

## Articles

### Treaty Termination and Historical Gloss

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*The termination of U.S. treaties provides an especially rich example of how governmental practices can provide a “gloss” on the Constitution’s separation of powers. The authority to terminate treaties is not addressed specifically in the constitutional text and instead has been worked out over time through political-branch practice. This practice, moreover, has developed largely without judicial review. Despite these features, Congress and the President—and the lawyers who advise them—have generally treated this issue as a matter of constitutional law rather than merely political happenstance. Importantly, the example of treaty termination illustrates not only how historical practice can inform constitutional understandings but also how these understandings can change. Whereas it was generally understood throughout the nineteenth century that the termination of treaties required congressional involvement, the consensus on this issue disappeared in the early parts of the twentieth century, and today it is widely (although not uniformly) accepted that presidents have a unilateral power of treaty termination. This shift in constitutional understandings did not occur overnight or in response to one particular episode but rather was the product of a long accretion of Executive Branch claims and practice in the face of congressional inaction. An examination of the way in which historical practice has shaped the constitutional debates and understandings concerning this issue can help shed light on some of the interpretive and normative challenges associated with a practice-based approach to the separation of powers.*

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## Introduction

Historical practice is frequently invoked in debates and decisions concerning the Constitution's distribution of authority between Congress and the President. On issues ranging from the President's authority to make recess appointments, to the role of Congress in authorizing military operations, to the validity of "executive agreements" with foreign nations, the way in which the government has operated over time is invoked as evidence of constitutional meaning.<sup>1</sup> Such governmental practice is sometimes referred to as "historical gloss," after Justice Frankfurter's contention in the *Youngstown*<sup>2</sup> steel-seizure case that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."<sup>3</sup>

This Article presents a detailed case study of historical gloss, focused on presidential authority to terminate treaties. Treaty termination is an especially rich example of how governmental practices can inform and even define the Constitution's separation of powers. The authority to terminate treaties is not addressed specifically in the constitutional text and instead has been worked out over time through political-branch practice. This practice, moreover, has developed largely without judicial review. Despite these features, Congress and the President—and the lawyers who advise them—have generally treated this issue as a matter of constitutional law,

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1. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (considering the role of historical practice in debates and decisions relating to the separation of powers); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984) (same).

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

3. *Id.* at 610–11 (Frankfurter, J., concurring).

not merely political happenstance. Legal scholars, too, have long discussed and debated the issue in legal terms. At the same time, there has been a recognition that the constitutional law in this area is not entirely distinct from politics, and that it both is informed by and shapes political contestation.

The example of treaty termination illustrates not only how a constitutional gloss on governmental authority can develop but also how it can change. As will be seen, the center of gravity of the debate over treaty termination has shifted substantially over time, from whether the full Congress or merely the Senate needs to *approve* a termination to whether Congress or the Senate can even *limit* the President's unilateral authority to terminate. One can identify a pattern of change, the contours of which may apply to other issues of constitutional law relating to presidential authority: First there is a consensus, both among the governmental actors and in the scholarly community. Then deviations take place with a potentially limited scope. The Executive Branch proceeds to articulate broader theories of the deviations. Congress's resistance is intermittent, depending on whether it objects to the deviations on policy grounds. Practice then builds up around low-stakes examples. Eventually a more controversial example arises and the President pushes forward successfully, thereby consolidating the changed understanding.

In developing the case study, this Article makes three contributions. First, it presents the most complete and accurate account to date of the historical practice of U.S. treaty terminations. In addition to reviewing various publicly available materials, such as congressional hearings and presidential proclamations, this Article considers a number of internal legal memoranda obtained from the State Department archives. Second, this Article recovers a nineteenth-century understanding of treaty-termination authority that has largely been lost from modern considerations of the issue, pursuant to which the termination of treaties, like the making of treaties, was generally understood by both Congress and the President as a shared power. Most modern accounts acknowledge vaguely that treaty terminations have been accomplished in a variety of ways throughout U.S. history but fail to appreciate the sharp contrast between the modern presidential unilateralism and the nineteenth-century practices and understandings. In endorsing a unilateral presidential power to terminate treaties, for example, the American Law Institute's *Restatement (Third) of the Foreign Relations Law* notes in passing that "[p]ractice has varied" without acknowledging that presidential unilateralism is almost entirely a twentieth-century development.<sup>4</sup> Third, this Article uses this historical

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4. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 reporters' note 2 (1987) ("Practice has varied, the President sometimes terminating an

record as a window into the nature of a practice-based approach to constitutional interpretation and some of its limitations and challenges.

Part I of this Article provides the legal and theoretical background needed to understand and assess the historical practice of U.S. treaty terminations. It describes both the allowable grounds under international law for terminating a treaty, as well as the textual and structural arguments relating to the Constitution's assignment of treaty termination authority. It also considers some of the reasons why historical practice has played a significant role in constitutional debates surrounding this issue. Parts II and III review the practice of treaty termination throughout U.S. history. Part II shows that, at least until the late nineteenth century, it was generally understood that presidents needed the agreement of Congress or the Senate in order to terminate a treaty. Part III recounts how this understanding changed in the twentieth century, a process that occurred over the course of decades as a result of repeated claims and actions by the Executive Branch in the face of congressional inaction. Part IV assesses the implications of the case study, both with respect to the specific question of treaty-termination authority as well as the more general issue of the proper role of historical practice in the separation of powers area. It concludes by reflecting on the relationship between law and politics for practice-based norms of institutional authority.

## I. Legal and Theoretical Background

This Part provides the legal and theoretical background needed to understand and assess the historical practice of U.S. treaty terminations. It begins by explaining the circumstances under which international law allows a nation to terminate a treaty. It then considers the textual and structural considerations that are relevant to determining which actors in the United States have the constitutional authority to terminate treaties. Finally, it describes why historical practice plays an especially important role in constitutional debates concerning this issue.

### A. *International-Law Standards*

Treaties are binding on nations as a matter of international law. Ultimately, therefore, whether a nation's treaty commitments are terminated is determined by international law, not U.S. law.<sup>5</sup> As a result, before considering the U.S. constitutional issues, it is important to understand first what international law provides about treaty termination. The modern rules

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agreement on his own authority, sometimes doing so when requested by Congress or by the Senate alone.”).

5. See generally Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634 (Duncan B. Hollis ed., 2012) (describing the international-law standards governing treaty termination).

on this subject are set forth in the Vienna Convention on the Law of Treaties,<sup>6</sup> which took effect in 1980 and has now been ratified by over 110 nations.<sup>7</sup> Although the United States is not a party to the Convention, Executive Branch officials have stated at various times that they regard the Convention as largely reflective of binding rules of international custom,<sup>8</sup> and U.S. courts also regularly refer to the Convention.<sup>9</sup> In addition, the International Court of Justice has specifically observed that “in many respects” the Vienna Convention’s provisions on the suspension or termination of treaty provisions reflect binding custom.<sup>10</sup>

Under the Convention, there are a variety of circumstances that can render a party’s consent to a treaty invalid. Some of these circumstances merely make the treaty voidable at the party’s discretion. For example, “[i]f a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.”<sup>11</sup> Other circumstances automatically void the treaty. For example, “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”<sup>12</sup> When a treaty is deemed void, it will be considered never to have created obligations.<sup>13</sup>

Whereas some circumstances will allow a party to void even its past treaty obligations, other circumstances will allow it to terminate or suspend its treaty obligations going forward. For example, a party may suspend or terminate its obligations under a bilateral treaty if the other treaty party has materially breached the treaty.<sup>14</sup> In addition, “[a] party may invoke the impossibility of performing a treaty as a ground for terminating or

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6. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

7. Chapter XXIII of Multilateral Treaties Deposited with the Secretary-General, UNITED NATIONS TREATY COLLECTION (last updated Feb. 3, 2014), [https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en).

8. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 3, intro. note (1987) (documenting Executive Branch statements); see also Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 286 (1988) (“[A]ccording to a widespread *opinio juris*, legal conviction of the international community, the Vienna Convention represents a treaty which to a large degree is a restatement of customary rules . . .”).

9. See, e.g., *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008) (“Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies on it ‘as an authoritative guide to the customary international law of treaties,’ insofar as it reflects actual state practices.”).

10. *Gabčíkovo–Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, para. 46 (Sept. 25).

11. VCLT, *supra* note 6, art. 49.

12. *Id.* art. 52.

13. See *id.* art. 69, para. 1 (“The provisions of a void treaty have no legal force.”).

14. *Id.* art. 60, para. 1.

withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.”<sup>15</sup> Furthermore, under narrow circumstances, a party may invoke a fundamental change of circumstances as a basis for suspending or terminating a treaty.<sup>16</sup> Treaty obligations can also be suspended or terminated if the parties expressly agree to such suspension or termination or act to conclude a new superseding treaty, or if the treaty expressly provides for suspension or termination after a certain period of time or in response to certain events.<sup>17</sup>

Finally, nations may also withdraw from (or “denounce”) a treaty that expressly provides for a right of withdrawal.<sup>18</sup> Such withdrawal clauses are common in modern treaties and often include a required notice period before the termination will take effect.<sup>19</sup> In some instances, a right of withdrawal will be implied. The Vienna Convention states that:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.<sup>20</sup>

When there is an implied right of withdrawal, the Vienna Convention states that the party seeking to withdraw from the treaty shall give at least twelve months’ notice.<sup>21</sup> A nation that withdraws from a treaty is bound by any obligations that arose before the effective date of the withdrawal.<sup>22</sup>

The rules of treaty termination that existed at the time of the constitutional founding were less developed and incorporated distinctions that are no longer relevant, such as a distinction between treaties that obligated only the particular monarchs making them and treaties that obligated their nations in perpetuity.<sup>23</sup> Nevertheless, these rules encompassed certain grounds for terminating a treaty that we would recognize today, such as a material breach by the other party.<sup>24</sup> It is worth

15. *Id.* art. 61, para. 1.

16. *Id.* art. 62, para. 1.

17. *Id.* arts. 54, 57, 59.

18. The terms “denunciation” and “withdrawal” are often used interchangeably to refer to a voluntary act of treaty termination. Helfer, *supra* note 5, at 635.

19. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1581–82, 1597–98 (2005).

20. VCLT, *supra* note 6, art. 56, para. 1.

21. *Id.* art. 56, para. 2.

22. *Id.* art. 70, para. 1(b).

23. See, e.g., 1 E. DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* bk. 2, §§ 187–197 (Charles G. Fenwick trans., 1916) (1758).

24. See, e.g., JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 524 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund, Inc. 2006) (1763); 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 405 (Francis W. Kelsey trans., Clarendon Press

noting, however, that although clauses in treaties allowing for unilateral withdrawal are now common, they were not common at the time of the founding. Indeed, it appears that the United States did not become a party to a treaty containing a unilateral withdrawal clause until 1822.<sup>25</sup>

What international law did not address then, and still does not address, is how treaty termination decisions are to be made internally by each nation. For the United States, that internal issue is a matter of U.S. constitutional law.

### B. *Textual and Structural Considerations*

Article II of the Constitution sets forth the process by which the United States is to conclude treaties. It provides 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.”<sup>26</sup> The vast majority of international agreements concluded by the United States in the modern era do not go through this process and are instead concluded as “congressional–executive agreements” (approved before or after the fact by a majority of Congress) or “sole executive agreements” (approved solely by the President).<sup>27</sup> Nevertheless, some of the United States’ most significant agreements are still concluded as Article II treaties. To take just a few examples, the United Nations Charter, the Geneva Conventions, and the International Covenant on Civil and Political Rights were all concluded

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1925) (1646); 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 1339–40 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688); Vattel, *supra* note 23, § 202; *see also* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J.) (“It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void.”)

25. The treaty concerned the imposition of customs duties, and it provided that it was to remain in force for two years “and even after the expiration of that term, until the conclusion of a definitive treaty, or until one of the parties shall have declared its intention to renounce it; which declaration shall be made at least six months before hand.” *Convention of Navigation and Commerce*, U.S.–Fr., art. 7, June 24, 1822, 8 Stat. 278; *see also* Memorandum from William Whittington, Termination of Treaties: International Rules and Internal United States Procedure 3 (Feb. 10, 1958) [hereinafter Whittington Memorandum] (on file with author) (noting that the 1822 treaty was the first treaty concluded by the United States containing a unilateral withdrawal clause). The withdrawal clause was included at the request of France, which explained that, “As their object is to make an experiment, it should be so established as not to press too heavily upon whichever of the two parties may, on experience, be found to have erred in the calculation.” Letter from G. Hyde de Neuville, Envoy Extraordinary, to John Quincy Adams, Sec’y of State (May 15, 1822), in 5 *AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES* 210, 211 (Asbury Dickins & James C. Allen eds., Wash., Gales & Seaton 1858).

26. U.S. CONST. art. II, § 2.

27. *See* CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 74–75 (2013); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1287–88 (2008). The constitutional issues implicated by the termination of executive agreements are potentially distinct from those implicated by the termination of Article II treaties, and they are not considered here.

through the senatorial advice and consent process. To the extent that the United States ever becomes a party to treaties such as the Law of the Sea Convention, the Rome Statute of the International Criminal Court, or the Convention on the Elimination of All Forms of Discrimination Against Women, it is expected that it will do so pursuant to the Article II process.<sup>28</sup> The Constitution does not specifically address, however, the way in which the United States is to go about terminating treaty commitments.

Some proponents of unilateral presidential authority to terminate treaties rely on what has been referred to as the “Vesting Clause Thesis.” According to this thesis, the first sentence of Article II of the Constitution, which provides that “[t]he executive Power shall be vested in a President of the United States of America,”<sup>29</sup> conveys to the President all authority that is “executive” in nature, regardless of whether that authority is specifically mentioned in the remainder of Article II, unless the Constitution specifically conveys that authority to another institutional actor.<sup>30</sup> This thesis supports a unilateral presidential authority to terminate treaties, it is argued, because the termination of treaties is executive in nature and is not specifically assigned to an actor other than the President.<sup>31</sup> The Vesting Clause Thesis, however, is highly controversial.<sup>32</sup> Moreover, supporters of this thesis vary in what authority they contend is conveyed by the clause.<sup>33</sup>

A variety of structural considerations are also potentially relevant to determining who has the treaty termination power in the United States, but these considerations do not point in a single direction. On the one hand, the

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28. To the extent that presidents have proposed moving ahead with ratification of these treaties, they have always suggested that the process would be the one set forth in Article II. For the treaty establishing the International Criminal Court, Congress has specifically mandated that it can be ratified by the United States only through the Article II process. 22 U.S.C. § 7401(a) (2012).

29. U.S. CONST. art. II, § 1.

30. For arguments in support of the thesis, see, for example, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001), and John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677–78 (2002). See also MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 158 (2007) (applying this thesis to the issue of treaty termination).

31. See RAMSEY, *supra* note 30.

32. For criticism of the thesis, see, for example, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004), and Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 263–64 (2009). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640–41 (1952) (Jackson, J., concurring) (“If [the Vesting Clause Thesis] be true, it is difficult to see why the forefathers bothered to add several specific items [in Article II], including some trifling ones.”).

33. For example, unlike Professors Prakash, Ramsey, and Yoo, Steven Calabresi and Kevin Rhodes contend simply that “the Clause grants the President the power to supervise and control all subordinate executive officials exercising executive power conferred explicitly by either the Constitution or a valid statute,” and they do not make “the more ambitious (and far more doubtful) claim” that it conveys substantive authority. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1177 n.119 (1992).

making of treaties might be viewed as analogous to the appointment of Executive Branch officers. Even though such appointment requires, as for treaties, senatorial advice and consent (albeit a majority of the Senate rather than two-thirds), it is well settled that presidents have some unilateral authority to remove executive officers.<sup>34</sup> On the other hand, the making of treaties could be viewed as analogous to the making of federal statutes, since both are part of the supreme law of the land. It is well settled that the same process that applies to the making of federal statutes (approval by a majority of both houses of Congress and presidential signature, or a supermajority congressional override of a presidential veto) also must be followed for the termination of federal statutes.<sup>35</sup>

Another structural consideration concerns Congress's well-accepted authority to override the domestic effect of a treaty by enacting a later-in-time inconsistent statute.<sup>36</sup> If that is all that Congress does, the international-law status of the treaty will continue, and the United States may end up in breach of its international obligations.<sup>37</sup> The fact that Congress has the authority to terminate the domestic effect of a treaty might suggest that it also can have a role in terminating the treaty's international-law effect, but the second power does not necessarily follow from the first. Conversely, even if the President has the unilateral authority to terminate a treaty internationally, it would not necessarily mean that he could (like Congress) terminate its domestic effect without having validly terminated its international-law effect. In fact, if treaties are part of the "Laws" that the President is obligated under Article II of the Constitution to take care to

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34. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary.").

35. *See, e.g.*, *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."); *INS v. Chadha*, 462 U.S. 919, 954 (1983) ("[R]epeal of statutes, no less than enactment, must conform with Art. I.").

36. *See, e.g.*, *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 193–95 (1888); *see also* *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) ("It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate.").

37. *See, e.g.*, *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) (noting that although a federal statute that conflicted with a treaty provision "would control in our courts as the later expression of our municipal law, . . . the international obligation [would] remain[] unaffected"). Courts will attempt to construe statutes, however, to avoid a treaty violation if possible. *See, e.g.*, *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); *see also* BRADLEY, *supra* note 27, at 54–55 (explaining reasons for this canon of construction).

faithfully execute (as a number of scholars have concluded),<sup>38</sup> it may be constitutionally impermissible for the President to override the domestic effect of a treaty that is otherwise still in force.

Still another structural consideration is the role of the Executive Branch in communicating with foreign nations. The President has often been described as the “sole organ” of formal communications between the United States and the rest of the world, a role that is arguably implied from both the unitary nature of the Executive Branch as well as the President’s constitutional authority to make treaties and appoint and receive ambassadors.<sup>39</sup> To be sure, the phrase “sole organ” is an overstatement, given that Congress often takes positions on matters of foreign policy and that members of Congress regularly interact with foreign officials.<sup>40</sup> But it has always been the case that formal diplomatic functions are handled by the Executive Branch.<sup>41</sup> Because a termination of a treaty needs to be communicated to the other treaty parties, the “sole organ” role of the President may mean that neither Congress nor the Senate can effectuate by themselves a treaty termination. This would not necessarily establish, of course, that the President has unilateral authority to terminate a treaty. After all, it is understood that no treaty can be ratified except through presidential action,<sup>42</sup> and yet the President is required to obtain the advice and consent of two-thirds of the Senate before engaging in such ratification. The President’s “sole organ” authority might mean, however, that Congress cannot validly require the President to terminate a treaty.

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38. *E.g.*, Derek Jinks & David Sloss, *Is the President Bound By the Geneva Conventions?*, 90 CORNELL L. REV. 97, 157–58 (2004); Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1231–32 (2005); *see also* U.S. CONST. art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”). It is not clear whether treaties must be “self-executing” in order to qualify as “Laws” for this purpose.

39. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (referring to “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”); *see also* 10 ANNALS OF CONG. 613 (1800) (describing a statement by John Marshall, made when serving as a Representative in Congress, that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”); Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38 (Harold C. Syrett et al. eds., 1969) (describing the Executive Branch as “the *organ* of intercourse between the Nation and foreign Nations”); Letter from Thomas Jefferson to Edmond Charles Genet (Nov. 22, 1793), *in* 27 THE PAPERS OF THOMAS JEFFERSON 414, 414 (John Catanzariti et al. eds., 1997) (stating that the President is the “only channel of communication” between the United States and foreign nations).

40. *See, e.g.*, Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331 (2013) (describing various forms of interactions between legislators and foreign nations and officials).

41. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 41–45 (2d ed. 1996) (describing the longstanding view of the Executive Branch as having exclusive power to conduct diplomacy).

42. *See* CONG. RESEARCH SERV., 106TH CONG., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 152 (Comm. Print 2001) [hereinafter CRS STUDY] (stating that a failure to ratify a treaty on the part of the President means that the treaty “cannot enter into force for the United States”).

Finally, it is conceivable that the President might have some constitutional authority to *suspend* treaty obligations even if he or she did not have constitutional authority to *terminate* the obligations. As noted, the President has the obligation and authority to “take Care that the Laws be faithfully executed.”<sup>43</sup> As part of his Take Care Clause responsibilities, the President necessarily makes judgments (at least within certain limits) about the levels of enforcement of federal law.<sup>44</sup> It is arguable that this authority encompasses the ability to direct a temporary suspension of U.S. compliance with a treaty while a dispute concerning the treaty is addressed.

### C. *Importance of Historical Practice*

The historical practice of U.S. treaty termination is described in detail in Parts II and III. As will be seen, when there has been debate over how treaties can constitutionally be terminated, such as in Congress or the courts, the debate has often focused on historical practice.<sup>45</sup> Moreover, Executive Branch lawyers have focused heavily on historical practice in advising presidents and secretaries of state about their constitutional authority concerning treaty termination.<sup>46</sup> Scholars, too, have long accorded historical practice a prominent place in the legal analysis of this issue.<sup>47</sup>

Consider two modern controversies. In the 1970s, there was extensive debate over the issue of treaty termination in the wake of President Carter’s announcement that he was terminating a mutual defense treaty with Taiwan in conjunction with his decision to recognize the People’s Republic of China.<sup>48</sup> The congressional hearings, scholarly commentary, and judicial decisions relating to that controversy were all heavily focused on historical practice.<sup>49</sup> So was the Executive Branch’s reasoning: In a memorandum to

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43. U.S. CONST. art. II, § 3.

44. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies [under the immigration laws] are consistent with this Nation’s foreign policy with respect to these and other realities.”); *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (“An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”). There are presumably limits on this enforcement discretion. *See, e.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. (forthcoming 2014) (considering the scope of the Executive Branch’s enforcement discretion).

45. *See infra* Parts II–III.

46. *See, e.g.*, *infra* subpart III(C) (describing how the State Department Legal Adviser relied heavily on historical practice when advising the President that he had authority to terminate a treaty with Taiwan).

47. *See infra* subparts II(E), III(E).

48. *See infra* subpart III(C).

49. *See infra* subpart III(C).

the Secretary of State advising him that the President had the constitutional authority to terminate the Taiwan treaty, for example, the Legal Adviser to the State Department cited twelve purported instances in which presidents had terminated treaties unilaterally and attached an appendix describing the “History of Treaty Termination by the United States.”<sup>50</sup>

More recently, there was controversy in 2002 over President George W. Bush’s announcement that he was unilaterally withdrawing the United States from the Anti-Ballistic Missile (ABM) Treaty with Russia.<sup>51</sup> Again, the Executive Branch relied extensively on historical practice. In concluding that President Bush had the unilateral authority to suspend or terminate the ABM Treaty, the Justice Department’s Office of Legal Counsel argued that “[t]he executive branch has long held the view that the President has the constitutional authority to terminate treaties unilaterally, and the legislative branch seems for the most part to have acquiesced in it.”<sup>52</sup>

There are a number of reasons why historical practice has played such a prominent role in discussions of this issue. As a general matter, arguments based on historical practice are a common feature of debates and decisions relating to the constitutional separation of powers.<sup>53</sup> This is especially true in debates and decisions relating to the scope of presidential power. Unlike the extensive list of powers granted to Congress, the text of the Constitution says relatively little about the scope of presidential authority.<sup>54</sup> Responding in part to this limited textual guidance, Justice Frankfurter emphasized the importance of historical practice to the interpretation of presidential power in his concurrence in the *Youngstown* steel seizure case. In his view, “[i]t 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.”<sup>55</sup>

50. See *infra* notes 223–24 and accompanying text.

51. See *infra* notes 252–58 and accompanying text.

52. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat’l Sec. Council, Authority of the President to Suspend Certain Provisions of the ABM Treaty 15–16 (Nov. 15, 2001) [hereinafter Yoo & Delahunty Memorandum], available at <http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf>.

53. Bradley & Morrison, *supra* note 1, at 417–24. Practice-based arguments are also common in other areas of constitutional law, such as federalism. Invocations of practice in those areas raise issues that are potentially distinct from the issues considered here. See *id.* at 416–17.

54. *Id.* at 417–18.

55. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); see also, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (noting that “‘traditional ways of conducting government . . . give meaning’ to the Constitution” (omission in original) (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring))); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the

When constitutional controversies implicate foreign relations, invocations of historical practice are particularly common, in part because of the lower level of judicial review in that area.<sup>56</sup> For example, a frequent argument in support of the constitutionality of “executive agreements” (that is, binding international agreements concluded by the President without obtaining the advice and consent of two-thirds of the Senate) is the fact that presidents have long concluded such agreements.<sup>57</sup> Similarly, debates over the scope of the President’s authority to initiate the use of military force in the absence of congressional authorization have been heavily informed by past uses of force.<sup>58</sup> Yet another example is the scope of the President’s authority to determine which foreign governments are recognized by the United States.<sup>59</sup>

Nevertheless, appeals to historical practice are not confined to matters relating to foreign affairs. For example, the Supreme Court has emphasized longstanding presidential practice when considering when the President’s “pocket veto” (that is, failure to sign a bill before Congress recesses) should be deemed to operate.<sup>60</sup> Similarly, in concluding that the President’s pardon power extended to a contempt of court conviction, the Court reasoned that “long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on.”<sup>61</sup> Moreover, as Trevor Morrison and I have noted elsewhere, “arguments about the scope of both the ‘executive privilege’ (concerning the ability to withhold internal executive branch communications from the other branches of government) and the

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[action] had been [taken] in pursuance of its consent . . . .” (alterations in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)); WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 135 (1916) (“Executive power is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution.”).

56. Bradley & Morrison, *supra* note 1, at 420, 456.

57. *See, e.g.*, *Whether Uru. Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994) (“[P]ractice under the Constitution has established that the United States can assume major international trade obligations such as those found in the Uruguay Round Agreements when they are negotiated by the President and approved and implemented by Act of Congress . . . .”); *see also* Bradley & Morrison, *supra* note 1, at 468–76 (describing the role of historical practice in debates over the validity of congressional–executive agreements).

58. *See* Bradley & Morrison, *supra* note 1, at 461–68 (describing the role of historical practice in the war powers area). *Compare, e.g.*, *Authority to Use Military Force in Libya*, 35 Op. O.L.C. (Apr. 1, 2011), <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (relying on historical practice in support of the argument that President Obama had the unilateral authority to initiate the use of military force in Libya), with Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion*, HARV. NAT’L SECURITY J.F. 1, 3–4 (2011) (arguing that historical practice did not support the exercise of this authority).

59. For a recent example, see *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 207 (D.C. Cir. 2013) (“We conclude that longstanding post-ratification practice supports the Secretary’s position that the President exclusively holds the recognition power.”).

60. *See* *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”).

61. *Ex parte Grossman*, 267 U.S. 87, 118–19 (1925).

'legislative privilege' (concerning, among other things, the internal powers of the two houses of Congress) are commonly informed by historical practice."<sup>62</sup>

On these and other separation of powers issues, lawyers and judges trained in the common law naturally look for precedent in evaluating legal claims, and when judicial precedent is lacking, it is not surprising that they turn to other forms of precedent.<sup>63</sup> Executive Branch agencies such as the Office of Legal Counsel also give weight to historical practice for reasons somewhat akin to the reasons that courts give weight to their own prior decisions under the doctrine of *stare decisis*, such as decisional efficiency and the protection of reliance interests.<sup>64</sup> Historical practice is particularly likely to be invoked for separation of powers issues not specifically addressed by the constitutional text,<sup>65</sup> as is the case for treaty termination. Among other things, when the implications of text are perceived to be unclear, appeals to past practice allow for a type of principled reasoning that might not otherwise be possible.<sup>66</sup>

To say that reliance on historical practice is unsurprising in this context is not to say that it is normatively attractive, and some of the tradeoffs associated with this sort of constitutional reasoning are explored in Part IV. One particular difficulty with a practice-based approach to the separation of powers is worth noting here: Most accounts of how historical practice can inform constitutional interpretation in this context require that the branch of government that is affected by a practice "acquiesce" in it before it is credited.<sup>67</sup> As Trevor Morrison and I have explained, however,

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62. Bradley & Morrison, *supra* note 1, at 421; see also JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW 3–19 (2007); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1384–405 (1974).

63. For a general consideration of the role of nonjudicial precedent in constitutional law, see Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

64. See, e.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

65. See Bradley & Morrison, *supra* note 1, at 455–56.

66. See *id.*

67. See, e.g., Glennon, *supra* note 1, at 134 ("[T]he branch placed on notice must have acquiesced in the custom."); Harold Hongju Koh, *Focus: Foreign Affairs Under the United States Constitution*, 13 YALE J. INT'L L. 1, 3 n.7 (1988) ("Under the heading of 'quasi-constitutional custom,' I would of course include executive practice of which Congress has approved or in which it has acquiesced."); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1356 (1993) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)) ("[T]he other branch must have accepted or acquiesced in the action."); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 880 (1996) (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)) ("Congress . . . must not only be on notice of an executive practice and accompanying claim of authority to act; it also must accept or acquiesce in that practice and claim of authority."); see also *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

acquiescence is a problematic concept, especially as applied to Congress.<sup>68</sup> Among other things, accounts of congressional acquiescence often assume a “Madisonian” model of interbranch rivalry that probably does not describe modern congressional–executive relations.<sup>69</sup> A number of factors contribute to the descriptive inaccuracy of this model, including the modern party system, which reduces the incentives of individual members of Congress to act systematically in constraining executive power or resisting executive aggrandizement.<sup>70</sup> If nothing else, the limitations with the acquiescence concept suggest that there should be a high bar for claims of congressional acquiescence and that greater attention should be paid to potential indications of congressional nonacquiescence that fall short of the enactment of contrary legislation, such as various forms of congressional “soft law.”<sup>71</sup>

In theory, the courts could determine whether and to what extent the historical practice relating to treaty termination should be credited. A variety of justiciability limitations, however, make this unlikely. The Supreme Court declined to resolve the dispute over the termination of the Taiwan Treaty because of these limitations, with four Justices concluding that the case presented a political question and Justice Powell concluding that the case was not ripe for judicial review.<sup>72</sup> Since that decision, the Supreme Court has sharply limited the standing of members of Congress to challenge presidential action.<sup>73</sup> In 2002, a federal district court dismissed a suit brought by thirty-two members of Congress challenging President Bush’s termination of the ABM treaty, based on both a lack of standing and the political question doctrine.<sup>74</sup> For these reasons, it can be expected that

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68. See Bradley & Morrison, *supra* note 1, at 432–47.

69. See *id.* at 438–47; see also Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 671 (2011) (“[A]ll indications are that political ‘ambition counteracting ambition’ has failed to serve as a self-enforcing safeguard for the constitutional structures of federalism and separation of powers in the way that Madison seems to have envisioned.”); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 884 (2007) (“Whether or not this [Madisonian] picture was ever realistic, it is no longer so today.”).

70. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

71. See Bradley & Morrison, *supra* note 1, at 446, 450. For discussion of congressional soft law, see generally Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715 (2012), and Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008).

72. *Goldwater v. Carter*, 444 U.S. 996, 997–1006 (1979).

73. See *Raines v. Byrd*, 521 U.S. 811, 823–24 (1997) (holding that members of Congress generally do not have standing to sue for injury to their institution absent a showing that their votes have been “completely nullified”).

74. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002); see also *Beacon Prods. Co. v. Reagan*, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986), *aff’d*, 814 F.2d 1 (1st Cir. 1987) (relying on the political question doctrine to dismiss a challenge to a treaty termination by President Reagan).

historical practice will continue to develop relating to this issue and that disputes will continue to be resolved outside the courts.

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The next two Parts of this Article consider the historical practice of U.S. treaty terminations.<sup>75</sup> Part II shows that, at least until the late nineteenth century, it was generally understood that presidents needed the agreement of Congress or the Senate in order to terminate a treaty. Part III describes the shift during the twentieth century towards unilateral presidential termination of treaties. As will be seen, the shift did not happen all at once but rather occurred over the course of decades as a result of repeated claims and actions by the Executive Branch in the face of congressional inaction. When a controversy finally did develop over this question of institutional authority—in connection with President Carter's termination of the Taiwan treaty—the President was able to plausibly maintain that his action was consistent with longstanding practice.

## II. Founding Through the Early Twentieth Century

This Part reviews the instances, during the period from the constitutional founding through the early twentieth century, in which the United States announced that it was terminating or suspending treaty obligations. In doing so, it divides the practice into four categories:

- termination pursuant to *ex ante* congressional authorization or directive;
- termination pursuant to senatorial authorization;
- termination with post hoc congressional or senatorial approval; and
- unilateral presidential termination.

The historical practice reviewed here includes instances in which the United States ultimately decided not to terminate a treaty after announcing its intention of doing so, on the theory that such instances can shed light on the constitutional understandings of the President and Congress.<sup>76</sup>

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75. For additional discussion of the historical practice, see DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 149–247 (1986); SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* §§ 178–186 (2d ed. 1916); 5 GREEN HAYWOOD HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 509 (1943). There is also extensive discussion of the historical practice in the Senate hearings regarding President Carter's termination of the Taiwan treaty in subpart III(C) *infra*, as well as in the various State Department memoranda that are referred to throughout this Article.

76. If, for example, a President initiates a unilateral termination and Congress does not object, that would seem to be a relevant event even if the President decides to withdraw the termination for policy reasons. The approach of this Article therefore differs from that of David Adler, who suggests in his 1986 book on treaty termination that instances in which the termination was not fulfilled are not relevant in discerning the constitutional practice of treaty termination. See ADLER, *supra* note 75, at 164–65, 170, 184–85.

A. *Congressional Authorization or Directive*

In the first instance in which the United States purported to terminate treaties, Congress played an especially direct role. In 1798, on the eve of war with France, Congress passed (and President Adams signed) legislation stating that the four treaties the United States had at that time with France “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”<sup>77</sup> In the congressional debates over whether to enact the statute, there does not appear to have been any doubt about Congress’s constitutional authority to terminate the treaties. One member of the House did observe that “[i]n most countries it is in the power of the Chief Magistrate to suspend a treaty whenever he thinks proper,” but he noted that “here Congress only has that power.”<sup>78</sup> Several years later, Thomas Jefferson referred to this episode in his *Manual of Parliamentary Practice*, observing that “[t]reaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.”<sup>79</sup>

Notwithstanding Jefferson’s contention that legislative action was the exclusive method of terminating a treaty, the 1798 statute appears to be the only instance in U.S. history in which the full Congress purported to effectuate a termination directly. As noted in subpart I(B), it has generally been understood that formal communications between the United States and other nations are channeled through the Executive Branch. A possible exception to that “sole organ” role for the Executive, however, is Congress’s authority to declare war. A state of war was understood as terminating certain types of treaty relationships, such as treaties of alliance.<sup>80</sup> So one way of understanding Congress’s termination of the

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77. Act of July 7, 1798, ch. 67, 1 Stat. 578, 578. Congress had already passed other war-related measures by that point. See ALEXANDER DECONDE, *THE QUASI-WAR* 102 (1966) (discussing a direct property tax enacted to pay for the expanded war program).

78. 8 ANNALS OF CONG. 2120 (1798). For additional discussion of the debate in Congress, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 250–53 (1997).

79. THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE* § 52 (Wash., Samuel Harrison Smith 1801); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J.) (suggesting that only Congress has the authority to terminate a treaty based on a violation by the other party). Many years later, the U.S. Court of Claims held that the French treaties had been validly terminated by Congress. See *Hooper v. United States*, 22 Ct. Cl. 408, 418 (1887) (“The treaties therefore ceased to be a part of the supreme law of the land . . .”); see also *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 272 (1817) (assuming that the treaties had been terminated in deciding a related property claim). During negotiations between the United States and France in 1800, however, France took the position that the U.S. treaty obligations had not been terminated (although not because of any claim that Congress was unable to terminate treaties). 5 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* § 774, at 357 (1906).

80. See, e.g., 2 Vattel, *supra* note 23, bk. 3, § 175 (“Conventions and treaties are broken or annulled when war breaks out between the contracting parties . . .”).

French treaties was as an exercise of its power to declare war (although Congress merely authorized naval warfare against France and did not formally declare war).<sup>81</sup>

In any event, without purporting directly to effectuate terminations, Congress has authorized or directed presidential termination of treaties in a number of other instances. In 1846, for example, Congress passed a joint resolution authorizing President Polk “at his discretion” to terminate a treaty with Great Britain relating to the two countries’ joint occupation of the Oregon Territory.<sup>82</sup> This resolution was issued in response to a request from the President, in which he stated that a notice of termination would, in his judgment, “be proper to give, and I recommend that provision be made by law for giving it accordingly.”<sup>83</sup> After Congress passed the resolution, the Secretary of State informed the U.S. Ambassador to Great Britain that “Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President’s) and your duty to conform.”<sup>84</sup> This was apparently the first time that the United States attempted to terminate a treaty pursuant to a unilateral withdrawal provision. Before the expiration of the notice period, the United States and Great Britain negotiated a new treaty to supersede the one that the United States had acted to terminate.

Prior to the issuance of the 1846 resolution, there was substantial debate in Congress over whether it was proper for the House of Representatives to be involved in the issue. During that debate, a majority of those who spoke expressed the view that it was constitutionally proper for the full Congress to authorize termination.<sup>85</sup> Several members of the House issued a minority report, however, arguing that, except when a treaty is being terminated pursuant to a declaration of war, authorization of treaty termination properly should come from a supermajority of the Senate, not the full Congress.<sup>86</sup> No one argued for a unilateral presidential power to terminate.

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81. See *The Head Money Cases*, 112 U.S. 580, 599 (1884) (noting that a declaration of war “must be made by Congress, and . . . when made, usually suspends or destroys existing treaties between the nations thus at war”); cf. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 41 (1800) (Washington, J.) (concluding that France in 1799 qualified as an “enemy” within the meaning of a naval salvage statute and noting that “[C]ongress had raised an army; stopped all intercourse with *France*; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships”).

82. Joint Resolution of Apr. 27, 1846, 9 Stat. 109, 109–10.

83. James K. Polk, First Annual Message (Dec. 2, 1845), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2235, 2245 (James D. Richardson ed., 1897).

84. S. DOC. NO. 29-489, at 15 (1st Sess. 1846).

85. See CONG. GLOBE, 29th Cong., 1st Sess. 635 (1846).

86. H.R. REP. NO. 29-34, at 1–3 (1984). Some senators also expressed this view. See, e.g., CONG. GLOBE, 29th Cong., 1st Sess. 635 (1846) (statement of Sen. Mangum) (contending that “[t]he power of treaty-making was one highly restricted by the Constitution—the Senate—two-thirds of it—and the Executive possessed the power,” and, therefore, the Congress did not have the power to make or break a treaty). For additional discussion of the debate in Congress, see

Congress authorized additional treaty terminations in 1865 and 1874 without controversy.<sup>87</sup> In 1876, President Grant informed Congress that Great Britain was not complying with an extradition provision in a treaty, and he stated that “[i]t is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land.”<sup>88</sup> In the meantime, he indicated that he would not comply with extradition requests from Great Britain under the treaty “without an expression of the wish of Congress that I should do so.”<sup>89</sup> Extradition by the United States under the treaty was then suspended for six months until the dispute with Great Britain was resolved.<sup>90</sup>

Sometimes Congress went beyond authorizing the President to terminate treaties and affirmatively ordered him to do so. In 1883, for example, Congress directed President Arthur to terminate various articles in an 1871 treaty with Great Britain, and Arthur subsequently terminated the articles.<sup>91</sup> In 1915, Congress, in the Seaman’s Act, “requested and directed” President Wilson to give notice of termination of various treaty obligations inconsistent with the Act,<sup>92</sup> and Wilson proceeded to do so.<sup>93</sup>

DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861*, at 78–80 (2005).

87. In 1865, Congress directed the President to terminate an 1854 Reciprocity Treaty with Great Britain that concerned trade with Canada, and the Johnson Administration subsequently did so. See Joint Resolution of Jan. 18, 1865, 13 Stat. 566; see also Letter from Charles Francis Adams, Minister to the U.K., to William H. Seward, U.S. Sec’y of State (Mar. 23, 1865), in *PAPERS RELATING TO FOREIGN AFFAIRS*, pt. 1, at 258 (Wash., Gov’t Printing Office 1866); Letter from William H. Seward, U.S. Sec’y of State, to Charles Francis Adams, Minister to the U.K. (Jan. 18, 1865), in *PAPERS RELATING TO FOREIGN AFFAIRS*, *supra*, at 93. In 1874, Congress authorized the President to terminate a Treaty of Commerce and Navigation with Belgium, and President Grant immediately did so. See Joint Resolution of June 17, 1874, 18 Stat. 287; Letter from Hamilton Fish, U.S. Sec’y of State, to J.R. Jones, Minister to Belgium (June 17, 1874), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES* 64 (Wash., Gov’t Printing Office 1874); see also Ulysses S. Grant, Sixth Annual Message (Dec. 7, 1874), in *10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS*, *supra* note 83, at 4238, 4242 (reporting that “[t]he notice directed by the resolution of Congress of June 17, 1874, to be given to terminate the convention of July 17, 1858, between the United States and Belgium has been given, and the treaty will accordingly terminate on the 1st day of July, 1875”).

88. Letter from Ulysses S. Grant to the Senate and House of Representatives (June 20, 1876), in *10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS*, *supra* note 83, at 4324, 4327.

89. *Id.*

90. CRANDALL, *supra* note 75, § 185, at 464.

91. Joint Resolution of Mar. 3, 1883, 22 Stat. 641; Letter from Frederick T. Frelinghuysen, U.S. Sec’y of State, to J.R. Lowell, Minister to the U.K. (Apr. 5, 1883), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES* 413, 413–14 (Wash., Gov’t Printing Office 1884).

92. Seaman’s Act, ch. 153, § 16, 38 Stat. 1164, 1184 (1915).

93. Circular from William Jennings Bryan, U.S. Sec’y of State, to Ambassador Page (May 29, 1915), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES* 3 (1924). In *Van Der Weyde v. Ocean Transport Co.*, 297 U.S. 114 (1936), the Supreme Court upheld the

At times, however, presidents argued that Congress could not constitutionally compel them to take certain actions relating to a treaty. In 1879, for example, President Hayes vetoed an immigration bill on the ground that it was trying to get him to partially terminate a treaty. In the bill, Congress directed the President to terminate two provisions in a treaty with China relating to Chinese immigration.<sup>94</sup> In his veto message, President Hayes conceded that Congress had the authority to terminate a treaty, and in fact said that this was “free from controversy.”<sup>95</sup> But he pointed out that the bill called for the abrogation only of *parts* of a treaty and argued 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.”<sup>96</sup>

In 1920, President Wilson refused to implement a provision in the Merchant Marine Act (also known as the Jones Act)<sup>97</sup> that stated that he was “authorized and directed” to terminate within ninety days various treaty obligations that disallowed the United States from imposing discriminatory customs duties and tonnage dues.<sup>98</sup> The State Department issued a press release explaining that, while the Act was seeking to have the President partially terminate treaties, the treaties in question did not allow for such partial termination.<sup>99</sup> In explaining the proposed press release to the Undersecretary of State, the Solicitor for the State Department cited President Hayes’s reasoning in his veto of the Chinese immigration bill and noted that although “Congress may pass an act violative of a treaty” and “may express its sense that a treaty should be terminated,” it “cannot in effect undertake legally to modify a treaty.”<sup>100</sup> Not surprisingly, Wilson’s

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termination of provisions in a treaty with Sweden and Norway pursuant to the directive in the Seaman’s Act and noted that it was unnecessary in that case to address “the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States.” *Id.* at 117.

94. An Act to Restrict the Immigration of Chinese to the United States, H.R. 2423, 45th Cong. (1878).

95. Rutherford B. Hayes, Veto of the Chinese Immigration Bill, H.R. EXEC. DOC. NO. 45-102, at 5 (3d Sess. 1879).

96. *Id.*

97. See Statement by State Department (Sept. 24, 1920), in 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8871, 8871–72 (1927).

98. Merchant Marine (Jones) Act, ch. 250, § 34, 41 Stat. 988, 1007 (1920).

99. Press Release, U.S. Dep’t of State 2–3 (Sept. 6, 1920) (on file with author); see also *President Won’t Denounce Treaties; Defies Congress*, N.Y. TIMES, Sept. 25, 1920, <http://query.nytimes.com/mem/archive-free/pdf?res=F00F10FC345511738DDDAC0A94D1405B808EF1D3> (reporting on the State Department’s issuance of a press release explaining the President’s refusal to implement the Act to the extent it would entail the illegal termination of treaty obligations).

100. Memorandum from the Solicitor of the Dep’t of State to Norman H. Davis, U.S. Undersecretary of State 2–3 (Sept. 6, 1920) (on file with author). The Office of the Solicitor was the chief legal advisor to the State Department from 1891 to 1931 and was based within the Department of Justice. Harold Hongju Koh, Remarks, *The State Department Legal Adviser’s*

refusal to implement this portion of the statute, after having signed the statute into law, generated controversy.<sup>101</sup>

The next year, Secretary of State Charles Evans Hughes advised President Harding that a partial termination like the one contemplated by Congress in the Jones Act was not permissible under international law. “As the existing treaties do not permit such partial termination by notice,” explained Hughes, “it follows that Congress has failed to give a mandate on which the President can act.”<sup>102</sup> There was no suggestion, however, that Congress could not direct the President to terminate a treaty in its entirety.

### B. Senatorial Authorization

The President has occasionally terminated a treaty based on prior authorization solely from the Senate. In 1855, the Senate issued a resolution authorizing the President to terminate a Friendship, Commerce, and Navigation Treaty with Denmark, after President Pierce had indicated that he thought termination was warranted.<sup>103</sup> In announcing the U.S. termination, President Pierce noted that he was acting “[i]n pursuance of the authority conferred by a resolution of the Senate.”<sup>104</sup>

The following year, the Senate debated whether it could properly act in this manner without the involvement of the House of Representatives. Senator Charles Sumner argued that, because a treaty is part of the supreme law of the land, it should only be repealed through action of the full legislature.<sup>105</sup> The Senate asked the Foreign Relations Committee to consider the issue, and the Committee prepared a report on the subject. It concluded that termination pursuant to senatorial authorization was constitutionally proper, at least where, as here, the treaty specifically

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*Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747, 1750 (2012). It was replaced in 1931 by the Office of the Legal Adviser, which is based in the State Department. *Id.*

101. See Jesse S. Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT’L L. 33, 33–34, 37–38 (1921).

102. Memorandum prepared by Charles E. Hughes, U.S. Sec’y of State, for President Harding 30 (Oct. 8, 1921) (on file with author).

103. See Franklin Pierce, Second Annual Message (Dec. 4, 1854), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 83, at 2806, 2812 (stating that “I deem it expedient that the contemplated notice should be given to the Government of Denmark”).

104. Franklin Pierce, Third Annual Message (Dec. 31, 1855), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 83, at 2860, 2867. Some years earlier, Secretary of State James Buchanan had informed Denmark that, in order for the United States to withdraw from the treaty, “an Act must first pass Congress to enable the President to give the required notice.” Letter from James Buchanan, Sec’y of State, to Robert P. Flenniken, Minister to Den. (Oct. 14, 1848), in 8 THE WORKS OF JAMES BUCHANAN, 220, 224 (John Bassett Moore ed., 1909).

105. CONG. GLOBE, 34th Cong., 1st Sess. 600 (1856) (statement of Sen. Sumner). Sumner, an ardent abolitionist, was apparently concerned that the pro-Southern Senate would seek to terminate a provision in the 1842 Webster–Ashburton Treaty that required patrols off the coast of Africa to suppress the slave trade. Reeves, *supra* note 101, at 35.

allowed for unilateral withdrawal. The Committee observed that, “so far as the ‘practice of the government’ is concerned, there is nothing to question the sufficiency of the notice that has been given to Denmark to terminate the treaty.”<sup>106</sup> It appears that the only other instance of senatorial (as opposed to full congressional) involvement in a treaty termination occurred in 1921, when the Senate gave its advice and consent to U.S. termination of the International Sanitary Convention, based on a request from President Wilson.<sup>107</sup>

### C. *Ex Post Congressional or Senatorial Approval*

Sometimes the President has acted to terminate a treaty and obtained subsequent approval from either the full Congress or the Senate. In 1864, for example, President Lincoln gave notice of termination of the Great Lakes Agreement with Great Britain (also known as the Rush–Bagot Agreement), which limited the naval military presence of the United States on the Lakes, pursuant to a six-months’ notice provision in the Agreement.<sup>108</sup> Congress subsequently passed a joint resolution (which Lincoln signed) “adopt[ing] and ratif[y]ing” the termination “as if the same had been authorized by [C]ongress.”<sup>109</sup> In the debate on this resolution, Senator Davis objected that Congress was creating a “mischievous precedent. . . . which is to sanction and to give authority to an unauthorized act by the President.”<sup>110</sup> Other senators agreed that Congress needed to approve the termination but thought that Congress could do so retroactively.<sup>111</sup> Despite the Senate’s action, the President decided to

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106. S. REP. NO. 34-97, at 7–8 (1st Sess. 1856). Senator Sumner (and other Senators) continued to dispute the point. CONG. GLOBE, 34th Cong., 1st Sess. 1147 (1856). For additional discussion of the debate in Congress, see CURRIE, *supra* note 86, at 80–84. A resolution was proposed in the Senate that would have confirmed the validity of the Senate’s action, but it was never voted on. CONG. GLOBE, 34th Cong., 1st Sess. 826 (1856).

107. S. Res. of May 26, 1921, 67th Cong., 61 CONG. REC. 1793; *see also* 61 CONG. REC. 1793–94 (1921) (providing the text of both President Wilson’s request for the Senate’s advice and consent to terminate the treaty and the Senate resolution providing this authorization). For another reference to the idea of senatorial involvement in treaty termination, see *Techt v. Hughes*, 128 N.E. 185, 192 (N.Y. 1920) (Cardozo, J.), where the court found a treaty with the Austro-Hungarian Empire to still be in effect despite World War I and observed that the “President and senate may denounce the treaty, and thus terminate its life,” a statement that was quoted by the Supreme Court in *Clark v. Allen*, 331 U.S. 503, 509 (1947).

108. *See* Abraham Lincoln, Fourth Annual Message (Dec. 6, 1864), in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 83, at 3444, 3447. Lincoln was responding to Confederate raids from Canada. *See id.*

109. Joint Resolution of Feb. 9, 1865, 13 Stat. 568.

110. CONG. GLOBE, 38th Cong., 2d Sess. 312 (1865); *see also id.* at 313 (Sen. Davis) (“[I]t is indispensably incumbent and necessary, in order to secure the termination of this treaty, that it shall be terminated not by the action of the President, but by the action of Congress.”).

111. *See, e.g., id.* at 313 (Sen. Sumner); *id.* at 314–15 (Sen. Johnson).

rescind the notice of termination after further negotiations with Great Britain, so it never took effect.<sup>112</sup>

Another example is President Taft's action in 1911, when he gave notice to Russia of a termination of a commercial treaty. In response to Russia's mistreatment of American Jews, the House of Representatives had passed a strongly worded resolution demanding termination of the treaty (on a vote of 301 to 1),<sup>113</sup> and the resolution was thought likely to pass in the Senate.<sup>114</sup> Taft, who had been reluctant to terminate the treaty at all, was concerned that the harsh tone of the House resolution would needlessly offend Russia.<sup>115</sup> He therefore quickly communicated his own statement of termination to Russia and submitted that statement to the Senate "with a view to its ratification and approval."<sup>116</sup> The Senate Foreign Relations Committee proposed a joint resolution stating that the notice of termination was "adopted and ratified," and this resolution was subsequently passed by both houses of Congress (with the vote in the Senate being unanimous) and was signed by the President.<sup>117</sup> The discussion in Congress primarily concerned whether the Senate or the full Congress should be involved in approving the termination, not whether the President had a unilateral power of termination.<sup>118</sup>

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112. ADLER, *supra* note 75, at 164–65.

113. See 48 CONG. REC. 353 (1911). In the deliberations on this resolution in the House Committee on Foreign Affairs, the prominent constitutional lawyer Louis Marshall testified that the proper procedure for terminating a treaty was by joint resolution of Congress. He noted that he initially "had an idea that the executive department had ample power to deal with the matter," but, after studying the historical practice, he had reached the conclusion "that the power rests in Congress." *Termination of the Treaty of 1832 Between the United States and Russia: Hearing Before the H. Comm. on Foreign Affairs*, 62d Cong. 42 (1911) (statement of Louis Marshall). In his testimony, Marshall presented Congress with a memorandum (prepared by Herbert Friedenwald, Secretary of the American Jewish Committee) describing the past practice of treaty terminations, which was reprinted as an appendix to the committee hearings. See *id.* at 49, app. III at 295.

114. ADLER, *supra* note 75, at 181.

115. *Id.* at 182.

116. 48 CONG. REC. 453 (1911); see also *Taft Himself May End Treaty*, N.Y. TIMES, Dec. 18, 1911, <http://query.nytimes.com/mem/archive-free/pdf?res=F70D11FA395517738DDDA10994DA415B818DFID3> (discussing the likelihood of Taft denouncing the Russian treaty and asking only for the Senate's approval, thereby avoiding presidential approbation of the harsh statement in the House).

117. See Joint Resolution of Dec. 21, 1911, 37 Stat. 627 (1911); 48 CONG. REC. 507 (1911) (recording the Senate vote); *id.* at 600 (documenting the fact that the President had signed the resolution).

118. See 48 CONG. REC. 484 (statement of Senator Stone noting that the issue was whether the termination should be accomplished "with the joint sanction of the two Houses of Congress or whether it should be taken by the President with the approval of the Senate alone"). Compare, e.g., *id.* at 473 (statement of Senator Rayner that "[a] treaty is the supreme law of the land under the language of the Constitution, and the supreme law of the land ought not to be set aside except by legislative action of both Houses"), with *id.* at 479 (statement of Senator Lodge that "in cases where treaties have involved no legislation the power of the Senate and the President to terminate a treaty by notice, or to arrest its operation . . . is absolute, because in making such a treaty the

Both of these episodes are obviously closer to presidential unilateralism than situations in which the President obtains advance authorization for a treaty termination. Lincoln's action was controversial for that reason.<sup>119</sup> The Taft episode was less controversial because it was obvious when Taft acted that Congress supported termination of the treaty and was in fact the driving force behind the decision to terminate, and the only issue was over how the message would be conveyed to Russia. It is also worth noting that, when writing some years later about presidential power, Taft made clear that he thought that "[t]he 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."<sup>120</sup>

#### D. *Unilateral Presidential Termination*

In modern debates, the Executive Branch has sometimes claimed that the first unilateral presidential termination of a treaty occurred in 1815,<sup>121</sup> but that is erroneous. The Madison administration observed that year that a treaty with The Netherlands, which had been concluded in 1782, had been "annulled" in light of the fact that The Netherlands had in the meantime been assimilated into the French Empire of Napoleon and then reconstructed in the Congress of Vienna.<sup>122</sup> The observation occurred in response to a suggestion by The Netherlands that the two countries conclude a new treaty based on the terms of the old one, a suggestion that itself assumed that the old treaty was no longer in force.<sup>123</sup> Under

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Senate and the President represent the high contracting party"). Some members of the House of Representatives cited historical practice in support of the proposition that the full Congress could terminate a treaty. See, e.g., *id.* at 319 (statement of Rep. Legare) (citing treaties that Congress had terminated in the past); *id.* at 331 (statement of Rep. Peters) (referring to past treaties abrogated by Congress).

119. The Rush-Bagot Agreement that Lincoln had proposed terminating was originally concluded by President Monroe unilaterally based on his Commander in Chief authority, although it eventually received senatorial advice and consent. See BRADLEY, *supra* note 27, at 90. As a result, it may have been viewed as occupying an uncertain place between sole executive agreements (which indisputably can be terminated unilaterally by the President) and Article II treaties.

120. TAFT, *supra* note 55, at 115-16.

121. See, e.g., 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) [hereinafter Hansel Memorandum], in S. COMM. ON FOREIGN RELATIONS, 95TH CONG., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER 395, 397 (Comm. Print 1978) ("In 1815, President Madison exchanged correspondence with the Netherlands which has been construed by the United States as establishing that the 1782 Treaty of Amity and Commerce between the two countries had been annulled.").

122. See CRANDALL, *supra* note 75, § 179, at 429 ("The state thus formed, although in general considered the successor to, differed in name, territory, and form of government from, the state which had entered into the treaty of October 8, 1782 with the United States.").

123. *Id.*

international law at that time, a treaty imposing reciprocal obligations became void if one of the parties ceased to exist—for example, if it was conquered by another nation.<sup>124</sup> The United States, therefore, did not terminate this treaty.

There is an even earlier episode that, although it did not involve any announced treaty termination, is sometimes cited in support of a unilateral presidential authority to suspend or terminate treaties.<sup>125</sup> In 1793, there was a debate within George Washington's cabinet over whether to receive an ambassador from revolutionary France with, or without, qualifications.<sup>126</sup> Receiving him without qualifications might signal that the United States accepted the continuing effect of the treaties it had with France, including a treaty of alliance, notwithstanding the changes in France's government.<sup>127</sup> Receiving him with qualifications, by contrast, might allow the United States the option of suspending or terminating the treaties.<sup>128</sup> Secretary of the Treasury Alexander Hamilton and Secretary of War Henry Knox thought the ambassador should be received with qualifications, whereas Secretary of State Thomas Jefferson and Attorney General Edmund Randolph thought he should be received without qualifications.<sup>129</sup> The cabinet members prepared memoranda focused on whether international law allowed for suspension or termination of the treaties under these circumstances.<sup>130</sup>

Ultimately, Washington decided to receive the ambassador without qualifications, so there was no effort to reserve the option of suspending or

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124. See, e.g., VATEL, *supra* note 23, § 203 (noting that a treaty comes to an end “if, for any cause whatever, the Nation should lose its character as an independent political society”); see also HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 191 (London, Cary, Lea & Blanchard 1836) (“*Treaties* . . . expire of course:—1. In case either of the contracting parties loses its existence as an independent State.”).

125. See Prakash & Ramsey, *supra* note 30, at 324–26 (arguing that President Washington's belief that he could renounce the treaties with France suggests that people during this period believed that the President had the power to terminate or suspend treaties); Yoo & Delahunty Memorandum, *supra* note 52, at 15–16 (citing Hamilton and Knox's recommendation to Washington that he consider suspending the French treaty as evidence of a general understanding that the President had unilateral authority to suspend treaties).

126. See generally WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 32–33 (2006) (describing the debate); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, at 339–41 (1993) (same).

127. Bradley & Flaherty, *supra* note 32, at 667.

128. *Id.*

129. See *id.* at 667–68.

130. See, e.g., Letter from Alexander Hamilton and Henry Knox to George Washington (May 2, 1793), in 14 *THE PAPERS OF ALEXANDER HAMILTON* 367, 367–96 (Harold C. Syrett et al. eds., 1969) (arguing that the United States could choose to suspend or even renounce the treaties with France); Letter from Thomas Jefferson to George Washington (Apr. 28, 1793), in 25 *THE PAPERS OF THOMAS JEFFERSON* 607, 607–18 (John Catanzariti et al. eds., 1992) (arguing that the United States should not renounce the French treaties).

terminating the treaties.<sup>131</sup> The cabinet members did not discuss in their memoranda whether it was proper as a matter of U.S. constitutional law for the President to suspend or terminate treaties unilaterally. Their silence might suggest that they assumed that the President had this authority, especially since they decided not to call Congress into special session, but this is reading a lot into mere silence.<sup>132</sup> In a related context, Alexander Hamilton did take the position that the President had the authority to suspend a treaty in response to a revolutionary change in the government of the other treaty party, but James Madison (whose views in this period were similar to Jefferson's) sharply disputed Hamilton's claim.<sup>133</sup> In any event, the Executive Branch never made any public claim of a unilateral suspension or termination authority, so there was no opportunity to find out Congress's views on the matter, and certainly no circumstance for crediting any sort of congressional acquiescence. Finally, when the United States did take action five years later to terminate the French treaties, it did so, as noted above, by congressional resolution, not unilateral executive action.<sup>134</sup>

The first instance in which a President actually proceeded to terminate treaty provisions without even after-the-fact congressional or senatorial approval appears to have been in 1899, when the McKinley Administration terminated certain clauses in an 1850 commercial treaty with Switzerland.<sup>135</sup> McKinley did not terminate the entire treaty, and in fact some provisions in the treaty remain in effect even today.<sup>136</sup> In addition, McKinley's action need not be viewed as purely unilateral, given that he

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131. See Bradley & Flaherty, *supra* note 32, at 669.

132. Cf. CURRIE, *supra* note 78, at 182 n.63 (noting that Washington's decision "avoid[ed] the difficult constitutional question whether the President alone could terminate a treaty").

133. Compare Hamilton, *supra* note 39, at 42 ("Hence in the case stated, though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone."), with James Madison, "Helvidius" Number 3 (Sept. 7, 1793), reprinted in 15 THE PAPERS OF JAMES MADISON 95, 99 (Thomas A. Mason et al. eds., 1985) ("Nor can [the President] have any more right to suspend the operation of a treaty in force as a law, than to suspend the operation of any other law."). More than two years earlier, Madison had suggested in a letter that the termination of a treaty in response to a breach by the other party required either congressional or senatorial approval. See Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 342, 344 (Charles F. Hobson et al. eds., 1981) (stating that the Constitution requires that only the Legislature can terminate a "Treaty of peace" (emphasis omitted)).

134. See *supra* note 77 and accompanying text.

135. See Letter from John Hay, U.S. Sec'y of State, to Ambassador Leishman (Mar. 8, 1899), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 753, 753-54 (1901); see also Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 661 (1937) (observing that "there seems to be at least one instance where the President alone without cooperation of Senate or Congress has terminated certain treaty provisions, i.e., in the case of a treaty with Switzerland").

136. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2012, at 266, available at <http://www.state.gov/documents/organization/202293.pdf>.

was responding to a potential conflict between the treaty and a federal statute. The Tariff Act of 1897 had authorized the President to negotiate reciprocal trade agreements,<sup>137</sup> and, pursuant to the Act, the United States had concluded such an agreement with France.<sup>138</sup> Switzerland contended that it was automatically entitled to the benefit of the concessions granted to France because of most-favored-nation provisions in the 1850 treaty.<sup>139</sup> But granting it such concessions, without obtaining in return concessions similar to the ones given by the French, would have been contrary to longstanding U.S. trade policy, including the policy of Congress reflected in the Tariff Act.<sup>140</sup>

#### E. *Early Scholarly Commentary*

The only treaties that the United States terminated in the early years of its history were the French treaties, and that termination was related to the imminent state of hostilities between the two countries. Moreover, early U.S. treaties did not contain clauses allowing for discretionary withdrawal,<sup>141</sup> so that scenario likely would not have been considered. Perhaps for these reasons, constitutional law treatises in the early part of the nineteenth century have little if any discussion of treaty termination. Thomas Sergeant's 1822 treatise on constitutional law did note, however, that "[i]t seems, the authority to declare a treaty to have been violated, and to be therefore void, belongs only to Congress; the judiciary cannot exercise it."<sup>142</sup> And William Rawle's constitutional law treatise, published in 1825, tied a congressional power to terminate treaties to Congress's power to declare war.<sup>143</sup> Similarly, Joseph Story stated in his 1833 *Commentaries on the Constitution* that "it will not be disputed, that [treaties] are subject to the legislative power, and may be repealed, like other laws, at its pleasure."<sup>144</sup> As discussed in the next Part, it appears that the first scholar to suggest a unilateral presidential authority to terminate treaties was Westel

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137. Tariff Act of July 24, 1897, ch. 11, § 3, 30 Stat. 151, 203 (repealed 1909).

138. ADLER, *supra* note 75, at 165.

139. *Id.*

140. For the exchange of correspondence between Switzerland and the United States about this issue, see PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 135, at 740–57.

141. See *supra* note 25 and accompanying text.

142. THOMAS SERGEANT, CONSTITUTIONAL LAW 403 (Phila., Abraham Small 1822).

143. 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."); see also WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 184 (N.Y.C., Harper & Bros. 1843) ("[T]he power in question may be regarded as an incident to that of declaring war.").

144. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1832, at 695 (Bos., Hilliard, Gray & Co. 1833).

Willoughby, a political science professor at Johns Hopkins, in his 1910 treatise on U.S. constitutional law.<sup>145</sup>

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Historical practice through at least the late nineteenth century suggests an understanding that congressional or senatorial approval was constitutionally required for the termination of U.S. treaties. Not only was Congress or the Senate almost always involved in treaty terminations, but presidents generally acted as if they needed such involvement. The chief debate was simply over whether the full Congress or merely the Senate should be involved in treaty terminations, and historical practice was viewed as relevant to that debate. Lincoln's initially unilateral action in 1864 was potentially contrary to this understanding, but it was an outlier and generated constitutional criticism in Congress rather than acquiescence. Grant's action in 1876 might have suggested some unilateral authority to *suspend* a treaty obligation, but this action was embedded within an acknowledgment of the need for congressional approval of termination. It was not until McKinley's action with respect to the Swiss treaty in 1899 that there was anything resembling a clear precedent for a unilateral presidential termination authority, and that action involved only a partial termination and was arguably part of an effort to implement congressional policy. Moreover, at least before the 1899 termination, the Executive Branch made no claim of a unilateral termination authority. For example, in the digests of international practice prepared by the Executive Branch in the late nineteenth century, the materials quoted relating to treaty termination referred only to termination by Congress.<sup>146</sup>

This historical account presents difficulties for scholars who have attempted to defend a presidential power over treaty termination on originalist grounds, such as under the Vesting Clause Thesis (which hypothesizes that the vesting clause of Article II of the Constitution implicitly conveys to the President authority not otherwise listed in Article II).<sup>147</sup> There is no direct evidence that the Founders understood that the Constitution was granting the President a unilateral power of treaty termination. Moreover, to the extent that originalists credit historical practice, they typically place much more emphasis on early practice than

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145. See *infra* subpart III(E).

146. See, e.g., JOHN L. CADWALADER, DIGEST OF THE PUBLISHED OPINIONS OF THE ATTORNEYS-GENERAL, AND OF THE LEADING DECISIONS OF THE FEDERAL COURTS WITH REFERENCE TO INTERNATIONAL LAW, TREATIES, AND KINDRED SUBJECTS §§ 48–50, at 234 (rev. ed. 1877) (discussing the principles of treaty abrogation but making no mention of abrogation by the Executive Branch); 2 FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 137(a), at 58–65 (2d ed. 1887) (same); see also David A. Schnitzer, Note, *Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination*, 101 GEO. L.J. 243, 265–66 (2012) (surveying period digests' treatment of treaty abrogation).

147. See *supra* notes 30–33 and accompanying text.

modern practice, on the theory that it is closer in time to the founding and, thus, either is more likely to reflect founding intent or is a “liquidation” of issues unsettled at the founding.<sup>148</sup> Yet the first century of U.S. practice weighs strongly against a unilateral presidential power of treaty termination. If the Article II Vesting Clause conveyed to presidents the unilateral authority to terminate treaties, it is surprising that no one (with the possible exception of Alexander Hamilton) seemed to be aware of it for a hundred years.

### III. Twentieth-Century Shift to Presidential Unilateralism

This Part describes the shift in U.S. practice during the twentieth century towards unilateral presidential termination of treaties. The accretion of claims and practice relating to this issue occurred over a long period, running from Congress’s protectionist trade policy of the early twentieth century, to the U.S. rejection of the Versailles Treaty after World War I, to the onset of World War II and the related rise of the United States as a superpower. Although there was significant controversy surrounding the issue in connection with President Carter’s announcement in 1978 that he was unilaterally terminating a mutual defense treaty with Taiwan, the Executive Branch prevailed in that dispute, and unilateral presidential termination of treaties has since become the norm. In addition to considering publicly available materials such as congressional hearings, official correspondence, and presidential proclamations, the description in this Part takes account of a number of internal memoranda prepared by the legal office for the State Department during the first half of the twentieth century, which have been retrieved from the State Department archives.<sup>149</sup>

#### A. *Seeds of Change*

The stirrings of a shift to presidential unilateralism can be seen in the early years of the twentieth century. In 1909, at the outset of the Taft Administration, the Solicitor for the State Department wrote an internal memorandum suggesting that it was constitutionally permissible for the President to act unilaterally in terminating a treaty. The memorandum stated that, although presidential action pursuant to a congressional

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148. Some originalists accept that the Founders allowed certain unresolved constitutional issues to be worked out, or “liquidated,” by early practice and decisions. *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 547–53 (2003). This liquidation idea was famously articulated by James Madison in *The Federalist Papers*. *See* THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961) (stating that the meaning of the Constitution, like that of all laws, would be “liquidated and ascertained by a series of particular discussions and adjudications” (emphasis omitted)).

149. Some of these memoranda have been partially excerpted in digests of practice published by the U.S. State Department. *See, e.g.*, HACKWORTH, *supra* note 75, § 509, at 319 (containing such an excerpt).

directive might be the “most effective and unquestionable method” for terminating a treaty, the President also had the option under U.S. law either of acting in conjunction with the Senate or through “notice given by the President upon his own initiative without either a resolution of the Senate or the joint resolution of the Congress.”<sup>150</sup> In support of the last option, the memorandum noted that there had been one instance of unilateral presidential termination of a treaty, namely the 1899 termination of the provisions in the Swiss treaty.<sup>151</sup> The memorandum concluded that the choice of which method to use for terminating a treaty “would seem to depend either upon the importance of the international question or upon the preference of the Executive.”<sup>152</sup> As discussed above, two years later the Taft Administration moved to terminate a treaty with Russia as a result of Russia’s mistreatment of American Jews,<sup>153</sup> and it seems likely that this memorandum was prepared in connection with the Administration’s initial consideration of that issue.<sup>154</sup>

A few years later, the Supreme Court seemed to suggest in dicta that the Executive Branch could decide whether to stop complying with a bilateral treaty in response to a breach by the other party. In *Charlton v. Kelly*,<sup>155</sup> the Court concluded that it was not improper for the Executive Branch to extradite a U.S. citizen to Italy pursuant to an extradition treaty between the two countries, notwithstanding the fact that Italy had declined to extradite its own citizens to the United States.<sup>156</sup> “The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens,” the Court reasoned, “it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.”<sup>157</sup> It is not clear how much should be read into such dicta, but it is worth recalling that there was the

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150. Memorandum from James Brown Scott, Solicitor, U.S. Dep’t of State, to President Wilson 1–2 (June 12, 1909) (on file with author).

151. *See id.* at 2.

152. *Id.* at 3.

153. *See supra* text accompanying notes 113–18.

154. The memorandum was prepared in June 1909. The American Jewish Committee was in communication with the Administration about the Russian issue during this time period, and members of the Committee met with Taft during the summer of 1909. *See* Naomi W. Cohen, *The Abrogation of the Russo-American Treaty of 1832*, 25 JEWISH SOC. STUD. 3, 9–10 (1963) (describing how Committee members Judge Sulzberger and Dr. Cyrus Adler met with Taft, the Secretary of State, and the American ambassador to Russia in the summer of 1909 and advocated for abrogation); Clifford L. Egan, *Pressure Groups, the Department of State, and the Abrogation of the Russian–American Treaty of 1832*, 115 PROC. AM. PHIL. SOC’Y 328, 329–30 (1971) (describing Taft’s interaction with the American Jewish Committee in 1909 and 1910).

155. 229 U.S. 447 (1913).

156. *Id.* at 475–76.

157. *Id.* at 476.

nineteenth-century precedent of President Grant in effect suspending extradition until an issue of treaty compliance could be worked out.<sup>158</sup>

The topic of treaty termination arose again in 1919, during the debate in the Senate over whether to give its advice and consent to the Versailles Treaty, which, among other things, established the League of Nations. The League of Nations Covenant had a provision allowing any member to withdraw after two years “provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.”<sup>159</sup> Senator Henry Cabot Lodge, the Republican leader in the Senate and Chairman of the Foreign Relations Committee, proposed attaching a reservation to the Senate’s advice and consent providing that the United States could withdraw from the Covenant through enactment of a concurrent resolution by Congress.<sup>160</sup> This proposal generated substantial discussion.

Noting that a concurrent resolution does not require the agreement of the President, Senator Thomas moved to delete the concurrent resolution clause from the reservation on the ground that withdrawal from a treaty was “an executive and not a legislative function.”<sup>161</sup> In the debate on the motion, Senator Jones asked “whether or not the President could give such notice [of termination] without authorization from Congress.”<sup>162</sup> Senator Walsh replied, “I think not; clearly not. I cannot believe that anybody could entertain any serious doubt as to that.”<sup>163</sup> In arguing in favor of the concurrent resolution clause, however, Senator Spencer contended that the President could unilaterally withdraw the United States from the treaty and thus the concurrent resolution clause was simply adding another option for U.S. withdrawal.<sup>164</sup> Numerous senators, however, either expressly disagreed with Spencer’s premise or expressed skepticism about it.<sup>165</sup>

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158. *See supra* notes 88–90 and accompanying text.

159. League of Nations Covenant art. 1, para. 3.

160. 58 CONG. REC. 8074 (1919). Lodge had significant concerns about the League of Nations Covenant, especially Article Ten, which involved a precommitment by the members to use military force in response to aggression. He led a group of Republicans that insisted that the Senate include a package of reservations with its advice and consent to the Covenant. Although there was majority support in the Senate for Lodge’s proposed approach, neither his proposal nor a Democratic proposal to have the Senate give its advice and consent without the reservations was able to garner the required two-thirds vote. *See* JOHN MILTON COOPER, JR., *BREAKING THE HEART OF THE WORLD: WOODROW WILSON AND THE FIGHT FOR THE LEAGUE OF NATIONS* 234–375 (2001).

161. 58 CONG. REC. 8074 (1919).

162. *Id.* at 8076.

163. *Id.*

164. *Id.* at 8121–22.

165. *See, e.g., id.* (Sen. Brandegee) (challenging Spencer’s premise that the President could withdraw the United States from the League of Nations unilaterally without the consent of Congress); *id.* at 8122 (Sen. Poindexter) (asking Spencer how the President can unilaterally repeal treaties if they are the supreme law of the land); *id.* (Sen. Thomas) (expressing skepticism of

In one of the more extensive analyses of the issue, Senator Robinson explained:

While the authorities on the subject are somewhat confusing, and while the Senate precedents, as in almost every disputed case, are somewhat conflicting, I believe that I can successfully maintain that the proper, the constitutional, the customary method of giving such notice as is contemplated in the reservation is through some action which contemplates the concurrence of the Executive and the two Houses of Congress.<sup>166</sup>

Robinson subsequently noted, however, that “[t]here may be cases . . . where the Executive alone[] has the authority to terminate a treaty, but these cases are exceptional.”<sup>167</sup>

Nevertheless, the views on this question were mixed. Senator Lenroot later pointed out that Westel Willoughby’s 1910 constitutional law treatise stated that the President had a unilateral withdrawal power.<sup>168</sup> This seemed to cause Senator Walsh to retreat to some extent from his earlier statement to the contrary, while noting that he would “want to examine the question with very great care before [he] could accept any such doctrine [as argued by Willoughby].”<sup>169</sup> Senator King then asked Senator Lenroot whether, if Willoughby were correct, there was any way that the Senate could protect itself against a President unilaterally terminating a treaty that the Senate had agreed to, and Lenroot responded that the courts would likely treat the matter as a political question, so the principal tool of Congress would probably be impeachment.<sup>170</sup> Lenroot further noted, in response to another question from King, that the Senate could prospectively limit the President’s termination authority by including a provision to that effect in its advice and consent to a treaty.<sup>171</sup> There was also some discussion of whether Taft’s termination in 1911 of the treaty with Russia was precedent for a unilateral termination authority, and Lenroot expressed the view that it was.<sup>172</sup> Ultimately, the proposed amendment to the reservation was

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Spencer’s interpretation of the League of Nations article requiring “member” to be equivalent to “President” and that the President has unilateral authority to repeal treaties as supreme laws of the land under the treaty-making power); *id.* at 8124 (Sen. Robinson) (expressing doubt that the Executive Branch can terminate a treaty without involving Congress unless perhaps the treaty relates to functions exclusively within the Executive’s power).

166. *Id.* at 8124.

167. *Id.* at 8125.

168. *Id.* at 8129, 8132.

169. *Id.* at 8131; *see also id.* at 8130 (responding that he did “not undertake to say . . . whether the actual concurrence” of the President and Congress for withdrawal is “essential”).

170. *Id.* at 8132.

171. *Id.*

172. *Id.*

rejected. Shortly thereafter, the Senate voted against giving its advice and consent to the treaty even with the reservations.<sup>173</sup>

The termination issue does not appear to have been settled. In the next session of Congress, the Senate reconsidered its rejection of the treaty.<sup>174</sup> During that discussion, Senator Lodge moved to amend his proposed reservation to make clear that the United States could withdraw either by two houses of Congress or by presidential action.<sup>175</sup> Lodge explained that the usual method of terminating treaties had been pursuant to congressional direction or concurrence, but he noted that there were two instances in which presidents had acted unilaterally—McKinley in 1889 and Taft in 1911.<sup>176</sup> When asked whether the President would have the authority to withdraw the United States from the Versailles Treaty even if this authority were not specified in the reservation, Lodge replied (somewhat awkwardly) that, “I think it is at least doubtful whether the President has not the power to do that.”<sup>177</sup> The ensuing debate on his motion, however, concerned whether the Senate could delegate termination authority to the President, not whether he had such authority independently.<sup>178</sup> In any event, Lodge’s amendment was rejected,<sup>179</sup> and the original language of his proposed reservation was retained.<sup>180</sup> The Senate then proceeded to reject the Versailles Treaty a second time.<sup>181</sup>

Despite these various discussions of treaty termination, no President actually terminated a treaty unilaterally during the twentieth century until 1927. In that year, the Coolidge Administration withdrew the United States from a smuggling convention with Mexico without authorization or subsequent approval from Congress or the Senate.<sup>182</sup> The administration explained that the United States had no commercial treaty with Mexico and that

it is not deemed advisable to continue in effect an arrangement which might in certain contingencies bind the United States to cooperation for the enforcement of laws or decrees relating to the importation of commodities of all sorts into another country with which this

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173. *See id.* at 8803.

174. 59 CONG. REC. 3229 (1920).

175. *Id.* at 3229–30.

176. *Id.*

177. *Id.* at 3230.

178. *Id.* at 3230–32.

179. *Id.* at 3242.

180. *Id.*

181. *Id.* at 4599.

182. ADLER, *supra* note 75, at 183–84.

Government has no arrangement, by treaty or otherwise, safeguarding American commerce against possible discrimination.<sup>183</sup>

This action was taken after extensive concerns had been raised in Congress about Mexico's confiscation of American property.<sup>184</sup>

Unilateral presidential terminations subsequently became more common in the administration of Franklin D. Roosevelt, although some of these terminations, like McKinley's 1899 termination of provisions in the Swiss treaty, were because of potential conflicts with trade legislation. In 1933, the Executive Branch withdrew the United States from a convention abolishing import and export restrictions, without authorization or subsequent approval from Congress or the Senate, because of (among other things) alleged conflicts between the convention and the new National Industrial Recovery Act.<sup>185</sup> Also in 1933, Roosevelt unilaterally announced termination of an extradition treaty with Greece because of its purported breach of the treaty after Greece had refused to extradite Samuel Insull, a billionaire tycoon who was accused of financial misdealings.<sup>186</sup> After Greece forced Insull to leave the country and a protocol to the extradition

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183. Telegram from Frank B. Kellogg, U.S. Sec'y of State, to Ambassador Sheffield (Mar. 21, 1927), in 3 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1927, at 230, 230-31 (1942). The Executive Branch has sometimes claimed that President Wilson unilaterally terminated a treaty with Belgium in 1920, but this is incorrect. Pursuant to Congress's directive in the Seaman's Act, *see supra* note 93 and accompanying text, Wilson had given notice to Belgium in 1916 that the United States was terminating certain provisions in a treaty concerning the Congo. *See* Letter from Robert Lansing, U.S. Sec'y of State, to Baron Beyens, Belg. Minister of Foreign Affairs (Nov. 11, 1916), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 34, 34-35 (1925) (notifying the Government of Belgium that pursuant to an Act of Congress, the United States government was terminating certain portions of a previously-agreed-upon treaty). Belgium responded by saying that it preferred simply to terminate the entire treaty, and it asked the United States to formally acknowledge this denunciation. Letter from Baron Beyens, Belg. Minister of Foreign Affairs, to Robert Lansing, U.S. Sec'y of State (Dec. 31, 1916), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, *supra*, at 35, 36. Eventually, in 1920, the United States "acknowledge[d]" Belgium's notice of termination. Letter from Norman H. Davis, U.S. Undersecretary of State, to Brand Whitlock, U.S. Ambassador to Belg. (Nov. 19, 1920), in 1 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1920, at 207, 207-09 (1935). Noting that the treaty did not contain any clause specifying the amount of notice required for withdrawal, the United States said that it would assume that the Belgian government wished the treaty to have terminated one year from the time of its notice of termination, since that was a customary period of notice. *Id.* at 209. The treaty was therefore terminated by Belgium, not the United States, and the U.S. action that prompted Belgium to terminate the treaty was directed by Congress.

184. *See, e.g.*, 68 CONG. REC. 4591 (1927) (presenting a letter from an unknown source in Mexico explaining the theft of American property by a newly radical Mexican government).

185. *See* Press Release, U.S. Dep't of State, Withdrawal of United States from International Convention for the Abolition of Import and Export Prohibitions and Restrictions (July 5, 1933), reprinted in DEP'T OF STATE, PRESS RELEASES, JULY 1-DECEMBER 30, 1933 18, 18; *see also* 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1933, at 783-86 (1950) (collecting telegram exchanges between U.S. officials that document the considerations surrounding the decision to withdraw from the convention).

186. *See* 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1933, at 552-69 (1949) (collecting telegram exchanges between U.S. officials that document the Insull affair).

treaty was subsequently negotiated, however, Roosevelt withdrew the notice.<sup>187</sup>

In 1936, the Executive Branch withdrew the United States from a commercial treaty with Italy.<sup>188</sup> The State Department wrote a memorandum advising President Roosevelt that this unilateral action was constitutional.<sup>189</sup> While acknowledging that “[t]he question as to the authority of the Executive to terminate treaties independently of the Congress or of the Senate is in a somewhat confused state,” the memorandum maintained that “[n]o settled rule or procedure has been followed.”<sup>190</sup> It also noted that there was a potential conflict between the treaty with Italy and a 1934 trade statute and that, if the treaty were not terminated, the President could “be placed in the position of having to choose between the execution of the act and observance of the treaty.”<sup>191</sup> The memorandum observed that this situation was “closely analogous” to the termination of provisions in the Swiss treaty in 1899, and it said that the 1899 “precedent” was confirmed by the U.S. withdrawal from the import-export treaty in 1933.<sup>192</sup>

### B. *Establishing a Pattern*

Because many of the early-twentieth-century presidential terminations were based on potential conflicts with statutes, these actions would not necessarily have been understood as fully unilateral in nature. By the late 1930s, however, the Executive Branch was increasingly asserting a purely unilateral authority. In 1939, the Roosevelt Administration announced that the United States was terminating a commercial treaty with Japan, after resolutions had been introduced in both houses of Congress supporting withdrawal.<sup>193</sup> In connection with this decision, the State Department argued that the President had unilateral termination authority, this time relying on the “general spirit” of the Supreme Court’s 1936 decision in

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187. See ADLER, *supra* note 75, at 184–85.

188. See 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1936, at 356–59 (1954) (collecting exchanges between U.S. officials that document this withdrawal).

189. Memorandum from R. Walton Moore, Acting U.S. Sec’y of State, to President Roosevelt 5 (Nov. 9, 1936) (on file with author).

190. *Id.* at 2–3.

191. *Id.* at 3–4.

192. *Id.* at 4–5. The State Department Legal Adviser had prepared a memorandum earlier that year on abrogation of treaties. That memorandum contends that, regardless of whether the President has a general power to terminate treaties unilaterally, it seems “that little doubt could arise when, as in the case of the Seaman’s Act, he is called upon to terminate provisions of treaties inconsistent with an Act of Congress and when failure to do so would place this Government in the position of failing to observe its treaty obligations.” HACKWORTH, *supra* note 75, at 327–28 (citing the Legal Adviser’s memorandum).

193. H.R. Res. 264, 76th Cong. (1939); S. Res. 166, 76th Cong. (1939); Letter from Cordell Hull, U.S. Sec’y of State, to Ambassador Horinouchi (July 26, 1939), in 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1939, at 558, 558–59 (1955).

*United States v. Curtiss-Wright Export Corp.*,<sup>194</sup> which had referred to the “delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”<sup>195</sup> The State Department reasoned that “the power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign state,” and it further contended that the President had “full control over the foreign relations of the nation, except as specifically limited by the Constitution.”<sup>196</sup>

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.<sup>197</sup> 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. A year after *Curtiss-Wright*, the Supreme Court decided *United States v. Belmont*,<sup>198</sup> in which it held that a sole executive agreement entered into by President Roosevelt as part of his recognition of the Soviet Union preempted state law.<sup>199</sup> Shortly thereafter, the Court began giving absolute deference to Executive Branch determinations relating to foreign sovereign immunity.<sup>200</sup>

National security soon became directly relevant to the issue of treaty termination and suspension. In 1939, for example, President Roosevelt suspended the London Naval Treaty (which limited naval armaments) because of the changed circumstances created by the war in Europe.<sup>201</sup> Two

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194. 299 U.S. 304 (1936).

195. *Id.* at 320. The Court in *Curtiss-Wright*, in an opinion authored by Justice Sutherland, upheld a delegation of authority from Congress to the President to criminalize arms sales to countries involved in a conflict in Latin America. *Id.* at 329–33.

196. HACKWORTH, *supra* note 75, at 331–32 (excerpting from a State Department memorandum).

197. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 286, 311 (1998).

198. 301 U.S. 324 (1937).

199. *Id.* at 327. The opinion in *Belmont*, like the opinion in *Curtiss-Wright*, was authored by Justice Sutherland. *Id.* at 325; *supra* note 195.

200. *See* *Republic of Mex. v. Hoffman*, 324 U.S. 30, 35–36 (1945) (deferring to the State Department in deciding foreign-government immunity); *Ex parte Republic of Peru*, 318 U.S. 578, 586–87 (1943) (holding that a ship owned by Peru, seized in the course of private litigation, should be released because the State Department declared Peru immune from suit); *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938) (deferring to the Executive Branch in determining whether foreign governments are immune from suit); *see also* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 110–26 (Mariner Books 2004) (1973) (describing Roosevelt’s increasingly aggressive approach to the exercise of foreign-affairs authority); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 8 (1999) (referring to “the triumph of executive discretion in the constitutional regime of foreign relations between 1933 and the close of the Second World War”).

201. *See Armament Reduction*, 1 DEP’T ST. BULL. 354, 354 (1939).

years later, he suspended, for the duration of the war, the International Load Lines Convention (which regulated ocean shipping) after his Attorney General, Francis Biddle, advised him that “[t]he convention may be declared inoperative or suspended by the President.”<sup>202</sup> Biddle also noted, however, that, since “[i]t is not proposed that the United States denounce the convention under [the unilateral withdrawal clause in the treaty], nor that it be otherwise abrogated. . . . [A]ction by the Senate or by the Congress is not required.”<sup>203</sup> The opinion thus seemed to suggest that a full termination of a treaty, as opposed to a suspension, would require legislative action. Nevertheless, the Roosevelt Administration terminated another treaty unilaterally in 1944—a protocol relating to a Latin American trademark treaty—citing the treaty’s general ineffectiveness.<sup>204</sup>

The 1950s saw several additional unilateral presidential terminations, usually in low-profile situations that did not generate much attention, such as the Truman Administration’s withdrawal of the United States from a whaling convention<sup>205</sup> and the Eisenhower Administration’s termination of both a Convention on Uniformity of Nomenclature for the Classification of Merchandise and a Treaty of Friendship, Commerce, and Navigation with El Salvador.<sup>206</sup> Although not solely a U.S. termination, the Eisenhower Administration also entered into a sole executive agreement in 1958 with Morocco to end a treaty relating to the management of a lighthouse in that country.<sup>207</sup>

A 1958 memorandum from the State Department’s Deputy Assistant Legal Adviser for Treaty Affairs, William Whittington, noted that, although “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,” in practice treaties have been terminated in a variety of ways, including through unilateral presidential action.<sup>208</sup> The 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.”<sup>209</sup> Attached to the memorandum were appendices

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202. Int’l Load Line Convention, 40 Op. Att’y Gen. 119, 123 (1941).

203. *Id.*

204. *Treaty Information*, 11 DEP’T ST. BULL. 442, 442 (1944).

205. *Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 83 (1979) [hereinafter *Treaty Termination Hearings*].

206. *See Treaty Information*, 32 DEP’T ST. BULL. 906, 906 (1955) (noting the withdrawal from the nomenclature convention); *Treaty Information*, 38 DEP’T ST. BULL. 238, 238 (1958) (noting the termination of the treaty with El Salvador).

207. Cape Spartel Light: Transfer of Management to Morocco; Termination of Convention of May 31, 1865, Mar. 31, 1958, 9 U.S.T. 527, 532.

208. *See* Whittington Memorandum, *supra* note 25, at 5–6.

209. *Id.* at 5.

listing the various treaty terminations in U.S. history and how they were carried out.<sup>210</sup>

The practice of unilateral terminations continued during the 1960s. In 1962, the Kennedy Administration terminated a commercial treaty with Cuba as part of the United States' embargo policy following the Cuban revolution.<sup>211</sup> In 1965, the Johnson Administration gave notice that the United States was withdrawing from the Warsaw Convention that governs liability for international air carriers,<sup>212</sup> but retracted the withdrawal shortly before the notice period expired.<sup>213</sup>

There were still occasions in this period, however, in which the United States terminated treaties pursuant to congressional directive. In 1951, for example, President Truman terminated commercial treaties with the Soviet Union and various Eastern European countries pursuant to a directive in the Trade Agreements Extension Act of 1951.<sup>214</sup> In 1976, the Ford Administration withdrew the United States from several treaties relating to fishing pursuant to a directive in the 1976 Fishery Conservation and Management Act.<sup>215</sup>

### C. *Termination of the Taiwan Treaty*

During the 1970s, the United States began to pursue closer relations with the People's Republic of China (PRC). As one of the conditions to a normalization of relations between the two countries, the PRC insisted that the United States terminate its 1954 mutual defense treaty with Taiwan. Anticipating a change in Executive Branch policy concerning Taiwan,

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210. *Id.* at 7.

211. See Convention for Commercial Relations with Cuba, U.S.-Cuba, Dec. 11, 1902, 33 Stat. 2136 (establishing good commercial relations between the United States and Cuba); Proclamation No. 3447, Embargo on All Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 7, 1962), reprinted in 76 Stat. 1446 (1962) (terminating commercial relations with Cuba).

212. See *Treaty Information*, 53 DEP'T ST. BULL. 923, 924 (1965) (relating the United States' denunciation of the Warsaw Convention and its attempt to negotiate revised terms).

213. See Press Release, Dep't of State, United States Government Action Concerning the Warsaw Convention (May 5, 1966), reprinted in *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243, 245–46 (1966) (discussing the United States' notification of termination and its subsequent withdrawal of that notice). For commentary suggesting that the proposed unilateral withdrawal would have been unconstitutional, see John H. Riggs, Jr., *Termination of Treaties by the Executive Without Congressional Approval: The Case of the Warsaw Convention*, 32 J. AIR L. & COM. 526, 527–28 (1966), and Comment, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580, 581–82 (1967).

214. See Trade Agreements Extension Act of 1951, ch. 141, 65 Stat. 72 (codified as amended at 19 U.S.C. § 1351 (2012)) (giving the President authority to take action in order to bring trade agreements "into conformity" with the Act); Proclamation No. 2949, 3 C.F.R. § 134 (1949–1953), reprinted in 65 Stat. c44 (1951).

215. See Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 202(b), 90 Stat. 331, 340–41 (giving the Executive Branch power to renegotiate international fishing treaties).

Congress in 1978 enacted (and the President signed) the International Security Assistance Act, which, among other things, expressed “the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty [with Taiwan] of 1954.”<sup>216</sup> In December 1978, President Carter announced that the United States would recognize the PRC as the sole government of China and would terminate the Taiwan treaty pursuant to the unilateral withdrawal clause in the treaty (which required one year’s notice).<sup>217</sup>

In a memorandum advising the President that he had the constitutional authority to terminate the treaty, the State Department Legal Adviser relied heavily on historical practice.<sup>218</sup> The memorandum cited twelve instances in which presidents had purportedly terminated treaties unilaterally, and it included an extensive appendix entitled “History of Treaty Terminations by the United States.”<sup>219</sup> The memorandum concluded 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.”<sup>220</sup>

Carter’s action prompted substantial debate in the Senate. Several resolutions were introduced in early January 1979, including a resolution sponsored by Senator Harry Byrd, Jr., that provided that it was “the sense of the Senate that approval of the U.S. Senate is required to terminate any mutual defense treaty between the United States and another nation.”<sup>221</sup> The Foreign Relations Committee held three days of hearings on this

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216. International Security Assistance Act of 1978, Pub. L. No. 95-384, § 26(b), 92 Stat. 730, 746; *see also* Jimmy Carter, International Security Assistance Act of 1978: Statement on Signing S. 3075 into Law (Sept. 26, 1978), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, 1978, at 1636, 1636 (1978) [hereinafter PUBLIC PAPERS OF JIMMY CARTER].

217. *See* President Jimmy Carter, Address to the Nation: Diplomatic Relations Between the United States and the People’s Republic of China (Dec. 15, 1978), in PUBLIC PAPERS OF JIMMY CARTER, *supra* note 216, at 2264, 2264–65 (recognizing the PRC as the sole government of China and announcing his intention to maintain relations with Taiwan “through nongovernmental means”).

218. *See* Hansell Memorandum, *supra* note 121, at 397–99 (listing past presidential treaty terminations). For criticism of the State Department’s description of the historical practice, *see*, for example, J. Terry Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. LEGIS. 46, 77–78 (1978); David J. Scheffer, Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT’L L.J. 931, 979 (1978); and Jonathan York Thomas, Article, *The Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination*, 6 YALE STUD. WORLD PUB. ORD. 27, 30 (1979).

219. Hansell Memorandum, *supra* note 121, at 397–98, 400.

220. *Id.* at 395.

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

resolution.<sup>222</sup> The hearings included testimony and prepared statements from a variety of witnesses, including a number of scholars. Scholars such as Arthur Bestor, Thomas Franck, and Michael Reisman testified or submitted statements in favor of senatorial or congressional participation in treaty termination.<sup>223</sup> Other scholars, such as Abram Chayes, Andreas Lowenfeld, and John Norton Moore, testified in favor of a unilateral presidential power of termination.<sup>224</sup>

The Foreign Relations Committee rejected the approach of the Byrd Resolution and reported out instead a resolution that would have recognized fourteen grounds for justifying unilateral presidential action to terminate treaty obligations, including the existence of a termination clause.<sup>225</sup> After it reached the Senate floor, however, the Senate (on a vote of 59–35) substituted for its consideration the original Byrd Resolution, after Byrd's motion for substitution was supported by a number of Senators who expressed the view that the President should not have unilateral power over treaty termination.<sup>226</sup> But the Senate never actually voted on this resolution.<sup>227</sup>

In the meantime, former Senator Barry Goldwater, along with a group of eight current senators and sixteen current members of the House of Representatives, filed a lawsuit in the federal district court in D.C. seeking declaratory and injunctive relief to prevent the termination of the Taiwan treaty.<sup>228</sup> The district court initially dismissed the suit without prejudice, reasoning that the legislators would not have standing until there was action taken on the resolutions pending in the Senate.<sup>229</sup> After the substitution of the Byrd Resolution in the Senate, the plaintiffs argued that they now had standing, and the court agreed, noting that the action on the Resolution was "evidence [of] at least some congressional determination to participate in the process whereby a mutual defense treaty is terminated, and clearly falls short of approving the President's termination effort."<sup>230</sup> The court proceeded to reach the merits and concluded that "the President's notice of termination must receive the approval of two-thirds of the United States Senate or a majority of both houses of Congress for it to be effective under

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222. *Treaty Termination Hearings*, *supra* note 205, at iii (indicating that the hearings were held from April 9 to 11, 1979).

223. *Id.* at 25–32, 223–74, 387–96.

224. *Id.* at 306–12, 396–425, 426–43.

225. 125 CONG. REC. 13,685 (1979). For the discussion in the Senate of this issue, see *id.* at 13,672–710.

226. *Id.* at 13,695–96.

227. *Id.* at 13,710.

228. *Goldwater v. Carter*, No. 78-2412, 1979 U.S. Dist. LEXIS 11893, at \*1 (D.D.C. June 6, 1979).

229. *Id.* at \*16–17.

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

our Constitution to terminate the [Taiwan treaty].”<sup>231</sup> In addition to textual and structural considerations, the court relied on historical practice, reasoning that “[t]he predominate United States’ practice in terminating treaties, including those containing notice provisions, has involved mutual action by the executive and legislative branches.”<sup>232</sup>

The D.C. Circuit reversed, holding that President Carter’s termination of the treaty was constitutional.<sup>233</sup> In addition to emphasizing the President’s role as “sole organ” in foreign relations, the court noted that the historical practice was varied and that there was no past instance in which “a treaty [has] been continued in force over the opposition of the President.”<sup>234</sup> The court also emphasized that Carter had acted pursuant to a unilateral withdrawal clause in the treaty and reasoned that “the President’s authority . . . is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year’s notice, and the President’s action is the giving of notice of termination.”<sup>235</sup> In other words, the court was claiming that Carter was acting within the highest category of presidential authority laid out by Justice Jackson in his concurrence in *Youngstown*.<sup>236</sup>

Judge MacKinnon issued a lengthy dissent, focused especially on the history of treaty terminations. He contended that “[c]ongressional participation in termination has been the overwhelming historical practice.”<sup>237</sup> As for the instances of unilateral presidential termination, MacKinnon reasoned:

It is almost farcical for appellant to contend that the President, acting alone, has absolute power to terminate a major United States defense treaty, and by the same token hereafter any defense treaty, because a few earlier Presidents withdrew financial support of a treaty bureau because of non-filing of trademarks by El Salvador, Honduras, Paraguay, et al., and terminated several violated treaties, or terminated treaties relating to a light house museum in Morocco, nomenclature in economic reports, smuggling with a country with

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231. *Id.* at 965.

232. *Id.* at 960–64.

233. *Goldwater v. Carter*, 617 F.2d 697, 699 (D.C. Cir. 1979) (per curiam).

234. *Id.* at 706–07.

235. *Id.* at 708.

236. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

237. *Goldwater*, 617 F.2d at 723 (MacKinnon, J., dissenting).

whom we had no commercial treaty, or with respect to which notices of termination had been given and then withdrawn.<sup>238</sup>

MacKinnon also argued that the majority's suggestion that the treaty itself authorized Carter to engage in unilateral termination was a "deceptive misstatement" since "the President is *not* named *in* the Treaty to give notice of termination" and "[t]he sole issue in this case is who can act for the United States; that issue is not determined by the Treaty but by the Constitution of the United States."<sup>239</sup>

Without hearing oral argument, the Supreme Court vacated the D.C. Circuit's decision and remanded with instructions to dismiss the case.<sup>240</sup> Four Justices reasoned that the case presented a nonjusticiable political question.<sup>241</sup> Providing a fifth vote for nonjusticiability, Justice Powell reasoned that the case was not politically ripe, given that the Senate had never voted on a resolution to disapprove the termination. "If the Congress chooses not to confront the President," said Powell, "it is not our task to do so."<sup>242</sup> The controversy effectively ended with this dismissal.<sup>243</sup>

#### D. *Subsequent Treaty Terminations*

In the years since the controversy over the termination of the Taiwan treaty, the United States has terminated dozens of treaties, and almost all of these terminations have been accomplished by unilateral presidential action. To take one example, the Reagan Administration gave notice in 1985 of its termination of a Treaty of Friendship, Commerce, and Navigation with Nicaragua, and the treaty terminated the following year.<sup>244</sup> In 2002, the

238. *Id.* at 733–34 (emphasis omitted). For additional criticism of the D.C. Circuit's reasoning, see generally Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980).

239. *Goldwater*, 617 F.2d at 737 (MacKinnon, J., dissenting).

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

241. *Id.* at 1002 (Rehnquist, J., concurring) (opinion joined by Justices Stewart and Stevens and Chief Justice Burger).

242. *Id.* at 998 (Powell, J., concurring). Justice Brennan reasoned that the termination was lawful because it was "a necessary incident" to President Carter's recognition of mainland China, which fell within his constitutional authority. *Id.* at 1007 (Brennan, J., dissenting). Justices Blackmun and White wanted to hold oral argument before making a decision. *Id.* at 1006 (Blackmun & White, JJ., dissenting in part).

243. For additional discussion of the termination controversy, see generally VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* (1991). In the mid-1980s, Goldwater introduced a resolution that would have provided that it was the sense of the Senate that, unless otherwise provided in a treaty, termination required either the advice and consent of the Senate or congressional approval. S. Res. 40, 99th Cong., 131 CONG. REC. 678 (1985). But the Senate never voted on the resolution. *See id.* at 679–80.

244. *Economic Sanctions Against Nicaragua*, 85 DEP'T ST. BULL. 74, 74–75 (1985). A federal district court subsequently applied the political question doctrine to dismiss a challenge to this termination. *See Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986) ("[A] challenge to the President's power vis-a-vis treaty termination raise[s] a nonjusticiable political question."). Not all the terminations were unilateral. In 1986, Congress

State Department Legal Adviser's Office listed twenty-three bilateral treaties and seven multilateral treaties that had been terminated by presidential action since termination of the Taiwan treaty.<sup>245</sup> Since then, the Bush Administration terminated two treaties: a protocol to a consular convention in 2005<sup>246</sup> and a tax treaty with Sweden in 2007.<sup>247</sup>

Most of these terminations do not appear to have generated controversy. An exception is President George W. Bush's announcement in 2002 that he was withdrawing the United States from the Anti-Ballistic Missile (ABM) Treaty with Russia. In an Op-Ed article, the prominent constitutional law scholar Bruce Ackerman contended that Bush was acting unconstitutionally and asked rhetorically, "If President Bush is allowed to terminate the ABM treaty, what is to stop future presidents from unilaterally taking America out of NATO or the United Nations?"<sup>248</sup> As noted earlier, thirty-two members of Congress brought suit challenging the constitutionality of the termination of the ABM Treaty, but the suit was dismissed for lack of standing and under the political question doctrine.<sup>249</sup> The Justice Department's Office of Legal Counsel (OLC) issued a memorandum concluding that the President had the authority to suspend or terminate the treaty.<sup>250</sup> The memorandum relies on textual and structural

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directed President Reagan to terminate a tax treaty and an air services treaty with South Africa as part of the Anti-Apartheid Act (which was enacted over Reagan's veto), and he did so. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, 1100, 1104 (directing the President to terminate the treaties); *Current Actions*, 86 DEP'T ST. BULL. 84, 87 (1986) (indicating that the treaties had been terminated).

245. OFFICE OF LEGAL ADVISER, U.S. DEP'T OF STATE, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 202-06 (Sally J. Cummins & David P. Stewart eds., 2002).

246. Frederic L. Kirgis, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHTS add. (Mar. 2005), <http://web.archive.org/web/20120716203621/http://www.asil.org/insights050309a.cfm>.

247. Press Release, U.S. Dep't of the Treasury, United States Terminates Estate and Gift Tax Treaty with Sweden (June 15, 2007), available at <http://www.treasury.gov/press-center/press-releases/Pages/hp463.aspx>.

248. Bruce Ackerman, Op-Ed., *Treaties Don't Belong to Presidents Alone*, N.Y. TIMES, Aug. 29, 2001, <http://www.nytimes.com/2001/08/29/opinion/treaties-don-t-belong-to-presidents-alone.html>. In a very partial description of the historical practice, Ackerman mentioned Congress's 1798 termination of the French treaties and President Polk's solicitation of congressional authorization to terminate the Oregon Territory Treaty in 1846, and then asserted that "[t]he big change occurred in 1978, when Jimmy Carter unilaterally terminated our mutual defense treaty with Taiwan." *Id.*

249. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002). Some members of the House of Representatives proposed a resolution that would have opposed termination of the ABM Treaty on policy grounds, but it did not take a position on the constitutionality of the termination, and the House never voted on it. *See* H.R. Res. 313, 107th Cong. (2001) (asserting that termination of the ABM Treaty could, among other things, "be perceived by other nations as a threat" and "weaken ties with traditional allies"); *see also* 147 CONG. REC. 25,917 (2001) (introducing H.R. Res. 313 but not voting on it).

250. Yoo & Delahunty Memorandum, *supra* note 52, at 9. OLC later disavowed this and another opinion relating to the suspension of treaty obligations, in part because it found

arguments such as the Vesting Clause Thesis and the President's role as the "sole organ" in foreign relations, as well as on historical practice.<sup>251</sup> Invoking the historical gloss concept, the memorandum reasons that "[t]he executive branch has long held the view that the President has the constitutional authority to terminate treaties unilaterally, and the legislative branch seems for the most part to have acquiesced in it."<sup>252</sup> While acknowledging that Congress and the Senate have sometimes been involved in treaty terminations, the memorandum contends that "[t]hese examples represent the workings of practical politics, rather than acquiescence in a constitutional régime."<sup>253</sup> Despite complaints by select members of Congress, there was no formal effort by Congress as a body to oppose the termination of the ABM Treaty,<sup>254</sup> and Congress ultimately approved funding for Bush's missile defense plan.<sup>255</sup>

#### E. *Shift in Scholarly Commentary*

As late as the early twentieth century, most commentators took the position that the President needed either senatorial or congressional approval to terminate a treaty. Charles Butler's highly regarded treatise on the U.S. treaty-making power, published in 1902, noted that treaties could be abrogated "by Congressional action in several different methods" and did not seem to contemplate termination by unilateral presidential action.<sup>256</sup> Similarly, the prominent constitutional law scholar Edward Corwin, in his 1917 book, *The President's Control of Foreign Relations*, stated: "All in

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unconvincing the reasoning in the opinions suggesting that the President could suspend a treaty even when such suspension was not permissible under international law. See Memorandum of Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., for the Files, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 8–9 (Jan. 15, 2009), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20090115.pdf> (indicating that the two opinions should not be relied upon "to the extent they suggest[] that the President has unlimited authority to suspend a treaty beyond the circumstances traditionally recognized"). OLC noted, however, that a 2007 opinion, which it was not disavowing, had observed that presidents have traditionally exercised the power to suspend treaties unilaterally "where suspension was authorized by the terms of the treaty or under recognized principles of international law." *Id.* at 9.

251. Yoo & Delahunty Memorandum, *supra* note 52, at 3–5, 13.

252. *Id.* at 9.

253. *Id.* at 14.

254. See DAVID M. ACKERMAN, CONG. RESEARCH SERV., RS21088, WITHDRAWAL FROM THE ABM TREATY: LEGAL CONSIDERATIONS 6 (2002) (noting that "the ABM Treaty has been terminated by President Bush in accordance with the terms of the treaty, and neither Congress nor the courts have acted to forestall or overturn that action"). Senator Kyl spoke on the floor of the Senate *in favor* of President Bush's authority to terminate the ABM Treaty. See 148 CONG. REC. 4536 (2002) (Sen. Kyl) (arguing that the text and structure of the Constitution, the intent of the Framers, and Supreme Court precedent all established executive authority to terminate treaties).

255. See Paul Richter, *Senate GOP Wins Funding Battle for Missile Defense*, L.A. TIMES, June 27, 2002, <http://articles.latimes.com/2002/jun/27/nation/na-missile27>.

256. 2 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES § 384, at 129 (1902).

all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the proposition that the power of terminating the international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone.”<sup>257</sup>

Quincy Wright similarly supported legislative involvement in treaty termination in his important 1922 treatise on foreign relations law, although his discussion is somewhat more equivocal than Corwin’s, stating that the President “ought not to [terminate] without consent either of Congress or of the Senate, except in extraordinary circumstances.”<sup>258</sup> Also writing in 1922 (shortly before becoming Solicitor of the State Department), Charles Cheney Hyde noted in his treatise on international law that “[i]n behalf of the United States, notice of termination is given by the President, commonly in pursuance of a joint resolution of the Congress; and it has followed the unanimous resolution of the Senate.”<sup>259</sup>

As noted earlier, an important exception to this early-twentieth-century consensus was the view of the constitutional law scholar Westel Willoughby, who stated without discussion in his 1910 constitutional law treatise that “[t]hrough the Senate participates in the ratification of treaties, the President has the authority, without asking for senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States.”<sup>260</sup> The second edition of Willoughby’s treatise, published in 1929, contains a much more extensive discussion of the issue of treaty termination, but it argues only that the President is not obligated to submit his treaty terminations to the full Congress and does not specifically address whether he must obtain the consent of the Senate.<sup>261</sup>

In any event, by the 1920s there were additional commentators who defended a unilateral presidential authority to terminate treaties. For example, John Mabry Mathews, in his 1922 treatise on foreign relations law, argued that

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257. EDWARD S. CORWIN, *THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS* 115 (1917).

258. QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 260 (1922). The year before, however, Wright had stated that “[p]ractice seems to sanction independent initial negotiation and denunciation of treaties by the President.” Quincy Wright, *The Control of Foreign Relations*, 15 *AM. POL. SCI. REV.* 1, 11 (1921) (emphasis added).

259. 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 539, at 80 (1922).

260. 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 223 (1910).

261. See 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 324, at 585 (2d ed. 1929) (“[T]here is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval . . .”). On the issue of whether the President needed congressional approval, Willoughby expressly disagreed with Corwin. See *id.* at 585 n.59 (stating that “[t]he author cannot, therefore, accept the conclusion of Corwin” that the power of treaty termination rests with Congress).

since the Senate has already, in its treaty-making capacity, acted upon a treaty providing for its termination upon notice, no further Senatorial action is necessary in effecting such termination, and that the President alone, as the mouthpiece of the nation in its international relations, may denounce the treaty by giving notice of its termination.<sup>262</sup>

Similarly, Jesse Reeves (a political science professor at the University of Michigan) expressed the view in 1921 that “[i]t seems to be within the power of the President to terminate treaties by giving notice on his own motion without previous Congressional or Senatorial action.”<sup>263</sup>

Nevertheless, scholarly views continued to be mixed, and there did not appear to be any settled understanding that the President possessed a unilateral power of termination. Berkeley law professor Stefan Riesenfeld, writing in 1937, argued that

[t]he most logical view is that the power to denounce a treaty is vested in the President by and with the advice and consent of the Senate, so that the department of the government which makes the treaty can terminate it, regardless of whether the termination is by unilateral, but lawful, denunciation or by a new treaty.<sup>264</sup>

In his history of the Senate, published in 1938, George Haynes observed that there was uncertainty about whether the President could unilaterally terminate a treaty and that “[d]enunciation of treaties has usually been by joint resolution, originating sometimes in the House, sometimes in the Senate.”<sup>265</sup>

By the 1940s, however, scholarly commentary was increasingly supportive of unilateral presidential authority. For example, the second edition of Hyde’s treatise on international law (published in 1945 after Hyde had served as Solicitor for the State Department) added to what it had stated in 1922 as follows:

The President is not believed, however, to lack authority to denounce, in pursuance of its terms, a treaty to which the United States is a party, without legislative approval. In taking such action, he is merely exercising in behalf of the nation a privilege already conferred upon it by the agreement, and which involves no necessary modification thereof. Denunciation in such case may be regarded as

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262. JOHN MABRY MATHEWS, *THE CONDUCT OF AMERICAN FOREIGN RELATIONS* 252 (1922).

263. Reeves, *supra* note 101, at 38.

264. Riesenfeld, *supra* note 135, at 660.

265. 2 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 670 (1938).

a mere normal incident in the conduct of foreign relations as they are confided to the Executive.<sup>266</sup>

This was also a time of significant discussion of the President's power to conclude executive agreements, and commentators who favored broad presidential authority to conclude such agreements also tended to favor unilateral presidential authority to terminate treaties.<sup>267</sup>

There were additional scholarly endorsements of unilateral presidential termination authority in the 1950s and 1960s.<sup>268</sup> The American Law Institute's *Restatement (Second) of the Foreign Relations Law of the United States*, published in 1965, continued this trend. It contended that the President had the authority to terminate a treaty pursuant to the terms of the treaty or based on the grounds for termination allowed under international law.<sup>269</sup> The *Restatement* explained that this power stemmed from "the authority of the President to conduct the foreign relations of the United States as part of the executive power vested in him by Article II, Section 1 of the Constitution."<sup>270</sup>

266. 2 CHARLES CHENEY HYDE: INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 539, at 1519–20 (2d rev. ed. 1945) (footnote omitted).

267. See, e.g., WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES 306 (1941) (claiming that "[i]n treaty making[,] . . . negative action, not being feared by the constitution makers, was left to the repository of general executive power"); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 336–37 (1945) (asserting that termination of both executive agreements and treaties can be "effected by executive denunciation, with or without prior Congressional authorization"). Many years later, in the context of President Carter's termination of the Taiwan Treaty, McDougal appeared to have changed his mind. See *Treaty Termination Hearings*, *supra* note 205, at 387, 391 (statement of Michael Reisman) (averring on behalf of himself and McDougal that "the constitutional system, if we are going back to this fundamental dynamic, seems to be based on a notion of sharing of power, rather than shifting it all to one branch"). McDougal also joined an amicus brief in the Taiwan case on behalf of the plaintiffs, Brief of Myres S. McDougal & W. Michael Reisman as Amici Curiae in Support of Petition for Certiorari, *Goldwater v. Carter*, 444 U.S. 996 (1979) (No. 79-856), and co-authored an article in the *National Law Journal* arguing against a unilateral presidential power of termination. See Michael Reisman & Myres S. McDougal, *Who Can Terminate Mutual Defense Treaties?*, NAT'L L.J., May 21, 1979, at 19, 19 ("[I]n the absence of material breach or *rebus sic stantibus* and, arguably, in the absence of an overwhelming external crisis to the body politic, the presumption must be that the president requires congressional authorization to terminate any agreement, other than a presidential agreement.").

268. See, e.g., 2 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT § 215, at 132 (1963) (noting that the unilateral termination of a treaty by the President "appears justified by the constitutional position of the President as the nation's sole organ of foreign intercourse"); Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 887 (1958) (expounding that, because the "conduct of foreign relations" is a "plenary executive power" and no limitation is placed on treaty termination under the Constitution, the President has the power to unilaterally terminate treaties).

269. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 163 (1965).

270. *Id.* § 163 cmt. a.

In his influential foreign relations law treatise, published in 1972, Louis Henkin suggested that the answer to the constitutional question was unclear but that “since the President acts for the United States internationally he can effectively terminate or violate treaties, and the Senate has not established its authority to join or veto him.”<sup>271</sup> He also noted that “[i]f issues as to who has power to terminate treaties arise again, . . . it seems unlikely that Congress will successfully assert the power.”<sup>272</sup> Here, Henkin appears to have been making a political science observation as much as a legal observation: whatever one may think about the correct distribution of constitutional authority on this issue, Henkin was suggesting that the President’s assertion of unilateral authority was likely to prevail as a practical matter in congressional–executive relations.<sup>273</sup> Historical practice since 1972 tends to support this assessment.

The controversy over President Carter’s termination of the Taiwan treaty revealed that the issue was still not settled, and, as noted, a number of scholars at that time took the position that congressional or senatorial approval was required for treaty termination.<sup>274</sup> Since that termination, however, the controversy seems to have receded. Like the earlier *Restatement (Second)*, the *Restatement (Third) of the Foreign Relations Law of the United States*, published in 1987, contends that the President has the authority to terminate a treaty as long as the treaty allows for unilateral withdrawal or there is an international-law ground for termination.<sup>275</sup> A number of scholars, including some who do not always favor expansive readings of presidential authority, have agreed with this proposition.<sup>276</sup> As a result, it is probably fair to describe this as the prevailing, although certainly not unanimous, view.<sup>277</sup>

271. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 169 (1972).

272. *Id.* at 170.

273. See also FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 194 (2d ed. 1989) (“[T]he President has demonstrated an effective power to terminate treaties, and the Senate has not successfully challenged that right to do so.”).

274. See *supra* text accompanying note 223.

275. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 339 (1987).

276. See, e.g., MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 153–55 (1990) (pronouncing the *Restatement*’s position “sound”); Jinks & Sloss, *supra* note 38, at 156 (agreeing with the functionalist rationale of presidential power to terminate treaties).

277. In its comprehensive 2001 study on treaties, prepared for the Senate Foreign Relations Committee, the Congressional Research Service noted that “[t]he constitutional requirements that attend the termination of treaties remain a matter of some controversy,” and it described the issue of whether the President has a unilateral termination power to be “a live issue.” *CRS STUDY*, *supra* note 42, at 198–99. Nevertheless, it also noted that, “[a]s a practical matter . . . the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect.” *Id.* at 201; cf. H. Jefferson Powell, Essay, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *GEO. WASH. L. REV.* 527, 562 (1999) (“Despite its obvious importance and the

#### IV. Implications for Law, Theory, and Politics

This Part considers the implications of the historical practice of U.S. treaty terminations, both for the specific issue of whether the President has a unilateral termination authority and for the more general historical gloss method of constitutional interpretation. It also reflects on the extent to which a practice-based account of institutional authority, such as the account given here, constitutes a description of constitutional law as opposed to a description of mere politics.

##### A. *Current Law of Treaty Termination*

As we have seen, as a matter of practice, presidents today exercise a unilateral power of treaty termination. The precedent for this practice can be traced back to the end of the nineteenth century, and the practice has been especially robust since the 1930s.<sup>278</sup> Moreover, with the important exception of the debate over the termination of the Taiwan Treaty, Congress has not seriously opposed exercises of this presidential authority.<sup>279</sup> Even during the Taiwan Treaty debate, the Senate Foreign Relations Committee took the position that the President had the authority to terminate a treaty when, as was true there, termination was permissible under international law. To be sure, a majority of the Senate appeared to disagree with the Committee, but it is also the case that the full Senate never voted on any resolution to contest the President's authority.

As discussed in Part I, most accounts of how historical practice can inform the separation of powers would require "acquiescence" by the affected branch of government. There are a number of conceptual difficulties with this concept, however, especially as applied to Congress, and these difficulties argue for caution before treating mere inaction by Congress as acquiescence.<sup>280</sup> Nevertheless, the congressional inaction surrounding the issue of treaty termination is noteworthy. First, it has been longstanding, involving numerous congresses and presidential administrations, during times of both unified and divided government. With the exception of the debate over the termination of the Taiwan Treaty, there has been a century of congressional passivity in the face of presidential treaty terminations. Second, Congress has failed to protest presidential terminations even with "soft law" measures such as one-house resolutions or statements by congressional leadership, even when presidential treaty terminations have received significant public attention (as they did, for example, in both the Taiwan termination debate and the

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substantial history surrounding the issue, the question of which political branch has the power to withdraw from or terminate treaties remains unsettled.").

278. See *supra* subpart III(B).

279. See *supra* subpart III(C).

280. See *supra* text accompanying notes 67–71.

debate over the termination of the ABM Treaty). Third, even though it has approved numerous treaties containing withdrawal clauses, the Senate has failed to address the question of which U.S. actor can invoke these clauses, even though it could easily do so in its resolutions of advice and consent.<sup>281</sup>

There are, in any event, reasons for crediting historical practice in the separation of powers area that do not turn on institutional acquiescence.<sup>282</sup> One such reason is the general desirability, for legitimacy and other reasons, of having an account of constitutional law that bears a reasonable resemblance to actual constitutional practice, both now and in the foreseeable future.<sup>283</sup> In addition, if in fact government actors look to past practice to inform their own understanding of—and to shape their claims about—the law, legal philosophers working in the tradition of H.L.A. Hart would treat that second-order practice as itself a fundamental feature of the legal order.<sup>284</sup> These considerations have particular salience for the issue of treaty termination. Unilateral presidential termination of treaties is an established and longstanding practice, and it seems unlikely that Congress will do anything in the coming years to destabilize that practice. Moreover, the courts have shown little inclination to resolve the issue, and the longer they wait the more entrenched the practice becomes. As a result, an account of modern U.S. constitutional law that denied a presidential authority to terminate treaties (at least as a general matter) would face serious descriptive limitations.<sup>285</sup>

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281. Cf. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 399–405 (2000) (discussing conditions imposed by the Senate in connection with its ratification of human rights treaties).

282. See Bradley & Morrison, *supra* note 1, at 456–60 (describing reasons for crediting historical practice concerning separation of powers).

283. See *id.* at 456 (arguing that the legitimacy of a law is partially tied to actual behavior and practice related to it); cf. RONALD DWORKIN, *LAW'S EMPIRE* 66 (1986) (“The justification need not fit every aspect or feature of the practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.”); LON L. FULLER, *THE MORALITY OF LAW* 81 (rev. ed. 1969) (discussing the importance of “congruence between official action and the law”).

284. See H.L.A. HART, *THE CONCEPT OF LAW* 94–99 (3d ed. 2012) (discussing secondary “rules of recognition”); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 150 (Sanford Levinson ed., 1995) (“The ultimate rule of recognition is a matter of social fact, and so determining it is for empirical investigation rather than legal analysis.”); see also Matthew D. Adler & Kenneth Einar Himma, *Introduction* to *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* xiii, xv (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (“[T]he U.S. rule of recognition may be substantially longer and more complicated than a simple reference to the 1787 Constitution (or the Amendment Clause thereof), in part because it may give independent effect to extraconstitutional sources of law, such as judicial precedent or official custom.”).

285. Because the precise contours of constitutional custom are contestable, it is still possible to argue as a descriptive matter that certain types of treaties are not subject to unilateral presidential termination. It might be argued, for example, that in light of Congress’s power to declare war, a president may not unilaterally terminate a peace treaty.

The absence of judicial review may itself be related to the longstanding nature of the practice. In abstaining on this issue, courts may reasonably perceive that the durability of a practice over numerous presidential administrations is evidence that the practice is functionally desirable, or at least not too functionally problematic.<sup>286</sup> It is easy to imagine that there are advantages to the United States of being able to make credible threats of exit from treaty regimes as part of negotiations to reform international institutions or induce better compliance by its treaty partners—advantages that could be facilitated by allowing for unilateral presidential action.<sup>287</sup> Moreover, it is possible that ease of exit as a matter of U.S. constitutional procedure makes it easier to persuade the Senate to agree to such treaties in the first place.<sup>288</sup> While such ease of exit could also in theory be destabilizing to foreign relations, it is not obvious from the historical record that there is any presidential tendency to devalue international commitments more than Congress.

For all these reasons, the best description of the current U.S. constitutional law governing treaty termination is probably as described by the *Restatement (Third) of the Foreign Relations Law*: the President has the unilateral authority to terminate treaties when such termination is permitted under international law and is not disallowed either by the Senate in its advice and consent to the treaty or by Congress in a statute.<sup>289</sup> Unlike the *Restatement (Third)*, however, which chiefly relies on a purported implication of the President's role as the "sole organ" in foreign affairs,<sup>290</sup> the account presented here is grounded chiefly in the longstanding accretion of Executive Branch practice and claims in the face of congressional inaction and judicial abstention.

Some scholars (and, for a time, the Executive Branch during the Bush Administration) have gone even further, suggesting that the President can

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286. Cf. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936) (explaining, in declining to invalidate a congressional delegation of foreign-affairs authority to the President, that "[t]he uniform, long-continued and undisputed legislative practice" of making broad delegations to the President in foreign affairs "rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb").

287. Cf. Matthew C. Waxman, *The Constitutional Power to Threaten War*, 123 YALE L.J. (forthcoming 2014) (arguing that, in thinking about the scope of the President's war authority, it is important to consider the President's ability to threaten war).

288. Recall that an argument along these lines was made, albeit unsuccessfully, in an effort to broker a compromise on the Versailles Treaty. See *supra* notes 159–61 and accompanying text.

289. See *supra* note 275 and accompanying text.

290. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 reporters' note 1 (1987) (arguing that "[a] power so characterized would seem to include the authority to decide on behalf of the United States to terminate a treaty that no longer serves the national interest, or is out of date, or which has been breached by the other side" while also stating that the power to terminate treaties "is implied in [the President's] office as it has developed over almost two centuries" (emphasis added)).

(like Congress) terminate or override a treaty's domestic effect even when there is no basis in international law for terminating the treaty.<sup>291</sup> That proposition is highly contested, however, and there is little historical practice in support of it. Moreover, the unusual decision in 2009 by the Office of Legal Counsel to withdraw an earlier claim of this authority renders it even more suspect.<sup>292</sup>

To say that the President has a unilateral authority to terminate treaties is not to say that this is an *exclusive* presidential power. If it is merely a concurrent power shared with either the full Congress or the Senate, then either Congress or the Senate could potentially place limitations on it. The termination authority, in other words, would fall within what Justice Jackson described in *Youngstown* as an intermediate “zone of twilight” in which the President and Congress might have overlapping authority.<sup>293</sup> If Congress or the Senate took action to prohibit presidential termination—for example, if the Senate made senatorial approval of termination a condition of its advice and consent to the treaty—then a unilateral presidential termination in violation of such a condition would cause the President's action to fall within what Jackson referred to as the “lowest ebb” of presidential authority.<sup>294</sup>

During the debates over the termination of the Taiwan Treaty, the Executive Branch suggested that it viewed the presidential power of

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291. See, e.g., HENKIN, *supra* note 41, at 214 (arguing that when the President terminates a treaty, it ceases to exist in international and domestic law); John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2242 (1999) (arguing that because the President, rather than Congress, has full policymaking control in treaty formation, the President may terminate a treaty unilaterally at will).

292. See *supra* note 250. This is an example of how international law might at least indirectly limit presidential authority: if international law causes a treaty to remain in force, then the U.S. Constitution may give the treaty a domestic-law status that cannot be terminated unilaterally by the President. A slight potential counterexample occurred in 2005, when the Bush Administration purported to withdraw the United States from a protocol to a consular convention. The Administration seemed to suggest that the withdrawal was effective immediately, whereas it was arguable that international law required a year's notice. See Kirgis, *supra* note 246 (discussing the legal ramifications of withdrawing from the consular convention). For additional consideration of potential interactions between international law and the separation of powers, see Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987 (2013).

293. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”); see also GLENNON, *supra* note 276, at 152 (arguing that “in the face of congressional silence, treaty termination by the President does not impinge upon the constitutional prerogatives of the Senate or Congress”).

294. See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”).

termination as exclusive.<sup>295</sup> Importantly, though, the Senate Foreign Relations Committee made clear during the debate that it did not accept that proposition, despite otherwise favoring robust presidential authority with respect to treaty terminations.<sup>296</sup> Moreover, there is no significant historical practice to support the Executive Branch’s claim. Perhaps for this reason, the *Restatement (Third)* contends that if the Senate gave its advice and consent to a treaty on the condition that any termination occur only with its consent, and the President proceeded to conclude the treaty, “he would be bound by the condition.”<sup>297</sup> A number of scholars have expressed agreement with this proposition.<sup>298</sup> In its 2001 study on treaties prepared for the Senate Foreign Relations Committee, the Congressional Research Service correctly noted that “the 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.”<sup>299</sup>

#### B. *Constitutional Interpretation and Change*

The account given in subpart IV(A) of the current constitutional law of treaty termination has potential implications for theories of constitutional interpretation and change. Under that account, a unilateral presidential termination authority does not exist today because of an assessment of founding intent or understanding. Nor does it follow clearly from constitutional text or structure, or from judicial decisions, although those aspects of constitutional interpretation are of course relevant. Rather, the President’s constitutional authority for this issue exists in part because *some aspects of U.S. constitutional law are made by the participants in the*

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295. See *Treaty Termination Hearings*, *supra* note 205, at 218 (statement of Larry A. Hammond, Deputy Assistant Att’y Gen., Office of Legal Counsel) (“[W]e do not believe that the Senate may expand that advice and consent power by attaching reservations with respect to termination.”).

296. See S. REP. NO. 96-119, at 11 (1979) (expressing the view that it was “clear beyond question” that the Senate could validly limit the President’s authority to terminate a treaty by placing a condition on such termination in the Senate’s advice and consent to the treaty).

297. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 reporters’ note 3 (1987).

298. See, e.g., GLENNON, *supra* note 276, at 156 (arguing that the Constitution compels the President to follow any termination procedure prescribed by the Senate); Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247, 279–86 (2013) (arguing that “for cause” limitations imposed by the Senate on the President’s treaty-termination power are constitutional); see also Powell, *supra* note 277, at 563 (concluding, based largely on historical practice, that the power of treaty termination is not exclusive to the President). Presumably, Congress could similarly limit presidential withdrawal from “congressional–executive agreements”—that is, international agreements approved or authorized by a majority of both houses of Congress rather than two-thirds of the Senate. See Hathaway, *supra* note 27, at 1332–33 (discussing possible limitations that Congress can place on the President in such agreements).

299. CRS STUDY, *supra* note 42, at 199.

*system over time.* Treaty termination is, in another words, an instance of what some scholars have termed “constitutional construction”—the fleshing out of constitutional meaning in ways that go beyond merely interpreting constitutional text.<sup>300</sup>

The best description of this constitutional law today is also different from the description that most constitutional observers would have been given, say, in 1900. Treaty termination thus provides a vivid illustration of how constitutional understandings can change even when the courts are not involved. This change did not occur at one particular moment in time but rather developed over the course of decades. While the dispute over President Carter’s termination of the Taiwan Treaty in the late 1970s was important in leading to a consolidation of presidential authority over this issue, that consolidation was facilitated by the accretion of claims and practice that had already occurred. The dynamic described here thus differs from accounts of constitutional change that focus primarily on dramatic moments and episodes.<sup>301</sup> There are reasons to believe, moreover, that something like this pattern of constitutional change can be identified for other issues as well, especially in the area of separation of powers.<sup>302</sup>

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300. See JACK M. BALKIN, *LIVING ORIGINALISM* 5 (2011) (noting that the actions of all three branches of government can contribute to constitutional construction); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 228 (1999) (discussing constitutional construction, the realm in which “the Constitution adapts and evolves to accommodate and to cause external change”); see also STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013) (considering how modern war powers authority has been constitutionally constructed); Alan M. Wachman, *Carter’s Constitutional Conundrum: An Examination of the President’s Unilateral Termination of a Treaty*, 8 FLETCHER F. WORLD AFF. 427, 456 (1984) (contending that “a decision [about treaty termination authority] would be a constitutional construction of our own making, not one found in the document [of the Constitution]”). For additional discussion of the concept of constitutional construction and the relationship of this concept to originalist theories of constitutional interpretation, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013) (discussing originalism and constitutional construction).

301. See generally, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that there are rare instances in American politics of “higher lawmaking” sufficient to change the Constitution despite the absence of a formal amendment); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 *U. PA. L. REV.* 991 (2008) (exploring the effect of “constitutional showdowns,” which involve interbranch confrontations that can produce precedent about the meaning of the Constitution).

302. For preliminary case studies on war powers and congressional–executive agreements that describe somewhat comparable patterns, see Bradley & Morrison, *supra* note 1, at 461–76. See also Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *TEXAS L. REV.* 961, 1009 (2001) (arguing, in addressing the debate over the constitutionality of congressional–executive agreements, that constitutional change can and does occur through “increments” rather than dramatic points in time); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 *N.Y.U. L. REV.* 1338, 1355 (1993) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)) (suggesting, in a consideration of the distribution of war authority between Congress and the President, that the relevant constitutional law stems from “an accretion of interactions among the branches” that “gives rise to basic norms governing the branches’ behavior in the area”).

Very likely the change in treaty-termination practice was driven in part by other changes—such as the increased role of the United States in the world—that were contributing to the enhancement of Executive authority across a wide range of issues.<sup>303</sup> The growth in both treaty-making in general, and the increasingly widespread inclusion of unilateral withdrawal clauses in treaties, probably also were factors. But lawyers, including lawyers within the State Department as well as legal scholars, also appear to have played an active role in assessing and influencing the relationship between the constitutional practice and constitutional understandings.<sup>304</sup> While not playing a direct role, the Supreme Court also may have helped facilitate the shift, through its increasingly deferential posture towards the Executive Branch starting in the 1930s.<sup>305</sup>

That constitutional change occurs in the United States in this way does not necessarily mean, of course, that it is desirable. The lack of modern resistance by Congress to presidential unilateralism on treaty termination could be for normatively attractive reasons, such as a recognition that the President is likely to have better information about the costs and benefits of such action and will have more negotiating power if he can make threats that are not dependent on legislative ratification. But this lack of resistance could be for other reasons, such as a disinterest by members of Congress in issues that are unlikely to be of concern to constituents, a phenomenon that may apply to a broad range of foreign-affairs issues, including treaty termination.<sup>306</sup> If so, crediting such inaction might produce socially undesirable outcomes.

The accretion dynamic described here also implicates tradeoffs associated more generally with the idea of “common law constitutionalism,” an approach usually associated with judicial decision making but which in theory might also apply to constitutional reasoning by nonjudicial actors.<sup>307</sup> On the one hand, having the law develop through the accretion of precedents can lead to path dependency and, relatedly, a lack of

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303. See *supra* notes 198–204 and accompanying text.

304. See *supra* notes 146, 189, 192, 202, 208 and accompanying text.

305. See *supra* text accompanying notes 198–200. Although not explored here, the social science literature on “historical institutionalism” might offer additional insights for assessing this sort of change in institutional practice. Recent scholarship in that area has focused on how institutions change, sometimes dramatically, through incremental shifts. See generally, e.g., PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004); KATHLEEN THELEN, *HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN GERMANY, BRITAIN, THE UNITED STATES, AND JAPAN* (2004).

306. See Bradley & Morrison, *supra* note 1, at 442 (describing the focus on reelection as a primary motivator for the actions of members of Congress).

307. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925 (1996) [hereinafter Strauss, *Constitutional Interpretation*] (describing common law constitutionalism); see also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33–42, 46–49 (2010) (same).

concentrated deliberation. On the other hand, it can also help ensure that the law is shaped to address specific, real-world contexts rather than abstract speculations about the future. This benefit might have particular salience for foreign relations law issues, such as treaty termination, in light of the ever-changing nature of the international environment and the United States' role within it. The wide variety of situations that might trigger a decision to suspend or terminate treaty obligations, or to threaten to do so, also supports an inductive, evolutionary approach to the issue rather than one based on a general theory or abstract reasoning.

Like any precedent-based approach, the historical gloss method of discerning the separation of powers also presents interpretive challenges. As an initial matter, there can be difficult questions about what counts as relevant practice. For example, it might be unclear how to weight claims of authority made by institutional actors that are not carried out (such as treaty terminations that are threatened but then rescinded). In addition, customary practice is not self-liquidating; it requires interpretation and description, which inevitably involves an element of judgment and subjectivity.<sup>308</sup> Of course, the same is probably true of other sources of constitutional interpretation, but the lack of a canonical text may exacerbate the difficulty. Moreover, if the relevant law is tied to practice, then the law can potentially change over time, as in fact appears to have happened with respect to the authority over treaty termination. Although this might be perceived as a virtue in that it allows the law to adapt to changing conditions, it might also pose challenges for stability and predictability in the law.<sup>309</sup> Again, though, this is not a problem unique to this interpretive source; constitutional law can and does change, for example, through Supreme Court interpretations. At least with Supreme Court opinions, however, there is an understood public text that serves as a point of reference and potentially also as a stare decisis break on deviations.

There is another potential problem that relates specifically to the reliance on historical practice in the area of separation of powers. For a

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308. See, e.g., Richard Craswell, *Do Trade Customs Exist?*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 118, 122 (Jody S. Kraus & Steven D. Walt eds., 2000) (“[A]ny history of prior decisions will always underdetermine the possible patterns that might be ascribed to that history.”); Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1105 (2001) (reviewing DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* (2001)) (“As a theoretical matter, custom has its own problems. Not least among these are the questions of what counts as the relevant custom, at what level of generality, and for how long.”). But cf. Michael D. Ramsey, *The Limits of Custom in Constitutional and International Law*, 51 SAN DIEGO L. REV. (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2249133](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249133) (distinguishing between applications of custom that do not involve contested value judgments and those that do).

309. See, e.g., Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1869 (noting that constitutional conventions “are under constant pressure of erosion”).

variety of reasons, the Executive Branch probably has a greater ability than Congress to generate both institutional practice and instances of nonacquiescence.<sup>310</sup> If so, then there is an obvious danger that a practice-based approach will favor Executive authority over the long term, which may contribute to an imbalance of authority between the branches. Indeed, it is generally thought that presidential authority has expanded in the modern era relative to congressional authority.<sup>311</sup> This phenomenon might be exacerbated by a tendency of Executive Branch lawyers to over-claim about past practice, something that appears to have been the case at various times with respect to the issue of treaty termination.<sup>312</sup>

Many commentators have suggested that the solution to the potential imbalance between the ability of Congress and the President to take direct action is greater judicial review.<sup>313</sup> It may well be that some additional amount of judicial review is needed in the separation of powers area, especially if judicial abstention is premised on the idea that Congress has sufficient capacity and incentives to sufficiently guard its institutional interests.<sup>314</sup> At the same time, courts are themselves part of the separation of powers structure, and thus there is no guarantee that they will be less acquiescent than Congress when faced with Executive unilateralism.<sup>315</sup>

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310. See Bradley & Morrison, *supra* note 1, at 439–45 (discussing structural impediments, political asymmetries, and issues of congressional–executive relations as explaining why Congress and the President “are not equally situated in their ability to take action”); see also Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133–34 (1999) (describing a variety of ways in which presidents can take actions that have legal effect without the participation of Congress).

311. See Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1381 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)) (“It is widely recognized that the expansion of presidential power from the start of the twentieth century onward has been among the central features of American political development.”).

312. See *supra* notes 50–52, 218 and accompanying text.

313. See, e.g., ELY, *supra* note 302, at 54 (discussing how the courts’ “relative insulation from the democratic process . . . situate[s] them uniquely well to police malfunctions in that process”); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 7 (1992) (arguing that judges should stop abdicating in favor of the other branches of government in foreign-affairs cases because they “are much better suited than is sometimes alleged to make decisions incidentally affecting foreign relations and national security”); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 181–84 (1990) (noting that “the role of judges is to define the rule of law by drawing the line between illegitimate exercises of political power and legitimate exercises of legal authority,” in part by moving away from doctrines of abstention in certain types of cases).

314. See Bradley & Morrison, *supra* note 1, at 451–52 (questioning “Madisonian assumptions about congressional capacity and motivation” and arguing that “courts should be more circumspect about invoking congressional acquiescence as a basis for deferring to executive practice”).

315. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1752 (2013) (“[A]rguments for ‘Madisonian’ judging go wrong by assuming that judges stand outside the Madisonian system.”); cf. Jide Nzelibe, *Our Partisan Foreign Affairs*

Moreover, for a variety of reasons, courts often give weight to established patterns of governmental practice.<sup>316</sup> If so, they might actually reduce Congress's ability to resist assertions of presidential authority rather than enhance it, by instantiating Executive practice into judicial doctrine.

In any event, it is worth noting that the shift to a new understanding of presidential authority on treaty termination cannot be attributed simply to Executive aggrandizement. It is striking how actively involved Congress and the Senate were in these issues in the nineteenth and early twentieth centuries, even in instances in which presidents sought to act unilaterally. That sort of congressional focus on treaty termination dissipated, however, by the 1930s. Although the issue would resurface in select instances of policy debate, most notably in the debate over the termination of the Taiwan Treaty, Congress and the Senate no longer sought to protect institutional prerogatives relating to treaty termination in any systematic way. Moreover, Congress and the Senate seem largely to have given up on the issue since the Taiwan debate, mounting only token resistance at the time of the termination of the ABM Treaty and no resistance at all to dozens of other presidential terminations.

Whether normatively attractive or not, the influence of historical practice on the separation of powers is likely to vary depending on the issue. Treaty termination is an especially good candidate for it, given the lack of any specific constitutional text relating to the issue.<sup>317</sup> The overlay

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*Constitution*, 97 MINN. L. REV. 838, 899–900 (2013) (“Even though judges and academic commentators may not necessarily be susceptible to the same instrumental motivations as elected officials, they may very well be plagued by both the kinds of cognitive biases and motivated reasoning that largely track partisan judgments in the electoral arena.”).

316. See Bradley & Morrison, *supra* note 1, at 418–22 (discussing the Supreme Court's recognition of “the significance of . . . practice-based ‘gloss’” when textual or other forms of guidance are absent or ambiguous).

317. When there is constitutional text that is perceived to be clear, it is likely to serve as a focal point for the practice of government actors. See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 708 (2011) (noting that “it is an indisputable feature of constitutional practice that the text is taken to be authoritative within its domain”); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 300–01 (1993) (“Relatively clear [constitutional] provisions in the separation of powers area may be enforced because they are natural focal points of bargains.”); Strauss, *Constitutional Interpretation*, *supra* note 307, at 911 (describing “conventionalism” as “a way of avoiding costly and risky disputes and of expressing respect for fellow citizens” through “allegiance to the text of the Constitution”). Relatedly, clear text may have a tendency to “crowd out” norms based on practice. See Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in THE RULE OF RECOGNITION, *supra* note 284, at 69, 76. That said, whether text is perceived as being clear might itself be affected by practice. See Bradley & Morrison, *supra* note 1, at 431; see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text* (Feb. 19, 2014) (unpublished manuscript) (on file with author) (developing this point). The perception of textual clarity might also be affected by what is at stake, see Levinson, *supra*, at 709–10 (asserting that the Constitution is perceived as being clear on many low-stakes issues but unclear on many high-stakes ones), and by one's

of a mix of international-law rules governing treaty termination, as well as potential distinctions between suspension and termination and between partial and complete termination, have also made presidential unilateralism relating to the issue a more complicated target to assess and criticize. In addition, judicial review has been especially limited for this issue, which means that the political branches have had to work the issue out themselves, without even much of a shadow of judicial supervision. On issues for which there is more textual guidance, a less complicated legal landscape, or a greater likelihood of judicial intervention, practice is likely to play a lesser role. Certainly decisions like *INS v. Chadha*<sup>318</sup> confirm that the Supreme Court will not inevitably give effect to even longstanding political-branch practice.<sup>319</sup>

### C. *Is It Law?*

Another challenge to the practice-based approach to constitutional authority described in this Article would be to dismiss it as merely an account of politics rather than law. The argument would be that, without any dispositive judicial resolution, the practice will simply be the result of the push and pull of the political process. The constitutional “law” of treaty termination, on this account, would merely be a pattern of behavior without normative significance.<sup>320</sup> If so, it might not be entitled to any particular weight in debates about constitutional interpretation.

As an initial matter, it is not clear why judicial review is so central to this purported distinction between politics and law. Presidential compliance with judicial decisions is itself a practice-based norm of U.S. constitutional law. It is largely taken for granted today, but this has not always been the case. As Daryl Levinson has noted, “[c]asting courts as constitutional enforcers merely pushes the question back to why powerful political actors are willing to pay attention to what judges say; why ‘people with money and guns ever submit to people armed only with gavels.’”<sup>321</sup>

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constitutional methodology, see Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 81 (2013) (“Whether a text is ambiguous is itself determined by one’s chosen interpretive method.”).

318. 462 U.S. 919 (1983).

319. *Id.* at 944–45, 959 (holding that a “legislative veto” provision enacted by Congress was unconstitutional even though Congress had enacted hundreds of legislative veto provisions since the 1930s).

320. Cf. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1836 (2009) (“We might also understand the settlement of non-textual constitutional issues as instances of successful coordination.”); Posner & Vermeule, *supra* note 301, at 1002 (“Precedents may just be patterns of behavior that parties recognize as providing focal points that permit cooperation or coordination.”).

321. Levinson, *supra* note 317, at 661 (quoting Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003)).

To be sure, there is a strand of British (and, more generally, Commonwealth) constitutional thinking that would limit the term “constitutional law” to norms that are enforceable by the judiciary. Under this view, associated most notably with the writings of A.V. Dicey, norms of constitutional practice that are not judicially enforceable are termed instead “constitutional conventions.”<sup>322</sup> This distinction, however, does not map well onto U.S. constitutional understandings. For example, there are a variety of nonjusticiability doctrines in U.S. law, such as the political question doctrine, that hypothesize that there can be constitutional law that might not be judicially enforceable.<sup>323</sup> In addition, there has been a significant emphasis in U.S. scholarship in recent years on the importance of “constitutional law outside the courts,”<sup>324</sup> an approach that implicitly declines to equate constitutional law simply with what is enforced by the judiciary. The longstanding idea of “underenforced constitutional norms” similarly is based on the idea that constitutional law is broader than what is judicially enforceable.<sup>325</sup>

In any event, the likelihood of judicial review for the issue of treaty termination is not zero, and in fact the lower federal courts did address the issue in the controversy over the termination of the Taiwan Treaty.<sup>326</sup> Thus, even if a shadow of possible judicial review were needed in order for a norm to have a legal character, such a shadow does exist for this issue, although it may be faint. Moreover, we know that courts often take account of longstanding practices when interpreting the separation of powers.<sup>327</sup>

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322. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 361, 366 (6th ed. 1902) (“[C]onventions of the constitution’ . . . [are] customs, practices, maxims, or precepts which are not enforced or recognised by the Courts” and “cannot be enforced by any Court of law [and so] have no claim to be considered laws”); see also Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1182 (2013) (noting this point).

323. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (“The issue [before the Court] is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”).

324. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

325. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (stating that “constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts’ role in enforcing the norm” rather than the boundaries of the norms themselves); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1299 (2006) (crediting Sager’s argument that “it would be a mistake to equate judicial enforcement, and thus the tests applied by courts, with the meaning of constitutional guarantees”).

326. The Supreme Court has also recently signaled a narrow view of the political question doctrine, even in the area of foreign affairs. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (describing the political question doctrine as a “narrow exception” to the judiciary’s obligation to decide cases).

327. See *supra* notes 53–62 and accompanying text.

Another potential answer to the “it’s all politics” critique is the simple observation that participants in the legal system generally view the issue of treaty termination as governed by legal norms. As noted earlier, at least according to legal philosophers working in the tradition of H.L.A. Hart, whether something is “law” depends on social facts—that is, it depends on whether the relevant community treats it as law.<sup>328</sup> Under that conception, it is significant that Congress, the Executive Branch, and legal scholars have long treated the issue of treaty termination as one of constitutional law and that they have viewed historical practice as relevant to determining the content of this law. The issue of treaty termination can therefore be distinguished from other customary conventions of U.S. constitutional practice that are not viewed as legal in character, such as (to take one example) the convention of senatorial courtesy for judicial appointments.<sup>329</sup>

To say that the issue of treaty termination is one of constitutional law does not mean that the law on this issue is fully settled. It is conceivable that the Senate or Congress at some point could assert itself on this issue, especially in a situation in which there was significant policy disagreement with the President’s decision to terminate a particular treaty. It is even conceivable that the Senate or Congress could successfully force a President to back down, or at least to seek formal legislative approval for a termination. But the description of the constitutional law set forth above in subpart (IV)(A) is probably both the best prediction of likely future practice and also the best prediction of the position of the courts if they were at some point to intervene in this area. In any event, many issues of constitutional law are not entirely settled even after being resolved by the Supreme Court, especially if the Court is closely divided, and this fact is not viewed by itself as making constitutional law merely epiphenomenal.

Notwithstanding these points, the dynamic between Congress and the Executive Branch with respect to treaty termination is obviously intertwined with political, and not just legal, considerations. Political realities, such as the President’s first-mover advantage over Congress and the tendency of members of Congress to support the President if he is of the same party, are likely to play a role in how the legal norms governing this issue develop. It is no coincidence that the most significant controversy over presidential termination of treaties occurred in connection with the Taiwan Treaty and associated recognition of mainland China, surrounding

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328. See *supra* note 284 and accompanying text.

329. Scholarship on U.S. constitutional conventions has tended to mix together legal and nonlegal practices. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 333–87 (2012); HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 23–43 (1925). For a useful effort to distinguish between conventions based on whether they impose “thin” or “thick” obligations, see Vermeule, *supra* note 322, at 1186–91. See also Dorf, *supra* note 317, at 89 (distinguishing between entrenched practices and constitutionally normative practices).

which there was substantial policy disagreement. Legally normative conventions in this context are therefore affected, perhaps heavily, by politics.<sup>330</sup> But this does not mean that these conventions entirely collapse into politics.<sup>331</sup> Moreover, this blending of law and politics almost certainly describes constitutional law in other contexts as well.<sup>332</sup>

There are also likely still some legal constraints on presidential action in this area. It can reasonably be predicted, for example, that if the Senate conditioned its advice and consent to a treaty on senatorial approval of any termination, and a president later attempted to ignore that condition, there would be significant resistance, even by senators of the President's own party.<sup>333</sup> Moreover, this resistance would likely be framed and debated in legal terms. It is also likely that, when deciding whether to take such action, the President would be advised by lawyers who would consider past governmental practice in assessing the state of the law. None of this is to suggest that these considerations would be dispositive in presidential decision making, just that they would likely be a factor.

Despite these points, a focus on the role of historical practice in discerning the separation of powers almost inevitably mixes together internal and external perspectives on the law.<sup>334</sup> As noted, invocations of such practice have long been part of the internal legal argumentation in debates over treaty termination. At the same time, there are a variety of

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330. In answer to a question, noted above, that was posed by Bruce Ackerman after President Bush announced that he was terminating the ABM Treaty, *see supra* note 248 and accompanying text, politics (both domestic and international) would likely operate as a significant constraint on unilateral presidential termination of something like the NATO pact or the UN Charter.

331. *See* 1 HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT* 5 (2013) (“Rather than obsess about whether constitutionalism is pure law or pure politics, we should study the distinctive ways American constitutionalism blends legal and political considerations.”). *See generally* Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) (explaining why a connection between practice-based understandings of constitutional authority and political considerations does not make the understandings nonlegal).

332. For example, efforts to reconcile the political and legal aspects of the Supreme Court's exercise of constitutional judicial review are longstanding and include perhaps most famously ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). *See also* Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 695 (2012) (“Scholars today widely recognize that Supreme Court opinions are not purely legal but, to some degree, reflect the ideology of the Justices.”).

333. An analogous issue concerns executive agreements: Despite the general rise of congressional-executive agreements in lieu of Article II treaties, the Senate has made clear at various times that it believes that significant arms-control agreements must be concluded as Article II treaties, and there has been successful bipartisan resistance in the Senate—framed in legal terms—to presidential efforts to do otherwise. *See* Bradley & Morrison, *supra* note 1, at 473–75 (describing this resistance).

334. *See* HART, *supra* note 284, at 89 (distinguishing between the “external” perspective of someone who is merely an observer of the rules of a social group and the “internal” perspective of someone who is a member of the group and “accepts and uses [the rules] as guides to conduct”).

reasons to think that such practice also has an external effect on the development of the law relating to this issue, whether such law is interpreted by the courts or by nonjudicial actors. There is tension between these two accounts since the more that the account is external, the more that the law will seem epiphenomenal. It is at least plausible to think, however, that the internal and external accounts are interrelated, such that historical practice not only affects legal understandings but is also itself affected by such understandings.

### Conclusion

Termination of treaties by the United States provides an important illustration of how historical practice can inform and even define the separation of powers. The constitutional text does not specifically address the issue, so practice has by necessity long played a central role in the legal analysis. Particularly in the nineteenth and early twentieth centuries—and then again in the controversy in the 1970s over the termination of the Taiwan Treaty—debates in Congress repeatedly focused on practice as relevant evidence of constitutional meaning. Legal advisers in the Executive Branch have also long emphasized the importance of practice in assessing the Constitution's distribution of authority over this issue. In addition to showing how practices can inform constitutional interpretation, the issue of treaty termination enriches our understanding of constitutional change. The twentieth-century shift towards a unilateral presidential power of termination was not the result of one particular controversy or period of deliberation, and it was not primarily driven by judicial decisions. Instead, the shift involved a gradual accretion of actions and claims by the Executive Branch combined with long periods of inaction by Congress. This account sheds light on some of the interpretive and normative challenges associated with a practice-based approach to the separation of powers.