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## Treaty Termination and the Presidency: Using Custom to Solve Separation of Powers Disputes

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TREATY TERMINATION AND THE  
PRESIDENCY:  
USING CUSTOM TO SOLVE SEPARATION OF  
POWERS DISPUTES

*Joseph M. Lapointe\**

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ABSTRACT

The debate over whether the President, the Senate, or the Congress has primacy in treaty termination remains unsettled.<sup>1</sup> Professor Curtis Bradley incorrectly argues that custom supports a presidential authority to terminate treaties independently.<sup>2</sup> This paper argues that a fuller view of custom, combined with the Intent of the Framers and functional considerations, shows

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The views expressed here are the author's and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, or any other department or agency of the United States Government.

1. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1323 (2008).

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

treaty termination is a shared executive-legislative power.

## I. INTRODUCTION

Treaties are an integral part of international relations. They are the building blocks upon which international relationships are codified and discussed in international and domestic law. Treaties and alliances have played a critical role in international relations since antiquity and have only grown in importance since the founding of the United States. They have become even more important as the number of states in the international system has continued to grow. Since the end of World War I, the international system has sought to stabilize relations among nations. Treaties provided the foundation for such stabilization during the Cold War, acting as a source of cooperation between the Soviet Union and the United States, most notably within the arms control process. Such cooperation allowed the two superpowers to normalize relations in at least one aspect of their power struggle, based as such negotiations were on mutual trust that the treaties would bind both parties.

International cooperation and stability are as important now as in the interwar and Cold War periods. The post-Cold War peace dividends have given way to increased global tensions and the return of great power competition. An ongoing debate in the post-9/11 international system is the longevity of the liberal international order. Proponents of maintaining the post-World War II order have viewed executive actions from 2001 to the present as a possible source of instability, in some cases even undermining the foundation of international cooperation.

Debate over various aspects of treaty procedures have been a feature of United States constitutional law since George Washington's negotiation of the Jay Treaty.<sup>3</sup> While the procedures for treaty ratification are specified in the Treaty Clause<sup>4</sup>, the proper authority and procedures for termination are not. The debate over whether the President, the Senate, or the

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3. JOSEPH RALSTON HAYDEN, *THE SENATE AND TREATIES, 1789-1817: THE DEVELOPMENT OF THE TREATY-MAKING FUNCTIONS OF THE UNITED STATES SENATE DURING THEIR FORMATIVE PERIOD*, 90-93 (1920).

4. U.S. CONST. art II, § 2.

Congress has primacy in treaty termination remains unsettled.<sup>5</sup> The current administration has undertaken multiple actions that have raised questions regarding executive authority under the United States Constitution and made other statements that have raised the specter of future treaty terminations. Given the President's espoused views on the value of international institutions, specifically the North Atlantic Treaty Organization (NATO) coupled with the administration's notice to withdraw from the Intermediate-Range Nuclear Forces Treaty (INF Treaty), it does not strain one's imagination to conceive of a lawsuit contesting the president's authority to unilaterally terminate treaties that could arise.<sup>6</sup>

This paper will use a framework based on the Court's general history of analyzing separation of powers disputes to attempt to anticipate how the Court would rule if such a case were to appear.<sup>7</sup> This paper will first focus on the constitutional text and proceed to trace constitutional case law applicable to treaty issues. Next, it will discuss custom and close with the intent of the Framers and functional considerations. This four-part analysis concludes that if a separation of powers dispute over the President's authority to terminate treaties unilaterally were to appear before the Supreme Court and be resolved on its merits, the Court would rule that the President does not have the authority to unilaterally terminate self-executing treaties unless it derives from the exercise of a plenary presidential power.

## II. CONSTITUTIONAL TEXT

The constitutional text does not reveal anything about the process for terminating treaties, but it does provide a basis for analyzing the importance and legal weight of treaties. Some scholars have suggested that something akin to a Rule of Equal

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5. Hathaway, *supra* note 1, at 1323.

6. See Scott R. Anderson, *Three Ways to Leave the INF Treaty Lawfare* (Oct. 29, 2018, 1:18 PM), <https://www.lawfareblog.com/three-ways-leave-inf-treaty>; Curtis A. Bradley & Jack L. Goldsmith, *Constitutional Issues Relating to the NATO Support Act Lawfare* (Jan. 28, 2019, 7:43 AM), <https://www.lawfareblog.com/constitutional-issues-relating-nato-support-act>.

7. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 36-70 (1990).

Formality should apply to the Constitution. Such a rule would, when interpreting the Constitution, give equal weight to similar statements in different articles and clauses. and it would favor similar procedures for “comparable situations and problems.”<sup>8</sup> A Rule of Equal Formality would also argue that processes are reversible. The Constitution lacks explicit instructions for how to undo certain acts and a Rule of Equal formality would provide the solution. As Professor Arthur Bestor explains:

The principal concern of the members of these [Constitutional] conventions was the proper allocation of the various positive powers of government. Only in exceptional instances did they give attention to the negative use of these powers – in other words, to procedures for undoing or reversing what had once been done.

The silence of the Constitution on a particular point does not constitute a license to fill the gap with whatever terms or provisions may happen to strike an official’s or a commentator’s fancy. Obviously the procedure that is supplied must be consistent with the Constitution’s handling of comparable situations and problems. Like things, it is but commonsense to say, ought to be done in like ways; furthermore, the closer the resemblance, the more compelling the analogy. Logic itself prescribes this rule if different procedures appear to be deducible from different provisions of the Constitution.<sup>9</sup>

This rule is like the constitutive thesis expressed of John O. McGinnis and Michael B. Rappaport in their supermajoritarian interpretation of the Constitution.<sup>10</sup> Both believe that those similar or identical processes and rules prescribed in the Constitution should receive equal weight when analyzed. Harold Koh provides a similar interpretation, describing “a commonsense ‘mirror principle,’ whereby absent exceptional circumstances the degree of congressional participation

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8. Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties – The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 17 (1979).

9. *Id.* at 17.

10. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

constitutionally required to exit any particular agreement should mirror the degree of congressional participation that was required to enter that agreement in the first place.”<sup>11</sup>

The Constitution uses the word “treaty” four times, two of which give context to understand the importance of treaties within the constitutional framework and how the treaty power is separated between the Executive and Legislative branches.<sup>12</sup> The first is the Treaty Clause itself which states 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>13</sup> The Treaty Clause clearly lays out the process for making treaties as a joint effort between the President and the Senate and requiring the consent of a supermajority of the Senate prior to ratification. The Constitution includes “seven express supermajority rules”<sup>14</sup> inclusive of the Treaty Clause<sup>15</sup>. According to McGinnis and Rappaport:

[i]t should be stressed that these supermajority rules are not restricted to small or unimportant parts of the Constitution. They involve some of the most significant matters that affect the structure of the polity and the nation’s political stability – matters such as impeachments, treaties, and amendments. They also operate in a wide variety of areas (e.g., foreign and domestic affairs, constitutional and personal matters) and apply to a broad range of bodies.<sup>16</sup>

The supermajority requirement occurs throughout various sections of the Constitution and is used to ensure that important matters are treated with the level of consensus required for such important matters. That treaties are one of seven instances of

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11. Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. 432, 436 (2018).

12. Hathaway, *supra* note 1 at 1276 (Prof. Hathaway uses this line of reasoning to lay the framework for her discussion of the history of the Treaty Clause within the context of the Constitution and international lawmaking).

13. U.S. CONST. art II, § 2, cl. 2.

14. McGinnis and Rappaport, *supra* note 10 at 711.

15. U.S. CONST. art II, § 2, cl 2; *id.* art I, § 3, cl. 6; *id.* art. I, § 5, cl. 2; *id.* art. I, § 7, cl 2; *id.* art. II, § 1, cl. 3, amended by U.S. CONST. amend XII; *id.* art. VII; *id.* art. V.

16. McGinnis & Rappaport, *supra* note 10, at 712.

supermajority requirements suggests treaties should be considered as important as the other six instances of supermajority decisionmaking,<sup>17</sup> one of which is the congressional override of a presidential veto.<sup>18</sup> The insistence of a supermajority for treaty ratification procedures in the Constitution shows the establishment of treaties is a critical process requiring great consensus to achieve ratification, just as the override of a presidential veto requires a supermajority. These processes were put in place to ensure checks and balances existed between the coequal branches of government, and these instances of two-thirds majority requirements stress the consensus needed for decisions of such import, whether it be a decision to override a presidential veto or to consent to a treaty.

Supporting the argument that treaties are one of the most important issues with which the nation will deal, the second mention of import is in the Supremacy Clause which states “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>19</sup> The Supremacy Clause explicitly states treaties are law equal to federal statute. Through the Supremacy Clause, the Constitution states that post-presidential negotiation (or possibly joint negotiation with the Senate in an advice role), followed by a vote of consent with a supermajority of the Senate, and treaty ratification by the President, a treaty becomes the supreme Law of the Land. It follows that once a treaty becomes the Law of the Land, it cannot be undone by sole executive action as the Executive lacks the authority to unilaterally terminate laws enacted through other enumerated constitutional processes.

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17. *Id.* at 710–17 (McGinnis and Rappaport provide an in-depth analysis of three decision-making processes in the Constitution. Their three processes are supermajority decisionmaking, ordinary Article I lawmaking, and constitutional limitations. The first process is the only one that is explicitly written as a supermajority, implying the importance of the seven instances and suggesting a level of importance above and beyond Article I procedures. The other two processes have essences of supermajority requirements but are not explicitly labeled as such).

18. U.S. CONST. art I, § 7, cl. 2.

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

There are multiple arguments against the use of the Supremacy Clause.<sup>20</sup> One argument comes from the 1979 Senate Committee on Foreign Relations which believed “treaties are *not* like statutes in one significant respect.”<sup>21</sup> The Committee argued:

[a]lthough the Congress has the last word in determining whether a statute is enacted, the Senate merely authorizes the ratification of the treaty; it is the President’s role that is determinative. He decides at the outset whether to commence treaty negotiations. He decides whether to sign a treaty. He decides whether to seek Senate advice and consent. And he decides whether to exchange instruments of ratification’ after a treaty has been approved by the Senate. At each of these stages, it is the President who has the power to determine whether to proceed and thus whether treaty relations will ultimately exist. It is not illogical, therefore, to conclude that the President’s authority may include the right to terminate treaty relations.<sup>22</sup>

This counter-argument to the Supremacy Clause is simple, but the logic does not follow. That the President can terminate a treaty because he exchanges the final instrument of ratification does not mean that the President may then decide to terminate the treaty at any time. A treaty is a contract between two sovereign powers, and, therefore, both sovereign parties must agree in order for the contract to be binding.<sup>23</sup> Should the President present the instrument of ratification to the other party or parties and they decide not to reciprocate, no treaty exists. The acceptance of the instrument by the other sovereign finalizes the contract, at which point, it becomes law under the Supremacy Clause, not the act of presentation by the President.

Another example is the attachment of Reservations, Understandings, or Declarations (RUDs) creating a point of contention. “When the Senate approves a treaty, it can condition its consent. . . either by requiring the president to get the other party to agree to a change in the treaty’s text, or simply by

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20. GLENNON, *supra* note 7, at 150–51.

21. *Id.* at 150.

22. S. REP. NO. 96-7, at 18 (1979).

23. *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

including its condition in the resolution of ratification.”<sup>24</sup> Such RUDs are the purview of the Senate, and while they may be acceptable to the President, they may not be acceptable to the other party or parties. These RUDs are binding, and the President is “constitutionally required to respect the Senate’s conditions.”<sup>25</sup> This does not mean that the President must move forward with ratification. Should the President disagree with any RUD and feel the treaty should no longer move forward, the President may decide not to present the instrument of ratification or withdraw the treaty from consideration in the Senate. If the President decided to continue and present the instrument of ratification, given no objection to the RUDs, the Senate’s RUDs would be an important factor in the other party’s decision whether to accept the instrument of ratification. This example is like the first in that the other party or parties to the treaty must finalize the act by accepting the conditioned treaty in the instrument of ratification. In both examples, it is not the President’s decision to present the instrument of ratification that finalizes the treaty. Rather, it is the acceptance of the treaty by the other party or parties that puts the treaty into force.

If one were to follow the Committee’s logic and accept that the President has the power to terminate a treaty because the President decides whether to present the instrument of ratification, other constitutional problems would arise. If one accepts such a “last-to-touch” argument, it would follow that Congress could make that argument regarding laws enacted because Congress has the final say in whether a Bill or Joint Resolution becomes law through their ability to override a presidential veto they could rescind a law through unilateral congressional action in the form of a concurrent resolution, bypassing the President entirely. Instead, there is no method for unilateral congressional action to unmake a law except for the override of a presidential veto by a two-thirds majority as written in the Constitution. Laws are unmade through the same process in which they are made, despite this process not appearing in the

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24. Michael J. Glennon, *What the New Arms Treaty Would Do*, N.Y. TIMES, November 16, 2010, at A32.

25. *Id.*

Constitution. “It is well settled that the same process that applies to the making of federal statutes. . . also must be followed for the termination of federal statutes.”<sup>26</sup> As Senator Goldwater argued to the Senate Committee on Foreign Relations:

it is true the Constitution is silent on treaty termination. But I [Senator Goldwater] would remind you that article I, section 7, is also silent on how a bill which becomes a law shall be terminated. Yet I am unaware of anyone in the executive branch arguing that the President can repeal a law on his own. In fact, there is a Supreme Court decision which says the President cannot terminate a law by his own action.<sup>27</sup>

The President cannot unmake a law,<sup>28</sup> and neither can Congress unmake a law except by following the same process required to make a law.

Senator Harry F. Byrd Jr. used this same argument in the Senate Committee on Foreign Relations during its hearings on Treaty Termination.<sup>29</sup> In his opening statement Senator Byrd said “[t]here is no disagreement, I [Senator Byrd] am sure, with the assertion that under our Constitution the President of the United States clearly shares the treaty-making process with the Senate of the United States. Does he not then share the treaty-terminating power in the Senate?”<sup>30</sup> Senator Byrd acknowledged the silence of the Constitution on the subject of treaty termination<sup>31</sup> but likened it to the Constitution’s silence “in explaining how statutes are terminated. The Constitution describes carefully the process of creating a law; but nowhere does it describe the process of nulifying [*sic*] a law.”<sup>32</sup> Yet even without this enumeration of how to nullify a law, Senator Byrd

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26. Bradley, *supra* note 2, at 781.

27. TREATY TERMINATION: HEARINGS BEFORE THE COMM. ON FOREIGN RELATIONS, UNITED STATES SENATE, 96TH CONG., 1ST SESS., 22 (1979) (statement of Sen. Barry Goldwater) [hereinafter TREATY TERMINATION HEARINGS].

28. Bruce Ackerman, *Treaties Don't Belong To Presidents Alone*, N.Y. TIMES, August 29, 2001, <https://www.nytimes.com/2001/08/29/opinion/treaties-don-t-belong-to-presidents-alone.html>.

29. TREATY TERMINATION HEARINGS, *supra* note 27.

30. *Id.* at 4.

31. *Id.* at 5.

32. *Id.* at 6.

argued using the Supremacy Clause that “[a]ll of us know that a President cannot unilaterally terminate a law; yet a treaty is law. To hold that a President can nullify a treaty is to assign to the President the power unilaterally to set aside a law, because a treaty is a law and is so recognized.”<sup>33</sup>

This argument received majority support in the Senate. On January 18, 1979 Senator Byrd proposed Senate Resolution 15 – A Resolution concerning Mutual Defense Treaties<sup>34</sup> which was referred to the Senate Committee on Foreign Relations March 8, 1979. This referral was the reason for the *Treaty Termination Hearings* in April, 1979 during which Senator Byrd made the above arguments. Following the hearings, the Senate Report of the *Treaty Termination Hearings* referred Senate Resolution 15 back to the Senate with amendments. These amendments expanded the scope of the resolution to encompass all treaties and affirmed significant unilateral presidential authority supported by the Committee’s counter to the Supremacy Clause Argument.<sup>35</sup>

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33. *Id.* at 6.

34. See S. RES. 15, 96TH CONG., (1979). The original text of S. Res. 15 as introduced by Senator Byrd read “*Resolved*, That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation.” *Id.* reprinted in TREATY TERMINATION HEARINGS, at 2.

35. See 125 CONG. REC., 13,672 (1979). The description and verbiage of S. Res. 15 with amendments from the Senate Committee on Foreign Relations as read by the assistant legislative clerk during floor debate was as follow:

A resolution (S. Res. 15) concerning mutual defense treaties.

Without objection, the Senate proceeded to consider the resolution (S. Res. 15) which had been reported from the Committee on Foreign Relations with an amendment to strike all after the resolving clause and insert the following:

That it is the sense of the Senate that treaties or treaty provisions to which the United States is a party should not be terminated or suspended by the President without the concurrence of the Congress except where –

(1)The treaty provision in question have been superseded by a subsequent, inconsistent statute or treaty; or

(2)Material breach, changed circumstances, or other factors recognized by international law, or provisions of the treaty itself, give rise to a right of termination or suspension on the part of the United States; but in no event where such termination or suspension would –

(A)result in the imminent involvement of United States Armed Forces in hostilities or otherwise seriously and directly endanger the security of the United States Armed Forces in hostilities or otherwise seriously and directly

Immediately after S. Res. 15 rose for debate on June 6, Senator Byrd proposed an amendment to change the Committee version of the resolution back to the original as he had sponsored in January.<sup>36</sup> During the subsequent debate, Senator Richard Schweiker argued in support of Senator Byrd's amendment.

Removed of legal complexities, the issue can be stated quite simply: If the Senate is an active party in the formulation of an international commitment, then it follows logically that it should likewise express itself on the validity or otherwise of abrogating that commitment. The Senate can hardly be accused of usurping a power which the Constitution confers upon it. On the contrary, for the Senate to disavow such responsibility through language similar to that proposed by the committee, would effectively place this body in contempt of its duly recognized authority.<sup>37</sup>

At the end of this debate, the Senate voted in favor of Senator Byrd's amendment with 59 Yeas, 35 Nays, and six not voting.<sup>38</sup> The Senate majority rejected the recommendation of the Committee on Foreign Relations and adopted Senator Byrd's original resolution language. While the Committee's version of S. Res. 15 resulted from the logic explained in their report,<sup>39</sup> the Senate majority rejected this logic and voted in favor of maintaining Senate involvement in the treaty termination process.<sup>40</sup> At the heart of the argument endorsed by the majority

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endanger the security of the United States; or

(B)be inconsistent with the provisions of –

(i)a condition set forth in the resolution of ratification to a particular treaty; or

(ii)a joint resolution; specifying a procedure for the termination or suspension of such treaty.

*Id.* See also *supra* notes 22-23 and accompanying text.

36. *Id.* at 13,672. The verbiage of the amendment was "Strike out the committee substitute and substitute in lieu thereof the following: "That it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." (Id. at 13,672).

37. *Id.* at 13,695.

38. *Id.* at 13,696.

39. See *supra* notes 21-22 and accompanying text.

40. S. Res. 15 never received a final vote to dispose of the issue. As of October 18, 1979, S. Res. 15 remained on the Senate calendar but was not voted on in its final, post-Byrd Amendment form. Senator Church had at one point

of the Senate during this debate was that the Senate, a constitutionally-required participant in treaty creation, should also be present in the decisions of treaty termination. Senators Byrd and Schweiker essentially argued the underlying concept of Koh's mirror principle or a Rule of Equal Formality and persuaded most of their colleagues.

The requirement for equal processes in making and terminating treaties, just as in making and repealing laws, seems especially clear following "the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, which held the legislative veto unconstitutional."<sup>41</sup> As Professor Oona Hathaway states, "[r]ead more broadly – and in the context of other related decisions – the Court arguably held [in *Chadha*] not simply that the particular form of the legislative veto is unconstitutional, but that Congress cannot shortcut the lawmaking process."<sup>42</sup> Just as Congress lacks the capacity to shortcut the process to unmake laws, so too does the Executive. As Professor Koh asks, "[i]f the President cannot enact or repeal a statute alone, why should he be able to repeal the duly enacted law of the land – and its accompanying framework of deeply internalized domestic law – just because the initiating juridical act happened to be in treaty form?"<sup>43</sup> There is

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proposed an amendment to Senator Byrd's language which would prevent S. Res. 15 from applying retroactively yet this amendment did not receive a floor vote either. During discussions on S. Res. 15 within a heading of "U.S. District Court Ruling on Termination of Mutual Defense Treaty With Taiwan" Senator Robert C. Byrd argued that should a vote have occurred, "[i]t is quite conceivable that the Senate could have rejected [S. Res. 15] after having approved the amendment, which in effect would have killed the amendment. So the record should show that the Senate did not pass any resolution that declared its view that the Taiwan Treaty could not be terminated without Senate approval." Senator Harry F. Byrd Jr. responded to this statement with the opposite sentiment. "June 6, 1979, the Senate, by a vote of 59 to 35, adopted my [Senator Harry F. Byrd Jr.'s] proposal that no mutual defense treaty between the United States and any other nation could be abrogated without Senate approval. While the resolution itself was not formally adopted, the Senate spoke loud and clear as to the merits on the issue." (125. Cong. Rec., 28,724-25). While Sen. R. Byrd is correct that no resolution would exist, the floor vote would likely provide a valid sense of the Congress that the Supreme Court would take into consideration. (*See infra* note 235).

41. Hathaway, *supra* note 1, at 1333–34.

42. *Id.* at 1333, n.283.

43. Koh, *supra* note 11, at 458.

no process for unmaking or repealing statute in the Constitution, just as there is no process for terminating a treaty. The Court's rationale for its ruling *Chadha* stated that "[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I."<sup>44</sup> This suggests the Court would view amendment<sup>45</sup> or termination of a treaty as requiring conformation with Article II procedures given treaty ratification requires presentment of a treaty to the Senate. Such an interpretation according to a Rule of Equal Formality would suggest that the President lacks the authority to unilaterally withdraw from a treaty that is self-executing, or from a non-self-executing treaty that Congress has proceeded to execute through subsequent legislation.

One may argue that such an argument is circular as it assumes Article II of the United States Constitution requires congressional inclusion. However, no assumption is necessary. The Treaty Clause specifically includes the Senate in an Article II power. There is no circularity to the argument if Senate involvement is specified in the text. Furthermore, arguing that an assumption of congressional involvement in treaty termination is in some way circular presupposes that treaty termination is an Article II power which it clearly is not as the text of the Constitution does not mention treaty termination. The lack of an enumerated power to terminate treaties under any article of the Constitution is the reason there is a debate as to where that power resides. Therefore, arguing an assumption of congressional involvement in an Article II power presupposes the antecedent question as to where such a power resides.

Analysis of the constitutional text does not present a definitive answer on presidential termination powers, but it does suggest one. Through the lenses of a Rule of Equal Formality and Professor Koh's mirror principle, particularly considering

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44. *INS v. Chadha*, 462 U.S. 919, 954 (1983).

45. Treaty amendment has not presented itself outside of a few instances and has never been ruled on by the Court. See Bradley, *supra* note 2, at 798-799. Prof. Bradley discusses President McKinley's termination of treaty provisions in an 1850 U.S.-Switzerland commercial treaty. Prof. Bradley notes, aside from the fact that this was the first example of the President proceeding unilaterally, that McKinley's actions followed the Tariff Act of 1897 which can be argued to have established McKinley's authority to proceed with the termination of certain provisions within the 1850 treaty.

*Chadha's* focus on respecting constitutional processes, textual analysis leans towards a lack of executive authority. As Professor Koh points out, quoting Chief Justice Burger's opinion in *Chadha*:

whether "a given law or procedure is efficient, convenient, and *useful in facilitating functions of government*, standing alone, will not save it if it is contrary to the Constitution. . . . [*P*]olicy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and. . . sets out just how those powers are to be exercised."<sup>46</sup>

Chief Justice Burger's argument suggests that, as treaties were meant to be difficult to enact given the supermajority requirement, expediency and ease for the President in his duties as the "sole organ" for foreign affairs would not justify such expansive executive powers regarding treaty termination.<sup>47</sup> But given the lack of a textually explicit process for terminating a treaty, the Constitution is only the first portion of the analysis. After analyzing the constitutional text, one should proceed to case law and then to any congressional or executive customs that have developed outside of judicial review.<sup>48</sup>

### III. CASE LAW

The courts have never ruled specifically on the question of treaty termination. Despite the lack of a definitive ruling on treaty termination, it is possible to trace early judicial precedent dealing with other aspects of treaties to get a sense of the Judicial Branch's views on treaty powers. Early case law surrounding the treaty power does not deal with the question of treaty termination itself, but its discussion is illuminating. Early opinions do not even discuss the possibility of executive authority to terminate treaties. This section will follow these discussions and trace the Court's ever-expanding view of Executive authority

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46. Koh, *supra* note 11, at 451.

47. U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

48. See Bradley, *supra* note 2, at 774, 783-785; Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); GLENNON, *supra* note 7, at 53-70, 151.

which coincides with a growth of Executive power in foreign relations at large.

Early case law dealing with treaty issues, albeit not treaty termination, supports the Supremacy Clause argument that treaties, once completed, are equivalent to Article I enacted laws. In 1829, Chief Justice Marshall delivered the opinion of the Court in *Foster v. Neilson* which dealt with a land dispute and an 1819 treaty between the United States and Spain where the Court ruled that some treaties require enactment of legislation to gain effect.<sup>49</sup> In his opinion, Chief Justice Marshall differentiated between self-executing and non-self-executing treaties and how each type should be interpreted under the Supremacy Clause. He stated unequivocally, “[o]ur constitution declares a treaty *to be the law* of the land.”<sup>50</sup> He then described self-executing treaties as those treaties which require no legislation to yield domestic effect, and non-self-executing treaties as those treaties which “the legislature must execute the contract before it can become a rule for the Court.”<sup>51</sup> This dichotomy established the requirement for Congress to enact laws in order for non-self-executing treaties to become domestic law; it does not impact the immediate status of self-executing treaties as law. Chief Justice Marshall clearly viewed self-executing treaties as law, not a separate entity to be afforded the same status as a law, with some exceptions, as the Senate Committee argued.<sup>52</sup>

In *Taylor v. Morton*, a case regarding hemp duties and the 1832 United States Treaty with Russia as it conflicted with the Tariff Act of 1842,<sup>53</sup> the court affirmed the last-in-time rule as applicable to treaties.<sup>54</sup> Justice Curtis, writing for the Circuit Court of Massachusetts relied on Chief Justice Marshall’s framework for determining self-executing versus non-self-executing statutes.<sup>55</sup> Justice Curtis, in discussing the execution of certain clauses in the treaty, observed:

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49. *Foster v. Neilson*, 27 U.S. 253 (1829).

50. *Id.* at 314 (emphasis added).

51. *Id.* at 314.

52. S. REP. NO. 96-7, *supra* note 22.

53. 5 Stat. 548 (1842).

54. *Taylor v. Morton*, 23 F. Cas. 784, 787 (1855).

55. *Id.* at 787.

[i]t must be admitted, . . . that in general, power to legislate on a particular subject, includes power to modify and repeal existing laws on that subject, and either substitute new laws in their place, or leave the subject without regulation, in which the repealed laws applied. There is therefore nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be displaced by the legislative power, at its pleasure.<sup>56</sup>

Justice Curtis distinguished a treaty as different, not from a law, but from an act of Congress. However, he concluded that this differentiation is inconsequential as it suggests a treaty, once it becomes law, may be terminated through congressional legislation, not only through a joint effort of the Executive and Senate which excludes the House of Representatives.<sup>57</sup> “Ordinarily, it is certainly true that the powers of enacting and repealing laws reside in the same persons. But there is no reason, in the nature of things, why it may not be otherwise.”<sup>58</sup> Justice Curtis concluded:

[t]hat the people of the United States have deprived their government of this power [to modify or repeal a law found in a treaty] in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. *I feel no doubt that it belongs to congress.* That, inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed, and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than congress possesses

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56. *Id.* at 785.

57. Justice Curtis argued:

the constitution. . . gives to congress, in so many words, power to declare war, an act which, ipso jure, repeals all provisions of all existing treaties with the hostile nation, inconsistent with a state of war. It is true this particular power to repeal laws found in treaties, is expressly given, and is applicable only to a case of war; but, in the first place, it is sufficient to prove the position stated above, that there is nothing, in the nature of things, which requires that the same persons who make the law by a treaty, should alone have power to repeal it.

*Id.* at 786.

58. *Id.* at 785–86.

it, then legislative power is applicable to such laws whenever they relate to subjects, which the constitution has placed under that legislative power. In conformity with these views was the action of congress in passing the act of July 7, 1798 (1 Stat. 578), declaring the treaties with France no longer obligatory on the United States.<sup>59</sup>

The logic for including congressional legislation as a valid instrument for treaty termination or modification relies on the plenary powers of Congress and argues that it should be included alongside action by the President *and* the Senate.<sup>60</sup> While Justice Curtis did not discuss whether he viewed termination as an exclusive or joint power, the lack of discussion of executive unilateral authority would continue for nearly a century.

The Supreme Court reiterated a similar view in its discussion of *La Abra Silver Mining Co. v. United States*. In that case, the Court noted, “[i]t 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.”<sup>61</sup> Again, this discussion does not discuss exclusivity despite the fact that the case dealt in part with Executive authority, albeit over legislation and not treaties. It is important to note the use of “abrogate” in the Court’s discussion. Modern legal thought differentiates between termination and abrogation. Professor Michael Glennon writes, “[t]reaty *termination* is. . . different, constitutionally, from treaty *abrogation*. A treaty is *terminated* when it is brought to an end in accordance with its terms. A treaty is *abrogated* when it is

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59. *Id.* at 786 (emphasis added).

60. *Id.*

61. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) citing *Head Money cases*, 112 U.S. 580, 599 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Chinese Exclusion case*, 130 U.S. 581, 600 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 721 (1893). This case dealt with a dispute over damages awarded by a commission created in an 1868 treaty between the U.S. and Mexico and whether subsequent legislation of 1892 directing the Secretary of State make inquiries into fraudulent evidence was valid given it was signed during a congressional recess. The Court held that the 1892 act was valid.

brought to an end in violation of its terms.”<sup>62</sup> The *Restatements* also make this point.<sup>63</sup> However, other writings fail to distinguish between termination and abrogation in a strict sense<sup>64</sup> or seem to use them interchangeably.<sup>65</sup> This confusion in modern law makes it difficult to determine when such a differentiation would have occurred historically.

Furthering this ambiguity, “[i]t is worth noting. . . 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>66</sup> The lack of withdrawal clauses at the time of the Founding and their incorporation during the nineteenth century makes it difficult to determine whether one should consider “abrogation” in earlier rulings distinct from termination pursuant to a withdrawal clause or if the intent of the ruling was to use them interchangeably. Two post-*La Abra* cases suggest the term has been used interchangeably by different courts. In *Van Der Weyde v. Ocean Transport Co.*<sup>67</sup> the Court for the first time mentions the possibility that the President could terminate a treaty unilaterally. This case involved the termination of an 1827 Treaty of Commerce and Navigation between the U.S. and Norway by the later-in-time Seaman’s Act of March 4, 1915 (38 Stat. 1164). While the Congressional authority to terminate a

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62. GLENNON, *supra* note 7, at 158.

63. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (AM. LAW INST. 1987) [hereinafter RESTATEMENT (THIRD)]. See also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (AM. LAW INST. 2018) [hereinafter RESTATEMENT (FOURTH)].

64. Bradley, *supra* note 2.

65. J. Terry Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. LEGIS. 46 (1978) (discussing treaty abrogation as a general concept but contemporaneously with the treaty termination of the Sino-American Mutual Defense Treaty). Mr. Emerson, writing at the time as Senator Goldwater’s Counsel, argues that the termination of the mutual defense treaty with Taiwan is an attempt at presidential abrogation of a treaty. This seems to be an expansive reading of abrogation insofar as the Sino-American Mutual Defense Treaty (6 UST 433) in Article X contains a withdrawal clause with a one-year notice and suggests he is using the terms interchangeably. *Id.*

66. Bradley, *supra* note 2, at 778–79.

67. 297 U.S. 114 (1936).

treaty via a later-in-time statute is not the question, this is the first mention of a unilateral Executive termination power. Not only does this case mention Executive authority, it also highlights the interchangeable use of terminate and abrogate. Chief Justice Hughes wrote:

[t]he [respondent's] first and second points are unavailing, if Article XIII was actually abrogated in its entirety, and that this was the purport of the diplomatic exchanges between the two Governments is beyond dispute. As to the [respondent's] third point, we think that the question as to 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, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act.<sup>68</sup>

While Chief Justice Hughes specifies that this case is not relevant to the question of Executive power in treaty termination, it does highlight the simultaneous utilization of the terms abrogate and terminate, neither of which he defined. This suggests that through the 1930s the two terms were interchangeable so far as the Court was concerned. While this differentiation is more common now, it does not appear to have been so from the Founding through the early twentieth century. Of note, this is an early reference of the Court to the concept of Executive termination powers that coincides with the rising scholarly and Executive arguments in support of such a power.<sup>69</sup> The other cases cited in this paper have only described an Executive power in conjunction with Senate termination or Congressional termination and have not even discussed a unilateral Executive power in *dicta*. While this is not conclusive evidence nor applicable to any future ruling of the Court, it does suggest that the views of the Court may have shifted alongside scholarly arguments and the legal opinions of the State

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68. *Id.* at 117–18.

69. Bradley, *supra* note 2, at 816–19 (discussing the shift in scholarly literature beginning in 1910 with a lone argument that the Executive possessed an independent power to terminate treaties which grew until it became a prevalent opinion in the 1940s).

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Shortly before *Van Der Weyde*, Judge Cardozo's opinion in *Techt v. Hughes*,<sup>70</sup> a case dealing with the validity of a treaty between the United States and Austria following a declaration of war, touched on two critical issues. First, in his determination of "whether a treaty shall be observed in the absence of some declaration by the political departments of the government that it has been suspended or annulled"<sup>71</sup> during a time of war, Judge Cardozo concluded that the "President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule. . . . The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly."<sup>72</sup> Judge Cardozo described two methods of termination. One as a joint function of the President and the Senate and the second by the Congress pursuant to its legislative

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70. 229 N.Y. 222 (1920).

71. Judge Cardozo cites Circuit Justice Jay in *Jones v. Walker*, 13 F. Cas. 1059 (1800) where Jay provides a detailed analysis of the question of treaty annulment by the various "departments". He concludes that the judiciary lacks the authority to annul a treaty. In his opinion he writes "[o]n comparing the principles which govern and decide the necessary validity of a treaty. . . we cannot but perceive that the former are of a judicial, and that the latter are of a political nature. (*Id.* at 1062) He continues by discussing the functional considerations of treaty annulment. "When it is considered that the voluntary validity of treaties. . . is to be decided not by fixed and immutable rules and principles, but entirely by prudential considerations, the inexpediency of committing its decision to two concurrent jurisdictions, that is to the judiciary *and to congress*. . ." (*Id.* at 1062, (emphasis added)). He concludes his analysis in two sections. First:

[e]very law derives its obligation from the will of those who had authority to enact it. Every treaty derives its obligation from the will of those who had authority to conclude it. Neither of them can be repealed or annulled but by the will of those who have authority to repeal or annual them.

*Id.* 1062-1063. The second, which Judge Cardozo cites, is:

[t]hat on the distribution of the sovereignty into the three departments, of executive, legislative and judicial, the authority in question became incidental to the latter. No right can be incident to one department which necessarily goes to the suspension of a right incident to another, or to control, suspend or defeat its operation. If this principle be just, it follows that, where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should no longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance.

*Id.* at 1063.

72. *Techt v. Hughes*, *supra* note 70, at 243.

powers. The second point was that pursuant to the Allied Powers' victory in World War I, "[t]he proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated."<sup>73</sup> The transition from the peace treaty terminating "earlier compacts"<sup>74</sup> and the selection of treaties "to be kept in force or abrogated"<sup>75</sup> implies some sort of interchangeability between the terms.

Twenty-seven years later, Justice Douglas wrote the opinion for *Clark v. Allen*, a World War II case dealing with inheritance rights under a treaty in existence prior to a declaration of war.<sup>76</sup> In the opinion, he noted that during a time of war regarding treaty obligations "the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. . . [t]his was the view stated in *Techt v. Hughes*. . . and we believe it to be the correct one."<sup>77</sup> Justice Douglas then quoted a significant portion of the *Techt v. Hughes* opinion to include the sections quoted *supra*.<sup>78</sup> The Court's inclusion of the specific language dealing with presidential and senatorial termination or congressional termination is not modified, either in the quote or subsequently in dicta, and does not include sole presidential termination. The only mention of unilateral executive action is the suggestion that the Chief Executive may have created a policy at odds with treaty enforcement.<sup>79</sup> This appears to be one of the first mentions

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73. *Id.*

74. *Id.*

75. *Id.*

76. 331 U.S. 503 (1947). This case dealt with the question of inheritance rights of foreign nationals under the Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923 (44 Stat. 2132) following the outbreak of hostilities and declarations of war in World War II between the United States and Germany. The Court held that the treaty remained valid despite a declaration of war citing *Techt v. Hughes*.

77. *Id.* at 508–09.

78. *Id.* at 509–10.

79. *Id.* at 508–09. *See also id.* at 510:

We do not think that the national policy expressed in the Trading with the Enemy Act, as amended, is incompatible with the right of inheritance granted German aliens under Article IV of the treaty. It is true that since the declaration of war on December 11, 1941 (55 Stat. 796), the Act and the Executive Orders issued thereunder have prohibited the entry of German

of presidential authority to suspend or abrogate a limited portion of a treaty, although it is quite explicit that any action on the part of the Executive would be through the creation of a conflicting policy, not a specific unilateral decision to terminate or abrogate a portion of a treaty. Given the Court's discussion of executive authority and the issue of treaty validity pursuant to a declaration of war and the President's commander-in-chief powers, the omission of unilateral Executive termination in the discussion suggests the Court did not see it as valid. *Techt v. Hughes* and *Clark v. Allen* are notable as they were cases brought following World War I and World War II respectively. Both cases dealt with the presidency during its peak power as Commander-in-Chief following a declaration of war by the Congress, yet neither of them expanded nor mentioned unilateral termination of treaties. Both cases, *Clark* citing *Techt*, specified joint Executive-Senate action or sole Congressional action as methods of termination. The only hint of a presidential authority to terminate a treaty was the suggestion that an executive action undertaken as the Commander-in-Chief may impact the Executive's ability to enforce a treaty during times of war, but this was in dicta and the cases did not touch on Executive treaty terminations and therefore have provided no legal precedent.

The post-1900 cases discussed *supra* occurred during a significant transition period for the country. The United States was culminating its ascent to replace Britain as the dominant global power, a journey that would end in 1945, just two years before *Clark v. Allen*, after a tumultuous interwar period characterized by American retrenchment and the Great Depression. As a result of two globe-spanning wars and a global economic depression, the presidency had experienced an unprecedented expansion of authority. This included a broadening of the Executive's interpretation of its foreign affairs power which would only continue to increase throughout the Cold

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nationals into this country, have outlawed communications or transactions of a commercial character with them, and have precluded the removal of money or property from this country for their use or account. We assume that these provisions abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the act provides that the prohibited activities and transactions may be licensed.

War.<sup>80</sup> Executive power in the realm of treaties increased with little to no Congressional resistance and no applicable case law for over thirty years. Despite this growth of Executive power, joint action continued contemporaneously through President Carter's termination of the Mutual Defense Treaty with Taiwan.

Many scholars have analyzed *Goldwater v. Carter*<sup>81</sup> despite the fact the Supreme Court remanded it to the District Court for dismissal. A large portion of this analysis concerned the justiciability of the case, although it now seems the justiciability question no longer applies following *Zivotofsky v. Clinton*.<sup>82</sup> Should *Goldwater v. Carter* have been granted certiorari, it is possible the Court would have ruled in favor of the President. Analyzing Justice Kennedy's opinion for the Court in *Zivotofsky v. Kerry*,<sup>83</sup> specifically the discussion of President Carter's termination of the mutual defense treaty with Taiwan,<sup>84</sup> one can infer a post-*Zivotofsky* Court might well have ruled in *Goldwater v. Carter* that Executive termination was constitutional pursuant to the President's plenary power<sup>85</sup> under the Recognition Clause.<sup>86</sup> However, it is unlikely the Court would have given the President a broad authority to terminate any treaty outside of the scope of the Executive's Recognition Power. This is the argument Justice Brennan put forward in his lone dissent,

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80. Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998).

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

82. *Zivotofsky v. Clinton*, 566 U.S. 189 (2012). *See also* Koh, *supra* note 11, at 444.

83. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

84. *Id.* at 2093–95.

85. Terence Smith, *Link to Taiwan Ends*, N.Y. TIMES, December 16, 1978, <https://www.nytimes.com/1978/12/16/archives/link-to-taiwan-ends-carter-in-tv-speech-says-we-recognize-reality.html> (last visited Nov 30, 2018). President Carter stated: “[T]he United States of America recognizes the Government of the People’s Republic of China as the sole legal government of China,” and informed reporters that the U.S. would terminate diplomatic relations and the mutual defense treaty with Taiwan as a result of the recognition of the People’s Republic of China.”

86. U.S. CONST. art II, § 3. *See also* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084–95 (2015) (Justice Kennedy’s history and acknowledgement of the President’s recognition power and its derivation from the Reception Clause); Koh, *supra* note 11 (providing analysis of the *Goldwater* decision focused on the President’s recognition power).

stating he would “affirm the judgment of the Court of Appeals insofar as it rests upon the President’s well-established authority to recognize, and withdraw recognition from foreign governments.”<sup>87</sup> Justice Brennan continued in his dissent, touching on the question of which branch has the authority to terminate treaties:

[t]he issue of decision making authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts. The constitutional question raised here is prudently answered in *narrow* terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. That mandate being clear, our judicial inquiry into the treaty rupture can go no further.<sup>88</sup>

*Goldwater v. Carter* may be an important benchmark for defining the power of the Executive in treaty termination, but it seems likely that it will define an exception to the rule, rather than provide the foundation for more expansive executive authority.

The seminal case for separation of powers disputes is *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>89</sup> Professor Koh views treaty termination according to the Justice Jackson’s framework<sup>90</sup> and argues “[i]n contrast to an overbroad unilateral

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87. *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

88. *Id.* at 1006 (Brennan, J., dissenting) (citations omitted).

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

90. Justice Jackson’s landmark concurrence in *Youngstown* famously set forth three familiar categories of executive action:

*Youngstown* Category One: “[w]hen 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”;

*Youngstown* Category Two: “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own

presidential termination ‘rule,’ the mirror principle does not mandate a ‘one-size-fits-all’ mode of agreement termination. Instead, depending on the substance and entry process, the mirror principle requires varying degrees of congressional and executive participation to exit from various kinds of international agreements.”<sup>91</sup> He argues the types of international agreements (sole executive agreements, treaties, and congressional-executive agreements) roughly map to Jackson’s three categories and following the mirror principle, such an analysis should in part determine withdrawal authority.<sup>92</sup> According to Koh, “the mirror principle is simply a variant of the famous ‘last-in-time rule.’”<sup>93</sup> The second factor he discusses is the substance of an agreement. When applying the second factor, Professor Koh states “which branch of government has *substantive constitutional prerogatives* regarding that area of foreign policy”<sup>94</sup> influences the termination requirement alongside the first factor. Professor Koh argues for reciprocal processes for treaty termination, analogous to the accepted process for repealing federal statutes and laws. It would then follow that while the *Youngstown* framework is helpful in determining some specifics regarding treaty termination authorities, the Court should not rely on Jackson’s second category as justification for absolute executive power in the face of congressional silence. Rather, the Court should view it as falling into the “twilight zone”<sup>95</sup> and treat it as a “concurrent power shared with either the full Congress or the Senate.”<sup>96</sup> Just

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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”; and *Youngstown* Category Three: “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson J., concurring).

Koh, *supra* note 11, at 461–63 n.130.

91. *Id.* at 461.

92. *Id.* at 462–63.

93. *Id.* at 457.

94. *Id.* at 462.

95. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–611 (1952).

96. Bradley, *supra* note 2, at 824.

as the Court would not accept unilateral presidential authority to rescind a law passed by Congress, neither should they accept a unilateral presidential authority to terminate treaties.<sup>97</sup> Congress should not have to act preemptively to keep the President from unilaterally terminating treaties.<sup>98</sup> Such executive power to act unilaterally should only apply to certain cases where termination is pursuant to a plenary presidential power, such as in *Goldwater* where termination authority was asserted under the Recognition Power.<sup>99</sup>

The next attempt by individual members of Congress to prevent a presidential treaty termination came in 2002 following President George W. Bush's announcement that the U.S. would withdraw from the 1972 Anti-Ballistic Missile Treaty (ABM Treaty) with Russia.<sup>100</sup> In *Kucinich v. Bush*<sup>101</sup> Judge Bates found the Senators lacked standing under *Raines v. Byrd*<sup>102</sup> and relied heavily on *Goldwater v. Carter* to determine the question was nonjusticiable under the political question doctrine.<sup>103</sup> Similar to *Goldwater v. Carter*, *Kucinich v. Bush* would likely reach the Court on its merits following *Zivotofsky I*. Unlike *Goldwater v. Carter*, *Kucinich v. Bush* would require the Court to decide if the Executive possesses the power to terminate treaties unilaterally. But unlike *Goldwater v. Carter*, *Kucinich v. Bush* does not fall under a plenary presidential power and President Bush's termination would most likely be ruled unconstitutional. As for the enduring strength of *Kucinich v. Bush* for the historical gloss,

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97. *Id.* at 786–87, 821.

98. Arguments have arisen that Congress could preempt such confusion through a few methods. These include legislation passing a law that prohibits unilateral presidential action or placing such a prohibition in a RUD for each treaty during the advice and consent process. See GLENNON, *supra* note 7, at 123-63 for a discussion of congressional remedies.

99. See *supra* notes 85-86 and accompanying text.

100. Terence Neilan, *Bush Pulls Out of ABM Treaty; Putin Calls Move a Mistake*, N.Y. TIMES, December 13, 2001, <https://www.nytimes.com/2001/12/13/international/bush-pulls-out-of-abm-treaty-putin-calls-move-a-mistake.html>.

101. *Kucinich v. Bush*, 236 F. Supp. 2d 1 (2002).

102. *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that appellees did not have a sufficient personal stake in the dispute and did not allege a sufficiently concrete injury to have established standing under the constitution).

103. *Kucinich v. Bush*, 236 F. Supp. 2d 1 at 32–49.

the Congress eventually funded President Bush's Ballistic Missile Defense Plans<sup>104</sup> as Bradley notes.<sup>105</sup> This action would move President Bush's action from Bradley's<sup>106</sup> fourth category, unilateral presidential termination, to his third category, termination with post hoc congressional or senatorial approval, adding it to the continued custom of Senate involvement as opposed to an extension of unilateral executive authority.

*Kucinich v. Bush* is the type of case that Professor Koh envisions arising should the current administration attempt to terminate any treaties without congressional involvement.<sup>107</sup> As this section traced, the general view of treaty termination custom has shifted since the founding, most noticeably in the twentieth century.<sup>108</sup> This shift coincides with a growth in American involvement in foreign affairs born of the United States' participation in two world wars and its subsequent position as a Cold War superpower. As Professor Bradley comments in his analysis, "[n]ational security soon became directly relevant to the issue of treaty termination and suspension" following World War I.<sup>109</sup> This trend towards deference to the Executive in foreign affairs and national security has concurrently shifted customary treaty practices. More than one hundred years of cooperation between the Congress and the President shifted significantly towards executive unilateralism.

#### IV. FRAMERS' INTENT & FUNCTIONAL CONSIDERATIONS

Next, the Court should look at the intent of the Framers in their analysis. Discussion of the Framers' Intent cannot be

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104. Paul Richter, *Senate GOP Wins Funding Battle for Missile Defense*, LOS ANGELES TIMES, June 27, 2002, <https://www.latimes.com/archives/la-xpm-2002-jun-27-na-missile27-story.html>.

105. Bradley, *supra* note 2, at 816.

106. See *infra* Section V of this paper, especially nn.217-18 and accompanying text.

107. Koh, *supra* note 11, at 432-34.

108. See e.g. Jules Lobel, *Emergency Power and the Decline of Liberalism.*, 98 YALE L.J. 1385 (1989); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009); Paul, *supra* note 79; Hathaway, *supra* note 1; Bradley, *supra* note 2.

109. Bradley, *supra* note 2, at 808.

undertaken without a concurrent evaluation of functional considerations given the Framers' focus was to create a more functional government than had resulted from the Articles of Confederation.<sup>110</sup> As the intent of the Framers centered upon functional considerations, this section will treat the two factors simultaneously. Section III of this paper described a post-1909 upward trend of presidential authority that coincided with two world wars and the Cold War and an "increasingly deferential posture towards the Executive Branch."<sup>111</sup> As the Court wrote in *Chadha*, "the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people."<sup>112</sup> In overriding the legislative veto, the Court overturned another post-1930 political creation aimed at expediency by looking to the intent of the Framers.

The Court in *Chadha* believed the Framers created an "unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process."<sup>113</sup> Just as with legislation, the Framers created a specific, deliberate, and deliberative process for ratifying treaties. In both these instances, the reverse procedures were not stated, yet in the case of legislation, presidential authority has not been asserted as it has with treaty termination. In *Chadha* the Court determined that efficiency did not undercut the intent of the Framers despite Congress having the final say in legislation, and neither should the Court allow efficiency in treaty termination to do so.<sup>114</sup>

Some have argued that "[t]he intent of the Framers is thoroughly ambiguous"<sup>115</sup> regarding treaty termination. But while such an argument may be ambiguous, "even the most

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110. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L. L. 695, 698 (1995).

111. Bradley, *supra* note 2, at 827.

112. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

113. *Id.*

114. See *supra* notes 41-47 and accompanying text.

115. GLENNON, *supra* note 7, at 151.

cursory consideration would suggest that the argument for excluding Congress (or the Senate) from treaty termination is weak.”<sup>116</sup> Others contend that their intent is quite clear.<sup>117</sup> One such argument arguing for a clear Framers’ Intent in support of unilateral Executive power was given by Senator Jon Kyl in 2002. During floor debate in the Senate over President Bush’s withdrawal from the 1972 ABM Treaty, Senator Kyl argued “the preponderance of writings and opinions on this subject [treaty termination] strongly suggests that the Framers intended for the authority to be vested in the President.”<sup>118</sup> Senator Kyl continues to provide references from Madison and Jefferson regarding the Vesting Clause<sup>119</sup> and executive power in support<sup>120</sup> of his argument that “[t]he Senate’s role in making treaties is merely a check on the President’s otherwise plenary power—hence the absence of any mention of treaty-making power in Article I, Section 8. Treaty withdrawal remains an unenumerated power—one that must logically fall within the President’s general executive power.”<sup>121</sup> As Professor Bradley points out, “[t]he Vesting Clause Thesis. . . is highly controversial.”<sup>122</sup> Senator Kyl continues and cites *Youngstown* in support of expansive executive power after raising the Vesting Clause Thesis<sup>123</sup> but fails to note that in his concurring opinion, Justice Jackson specifically refutes the Solicitor General’s assertion that “[i]n [the Solicitor General’s] view, [the Vesting Clause] constitutes a grant of all the executive powers of which the Government is capable.”<sup>124</sup> Justice Jackson rebuts this assertion and argues the Framers were instead trying to curtail executive power.

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116. *Id.*

117. Emerson, *supra* note 65, at 48–52. See also Charles A. Lofgren, *War Powers, Treaties, and the Constitution*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* (1987); Bestor, *supra* note 8; Arthur Bestor, *Separation Of Powers In The Domain Of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 *SETON HALL L. REV.* 527 (1974).

118. 148 *CONG. REC.* 4,536 (2002).

119. U.S. CONST. art II, § 1.

120. 148 *CONG. REC.* 4,536–38 (2002).

121. *Id.* at 4,536.

122. Bradley, *supra* note 2, at 780.

123. 148 *CONG. REC.* 4,536 (2002).

124. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952).

If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones. The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.<sup>125</sup>

Senator Kyl's argument also fails in his reliance upon Jefferson and Madison. As noted in Section II, Thomas Jefferson unequivocally stated treaty termination could occur through "an act of the legislature alone."<sup>126</sup> Similarly, responding to inquiries made by Edmund Pendleton regarding the Treaty of Peace with Great Britain<sup>127</sup> in 1790, Madison wrote concerning the Supremacy Clause, "[t]reaties, as I understand the Constitution, are made *Supreme* over the Constitutions and laws of the particular states, and like a subsequent law of the United States, over pre-existing laws of the United States."<sup>128</sup> He continues, "[t]hat the contracting powers can annul the Treaty cannot, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a Treaty."<sup>129</sup> Madison concludes his subsequent discussion of breaches of the treaty:

[i]n case it should be advisable to take advantage of the adverse breach, a question may perhaps be started, whether the power vested by the Constitution with respect to Treaties in the President and Senate makes them the competent Judges, or whether, as the Treaty is a law, the whole Legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary Treaties, the Legislative authority be requisite to annul a *Treaty of peace*, as being equivalent to a Declaration of war, to which that authority alone, by our Constitution, is competent.<sup>130</sup>

Madison contemplates several scenarios and treaty types,

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125. *Id.* at 640–41; *see also* Taylor v. Morton, 23 F. Cas. 784, 786 (1855).

126. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 111 (1850).

127. Emerson, *supra* note 65, at 51.

128. JAMES MADISON, 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES 524 (1884) (emphasis in original).

129. *Id.*

130. *Id.* at 524–25 (emphasis in original).

even differentiating between normal treaties and those involving an enumerated power of the Congress, but at no point does he consider removing parties in the deliberation. Furthermore, “[i]t should be noted that, in his careful analysis of the treaty abrogation power, Madison did not once consider the possibility of the President alone terminating a treaty, even when the other side had committed a breach of it, which offers an insight into what the Founding Fathers thought.”<sup>131</sup> In total, Senator Kyl’s argument is easily disproven and one can firmly reject such an interpretation of the intent of the Framers.

Opposite Senator Kyl’s point is that the Framers intended the treaty power, both creation and termination, to be a joint power. *The Federalist Papers* offer additional perspectives from John Jay and Alexander Hamilton.<sup>132</sup> John Jay focused on the importance of treaties and the logic behind involving both the President and the Senate. He espoused the value of their collective wisdom and understanding of the subject matter acting in concert to create the best possible situation for the United States as a whole and not simply for any of the states individually.<sup>133</sup> Jay’s and Hamilton’s views also overlapped on the importance of according treaties the status of federal law to ensure the United States would be bound by treaties and act as an honorable nation in international relations as opposed to the weakness of treaty obligations under the Articles of Confederation.<sup>134</sup> Both men also viewed the treaty power as a concurrent power of the Executive and the Senate.<sup>135</sup>

Regarding treaty-making and treaty-breaking, Jay believed “[t]hey who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them.”<sup>136</sup> Acting jointly, the Senate and the

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131. Emerson, *supra* note 65, at 52.

132. THE FEDERALIST NOS. 4, 64 (John Jay), NOS. 12, 75 (Alexander Hamilton).

133. THE FEDERALIST NOS. 4, 64 (John Jay).

134. THE FEDERALIST NO. 12 (Alexander Hamilton), NO. 64 (John Jay).

135. THE FEDERALIST NO. 64 (John Jay), NO. 75 (Alexander Hamilton).

136. THE FEDERALIST NO. 64, at 379 (John Jay) (Isaac Kramnick ed., 1987). Jay continues: “. . . but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the

President are responsible for making treaties for the good of the nation, and it follows that they should act harmoniously in their maintenance and in their dissolution. In a warning regarding the separation of powers reminiscent of Justice Jackson's caution about the Vesting Clause Thesis in *Youngstown*, Hamilton cautioned:

The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws nor to the enactment [sic] of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. . . . The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust [sic] that power to an elective magistrate of four years' duration.<sup>137</sup>

Just as it would be unsafe to entrust the creation of treaties solely to the President, it would also be unsafe to allow their termination through unilateral action. Hamilton quite clearly believed that while the Executive must be able to negotiate for the nation, the results of the Executive's efforts must be tempered against the wisdom of the legislatures that represent

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consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them." *Id.* Jay is discussing the treaty as a contract in this section and taken out of context it is not very illustrative for the aim of this paper. But taken in context with all of *Number 64*, Jay very clearly discusses the President and Senate acting in harmony, it seems obvious that Jay does not discern any separate power with regards to treaties in either the Senate or the President.

137. THE FEDERALIST NO. 75, at 425 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis in original).

the people. Just as the good of the nation and the will of the people must be considered when forming treaties, so must they also impact the nation's decision on whether to leave those treaties. If the nation deems it appropriate, through a concurrent effort of the Executive and the Senate, to form a treaty with another nation, it follows that a joint effort should be needed to ensure the good of the nation, and not a single entity, are at the forefront of the decision to terminate the resulting law.

This focus on joint power also highlights the separation of powers doctrine upon which the Constitution is built. During the initial discussions in Philadelphia in 1787, "the treaty power, lie the war-making power, went almost without comment. . . . The draft reported by the Committee [of Detail] gave the Senate both treaty-making authority and the power to appoint ambassadors. The sole diplomatic duty given to the President was the power to receive ambassadors."<sup>138</sup> This distinction between the Congress and the Executive did not hold as the treaty power was eventually placed within Article II but stipulated as a joint power. "These shifts in wording and placement hint that the members of the convention came to view treaty-making and perhaps the general control of foreign relations as executive functions"<sup>139</sup> which would suggest support for the modern-day interpretation. But Professor Arthur Bestor, "a most careful student of the subject,"<sup>140</sup> cautions against such a simplistic interpretation. Professor Bestor argues "the precise meaning of the words ultimately selected must be ascertained from the debates themselves, not from a dictionary. Moreover, an exhaustive examination rather than a mere sampling of the sources is necessary if an unconscious bias toward present-day interpretations is to be avoided."<sup>141</sup> It is possible to interpret this change and argue that the "framers might be supposed to have shown an intention to transfer the control of foreign policy from legislative to executive hands," and this was in fact an argument

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138. Charles A. Lofgren, *War Powers, Treaties, and the Constitution*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, 253 (1987).

139. *Id.* at 254.

140. *Id.* at 254.

141. Bestor, *supra* note 8, at 91.

given by Senator Spooner on the floor of the Senate in 1906.<sup>142</sup> But Professor Bestor argues against such an interpretation:

One searches in vain the records of the Convention and the discussions of the period for the slightest bit of evidence that the framers intended any such result or that contemporaries expected the proposed Constitution to operate in this way. No one hinted that the legislature of the Union was to be deprived of its long-established authority to instruct the diplomatic representatives of the Nation. Even the opponents of ratification did not charge the document with so massive a surrender of authority to the executive. Had such an intention been suspected, the outcry against monarchical tendencies would have been even shriller than it was.<sup>143</sup>

In fact, there were substantial criticisms against the treaty power as it came out of the Committee of Detail, but these criticisms focused on the “exclusion of the House of Representatives” and “the absence of any requirement for a greater-than-simple-majority vote for the approval of treaties.”<sup>144</sup> These objections both rose from “economic and sectional rivalry” among the delegates for the states.<sup>145</sup> The final compromise<sup>146</sup> for the treaty clause was meant to have the President “act as a check on the Senate.”<sup>147</sup> In Madison’s view, “the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”<sup>148</sup> The final solution, a “presidential check[,] became the acceptable alternative once the convention had worked out a method of electing the President that stripped the Senate of any role in presidential selection.”<sup>149</sup> This checks and balances solution was important for other functional reasons. As Hamilton explained,

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142. *Id.* at 92.

143. *Id.* at 93.

144. *Id.* at 93.

145. *Id.* at 93.

146. *See id.* at 91–120 for a detailed discussion of the debates surrounding the Treaty Clause.

147. Lofgren, *supra* note 138, at 254.

148. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 392 (Max Farrand ed., 1911).

149. Lofgren, *supra* note 138, at 254.

the President was much more suited to act in concert with the Senate in treaty formation, as opposed to the House of Representatives, The President could act with unity of purpose and as a single negotiator, whereas “the multitudinous composition of [the House of Representatives] forbid[s] us to expect in it those qualities which are essential to the proper execution of such a trust.”<sup>150</sup> These qualities, “[a]ccurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous.”<sup>151</sup> Functionally, the President as an “Agent” of the Senate was the intent of the Framers and such a functional consideration remains just as prescient today as it did in 1787. Hamilton, also made use of the term “agent” when describing the President’s role in the treaty process.<sup>152</sup> And as an agent, the President’s responsibility was the negotiation of the treaty which the Senate would approve based upon its view of the national interest. Upon the Senate’s approval, the President became the caretaker of the treaty, now law, under the Take Care Clause.<sup>153</sup> Given the Framers’ view of the President as an agent and the functional utility of an agent in negotiations and communications, it seems that they would view the President’s role in treaty termination as that of an agent carrying out the will of the Senate or the Congress when they determine a treaty no longer suits the national interest, and not as the individual responsible for determining whether or not the treaty retains its value.

The functional considerations of secrecy and speed in negotiations do not carry over to the case for termination as the *Restatement* asserts.<sup>154</sup> As Professor Glennon has written, “[t]he decision to withdraw from a treaty is almost never precipitated

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150. THE FEDERALIST NO. 75, at 426 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

151. *Id.* (emphasis in original).

152. *Id.* at 425.

153. U.S. Const. art II, § 3.

154. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313, cmt. *d* (citing *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979)).

by an emergency that requires. . . secrecy or dispatch; it represents a question that looms on policy horizons for some months, one that might benefit from the ventilation of diverse opinion in congressional hearings and debate.”<sup>155</sup> The question then, according to Professor Glennon, is one of initiative, as “these considerations do no imply that an *initial* resolution of the question by the President is improper.<sup>156</sup> Professor Abram Chayes argued to the Committee on Foreign Relations that “[t]he structure of the overall distribution of the foreign affairs powers, then, seems, at least on first appraisal, to argue for the existence of an independent presidential initiative in termination.”<sup>157</sup> However, Professor Bestor argues that a closer inspection of the Constitutional Congress and the contemporaneous definition of “Advice and Consent”<sup>158</sup> shows that Presidential initiative in treaty procedures was not the intent of the Framers.<sup>159</sup> The Framers would have understood “that treaties were to be made by the head of state (in conformity with traditional diplomatic protocol) but only ‘by and with the Advice and Consent of the Senate’ – therein employing the traditional phrase that connoted legislative deliberation and decision and executive concurrence.”<sup>160</sup> Professor Bestor argues that the critical difference showing a lack of Presidential initiative is found in the two usages of “Advice and Consent” in Article II.<sup>161</sup> The Appointments Clause states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint.”<sup>162</sup> According to Professor Bestor, “[b]y providing so carefully for the President alone to initiate the appointments, and by granting him no comparable initiative in treaty matters,

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155. GLENNON, *supra* note 7, at 151.

156. *Id.* at 152.

157. TREATY TERMINATION HEARINGS, *supra* note 27, at 311.

158. See Arthur Bestor, *Separation Of Powers In The Domain Of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 541–47 (1974) for a discussion of the history of “Advice and Consent” and its meaning as would have been understood at the time of the Constitutional Congress.

159. Bestor, *supra* note 8, at 115–20.

160. Bestor, *supra* note 158, at 547.

161. U.S. CONST. art II, § 2, cl. 2.

162. *Id.*

the Committee on Postponed Parts (and the finished Constitution. . .) made a significant distinction, often overlooked.”<sup>163</sup> Professor Glennon on the other hand argues:

these [functional] considerations do not imply that *initial* resolution of the question by the President is improper. The act falls within the concurrent powers of the President; it is a matter concerning which the President’s power is *initiative* and the power of the Congress (or the Senate) is *reactive*.<sup>164</sup>

But this view of Executive initiative is at odds with “the procedure that had developed over the years between independence and the adoption of the Constitution. This procedure. . . assumed that it was a legislative responsibility to determine the objectives of any contemplated treaty negotiation.”<sup>165</sup> Whereas the Framers specified initiative for the President as to appointments, they left out such Executive initiative with respect to treaties which is in keeping with the Framers’ view of the President as an agent of the Senate. The *Restatement* makes the analogy between treaty termination and the termination of Senate-confirmed appointees in support of Executive treaty termination.<sup>166</sup> Professor Bestor, citing the identical phrase from state constitutions,<sup>167</sup> argued:

[t]he persuasive analogy is not between the power to terminate a treaty and the power to terminate the appointment of a subordinate, but between the power to terminate a treaty and the power to terminate (that is, to repeal) a statute. The reasons justifying an exception to an otherwise controlling rule – that is, an exception in favor of a Presidential dismissal power – are applicable in no logical way to the totally different questions of treaties.<sup>168</sup>

To summarize the joint nature of the treaty power with respect to the separation of powers, “[t]he treaty clause reported by the Committee on Postponed Parts was designed to make the

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163. Bestor, *supra* note 8, at 117.

164. GLENNON, *supra* note 7, at 152.

165. Bestor, *supra* note 8, at 117–18.

166. RESTATEMENT (FOURTH) § 313, cmt. *d*.

167. Bestor, *supra* note 8, at 115-17.

168. *Id.* at 30.

President a joint participant in the treaty-making process, not to transfer that process to him.”<sup>169</sup> As such, the initiative for treaty termination should also come from the Executive. And while there are instances of Executive initiative prior to 1978, the plurality were requests to the Congress to authorize termination *to allow* the Executive provided the other party had notice.<sup>170</sup> While some may argue that the lack of an enumerated Senate exclusivity to initiation in the Treaty Clause leaves it open to Executive initiative, this is not the understanding the Framers would have had given the contemporaneous meaning of Advice and Consent. Furthermore, to argue that a reactive role for Senate or Congress still such an action is to assume that Congressional silence is acquiescence in treaty termination. This has not been adjudicated by the Court, but given the understanding of the treaty power at the time of the Constitutional Convention, it loses much of its power. If one accepts the definition of Advice and Consent argued by Professor Bestor, silence as consent does not hold. Requiring the Consent of the Senate to a treaty would, as discussed in Section II regarding the Rule of Equal Formality, also requires Senate consent to treaty termination. Under such an understanding, silence would equate to a rejection of the proposal to terminate, just as Senate silence on a Presidential nominee is taken as Senate disapproval and Senate silence on a treaty submitted for ratification is also tantamount to rejection. Given the custom of treaty termination throughout the 19th century relied upon *ex ante* Senate or Congressional approval (except for President Lincoln’s action in 1864<sup>171</sup>), practice would argue that silence with regards to treaties is tantamount to rejection, not acquiescence.

A final consideration the Framers had in mind during the Constitutional Convention on the topic of treaties was that the United States should be viewed as a reliable actor in the international community of states.<sup>172</sup> While their focus was primarily on economics, they acknowledged the importance the

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169. *Id.* at 118.

170. Bradley, *supra* note 2, at 789–91.

171. *Id.* at 794.

172. David Gray Adler, *The Framers and Treaty Termination: A Matter of Symmetry*, ARIZ. ST. L. J. 891, 895 (1981).

Colonies' alliance with France during the Revolutionary War. One point of discussion focused on the failure of the Articles of Confederation regarding treaties.<sup>173</sup> The Articles failed to ensure that all the member states of the Confederation would be subject to national treaties and the resulting fear was that the United States would not be viewed as a reliable international partner if its treaties were abrogated by its constituent parts.<sup>174</sup> The Constitution sought to rectify this oversight through the Supremacy Clause, thereby specifying treaties as the "supreme Law of the Land."<sup>175</sup> As Senator Byrd illuminated during the *Treaty Termination Hearings*, granting the President the authority to withdraw from a treaty without Senate involvement would also make the United States an unreliable actor. Treaty termination must involve the Senate according to Senator Byrd because:

Otherwise. . . the Senate could grant consent to the President's ratification of a treaty, and within a matter of weeks or months, a new President, newly elected, could undo that action.

I [Senator Byrd] do not believe that a precipitous reversal of policy of that nature should be permitted solely on the judgment, or even the whim, of a single man. It would not be sensible, it seems to me, to require Senate approval of ratification of a mutual defense treaty and, at the same time, permit a virtually immediate reversal of that decision without Senate approval.<sup>176</sup>

The reliability of the United States in the international system was a concern of the Framers and has remained a concern throughout the nation's history.<sup>177</sup> As Dr. David Adler argues, "[o]ne primary goal at the Philadelphia Convention was to restore the reputation of the country with respect to its international agreements. This concern could hardly have been eased by placing the termination authority in the hands of a

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173. Lofgren, *supra* note 138, at 242–44.

174. Vazquez, *supra* note 110, at 698.

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

176. TREATY TERMINATION HEARINGS, *supra* note 27, at 6–7.

177. Adler, *supra* note 172, at 908.

single political officer of the government.”<sup>178</sup>

That concern has resurfaced over the last two years. While the Framers likely did not envision a world held together by alliances and the United States as the leader of a liberal world order, they did see treaties as an important part of the international arena and credible treaty commitments were a necessity.<sup>179</sup> As discussed earlier, treaty terminations often represent long-term considerations that would benefit from careful, collective deliberation focused on the national interest as opposed to swift, efficient, single-entity decisions. The faith of other nations that such deliberations would be undertaken with grave consideration and not the passing fancy of the moment, lend credibility to American assurances throughout the world. “The Framers were concerned about the nation’s fidelity to international obligations; accommodating the many sectional interests, the need to account for the jealousy of small states; and the need for solemn deliberation. They also had an overriding fear of absolute executive power.”<sup>180</sup> Given these concerns, “[i]t is unlikely that they would have been willing to permit either simple dissolution of treaties, or any termination procedure which would have ignored these major concerns.”<sup>181</sup> The intersection of these various functional concerns were at the center of the Framers’ discussions and the concept of unilateral Executive termination does not remedy these concerns.

The intentions of the Founding Fathers, with respect to the treaty power, are clear. To secure the ratification of the small states it was essential that all states had an equal voice in the treaty power, so that their interests would not be ignored or sacrificed. Mere participation in the formulation of treaties would not have secured those interests. The termination of a treaty could do as much harm to the Framers’ jealously guarded sectional and state interests as the making of the treaty. It seems then wholly unrealistic to believe that the Framers would have unbalanced this carefully drafted system by not providing that the treaty-making power included the

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178. *Id.*

179. Lofgren, *supra* note 138, at 242–45.

180. Adler, *supra* note 172, at 908.

181. *Id.*

power to terminate treaties as well.<sup>182</sup>

These concerns remain valid in the present and based upon this analysis of the Framers, one can conclude that they intended the power to terminate treaties as a joint power not to be delegated for unilateral action by the Executive.

## V. CUSTOM

Lastly, custom should be applied to the dispute to trace various practices of termination through the life of the Republic. This paper utilizes Professor Michael Glennon's proposed framework for how the Court decides questions on the separation of powers.<sup>183</sup> Within this framework, Professor Glennon proposes a methodology for understanding how the Court identifies and uses custom to solve these issues,<sup>184</sup> which it has as early as 1803.<sup>185</sup> Professor Curtis Bradley's analysis of the historical gloss of treaty termination also uses this framework.<sup>186</sup>

According to Professor Glennon, "[w]hen the Court moves beyond the text, it is seeking to find a fact that it will treat as the equivalent of a textual provision of the Constitution."<sup>187</sup> This fact upon which the Court can base a rule<sup>188</sup> is analogous "to footsteps across a common that eventually become a widely used 'path.'"<sup>189</sup> But before the Court can determine to what rule a path leads it must first determine whether or not a custom exists. The framework suggested by Professor Glennon rests upon six factors to determine whether a practice constitutes a custom.

The first factor is consistency, whereby "[a]n initial determination must be made concerning when distinct and often unrelated historical events are sufficiently similar to constitute a

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182. *Id.* at 922.

183. GLENNON, *supra* note 7, at 36-70.

184. Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

185. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

186. Bradley, *supra* note 2, at 774, n.1.

187. Glennon, *supra* note 184, at 122.

188. *Id.* at 122 n.76.

189. *Id.* at 128 (Prof. Glennon cites Pitt Cobbett's discussion of international law custom and uses it as the basis for his analogy).

custom.”<sup>190</sup> This can be difficult for custom as “the circumstances surrounding historical occurrences must somehow be found by a court before it can ‘apply’ such events to the case before it. Because of these difficulties the requirement of consistency may devolve into a philosophical inquiry into the substitutability of elements drawn from various contexts.”<sup>191</sup> The second factor is numerosity. Quite simply, “the act constituting a custom must be repeated more than once, and obviously, the greater the number of times the act has been repeated, the more probative the custom.”<sup>192</sup> Duration is the third factor. “This consideration relates to the period of time over which the act has been repeated. The longer the time period, the more reason to view the repetition as having authority as custom.”<sup>193</sup> The fourth factor, density, “focuses on the number of times an act has been repeated over the course of its duration; the greater the density, the more probative the custom.”<sup>194</sup> Continuity, the fifth factor, concerns “the regularity with which the act has been repeated over its duration. If repetition of the act is irregular, so that comparatively long periods of time occur in which the practices has not been followed, less reason exists for the act to take on the authority of custom.”<sup>195</sup> The last factor is normalcy. “If an act has been performed by a number of different Congresses or presidents, greater reason exists to regard it as custom. Normalcy ensures that the act was not an aberration attributable to their personality of certain presidents or congressional leaders, or to other unique historical circumstances.”<sup>196</sup> According to this framework for determining if custom exists, “[t]he consistency requirement must always be satisfied. Not all of the remaining five elements discussed above, however, must be present to justify the conclusion that a custom exists.”<sup>197</sup> Furthermore, it is necessary to weigh each of the factors against the others and

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190. *Id.* at 129.

191. *Id.*

192. *Id.* at 130.

193. *Id.* at 131.

194. *Id.* at 132.

195. *Id.*

196. *Id.* at 133.

197. *Id.*

determine where upon a spectrum of weak to strong does the custom in question fall.<sup>198</sup>

Once the analysis has answered the question as to a custom's existence, it remains necessary to examine the custom in light of *opinio juris seu necessitatis*.<sup>199</sup> "A custom, to be considered probative evidence of a legislative or constitutional fact, must have been understood and intended by both branches to represent a juridical norm; it cannot be simply a series of essentially random acts that happen to form a pattern of usage."<sup>200</sup> *Opinio juris* applied to separation of powers "assumes the concurrence of three elements. First, the custom in question must consist of act; mere assertions of authority to act are insufficient. Second, if a coordinate branch has performed the act, the other branch must have been on notice of its occurrence. Third, the branch placed on notice must have acquiesced in the custom."<sup>201</sup> When discussing treaty termination, the first two elements of *opinio juris* are straightforward as the custom in question deals with the act of terminating a treaty and as treaties require notification of termination each branch has historically been aware of acts regarding termination. In some cases, one branch explicitly acquiesces to the action of another, such as a congressional authorization for a President to execute a specific act. But many cases "will. . . require a determination of whether consent can be inferred from the nonaction or silence of the other branch."<sup>202</sup> To this end, Professor Glennon enumerates four conditions that if satisfied should make it possible to "infer consent in the relations between governmental branches."<sup>203</sup> The first condition is absence of objection.<sup>204</sup> "The Court has insisted that a notice requirement be fulfilled before it will give weight to custom. Similarly, it has also required that the practice in question not have been objected to by the other branch; when

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198. *Id.*

199. *Id.* at 133–34.

200. *Id.* at 134.

201. *Id.*

202. *Id.* at 138.

203. *Id.* (the argument for silence as consent draws primarily from tort law dealing with harm and with assertions of legal rights).

204. *Id.* at 139–40.

such an objection has occurred, the Court has declined to view custom as relevant.”<sup>205</sup> Second is an institutional capability of objecting<sup>206</sup> which in the context of the separation of powers “is largely a function of time constraints.”<sup>207</sup> Utility of objection, the third factor, “is closely related to the institutional capability of objection.”<sup>208</sup> Professor Glennon uses the situation of one branch facing a *fait accompli* whereby “there is no point in objecting.”<sup>209</sup> The last factor is compliance with the Delegation Doctrine.<sup>210</sup> “Despite the existence of a custom accompanied by otherwise effective acquiescence, a court remains free to decide whether the custom in question violates the delegation doctrine.”<sup>211</sup> If these four conditions are met, “*opinio juris* exists [and] it is appropriate for a court to regard custom as a fact upon which its decision might be based.”<sup>212</sup> The last question that remains after *opinio juris* is met is whether “the custom represent[s] a legislative fact, which must give way in the face of nonconcurrence by the other branch; or is it a constitutional fact, establishing the acting branch’s plenary authority over the matter?”<sup>213</sup> Professor Glennon’s “examination of Supreme Court decisions in this area reveals that only those customs dating from the earliest days of the Republic will be accorded the status of constitutional facts.”<sup>214</sup>

In his recent review of constitutional custom, or “historical gloss,”<sup>215</sup> Professor Curtis Bradley examines treaty termination with the aim of “present[ing] the most complete and accurate account to date of the historical practice of U.S. treaty terminations. . . and recover[ing] a nineteenth-century

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205. *Id.* at 139.

206. *Id.* at 140–41.

207. *Id.* at 141.

208. *Id.*

209. *Id.*

210. *Id.* at 142.

211. *Id.* (Prof. Glennon also discusses as a subcategory of the Delegation Doctrine, Noninterference with Protected Freedoms).

212. *Id.* at 144.

213. *Id.* at 144–45.

214. *Id.* at 145.

215. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

understanding of treaty-termination authority that has largely been lost from modern considerations.”<sup>216</sup> In his discussion of historical gloss, Professor Bradley “divides the practice [of treaty termination] 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.”<sup>217</sup> He also considers “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>218</sup>

Professor Bradley’s detailed analysis highlights the course of treaty termination and abrogation, starting with the first instance in 1798.<sup>219</sup> The termination of four treaties between the United States and France occurred ex post to legislation passed by the Congress and signed by President Adams.<sup>220</sup> During the debate in Congress, “[o]ne member of the House did observe that ‘in 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>221</sup> This debate informed Thomas Jefferson’s *A Manual of Parliamentary Practice* which stated, “[t]reaties being declared, equally with the laws of the United 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>222</sup> Some sources cite this instance as the

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216. Bradley, *supra* note 2.

217. *Id.* at 788.

218. To analyze the import of custom, or historical gloss, on constitutional problems, specifically those dealing with the separation of powers, Prof. Bradley relies on Prof. Glennon’s discussion of the Court’s use of custom in separation of powers questions. *Id.* at 788. See Glennon, *supra* note 184; GLENNON, *supra* note 7, at 54-68.

219. Bradley, *supra* note 2., at 789.

220. *Id.* at 789.

221. *Id.* (emphasis added). Prof. Bradley also notes, “For additional discussion of the debate in Congress, see David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 250-23 (1997).” *Id.* at 790 n.78.

222. *Id.* at 799. See also JEFFERSON, *supra* note 126, at 111 § 52 (1850).

only treaty abrogation in American history,<sup>223</sup> but it is in fact the “only instance in U.S. history in which the full Congress purported to effectuate a termination directly.”<sup>224</sup>

Treaty termination continued throughout the nineteenth century with the involvement of both political branches. In 1846, “the first time that the United States attempted to terminate a treaty pursuant to a unilateral withdrawal provision,”<sup>225</sup> the “Congress passed a joint resolution authorizing President Polk ‘at his discretion’ to terminate a treaty with Great Britain.”<sup>226</sup> This resolution followed a request from the President for such an authorization<sup>227</sup> and the Secretary of State informed the Ambassador of the termination saying, “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>228</sup> The debate over the resolution centered on whether the House should be involved, or if only a resolution by the Senate was needed.<sup>229</sup> During this debate, “[n]o one argued for a unilateral presidential power to terminate.”<sup>230</sup>

One debate that began in the nineteenth century and continued into the twentieth was whether or not the Congress could order the termination of a treaty if the President was opposed or if they could order partial termination or suspension without negotiating an entirely new treaty.<sup>231</sup> It was not until 1899 when President McKinley terminated certain provisions of a commercial treaty with Switzerland from 1850 that one finds

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223. TREATY TERMINATION HEARINGS, *supra* note 27, at 310 (testimony of Prof. Abram Chayes).

224. Bradley, *supra* note 2 at 789.

225. *Id.* at 790.

226. *Id.* at 790 (*quoting* Joint Resolution of Apr. 27, 1846, 9 Stat. 109, 109-10).

227. *Id.* at 790 (*quoting* 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)).

228. *Id.* at 790 (*quoting* S. Doc. No 29-489, at 15 (1<sup>st</sup> Sess. 1846)).

229. *Id.* at 790.

230. *Id.* at 790.

231. *Id.* at 791-93. This debate aligns with a view of Senate initiative more in line with the Framers’ interpretation of the separation of the treaty power between the Legislative and the Executive (*See infra* notes 160-70 and accompanying text).

an instance of unilateral executive action.<sup>232</sup> However, this was not a complete termination of the treaty, only of certain provisions, and “McKinley’s action need not be viewed as purely unilateral, given that he 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, and . . . the United States had concluded such an agreement.”<sup>233</sup> Despite this ambiguity, President McKinley’s action became the basis for the Executive’s assertion of unilateral termination authority which would grow throughout the twentieth century, working to change a one hundred and one year-long precedent of treaty termination as a concurrent power.<sup>234</sup>

Following President McKinley’s decision, the Executive Branch moved to define its power. “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. . . . [T]he memorandum noted. . . the 1899 termination of the provisions in the Swiss treaty” as the one instance of such a power as its support.<sup>235</sup> President Wilson’s submission of the Versailles Treaty sparked serious debate in Congress as to the authority of the Executive to terminate a

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232. *Id.* at 798. In 1864, President Lincoln initiated termination of a treaty unilaterally but received ex post Congressional authorization. *Id.* at 794.

233. *Id.* at 798–99 (footnotes omitted).

234. 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. . . . 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.

*Id.* at 800.

235. *Id.* at 801–02 (footnote omitted).

treaty but failed to resolve the issue.<sup>236</sup> But despite the Department of State memorandum and the discussion in Congress, no unilateral termination occurred until 1927 during the Coolidge Administration when the President terminated a U.S.-Mexican treaty on smuggling.<sup>237</sup> Unilateral terminations became more frequent after the Coolidge Administration.<sup>238</sup> This practice continued nearly unchecked until the Carter Administration, although concurrent action continued to occur contemporaneously.<sup>239</sup>

*Goldwater v. Carter*<sup>240</sup> is the most visible action where members of the Senate actively sought to prevent the President from unilaterally terminating a treaty, in this case the Mutual Defense Treaty with Taiwan. Throughout a variety of venues, from the court room to the Senate floor and committee chambers, proponents on both sides of the argument used custom and precedent to support their argument.

In defense of the President's authority, the State Department prepared a study on the history of presidential treaty termination as they had in previous instances.<sup>241</sup> Responsible for this effort was Arthur W. Rovine, the Assistant Legal Adviser for Treaty Affairs in the Department of State, whose responsibilities encompassed "advising on constitutional and international law questions with respect to treaties and executive agreements" and

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236. *Id.* at 803–05.

237. Prof. Bradley notes that the abrogation of the 1832 Russo-American Treaty which President Taft terminated occurred after Congress passed a resolution *ex post* to the President's announcement of termination. Such an action resembles precedent established in the nineteenth century. *Id.* at 805–06.

238. *Id.* at 806–10.

239. *Id.* at 808–11.

240. *Goldwater v. Carter*, 617 F.2d 697 (1979).

241. Herbert J. Hansel, Legal Advisor, to the Sec'y of State, Cyrus Vance, summarized this study in a memorandum in 1978. Mr. Hansel was Mr. Rovine's supervisor within the State Department and the instances of Executive treaty termination presented in Mr. Rovine's affidavit are the same instances presented in the memorandum. Memorandum from Herbert J. Hansel, 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"], *reprinted in* S. COMM. ON FOREIGN RELATIONS, 95TH CONG., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER, 395 (Comm. Print 1978).

“for advising on the history of treaties and agreements to which the United States is or has been a party.”<sup>242</sup> Mr. Rovine cites twenty-five cases of treaty termination broken into five categories<sup>243</sup> that can be generally split between twelve cases of unilateral presidential action and thirteen actions with congressional involvement.<sup>244</sup> To arrive at these specific numbers, Mr. Rovine used a method of counting whereby “treaty termination undertaken pursuant to a single statutory enactment are counted as one case. Thus, the Seaman’s Act of 1915, which ‘requested and directed’ the President to give notice. . . affected some twenty-five treaties. This is counted as one instance of Congressional direction.”<sup>245</sup>

In favor of executive authority, Mr. Rovine argued that “when the President did not act entirely alone, the Congress has followed no identifiable pattern in terms of the form of its participation in the treaty termination process, nor do legislative debates reveal a consistent view on the legal necessity of Congressional activity.”<sup>246</sup> As the argument in favor of the President’s authority to terminate the Mutual Defense Treaty with Taiwan was based on the presence of a provision within the treaty to terminate, Mr. Rovine raised the fact that “[t]he first

242. Declaration of Arthur W. Rovine, *Goldwater v. Carter*, Civ. No. 78-2412 (D.D.C. 1979) [hereinafter *Rovine Aff.*] reprinted in 2 UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES, 512-22 (Michael J. Glennon & Thomas M. Franck eds., 1980).

243. Per Mr. Rovine’s Declaration:

These 25 cases of Presidential action to terminate treaties were taken in the following ways:

- a. by the President acting alone (12 times).
- b. preceded by some form of Senate action (4 times).
- c. preceded by some form of concurrent authorization (2 times).
- d. pursuant to statutory directive (5 times).
- e. followed by subsequent Congressional action (2 times).

*Id.* at ¶ 3. This method of dividing termination actions is like Professor Bradley’s division except Mr. Rovine differentiates between *ex ante* congressional and Senate action whereas Professor Bradley combines the two categories into a single *ex ante* category (Bradley, *supra note 2*, at 788).

244. *Rovine Aff.*, *supra note 240*, at ¶ 3.

245. *Id.* at ¶ 4 (these 25 instances are as of the study into treaty termination Mr. Rovine conducted in 1978).

246. *Id.* at ¶ 6.

notice of termination provision did not appear in a treaty until 1822, and the matter of Presidential termination pursuant to such provisions was first debated in connection with the 1846 notice of termination of an 1827 Convention with Great Britain.”<sup>247</sup> However, Mr. Rovine presents no evidence that such discourse occurred and Professor Bradley’s analysis contradicts Mr. Rovine’s statement.<sup>248</sup> The legislation authorizing termination arose at President Polk’s request and the termination occurred through the passage of a superseding treaty, not as a result of the President’s action. Furthermore, there is no evidence of any arguments in support to the executive’s authority to terminate a treaty unilaterally. Mr. Rovine also asserts “[t]he pre-1846 period addressed the question of treaty termination primarily from the perspective of Congressional legislation superseding treaties” but again without supporting evidence that there was a change in the dialogue in 1846.<sup>249</sup> The debate through the early 20th century continued to focus on whether termination required the President and the Senate or the whole Congress to act.<sup>250</sup>

Mr. Rovine concludes his argument discussing the twelve treaty terminations by the President. “[O]nly one of these twelve instances arguably involved treaty violation by the other party. . . ; one occasion where statutory policy may have necessitated termination. . . ; and no cases of impossibility of performance. The Executive Branch’s state reasons for the termination actions in these twelve cases varied widely, depending upon the facts in each instance.”<sup>251</sup> He concludes, “[i]n none of these twelve cases had the treaty already been terminated or rendered void by operation of law or changed circumstances.”<sup>252</sup> Mr. Rovine traced these twelve cases from 1815 to the 1965, arguing for a long custom of executive action against inconsistent congressional involvement.<sup>253</sup>

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247. *Id* at ¶ 6.

248. *See supra* notes 225-30 and accompanying text.

249. *Rovine Aff.*, *supra* note 242, at ¶ 6.

250. Bradley, *supra* note 2, at 794–96 nn.111-20 and accompanying text.

251. *Rovine Aff.*, *supra* note 242, at ¶ 7.

252. *Id* at ¶ 7.

253. *Id* at ¶ 6.

The voice most in opposition to this executive assertion was Senator Barry Goldwater. Senator Goldwater introduced Senate Concurrent Resolution 2 – A concurrent resolution to uphold the separation of powers between the executive and legislative branches of Government in the termination of treaties<sup>254</sup> and was the lead plaintiff in *Goldwater v. Carter*.<sup>255</sup> During the *Treaty Termination Hearings* Senator Goldwater attempted to directly refute Mr. Rovine's assertions. As opposed to the thirteen instances of congressional involvement in treaty terminations acknowledged by Mr. Rovine, Senator Goldwater provided a list of 52 treaties or treaty provisions terminated with legislative action.<sup>256</sup> The largest reason for the disparity in numbers is that Senator Goldwater cited all twenty-five treaties affected by the Seaman's Act of 1915.<sup>257</sup> Senator Goldwater also provided his analysis of Mr. Rovine's argument, specifically the twelve actions cited as evidence of unilateral executive terminations:

I [Senator Goldwater] have read the argument by the legal adviser of the State Department, who claims there are 12 examples of Presidential treaty termination. I have examined each of these incidents in detail and I frankly must say that they are phony. There was ample legislative authority on the books for the cancellation of 6 of these 12 treaties. Two others were not terminated. Another expired because the country with whom we had entered into the treaty lost its existence and disappeared as a nation.

The final three treaties expired because they were outdated and ineffective. They were inoperative under international law because of unique circumstances and not because of any power of the President to terminate treaties generally.<sup>258</sup>

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254. S. REP. NO. 96-7, *supra* note 22, at 11–13 (this resolution received no further action and was not referred out of Committee back to the floor but was discussed during the TREATY TERMINATION HEARINGS).

255. *Goldwater v. Carter*, 617 F.2d 697 (1979).

256. S. REP. NO. 96-7, *supra* note 22, at 15.

257. 38 Stat. 1164 (1915).

258. TREATY TERMINATION HEARINGS, *supra* note 27, at 16 (statement of Senator Barry Goldwater). *See also* 125 Cong. Rec. S1891-95 (daily ed. Mar. 1, 1975) (statement of J. Terry Emerson) *reprinted in* TREATY TERMINATION HEARINGS, at 17-21.

The first instance of unilateral executive termination Mr. Rovine cited was a termination of the 1782 Treaty of Amity and Commerce with The Netherlands.<sup>259</sup> According to Professor Bradley, “the Executive Branch has sometimes claimed that the first unilateral presidential termination of a treaty occurred in 1815, but that is erroneous.”<sup>260</sup> In reality, the Netherlands had been subsumed by Napoleon into the French Empire and recreated by the remaining great powers during the Congress of Vienna.<sup>261</sup> The action of the Executive in this case was President Madison’s correspondence with the Netherlands acknowledging the treaty was “annulled,” after the Netherlands suggested “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>262</sup> The second treaty termination Mr. Rovine cited was President McKinley’s termination of certain provisions of the 1850 Convention of Friendship, Commerce and Extradition with Switzerland.<sup>263</sup> As discussed above, this was not a complete termination and was arguably “responding to a potential conflict between the treaty and a federal statute.”<sup>264</sup> Mr. Rovine’s third case was President Wilson’s 1920 termination of the 1891 Treaty of Amity, Commerce, and Navigation with Belgium concerning the Congo.<sup>265</sup> As Professor Bradley explains, “this is incorrect.”<sup>266</sup> The Seaman’s Act of 1915 had authorized the suspension of certain portions of this treaty and President Wilson notified Belgium of this action in 1916.<sup>267</sup> In December 31, 1916, “Belgium responded by saying that it preferred simply to terminate the entire treaty, and it asked the United States to formally acknowledge this denunciation. Eventually, in 1920, the United States ‘acknowledged’ Belgium’s notice of termination.”<sup>268</sup>

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259. Rovine Aff., *supra* note 242, at Exhibit 1.

260. Bradley, *supra* note 2, at 796.

261. *Id.* at 796.

262. *Id.* at 796.

263. Rovine Aff., *supra* note 242, at Exhibit 1.

264. Bradley, *supra* note 2, at 799. *See also supra* note 232-34 and accompanying text.

265. Rovine Aff., *supra* note 242, at Exhibit 1.

266. Bradley, *supra* note 2, at n.183.

267. *Id.* at n.183.

268. *Id.*

The first action from Mr. Rovine's list of precedent that Professor Bradley considers an actual unilateral termination is President Coolidge's 1927 termination of the 1925 Treaty with Mexico on Prevention of Smuggling.<sup>269</sup> Of the twelve examples of the Executive terminating treaties provided by the State Department, the first quarter are not supported by the historical record which was clear at the time the State Department asserted their analysis was accurate. This leaves nine examples of treaty termination through executive authority, but as opposed to a near-even split between presidential and congressional involvement as argued by Mr. Rovine, it is more skewed in favor of the Congress. Furthermore, if one uses Senator Goldwater's method of accounting instead of the State Department's, the ratio is nearly 1-to-6 in support of congressional involvement, yielding greater numerosity. Yet even the nine instances cited by Mr. Rovine are not without argument.<sup>270</sup>

Contemporaneous to Mr. Rovine's study of treaty termination, J. Terry Emerson, Senator Goldwater's Counsel, published his analysis of *The Legislative Role in Treaty Abrogation* from which Senator Goldwater based his criticism of the State Department's examination.<sup>271</sup> According to Mr. Emerson, "[s]tarting in 1927, there are nine instances in which Presidents have given notice of the termination of treaties without receiving accompanying Congressional authority or seeking ratification. Upon close examination, however, the recent record does not support an untrammelled power of the President to annul any treaty he wishes."<sup>272</sup> According to Mr. Emerson, President Coolidge's 1927 termination was because of "the disruptive situation of the period, it appears to have been impossible to implement the Convention."<sup>273</sup> Professor Bradley does not go as far as Mr. Emerson, but he does acknowledge that President Coolidge's "action was taken after extensive concerns had been raised in Congress about Mexico's confiscation of

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269. Rovine Aff., *supra* note 242, at Exhibit 1; Bradley, *supra* note 2, at 805.

270. See *supra* note 258 and accompanying text.

271. Emerson, *supra* note 65.

272. *Id.* at 60.

273. *Id.* at 60.

American property.”<sup>274</sup> Similarly, of the five treaties that President Roosevelt terminated unilaterally, Professor Bradley acknowledges four of them were pursuant to competing legislation or resolutions in Congress or the notice of termination was subsequently withdrawn.<sup>275</sup> Neither Professor Bradley nor Mr. Emerson address the fifth instance cited by Mr. Rovine, which is the “1944 notice of denunciation, pursuant to notice provision” of the 1929 Protocol to the General Inter-American Convention for Trademark and Commercial Protection.<sup>276</sup> However, as of January 1, 2018, this treaty remains in force according to the United States Department of State.<sup>277</sup>

Mr. Emerson cites to changes of circumstance and impossibility of performance which supported President Eisenhower,<sup>278</sup> and previous legislation which supported President Kennedy.<sup>279</sup> The final instance, President Johnson’s

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274. Bradley, *supra* note 2, at 805–06.

275. *Id.* at 806.

276. (2 Bevens 751)

277. 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, 2018, at 523 (2018).

278. This was the 1954 notice of withdrawal, pursuant to notice provision of the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise, *Rovine Aff.*, *supra* note 242, at Exhibit 1. “A fundamental change in circumstances resulting in an actual impossibility of performance was gain invoked by the United States. . . . The U.S. notice specifically observed that the convention had been ‘rendered inapplicable’ since a fundamental component, the Brussels nomenclature of 1913, had itself ‘become outdated.’” (Emerson, *supra* note 65, at 62).

279. This case was the 1962 notice of termination, pursuant to notice provision from the 1902 Convention on Commercial Relations with Cuba (*Rovine Aff.*, *supra* note 242, at Exhibit 1).

The President acted under provisions of the Foreign Assistance Act of 1961 and the Export Control Act of 1948. Also, he had ample authority to impose a trade embargo under the Trading With The Enemy Act and Mutual Assistance Act of 1954, known as the Battle Act. Under these circumstances, notice of terminating the commercial convention was a mere formality mandated by national policy authorized and sanctioned by Congress. . . . Finally, Congress may have ratified the decision in September, 1962, if any ratification were needed, by enacting the joint resolution knowns as the Cuban Resolution. This legislation recognized broad authority in the President to take whatever means may be necessary to prevent Cuba from exporting its aggressive purposes” [sic] in the hemisphere and to prevent establishment of a Soviet military base. Thus, the termination was at one and the same time ratified and authorized by

1965 decision to withdraw from the Warsaw Convention, was subsequently withdrawn.<sup>280</sup> Professor Bradley acknowledges the Eisenhower termination was unilateral but only cites State Department Bulletins<sup>281</sup> and does not provide as exhaustive a treatment as Mr. Emerson. Throughout these reputed Executive terminations, “[t]here were still occasions in this period, however, in which the United States terminated treaties pursuant to congressional directive.”<sup>282</sup> Overall, the evidence presented by the Carter State Department does not appear to support the historical precedent they argued existed. Despite this, “[i]n 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.”<sup>283</sup> As of “2002, the 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>284</sup>

As Professor Bradley concludes in his analysis of the historical gloss:

[v]ery 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. 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. While not playing a direct role, the Supreme Court also may have helped facilitate the shift, through its increasingly deferential posture

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legislation and in accordance with a treaty.

Emerson, *supra* note 65, at 63.

280. Bradley, *supra* note 2, 810 & nn.212-13.

281. *Id.* at 809 & n. 206.

282. *Id.* at 810.

283. *Id.* at 814.

284. *Id.* at 814-15.

towards the Executive Branch starting in the 1930s.<sup>285</sup>

The historical gloss clearly points to a shared power of treaty termination between the two political branches starting soon after the founding. While the period since the 1930s provides a narrative for a presidential power to terminate<sup>286</sup> and there has been a clear increase in the number of incidents of executive terminations,<sup>287</sup> it does not seem that this trend represents custom according to Professor Glennon's framework.<sup>288</sup> Furthermore, as Professor Jean Galbraith argues, "the changing constitutional practice in treaty termination bears little resemblance to Justice Frankfurter's articulation of the 'historical gloss.' Rather, this practice reveals a far more dramatic shift than Justice Frankfurter would view as legitimate."<sup>289</sup> In his concurring opinion, Justice Frankfurter wrote:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.<sup>290</sup>

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285. *Id.* at 827.

286. *See* RESTATEMENT (FOURTH), § 313, cmt. c (the RESTATEMENT (FOURTH), for which Prof. Bradley was a Reporter, takes a much less forceful view of the President's authority, compared to the RESTATEMENT (THIRD) and is based on historical practice and custom in accordance with Prof. Bradley's work (Bradley, *supra* note 2) ; RESTATEMENT (THIRD), *supra* note 63, at § 339 (Rep. Note 1. *Basis for President's authority* relies less on historical practice and more on the sole organ thesis). The *See also* Bradley, *supra* note 2, for further analysis and various Executive memoranda supporting this argument for historical practice in favor of the President.

287. Bradley, *supra* note 2, at 814–16.

288. *See supra* notes 184-214 and accompanying text for the discussion of Prof. Glennon's custom framework for separation of powers disputes.

289. Jean Galbraith, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. 76, 121-22 (2014).

290. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J. Concurring).

While Justice Frankfurter was speaking of a custom of Executive practice,<sup>291</sup> the use of gloss to establish the powers of Congress has been used with respect to treaties and “[t]he authority of the Senate to condition its consent to treaties.”<sup>292</sup> In the case of treaty termination, the controlling gloss, paraphrasing Justice Frankfurter, would be *a systematic, unbroken, congressional practice, long pursued to the knowledge of the President and never before questioned.*

The argument supporting a custom of unilateral termination by the Executive has been used since the first State Department memorandum in 1909.<sup>293</sup> For a custom to exist, it must meet the six factors laid out by professor Glennon; consistency, numerosity, duration, density, continuity, and normalcy. Using Mr. Rovine’s memorandum as the bellwether for this argument, the supporting evidence of an Executive custom of unilateral termination authority is lacking.<sup>294</sup> The consistency of the acts cited on behalf of Executive power over treaty termination fails

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291. Writing of the separation of powers between the three branches of government, Justice Frankfurter argued for the use of practice, in this case Executive practice, as a specific source from which to identify the specific sources of power for each branch:

In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the Structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.

*Id.* at 610-11.

292. GLENNON, *supra* note 7, at 124.

293. Bradley, *supra* note 2, at 801.

294. Mr. Rovine’s document serves as a useful point of analysis for Executive custom for the following reasons. First, it traces the longest path of Executive treaty termination (Bradley, *supra* note 2) and therefore has a better chance of meeting Prof. Glennon’s criteria for custom than any other argument on behalf of the executive discussed in this paper. Second, Mr. Rovine’s memorandum was written at a critical point in the history of Executive treaty termination. Mr. Rovine discussed thirteen instances of treaty termination from America’s founding to the late 20<sup>th</sup> century and there has been a significant increase in Executive treaty terminations since then (*Id.* at 814-15). The termination of the Mutual Defense Treaty with Taiwan signaled an increase in Executive authority and arguments in support of this Executive authority often cite President Carter’s action as precedent. It is therefore relevant to discuss the underlying logic supporting this action when analyzing the entirety of the custom.

upon closer scrutiny. None of the examples given by Mr. Rovine are clear examples of treaty termination pursuant to an Executive act alone with the result termination of a treaty. As discussed, every termination used to support President Carter's authority to terminate the Mutual Defense Treaty with Taiwan can be traced to a different legislative source which authorized termination.<sup>295</sup> Per Professor Glennon's framework, "[t]he consistency requirement must always be satisfied" and that is clearly not the case with the pre-1978 argument for Executive custom.<sup>296</sup> The numerosity of Executive treaty terminations has increased significantly since 1978. Prior to President Carter, there were at most twelve instances of unilateral treaty terminations by various presidents.<sup>297</sup> Since then, "the United States has terminated dozens of treaties, and almost all of the terminations have been accomplished by unilateral presidential action."<sup>298</sup> If one accepts the argument of Mr. Rovine and its expanded justification in the Hansel Memorandum, the custom of Executive treaty termination traces to the early years of the United States when the Framers were still alive and involved in the operation of the government. Yet as this paper has shown, the examples of Executive acts of termination are not clear acts of sole Executive action and are in fact largely supported by some sort of Congressional action. Once these earlier acts are removed, the action all occurs in the fifty years post-1978, increasing the density of the acts where "[m]ost of these terminations have not generated controversy in Congress.<sup>299</sup> But as Professor Glennon notes, "in *Chadha*, even though Congress had placed legislative veto 'mechanisms in nearly 200 separate laws over a period of fifty years,' the use of the device was struck down by the Court."<sup>300</sup> Looking at the entirety of the Executive argument in support of its termination power, the continuity is sporadic but it

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295. See *supra* notes 259-75 and accompanying text.

296. Glennon, *supra* note 184, at 133.

297. Rovine Aff., *supra* note 242, ¶ 3, Exhibit 1.

298. RESTATEMENT (FOURTH), § 313, Rep. Note 3.

299. *Id.* § 313, Rep. Note 3 (the Note continues to discuss the 2002 termination of the Anti-Ballistic Missile Treaty with Russia by President George W. Bush as the exception).

300. Glennon, *supra* note 184, at 132.

appears much stronger only looking at the past fifty years where the Executive has taken the lead in treaty terminations according to the *Restatement*. The last factor, normalcy, also receives support over the last fifty years. It is unlikely that, given all the arguments against the Executive's pre-1978 example actions, the Court would find consistency in such an Executive custom. If the Executive were to narrow its argument to post-1978, consistency appears much more strongly though the duration of the custom is greatly weakened. Given the six factors described above, an argument supporting an Executive custom of unilateral treaty termination is weak in nature and would likely be viewed by the Court as lacking, analogous to the argument of a Legislative Veto custom that the Court dismissed in *Chadha*.<sup>301</sup>

If the Court adopted a post-1987 Executive custom of treaty termination, it remains necessary to determine whether it meets the requirements of *opinio juris seu necessitatis*. The first two criteria of *opinio juris*, requirement of an act and requirement of notice, require no discussion. Terminating a treaty is, by its very nature, an act that requires notice to another party. While this notification is given to the other sovereign or sovereigns, one may safely assume that the Congress would be aware of the act given the public nature of treaties. This leaves the third criteria, acquiescence. Within Professor Glennon's framework of acquiescence and its four sub-categories, all four may influence the Court's decision. The first sub-category, absence of objection, is cited in the most current *Restatement* as a factor when analyzing the Executive Practice of treaty termination.<sup>302</sup>

Since [the 19<sup>th</sup> century], almost all actions to suspend, terminate, or withdraw from treaties have been carried out on behalf of the United States by the President and his or her agents acting unilaterally. . . . For the most part, Congress has not seriously disputed that the President has the authority to represent the United States in this manner. Although there was substantial controversy over President Jimmy Carter's unilateral termination of a mutual defense treaty with Taiwan in 1978, the termination nevertheless took effect, and

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301. *INS v. Chadha*, 462 U.S. 919 (1983).

302. *RESTATEMENT (FOURTH)*, § 313, Rep. Note 3.

subsequent presidential actions to terminate or withdraw from treaties have been less controversial.<sup>303</sup>

When determining whether a Congressional objection exists, Justice Rehnquist's point on Justice Jackson's three categories in *Dames & Moore v. Regan*<sup>304</sup> that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition"<sup>305</sup> is prescient. However, debate remains about what constitutes Congressional silence along this spectrum, or if the "sounds of silence"<sup>306</sup> should even factor in to the analysis of separation of powers.

In the Court's opinion in the *Steel Seizure Case*, Justice Black cited the Congress' rejection of an amendment to the Taft-Hartley Act in the 1947 debate which would have authorized the seizures in question.<sup>307</sup> As discussed in Section II, in its debate on Senate Resolution 15 in 1978, the Senate firmly rejected the language from the Committee on Foreign Relations and adopted the Byrd Amendment, rejecting language supporting the authority of the President to terminate the U.S.-ROC Mutual Defense Treaty.<sup>308</sup> But as Professor Glennon points out, the Court sometimes chooses to ignore these events such as it did in *Haig v. Agee*.<sup>309</sup> Aside from acts upon the floor and a lack of approved legislation going to the President, there have been two concerted efforts by individual members of Congress to bring this issue to the Supreme Court.<sup>310</sup> The Court would likely not construe these acts as evidence that the Congress is not silently acquiescing, although the floor debate and votes at these times

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303. *Id.* §313 Comment c.

304. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

305. *Id.* at 669.

306. Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 17 (2013).

307. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952).

308. *See supra* notes 36-40 and accompanying text.

309. *Haig v. Agee*, 453 U.S. 280, 317 n.7 (1981) (Brennan, J., dissenting).

310. *See supra* notes 81-108 and accompanying text.

may provide insight for the Court.<sup>311</sup> “In short, there exist gradations of objection, requiring case-by-case analysis to determine whether it is reasonable to infer objection by Congress as an institution, which would presumably involve a majority of the membership of each House.”<sup>312</sup>

Given the lack of consistency of any Executive actions prior to 1978, it seems that no Executive custom of treaty termination existed prior to 1978 and any such semblance of said custom is instead a post-*Goldwater* construction of the Executive Branch, representing “foreign affairs exceptionalism”<sup>313</sup> rather than valid historical gloss. Should the Court prescribe that a post-1978 custom exists in favor of the Executive, it is unclear how such a custom would fair in an evaluation of *opinio juris* given the ambiguity of both Congressional actions, or inaction, and uncertainty over how the Court would treat the less-than-clear acts described in this section.

As for the argument in favor of joint action by the Executive and some body of Congress, consistency is also difficult to ascertain upon initial inspection. As Professor Bradley and Messrs. Rovine and Hansel described, Congressional involvement

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311. Professor Alan Morrison argues that, in *Steel Seizure*, Justice “Jackson did not rest solely on what Congress had done. Similarly, Justice Black pointed to several bills Congress had considered which would have given the President something very close to the power that he used, none of which became law.” (Morrison, *supra* note 306, at 1215–16). The Justices “seemed to treat the failure to grant the President those powers as the functional equivalent of denying them to him. In other words, inaction equaled action, and congressional silence was the same as congressional legislation.” *Id.* Some argue that such voting down of amendments factors in to the conversation on congressional silence only because the amendments in question were voted upon during consideration of the Taft-Hartley Act in 1947. However, the Taft-Hartley Act (61 Stat. 152) does not include any discussion of the amendments that were not included in the final text of the bill. The majority opinion in *Steel Seizure* cites the Cong. Record and not the enrolled legislation or the U.S.C. in its analysis of what Congress did not authorize. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 n.3-4. The argument against using votes on the floors of Congress on certain amendments seems to fail given this use of floor votes in the *Steel Seizure* opinion and the lack of supporting documentation in the subsequent enrolled legislation or statute. Given such use of a negative action to infer the implied intent of the Congress, the subsequent use of the Cong. Record and votes on amendments, whether final legislation is enacted, seems warranted.

312. Glennon, *supra* note 184, at 140.

313. Galbraith, *supra* note 289, at 123.

in treaty terminations have historically taken a variety of courses. Termination pursuant to an act of the entirety of the Congress is the predominant method which can be traced to the first treaty termination in 1798.<sup>314</sup> Such Congressional authorization extended through the 1920s<sup>315</sup> and into the 1970s.<sup>316</sup> In fact, such custom still occurs. On February 1, 2019, Secretary of State Mike Pompeo gave official notice to the Russian Federation that the United States would withdraw from the INF Treaty under Article XV<sup>317</sup> given Russia's non-compliance with the terms of the treaty<sup>318</sup> pursuant to statutory authorization from the Congress. On November 25, 2015 Congress passed the National Defense Authorization Act (NDAA) For Fiscal Year 2016.<sup>319</sup> Sections 1243(d)(1)(a) and (b) of the NDAA direct the Secretary of Defense to prepare a plan to counter Russian violations through the development of "counterforce capabilities" and "countervailing strike capabilities" respectively. In this guidance, Congress directed the Secretary of Defense to create said plans "whether or not such capabilities are in compliance with the INF Treaty."<sup>320</sup> Under Section 1243(d)(3) Congress allocated funds to "carry out the development of capabilities. . . that are recommended by the Chairman of the Joint Chiefs of Staff to meet military requirements and current capability gaps."<sup>321</sup> This action was

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314. Bradley, *supra* note 2, at 789.

315. *Id.* at 792 (Prof. Bradley ends his section on Congressional authorization in the 1920s but he continues discussing Executive terminations where he acknowledges that some supposed Executive terminations were in fact due to statutory conflict).

316. Emerson, *supra* note 65, at 63; Rovine Aff., *supra* note 242, at Exhibit 2.

317. Treaty Between The United States of American And The Union Of Soviet Socialist Republics On The Elimination Of Their Intermediate-Range And Shorter-Range Missiles, U.S.-U.S.S.R., June 1, 1988, T.I.A.S. No. 12,101 [hereinafter The INF Treaty].

318. See AMY F WOLF, RUSSIAN COMPLIANCE WITH THE INTERMEDIATE RANGE NUCLEAR FORCES (INF) TREATY: BACKGROUND AND ISSUES FOR CONGRESS (2019).

319. National Defense Authorization Act For Fiscal Year 2016, 129 Stat. 1062 (2015).

320. *Id.*

321. *Id.*

reiterated in the 2017 NDAA<sup>322</sup> and strengthened in the 2018<sup>323</sup> and 2019<sup>324</sup> NDAs which called for the President to make his determination on Russia's compliance or lack thereof. While the Executive did not cite this congressional authorization in its notification of withdrawal, the actions of the Congress show a continuance of a joint custom of termination.

Joint Executive-Senate action first appeared in 1855 and reappeared in 1921<sup>325</sup> in Professor Bradley's analysis while the State Department cites four instances.<sup>326</sup> The difference between these two accounts are two treaties terminated by President Truman. Professor Bradley uses "the Truman Administration's withdrawal of the United States from a whaling convention" as an example of "unilateral presidential terminations. . . that did not generate much attention."<sup>327</sup> But as the State Department<sup>328</sup> notes, President Truman's withdrawal from the 1937 Convention for the Regulation of Whaling<sup>329</sup> was not a unilateral Executive action as withdrawal occurred pursuant to the Senate's approval and the subsequent ratification of the 1946 Convention for the Regulation of Whaling.<sup>330</sup> While the second disagreement is less clear, it is likely that President Truman's withdrawal from the 1929 Convention on Safety of Life At Sea,<sup>331</sup> which was terminated in 1952, was a result of the 1948 Safety of Life At Sea<sup>332</sup> treaty coming into force following the Senate's consent and its subsequent ratification. Characterizing these terminations as unilateral Executive action casts the constitutional process of

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322. National Defense Authorization Act For Fiscal Year 2017, 130 Stat. 2488, §1231 (2016).

323. National Defense Authorization Act For Fiscal Year 2018, 131 Stat. 1673 §1243(c)(1) (2017) (this section creates a Program of Record for a ground-launched cruise missile directly in violation of Article I of the INF Treaty).

324. National Defense Authorization Act For Fiscal Year 2019, Pub. L. No. 115-232, §§1243-44 (2018).

325. Bradley, *supra* note 2, at 793-94.

326. Rovine Aff., *supra* note 242, at ¶ 3.b.

327. Bradley, *supra* note 2, at 809.

328. See Rovine Aff., *supra* note 242; Hansel Memorandum, *supra* note 241.

329. 3 Bevans 455.

330. 4 Bevans 248.

331. 2 Bevans 782.

332. 4 Bevans 757 (For full text see 3 UST 3450 or TIAS 2495).

treaty-making as a sole Presidential power rather than the shared power written into the Constitution. The Truman Administration provided the notifications of withdrawal under the terms of the treaties so that they remained in effect until the replacement treaties entered into force, essentially conducting maintenance of the treaties to ensure no duplication existed. The 1937 withdrawal came into effect “for the United States and certain other parties June 30, 1949,”<sup>333</sup> after the 1947 Whaling Convention “[e]ntered into force November 10, 1948.”<sup>334</sup> Similarly, the 1929 Safety Of Life At Sea Treaty was “[t]erminated as to the United States November 19, 1953”<sup>335</sup> “[p]ursuant to notice of denunciation given by the United States on Nov. 19, 1952.”<sup>336</sup> The date of the notice of denunciation for the treaty of 1929 is the same date as the date the 1948 treaty entered into force.<sup>337</sup>

The last category, Presidential action with ex post Congressional authorization, encompasses two actions and highlights concerns in the Senate regarding Executive initiative in treaty termination.<sup>338</sup> The first was President Lincoln’s “notice of termination of the Great Lakes Agreement with Great Britain (also known as the Rush-Bagot Agreement)”<sup>339</sup> which was agreed to by Congress when “Congress subsequently passed a joint resolution (which Lincoln signed).”<sup>340</sup> The Joint Resolution to terminate the Treaty of eighteen hundred and seventeen, regulating the naval Force on the Lakes read “*Be it resolved by the Senate and House of Representatives of the United States of American in Congress assembled, That the notice given by the President. . . is hereby adopted and ratified as if the same had been authorized by congress.*”<sup>341</sup> The debate on this Resolution raised the question if the Congress was setting a dangerous

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333. 3 Bevens 455 at n.7.

334. 4 Bevens 248.

335. 2 Bevens 782.

336. *Id.* at n.4.

337. 4 Bevens 757.

338. Rovine Aff., *supra* note 242, at ¶ 3; Bradley, *supra* note 2, at 794–96.

339. Bradley, *supra* note 2, at 794.

340. *Id.* at 794.

341. J. RES. OF FEB. 9, 1865, 13 STAT. 568, (1865) (emphasis in original).

precedent by subsequently authorizing the action.<sup>342</sup> One member, Senator Davis, felt “[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.”<sup>343</sup> The second act in this category was President Taft’s 1911 “notice to Russia of a termination of a commercial treaty,”<sup>344</sup> although this was the reverse of the 1865 situation. In 1911, President Taft “was concerned that the harsh tone of the House resolution would needlessly offend Russia” and he initiated termination only after the House Resolution passed and “was though likely to pass in the Senate.”<sup>345</sup> The Senate ex post passed a Joint Resolution that “adopted and ratified” the “notice thus given by the President.”<sup>346</sup>

Upon closer inspection, there is consistency between all these acts. Whether the President terminated a withdrawal pursuant to Senate authorization, either as a resolution or through its consent to a superseding treaty, Congressional legislation of a later-in-time law, or a Congressional law instructing the President to terminate a treaty, these are all constitutionally-prescribed methods of creating a law. The only two acts that are not in accordance with constitutional procedures are the ex post adoptions and ratifications of Presidents Lincoln’s and Taft’s actions, although the former was never carried out and the latter was initiated because of Congressional action. While there are multiple routes through which joint action can result in treaty termination, each route used throughout the history of the United States have been paths consistent with those created by the Constitution. Not only is a custom of joint power shared between the Executive and the Congress consistent, it has occurred dozens of times<sup>347</sup> spanning centuries and nearly every

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342. Bradley, *supra* note 2, at 794. See also Cong. Globe, 38<sup>th</sup> Cong., 2d Sess. 312-15 (1865).

343. Cong. Globe, 38<sup>th</sup> Cong., 2d Sess. 313 (1865) (statement of Sen. Davis).

344. Bradley, *supra* note 2, at 795; Rovine Aff., *supra* note 242, Exhibit 2.

345. Bradley, *supra* note 2, at 795.

346. J. RES. PROVIDING FOR THE TERMINATION OF THE TREATY OF EIGHTEEN HUNDRED AND THIRTY-TWO BETWEEN THE UNITED STATES AND RUSSIA, 37 Stat. 627 (1911).

347. This count includes the instances cited by Messrs. Rovine and Hansel and Prof. Bradley as well as those they cite that have been subsequently

Presidential administration and their associated congresses,<sup>348</sup> given additional weight to duration, continuity, and normalcy.

*Opinio juris* clearly exists given the fact that joint termination was the sole practice through 1927, establishing more than a century of custom in which neither branch refuted the concurrency of termination powers. Even in its original assertion of unilateral executive power in 1909, the State Department discusses termination pursuant to congressional or Senate action as the “most effective and unquestionable method” for terminating a treaty.<sup>349</sup> Such a statement shows the Executive recognized the concurrent nature of the treaty termination power; they were not trying to argue against legislative involvement because termination belonged to the Executive, they simply wanted to establish an expedient method of conducting foreign affairs. Joint action continues to the present administration despite the post-1978 surge in unilateral Executive terminations and there does not appear to be any significant instance of a President objecting to Congressional actions calling for the termination of treaties.<sup>350</sup>

In an evaluation of custom by the Court, any argument for an Executive custom of treaty termination would appear weak compared to the much stronger custom supporting joint Executive-Congressional power over treaty terminations. Given that *opinio juris* exists for joint terminations, “it is appropriate for a court to regard custom as a fact upon which its decision might be based.”<sup>351</sup> Finding that such a custom exists does not preclude the existence of an Executive custom of unilateral terminations. The Court would have to decide if the joint custom is “a constitutional fact, establishing the acting branch’s plenary

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refuted. The numerosity is even greater if one expands the effect of the 1915 Seaman Act and counts each instance of treaty termination which would also increase the density of events for the early 1900s.

348. As the first instance of treaty termination occurred in 1798 under President John Adams, only President George Washington’s administration is not included.

349. Bradley, *supra* note 2, at 801.

350. *Id.* at 792–93 (the objections discussed here were Presidential objections to instructions by Congress to terminate certain provisions of treaties that did not allow for partial termination).

351. Glennon, *supra* note 184, at 145.

authority over the matter. . . . An examination of Supreme Court decisions in this area reveals that only those customs dating from the earliest days of the Republic will be accorded the status of constitutional facts.”<sup>352</sup> Professor Glennon cites a number of instances where the Court ruled based on custom dating to the birth of the nation. “Perhaps custom has been used by the Court in this manner because a starting point virtually coincident with the birth of the Nation suggests that the Framers intended to permit such acts.”<sup>353</sup> In *Myers v. United States*<sup>354</sup> the Court explained the logic of gloss and how proximity to the Founders gave such customs weight:<sup>355</sup>

This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.<sup>356</sup>

One such custom dealing with treaties is “the Senate’s power to condition its consent to treaties [which] might be regarded as a constitutional fact; the custom dates from Senate approval of the Jay Treaty, with reservations, in 1798.”<sup>357</sup> The custom of joint termination by Congress and the President also dates from 1798, and it is this practice that Thomas Jefferson cites in his *Manual of Parliamentary Practice* when he asserts “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, 1798.”<sup>358</sup> Given these facts and the length of the joint custom, it is likely that the Court would support joint action as a constitutional fact. In rendering its opinion as to how to interpret such a constitutional fact, the Court should not assume

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352. *Id.* at 145.

353. *Id.* at 146.

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

355. *Id.* at 161–75.

356. *Id.* at 175.

357. Glennon, *supra* note 184, at 146.

358. JEFFERSON, *supra* note 126, at 111.

Congressional silence and acquiescence to unilateral Executive action.<sup>359</sup> When interpreting the intent of the Framers on treaty termination and how they would have viewed such a joint custom, the Court should recall the words of Senator Warner during the debate on the Byrd Amendment in 1979:

Those of us from Virginia, whenever confronted with an interpretation of our Constitution, understandably look to the wisdom and the guidance of none other than Thomas Jefferson. I then quote, in conclusion, from the manual of parliamentary practice for the use of the Senate of the United States, found in every desk in this Chamber.<sup>360</sup>

## VI. CONCLUSION

[The Constitution] bestowed on the President and Senate a shared power to make treaties. There is no historical evidence whatever to suggest that they intended the correlative power to terminate treaties to be other than a shared power. And a shared power is, by definition, a power that cannot be exercised by one of the partners without the concurrence of the other.<sup>361</sup>

The Framers' concern about the credibility of U.S. commitments discussed in Section IV is one of the motivating factors behind the NATO Support Act.<sup>362</sup> During the bill's introduction,, Representative Gerry Connolly, speaking in support of the Act, explained that “[a]s head of the United States delegation to the NATO Parliamentary Assembly and rapporteur for the political committee of that assembly, I can attest to the anxiety within NATO regarding this administration’s commitment to the alliance.”<sup>363</sup> In closing, he argued “[t]he last thing the United States should do is send mixed signals about our commitment, as this President, unfortunately, has done. . . . From Congress, you will get no such ambiguity. We hope our allies hear that. . . .”<sup>364</sup> The NATO Support Act passed the House

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359. Morrison, *supra* note 306, at 1213, 1235.

360. 125 CONG. REC., 13,690 (1979).

361. Bestor, *supra* note 8, at 29–30.

362. NATO Support Act, H.R. 676, 116th Cong. (2019).

363. 165 CONG. REC., H978 (2019) (statement of Rep. Connolly).

364. *Id.*

of Representatives January 23, 2019.<sup>365</sup> If this Act passes the Senate, it could set the stage for a legal battle between the President and the Congress should President Trump wish to withdraw from NATO.<sup>366</sup> Such a confrontation would provide the judicial test of the theory espoused in this paper.<sup>367</sup>

While it is unlikely that the NATO Support Act will be heard in the Senate given it was received more than a year ago, the 2020 NDAA contains some language that could support challenges to treaty terminations. The original House version of the 2020 NDAA included the NATO Support Act and was included in the House amendment to the Senate's version. However, the engrossed bill out of the conference committee removed the NATO Support Act language. The 2020 NDAA does not contain NATO Support Act but it does contain two sections specific to the North Atlantic Treaty<sup>368</sup> and a section focused on the Open Skies Treaty.<sup>369</sup> While less forceful than the NATO Support Act, the 2020 NDAA provides a "Sense of Congress on Support for the North Atlantic Treaty Organization"<sup>370</sup> and specifies a "Prohibition on the Use of Funds to Suspend, Terminate, or Provide Notice of Denunciation of the North

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365. At the same time Rep. Panetta introduced the NATO Support Act in the House, Senator Tim Kaine introduced S.J. Res. 4 – A joint resolution requiring the advice and consent of the Senate or an Act of Congress to suspend, terminate, or withdraw the United States from the North Atlantic Treaty and authorizing related litigation, and for other purposes (S.J. Res. 4, 116th Cong. (2019)). The Senate Resolution remains in the S. Comm. on Foreign Relations and has not left the committee as of the writing of this paper.

366. The NATO Support Act states in § 3, "[i]t is the sense of Congress that – (1) the President shall not withdraw the United States from NATO; and (2) the case *Goldwater v. Carter* is not controlling legal precedent with respect to the withdrawal of the United States from a treaty." H.R. 676, 116th Cong. (2019).

367. As Prof. Bradley and Prof. Goldsmith point out, it is difficult to "imagine [President] Trump signing the NATO Support Act into Law. But the bill passed in the House by a margin sufficient to override a veto, and the bill in the Senate might have similar support." Bradley and Goldsmith, *supra* note 6.

368. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

369. Treaty on Open Skies, Mar. 24, 1992, TIAS [hereinafter Open Skies Treaty].

370. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 § 1241 (2019).

Atlantic Treaty.”<sup>371</sup> This language provides a clear sense of Congress’ intent to remain in NATO and prohibits the use of funds to withdraw. The presence of such language would clearly place any attempt by the Executive to withdraw from the North Atlantic Treaty without Congressional approval in Justice Jackson’s third category. The language discussing the Open Skies Treaty is less prohibitive. The NDAA requires proactive notice to both Chambers by the Secretaries of Defense and State of the Executive’s intent to withdraw from the treaty no less than 120 days prior to transmitting such notice to the other signatories pursuant to the treaty’s withdrawal clause.<sup>372</sup> This requirement could place Congress in a position to prepare legislation to prohibit termination of the treaty should they disagree with the Departments’ assessment that it is “in the best interests of the United States national security.”<sup>373</sup>

If the Executive provided notice to withdraw from NATO, or the Open Skies Treaty without providing notification to Congress as required, the 2020 NDAA could provide standing for a Congressional challenge. If such a challenge were to occur, Professors Bradley and Goldsmith argue that under the framework of *Zivotofsky II*,<sup>374</sup> the Court would find the constitutional text inconclusive alongside case law. However, they argue that the historical gloss would likely push the Court towards an exclusive presidential power, as would functional considerations. All told, they suggest it is unclear how the Court would decide but seem to suggest it would rule in favor of the President. This paper argues the opposite. Should such a case considering unilateral termination of a treaty by the President in the face of Congressional opposition reach the Supreme Court on its merits, this paper argues that the Court would likely rule against such unilateral action and specify treaty termination as a concurrent power. The Court would likely decide Congressional involvement is required, either in the form of a Senate supermajority or Congressional majority.

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371. *Id.* at § 1242.

372. *Id.* at § 1234.

373. *Id.* at § 1234(a)(1).

374. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

The constitutional text by itself, nor with case law, fails to resolve the issue of where the power to terminate a treaty belongs, although it is quite explicit in its creation of a specific avenue for treaty ratification outside of the legislative process or Article II powers.

The intent of the Framers, contrary to claims of ambiguity, clearly reveals their belief that treaties are central to the conduct of nations on the international stage, that the treaty power is distinct from other constitutional powers, and that it must be shared between the Senate and the Executive. They made deliberation prior to the enactment of treaties critical to the ratification process so as to ensure the entire nation's interests were at the forefront of the decision-making process as opposed to the industrial or agrarian interests of certain blocs of Senators. To this end, the Framers included the President *as a check on the Senate*. They also wanted to ensure the United States was viewed as an honorable actor in the international community by elevating treaties and making them binding as the law of the land. Lastly, they chose language that, to them, clearly made any act regarding treaties dependent upon the *consent* of the Senate. With this effort clear, it does not logically follow that they would intend for the President to be able to withdraw the United States without the deliberations of the Senate, or the Congress in its entirety, upon the ramifications of such a termination. Such a termination would require deliberate and joint consideration to ensure termination was in the best interest of the country and a positive action of the Senate or Congress as has been established by over two hundred years of practice and custom. While the Framers may not have foreseen mutual defense treaties<sup>375</sup> or collective security alliances, it does not change their intent or the framework for the Government they created.

Adding custom to the analysis, one sees a uniform understanding of a joint power to terminate originated in 1798 which remained in place through the early twentieth century. In the 20th century, coinciding with the rise of America as a global power and an overall expansion of executive authority in foreign affairs, the Executive increasingly argued in favor of Executive

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375. Emerson, *supra* note 65, at 50.

unilateralism and its right to terminate treaties unilaterally. Some scholars and proponents of Executive power argue that the custom of joint treaty termination steadily diminished throughout the Cold War and is nearly non-existent. This paper has shown that contrary to these assertions, unilateral Executive actions did not truly begin until 1978, but despite the steady increase in unilateral Executive terminations, joint action has not yet disappeared. The *Goldwater* and *Kucinich* challenges to Executive unilateralism show some members of Congress have not entirely acquiesced to the Executive. The NATO Support Act continues this trend but would notably be the first Joint Resolution challenging the Executive's authority. Should the act pass and the Executive challenge the Resolution, the debate would fall to the Supreme Court to settle this separation of powers question, just as Justice Brennan argued it should when the first true case of unilateral Executive termination arose.<sup>376</sup> Given the understanding of the Framers' Intent and the path of historical gloss developed in this paper, along with the logic of a Rule of Equal Formality in a separation of powers dispute over the power to terminate treaties, the Court would likely rule that it is a joint power shared between the Senate or the Congress and the President. Neither side would have a unilateral authority to terminate except when that power derived from an explicit power within the Constitution, such as the President's authority to recognize foreign nations.

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376. *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Brennan, J., dissenting).