Reasserting Its Constitutional Role: Congress's Power To Independently Terminate a Treaty

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ABSTRACT

Who has the authority to terminate a treaty? The Constitution’s text is silent on the matter and historical precedent has been anything but consistent. Recently, the debate has focused on whether the President can unilaterally terminate a treaty without considering Congressional concerns: witness President Carter’s termination of the 1954 Mutual Defense Treaty with Taiwan and President Bush’s 2001 termination of the Anti-Ballistic Missile Treaty with Russia. There has been comparatively little analysis of the converse question; does Congress have the unilateral power to terminate a treaty in the face of Presidential opposition? This question invokes strong separation of powers considerations; can the President ignore legislative opposition to a treaty’s continuation, unilaterally binding the U.S. to its foreign commitments. Relying on an analysis of the Constitution, the Framers’ intent and the historical precedents from 1789 to today, the article concludes that Congress does have the constitutional authority to terminate a treaty and that the President is thereby constitutionally bound to consider Congressional objections to a treaty’s continuation. The article concludes by laying out the tools Congress has to enforce its treaty termination power over Presidential opposition.
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I. Introduction

1. Background

Who has the authority to terminate a treaty? The Constitution’s text is silent on the matter and historical precedent has been anything but consistent. Recently, the debate has focused on whether the President can unilaterally terminate a treaty without considering Congressional concerns: witness President Carter’s termination of the 1954 Mutual Defense Treaty with Taiwan and President Bush’s 2001 termination of the Anti-Ballistic Missile Treaty with Russia. There has been comparatively little analysis of the converse question; does Congress have the unilateral power to terminate a treaty in the face of Presidential opposition? While the question is in many ways academic, as the majority of treaty terminations historically have been cooperative, it invokes strong separation of powers considerations. Is the President constitutionally required to consider legislative opposition to a treaty, or can he ignore it, continuing to bind the U.S. to its international obligations. Analogously, does the President have to consider Congressional opposition to the U.S. signing, or leaving its signature on a treaty, or can he ignore the

1 Some scholars differentiate between a treaty’s “termination” which is done in accordance with international law and a treaty’s “abrogation” which is undertaken in violation of international law. See e.g., MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 156 (2007). However, this paper uses the terms interchangeably as it focuses on the constitutional power of the legislature to end a treaty and not on whether those actions would be taken in compliance with international law. It would initially appear however that most of these legislative actions would qualify as terminations as the legislature has typically complied with an individual treaty’s termination provisions, explicitly legalized in the Vienna Convention on the Law of Treaties [VCLT] Articles 54-64. Randall Nelson, “The Termination of Treaties and Executive Agreements by the United States: Theory and Practice,” 42 Minn. L. Rev. 879, 880 (1957-58). At the time of the 1979 treaty termination hearings, one noted scholar argued that the U.S. had only ever ‘abrogated’ one treaty, when Congress itself unilaterally abrogated a treaty with France in 1798. Treaty Termination: Hearings Before the Comm. on Foreign Relations, United States Senate, 96th Cong. 310 (1979) (statement of Prof. Abram Chayes).

2 See e.g., DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES, 149-90 (1986) (analyzing the historical practice and concluding that there has been no consistent means be which treaties were terminated). This varied precedent will be discussed throughout the paper as it relates to each section.
opposition, binding the U.S. to abiding by the treaty’s “object and purpose.”

This article will argue that he must and that Congress does have the constitutional authority to terminate a treaty and that the President is thereby constitutionally bound to consider Congressional objections.

2. International v. Domestic Obligations

As a background matter, it is necessary to distinguish the two types of obligations imposed by a treaty: domestic and international. Domestically, there is no question that Congress “may abrogate or amend [a treaty] as a matter of internal law by simply enacting inconsistent legislation.”

Under the “last in time” rule, if a treaty and a statute are in conflict, “the one last in date will control the other: provided always, the stipulation of the treaty on the subject is self-executing.” However, inconsistent domestic legislation does not “relieve the United States of its international obligation or of the consequences of a violation of that obligation.” If Congress were to pass inconsistent domestic legislation, it would override our domestic law, but leave our international obligations unaffected. As a result, when this article discusses Congress’s ability to terminate a treaty

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3 Vienna Convention on the Law of Treaties, art. 18.
5 Whitney v. Robertson, 124 U.S. 190, 194 (1888). See also Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (“In either case, the last expression of the sovereign will must control.”); The Cherokee Tobacco, 78 U.S. 616, 621 (1870) (“A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”).
6 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115(1)(b) (1987); See also Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) (An act of Congress “would control in our courts as the later expression of our municipal law … the international obligation [would] remain [] unaffected.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115 cmt. b (1986) (“Although a subsequent act of Congress may supersede a rule of international law or an international agreement as domestic law, the United States remains bound by the rule or agreement internationally under the principle stated in §321 [pacta sunt servanda].”); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 585 (1910) [henceforth 1 WILLOUGHBY] (“The termination of a treaty as an international compact carries with it the annulment of the agreement as a law of the land; but its annulment as a law by Congress does not carry with it its annulment as an international compact.”).
it is in reference to these international obligations, the forum in which Congressional power is not as straightforward.

3. The Outline of the Article

This article will argue that Congress’s independent constitutional role in the termination of treaties must be recognized. In contrast to other studies that have argued for a joint Congressional-Executive role in treaty termination, this article will argue that there are constitutional mechanisms by which the Congress can terminate our involvement in treaties despite Presidential opposition. In order to do this, the article will start by demonstrating that neither the Constitution’s text, nor the Framer’s background intent identifies, let alone clarifies, which branch has the authority to terminate treaties. In Section III, the article will then analyze the ongoing debates regarding the President’s potential unilateral authority to terminate treaties. This section will argue that, at best, this power is non-exclusive, if it exists at all. Building on this background, Section IV will present the core of this article, analyzing each of the possible means by which either house of Congress might influence the termination of a treaty. The section will argue that Congress’s primary means of terminating a treaty is to enact legislation, over a Presidential veto if necessary, directing the President to deliver the notice necessary to terminate the treaty to the foreign state or international depository. Nevertheless, as Section V will show, Congress has limited means by which it can enforce this power, as it has few tools available to compel a recalcitrant President to comply with its directives. As a result, this article will conclude by arguing that the House and Senate, should take a number of ex ante steps in the treaty approval process to ensure they retain power in its possible termination.
II. Textualism and the Framer’s Intent

1. Direct Textualism

Any analysis of the Constitution’s allocation of power between the legislative and executive branches must start with an analysis of the Constitution’s text. However, the only language relating to treaties in the Constitution, indicates that both the President and the Senate are required to create treaties,7 “it does not say who can unmake them.”8 While the U.S. government presumably has the power, generally recognized under international law9 and not expressly denied to the government by the Constitution,10 to terminate its involvement in treaties, the Constitution’s text does not expressly indicate where that power resides. This oversight is unsurprising given the Constitution’s consistent failure to indicate which branch of government has the power to reverse many of its affirmatively granted powers; most obviously, the Constitution does not discuss who can exercise the necessary ability to overturn or repeal any constitutionally enacted laws.

2. Framer’s Intent

While occasionally, an analysis of the Framer’s intent can serve to help clarify ambiguous constitutional provisions, “the Framers never directly discussed the power to

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7 “He [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;” U.S. CONST. art. II, § 2.
8 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 211 (2nd Ed.) (1996).
9 See e.g., The Vienna Convention on the Law of Treaties [VCLT], Articles 54-64, for a discussion of the conditions under which a treaty can be terminated in compliance with international law, a discussion which presumes the ability of states to terminate their treaty commitments. The U.S. is not a signatory to the VCLT but has accepted many of its provisions as reflective of customary international law.
10 Henkin (1996), 211.
terminate treaties in the Federalist or in the Convention,11 or even “in the state ratifying conventions that followed.”12 Even looking at the treaty power more generally, the history of the Founding only serves to further confuse the Constitution’s ambiguous allocation of power between the branches. The initial draft of the treaty provision at the Constitutional Convention gave the Senate exclusive control over treaties; “[t]he Senate of the United States shall have the power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”13 However, within two weeks, the provision was amended to divide the power between the President and the Senate; “[t]he President by and with the advice and consent of the Senate, shall have the power to make treaties…. But no Treaty except Treaties of Peace shall be made without the consent of two thirds of the members present.”14 While some scholars argue that the Framers’ decision to move the treaty power from Article I into Article II indicates an intent to grant the power to the Executive (except as specifically limited), “there is no direct evidence of why the Framers put the treaty power in Article II….15 In fact, one of the preeminent historians on the Convention argues that the placement was due as much to fatigue as to anything;

It was evident that the convention was growing tired. The committee had recommended that the power of appointment and the making of treaties be taken from the senate and vested in the president ‘by and with the advice and consent of the senate.’ With surprising unanimity and surprisingly little debate, these important changes were agreed to.16

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13 MAX FARRAND, II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (1966). The initial draft was introduced by the Committee of Detail on August 20, 1787. For the first three months of the Convention there was no draft language regarding the treaty power.
14 Id. at 495. The language was introduced by the Committee of Eleven on September 4, 1787.
15 Sabis, supra note 11, at 251.
Looking outside of the Convention, while individual Founders can be cited in favor of viewing treaties as either a Senatorial\textsuperscript{17} or Presidential\textsuperscript{18} power, no consensus view ever developed.\textsuperscript{19} While authors from both ideological camps attempt to utilize this uncertainty as support for their own ideological positions,\textsuperscript{20} the only certainty produced by analyzing the founder’s views of the treaty process is that “[t]he intent of the Framers is thoroughly ambiguous.”\textsuperscript{21}

3. Indirect Textualism

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

\begin{footnotes}
\item[17] See e.g., 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 524 (1865) (“That the contracting parties can annul the Treaty can not, I presume, be questioned, the same authority, precisely, being exercised in annulling as in making a treaty.”).
\item[18] See e.g., ALEXANDER HAMILTON, PACIFICUS 1 (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 43 (Harold C. Syren et al. eds., 1969) (“[T]hough treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone.”).
\item[19] In fact, several Founders appeared to have changed their views over time. Compare Jefferson acting as President of the Senate in 1801. Sabis, supra note 11, at 244 (“Treaties 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.”) (quoting Senate Manual, S. Doc. No. 93-1, 93d Cong., 1st Sess. (1973)) with Jefferson as Secretary of State in 1793 (cited by Sabis, supra note 11, at 244) (“The Constitution, ‘had made the President the last appeal’ concerning the termination of treaties, since the legislature was supreme ‘in making the laws only.’”).
\item[20] Compare J. Terry Emerson, The Legislative Role in Treaty Abrogation, 5 J. LEGIS. 46, 49 (1978) (“Absent any specific evidence that the Framers meant to confer an untrammeled power upon the President in repealing treaties, it must be concluded the legislative body continues to have a role in the abandonment of a treaty as it does in making the treaty.”) with Randall H. Nelson, The Termination of Treaties and Executive Agreements by the United States: Theory and Practice, 42 MINN. L. REV. 879, 883 (1957-58) (“In the absence of express limitations upon the power to remove and the power to terminate, there is a strong presumption that no such limitation was intended.”).
\end{footnotes}
He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls …  

Furthermore, “[j]ust as there is no provision in the Constitution with respect to the removal of officials appointed ‘by and with the advice and consent of the Senate,’ there is no provision in the Constitution for the termination of treaties which have been made ‘by and with the advice and consent of the senate.’”  

However, in contrast to the question of treaty termination, the Supreme Court has established a substantial jurisprudence clarifying who has the power to remove a presidential appointment.  

In *Myers v. United States*, the Court was confronted for the first time with the question of whether the President has the “exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.” The case arose out of President Wilson’s firing of a postmaster who had been appointed under a law that explicitly conditioned the President’s ability to remove an appointee on the “advice and consent of the Senate.” After reviewing the history of the Constitutional Convention and the early Congresses, Chief Justice William Taft concluded that the power of removal lay with the President alone, arguing that “the fact that no expressed limit was placed on the power of removal by the Executive was convincing indication that none was intended.” Chief Justice Taft argued that the Senate’s involvement in the appointment process should be “strictly construed;” the
Executive’s power is “given in general terms” and is only “limited by direct expressions where limitation was needed.”\textsuperscript{29} In other words, the appointment and removal of officers is an executive function permitting Senate involvement only where explicitly provided for by the Constitution. While Myers was subsequently limited by a number of cases including Humphrey’s Executor\textsuperscript{30} and Morrison v. Olson,\textsuperscript{31} it still stands for the proposition that “unless a power granted to the executive by the Constitution is specifically circumscribed, it belongs to that branch alone.”\textsuperscript{32} Therefore, extending the analogy to the “treaty clause in light of Myers, it would appear that the only power the Congress has related to treaties is the Senate’s advice and consent power in creating them, since the wording of the two powers is nearly identical.”\textsuperscript{33}

Nevertheless, despite the textual similarities between the provisions, there are a number of reasons why the treaty termination question cannot be answered by reference to the Executive’s removal power. First, the provisions are not textually identical, granting the Senate more involvement in the treaty process than in the appointment process. The Constitution requires that treaties garner two-thirds acceptance of the Senators present while appointments require only a simple majority. Furthermore, the President is given the “exclusive power to make nominations to office, whereas in treaty-making the Constitution does not set him apart in this special way from those who advise

\textsuperscript{29} Id.
\textsuperscript{30} Rathbun v. United States, 295 U.S. 602 (1935) (limiting the sole Executive power of removal to those appointees who were engaged in executive and not “quasi judicial or quasi legislative” functions).
\textsuperscript{31} 487 U.S. 654, 691 (1988) (relaxing the conditions from Humphrey’s Estate and permitting Congress to legislate as long as it does not “impede the President’s ability to perform his constitutional duty”).
\textsuperscript{32} Sabis, supra note 11, at 239 (2002). See also Louis Henkin, Litigating the President’s Power to Terminate Treaties, 73 Am. J. Int’l L. 647, 652-53 (1979) (arguing that the Senate should not be given an implied termination right because it has never been granted an implied removal right); Nelson, supra note 20, at 887 (“In the absence of express limitations upon the power to remove and the power to terminate, there is a strong presumption that no such limitation was intended.”).
\textsuperscript{33} Id.
and share responsibility with him.”

Textually, both provisions afford the Senate a greater role in the treaty process than it has in appointments.

Second, a ratified treaty should more appropriately be compared with other duly enacted domestic legislation than it should be with Executive appointments. Appointees help the Executive to execute the law, but a ratified treaty becomes part of the “supreme law of the land” itself. As such, it has the same domestic importance (and typically greater international importance) than any other bill passed via the standard bicameralism and presentment legislative process. Terminating a treaty is therefore in many ways analogous to repealing a statute, a power which requires the involvement of both Congress and the President. While there are a number of important differences that caution against treating them identically, once can make a strong argument that Congress should have a role in any action that involved “changing the law itself…”

Finally, the “fundamental separation of powers considerations, which underwrite the Court’s narrow construction of congressional power over appointments, are entirely inapt when applied to the treaty power.” Instead, treaty making is not “a core executive function” and therefore does not invoke the same separation of powers concerns

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34 Treaty Termination: Hearings on S. Res. 15 Before the Senate Comm. on Foreign Relations, 96th Cong. 32 (Apr. 9-11, 1979) [hereinafter Hearings] (testimony of Prof. Arthur Bestor).
35 Sabis, supra note 11, at 240.
37 Id. at 1847. Accord THE FEDERALIST NO. 75 (Alexander Hamilton) (“[F]or if we attend carefully to its [treaty power] operation it will be found to partake more of the legislative than the executive character, though it does not seem strictly to fall within the definition of either of them.”). But see Nelson, supra note 20, at 887 (“Inasmuch as the making of treaties pertains to the conduct of foreign relations, distinctly an executive power, much of Chief Justice Taft’s argument in Myers can be applied with equal cogency to support an unlimited power of treaty termination by the President.”); Moriarty, supra note 12, at 163 (1999) (“[T]he burden is on the President to show that the decision as to whether or not notice should be delivered is an area of sole executive authority.”).
involved in a Congressional assertion of power. Consequently, no emanation from the Treaty Clause can underwrite a Myers-like strict rule of construction, ruling out a priori any congressional participation in agreement-making as an infringement on the essential powers of the executive.” Importantly, in Goldwater v. Carter, the seminal case on treaty termination, both the D.C. District Court and the D.C. Circuit rejected the appellee’s argument that Myers should be controlling in deciding the treaty termination issue. None of the five separate opinions in the Supreme Court touched on the issue, though the Justices clashed over its relevance in oral argument, undermining the argument that Myers would be controlling today if the Supreme Court were ever to reach the merits of the issue.

Given that both a direct and indirect analysis of the Constitution’s text as well as an examination of the Framers’ intent leaves the question of whether Congress can unilaterally terminate a treaty unresolved, one must turn to an analysis of how the issue has been understood by commentators and practitioners historically and today. As Professor Corwin once said, “the Constitution, considered only for its affirmative grants of power … is an invitation to struggle for the privilege of directing American foreign

38 In this way, Congressional influence over the treaty process would be more analogous to its influence over quasi-legislative and quasi-judicial appointees which the Court upheld in Humphrey’s Executor, 295 U.S. 602 (1935).
41 Goldwater v. Carter, 617 F.2d 697, 703 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979) (“Expansion of the language of the Constitution by sequential linguistic projection is a tricky business at best. Virtually all constitutional principles have unique elements and can be distinguished from one another.”)
42 Sabis, supra note 11, at 240.
43 See infra Section IV(2) (discussing the likelihood that any of the courts would be willing to hear a treaty termination case today).
The rest of this article therefore focuses on a part of this struggle, analyzing the ways in which Congress might assert its role in the treaty termination process even in the face of Executive opposition. For purely organizational purposes, the article will be divided into sections analyzing the various ways that the Houses of Congress, separately or together, might assert a role in the treaty termination process, beginning with Congress’s weakest option and progressing toward its strongest.

III. The Recent Focus on the Executive Acting Unilaterally

For the last thirty years, the treaty termination debate has focused on whether a President can unilaterally terminate a treaty without Congressional/Senatorial approval. While this article inverts the question by asking whether Congress can terminate a treaty without the executive’s approval, a brief discussion of the unilateral executive question is necessary to both inform and underpin this article’s discussion.

While President Johnson controversially came within twenty four hours of terminating U.S. participation in the Warsaw Convention in 1965, the debate about a President’s power to terminate treaties begin in full when President Carter unilaterally terminated the 1954 Mutual Defense Treaty between the U.S. and Taiwan in 1978. President Carter’s claim to a unilateral termination power was grounded first in precedent; he cited both historical academic support as well as real-world examples of a

44 Edward Samuel Corwin, The President’s Office and Powers, 1787-1798; History and Analysis of Practice and Opinion, 208 (3d ed. 1948).
46 See e.g., Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (1790) reprinted in 16 The Papers of Thomas Jefferson 378 (Julian P. Boyd ed., 1961) (“The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate.”); 1 Wiloughby, supra note 6, at 223 (“Though the Senate participates in the ratification of treaties, the President has the
President’s ability to unilaterally terminate treaties without Congressional consent. However, a number of scholars have persuasively argued that none of Carter’s cited precedents help prove the point he was trying to prove.47

President Carter’s argument gained more traction in its reliance on a historical tradition of broad executive power in foreign affairs.48 The Supreme Court has recognized the President “alone has the power to speak or listen as a representative of the nation.”49 Furthermore, the President is the “sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress.”50 While this argument is itself controversial, over the last thirty years it has been widely accepted by academic commentators,51 the Restatement of Foreign Affairs,52 the executive branch,53 as well as by the Senate itself.54

authority, without asking for senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States.”).

47 See, Jonathan York Thomas, The Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination, 6 YALE J. STUD. WORLD PUB. ORD. 27, 79 (1979) (arguing that none of the thirteen examples support a claim for presidential power); David J. Scheffer, The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China, 19 HARV. INT’L L.J. 931, 979-86 (1978) (same). Even Professor Henkin, a strong supporter of the President’s power to terminate treaties unilaterally has cautioned against reliance on these precedents. See Henkin, supra note 32, at 652 (“But looking to the precedents alone is misleading, especially since many of them are old, antedating the development of clear lines of constitutional authority in foreign affairs.”).

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


50 Id. at 320.

51 See e.g., John Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 COLUM. L. REV. 2218, 2242 (1999) (“…today most commentators, courts and government entities accept that the president unilaterally may terminate treaties.”); Henkin, supra note 32, at 652 (“Termination of a treaty is an international act, and the President, and only the President, acts for the United States in foreign affairs.”).

52 RESTATEMENT, supra note 6, at § 339;

“Under the law of the United States, the President has the power
(a) to suspend or terminate an agreement in accordance with its terms;
(b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or
(c) to elect in a particular case not to suspend or terminate an agreement.”
Importantly, the Supreme Court also appears sympathetic to this position. In 1979, eight members of the U.S. Senate, one former Senator, and sixteen Congressmen sued President Carter in federal court to enjoin his termination of the Mutual Defense Treaty. Ultimately, in a fractured set of decisions, the Supreme Court dismissed the case predominantly based on political question and ripeness grounds. However, one Justice did reach the merits. Justice Brennan would have affirmed the D.C. Circuit and upheld President Carter’s unilateral termination of the treaty, providing the only available data point regarding the Supreme Court’s view of the specific question at issue.

As the preceding paragraphs demonstrate, there is widespread support for the view that the President has the unilateral authority to terminate a treaty. However, this support does not help to answer this article’s inquiry for a variety of reasons. First, even if one were to accept that the executive has a unilateral termination right, which as was

Michael Glennon argues that this provision should be read to uphold a presidential power to terminate treaties in compliance with international law and not to abrogate them in violation thereof. However, there is no evidence that the Restatement intended to so distinguish these terms, nor is there any evidence that the Restatement intended to qualify the President’s power to terminate a treaty. See Glennon, supra note 18, at 158-59.

See e.g., Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Re: Authority of the President to Denounce the ABM Treaty (Dec. 14, 2001), unreleased but cited by Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, at 12, note 36 (Jan. 22, 2002) (“[The president’s power to terminate treaties] has been accepted by practice and considered opinion of the three branches.”).

S. Rep. No. 119, 96th Cong., 1st Sess. 9-10 (1979) (upholding President’s power to terminate a treaty if it is in accordance with international law and the Senate has not expressed a contrary position); United States Senate, Treaties, http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm#5 (“But clearly it seems that the right to terminate belongs to the Executive, the sole branch of government that communicates with foreign governments.”). See also Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Committee on Foreign Relations of the United States Senate by the Congressional Research Service, 201 (2001) [hereinafter CRS Treaty Termination] (“Although the Congress can effectively terminate a treaty’s domestic effect by passage of a superseding public law … the termination of an outstanding international obligation seems to reside with the President since he alone is able to communicate with foreign powers.”).

Goldwater, supra note 24, at 1002 (Rehnquist, J., concurring).

Id., at 996 (Powell, J., concurring).

Id., at 1006 (Brennan, J., dissenting) (“[Termination is] a necessary incident to Executive recognition of the Peking government…. Our cases firmly establish that the Constitution remits to the President alone the power to recognize and withdraw recognition from foreign regimes.”).
demonstrated above remains controversial, “the President has never been accorded an
exclusive power to terminate treaties.”58 For example, the Restatement only indicates that
“the President has the power … to suspend or terminate an agreement” without giving
any indication that another body might not also have the same right.59

Secondly, the only Justice to reach the merits in Goldwater based his decision on
the President’s power to recognize/derecognize other governments,60 an alternative
presidential power not likely to be relevant in many other termination settings. Finally,
most commentators who argue that a President’s right to terminate is exclusive, base their
opinions on the President’s recognized role as the sole representative of the United States
in foreign affairs.61 However, as the next section of this article will endeavor to show,
while this might limit Congress’s ability to terminate treaties by directly notifying foreign
states, it does not necessarily preclude Congress from passing legislation which directs
the President to give the requisite notification. As there have been no coherent defenses
of a President’s termination right as exclusive, there remains an open question of whether
Congress has the unilateral authority to do so. The following sections of this article
address this question.

58 Nelson, supra note 20, at 888 (emphasis in original).
59 RESTATEMENT, supra note 48, at § 339(a).
60 Goldwater, supra note 24, at 1006 (Brennan, J., dissenting). The language in the D.C. Circuit’s opinion
affirming the President’s unilateral authority was more general than that used by Justice Brennan.
Goldwater v. Carter, 617 F.2d 697, 708 (1979), vacated, 444 U.S. 996 (1979) (“…the power of the
President to terminate may appear theoretically absolute.”). However, the Circuit Court explicitly limited
its holding to the facts before it, reserving the question of a President’s authority to terminate other treaties.
Id. at 699 (“The constitutional issue we face, therefore, is solely and simply the one of whether the
President in these precise circumstances is, on behalf of the United States, empowered to terminate the
Treaty in accordance with its terms.”) (emphasis added).
61 See e.g., Henkin, supra note 32, at 652 (“Termination of a treaty is an international act, and the President,
and only the President, acts for the United States in foreign affairs.”); CRS TREATY TERMINATION, supra
note 54, at 201 (2001) (“Although the Congress can effectively terminate a treaty’s domestic effect by
passage of a superseding public law … the termination of an outstanding international obligation seems to
reside with the President since he alone is able to communicate with foreign powers.”).
III. Congress’s Independent Options to Influence the Termination of Treaties

1. Introduction

Given that the neither the Constitution’s text nor its history clearly delineate who possesses the power to terminate a treaty, and that the recent consensus does not argue that the President’s unilateral authority to do so is exclusive, this section will analyze each of the conceivable ways by which either house of Congress, acting separately or together, might independently influence the termination of a treaty. While the varied practice of the United States in terminating treaties over its history provides precedent for several of these methods, this section will argue that the only defensible means by which Congress might be able to independently terminate a treaty without infringing on the President’s constitutional authority is by passing legislation, presumably over a Presidential veto, directing the President to give the requisite notice. All of the other possible methods either require Presidential involvement or are patently unconstitutional.

As an initial matter, two of the possible combinations of the House and Senate can be quickly disposed of as useless in terminating a treaty. First, as opposed to the Senate, which the Constitution grants several independent powers regarding foreign affairs, the House of Representatives acting independently has no constitutional authority whatsoever. Independently, the House is only capable of passing a ‘Sense of the House’ which “is not binding upon the President” and he may therefore “comply with or ignore the resolution as he sees fit.” While the House has from time to time argued for a

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62 See e.g., Goldwater, supra note 24, at 1005 note 1 (Rehnquist, J., concurring) (noting the varied historical practice of the U.S. in treaty termination); Henkin, supra note 8, at 211 (1996) (“At various times, the power to terminate treaties has been claimed for the President, for the President-and-Senate, for President-and-Congress, [and] for Congress.”); Moriarty, supra note 12, at 129 (“Treaties have been terminated throughout the history of the United States in a variety of ways.”).

63 Nelson, supra note 20, at 892.
greater role in foreign affairs, its exclusion was deliberate on the part of the Framers who believed that the quick turnover of Representatives would not be conducive to successful foreign policy.  

Secondly, a concurrent resolution, passed by both houses of Congress but not signed by the President has no constitutional authority. While such an action would presumably be sufficient to demonstrate either Congress’s support for the President or its opposition, thereby creating a case or controversy ‘ripe’ for judicial determination, the President can “heed or ignore a concurrent resolution of the two Houses.”

A concurrent resolution is therefore a constitutionally insufficient mechanism for Congress to terminate a treaty.

2. 2/3 of the Senate Acting Independently

A strong logical argument can be made that treaties should be terminated in the same way as they are made, i.e., by a 2/3 vote of the Senate. Historically, this practice has been relied upon several times. The first instance appears to have been in 1855 when the Senate unanimously passed a resolution authorizing President Pierce to give Denmark notice of our withdrawal from the treaty. President Pierce subsequently gave “the notice

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

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

66 The Senate Committee on Foreign Relations has argued that if both Houses of Congress demonstrate their support for termination, which could be accomplished by concurrent resolution, the President has the constitutional capacity to unilaterally terminate a treaty. S. Rep. No. 119, 96th Cong., 1st Sess. 9-10 (1979).

67 In Goldwater, Justice Powell voted to dismiss the case and vacate the District Court’s decision on ripeness grounds, because Congress had yet to take any “official action.” Presumably therefore, if each branch were to take “action asserting its constitutional authority” thereby creating an “actual confrontation between the Legislative and Executive Branches” there would be a justiciable case or controversy. Goldwater, supra note 24, at 997-98 (Powell, J., concurring).

68 Nelson, supra note 20, at 892.

in pursuance of the authority conferred’ by the Senate Resolution.”  After the House complained of its exclusion, arguing that its constitutional role in the creation of law had been bypassed, the Senate Committee on Foreign Relations studied the issue and issued a report concluding:

The Committees are clear in the opinion that it is competent for the President and Senate, acting together, to terminate in the manner prescribed by the eleventh article without the air or intervention of legislation by Congress, and that when so terminated it is at an end to every intent both as a contract between the Governments and as a law of the land.  

When President Wilson sought to terminate the International Sanitary Convention of 1903 he also sought, and received, support from a 2/3 Senate majority. In the 1979 dispute over President Carter’s termination of the 1954 Mutual Defense Treaty, the Senate appeared to reaffirm its support for this method, introducing at least one resolution calling for its use. Furthermore, there is historical support for this approach from the courts (in dicta), several of the Founders, the State Department, as well as from a number of more modern commentators.

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70 Emerson, supra note 20, at 54.
71 S. Rept. 97, 34th Cong., 1st Sess., 3 (1856). Two years later, the Senate went further, changing a Joint Resolution passed by the House into a simple Senate Resolution authorizing the President to withdraw from a commercial treaty with Hanover. Emerson, supra note 20, at 55.
72 See CRS Treaty Termination, supra note 54, at 205 (“By a resolution adopted by a two-thirds majority on May 26, 1921, the Senate gave its advice and consent to the denunciation of the convention; and the Secretary of State communicated notice of the denunciation to the convention’s depositary.”).
73 S.Res. 15, 96th Cong., 1st Sess. (1979) (“Resolved, that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation.”). The Resolution was approved in committee but never received a vote on the Senate floor.
74 See e.g., Clark v. Allen, 331 U.S. 503, 509 (1947) (“The President and Senate may denounce the treaty, and thus terminate its life.” (quoting Techt v. Hughes, 229 N.Y. 222, 243 (1920), cert denied, 254 U.S. 643 (1920))); The Amiable Isabella, 19 U.S. 1, 75 (1821) (“The obligations [of] the treaty could not be changed or varied, but by the same formalities with which they were introduced, or, at least, by some act of as high an import, and of as unequivocal an authority.”).
75 See e.g., The Federalist No. 64 (John Jay) (“They who make treaties may alter or cancel them.”); Roger Sherman quoted in Ramsey, supra note 1, at 159 (2007) (“It is a general principle in law, as well in reason, that there shall be the same authority to remove as to establish.”).
76 V Green Haywood Hackworth, Digest of International Law 319 (1927) [hereinafter V Hackworth] (“[T]he power that makes the treaty can likewise revoke it; in other words, that the President
Despite this widespread agreement, this approach has been countered on the merits in a number of ways. First, most of its apparent support is derived from juridical dicta and academic commentators, offering little in precedential value. Practically speaking, the practice does not appear to have been used in an actual treaty termination for the last fifty years. Relying on the previous precedents “is misleading, especially since many of them are old, antedating the development of clear lines of constitutional authority in foreign affairs.”78 Secondly, the Senate acting independently “is an extraordinary body in the constitutional scheme” leading scholars not to infer “any powers for the Senate (as distinguished from Congress) other than those specified.”79 Third, as was established above, in the executive appointment context the Supreme Court has explicitly rejected the argument that the power to create necessarily implies the power to repeal.80 The Court has granted the Executive almost untrammeled authority to remove executive officials, despite the role the Senate is granted in their confirmation. While clearly not dispositive, the court’s approach to the textually similar appointment doctrine calls into question an automatic assumption that it would uphold a Senate power over termination merely based upon its power over ratification.

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77 See e.g., Moriarty, supra note 12, at 132-33; Bestor, supra note 16, at 135 (reviewing the history of the treaty clause in order to conclude that “treatymaking was to be a cooperative venture from the beginning to the end of the entire process. This, the evidence shows, was the true intent of the founders.”); Scheffer, supra note 47, at 1008-09 (“Given the peculiar design of the United States Constitution, whereby the Senate and President share in the treaty-making power, there is much to be said for a court-approved procedure requiring Senate participation in the termination process.”); Nelson, supra note 20, at 888 (“Practice and opinion in the United States also supports the view that treaties should be terminated as they are made, i.e., by the President and the Senate acting as the ‘treaty-making power’ of the United States.”).
78 Henkin, supra note 32, at 652.
79 Id. at 652-53. Accord Ramsey, supra note 175, at 159 (“[T]he text gave the Senate a role in treatymaking. It did not give the Senate a role in treaty withdrawal, so that power remained part of the President’s executive power.”).
80 Myers, supra note 25.
Finally, and most importantly in the context of this article, the Senate can make no claim that it could force a recalcitrant President to terminate a treaty even with a 2/3 majority. Any role that the Senate independently might possess is inferred from its power over treaty ratification, a power that itself requires presidential approval. Presidential opposition to a treaty’s termination would render precatory any resolution supporting such an action passed only by a Senate supermajority.

3. **Both Houses of Congress Acting Jointly to Independently Notify Foreign States of a Treaty’s Termination**

As the previous sections have demonstrated, Congress has no constitutional authority to independently influence the termination of a treaty when it acts through a concurrent resolution or through either house individually. The only means by which Congress can constitutionally influence policy is by acting jointly and passing legislation through the rigors of bicameralism and presentment, thereby incorporating the president’s support or overcoming his veto.

Even here however, there are two potential ways by which Congress could act. The first, and seemingly the simplest option, would be to pass legislation purporting to terminate the U.S.’s treaty involvement. In fact, this may have been the option at the forefront of the Founders minds as well, as the first treaty termination in U.S. history was accomplished solely by Congressional joint resolution. On July 7, 1798, the 5th Congress passed an act entitled “An act to declare the treaties heretofore concluded with France no longer obligatory on the United States,” whose operating paragraph read in full:

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81 See e.g., Moriarty, *supra* note 12, at 137-38.
82 The prefatory language of the Act read:

> Whereas, the treaties concluded between the United States and France have been repeatedly violated on the part of the French government, and the just claims of the United States for
Be it enacted by the senate and house of representatives of the United States of America, in congress assembled that the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.\textsuperscript{83}

While President Adams signed the act, the bill’s language indicates that Congress itself was terminating the U.S. involvement in a series of four commercial treaties with France. The bill does not direct the President to notify France of our termination, it simply assumes that Congress’s action alone is sufficient to end our international obligations. While this might have been interpreted as an anomaly of the founding, almost one hundred years later, the U.S. Supreme Court upheld Congress’s actions, declaring that “[i]n 1798, the conduct towards this country of the government of France was of such a character that Congress declared that the United States were freed and exonerated from the stipulations of previous treaties with that country.”\textsuperscript{84} Interestingly, though admittedly of more relevance to international than constitutional law, France refused to recognize Congress’s abrogation.\textsuperscript{85}

\textsuperscript{83}See \textit{The Chinese Exclusion Case}, supra note 79, at 602. \textit{See also} \textit{Hooper v. United States}, 22 Ct. Cl. 408, 418 (1887) (“The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was within the power of one party to abrogate these treaties it was indisputably done by the Act of July 7, 1798.”) (discussed in Sabis, supra note 11, at 235 (“In rendering its decision, the court of claims held Congress was the correct U.S. authority to abrogate a treaty and had properly issued the terminating act, apparently on the grounds that a treaty was the supreme law of the land and thus, a legislative act was needed for its termination.”)).

\textsuperscript{84}The Chinese Exclusion Case, supra note 79, at 601. \textit{See also} \textit{Hooper v. United States}, 22 Ct. Cl. 408, 418 (1887) (“The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was within the power of one party to abrogate these treaties it was indisputably done by the Act of July 7, 1798.”) (discussed in Sabis, supra note 11, at 235 (“In rendering its decision, the court of claims held Congress was the correct U.S. authority to abrogate a treaty and had properly issued the terminating act, apparently on the grounds that a treaty was the supreme law of the land and thus, a legislative act was needed for its termination.”)).

\textsuperscript{85}See CRS \textit{TREATY TERMINATION}, supra note 54, at 207 note 193 (citing V \textsc{John Bassett Moore}, A \textsc{Digest of International Law} 608 \textit{et seq.} (1906)).
Despite its assertive beginning, Congress appears does not appear to have passed a bill directly repeating its 1798 efforts to independently terminate a treaty. Several such bills were proposed during the debates over the Yalta Agreement in 1953, but none of them even passed the House of Representatives.\(^8^6\) In the Judicial branch, there is some obscure language in several court opinions which could be read as continued affirmation of the constitutionality of such an approach,\(^8^7\) though the precedential value of such historical dicta is low.

Nevertheless, despite the widespread acceptance of Congress’s actions in 1798, and its occasional reemergence in the House and in the Courts, more recent developments in constitutional authority are likely to have rendered Congress incapable of directly communicating its will internationally. Instead, the “President alone has the power to speak or listen as a representative of the nation … The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”\(^8^8\) As such, Congress cannot independently communicate with foreign nations, nor can it purport to drive policy by any means other than through the President. Foreign states themselves are presumed to know that only the President, and his representatives, are

\(^{86}\) See Nelson, supra note 20, at 895 note 72 (listing the various bills that were introduced and what would have been the effect of their language).

\(^{87}\) See Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (attempting to decipher Congressional intent as to the possible application of a statute to U.S. international commitments, the court wrote “We think that some affirmative expression of congressional intent to abrogate the United States’ international obligations is required in order to construe the word ‘treaty’ in §106 as meaning only Art. II treaties.”) (emphasis added); Ware v. Hylton, 3 U.S. 199, 260-61 (1796) (“If Congress, therefore, (who, I conceive, alone shall have such authority under our government), shall make such a declaration, in any case like the present, I shall deem it my duty to regard the treaty as void …. “); Ropes v. Clinch, 20 F. Cas. 1171, 1174 (C.C.N.Y. 1871) (“There are three modes in which congress may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once, by express terms…. “).

\(^{88}\) Curtiss-Wright, supra note 49, at 319.
authorized to speak on behalf of the United States.\textsuperscript{89} As early as 1816, the Senate Foreign Relations Committee [SFRC] indicated that “[t]he President is the constitutional representative of the United States with regard to foreign nations.”\textsuperscript{90} By 1911, the Chairman of the SFRC, Senator Henry Cabot Lodge, argued that “it is well for the Senate and for Congress also to remember that it does not lie in our hands alone to give this notice to a foreign Government. We can not give the notice.”\textsuperscript{91} By 1929, one prominent academic commentator had concluded “Congress has no means whereby it may itself give notice of termination of a treaty to the foreign government concerned, for, under the Constitution, Congress has no power to communicate directly with the foreign Powers.”\textsuperscript{92}

This position has gained almost unanimous acceptance by modern academic commentators.\textsuperscript{93} Professor Henkin argues that Congress’s actions in 1798 were justified by a different conception of the relationship between treaty abrogation and the likelihood of war than exists today. In 1798, the “maintenance or termination of treaties” was seen as “intimately related to war or peace for which Congress has primary responsibility.”\textsuperscript{94} Indeed, Congress’s actions in 1798 were subsequently interpreted by the courts as having amounted to a declaration of war against France.\textsuperscript{95} If treaty terminations are seen as declarations of war, then Congress can justify an independent role based on its express

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\textsuperscript{89} See RESTATMENT, supra note 6, at § 311(b) & § 311 cmt. b.
\textsuperscript{90} Curtiss-Wright, supra note 49, at 319.
\textsuperscript{91} 48 CONG. REC. 587 (1911) (statement of Sen. Lodge).
\textsuperscript{92} I Willoughby, supra note 6, at 587.
\textsuperscript{93} See e.g., Moriarty, supra note 12, at 148 (“The vast majority of commentators who have spoken on the subject have concluded that Congress has no independent power to give foreign nations notice of termination, if the President refused to do so.”); Henkin, supra note 8, at 213 (“Congressional resolutions have no effect internationally unless the President adopts and communicates them; some Presidents have chosen to comply with Congressional wishes, but others have disregarded them.”); Scheffer, supra note 47, at 992 (“There is no dispute as to which authority is to actually deliver notice of termination … it is the President. A Senate or congressional attempt to deliver the notice of termination would risk severe constitutional censure.”).
\textsuperscript{94} Henkin, supra note 8, at 213.
\textsuperscript{95} Bas v. Tingy, 4 U.S. 37 (1800).
Constitutional delegation of power in the declaration of war.\textsuperscript{96} Today, Congress likely has the constitutional authority to give “the requisite notice to a foreign nation that it is terminating a treaty when it is doing so pursuant to its power to declare war,”\textsuperscript{97} an authority even the Executive branch concedes.\textsuperscript{98}

However, the creation and abrogation of treaties is no longer considered to be as intimately connected with matters of war and peace as it was in 1798. For example, in 2001, President Bush terminated the Anti-Ballistic Missile [ABM] Treaty, a bilateral arms control treaty that had served as one of the foundations of peace during the Cold War. Its termination was controversial, but no-one in either country construed it as amounting to a possible declaration of war. If terminating the ABM Treaty did not produce such a reaction, there are few treaties that would. As a result, Congress today would not be able to justify a treaty termination power based on its war declaration power.\textsuperscript{99}

As the previous sections have demonstrated, the only means by which Congress can constitutionally compel action is through legislation constitutionally enacted via

\textsuperscript{96} U.S. CONST. art. I., § 8, cl. 11.

\textsuperscript{97} Moriarty, supra note 12, at 148. Accord University of Chicago, supra note 45, at 600 (“[Congress’s right] to give notice of denunciation to other countries … has since been restricted to declarations pursuant to war.”). But see ADLER, supra note 2, at 157 (arguing that even this power no longer exists).

\textsuperscript{98} Office of Legal Counsel, Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations Under an Existing Treaty, Christopher Schroeder, Memorandum to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, from Christopher Schroeder, Acting Assistant Attorney General, Nov. 25, 1996, at 13 note 17 (“A declaration of war is a legislative act that can have the effect of abrogating a treaty in whole or in part….Accordingly, it is at least arguable that Congress’ war power enables it to enact legislation, other than a formal declaration of war, that authorizes the President to vary the United States’ obligations under disarmament or other political-military treaties.”).

\textsuperscript{99} The D.C. Circuit went further in Goldwater arguing that treaty terminations should be treated as a singular power and not differentiated based on the subject of the treaty, thereby rejecting a Congressional argument for termination power only in war settings. See Goldwater v. Carter, 617 F. 2d 697, 707 (D.C. Cir. 1979), vacated, 444 U.S. 996 (“There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards. We know of no standards to apply in making such distinctions.”).
bicameralism and presentment. Yet, even via such legislation, Congress cannot independently communicate with foreign states, as the President is the only authority constitutionally empowered to do so. While this may appear to preclude Congress from acting, there is one remaining option by which Congress may be able to independently terminate a treaty: passage of legislation directing the President to deliver the notice of termination himself. As the next section will demonstrate, this method is Congress’s best, and only, means by which it can terminate a treaty.

4. Both House of Congress Acting Jointly to Direct the President to Deliver the Notification of Termination to Foreign States

a. Argument in Favor

While the previous section demonstrated that Congress cannot itself directly communicate with foreign states, this section will analyze “whether Congress has the right to legislate that a treaty shall be terminated, and by such legislation … demand that the President deliver notice of termination pursuant to his duty to see that the laws are faithfully executed.”100 Historically, legislation authorizing or directing the President to terminate a treaty “has been the most common method employed by Congress and acted upon by the President.”101 While most of these terminations have been cooperative, with both Congress and the President supporting the treaty’s termination, this section will endeavor to show that Congress has the constitutional capacity to direct even a recalcitrant President to deliver a treaty’s termination notification.

The principle justification for this argument is the President’s constitutional duty to “take care that the laws be faithfully executed…”102 As the head of the Executive

100 Moriarty, supra note 12, at 156.
101 Scheffer, supra note 47, at 997. Accord Moriarty, supra note 12, at 140 note 87 (same).
102 U.S. CONST. art. II, § 3.
branch, the President is charged with executing the laws enacted by Congress. While the
President has the ability to veto legislation, if that legislation is subsequently passed over
his veto, he is constitutionally required to enforce it. This requirement permits no
discretion; the President is required to enforce all enacted legislation equally and cannot
do so piecemeal, discriminating between those provisions he chooses to execute and
those he does not.

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

The first apparent instance of Congress acting via this procedure was on April 27,
1846 when Congress authorized President Polk to repeal a treaty with Great Britain
granting shared occupancy of the Oregon Territory. The language used by Congress in
1883 to direct President Arthur to terminate a treaty with Britain is representative of its
consistent practice throughout the 19th century; “[t]he President be, and he hereby is,
directed to give notice of His Brittanic Majesty that the provisions of … will terminate

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103 For the purposes of this section, assume that any reference to legislation that has been passed in an
attempt to force an opposed President to act, was duly enacted into law, whether over a presidential veto or
his unwilling signature.
104 Nancy Murray, Treaty Termination by the President Without Senate or Congressional Approval: The
Case of the Taiwan Treaty, 33 Sw. L.J. 729, 743 (1979).
105 Henkin, supra note 8, at 118.
106 Id.
and be of no force on the expiration of two years next after the time of giving such notice.”

While the Supreme Court seemed to uphold the practice several times in passing during the 19th century, in 1936 it confronted a direct challenge to the constitutionality of Congress’s attempt to terminate a treaty. The case arose out of a challenge to a statute passed by Congress in 1915, which “expressed ‘the judgment of Congress’ that treaty provisions in conflict with the provisions of the act ‘ought to be terminated,’ and the President was ‘requested and directed’ to give notice to that effect to the several governments concerned….” In compliance with the Act’s direction, President Wilson subsequently terminated a number of treaties that conflicted with its provisions between 1915 and 1918. While the Court was confronted with the limited issue of whether the Executive had the authority to terminate the treaty in question, the Court ultimately held that the President had a duty to abide by the dictates of the Congressional statute;

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

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108 CRS TREATY TERMINATION, supra note 54, at 202 (citing 22 Stat. 641 (1883)).
109 See Head Money Cases, 112 U.S. 580, 599 (1884) (“[W]e are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.”) (emphasis added); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899) (“Congress by legislation … could abrogate a treaty.”).
110 As was true throughout the 19th century, the treaty terminations in question were supported by both the legislative and executive branches working cooperatively. As such, the Courts were not confronted with the question at issue in this paper, and subsequently addressed in Goldwater, regarding which branch had the constitutional authority to terminate the treaty when the other branch stood in opposition.
112 Id. at 116 note 3.
113 Id. at 117-18 (emphasis added).
While one contemporaneous scholar argued that the Van Der Weyde Court “did not state squarely that Congress could direct the President to terminate a treaty,”\textsuperscript{114} the court’s argument that “it was incumbent upon the President” indicates an unambiguous duty to abide by Congress’s directive.

More recently, Justice Rehnquist’s plurality opinion in \textit{Goldwater} noted that one of Congress’s many tools to protect its interests against Executive encroachment, was its previous practice of initiating “the termination of treaties by directing or requiring the President to give notice of termination.”\textsuperscript{115} Presumably, if Congress’s practice of so directing the President was unconstitutional, Justice Rehnquist would not have affirmatively cited to it. As a result, while the citation is insufficient to establish the practice’s constitutionality, especially given that the cases to which he cites involved Congress and the President working in cooperation,\textsuperscript{116} it does serve as basic evidence that Congressional direction is not patently unconstitutional.

\textbf{b. Arguments Against}

1. \textbf{Historical Examples}

Despite this apparent support, a number of commentators argue that “the President cannot be forced by Congress or by the Senate to perform the international act of giving notice.”\textsuperscript{117} These commentators begin their arguments by citing to historical

\textsuperscript{114} Stefan Riesenfeld, \textit{The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions}, 25 CALIF. L. REV. 643, 647 (1937).

\textsuperscript{115} \textit{Goldwater, supra} note 24, at 1004 note 1 (quoting \textit{Goldwater v. Carter}, 418 F.Supp. 949, 958 (D.D.C. 1979) (C.J. Wright)).

\textsuperscript{116} Three statutes were cited by Chief Judge Wright and then incorporated by reference by Justice Rehnquist in his footnote: Act of January 18, 1865, 13 Stat. 566 (“Providing for the Termination of the Reciprocity Treaty of fifth June, eighteen hundred and fifty-four, between the United States and Great Britain.”); Act of June 17, 1874, 18 Stat. 287 (“Providing for the termination of the treaty between the United States and His Majesty the King of the Belgians, concluded at Washington, July seventeenth, eighteen hundred and fifty-eight.”); Act of March 3, 1883, 22 Stat. 641 (“Providing for the termination of articles numbered eighteen to twenty-five, inclusive, and article numbered thirty of the treaty between the United States of America and Her Brittanic Majesty, concluded at Washington, May eighth, eighteen hundred and seventy-one.”).
practice in which several Presidents have refused to deliver termination notices to foreign countries after Congress had directed them to do so. While Professor Henkin cites two examples of such refusals in order to demonstrate that the President has no duty to obey a Congressional direction to deliver a treaty’s termination notification, in reality none of his examples prove the point he is trying to make.

Professor Henkin’s first example is when President “Lincoln ignored Congressional directions to terminate the Rush-Bagot Agreement disarming the Great Lakes.” At first, this example appears to support Professor Henkin’s claim. On February 9, 1865, Congress passed a resolution directing the President to notify Great Britain of our desire to terminate the Rush-Bagot Agreement regulating the use of naval forces on the Great Lakes. President Lincoln never delivered that notification and the Rush-Bagot Agreement exists to this day, seemingly demonstrating a President’s successful unwillingness to comply with the directives of Congress.

However, Congress’s action in February was not the first step in this process. Earlier, President Lincoln had endeavored to unilaterally terminate the treaty. Congress’s action was meant as an _ex post_ ratification of the earlier Presidential action;

> Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the notice given by the President of the United States to the Government of Great Britain and Ireland to terminate the treaty of eighteen hundred and seventeen,

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117 I WILLOUGHBY, supra note 6, at 587. See also Scheffer, _supra_ note 47, at 982 (“The allocation of treaty termination powers has always recognized the President’s discretion to refuse to deliver notice of termination to a foreign country.”); Henkin, _supra_ note 8, at 214 note * (“A President who wishes to maintain a treaty will doubtless treat a Congressional denunciation or directive to terminate it as only a hortatory ‘sense resolution.’”). This claim is difficult to reconcile, a task Henkin leaves unaddressed, with a claim he makes earlier in the same book; “it is difficult to build a persuasive argument that ‘He shall take Care that the Laws be faithfully executed’ gives him discretion not to execute them.”

118 Henkin, _supra_ note 8, at 213 note 143.
regulating the naval force upon the lake, is hereby adopted and ratified as if the same had been authorized by Congress.\textsuperscript{119}

President Lincoln’s six-month notice had been delivered on November 23, 1864 and would therefore take effect in the middle of May, 1865.\textsuperscript{120} However, by March of 1865, after General Sherman’s successful March to the Sea, the Battle of Nashville, and the encirclement of General Lee’s forces at Petersburg the Union’s position in the Civil War had changed dramatically. With victory almost certain, President Lincoln now saw the continuation of the treaty as in the U.S.’s best interests, and on March 8, 1865 Secretary of State Seward notified Great Britain that the U.S. was withdrawing its notice of termination.\textsuperscript{121} As a result, the episode is not an example of a Presidential refusal to abide by a Congressional directive. Not only were Congress’s actions only a post-hoc ratification of the president’s actions, but the President’s subsequent retraction of the notification was motivated by drastically changed international circumstances and not by any view as to his constitutional authority to ignore Congress.

A second example occasionally cited as proof that Presidents have refused to abide by Congressional directives to terminate treaties, is President Hayes 1897 veto of an Act requiring him to terminate two articles of the Burlingame Treaty of 1868 with China. President Hayes’ veto was constitutionally based, as he argued that the power is “not lodged by the Constitution in Congress, but in the President, by and with the consent of the Senate …. “\textsuperscript{122} Nevertheless, this example also does not support the thesis. First, this was only a presidential veto, which can be exercised on any grounds. It does not

\textsuperscript{119} Act of February 9, 1865, 13 Stat. 566 (1865) (quoted in full in Henry Sherman Boutell, \textit{Is the Rush-Bagot Convention Immortal?}, 173 THE NORTH AMERICAN REVIEW 331, 339-42 (1901)).
\textsuperscript{120} Id. at 340.
\textsuperscript{121} Id. at 341.
\textsuperscript{122} Emerson, \textit{supra} note 20, at 56-57 (quoting President Hayes, Message of March 1, 1897, 9 Richardson 4466-4472).
represent a President ignoring a duly-enacted piece of legislation. Second, and more importantly, President Hayes actually viewed the Congressional legislation as amounting to an amendment of a treaty, a power he believed to lie only in the President and Senate acting together. In fact, the President went so far as to argue that the “authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is … free from controversy under our Constitution.” As a result, this example serves to support this article’s thesis, that Congress has the power to direct the President to terminate a treaty, not undermine it.

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

However, just like the previous example, a closer reading indicates that President Wilson believed the “law was not an effort to terminate treaties … but to modify them,

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123 Id. at 57 (quoting President Hayes, Message of March 1, 1897, 9 Richardson 4470).
124 Henkin, supra note 8, at 213 note 143.
which Congress could not do."\textsuperscript{127} As the State Department Bulletin indicated, the Congressional action amounted to a termination of specific treaty provisions despite the fact that the obligations were “mutual” and that “the treaties contain no provisions for their termination in the manner contemplated by Congress.”\textsuperscript{128} As a result, the episode is unrelated to the question of treaty termination and again focuses merely on treaty modification. As a result, none of the precedents typically cited provide any support for the claim that a President does not need to comply with a Congressional directive for him to deliver the notification of a treaty termination.

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

The second and more persuasive argument against Congress’s ability to direct the President to deliver the notice of a termination of a treaty is the view that the take care clause does not obligate the President to enforce unconstitutional statutes.\textsuperscript{129} The argument here is predominantly practical; 2/3 of Congress should not be able to force the President to execute an unconstitutional provision until such time as he can challenge it in court. Judge Easterbrook makes the point most clearly by example; if Congress were to enact a statute, over a presidential veto, requiring the President to “execute the CEO of Apex Missile Corporation,” the Constitution cannot require the President to carry out the action before he can challenge it in court.\textsuperscript{130} Judge Easterbrook’s example does establish that there may be “circumstances in which the President may appropriately decline to

\textsuperscript{127} Emerson, \textit{supra} note 20, at 59 (citations omitted).
\textsuperscript{128} Id.
\textsuperscript{129} See generally, Frank H. Easterbrook, \textit{Presidential Review}, 40 \textit{CASE W. RES. L. REV.} 905 (1989-90) (arguing that the President is not constitutionally obligated to enforce unconstitutional enactments).
\textsuperscript{130} Id. at 922.
enforce a statute that he views as unconstitutional.”\textsuperscript{131} The difficulty is in identifying them.

Historically, Presidents have frequently refused to enforce what they have viewed as unconstitutional enactments. When signing bills, many Presidents have attached signing statements indicating their unwillingness to enforce certain provisions that they view as unconstitutional.\textsuperscript{132} In the foreign affairs context, every President since Lyndon Johnson has maintained the view that the 1973 War Powers Resolution represents an unconstitutional infringement on Executive power, though most have “voluntarily” complied with its terms for political reasons.\textsuperscript{133} Furthermore, the Supreme Court has to indirectly upheld the practice several times. In Myers, no member of the Court challenged the constitutionality of President Wilson’s decision not to abide by the initial Congressional Resolution which he viewed as an unconstitutional infringement on his rights, a position which the Supreme Court ultimately upheld.\textsuperscript{134} Similarly, in INS v. Chadha, the Court affirmatively cited to the Presidential practice of objecting to the constitutionality of provisions of a broader piece of legislation they signed into law.\textsuperscript{135} However, the Supreme Court has also

Despite this apparent support from the Executive branch and occasional Court opinions, there are strong arguments against a Presidential power to independently assess

\textsuperscript{131} Memorandum for the Honorable Abner J. Mivka, Counsel to the President, “Presidential Authority to Decline to Execute Unconstitutional Statutes, from Walter Dellinger, Assistant Attorney General (Nov. 2, 1994).
\textsuperscript{132} Id. at 6-8.
\textsuperscript{133} James A. Baker III & Warren Christopher, Put War Powers Back Where They Belong, N.Y. TIMES, July 8, 2008.
\textsuperscript{134} Myers, supra note 25.
\textsuperscript{135} INS v. Chadha, supra note 65, at 942 note 13. See also Freytag v. Commissioner, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (“[I]t was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various including … the power to veto encroaching laws, or even to disregard them when they are unconstitutional.”).
a law’s constitutionality. First, such a power would place the President in the role of both legislator and judge. By claiming a power of constitutional review, the President could freely choose which statutes he wanted to apply, until such time as he was challenged in court. The House of Representatives came to a similar conclusion when it analyzed whether President Reagan had the constitutional authority to not apply provisions of the ‘Competition in Contracting Act’;

To adopt the view that one's oath to support and defend the Constitution is a license to exercise any available power in furtherance of one's own constitutional interpretation would quickly destroy the entire constitutional scheme. Such a view, whereby the President pledges allegiance to the Constitution but then determines what the Constitution means, inexorably leads to the usurpation by the Executive of the others' roles….\textsuperscript{136}

The Committee went on to argue that “'[t]he Executive's suspension of the law circumvents the constitutionally specified means for expressing Executive objections to law and is a constitutionally impermissible absolute veto power.'\textsuperscript{137} As the Congressional Research Service (CRS) concluded, “[t]he refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power.”\textsuperscript{138} Textually, as Professor Henkin has indicated, the argument that the President has any discretion in the “take

\textsuperscript{137} Id. at 13.
\textsuperscript{138} Congressional Research Service, Memorandum to the Committee on Government Operations concerning the “Executive’s Duty to Enforce the Laws,” 544 (Feb. 6, 1985) [hereinafter CRS \textit{ENFORCEMENT}], \textit{reprinted in}, \textit{CONSTITUTIONALITY OF GAO'S BID PROTEST FUNCTION: HEARING BEFORE A SUBCOMM. OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 99th Cong. 544 (1985)). Accord 1 WILLOUGHBY, \textit{supra} note 6, at 767 (“Here the President has to deal not with a measure in the process of enactment, as in the case when the veto is exercised, but with a bill that has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure.”).
care” clause “goes against explicit, unambiguous constitutional text; it is not persuasive.”\textsuperscript{139}

The Courts have occasionally taken a similar view. In the context of the requirement to abide by a Congressional directive to pay the postmaster General a certain amount, the Supreme Court argued “[t]o contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.”\textsuperscript{140} More recently, the Supreme Court has held that the President doesn’t have the discretion ‘impound’ funds by spending “less than congress appropriated for a bill.”\textsuperscript{141} If the President can’t limit a Congressional directive, it follows \textit{a fortiori} that the President can’t ignore one.

Even assuming, \textit{arguendo}, that the Executive requires some discretion in analyzing a law’s constitutionality in order to protect its position before the courts can intervene, such discretion would need to be sharply limited. While drawing such a line is inescapably controversial, importing a ‘clearly established’ principle provides the most defensible framework. As even the Executive Branch’s own lawyers have recognized, “[u]nless the unconstitutionality of a statute is clear … [the President] should not decline to enforce it unless he is compelled to do so under the circumstances.”\textsuperscript{142} While such a principle would permit the Executive to ignore Judge Easterbrook’s clearly unconstitutional executionary directive, in the typically ambiguous case, “[t]he President should presume that enactments are constitutional,” giving “great deference to the fact

\textsuperscript{139} Henkin, \textit{supra} note 8, at 118.
\textsuperscript{140} Kendall \textit{v. United States}, 37 U.S. 524, 611 (1838).
\textsuperscript{142} Memorandum to the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Sept. 27, 1977).
that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation.”\footnote{143}{Dellinger, supra note 131, at 2.}

In the context of treaty termination, this article has demonstrated that Congress has a strong claim to an independent power to terminate treaties. At worst, such a power is not “clearly unconstitutional,” and as a result even under this standard, the President would be required to abide by the Congressional mandate, before potentially challenging the action in court.


In order to demonstrate how the arguments made in the prior section have played out in reality, this section focuses on a case study of Congress’s most recent attempt to terminate a treaty in the face of Presidential opposition. In 1986, in opposition to the apartheid regime in South Africa, Congress began debating the implementation of sanctions against South Africa. Ultimately, Congress enacted sanctions legislation over the President’s veto. As a component of that legislation, Congress directed the President to terminate a tax treaty\footnote{144}{Convention for the avoidance of double taxation and for establishing rules of reciprocal administrative assistance with respect to taxes of income, U.S.-S. Afr., Dec. 13, 1946, T.I.A.S. No. 2,510 (entered into force July 15, 1952).} and an air services treaty\footnote{145}{Agreement respecting Air Transport Services, U.S.-S. Afr., May 23, 1947, 1 Stat. 3057 (entered into force, May 23, 1947).} with South Africa. As the following discussion will show, not only was the constitutionality of that direction never challenged by either party or branch, but the President promptly complied with the enacted legislation despite his original veto.

The draft of the Anti-Apartheid Act that was passed in the House did not contain a provision for the termination of either treaty.\footnote{146}{132 Cong. Rec. H. 3861 (June 18, 1986).} The provision terminating the Air
Services Agreement was added by the Senate Foreign Relations Committee,\textsuperscript{147} while the provision relating to the Tax Treaty was added as a floor amendment.\textsuperscript{148} In both cases, while subsequent discussion reiterated that the provisions would mandate the termination of their respective treaties,\textsuperscript{149} there was no discussion regarding their constitutionality, or any concern about the included directive to the President.\textsuperscript{150}

President Reagan opposed the bill throughout its drafting because he believed that sanctions represented too drastic a measure. As a result, he vetoed the bill after it passed both houses of Congress. While his veto message never directly discussed the sections requiring him to deliver notification of the two treaties’ terminations to South Africa, he did state cryptically “I am also vetoing the bill because it contains provisions that infringe on the President’s constitutional prerogative to articulate the foreign policy of the United States.”\textsuperscript{151} However, this is most likely a reference to President Reagan’s belief that by sanctioning South Africa, “the legislation discards our economic leverage, constricts our

\textsuperscript{147} 132 CONG. REC. S. 11544 (Aug. 13, 1986) (“Sec. 306 (a)(1) The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, in accordance with the provisions of that agreement.”).
\textsuperscript{148} 132 CONG. REC. S. 11621 (Aug 14, 1986) (“Sec. 314. The Secretary of State shall terminate immediately the following convention and protocol, in accordance with its terms, the Convention Between the Government of the Union of South Africa for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance With Respect to Taxes on Income, done at Pretoria on December 13, 1946, and the protocol relating thereto.”).
\textsuperscript{149} See S. REP. No. 99-370, at 13-14 (Aug. 6, 1986) (“The Secretary of State is to terminate the bilateral air services agreement now in effect with South Africa.”); 132 CONG. REC. S. 11621 (Aug. 14, 1986) (statement of Sen. Weicker) (“Because the committee language terminates a treaty relating to air travel between the United States and South Africa, no flights would be allowed between the two countries once this amendment is adopted.”); Id. (“This amendment would terminate the treaty entitled ‘convention between the Government of the United States of America and the Government of the Union of South Africa for the avoidance of double taxation and for establishing rules of reciprocal administrative assistance with respect to taxes of income.’”).
\textsuperscript{150} \textit{Cf} The bill’s constitutionality was implicitly assumed by the chair of the National Bar Association’s tax committee in a 2002 article discussing its impact on the apartheid regime. Calvin J. Allen, \textit{The Effective Role of United States International Tax Law In Dismantling ‘Apartheid’ in the Union of South Africa and in Rebuilding the Union of South Africa after the Demise of ‘Apartheid}, 27 T. MARSHALL L. REV. 165, 171-173 (2002).
\textsuperscript{151} President’s Message to Congress Vetoing the Comprehensive Anti-Apartheid Act of 1986, 22 WEEKLY COMP. PRES. DOC. 1281 (Sept. 26, 1986).
diplomatic freedom, and ties the hands of the President of the United States in dealing with a gathering crisis in a critical subcontinent where the Soviet Bloc ... clearly sees historic opportunity." As a result, there is no indication President Reagan objected to the constitutionality of the two congressional directives.

Soon thereafter, Congress reconvened and with little debate, and no mention of the treaty terminations, overrode the President’s veto. Despite his previous objections, President Reagan indicated that “our administration will, nevertheless, implement the law.” Without objecting to the constitutionality of the direction, President Reagan’s Secretary of State George Schultz duly notified South Africa of the U.S. intention to terminate the tax treaty and the air services treaty. The notification language is neutral, giving no indication as to whether President Reagan believed he was acting to terminate the treaties based on a Congressional dictate or on an inherent Executive authority.

When all was said and done, Congress had successfully directed the President to terminate two treaties over his initial opposition. There is no indication in the record that

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152 Id.
157 II CUMULATIVE DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1981-88, at 2185 (Marian Nash, ed. 1994) (quoting Note to South African Ambassador Johannes Hermanus Albertus Beukes, from: Jeffrey N. Shane, Deputy Assistant Secretary of State for Transportation Affairs (Oct. 8, 1986) (“On behalf of the Government of the United States of America, I hereby request consultation pursuant to paragraph (B) of Article XI of the [Air Services] Agreement and hereby give notice pursuant to paragraph (D) of Article XI to terminate the Agreement. The Agreement shall terminate one year after the date of receipt of this notice, which is being simultaneously communicated to the International Civil Aviation Organization.”).
any member of either branch questioned the constitutionality of Congress’s action. Furthermore, the initial policy disagreement, once Congress overrode his veto, President Reagan duly complied with the Congressional directives in less than a week.

As this section has shown, it appears that while Congress cannot independently terminate a treaty, it would appear to “have a solid claim, while no means a settled one, for the right to pass legislation that calls for the termination of a treaty and the concomitant delivery of termination notice by the President.”158 While Presidents may claim the discretion to not enforce unconstitutional statutes, such a right is by no means established, nor is it clear that it would apply to treaty terminations if it did exist. Nevertheless, as the next section will show, if a President does not comply with a termination notification directive contained in a duly-enacted statute, Congress has very few tools to compel him to do so.

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

As the previous sections have demonstrated, while Congress can’t itself deliver the notification necessary for termination of a treaty, it has a strong constitutional claim for a power to be able to direct the President to deliver such notice. This then begs the question, if the President refuses to abide by the directive, what powers does Congress have to compel his compliance?

1. Express Constitutional Powers: Impeachment?

Unfortunately for Congress, the answer is very few. Initially, Congress might try and use its spending power to cut off funding for the implementation of the treaty. This solution is plagued by two problems however. First, a number of treaties require no

158 Moriarty, supra note 12, at 166.
express appropriation for their implementation: for example, the Tax Treaty referenced in
the Anti-Apartheid Act above, merely called for reciprocal standards to prevent double
taxation and therefore required little to no appropriated money. Secondly, for those
treaties that do require funding, cutting off those funds can be politically infeasible; for
example, cutting off funding for any treaty that required U.S. personnel would render
Congress liable for charges of not supporting our citizens/soldiers/employees. Combined,
these two problems present large enough political obstacles that Congress has never cut
off appropriations for a treaty’s implementation.\footnote{159}

The only other explicit constitutional power Congress might use to enforce
compliance is impeachment;\footnote{160} “there is no constitutional or other governmental
machinery short of impeachment whereby the President could be forced to obey the
statute.”\footnote{161} Congress would have to argue that the President, by failing to deliver the
treaty termination notification, had violated his constitutional duty under the take care
clause, and thereby committed an impeachable “high crime[] and misdemeanor[].”\footnote{162}
President Andrew Johnson was impeached for similarly failing to implement duly-
enacted legislation in 1867, “which it was contended constituted a violation of the
constitutional duty to ‘take care that the laws be faithfully executed.’"\footnote{163} More recently,
Senators have explicitly threatened impeachment in the treaty termination context.\footnote{164}
Nevertheless, it is unlikely that Congress would resort to the nuclear option over a single

\begin{footnotes}
\item[159] Nelson, \textit{supra} note 20, at 891-92.
\item[160] U.S. CONST. art. I, secs. 2, 3.
\item[161] \textit{Id.} at 893.
\item[162] U.S. CONST. art. II, sec. 4.
\item[163] CRS ENFORCEMENT, \textit{supra} note 133, at 551.
\item[164] Sen. Goldwater, \textit{Abrogating Treaties}, N.Y. TIMES, Oct. 11, 1987 (“Any President who would violate the
Constitution on such a major matter as breaking faith with the nation’s treaty obligations would run the risk
of impeachment.”). \textit{See also} Scheffer, \textit{supra} note 47, at 988 (“This presumably might make [the President]
liable to impeachment as Senator Goldwater has threatened....”).
\end{footnotes}
treaty termination dispute; “[a]s an instrument of checking unconstitutional action on the part of the President, impeachment has been found too cumbersome.”^{165} Given that only two Presidents have ever been impeached, only one of whom was impeached on constitutional grounds, Congress’s ability to bring impeachment proceedings, while theoretically available, is likely to prove too extreme a step to serve as a credible threat to deter Presidential noncompliance.

2. **Challenging the Executive in Court**

Alternatively, Congress might try and use the legal system to enjoin the President to comply with the terms of the legislation. However, while it is true that the Supreme Court has never “invalidated an act of Congress because it impinged upon the President’s sole power under the Constitution,”^{166} courts have traditionally been unwilling to mediate foreign affairs disputes between the political branches. When the Goldwater Court was confronted with the opposite side of this same issue, whether a President could unilaterally terminate a treaty, the Court relied upon a variety of prudential doctrines to dismiss the case and leave the issue to the political branches.

Nevertheless, if Congress were to challenge the President in court to compel compliance with its legislation, several of the objections raised by the Goldwater Court would be overcome. First, the legislators here would have standing; “courts have upheld the standing of legislators when the effectiveness of their votes is at stake.”^{167} In this case, the Presidential noncompliance would serve to nullify the votes cast by Congress in

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^{165} I Wiloughby, supra note 6, at 767.
^{166} Glennon, supra note 21, at 13.
^{167} Scheffer, supra note 47, at 969.
favor of the statute. Secondly, the controversy would be ripe for judicial review. By taking formal action, Congress will have “assert[ed] its constitutional authority.” While the courts have been hesitant to involve themselves when the political branches remain uncommitted, both Congress, through the statute, and the President, through his noncompliance, would have formalized their positions creating a quintessential “constitutional impasse,” and necessitating judicial review.

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

There are several factors that might work in the legislators favor in avoiding such a dismissal on political question grounds. Doctrinally, the legislators might argue, as Justice Brennan did in *Goldwater*, that the political question doctrine is aimed at keeping

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168 Moriarty, *supra* note 12, at 146 (arguing that if Congress enacted a statute, it would meet the standing requirements). By enacting the statute, this case could be distinguished from *Goldwater* where Congress never established a formal position. *Goldwater, supra* note 24, at 997. See also *Kucinich v. Bush*, 236 F.Supp.2d 1 (D.D.C. 2002) (distinguishing a challenge to President Bush’s termination of the ABM treaty on both standing and political question grounds).

169 *Goldwater, supra* note 24, at 997 (Powell, J., concurring).

170 *Id.*

171 *Id.* at 1002 (Rehnquist, J., concurring). See also *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889) (finding that the validity of Congress’s purported termination of the treaty with France in 1798 was a political question); *Made in the USA Foundation v. United States*, 242 F. 3d 1300, 1302 (Eleventh Cir. 2001) (holding that the determination of what constitutes a treaty is a political question).

172 *Id.* at 1003 (citations omitted).
the Court from resolving foreign policy disputes; “the doctrine does not pertain when a
court is faced with the antecedent question whether a particular branch has been
constitutionally designated as the repository of political decisionmaking power.”173
However, while the argument is doctrinally strong, pragmatically it failed to persuade any
of the other eight Justices, undermining its apparent utility. However, recently the Court’s
reliance on the political question doctrine has been in decline, potentially indicating they
might be less willing to rely on it in this context.174 Finally, even in Goldwater, a majority
of the Court decided the case on non-political question grounds, opening up the
possibility that a modern Court might be convinced to hear the case on its merits.

Ultimately, there is no ex ante way to predict whether the judicial system would
involve itself in this dispute between the political branches. However, given that a failure
to intervene to compel compliance would effectively uphold the Executive’s authority to
ignore Congress’s directive, this ambiguity is unreliable as a Congressional check on
Presidential noncompliance, so another tool must be found.

3. Ex Ante Control: What Can Congress do Ahead of Time to Expand
   its Influence?

Realizing that it may find it difficult to compel a President to comply with the
terms of its directives after the fact, Congress should take several steps during the treaty
ratification/authorization process in order to insure itself a subsequent role in a possible
termination. First, any executive agreement which is concluded by the President under an
authorizing statute can be controlled by the terms of that statute; “[t]o the extent that the
agreement in question is authorized by statute or treaty, its mode of termination likely

173 Id. at 1007 (Brennan, J., dissenting) (emphasis in original).
174 Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise
of Judicial Supremacy, 102 COLUM. L. REV. 237 (2002). See also Glennon, supra note 21, at 315-25
(same).
could be regulated by appropriate language in the authorizing statute." 175 While Congress, after Chadha, is no longer constitutionally capable of reserving the right to revoke that authorization by concurrent resolution, 176 a provision retaining the right to terminate the agreement by duly-enacted legislation would presumably be constitutional. Second, many of the “executive agreements to which the United States is a party” already contain provisions providing “for termination in the event Congress should fail to make the necessary appropriations or should pass contrary legislation.” 177 For example, the 1951 Agreement for a Cooperative Program of Agriculture with Honduras provided that the agreement shall only become effective “subject to the availability of appropriations of both parties for the purposes of the program….“ 178 Such a provision is typically included at the request of foreign states who don’t want to be bound by an agreement which the U.S. Congress has no intention of implementing through appropriations. As such, Congress might even be able to combine these practices, and insert a provision in every authorizing statute indicating that if appropriations for an agreement concluded under its provisions are not made in a designated period of time, the agreement is terminated.

These procedures don’t however help Congress retain control over most treaties which are concluded without the aid of an authorizing statute. The only means by which Congress, acting through the Senate, can increase its control over the termination is through the advice and consent process. According to the Restatement, if the Senate conditions its consent to the treaty on the condition “that the President shall not terminate

175 CRS TREATY TERMINATION, supra note 54, at 208.
176 See e.g. Nelson, supra note 20, at 893 note 63 (listing several authorizations in which Congress retained control to terminate/revoke by concurrent resolution).
177 Id. at 894.
the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty.”^179 Conditions attached by the Senate in the ratification process are seen as valid if they have a “plausible relation to a treaty, or to its adoption or implementation” and if the President then “proceeds to make the treaty he is bound by the condition.”^180 In the debate over the Versailles Treaty, the Senate followed this practice and attached a condition that would have authorized the Treaty’s denunciation by concurrent resolution.\(^{181}\)

The power of the Senate to attach a termination condition is subject to several conditions. First, the Supreme Court has struck down several attempts by Congress to prescribe constitutionally novel procedures for the enactment of law.\(^{182}\) Most recently, the Supreme Court ruled that Congressional vetoes that did not abide by the requirements of bicameralism and presentment were unconstitutional.\(^{183}\) Therefore, a condition reserving the termination right to the Senate, or to both houses by concurrent resolution, “would presumably by unconstitutional under Chadha.”\(^{184}\) However, a condition that required that the President abide by legislation enacted over his veto would be in

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^179 RESTATEMENT, supra note 6, at §339.
^180 Id. at §303 cmt. D. See also Henkin, supra note 8, at 184 (“But if, as a condition of its consent to a treaty, the Senate should serve special powers to interpret or terminate the treaty, a President might have to accord it that role or refuse to ratify the treaty because he cannot meet its conditions.”); Henkin, supra note 32, at 654 (“…a condition applicable to the treaty before it and having a plausible relation to it might pass.”); Sabis, supra note 11, at 263 (“it is of vital importance that when the Senate ratifies future treaties it requires congressional consent of some form in their termination.”).
^181 59 CONG. REC. 5423, 66th Cong. (1919) (“Notice of withdrawal by the United States [from the League of Nations] may be given by concurrent resolution of Congress of the United States.”). See also Quincy Wright, Validity of the Proposed Reservations to the Peace Treaty, 20 COLUM. L. REV. 121, 127-34 (1920) (finding the proposed condition invalid because treaties cannot be denounced by concurrent resolution, not because the Senate can’t condition termination on a prescribed procedure).
^182 See e.g. Myers, supra note 25 (holding that Congress cannot legislate that the Senate should be involved in the removal of appointments when such a provision is not included in the Constitution).
^183 Chadha, supra note 65.
^184 Moriarty, supra note 12, at 140.
“conformity with the express procedures of the Constitution’s prescription for legislative action: passage by both Houses and presentment to the President.”

Attaching such a condition would reinforce Congress’s claim to an independent role in treaty termination and potentially provide an extra incentive for judicial involvement.

4. Conclusion: Relying upon Political Pressure

Nevertheless, even if the Senate has attached a condition requiring Congressional participation in treaty termination, as the previous section has illustrated, Congress has very little to compel compliance from a recalcitrant President; reliance on the spending power, impeachment proceedings, or the judicial system would have little effect on the pending dispute. However, Congress can still resort to its traditionally most potent tool; political pressure; “[a]s a matter of political reality, the President still is often obligated to respect the wishes of Congress, even if Congress is unable politically or legally to force the President to obey the law and deliver notice….”

In this rare setting in which 2/3 of both houses of Congress agree on a (isolationist) foreign affairs policy, Congress would be able to bring enormous political pressure to bear on the President. Presumably, a Congressional override of a Presidential veto would have required widespread bipartisan and public support, an influential combination as evidenced by President Reagan’s ultimate decision to abide by the provisions of the Anti-Apartheid Act.

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185 Chadha, supra note 65, at 958.
186 Moriarty, supra note 12, at 151. Accord Nelson, supra note 20, at 891 (“Moreover, it must always be remembered that the President’s constitutional power to act is curtailed by political considerations. No President can long determine national policy without the support of Congress and party.”).
187 Henkin, supra note 8, at 214 note * (“politically, of course, the President could not lightly disregard the sense of Congress, especially if both houses joined, asserted constitutional power, and publicly proclaimed a call for radical action.”).
188 This pattern was also followed in 1951, when Congress passed the Universal Service and Training Act, 50 U.S.C. §451 (1951) whose provisions were in conflict with the Treaty of Friendship, Commerce, and Consular Rights, U.S.-Ger., Art. VI, Dec. 8, 1923, 44 Stat. 2132. Over time, the political pressure to reconcile the domestic statute with the U.S.’s international noncompliance grew, eventually resulting in the
V. Conclusion

Recent scholarship has focused on the President’s independently authority to terminate treaties, but as this article has demonstrated, Congress has an independent power to do the same. By acting jointly to enact legislation, presumably over a Presidential veto, there is a strong constitutional argument that Congress can direct the President to deliver the requisite termination notification, a power it must continue to assert in order to protect its constitutional authority from Executive encroachment.

On the one hand, this analysis may seem highly academic; realistically, how often is a President going to oppose the wishes of 2/3rds of both houses of Congress acting in tandem? Given that everyone would agree that Congress and the President acting cooperatively have the power to terminate treaties, it may appear unimportant to identify if Congress can unilaterally do so. On the other hand, this analysis has broader implications on the separation of powers in international affairs. Perhaps most interestingly, what influence would Congress have over the President’s decision to sign or unsign a treaty? While a signature would have no binding domestic effect, under international law the United States would be “obliged to refrain from acts which would defeat the object and purpose” of the treaty. Can the President thereby unilaterally bind the United States to an international commitment, immunized from Congressional oversight? President Clinton asserted such a right in 1999, when he indicated that the United States was still bound by the “object and purpose” requirements, even after the delivery of a notice of termination on June 2, 1953. See also Goldwater v. Carter, 617 F.2d 697, 715 (Wright, J., concurring) (citing several statutes that had the practical effect of nullifying a treaty and which ultimately resulted in Presidential delivery of termination).

Senate’s explicitly rejection the Comprehensive Nuclear Test Ban Treaty [CTBT].\textsuperscript{190} In the CTBT context, this argument meant that President Clinton was asserting an unreviewable right to bind the United States to an international commitment not to test a nuclear weapon.\textsuperscript{191}

While this question requires more detailed analysis in a subsequent article, if Congress can prove that it has the power to direct the President to terminate a treaty, it might also be able to show that it can direct the President to un-sign a treaty. Such a power is unlikely to ever be used, but it does establish a very basic check on the President’s unilateral ability to bind the U.S. to international obligations, thereby insuring that Congress retains some role in the formulation of U.S. foreign policy, as was originally intended.

\textsuperscript{190} Bill Gertz, Albright Says U.S. Bound by Nuke Pact; Sends Letters to Nations Despite Senate Vote, WASH. TIMES A1 (Nov. 2, 1999) (“The administration believes it is still bound to legally abide by the test-ban treaty because it has not given up on ratification in the future.”).

\textsuperscript{191} See RESTATEMENT, supra note 6, at § 312 cmt. i (“Testing a weapon in contravention of a clause prohibiting such a test might violate the purpose of the agreement, since the consequences of the test might be irreversible.”).