judicial interpretation, and executive branch interpretation even in light of the non-self-execution doctrine).

49. U.S. CONST. art. II, § 3.

50. *See, e.g.*, Finucane, *supra* note 48, at 1853 (upholding the view that self-execution of a treaty is not dispositive as to whether a treaty is "Law").

51. *See* Clinton v. City of New York, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

52. *See* Bradley, *supra* note 21, at 781. *See also* JOSEPH STORY, COMMENTARIES ON CONSTITUTION OF THE UNITED STATES 695 (1833) (showing an early commentary on constitutional law noting the parallels between treaties and laws: "it will not be disputed, that [treaties] are subject to the legislative power, and may be repealed, like other laws, at its pleasure.").

53. *See* discussion *infra* Section II.B. on Historical Support.

54. *Cf.* Bradley, *supra* note 21, at 780 (discussing a "highly controversial" counterargument which says that the President's Vesting Clause authority gives him authority on all executive matters and terminating a treaty is an executive act).

3. Analogizing "Senate Advice and Consent" in the Treaty Making Clause and the Appointments Clause

With regards to treaty creation, the Constitution states that 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."[55] Some scholars have pointed to the similarity between the "advice and consent" language for both treaties and officers in the Appointments Clause as a way to draw parallels in identifying congressional authority for the termination of treaties.[56] For presidentially-appointed and Senate-confirmed positions, the Supreme Court has ruled repeatedly that Congress's constitutional authority to impose restrictions upon the President's power is available but limited.[57] For example, in some cases, Congress can only impose an additional "for cause" termination requirement upon certain positions.[58] If Congress has, at a minimum, similar authority for treaties as it does for the removal of executive appointments, then Congress at least has the authority to impose limitations upon the President's authority to withdraw from treaties.

However, the nomination and confirmation of appointees is not the same as the creation of laws. Whereas officers of the United States serve to execute the President's agenda and direct agencies, treaties are more similar to law, legislative acts, and establishing binding obligations. Therefore, congressional authority to limit treaty termination should go beyond the congressional authority to limit appointments termination and Congress should have the authority to play a stronger role in treaty termination oversight than it does to limit appointee terminations.[59] But at the very least, the "for cause" restriction proposed by scholars should be a constitutionally permissible minimum, not a ceiling.[60]

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55. U.S. CONST. art. II, § 2, cl. 2.

56. *See* Kristen Eichensehr, *Treaty Termination And The Separation Of Powers*, 53 VA. J. INT'L L. 247, 252 (2013).

57. The appointments clause and presidential removal power jurisprudence is its own complicated area of law for which the Supreme Court has attempted to draw careful limits upon the Congress's ability to interfere with the Presidents control of their executive branch officers, and it is in more narrow and limited circumstances that Congress is allowed to impose restrictions at all. *See, e.g.,* Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) (holding that quasi-legislative or quasi-judicial officers may have statutory protections to keep the President from firing them for solely political reasons).

58. *See, e.g.,* Morrison v. Olson, 487 U.S. 654, 725 (1988) (holding that a "for cause" termination limit on an independent counsel functioning in an executive capacity would not unduly interfere with the President's Take Care clause duties to faithfully execute the laws). *See also* Eichensehr, *supra* note 56, at 269–76.

59. For example, reasoning that Congress has stronger authority to impose limits on termination of treaties than appointments of officers because the action is more similar to a legislative act than an executive act is similar reasoning as to why the Supreme Court ruled in *Humphrey's Executor* that Congress could impose limitations on removal of "quasi-legislative" officers over purely executive officers. *See* Humphrey's Ex'r, 295 U.S. at 624.

60. *See* Eichensehr, *supra* note 56, at 269–76 (discussing the Appointments Clause analogy to argue for the permissibility of a "for cause" treaty termination restriction imposed by Congress).

4. Enumerated Congressional Foreign Affairs Authority

The height of congressional authority to limit treaty terminations may also depend upon the subject matter of the treaty and how closely the treaty can be tied to an enumerated congressional foreign affairs power.[61]

Among several of Congress's security-related enumerated foreign affairs powers are the powers to: "provide for the common defense and general welfare of the United States;" "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;" "declare war;" "make rules concerning captures on land and water;" "raise and support armies;" "provide and maintain a navy;" "make rules for the government and regulation of the land and naval forces;" and related laws regarding the militia.[62] Other constitutional clauses to which Congress may seek to tie treaty oversight can include the explicit foreign affairs power to "regulate commerce with foreign nations," which has led to trade agreements being approved through a majority vote bicamerally rather than through the usual Senate-only supermajority advice and consent process.[63]

In key part, treaties have historically been tied to resolution of war, and especially during the time of the nation's founding, the negative inference has been drawn that a termination of a treaty is a signal for a declaration of war.[64] Such an interpretation was because most treaties of the time were peace and amity treaties.[65] As such, the breaking of certain treaties, such as peace treaties, would invoke Congress's War Powers Clause authority and gives Congress the strongest authority to weigh in on treaty termination.

To put this theory into context, a hypothetical withdrawal from the North Atlantic Treaty could imply that the United States is seeking a state of war with one of the nations in the alliance. Take for example, NATO member Türkiye. In just a few years, tensions between Türkiye and the United States have risen

61. Amirfar & Singh, *supra* note 10, at 444-45. *See also id.* at 451 ("[T]he President's power to withdraw from international agreements exists on a continuum, like any other presidential power pursuant to the Youngstown framework."). Even in the unsettled plurality opinion of *Goldwater v. Carter*, Justice Rehnquist, who in the opinion had just written on the separate issue of political question doctrine writes: "In 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 (*see, e.g.*, n. 1, infra), the instant case in my view also 'must surely be controlled by political standards.'" Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

62. U.S. CONST. art. I, § 8, cls. 1, 10–16.

63. *Id.* at cl. 3. Mark Strand & Dan Risko, *Trade or Treaty? Why Does the House Approve Free Trade Agreements?*, CONG. INST. (Dec. 12, 2011), https://perma.cc/57UU-X26J.

64. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 68 (Phila., Philip H. Nicklin 2d ed. 1829) ("Congress alone possesses the right to declare war; and the right to qualify, alter, or annul a treaty being of a tendency to produce war, is an incident to the right of declaring war.").

65. *See generally* Daniel J. Hessel, Note, *Founding-Era* Jus Ad Bellum *and the Domestic Law of Treaty Withdrawal*, 295 YALE L.J. 2934 (2016) (looking at treaty termination through the lens of *jus ad bellum* to conclude that treaty withdrawal would have been seen as a matter of war and peace during the time of the nation's founding). *See also* discussion on first U.S. treaty termination between the U.S. and France due to impending war between the two nations *infra* Section II.B.2.

dramatically, from Türkiye's acquisition of a Russian missile defense system to the U.S. recognition of the Armenian genocide.[66] Given a few more years, and a continuing decline in trust and relations, might the U.S. leave NATO so it can counter Türkiye more openly with threats of war? What if Türkiye would perceive a treaty termination as tantamount to a declaration of war—then, at that point, surely it would be Congress's prerogative to weigh in on U.S. actions which are equivalent to a declaration of war.

Alternatively, what if Russia hypothetically invaded NATO member Poland after years of warning the United States not to advocate for NATO troops in Poland?[67] Presume that some NATO allies have threatened to defy any invocation of Article 5 of the treaty (which commits states-parties of the agreement to mutual defense) in defense of Poland and will remain neutral. If the United States wishes to take a further step to take stronger action against Russia in defense of Poland, the U.S. President may decide that withdrawing from NATO is the best way to proceed, to freely declare war against Russia . In this treaty termination scenario, Congress's War Powers authority is, again, invoked.

In continuing to consider the hypothetical, even if no outright war is declared and congressional war power authority is unable to be relied upon, Congress's constitutional authority to provide for and consider rules and regulations for U.S. armed forces might also support a finding of congressional authority to care about when and how the North Atlantic Treaty is to be terminated.[68] Congressional power on rules and regulations of the armed forces is being used today to affect U.S. forces participating, and poised to participate, in NATO coalitions based abroad.

As previously mentioned, scholars have repeatedly recognized that a presidential treaty termination power and the Congress's authority to impose limits on that termination may depend in part on the treaty's subject matter, content, and process of ratification. The congressional proposals already introduced about the North Atlantic Treaty—an Article II treaty which has multiple subject matter reasons for how it can be tied back to express constitutional powers—would be a treaty upon which Congress has a strong claim to conduct oversight of, including how that treaty may be terminated.[69] At the very least, the point remains that not all treaty terminations can be said to be unilateral and exclusive prerogatives of

66. *See* Pinar Sevinclidir, *Will Biden's Armenian genocide remark "stir the hornet's nest," further straining ties with Turkey?,* CBS NEWS (April 28, 2021, 8:22 AM), https://perma.cc/A2KL-A9CF; *see also* Matthew Lee, *U.S. Sanctions NATO Ally Turkey over Russian Missile Defense,* ASSOC. PRESS (Dec. 14, 2020), https://perma.cc/Z6JT-F7DT.

67. *See* Henry Ridgwell, *As Poland Hails US Troop Deal, Germany Fears Weakening of NATO*, VOICE AM. (Aug. 17, 2020, 05:06 PM), https://perma.cc/7L8J-U8ZN.

68. Of course, the President's Commander-in-Chief prerogative still maintains in terms of posturing U.S. forces. What this point is arguing for is that Congress has a concurrent, but not exclusive authority, to set guidelines and limits on presidential action where it can be linked to an express constitutional power.

69. *See* Hessel, *supra* note 65.

the executive branch, upon which the Congress has no concurrent authority or ability to impose restrictions in any way.

The realm of foreign affairs is not exclusively for the President.[70] The foregoing textual analysis of the Constitution—including expressly foreign affairs related provisions of the Constitution—especially in light of the consideration that legislative diplomacy has long been an accepted practice,[71] both show that the President cannot alone claim all the nation's foreign affairs powers.

B. Historical Support

Where textual support is limited, the legal analysts, scholars, and the courts will look to historical practice for support.[72] Though in recent years the executive branch has increased treaty terminations without any input by Congress,[73] the executive branch did not always do so.[74]

1. Leading up to and During Constitutional Ratification

Before the establishment of the United States, peace treaties, primarily signed by monarchs, did not generally include termination clauses.[75] While customary international law allowed for treaty terminations due to material breach, the general understanding was that treaties were meant to be permanent obligations.[76] The expectation that treaties were meant to be durable and withdrawn from only for exceptional reasons may also account for why treaty termination is not spelled out in the Constitution as treaty ratification is. Recall that *pacta sunt servanda* (agreements must be kept) was, and still is, a foundational international legal principle and would have been during the time of the United States' founding.

As for the role of Congress in treaty termination, note that even Alexander Hamilton, the framer well-known for his belief in a strong executive, wrote in the *Federalist Papers* that treaty power belonged neither exclusively to the executive or legislative branches, but that the two together played important roles.[77]

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70. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) ("It is not for the President alone to determine the whole content of the Nation's foreign policy.").

71. *See, e.g.,* Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 332-36 (2013) (reviewing communications and interactions between members of Congress and foreign heads of state and other forms of diplomatic communications).

72. *See e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

73. *See* David Sanger, *Trump will Withdraw From Open Skies Arms Control Treaty*, N.Y. TIMES (May 21, 2020), https://perma.cc/5FMC-LDWU (highlighting the third terminated arms control agreement by the Trump administration following the withdrawal from the Intermediate-Range Nuclear Forces Treaty and the Joint Comprehensive Plan of Action agreement).

74. *See* Bradley, *supra* note 21, at 773–99 (providing a comprehensive historical overview on the cooperative treaty termination process between executive and legislative branches until the end of the nineteenth century into the modern unilateral termination process).

75. *Id.* at 779.

76. *Id.* at 778.

77. THE FEDERALIST NO. 75 (Alexander Hamilton) (regarding the treaty making power of the executive).

Though Hamilton notes that the Executive is "the most fit agent" to take on the responsibility of "foreign negotiations," he writes that "the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them."[78] Hamilton's rationale applies equally to treaty termination as to a treaty's realization.

2. U.S. Practice from the Constitution's Beginning Until Franklin Delano Roosevelt

Between the country's founding and through the early twentieth century, treaty termination practices largely fell into four main categories: (1) the full Congress could preemptively authorize or direct treaty termination; (2) the Senate alone could authorize treaty termination; (3) the executive would terminate a treaty and then seek congressional or Senate approval; and finally, (4) the President would terminate unilaterally.[79] This period between the nation's founding and President Franklin D. Roosevelt's administration reflects a broad range of treaty termination procedures which all generally involved congressional input.

The country's first treaty termination involved preemptive direction by the Congress to the President (not merely providing authorization). In 1798, the United States was set to go to war with France when Congress passed legislation that the four U.S.-French treaties "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[80] President John Adams signed the legislation, and the treaty terminations went into effect.[81]

By this point, Congress had already passed other war-related measures which would have already put the treaties between the United States and France on questionable footing.[82] Therefore, it is possible in this instance that Congress wasn't trying to stake a claim in treaty termination authority but was simply focused on the brewing U.S.-French conflict. At the time, congressional authority to play a role in treaty termination was not in debate.[83] Rather, the debate around the French treaty termination centered around whether only the congressional voice mattered on whether to terminate a treaty, or whether the President's voice was also needed.[84]

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78. *Id.*

79. *See* Bradley, *supra* note 21, at 788.

80. *Id.* at 789 (citing Act of July 7, 1798, ch. 67, 1 Stat. 578, 578).

81. *Id.* To be sure, President Adams could have refused to sign the legislation directing U.S. policy or he could have vetoed it. In that way, Adams could have exercised some discretion over the termination of the treaty. But his affirmative signing of the law without objection appears to condone the legislature's authoritative directive that the treaty "shall not" be legally binding on the United States. Note that later bills will merely "authorize the president" to act and give the President more discretion on whether to terminate a treaty or not. For example, an 1846 congressional joint resolution explicitly noted that a U.S.-British treaty termination was to occur at President Polk's discretion. *Id.* at 790.

82. *Id.* at 789 n.77.

83. *Id.* at 789.

84. *See id.* (citing Thomas Jefferson's observation that treaties as "supreme law of the land" meant it should be understood that "an act of the legislature alone can declare them infringed and rescinded.");

Future terminations would include language authorizing or directing the executive to take the termination action, implicitly recognizing that executive action was, in fact, necessary while still maintaining congressional approval and oversight. Even so, exactly what that congressional approval looked like was debated within Congress. An 1846 withdrawal from a U.S.-British treaty regarding the Oregon territory spurred a debate on whether treaty termination not pursuant to a declaration of war required the full Congress (which would be needed for a declaration of war vote, and how the Congress approved the 1798 treaty withdrawal) or a super-majority of the Senate (as is necessary for advice and consent).[85] One thing that remained constant, however, was that during the 1800s, there was no mainstream theory that treaty terminations were for the President alone.[86]

Later examples of a President seeking or being provided congressional authorization for treaty termination after submitting international notice of treaty termination, begins to hint at U.S. acceptance of unilateral presidential authority with congressional oversight. For example, in 1911, the House of Representatives passed a resolution demanding the termination of a U.S.-Russian commercial treaty. President William Taft, concerned about the wording of the House resolution being passed by the Senate as well, submitted his own statement of termination to Russia and then the Senate, requesting Senate approval of his version of the termination statement.[87]

In the U.S.-Russia treaty termination instance, presidential preemption was not due to an executive belief in unilateralism, but to preempt a congressional action the President thought damaging to U.S.-Russian relations.[88] Even Taft later conceded that the President may not "annul or abrogate a treaty without the consent of the Senate unless he is given that specific authority by the terms of the treaty."[89]

Finally, the first instance of a unilateral treaty termination in this period is generally seen to be the 1899 partial treaty termination of a U.S.-Swiss treaty, also by Taft.[90] Even this termination, however, was done for only specific treaty

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see also id. at 789 n.79. Recall that the 1798 resolution declaring the treaty no longer binding (rather than directing the President to do so) assumed that congressional authority alone was enough for treaty termination.

85. *See* Bradley, *supra* note 21, at 789. During this period, the President had at least twice terminated a treaty based on authorization solely from the Senate. First, in 1855 for a U.S.-Denmark amity treaty termination, as well as a 1921 termination of termination of the International Sanitary Convention at the request of President Wilson. *Id.* at 793–94.

86. *See, e.g.*, Rutherford B. Hayes, Veto of the Chinese Immigration Bill, Address Before the House of Representatives *in March 1, 1879: Veto Message Regarding Immigration Legislation*, UVA MILLER CENTER, https://perma.cc/HRT7-CRNV ("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 as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate, as shown by the concurrence of two-thirds of that body.").

87. Bradley, *supra* note 21, at 795.

88. *Id.*

89. *Id.* at 796 n.120.

90. *Id.* at 800.

provisions, and not the treaty as a whole. The termination was also done to avoid a conflict with a statute approved into law by Congress.[91] Thus, the 1899 treaty termination is not a true unilateral presidential treaty termination as is understood in today's time. The 1899 withdrawal was done implicitly to satisfy congressional will.

3. A New Deal Between Congress and the White House on Treaty Termination

As with many other aspects of government, the Franklin Delano Roosevelt administration took great strides towards solidifying executive power, including in the realm of treaty terminations.[92] A 1939 withdrawal by President Roosevelt of a commercial treaty with Japan was executed—as other treaties had largely been—after the introduction of a resolution introduced by both houses of Congress supporting the treaty termination.[93] The difference this time, however, was that the State Department was beginning to rely on the "general spirit" of the 1936 case *United States v. Curtiss-Wright Export Corp* (discussed *infra* Section III.B.) to contend that the President had a unilateral treaty termination authority, if he wanted do so.[94] Roosevelt's justification then opened the door to more unilateral presidential treaty terminations that had little, if anything, to do with statute conflicts or any congressional authorization (whether *ex ante* or *ex post*). For example, after *Curtiss-Wright*, Roosevelt next terminated the London Naval Treaty in 1939 because of the changed circumstances of the war (which the United States did not officially enter with a congressional declaration until 1941) under the justification of general national security interests.[95]

Thus, Roosevelt set a trend that nearly every President following him upheld.[96] Particularly during the era leading up to the Carter administration, legal advisors were still reticent to assert a complete exclusive presidential authority for treaty termination, but felt comfortable arguing for a unilateral termination authority.[97] One 1958 memorandum by a State Department legal advisor observed that even

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91. *Id.*

92. *See id.* at 808 ("The 1930s also saw a political transformation in the United States, with Roosevelt having landslide victories in the presidential elections of 1932 and 1936 and the Democrats coming to dominate both houses of Congress. In addition, the national security environment was changing significantly in this period, with increasing aggression by Adolf Hitler in Germany, the invasion of China by Japan, and eventually the start of World War II. This environment was conducive to broader claims of executive authority.").

93. *Id.* at 807.

94. *Id.* at 807–08.

95. *Id.* at 808.

96. *Id.* at 809–10 (2014) (discussing non-controversial but nevertheless unilateral treaty terminations, including President Harry S. Truman's withdrawal from a whaling convention, President Dwight D. Eisenhower's termination of a treaty on merchandise and friendship with El Salvador, President John F. Kennedy's termination of a commercial treaty with Cuba, and Truman's termination of a Warsaw convention governing international air carriers).

97. In other words, the presidents maintained that they did not need congressional approval to terminate treaties, but they did not go so far as to say that Congress was excluded from weighing in on treaty termination should it so choose to.

though "matters of policy or special circumstances may make it appear to be advisable or necessary to obtain the concurrence or support of the Congress or the Senate" that the history of treaty termination in practice had been mixed.[98] Since the historical record did include unilateral presidential termination, such termination thus appeared to be "proper" at least for self-executing treaties allowing withdrawal without cause.[99]

Generally, the unilateral terminations continued on quietly until President Jimmy Carter's infamous termination of a U.S. defense treaty with Taiwan which would culminate in the Supreme Court *Goldwater v. Carter* separation of powers case on treaty termination.

4. Taiwan Treaty Termination and Reverberations

In 1978, President Jimmy Carter announced that due to a change in recognition of the People's Republic of China as the sole government of China, he was going to unilaterally terminate a mutual defense treaty the United States had with Taiwan, pursuant to a unilateral withdrawal clause in the treaty requiring a one-year notification period.[100] Earlier that year, the President had signed into law the International Security Assistance Act which contained a provision "expressing the sense of the Congress" that there should be "prior consultation" between the executive and legislative branch if there are to be changes to the continuation of the U.S.-Taiwan defense treaty.[101] However, President Carter's legal advisor argued heavily in favor of unilateral treaty termination, relying on twelve instances of alleged unilateral treaty termination.[102]

Senator Harry Byrd introduced a resolution objecting to the termination without Senate approval.[103] The Byrd resolution was brought to the floor of the Senate and procedurally approved with a preliminary 59-35 vote, but did not undergo a second and final vote to be formally adopted.[104] Senator Barry Goldwater then brought suit against Carter seeking both a declaration that congressional approval was required for this treaty termination and an injunction to stop treaty

98. Bradley, *supra* note 21, at 809 (quoting Memorandum from William Whittington, Termination of Treaties: International Rules and Internal United States Procedure 3 (Feb. 10, 1958) (on file with Curtis Bradley)). Bradley also records that "[t]he memorandum also asserted that, at least for a self-executing treaty containing a unilateral withdrawal clause, 'it is now generally considered that . . . it is proper for the Executive acting alone to take the action necessary to terminate or denounce the treaty.'" *Id.*

99. *Id.*

100. *Id.* at 811.

101. *Id.*

102. *Id.* The legal advisor noted that that "[w]hile treaty termination may be and sometimes has been undertaken by the President following Congressional or Senate action, such action is not legally necessary." *Id.* (quoting Memorandum from Herbert J. Hansell, Legal Adviser, U.S. Dep't of State, to Cyrus R. Vance, U.S. Sec'y of State, President's Power to Give Notice of Termination of U.S.– ROC Mutual Defense Treaty (Dec. 15, 1978), *in* S. COMM. ON FOREIGN RELATIONS, 95TH CONG., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER 395, 397 (Comm. Print 1978)).

103. S. Res. 15, 96th Cong., 125 CONG. REC. 475 (1979).

104. Bradley, *supra* note 21, at 812.

termination.[105] Goldwater and his co-plaintiffs argued that the 59-35 procedural vote of text substitution was enough formal action to warrant standing.[106]

The district court in *Goldwater v. Carter* agreed with the plaintiffs and went on to rule in favor of the Senators citing the longstanding and "predominant" U.S. practice of treaty termination which involved "mutual action by the executive and legislative branch."[107] Though the *Goldwater v. Carter* case will be analyzed further into the article (in discussion *infra* Section III.C), for now, it is sufficient to observe that the Supreme Court vacated all prior rulings in the case in a per curiam one sentence holding.

The justices instead penned concurrences explaining their reasons for vacating the lower opinion, including issues of political questions and ripeness. However, in the years following the Supreme Court decision, lower courts have read the opinion as a rule that issues of treaty terminations were non-justiciable political questions.[108] The executive branch went a step further and read the decision as broad permission to move forward on unilateral treaty termination authority without needing or seeking congressional approval again in the future.[109]

After the Taiwan treaty termination, unilateral treaty withdrawals occurred at a rapid pace. [110] These withdrawals largely went uncommented upon until the 2002 withdrawal from the Anti-Ballistic Missile (ABM) Treaty by the George W. Bush administration.[111] The outcry by Congress was similar to that of the termination against the Taiwan mutual defense treaty, including in the Senate Foreign

105. *Id.*

106. *Id.*

107. Goldwater v. Carter, 481 F. Supp. 949, 954 (D.D.C. 1979).

108. *See, e.g.*, Kucinich v. Bush, 236 F. Supp. 2d 1 (D.D.C. 2002) (dismissing a suit by thirty-one members of Congress against the Bush administration for withdrawing from the Anti-Ballistic Missile Treaty without congressional consent as a nonjusticiable political question). *See also No Appeal in ABM Treaty Case,* ARMS CONTROL TODAY (Mar. 2003), https://perma.cc/6R9G-B893. This article will continue to argue in the following sections that the reliance on the plurality opinion to create a strict rule is incorrect.

109. Between 1980 and 2002, the State Department catalogued twenty-three bilateral treaties and seven multilateral treaties withdrawn from. *See* OFF. OF LEGAL ADVISER, U.S. DEP'T OF STATE, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, §B(5)(b) at 202–06 (Sally J. Cummins & David P. Stewart eds., 2002) [hereinafter 2002 DIGEST], https://perma.cc/8UZS-DB9R. However, academics have noted that a majority of the treaties within this group are bilateral naturalization treaties which in part because of Supreme Court decisions had just been rendered unenforceable and were terminated in consultation with the Senate Foreign Relations Committee and so still were not completely incompatible with the express or implied will of Congress. Amirfar & Singh, *supra* note 10, at 453.

110. As noted, between 1980 and 2002, the State Department catalogued twenty-three bilateral treaties and seven multilateral treaties withdrawn from. *See* 2002 DIGEST, *supra* note 109, at 202–06. Since then, there has been no public effort government effort to publish a register of the treaty withdrawals the way that ratifications can be easily tracked. *See* Curtis Bradley & Jack Goldsmith, *Presidential Control Over International Law,* 131 HARV. L. REV. 1201, 1293 n.419 (2018) ("At the moment, there is no comprehensive compendium of terminated U.S. agreements, and finding such terminations is haphazard and involves guesswork."). *Id.* at 1293–94.

111. Bradley, *supra* note 21, at 815.

Relations Committee.[112] Some Members tried to sue the President to stop the treaty termination.[113] However, Congress took no formal action as a body, and ended up funding the missile defense program which the treaty had outlawed.[114] Doing so appeared to be an implicit approval of the President's termination decision.

At the time of the ABM Treaty debate, John Yoo, one of the most well-known champions of broad executive power, penned a 2002 Department of Justice memorandum repeatedly asserting the President's "exclusive" foreign affairs power, and how that exclusive power extends to both treaty termination and suspension.[115] This legal opinion was rescinded in 2009 before President Barack Obama's inauguration by Stephen Bradbury.[116] The Bradbury memorandum noted that though the 2002 memo was ultimately unpersuasive and held insufficient legal analysis, that the 2009 memo was not meant to be a determination of the presidential treaty terminational authority matter either way, and that the issue of treaty termination "is not nearly as simple or clear as the [2002 memo] indicated."[117]

5. The Trump Administration's Train of Terminated Treaties

The Trump administration revived the conversation around the President's authority to unilaterally conduct treaty terminations with a series of high-profile and controversial treaty withdrawals. Of particular interest is the withdrawal of the Open Skies Treaty (OST) because of directly opposing legislation signed into law by the President, which the executive branch ignored during the treaty termination process.

In the National Defense Authorization Act for fiscal year 2020, Congress passed a provision which required the President to provide advance notice of withdrawal from the OST to Congress before the President gave Russia a notice of withdrawal.[118] However, in the President's signing statement for the authorization bill, he wrote that the provision would "encompass only actions for which

112. *See* CONG. RSCH. SERV., 108th Cong., S-PRT 106-71, Treaties and Other International Agreements: The Role of the United States Senate 198–99 (Comm. Print 2001) ("The constitutional requirements that attend the termination of treaties remain a matter of some controversy. The Senate Foreign Relations Committee has from time to time contended that the termination of treaties requires conjoint action by the President and the Senate (or Congress) . . . . [T]he assertion of an exclusive Presidential power in the context of a treaty is controversial and flies in the face of a substantial number of precedents in which the Senate or Congress have been participants[.]").

113. Kucinich, 236 F. Supp. 2d at 2.

114. Bradley, *supra* note 21, at 815–16.

115. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, Off. of Legal Counsel, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat'l Sec. Council 15–16 (Nov. 15, 2001), https://perma.cc/J2YQ-UG8K.

116. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., for the Files 8–9 (Jan. 15, 2009), https://perma.cc/YF35-CJX9.

117. *Id*. at 9.

118. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §1234(a), 133 Stat. 1648 (2019).

such advance certification or notification is feasible and consistent with the President's exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs."[119] Released Office of Legal Counsel (OLC) opinions also show that the Assistant Attorney General Steven Engel had advised the Legal Advisor for the National Security Council that "Section 1234(a) of the 2020 NDAA unconstitutionally interferes with the President's exclusive authority to execute treaties and to conduct diplomacy, a necessary incident of which is the authority to exercise the United States' right to withdraw from a treaty."[120] Specifically, the OLC did not necessarily object to the requirement that the executive branch provide congressional notification of intent to withdraw, which the opinion notes the Trump administration did do during the OST withdrawal process.[121] The memo instead objects that the provision's requirement of notification 120 days before actual withdrawal was actually a forced "wait" of 120 days and thus was the constitutionally impermissible interference.[122]

When the Trump administration did withdraw from the OST without providing the advance congressional notice required by law, Members of Congress objected.[123] Experts contended that because there is a statute which was clearly ignored by the President, that the standing and ripeness issues that have traditionally

119. 2019 Presidential Statement, *supra* note 6.

120. Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Counsel, to the Legal Adviser to the Nat'l Sec. Council 31 (Sept. 22, 2020), https://perma.cc/XZ8L-BBVX [hereinafter Engel]. According to the OLC opinion, this memo and the signing statement followed a DOJ letter to the Chair of the House Armed Services Committee during consideration of the NDAA generally where the DOJ's Office of Legislative Affairs laid out the executive branch's objection to the treaty termination provisions specifically, citing prior OLC memos, Alexander Hamilton's Pacificus No. 1, recent constitutional scholars and dicta from federal court opinions in *Goldwater v. Carter* and *Zivotofsky v. Kerry* in support of the objection to treaty termination restrictions. Letter from Prim F. Escalona, Principal Deputy Assistant Att'y Gen., Off. of Legis. Affairs, to Adam Smith, Chairman, Comm. on Armed Servs. 9 (Nov. 27, 2019), https://perma.cc/JHZ5-W8R3.

121. Engel, *supra* note 120, at 2.

122. *Id.* It is interesting to note that the OLC memo first downplays the importance of the Open Skies Treaty by trying to point to the Senate executive reports during the advice and consent process of the treaty's "marginal" and "questionable" benefit to the United States and then highlights the recent criticisms against the treaty levied in congressional hearings by military leaders but cites Senator Tom Cotton (R-Ark)'s *Washington Post* opinion article against the treaty. *Id.* at 3, 4 n.2. It is also interesting that the OLC memo on the question comes after the President's signing statement, which from a practical perspective makes it less likely that the OLC could rule against what had already been expressed in the signing statement and in a prior letter to the House Armed Services Committee Chairman. The memo only concedes that adhering to the actions required by the provision at issue should be carried out as a matter of "interbranch comity." *Id.* at 7. Note also that this OLC memo was issued several months after the announced withdrawal of OST. *See id.* at 1.

123. *See* Press Release, Senate Foreign Relations Comm., Leading Senate Democrats Question Legality of Trump Administration's Withdrawal from Open Skies Treaty (Jun. 22, 2020), https://perma.cc/78KL-VMTF; Press Release, House Foreign Affairs Comm., House Foreign Affairs Committee Democrats Demand Answers on Trump's Illegal Withdrawal from Open Skies (May 29, 2020), https://perma.cc/3TFH-4N5C.

been raised since *Goldwater v. Carter* could be met in this case if Members of Congress decided to legally pursue the issue.[124]

In the following year's defense authorization bill, Congress included final language as a sense of Congress that "the decision of the United States to withdraw from the Open Skies Treaty, while taken in accordance with paragraph 2 of Article XV of the Treaty, did not comply with the requirement in section 1234(a) of the National Defense Authorization Act for Fiscal Year 2020 to notify Congress not fewer than 120 days prior to any such announcement."[125] This language is beneficial in putting Congress on the record about its objection of the executive's actions, but does not give Congress a remedy in the case of the Open Skies Treaty.

Similarly, in a hypothetical situation where a future President chooses to withdraw from the North Atlantic Treaty, that President would likely run into similar legislation imposing limits upon treaty termination.[126] Furthermore, if Congress does not reassert its authority more strongly after having limiting legislation ignored, then what happened with the Open Skies Treaty may happen again. The executive branch may win the day, and Congress's authority will slip further away as historical precedent continues to be set. It will be more difficult than ever to return back to the cooperative treaty termination relationship that Congress and the President used to once enjoy.

One potential resolution for Congress, however, to ensure that an Open Skies Treaty-type scenario does not happen again, is for the members of Congress to try again to go back to the courts to settle the matter of which branch's authority (congressional oversight or exclusive presidential power) should prevail.

III. SUPREME COURT PRECEDENT AND DOCTRINE

The Supreme Court has not definitively ruled one way or another on whether Congress has the authority to limit a President's actions with regards to treaty terminations. To expound on this point, this section will first analyze the *Youngstown* three-part framework to show that even if the President is able to act alone under his own authority, that if Congress objects, then the President is functioning at his "lowest ebb" of authority.[127] Next, the "sole organ" doctrine, used by proponents of broad executive power, will be contextualized using *Curtiss-*

124. *See* Michael Krepon, *U.S. Withdrawal from the Open Skies Treaty: Three Legal Issues,* ARMS CONTROL WONK BLOG (Nov. 24, 2020), https://perma.cc/3AUF-BS76; *see also* Scott R. Anderson & Pranay Vaddi, *When Can the President Withdraw From the Open Skies Treaty?*, LAWFARE (Apr. 22, 2020 2:59 PM), https://perma.cc/GF4J-B6GN.

125. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1232(a), 134 Stat. 3933 (2021) (citation omitted).

126. Bradley, *supra* note 21.

127. When the President is functioning at his "lowest ebb" of authority, the congressional objection should either cause the President to change his course of action, or the two branches' weight of authority must be weighed against each other. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 1–2 (2015) ("Where, as here, the President's action is 'incompatible with the expressed or implied will of Congress,' the President 'can rely [for his authority] only upon his own constitutional powers minus any constitutional powers of Congress over the matter'. . .His asserted power must be both 'exclusive' and

Wright and *Zivotofsky II*. Contextualizing the "sole organ" doctrine is important to establishing congressional authority to impose limits upon the President's acts of treaty termination. Finally, a structural and textual analysis of *Goldwater v. Carter* will show that the Supreme Court has not definitively ruled on treaty termination, and that the door to future litigation may remain open. Finally, this section will analyze how, in light of more recent Supreme Court opinions (such as Zivotofsky II and Gundy[128]), the modern Supreme Court appears more open to restraining presidential power, perhaps even in the realm of foreign affairs.

A. The Youngstown *Three-Part Framework and Congressional Objection*

The tension and delegation of authority between Congress and the President, should the two branches disagree on a treaty termination, can best be understood within the context of Justice Jackson's *Youngstown* three-part framework.[129] The majority opinion in *Youngstown* held that President Truman had no constitutional authority to take control of steel mills pursuant to a national security related executive order, and by doing so, he intruded upon Congress's lawmaking authority.[130] In a concurring opinion, Justice Jackson elaborated on instances in which the President and the Congress may jointly share certain powers. In these concurrent authority instances, Justice Jackson observed that the reach of executive authority can be measured in a tripartite framework of Congressional approval.[131]

The first category is when the President is taking an action with implicit or explicit congressional authorization. In these instances, the President's "authority is at its maximum" because it includes both all of the President's own authority plus all of the authority of Congress which Congress has chosen to delegate.[132] If, however, the President takes action on a power that has neither congressional authorization nor opposition, the President is operating in a second category described as a "zone of twilight." In these "zone of twilight" instances, congressional inaction may also to an extent enable an independent presidential responsibility.[133] And finally, when the President takes action that is "incompatible with the expressed or implied will of Congress," the President's power is "at its lowest ebb," and in the third category of the *Youngstown* framework.[134] When functioning at the President's lowest ebb, a President is acting on the executive's own constitutional authority, but the presidential authority is diminished by the constitutional powers of Congress on the subject matter. For a court to rule that the President's actions done at the "lowest ebb" of presidential authority were valid

'conclusive' on the issue, . . . and he may rely solely on powers the Constitution grants to him alone[.]" (citations omitted).

128. Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

129. Amirfar & Singh, *supra* note 10, at 445.

130. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952).

131. *Id.* at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.").

132. *Id.*

133. *Id.* at 637.

134. *Id.*

and constitutional would be "disabling the Congress from acting upon the subject."[135]

There are a few different ways to apply the *Youngstown* framework to the concurrent authority of the executive and legislative branch with regards to regulation of treaty termination. The first, as discussed, is that the strength of the presidential authority to withdraw from a treaty relies upon whether the President has explicit congressional authorization (category one) or is acting against the expressed or implied will of Congress (category three).

Another way to apply the *Youngstown* framework would be to measure the strength of presidential and congressional authority based on the topic of the treaty being terminated.[136] For example, where a treaty might relate primarily to an exclusive executive function—such a recognition of foreign nations—then the President is acting in category one of the *Youngstown* framework, even without congressional authorization.[137] On the other hand, presume that a treaty relates to matters directly within the express constitutional authority of Congress, such as regulating foreign commerce. A treaty termination which is acting inconsistently with congressional will as expressed through legislation (consider for instance implementation of the North America Free Trade Agreement, squarely within Congress' purview), would place the executive branch's action within category three of the framework, and because of the subject matter that lowest ebb would be particularly low.[138]

Generally, foreign affairs authority given by the Constitution is a shared responsibility between Congress and the Executive Branch, granted with varying degrees of authority on various subjects.[139] Congress has explicit and implicit authority to oversee the U.S. treaty process. Thus, in recent years, congressional silence on treaty termination has meant that the President has been exercising his treaty termination authority in the Youngstown category two "zone of twilight." In this zone, the Court has written that even when Members of Congress have objected to presidential treaty termination, a lack of formal legislative disapproval does not count as true objection and is congressional silence.[140]

If a President were to terminate U.S. participation in NATO, the President would arguably be at an even lower ebb given: 1) the enacted legislation in support of NATO and limiting of treaty withdrawal, and 2) the defense and war-related subject matter of NATO. If, in such an instance, the President were to maintain that the treaty termination authority is an exclusive one to the presidency, then, as Justice Jackson in *Youngstown* said, a "presidential claim to a

135. *Id*. at 637–38.

136. Amirfar & Singh, *supra* note 10, at 445.

137. *Id*.

138. *Id*.

139. *See* discussion *supra* Section II.A.4 on enumerated congressional foreign affairs authority.

140. *See* Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) ("Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, [citation omitted], no final vote has been taken on the resolution. . .If the Congress chooses not to confront the President, it is not our task to do so.").

power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[141] The Supreme Court is one avenue to provide that scrutiny.

B. Dismantling the "Sole Organ" Dicta: Curtiss-Wright *and* Zivotofsky II

Critics who do not believe that Congress should play a role in treaty termination frequently refer to the "sole organ" doctrine which broadly states that the President is the country's "sole organ" in the realm of international relations.[142] This doctrine comes from a key 1936 Supreme Court case, *United States v. Curtiss-Wright Export Corp.,* during a discussion on the power balance between the legislative branch and the executive in foreign affairs matters.[143]

The facts leading up to *Curtiss-Wright* involve a law passed by Congress which gave the President authority to prohibit private companies from selling weapons to the parties of the Chaco conflict if the President first make the finding that such a ban would contribute to re-establishing peace.[144] Subsequently, President Franklin Roosevelt issued an executive order finding that a weapons-sale ban would help re-establish peace and private companies immediately had to stop selling their weapons. Curtiss-Wright Export Corp., however, did not and was caught selling arms which resulted in criminal charges for the company.[145] Curtiss-Wright Export Corp. then challenged the law as an unconstitutional law-making delegation to the President.

The full question presented was whether Congress had exceeded its ability to delegate lawmaking authority onto the President by allowing him to make the determination of whether halting sales would be beneficial towards peace, which would then trigger a prohibition of weapons sales.[146] However, instead of focusing on the delegation question, the Court broadened their reasoning and first decided to weigh the President's authority in light of domestic affairs compared to foreign affairs powers. The Court concluded that because of the President's increased authority in the realm of foreign affairs, he was able to make what may otherwise be an unconstitutional determination.[147]

To reach this conclusion, the Court reviewed historical precedent to reason that the presidential foreign affairs authority is necessarily broad and frequently exclusive.[148] Famously, the majority relied on the "exclusive power of the

141. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

142. *See* Bradley, *supra* note 21, at 782.

143. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("... the delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations[.]"). For more historical background on the "sole organ" language see generally LOUIS FISHER, STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS: NO. 1: THE "SOLE ORGAN" (2006), https://perma.cc/JC3J-AEW5.

144. *Curtiss-Wright*, 299 U.S. at 304–06.

145. *Id.*

146. *Id.* at 315 ("In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.").

147. *Id.* at 329.

148. *Id.* at 319.

President as the sole organ of the federal government in the field of international relations."[149] This quote is the genesis of the sole organ doctrine.

Today's proponents of an exclusive presidential authority for treaty termination would say that the sole organ doctrine proves that only presidential action matters with regards to treaty termination. Yet, there are several reasons why supporters of an exclusive presidential authority are over-relying on the sole organ doctrine. First, the "sole organ" language comes from dicta in *Curtiss-Wright*, which was relying on an 1800 speech which may have been taken out of context. Second, the dicta has since been explicitly narrowed by the Supreme Court in the 2015 case *Zivotofsky v. Kerry* (*Zivotofsky II*).

On the first point, the Supreme Court has echoed many other scholars to conclude that the "sole organ" language in *Curtiss-Wright* is dicta.[150] Even in the context of the full original quote, however, the sole organ language is not saying that the President's foreign affairs power is unbounded. The full quote is as follows:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as 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 but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[151]

Recall that at issue in *Curtiss-Wright* was whether a statute was unconstitutional because of its delegation of congressional authority. The Court in this paragraph is questioning whether the President needed congressional authorization to act, or whether the President has his own authority to act. Because the President has broad foreign affairs authority, the President did not need congressional authorization to act, and therefore the President's executive order prohibiting arms sales was valid.

To apply this doctrine as applied in *Curtiss-Wright* to the context of treaty termination, one would ask: Does the President need Congress to authorize a treaty withdrawal? Or, does the President (because of his broad foreign affairs power) have independent authority to withdraw? In modern historical practice, the President does indeed appear to have unilateral authority to withdraw, at least to the extent that Congress has seemingly allowed it. However, the sole organ

149. *Id*. at 320.

150. Zivotofsky *ex rel*. Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) (noting that the "sole organ" language and related reasoning "of the President's exclusive power was not necessary to the holding of *Curtiss-Wright"*). *See also* Louis Fisher, *The Staying Power of Erroneous Dicta: from Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 150 (2016).

151. *Curtiss-Wright*, 299 U.S. at 319–20.

doctrine as applied in *Curtiss-Wright* does not extend so far as to exclude any constitutional authority that Congress may itself have.

Furthermore, the "sole organ" dicta as used in *Curtiss-Wright* was mistakenly contextualized to begin with.[152] Justice Sutherland's development of "sole organ" as a term stemmed from an 1800 speech by then-Representative John Marshall in the House of Representatives.[153] Though Marshall did say that the "President is the sole organ of the nation in its external relations, and its sole representative with foreign nations," he also immediately added, "Of consequence, the demand of a foreign nation can only be made on him."[154] At the time, Marshall was defending President John Adams' implementation of a Jay Treaty provision[155] and arguing for Adams' exclusive executive responsibility in implementing that treaty.[156] As Marshall later noted in the speech, a President "is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it."[157] Marshall did not suggest exclusive presidential authority over foreign affairs broadly, but the interpretation of exclusive authority is how the sole organ doctrine has been used over the years.[158]

On the second point of weakening the "sole organ" doctrine, decades later the Supreme Court will revisit the *Curtiss-Wright* dicta in *Zivotofsky II*.[159] *Zivotofsky II* was a case about whether Congress had authority to force the State Department to allow a citizen to write "Jerusalem, Israel" as a place of birth as opposed to the State Department's policy of simply listing "Jerusalem" without recognizing it as being a part of Israel.[160] The federal government tried to persuade the Court as to the President's ability to override congressional authority in this regard by focusing on the sole organ doctrine. However, the Court chose to decide the case on a narrower issue, merely holding that the President has exclusive "recognition" power stemming from the Constitution's Art. II, § 3 Reception Clause.[161]

Even though the executive branch won the case with a ruling in the State Department's favor, the Supreme Court also took to the time to set limiting principles for the President's growing foreign affairs power. Justice Kennedy, writing for the Court, said:

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152. *See* FISHER, *supra* note 143, at 150.

153. *Curtiss-Wright*, 299 U.S. at 319 ("As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'").

154. 10 ANNALS OF CONG. 613 (1800), https://perma.cc/NF6C-7N5J.

155. Treaty on Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 129.

156. *See* FISHER, *supra* note 143, at 164.

157. *See* ANNALS OF CONG., *supra* note 154, at 615–16.

158. *See, e.g.*, FISHER, *supra* note 143, at 150.

159. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015).

160. *Id.* at 9.

161. *Id.* at 12.

> In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss-Wright Export Corp*., which described the President as 'the sole organ of the federal government in the field of international relations.' 299 U.S., at 320. This Court declines to acknowledge that unbounded power.[162]

Justice Kennedy noted that the "sole organ" language was "not necessary to the holding of *Curtiss-Wright*," thus affirming the text's status as dicta.[163] However, Kennedy also himself expounds on the important role played by Congress in the realm of international affairs:

> In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. . . It is not for the President alone to determine the whole content of the Nation's foreign policy.[164]

Furthermore, additional evidence of the unanimity of the majority's viewpoint can be observed from *Zivotofsky II*'s dissent, written by Chief Justice Roberts:

> [A]s the majority rightly acknowledges, *Curtiss-Wright* did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation. The expansive language in *Curtiss-Wright* casting the President as the 'sole organ' of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. But our precedents have never accepted such a sweeping understanding of executive power.[165]

Though lawyers over the years have relied upon the sole organ doctrine as evidence for presidential exclusivity in foreign affairs matters, the Supreme Court has signaled an openness to one day drawing limiting principles not just in dicta, but in actual precedent. For even the majority opinion and the dissent in *Zivotofsky II*, this was at least one thing they could both agree on.

C. Contextualizing Goldwater v. Carter's *Opinions on Treaty Termination Power*

The question of the separation of powers delegation between the President and the Congress on treaty termination has indeed reached the Supreme Court once

162. *Id*. at 20.
163. *Id*. at 21.
164. *Id*.
165. *Id*. at 66 (Roberts, C.J, dissenting) (citations omitted).

before, in the 1979 case *Goldwater v. Carter*.[166] After President Carter withdrew from a mutual defense treaty with Taiwan, several Members of Congress, led by Senator Goldwater, sued the administration for not seeking prior Senate approval for the treaty termination. The Supreme Court's opinion that the case should be dismissed has since been held by proponents of unilateral treaty termination as a Supreme Court ruling in support of the position that the power to terminate treaties is an exclusive presidential prerogative.[167] Or, at the very least, scholars and lower courts have held the ruling up in support of the proposition that the courts cannot weigh in on the matter of a treaty termination because the issue is an nonjusticiable political question.[168]

However, a deeper analysis into the text of the court's opinions in *Goldwater* will show that the precedent, if any exists at all, is still open for change. First, the structure of the Court's decision is not a unanimous or even a majority ruling, but a series of per curiam, concurring, and dissenting opinions. Second, more recent Supreme Court precedent has shed light on which *Goldwater* opinion advocating for dismissal should carry more weight—and modern interpretation has shown that political separation of powers issues between the executive and legislative branch on foreign affairs issues can indeed be adjudicated.

The contextual background to *Goldwater* has briefly been explained in the previous sections.[169] The *Goldwater* case arose out of Carter's termination of a U.S. -Taiwan mutual defense treaty in order for the United States to provide official recognition of the People's Republic of China as the official Chinese government. Of additional note is that the lawsuit seeking to overturn Carter's termination of the Taiwan treaty was not the only foreign policy-related lawsuit Republican lawmakers had brought against the Democratic President.[170] This background context could have contributed to the fractured opinion which was issued after consideration of *Goldwater* by the Supreme Court.

The primary questions decided by the D.C. Court of Appeals below were whether the court should decline to hear the case (1) if the Senators had no

166. 444 U.S. 996 (1979).

167. *Compare* Roy Brownell II, *Foreign Affairs and the Separation of Powers in the Twenty-First Century*, 2 J. NAT'L SEC. L. & POL'Y 367, 392–93 (2008) (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) (discussing John Yoo's argument for a unilateral presidential authority to withdraw from treaties, relying heavily on *Goldwater v. Carter* when discussing judicial precedent), *with* William Jay Powell, *Justiciability and Foreign Affairs—the Treaty Termination Power*, 46 MO. L. REV. 164 (1981) (arguing that in *Goldwater v. Carter*, the Supreme Court did not, but should have, reached the merits of the case to rule on who may terminate a treaty).

168. Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (dismissing a suit by 31 members of Congress against the Bush administration for withdrawing from the Anti-Ballistic Missile Treaty without congressional consent as a nonjusticiable political question).

169. See discussion *supra* Section II.B.4 ("Taiwan Treaty Termination and Reverberations").

170. Joshua Kastenberg, Goldwater v. Carter *At Forty: A Historic Analysis Of Judicial-Legislative Relations, The Court's Role In The Regrowth Of Executive Branch Supremacy, And Senator Barry Goldwater's Prescient Warning For Our Time* 38 QUINNIPIAC L. REV 137, 154 (2020) ("From almost the start of Carter's presidency, leading Republican legislators asserted standing to challenge the administration's foreign policy actions.").

standing and (2) due to the political nature of the question before the court.[171] The lower court ultimately decided that neither standing nor the matter of a political question were at issue in this case.[172]

The Supreme Court's response to the D.C. Court of Appeals ruling was officially issued in a two-sentence per curiam opinion: "The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint."[173] The rest of the reasoning for the dismissal of the case comes largely from two opposing concurring opinions. The concurring opinion with plurality support was authored by Justice Rehnquist and joined by three other justices. The Rehnquist opinion argued that the case should be dismissed because it posted a nonjusticiable political question.[174] A solo concurring opinion by Justice Powell argued for dismissal of the case because of lack of standing and ripeness—otherwise, the case could be indeed justiciable by the courts.[175]

As noted earlier, one reason to question the durability of the Rehnquist opinion in legal precedent is by looking at how the Supreme Court structured the filing of the opinions in *Goldwater*. There is structural evidence to suggest that the Rehnquist opinion arguing for dismissal of the case due to a political question should not be read as concretely as it has been. First, as noted, the Rehnquist opinion is not a majority opinion, but a plurality, and thus the Court is possibly not bound by the same strength of *stare decisis* as it would be if the opinion represented a majority of the Court.[176] Perhaps the courts may not be bound by a plurality opinion at all.[177] However, even if the plurality opinion and it's "fifth vote" (the Powell opinion) were to be read together as narrowly as possible, the only thing the two opinions agreed on were that this specific case regarding this treaty termination should be dismissed.

Second, the Rehnquist opinion is clearly marked, even by the Supreme Court reporter, as a "concurring" opinion. This is in contrast to other Supreme Court cases where a four-justice plurality opinion is still marked by the reporter not as a "concurring" opinion but as "announc[ing] the judgement of the Court."[178] A concurring opinion does not have the legal weight as the announcement of the judgement would have.

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171. Goldwater v. Carter, 617 F.2d 697, 699 (D.C. Cir. 1979).

172. *Id.*

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

174. *Id.* at 1002 (Rehnquist, J., concurring).

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

176. *See, e.g.*, Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799 (2017) (discussing the differing ways which plurality opinions have been viewed by lower courts and the Supreme Court in establishing precedent); KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10113, WHAT HAPPENS WHEN FIVE SUPREME COURT JUSTICES CAN'T AGREE? (2018), https://perma.cc/5L4S-ZBNM.

177. LEWIS, *supra* note 176.

178. Freeman v. United States, 546 U.S. 522, 522 (2011).

As also noted, beyond the structural considerations of the *Goldwater* opinions, a second reason to suggest that the Rehnquist *Goldwater* opinions are open for revisitation is because of superseding judicial precedent, which supports Powell's and even dissenting Justice Brennan's *Goldwater* reasoning on justiciability. Revisiting *Zivotofsky II* is particularly instructive in this regard. In *Zivotofsky II*, what seemed like a political question (where a congressional statute was imposing limits upon a President's foreign affairs authority) was heard by the Supreme Court as a justiciable issue. As noted in the above discussion, the Supreme Court holds that in *Zivotofsky II*, that the President had an exclusive presidential power with regards to recognizing ambassadors and foreign nations, and it was this exclusive power which allowed the President to disregard a congressional statute. However, the Court in *Zivotofsky II* noted, the President's foreign affairs authority was not unbounded.

If the Supreme Court were to take up the issue of treaty termination in a *Youngstown* category three situation once again, then the question in such a withdrawal case can be just as narrowly decided as the decision on recognition power in *Zivotofsky II*. For example, In a North Atlantic Treaty termination case, instead of ruling on the blanket authority by the executive or legislative branch on treaty terminations, the Supreme Court could rule that because the North Atlantic Treaty is a defense treaty which has clear implications for congressional power to regulate the military, then Congress has clear authority to impose limitations on the President's ability to terminate the treaty. The Supreme Court could also weigh what type of limits might be constitutional in lieu of a full withdrawal prohibition, just as the Supreme Court allowed limits to a certain extent regarding the protection of presidential appointees from removal.

In his *Goldwater* dissent, Justice Brennan had already suggested a similar method of determining the separation of powers authority based on the topic of the treaty termination. Brennan argued that the President's actions to terminate the Taiwan treaty were permissible, despite congressional objection, because the termination was done as part of a larger set of moves to recognize the People's Republic of China.[179] Thus, the treaty termination was stemming from the President's authority to "recognize, and withdraw recognition from, foreign governments."[180]

Supreme Court rulings on a narrow issue on the topic of treaty termination today would be following *Zivotofsky II* precedent and would today be concluded after appropriate distance of time by the Court from the fractured opinions in *Goldwater*. After all, it was the result of *Zivotofsky II* which buttressed Justice Powell's *Goldwater* opinion where he cautioned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[181] Future treaty termination cases brought to the Supreme Court can

179. *Goldwater*, 444 U.S. at 1006 (Brennan, J. dissenting).
180. *Id*. at 1007.
181. *Id*. at 999 (Powell, J., concurring) (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

and should be heard, in the absence of strong *Goldwater* precedent and modern Supreme Court rulings.

D. The Current Supreme Court

There is scholarly support for the proposition that cases such as *Zivotofsky II* and *Gundy* represent a willingness to restrain unbounded presidential power at the expense of congressional authority. For example, Professor Jean Galbraith suggested in 2014 that the Supreme Court has signaled a willingness to be sympathetic to the view that there should not be such an extreme divide between domestic and foreign affairs with its ruling in *Zivotofsky II*.[182] Galbraith considered prior Supreme Court rulings as promoting "foreign affairs exceptionalism."[183] Foreign affairs exceptionalism is a term which describes the phenomenon of historical practice-based shifts tending to favor presidential power, particularly in the realm of foreign affairs. Galbraith argues that a change may be necessary for the modern era.[184] The requirement of a change for the modern era particularly holds true given the pervasiveness of the impact foreign affairs issues can have even on domestic affairs, especially given increased globalization.

Galbraith noted that the Supreme Court has recently been resolving cases involving foreign affairs, such as *Zivotofsky II*, without relying too heavily on the justification that the context of foreign affairs matters. Resolving cases as they stand instead punting on foreign affairs issues shows that the Court may be amenable to moving away from "foreign affairs exceptionalism."[185] As noted, in previous sections (*supra* Section III.B), both the majority and the dissenting opinions in *Zivotofsky II* signaled that the presidential power in the realm of foreign affairs has limits and is not unbounded. Chief Justice Roberts was particularly empathetic that the plurality's decision to allow the President to "defy" an act of Congress in the field of foreign affairs was a "perilous step" by the Supreme Court.[186] Congress, Roberts wrote, has "extensive foreign relations powers of its own."[187]

In a potential signal by newer Supreme Court justices on the general trend to rein in presidential authority, Justice Neil Gorsuch penned a dissent in *Gundy v. United States*.[188] Gorsuch's dissent set off much analysis on whether a shifting ideological balance in the court would eventually tighten the nondelegation doctrine away from the "intelligible principle" standard adopted.[189] *Gundy* was

182. Jean Galbraith, Response: Treaty Termination as Foreign Affairs Exceptionalism, 92 TEX. L. REV. 121, 129 (2014).

183. *Id.*

184. *Id.*

185. *Id.*

186. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 67 (2015) (Roberts, C.J., dissenting).

187. *Id.* at 66.

188. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

189. *See, e.g.*, Kristen E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGUL. REV. (Jul. 8, 2019), https://perma.cc/MQ7P-5ZEM. Johnathan Hal, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, (2020);

decided with a plurality opinion authored by Justice Elena Kagan and joined by the more typically liberal members of the Court: Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor; and the fifth vote was provided in a concurring opinion by Samuel Alito, who concurred in judgement only.[190]

The judgement upheld the nondelegation doctrine, but the dissent, joined by Chief Justice John Roberts and Justices Clarence Thomas (Justice Kavanaugh had not yet joined the court for the case), argued for a stricter version of the nondelegation doctrine to ensure that Congress has not "unconstitutionally divested itself of its legislative responsibilities."[191] The nondelegation doctrine is indicative of a Court acting in favor of a strong legislature generally, because just as the nondelegation doctrine weighs congressional responsibility against executive branch actions, treaty terminations are also a matter of the executive branch acting where their actions may need to be checked by Congress as well. In the *Gundy* dissent's protection of congressional prerogatives, it is possible to imagine that a new Supreme Court make-up will also consider protecting congressional authority in the realm of foreign affairs.[192]

IV. POLICY IMPLICATIONS

In considering the constitutional structure of which institution either has the authority to act or is disabled from acting in certain matters, it is important to consider the practical consequences of any particular result. Disabling Congress from being able to conduct any legal oversight regarding treaty terminations will impact the strength of the nation in the field of international relations and foreign affairs.

First, domestically there has been a decline in the number of international agreements submitted as an Article II treaty over the course of the nation's history. Instead, more international agreements are concluded and processed domestically as executive agreements. The executive branch spends much work and political capital to seek Senate advice and consent for Article II treaties because such agreements require a two-thirds chamber approval before the President may ratify the treaty. The high threshold required by the Senate for approval means that the approval is likely to be bipartisan. Getting this approval can be difficult

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William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. REV. 211 (2019).

190. *See* Mila Sohoni, *Opinion Analysis; Court Refuses to Resurrect Nondelegation Doctrine*, SCOTUSBLOG (Jun. 20, 2019, 10:32 PM), https://perma.cc/J2BB-VGZ5.

191. *Id.* (citing Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting)); *see also* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

192. *See* Elad D. Gil, *Totemic Functionalism in Foreign Affairs Law*, 10 HARV. NAT'L SEC. J. 316, 317 (2019) (arguing that the judicial deference to rely on the executive's special competence in foreign affairs insulates the President from accountability). *See also* Nino Guruli, *Pro-Constitutional Engagement: Judicial Review, Legislative Avoidance and Institutional Interdependence in National Security*, 12 HARV. NAT'L SEC. J. 1, 10-11 (2021) (arguing that better judicial engagement on constitutional separation of powers disputes in national security issues would prompt more engaged legislative action).

for the executive branch, which may begin to look towards easier alternatives to concluding an international agreement.

For example, congressional executive agreements, such as free trade agreements, also rely on a form of congressional authorization, but only require a more easily obtained simple majority vote for agreement approval.[193] Some scholars have even advocated for an increased use of executive agreements and to fully phase out Article II treaties.[194] The incentive of presidents to seek Senate advice and consent to conclude international agreements is steadily declining, and may continue to do so unless the United States improves the durability of Article II treaties. Accepting congressional restraints on treaty termination would help to improve the durability of Article II treaties beyond the tenure of the President who concluded the agreement. A more durable agreement then could encourage a President to go through the Article II treaty process despite the increased political cost and effort in seeking Senate advise and consent.

Second, the rapid termination of treaties may have put the U.S. commitment into doubt. This doubt may also have been heightened because of an increased reliance on non-Article II treaties, which international partners may see as inherently more easily derogated. Allies have become worried about whether the United States could either uphold its security commitments or maintain stability and reliability between presidential administrations.[195] Competitors who saw the collapse of the Iran nuclear deal and foundational U.S.-Russian arms control treaties were also given reason for pause. Hypothetically, why would North Korea be incentivized to conclude an agreement with the United States, whether an Article II treaty or a nonbinding political agreement, if the agreement could be nullified by the next President, or be at risk every four to eight years? Even if the Iran nuclear deal (a political agreement) had been ratified as a treaty by President Obama after passing Senate advice and consent, there seems to have been nothing Congress or others could have done to stop President Trump from withdrawing. Showing our international partners that treaty termination for U.S. domestic law purposes is a rigorously debated and serious process just as with treaty ratification, could help to set negotiating partners' minds at ease regarding agreement stability and longevity.[196]

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193. Mark Strand & Dan Risko, *Trade or Treaty? Why Does the House Approve Free Trade Agreements?*, CONG. INST. (Dec. 12, 2011), https://perma.cc/SUH4-3NYG.

194. *See, e.g.*, Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1236 (2008); *see also* John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 4 (2011).

195. Steven Erlanger, *Europe Wonders if It Can Rely on U.S. Again, Whoever Wins*, N.Y. TIMES (Oct. 22, 2020), https://perma.cc/8RU5-LYGA.

196. *See* Kristen Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 248 (2013) (arguing that "a 'for-cause' termination reservation would increase the reliability of Article II treaties and so would shift the comparative utility of congressional-executive agreements and Article II treaties").

CONCLUSION

In conclusion, if the Supreme Court were to take up the issue of Congress's constitutional authority to impose limits on treaty termination, there is affirmative evidence of this authority through constitutional text and historical practice. In the text of the Constitution, Congress can look to its authority to put limits on a treaty termination through a variety of provisions, including the Supremacy Clause equating treaties to the law, the Appointments Clause's precedent of allowing Congress to impose some limits to protect officer removal by the President, and Congress's enumerated foreign affairs powers, such as the power to declare war. A historical review of past practice shows that Congress was authorizing and cooperating with the executive branch on treaty terminations for over 100 years before the beginning and rise of unilateral treaty terminations. Though modern executive preference has been for unilateral treaty termination in the face of congressional silence, this point has not been adequately ruled on by the Supreme Court, nor were previous congressional actions authorizing termination ever denounced as unconstitutional. Congressional acquiescence to unilateral termination over the years does not have to mean congressional abdication of authority.

The U.S. Supreme Court weighing in on a conflict between branches with regards to treaty termination would not only support a proper system of checks and balances, but it would also bolster congressional authority. The need to support a proper checks and balances system is especially important given that the President has and likely will continue to rely on the functional advantages of the executive branch to potentially ignore congressional input outside of any explicit constitutional requirement, such as seeking Senate advice and consent to treaty ratification. The Supreme Court should continue circumscribing presidential power where it functionally makes sense by supporting Congress when such issues are inevitably brought up in court. Not only does Congress have constitutional authority that needs protecting, but our nation is better off when there is a properly working system against the negative side effects of presidential overreach.[197]

Finally, Congress is no innocent bystander as to how the President has currently ended up with such strong treaty termination authority. Congress is also to blame due to its own inaction as to how the intra-branch relationship moved from that of a cooperative treaty termination relationship with the executive branch at

197. For example, could the logical conclusion of the president's exclusive foreign policy powers extend to claiming that any later-in-time legislation conflicting with U.S. treaty obligations mean that the legislation is immediately unconstitutional? *See Art.II.S2.C2.1.10 Breach and Termination of Treaties,* CONST. ANNOTATED, https://perma.cc/AJ7Y-3UDL (noting that "[t]he Court also has stated that Congress possesses the power to breach and abrogate a treaty by passing later-in-time legislation that conflicts with U.S. treaty obligations.").

the outset of the nation's founding to today's presidential assertion of exclusive power. Congress should play a greater and more active role with regards to treaty termination in all cases, whether it is to approve or disapprove terminations as it used to do in the country's earliest history, or requiring and enforcing executive branch consultation prior to treaty termination. Reinstituting a congressional process for treaty termination will re-establish a custom and expectation of congressional input and may support a more durable interpretation of congressional authority for today's and future instances of treaty termination practice.