

The Trump Administration and the “Unmaking” of International Agreements

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INTRODUCTION

President Donald Trump came into office proclaiming “America First.” This platform has since manifested in part as skepticism of, if not outright hostility to, the rules-based, interconnected international order that the United States had played a central role in painstakingly constructing since World War II. President Trump’s approach to international agreements stands in sharp contrast to that of his predecessor, Barack Obama, who frequently emphasized the benefits of participating in multilateral agreements and institutions, as well as adhering to international standards. President Trump’s Administration has evidenced a predilection for pulling the United States back from international commitments or withdrawing from them entirely, in a stated effort to scrub the U.S. body politic clean of what it appears to view as pesky “foreign” entanglements, without regard to how these commitments long have served U.S. national interests. Witness the announced “end” of U.S. participation in the Paris Agreement, the Trans-Pacific Partnership, and the Iran nuclear deal (the Joint Comprehensive Plan of Action, or “JCPOA”), as well as the uncertain fate of the North American Free Trade Agreement (“NAFTA”).¹

President Trump’s inauguration has heralded a flurry of scholarship examining presidential power to withdraw from international commitments as well as the relationship between the Executive and international law more broadly.² Some of the recent literature on the President’s treaty power has

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1. The Trump Administration has also curtailed or threatened to curtail U.S. participation in various U.N. bodies and initiatives. For example, the United States ended its participation in the Global Compact on Migration and withdrew its UNESCO membership in 2017, and this year it has threatened to quit the United Nations Human Rights Council.

2. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201 (2018); Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413 (2017) [hereinafter Koh, *Trump*]; Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338 (2017) [hereinafter Koh, *Triptych’s End*]; Jean Galbraith, *The President’s Power to Withdraw the United States from International*

considered questions about termination of agreements in relation to the type of agreement at hand.³ Other pieces focus on historical practice, or soft law and practical considerations.⁴ President Trump's Administration, however, has so far proven to be generally immune to past or best practices. And while historical precedents may inform constitutional interpretation, such practice does not equate to constitutional requirements.⁵

This Essay takes a closer look at one small piece of that larger puzzle: the balance of power between the President and Congress under the Constitution with respect to the termination of, or withdrawal from, international agreements.⁶ As others have observed, the Constitution is silent on the question of how international agreements may be terminated.⁷ Nevertheless, the balance it strikes between executive and congressional power in the realm of foreign relations, and the Supreme Court's interpretation of that balance, can inform the question of termination. It is indisputable that the President has a "vast share of responsibility for the conduct of our foreign relations."⁸ But Congress also can play an important role in international arrangements, and in certain circumstances arguably can limit the Executive's ability to shape U.S. international commitments. Properly viewed, the President's power to withdraw from or terminate international agreements is, at its core, a separation-of-powers issue. Recent scholarship has observed that the Executive has unilateral power to terminate treaties, drawn largely from assessments of historical practice.⁹ But it is too simplistic to say either that the President always or never can unilaterally withdraw from international agreements more generally. Rather, the President's power to terminate or withdraw

Agreements at Present and in the Future, 111 AJIL UNBOUND 445 (2018), <https://doi.org/10.1017/aju.2017.99>; Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, DUKE L.J. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049279 [hereinafter Bradley, *Exiting CEAs*]; Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus a Historical Gloss Half Empty* (draft 2017), <https://ssrn.com/abstract=3015981>.

3. See, e.g., Daniel Bodansky & Peter Spiro, *Executive Agreement Plus*, 49 VAND. J. TRANSNAT'L L. 885 (2016); David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. TRANSNAT'L L. 741 (2017); Bradley, *Exiting CEAs*, *supra* note 2.

4. See, e.g., Bradley, *Exiting CEAs*, *supra* note 2; Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014) [hereinafter Bradley, *Treaty Termination*]; Koh, *Triptych's End*, *supra* note 2; Koh, *Trump*, *supra* note 2. Bradley's work in this area is foundational and impressively catalogs the various instances of treaty or congressional-executive agreement termination in American history, dating back to the earliest days of the Republic.

5. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

6. This Essay will generally treat termination and withdrawal interchangeably, as the authority for both would be the same under U.S. constitutional law.

7. See, e.g., Bradley, *Exiting CEAs*, *supra* note 2, at 2.

8. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003).

9. Bradley, *Treaty Termination*, *supra* note 4, at 821 ("Whereas it was generally understood throughout the nineteenth century that the termination of treaties required congressional involvement, the consensus on this issue disappeared in the early parts of the twentieth century, and today it is widely (although not uniformly) accepted that presidents have a unilateral power of treaty termination. This shift in constitutional understandings did not occur overnight or in response to one particular episode but rather was the product of a long accretion of Executive Branch claims and practice in the face of congressional inaction.").

from international agreements may be viewed as context-specific.¹⁰ Determining the constitutionality of any given withdrawal requires an assessment of several factors, including the terms of the agreement (especially any express withdrawal clauses), the form of the agreement under domestic law, the subject matter of the agreement, the broader historical context around that subject matter, and, if applicable, the circumstances of the termination.

Although the Supreme Court has yet to clearly delineate the line between presidential and congressional power on this issue of termination, Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹¹ provides a helpful framework that can be applied here. In *Youngstown*, Justice Jackson outlined three categories for understanding the scope of presidential power,¹² which exist along a "spectrum running from explicit congressional authorization to explicit congressional prohibition."¹³ Justice Jackson's tripartite framework suggests that the President's power to withdraw unilaterally from international agreements is at its height where the withdrawal relates primarily to the exercise of the Executive's exclusive Article II powers, such as the power to recognize foreign nations.¹⁴ Conversely, the power of unilateral withdrawal is at its nadir where the treaty relates to matters within the constitutional authority of Congress, such as the power to regulate foreign commerce, and the withdrawal is not supported by the express or implied will of Congress.

10. While this case-by-case separation-of-powers approach to the President's treaty termination power has not gone unrecognized, it seems to have fallen out of favor in recent years. In 1979, Laurence Tribe opined that "the very fact that the Constitution does not prescribe a mode of treaty termination suggests that the framers did not think any one mode appropriate in all cases, and therefore left the matter to be resolved in light of the particular circumstances of each situation. The subject of a particular treaty, for example, could be a relevant factor." Trachtman, *supra* note 2, at 3 n.5 (quoting Tribe); *see also id.* at 3–4 (discussing this theory in the context of presidential authority to terminate trade agreements); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1246–47, 1339 n.299 (2008) (noting Tribe's stance as something of an outlier when it comes to interpretations of the treaty power). David Scheffer argued in a 1978 piece in this Journal that "neither the executive nor legislative branch has exclusive power to terminate treaties. Instead, they share this power or acquiesce in its unilateral exercise, depending upon the nature of the treaty and the circumstances warranting its termination." 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, 937 (1978). Other attempts to find a constitutional locus for a unilateral presidential termination power, such as in the Vesting Clause or by analogy to the Appointments Clause or the Take Care Clause, have been challenged for the reasons already laid out by scholars such as Bradley and Scheffer. *See* Bradley, *Treaty Termination*, *supra* note 4, at 780–81; Scheffer, *infra*, at 989–90.

11. 343 U.S. 579 (1952).

12. The *Youngstown* categories are: (1) "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate;" (2) "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain;" and (3) "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 635–38 (Jackson, J., concurring in the judgment).

13. *Dames & Moore*, 453 U.S. at 669.

14. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Goldwater v. Carter*, 444 U.S. 996 (1979).

This Essay will primarily examine withdrawal from Article II “advice-and-consent” treaties and congressional-executive agreements (“CEAs”),¹⁵ two of the forms that legally binding international commitments may take under U.S. law.¹⁶ Those agreements result from joint exercises of congressional and executive authority, requiring some action from both branches. When and how can they be “unmade”? If congressional support or action is required, how must it manifest? For example, must Congress provide explicit acquiescence to the executive action at issue? In the face of congressional opposition, how do we define executive power to withdraw?

In Part I, this Essay will explore these questions by first setting out the international and national legal schemes governing the making and unmaking of binding international agreements. Parts I.C to I.E then apply the *Youngstown* framework to various past or hypothetical future cases of treaty termination, explaining their constitutional validity with reference to their place on the *Youngstown* spectrum. As Part I.E demonstrates, the point at which the President’s ability to act unilaterally may come up short lies within *Youngstown* III, if the action is contrary to the “express or implied will” of Congress. The manner in which Congress manifests that contrary will, however, must also be considered; indeed, congressional opposition likely needs to be reflected in duly enacted laws or other constitutionally sufficient congressional action in order to bring executive withdrawal within the ambit of *Youngstown* III.

15. Defining what constitutes a congressional-executive agreement (“CEA”) is not always straightforward; for these purposes, we define a CEA as an international agreement concluded by the Executive “with majority congressional authorization or approval.” Bradley, *Exiting CEAs*, *supra* note 2, at 2; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303(2) (AM. LAW INST. [1987]) (“[T]he President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution[.]”). Bodansky and Spiro have delineated “three flavors” of CEAs: (1) *ex ante* CEAs, which “enjoy congressional authorization in advance of their negotiation by the president”; (2) *ex ante* CEAs authorized by a prior Article II treaty; and (3) *ex post* CEAs, which “receive congressional approval after the president has negotiated them—the sequencing resembles the Article II process except that they are approved by bicameral majority rather than by Senate supermajority.” Bodansky & Spiro, *supra* note 3, at 894.

16. Withdrawal from sole Executive Agreements (“EAs”), the third form of legally binding international agreement under U.S. law, is more straightforward: the subject of a sole EA must necessarily be within the four corners of the President’s Article II authority, so unilateral withdrawal from such agreements is within that authority as well. There is little disagreement on this point. For example, Harold Koh recently applied a similar *Youngstown*-based model to assess the President’s constitutional authority to enter into international commitments. His discussion of exiting agreements focused on the JCPOA and the Paris Agreement, non-binding sole Executive political commitments for which exit does not raise the constitutional questions this Essay seeks to explore. As Koh notes, “[t]o the extent that these two deals constitute nonbinding political agreements made by the Executive alone, of course, both could be terminated by a new President as a matter of domestic law.” Koh, *Triptych’s End*, *supra* note 2, at 355.

I. “UNMAKING” THE UNITED STATES’ INTERNATIONAL OBLIGATIONS

A. *International Agreements Under International Law*

In addition to the U.S. domestic legal framework that governs termination, it is important to note at the outset that there are international norms that must also be respected in order for the termination of an agreement to be valid on the international plane. Although it is not a party to it, the United States considers that the Vienna Convention on the Law of Treaties (“VCLT”) “provides an authoritative guide to international treaty law and practice on the validity and termination of treaties.”¹⁷ Since they are intended to be legally binding agreements, both Article II treaties and CEAs are “treaties” for the purposes of international law.¹⁸ Thus, as a matter of international law, the United States can only withdraw from Article II treaties and CEAs in accordance with the provisions of the VCLT, which specifies that termination or withdrawal may only occur “[i]n conformity with the provisions of the treaty,” or “[a]t any time by consent of all the parties after consultation with the other contracting States.”¹⁹

For example, while the emissions-reduction pledges in the Paris Agreement are non-binding political commitments, its procedural provisions do create legally binding obligations under international law.²⁰ Therefore, President Trump could not “undo” the Paris Agreement with the stroke of a pen; in order for U.S. withdrawal to be effective as a matter of international law, the withdrawal provisions in the Agreement must be followed. Under Article 28 of the Paris Agreement, a country may give notice of its intention to withdraw after three years have elapsed from the Agreement’s entry into force on November 4, 2016. Withdrawal will then take place one year after the receipt of the notification. In August 2017, the United States submitted a formal notice of withdrawal.²¹ But U.S. withdrawal from the Paris Agreement could only take effect from November 4, 2020—notably, the day after the next U.S. presidential election. Under Article 68 of the VCLT, such withdrawal could be revoked at any time before it takes effect. Accordingly, if the United States ceases implementation of at least the binding elements of the Agreement before then, there is significant risk the United States would be in breach of international law, as the United States remains bound

17. OFFICE OF LEGAL ADVISER, U.S. DEP’T OF STATE, 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, at 154.

18. See Frederic L. Kirgis, *International Agreements and U.S. Law*, 2 ASIL INSIGHTS (1997), <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>.

19. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 344–45 [hereinafter VCLT]. In addition, certain events can provide a basis for termination or withdrawal under international law, including a material breach by one of the other parties (*id.* art. 60); impossibility of performance (*id.* art. 61); or a fundamental change in circumstances if certain conditions are satisfied (*id.* art. 62).

20. See Tess Bridgeman, *Paris Is A Binding Agreement: Here’s Why that Matters*, JUST SECURITY (June 4, 2017), <https://www.justsecurity.org/41705/paris-binding-agreement-matters>.

21. *Id.*

by its Paris Agreement commitments until withdrawal takes effect. While not within the scope of this Essay, it suffices to say that a breach of international law by the United States would have significant foreign policy ramifications, including for the ability of the United States to hold other countries accountable for their conduct as well as for breaches across a broad array of international agreements, reaching far beyond climate change to national security, international criminal cooperation, and trade, to name a very few.

Of course, international law does not address the question of who within the State may act to terminate a treaty and how withdrawal might affect domestic law, which is left to domestic schemes.²²

B. *International Agreements in the U.S. Legal Scheme*

The Constitution speaks directly to only one of the three main types of international agreements: Article II treaties, which the Executive may make with the advice and consent of two-thirds of the Senate.²³ The vast majority of international agreements to which the United States is a party, however, are not Article II treaties; they are CEAs, made by the Executive with either *ex ante* authorization or *ex post* approval from both houses of Congress.²⁴ Trade agreements, including NAFTA, are generally CEAs. The Executive also may enter into “sole EAs”: agreements with no congressional authorization or approval, which rest on the President’s independent constitutional authority in the realm of foreign affairs. Recent scholarship has also highlighted the existence of agreements that are neither the subject of explicit congressional action nor solely executive but somewhere in between—agreements that complement and are supported by legislation, if not specifically authorized by it.²⁵

The source of constitutional authority for CEAs is somewhat unclear, lost in the fog of history. Some point to Article I, Section 10, which provides both that “[n]o State shall enter into any Treaty,” and that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power[.]”²⁶ This language arguably implies the existence

22. The little that the VCLT does say about the interplay of domestic and international law in the making of treaties cuts in favor of upholding the stability of international regimes: States may not invalidate a treaty on the grounds that it was entered into unlawfully under domestic law, unless the violation of domestic law was “manifest” and “concerned a rule of its internal law of fundamental importance.” VCLT, *supra* note 19, art. 46, 1155 U.N.T.S. at 343.

23. See U.S. CONST. art. II, §2, cl. 2.

24. Bodansky & Spiro, *supra* note 3, at 893–94.

25. Some have noted that the three main categories are overly simplistic and do not accurately reflect the intricacies of U.S. international agreements in the 21st century. See *id.*; see also Koh, *Triptych’s End*, *supra* note 2, at 338–44; Bradley & Goldsmith, *supra* note 2, at 1207–09. Indeed, the dividing line between sole EAs and *ex ante* CEAs, in particular, can be difficult to divine, which necessarily has important ramifications for termination. A full exploration of this issue is outside the scope of this Essay, but the point highlights the importance of a case-by-case, context specific approach to assessing executive and congressional powers with respect to international agreements.

26. U.S. CONST. art. I, §10, cls. 1, 3; see Hathaway, *supra* note 10, at 1286–87.

of international agreements other than treaties, an understanding that was reinforced by practice: The use of international agreements other than Article II treaties dates back to the earliest days of the Republic. At first, such agreements were made with prior congressional authorization, but the use of *ex post* CEAs gained steam in the Twentieth Century.²⁷

The web of international agreements to which the United States is a party is complex, cutting across all aspects of society and governance: defense, trade, human rights, the environment, and much more. While some have made the argument for a relationship between an agreement’s subject matter and form,²⁸ research has demonstrated that there is not much correlation; some subject areas do adhere almost exclusively to one form (for example, most extradition agreements are Article II treaties), while many others do not.²⁹ Determining how international agreements may be made and unmade therefore entails more than contemplation of the constitutional authority for an agreement’s form; consideration must also be given to the authority for the agreement’s subject matter and the broader historical context surrounding its entry or exit.

The Constitution lays out a number of substantive powers that relate to foreign affairs. The President is the Commander-in-Chief of the military and can nominate ambassadors and consuls with the advice and consent of the Senate.³⁰ The President can also receive “Ambassadors and other public Ministers.”³¹ The Executive’s now broad authorities in the field of foreign relations flow from these enumerated powers, as well as from the Vesting Clause and the Take Care Clause more generally.³²

Nevertheless, Congress has the power to “provide for the common Defence,” “regulate Commerce with foreign Nations,” “declare War,” and various other enumerated powers that may touch on foreign affairs, as well as the authority to make all laws “necessary and proper” to these ends.³³ The Supreme Court recently underscored Congress’s role in foreign affairs:

[W]hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law. In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and

27. Hathaway, *supra* note 10, at 1298–1301.

28. John Yoo, for example, has argued that CEAs must be used to conclude agreements on matters within Congress’s Article I powers, while Article II treaties are required for agreements outside that scope or for agreements on matters in an area of overlapping powers between Congress and the President. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 821 (2001).

29. Hathaway, *supra* note 10, at 1257–70.

30. U.S. CONST. art. II, §2.

31. U.S. CONST. art. II, §3.

32. U.S. Dep’t of State, Opinion Letter on Constitutionality of Sec. 7054 of F.Y. 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1, 4–5 (June 1, 2009), <https://www.justice.gov/file/18496/download>.

33. U.S. CONST. art. I, §8, cls. 1, 3, 11, 18.

respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. . . . It is not for the President alone to determine the whole content of the Nation's foreign policy.³⁴

While the interplay between congressional and executive authority in concluding Article II treaties and CEAs is well-established, the boundaries of the President's unilateral withdrawal authority remain unsettled. The Constitution itself provides no clear answer: “[W]hile the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body’s participation in the abrogation of a treaty.”³⁵ The Supreme Court has declined to rule on the question.³⁶ The Senate Foreign Relations Committee (“SFRC”) has resisted conceding that the Executive may, as a general rule, unilaterally terminate an Article II treaty.³⁷ The Restatement (Third) of Foreign Relations Law, on the other hand, asserts the existence of an expansive executive authority “to suspend or terminate an [international] agreement in accordance with its terms,” predicated on the “very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations.”³⁸ The academic literature runs the gamut from broad recognition of executive authority to unilaterally terminate both treaties and CEAs, to refusal to recognize any unilateral withdrawal authority in certain contexts.³⁹

34. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

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

36. *Id.*; see discussion in Section I.D, *infra*.

37. See CONG. RESEARCH SERV., S-PRT 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 198–99 (2001) (“The constitutional requirements that attend the termination of treaties remain a matter of some controversy. The Senate Foreign Relations Committee has from time to time contended that the termination of treaties requires conjoint action by the President and the Senate (or Congress) . . . [T]he assertion of an exclusive Presidential power in the context of a treaty is controversial and flies in the face of a substantial number of precedents in which the Senate or Congress have been participants[.]”).

38. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §339 cmt. a (AM. LAW INST. 1987) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). To the extent that the broadest characterizations of the Executive’s withdrawal power rely on *Curtiss-Wright*, the Supreme Court recently cabined the expansive description of the President’s foreign affairs powers in *Curtiss-Wright*, dismissing it as dicta and emphasizing the existence of a constitutionally allocated role for Congress in the realm of foreign affairs as well. See *Zivotofsky*, 135 S. Ct. at 2090 (“This description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress’ lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments. . . . But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.”).

39. See generally Bodansky & Spiro, *supra* note 3; Trachtman, *supra* note 2.

The best answer may be that there is no one right answer—the President’s power to withdraw from international agreements exists on a continuum, like any other presidential power pursuant to the *Youngstown* framework. As Justice Jackson explained, “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”⁴⁰

An analysis of constitutional authority to unmake Article II treaties and CEAs through the lens of the *Youngstown* framework necessitates the examination of several questions: Does the subject matter of the agreement indicate that the constitutional authority for its conclusion is grounded in Article I or Article II?⁴¹ What, if anything, has Congress had to say about termination of the treaty—was there implicit or explicit congressional authorization of presidential termination? Or is the President operating in the “zone of twilight,”⁴² in absence of implicit or explicit congressional opposition? This Essay will provide a preliminary exploration of these questions, taking each *Youngstown* category in turn.

C. *Youngstown I: Presidential Action Pursuant to the Express or Implied Will of Congress*

For over a century after the United States’ founding, treaty terminations were effectuated primarily in the *Youngstown* I realm of maximum constitutional authority: either by congressional direction or with congressional support.⁴³ Congress variously authorized, ordered, or approved presidential action to terminate treaties.⁴⁴ In these circumstances, presidential authority to withdraw was at its zenith; withdrawal was not unilateral but supported by the express will of Congress.

Indeed, the very first time that the United States terminated a treaty, the termination was initiated by Congress rather than the President, an illustration of joint executive-legislative action. In 1798, with the looming prospect of war against France, Congress passed legislation terminating the four treaties then in force between the United States and France.⁴⁵ Just as it took ratification by the President, with the advice and consent of the Senate, to enter into the treaties, it took congressional action, necessarily supported by the President in order to sign the bill into law, to exit them. The Founders

40. *Youngstown*, 343 U.S. at 635.

41. Hathaway makes the case that the constitutional authority for CEAs is grounded in Article I, which suggests the need for some form of congressional participation or acquiescence in termination or withdrawal from any CEA. See Hathaway, *supra* note 10, at 1328. Bradley, however, argues that the President may unilaterally terminate CEAs, based primarily on his arguments with regard to treaty termination. See Bradley, *Exiting CEAs*, *supra* note 2, at 11–22.

42. *Youngstown*, 343 U.S. at 637.

43. Bradley, *Treaty Termination*, *supra* note 4, at 788; see also Bradley & Goldsmith, *supra* note 2, at 1224.

44. See Bradley, *Treaty Termination*, *supra* note 4, at 788.

45. Act of July 7, 1798, ch. 67, 1 Stat. 578 cited in Bradley, *Exiting CEAs*, *supra* note 2, at 4.

understood the treaty power as a joint power—even Alexander Hamilton, that champion of executive authority, had previously emphasized the joint nature of the treaty-making power, explaining that the treaty power belongs “neither to the legislative nor to the executive” and that whereas the Executive Branch “is the most fit agent” for negotiation, “the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.”⁴⁶ Thomas Jefferson subsequently indicated his belief that treaties could be terminated *only* by an act of Congress: “[t]reaties being declared, equally with the laws of the U[nited] States, to be the supreme law of the land, it is understood that an act of legislature alone can declare them infringed and rescinded.”⁴⁷

Congress’s decision to terminate the treaties must also be viewed in relation to the broader historical context: the prospect of war with France. Treaty termination was one action among others taken pursuant to war powers that Congress both exercises independently and shares with the President, the Commander-in-Chief of the armed forces.⁴⁸ At least historically, the underlying logic was perceived to be straightforward: where there are shared powers, joint exit is required. On that basis, the termination stands on solid constitutional grounds.

Congressional action to terminate treaties directly, however, was the exception rather than the rule even in the early days of the Republic. More common was *ex ante* congressional authorization permitting or directing the President to terminate an international agreement. Occasionally, the President with *ex post* congressional approval terminated an agreement.⁴⁹ Either way, there was a fairly consistent belief shared by Congress, commentators, and the Executive Branch that some form of congressional action was a necessary component of treaty termination.⁵⁰

Most scholars agree that “unilateral” presidential termination became more common over the course of the Twentieth Century, pointing to various instances of presidents terminating Article II treaties and *ex ante* CEAs.⁵¹ With respect to Article II treaties, the historical practice in the Twentieth Century is considered strong support for the proposition that “it is widely (although not uniformly) accepted that presidents have a unilateral power of treaty termination.”⁵² This Essay does not seek to push at that sacred cow

46. THE FEDERALIST NO. 70 (Alexander Hamilton).

47. Bradley, *Treaty Termination*, *supra* note 4, at 789.

48. *Id.* at 789–90.

49. See Bradley, *Exiting CEAs*, *supra* note 2, at 10.

50. See Bradley, *Treaty Termination*, *supra* note 4, at 789–99.

51. *Ex ante* CEAs refer to those for which Congress provided prior authorization. The authorizing legislation, however, is generally silent with regard to how or whether the agreement may be terminated. Termination of *ex post* CEAs was less common, perhaps in part because *ex post* CEAs themselves are less common. See Bradley & Goldsmith, *supra* note 2, at 1224–25.

52. Bradley, *Treaty Termination*, *supra* note 4, at 773.

generally, but makes the more limited point that context matters. Terminations that have been characterized as “unilateral” may not be truly unilateral when viewed through the *Youngstown* framework and in light of the historical circumstances. For one example, the draft Restatement (Fourth) of Foreign Relations Law references a 2002 State Department list of treaties terminated by “unilateral” executive action since 1980, in support of its assertion of a broad presidential power to suspend or terminate U.S. treaty commitments.⁵³ A closer look at the 2002 list, however, reveals that the vast majority of treaties on the list are bilateral naturalization treaties, also known as the Bancroft Conventions, which were rendered unenforceable in part due to two Supreme Court decisions that indicated that some of their provisions were unconstitutional and were terminated with the support of the Senate.⁵⁴ “Concluding that the treaties had become unenforceable,” the Carter Administration, “acting in consultation with the Senate Committee on Foreign Relations, gave notice terminating the treaties to the remaining 21 countries with whom the Bancroft Conventions were still in force.”⁵⁵ Viewed in this light, the termination of the Bancroft Conventions is hardly an overwhelming example of termination according to unilateral executive prerogative; rather, it was forced by the Supreme Court and supported by a Senate body, the SFRC. The President was certainly not acting in a manner “incompatible with the express or implied will of Congress” or even in the absence of any congressional engagement, placing the termination more in the realm of *Youngstown I* than in the other two categories.

D. *Youngstown II: The “Zone of Twilight”*

Any truly unilateral termination in the absence of action by Congress necessarily resides in the *Youngstown II* “zone of twilight”: the President takes independent action to terminate an international agreement, “in absence of either a congressional grant or denial of authority.”⁵⁶ The Supreme Court has yet to resolve the question of whether and when such unilateral termination authority exists. The Court punted on this question in *Goldwater v. Carter*,⁵⁷ after President Carter unilaterally terminated a mutual de-

53. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, Reporters’ Note 3; Bradley, *Treaty Termination*, *supra* note 4, at 814–15.

54. See OFFICE OF LEGAL ADVISOR, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 202–05. From 1868 to 1937, the United States entered into 25 Bancroft treaties (named for their chief negotiator George Bancroft) covering 34 countries. The treaties were intended to address continuing issues with action taken by foreign governments against naturalized U.S. citizens, to ensure recognition of naturalization as a means of loss of nationality. “The treaties provided for loss of citizenship by a citizen of one state upon naturalization in the other state and for loss of the second nationality upon resuming permanent residence in the original country.” U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL 1270, App. A (2009); see also Michael F. Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Democracy*, 52 UNIV. CIN. L. REV., 84, 93 n.44 (1983).

55. U.S. Dep’t of State, *supra* note 54, at 1270, Appendix A.

56. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

57. 444 U.S. 996 (1979).

fense treaty with Taiwan in conjunction with U.S. recognition of the People's Republic of China ("PRC") as the sole government of China. The move caused controversy in the Senate, but neither the Senate nor Congress as a whole took any official action in response. Instead, a group of Representatives led by Senator Goldwater filed suit in federal court to block the termination, but the Supreme Court ultimately declined to resolve the issue, with a plurality determining that it was a non-justiciable political question.⁵⁸ The best answer for the constitutional question that the Supreme Court refused to address, however, may be found in Justice Brennan's dissent: the President's withdrawal from the treaty was a "necessary incident" to the Executive's recognition of the PRC as the sole government of China, a power that is admittedly and exclusively within the Executive's Article II constitutional authority.

President Carter's January 1, 1979, announcement that the United States would notify Taiwan that it would terminate the treaty sparked a vociferous Senate debate. Various Senators introduced resolutions concerning the appropriate balance of power between the President and Congress with respect to treaty termination.⁵⁹ After considering the issue, the SFRC appeared willing to concede some constitutional space for a unilateral presidential termination authority. The SFRC proposed a resolution providing for unilateral termination without the concurrence of Congress under certain circumstances, such as where the treaty was superseded by statute, or where material breach or other factors recognized by international law allowed for termination by the United States.⁶⁰ Such termination could not "endanger the security of the United States" or conflict with provisions of the treaty or those of a related joint resolution.⁶¹

The SFRC proposal appears to try at some kind of balancing of Congress's Article I and the President's Article II powers. The President may act "without the concurrence of Congress" where the treaty has been superseded by statute or treaty; in effect, however, such action would not be truly unilateral, as the President would be acting to harmonize U.S. international

58. *Id.* In his lengthy dissent to the D.C. Circuit's vacated decision in *Goldwater*, Judge MacKinnon warned of the ramifications of the Supreme Court's reliance on the political question doctrine: "[i]f the President's unilateral action were to go unchecked, then the precedent which this case would establish could lead to the inevitable consequence of an ambitious or unreasoned President disengaging the United States from crucial bilateral and multilateral treaties with the stroke of a pen and without the constitutional balance of legislative advice and consent' . . . In future years, a voracious President and Department of State may easily use this grant of absolute power to the President to develop other excuses to feed upon congressional prerogatives that a Congress lacking in vigilance allows to lapse into desuetude." *Goldwater v. Carter*, 617 F.2d 697, 739 (D.C. Cir.) (1979) (MacKinnon, J., dissenting), *vacated*, 444 U.S. 996 (1979).

59. Edward McGlynn Gaffney Jr., *Goldwater v. Carter: The Constitutional Allocation of Power in Treaty Termination*, 6 YALE J. INT'L L. 81, 82 (1980). For example, Senator Harry F. Byrd proposed a "sense of the Senate" resolution stating that "approval by the Senate of the United States is required to terminate any mutual defense treaty between the United States and another nation." *Id.* at 82-83.

60. S. Rep. No. 96-119, 96th Cong., 1st Sess. (1979).

61. *Id.*; Gaffney, *supra* note 59, at 85.

obligations with the already-expressed will of Congress via statute or ratification of the subsequent treaty. Or the President may act truly unilaterally in the case of a material breach or other circumstances that, under international law, would call for termination—in other words, in accordance with his Article II powers to act as the competent U.S. organ on the international plane and the primary interpreter of the United States’ international obligations. But even that unilateral power would be conditioned on a requirement not to act contrary to the will of Congress and not to act in a manner that would engage the realm of warfare or national defense—critical responsibilities constitutionally shared between the President and Congress.

The SFRC resolution, however, did not pass. So in proceeding to withdraw from the treaty knowing some in Congress opposed the move, but without general congressional action manifesting opposition, did President Carter violate the Constitution? Since the agreement at issue in *Goldwater* was an Article II treaty dealing with the important and shared responsibility of national defense, there is an argument that the Senate could have concurrent termination authority. Nonetheless, the President, in withdrawing from the treaty without express or implied Senate authorization, may have been acting lawfully within *Youngstown’s* “zone of twilight.” As Justice Jackson noted, “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility . . . any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”⁶² The President had some independent authority to act and Congress did not assert whatever authority it may have had. Therefore, President Carter’s withdrawal from the mutual defense treaty was constitutionally permissible, though it would have been defeasible if exercised in a subject area of concurrent congressional authority that Congress had chosen to assert.

This does, however, raise the additional question of what, if anything, is to be made of the Supreme Court’s apparent belief, expressed in *Medellin v. Dretke*,⁶³ or even earlier cases like *Foster v. Neilson*,⁶⁴ that it is somehow possible to divine from the terms of the treaty itself whether congressional action is needed. Logically, that would apply equally to a decision to terminate a treaty in accordance with its terms, just as much as it applies to a decision to implement the obligations imposed by the treaty. But in many cases, it is difficult to see how the terms of an international treaty can answer a quintessentially domestic legal issue. For example, the D.C. Circuit, in its vacated opinion upholding the termination, seemed to place President Carter’s action within *Youngstown I* on the basis of the treaty language: “[T]he President’s authority as Chief Executive is at its zenith when the

62. *Youngstown*, 343 U.S. at 637.

63. 544 U.S. 660 (2005).

64. 27 U.S. 253 (1829).

Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of notice of termination."⁶⁵ That reasoning, however, appears to beg the question it purports to answer: neither the treaty nor international law generally, as discussed above, sheds light on what is a question of constitutional authority under U.S. domestic law. If the President does not have the authority to unilaterally terminate the treaty under domestic law, it is hard to see how the Senate's consent to a termination clause in a treaty can be equated with the Senate ceding any domestic authority it may have to determine whether and when that termination clause may be acted upon.

*E. Youngstown III: Presidential Action in Conflict with
Congress's Express or Implied Will*

The burning question at the heart of this exploration of constitutional authority has yet to squarely present itself: What if a President seeks to terminate an international agreement based on his or her own unilateral determination that such action is in the best interests of the United States, and Congress exercises its will to oppose the termination through constitutionally-mandated processes?⁶⁶

Although there is no direct precedent to guide us towards a clear answer, courts have in the past refused to give domestic legal effect to sole EAs that conflict with congressional statutes. By the same logic, there may be refusal to give effect to presidential decisions to terminate agreements if the termination would conflict with a statute or other formal expression of congressional will. In *United States v. Guy W. Capps*,⁶⁷ the Fourth Circuit declared a sole EA with Canada regarding potato exports to be void and unenforceable "because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related."⁶⁸ The agreement in that case dealt with a matter squarely within Congress's Article I authority: the regulation of foreign commerce. If the Executive may not make agreements on subjects within Article I's domain that conflict with the will of Congress, as expressed through a constitutionally-mandated process such as a statute, it is difficult to see why the Executive should be constitutionally able to unmake agreements in the same circumstances.⁶⁹

65. *Goldwater v. Carter*, 617 F.2d 697, 708 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

66. Congressional action likely must take the form of "duly enacted laws (or other constitutionally sufficient congressional action)," rather than select members of Congress bringing suit, in order to meet the "express or implied will" standard of *Youngstown III*. See Defendants' Memorandum in Support of Their Motion to Dismiss, or, in the Alternative, for Summary Judgment at 40-41, *TransCanada Keystone XL Pipeline v. Kerry*, (No. 4:16-cv-00036).

67. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

68. *Id.* at 658.

69. It is well-understood that Congress may override a pre-existing treaty by passing a later-in-time statute, although such action is disfavored because it would place the United States in breach of its international obligations. *Kirgis*, *supra* note 18; see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of

Further, for Article II treaties and CEAs, Congress may claim a role for itself in the termination of the agreement when it initially approves or authorizes the agreement. Even the Restatement (Third) of Foreign Relations Law, with its expansive interpretation of the Executive's withdrawal authority, concedes:

[i]f the United States Senate, in giving consent to a treaty, declares that it does so on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate, or that he shall do so only in accordance with some other procedure, that condition presumably would be binding on the President if he proceeded to make the treaty. . . . Congress could impose such a condition in authorizing the President to conclude an Executive agreement that depended on Congressional authority.⁷⁰

Presumably, if the President took unilateral action to withdraw in the face of such a requirement of congressional consent, the President would be operating in the realm of *Youngstown* III and thereby would need a strong, independent constitutional basis to effectuate termination. To date, this circumstance has not been tested.

The same could arguably be said for *ex post* congressional disapproval of termination or withdrawal. For example, if the Senate had passed the "sense of Congress" resolutions sponsored by Senator Byrd or the SFRC after President Carter announced his intention to withdraw the United States from the Taiwan mutual defense treaty, that could set up the "constitutional impasse" that at least some members of the *Goldwater* Court deemed necessary before the Court could intervene, and President Carter's withdrawal would likely move from the realm of *Youngstown* II to *Youngstown* III.⁷¹

An additional hurdle the President may face if termination is opposed by Congress is the fate of any legislation implementing a non-self-executing CEA or Article II treaty. As Hathaway has observed, "Even though the President may be able to 'unmake' the international commitment created by a Congressional-Executive agreement as a matter of international law, the President cannot unmake the legislation on which the agreement rests."⁷² The same would apply to any legislation implementing Article II treaty commitments. Congress has at times addressed this problem in advance by writing a sunset clause into the implementing legislation. For example, the United States is a party to fourteen free-trade agreements, covering twenty countries. For most of them, the implementing legislation provides that

nations if any other possible construction remains."). In the *Guy W. Capps* case, the court refused to enforce the international agreement based on an earlier-in-time statute. 204 F.2d at 658.

70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 cmt. a (AM. LAW. INST. 1987).

71. *Goldwater*, 444 U.S. at 997-1000 (Powell, J., concurring in the judgment).

72. Hathaway, *supra* note 10, at 1134.

"[o]n the date on which the Agreement ceases to be in force," the legislation "shall cease to be effective."⁷³

But what if Congress has not given advance approval to terminating the implementing legislation upon termination of the agreement (and, if Congress opposes termination, is now unlikely to play ball by repealing the legislation)? NAFTA, whose existence President Trump has threatened since the campaign trail, may prove a particularly potent test case for a *Youngstown* III scenario. The case-by-case, contextual termination analysis advocated by this Essay militates against a unilateral presidential termination authority for NAFTA: the agreement is a CEA that implicates Congress's authority to regulate foreign commerce. President Trump's desire to withdraw from NAFTA does not appear to involve any matters touching upon the President's independent foreign affairs powers, in the manner that President Carter's termination of the Taiwan mutual defense treaty related to the exercise of the recognition power.⁷⁴ Further, the NAFTA Implementation Act does not contain an automatic termination clause. Thus, even if the President had the unilateral power to withdraw from NAFTA, he does not have the power to repeal the NAFTA Implementation Act.⁷⁵ If Congress does not act, the agreement remains the "commercial law of the land," and withdrawal may do nothing to change U.S. domestic obligations.⁷⁶ Of course, this is not always true, as there may be instances where the implementation act, even if it seeks to replicate entirely the terms of the treaty, should not be construed as outlasting the treaty. Nevertheless, this example illustrates the "stickiness" of international agreements in the realm of *Youngstown* III; even if the President can assert some independent executive authority on which to premise unilateral withdrawal, such action will not get far in undoing the domestic effects of agreements that have been implemented into law without congressional acquiescence.

CONCLUSION

The current debate over President Trump's actual or putative withdrawal from U.S. international commitments thus should not overlook the extent to

73. Bradley, *Exiting CEAs*, *supra* note 2, at 17.

74. See, e.g., Philip Rucker, *No More DACA Deal!*, WASH. POST., April 1, 2018 (noting that President Trump, likely after watching a *Fox & Friends* report about a "caravan of illegal immigrants" headed to the United States, tweeted that Mexico "laugh[s] at our dumb immigration laws" and must "stop the big drug and people flows" or he would "stop their cash cow, NAFTA.").

75. *Cf. Clinton v. New York*, 524 U.S. 417, 436–441 (holding Congress cannot statutorily authorize the President to repeal legislation).

76. See Trachtman, *supra* note 2, at 2–11; see also Joel Trachtman, *Trump can't withdraw from NAFTA without a "yes" from Congress*, THE HILL: PUNDITS BLOG: (Aug. 16, 2017), <http://thehill.com/blogs/pundits-blog/international-affairs/346744-trump-cant-withdraw-from-nafta-without-a-yes-from>; Anna Swanson & Kevin Granville, *What Would Happen if the US Withdrew from NAFTA*, N.Y. TIMES: (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/business/economy/what-would-happen-if-the-us-withdrew-from-nafta.html>.

which the ability to withdraw effectively may not lie with the Executive alone. As a matter of constitutional law, the ability of a President to withdraw from an international commitment should be assessed via application of the *Youngstown* framework, like any other exercise of presidential power. And even if the Executive can act unilaterally to withdraw from commitments on the international plane, the lasting effects of those commitments domestically may be stickier than expected.

Of course, the act of withdrawal is of enormous symbolic importance and will have repercussions on the United States’ international relationships and standing on the world stage. The foundational principle of international treaty law is *pacta sunt servanda*; that is to say, agreements must be kept.⁷⁷ Of course, circumstances change and international obligations must sometimes be adjusted to change with them. But if our foreign partners feel that they can no longer rely upon the United States, one of the chief architects of the current global order, to keep its international commitments, the foundations of that order are threatened. This is particularly true if the change in U.S. position is perceived to be born not from a genuine response to changed conditions, but from arbitrary and capricious impulse.

There are indubitably States that would relish a return to a global order that is a Hobbesian free-for-all, where power is the only arbiter and the strong States dominate the weak. It took the world centuries to inch away from that model and towards a system of international cooperation, which is the only way to build sustainable solutions to truly international problems such as climate change, migration, and war. For the United States, an important part of the maintenance of the global rule of law is adherence to constitutional requirements designed to protect against the risk of “an ambitious or unreasoned President disengaging the United States from crucial bilateral and multilateral treaties with the stroke of a pen.”⁷⁸

77. See VCLT, *supra* note 19, art. 26, 1155 U.N.T.S. at 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

78. *Goldwater v. Carter*, 617 F.2d 697, 739 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (quoting Scheffer, *supra* note 10, at 1008) *vacated*, 444 U.S. 996 (1979).

