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Cormac C. Broeg

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Leaving the Twilight Zone
A Congressional Check on Treaty Termination
By Cormac H. Broeg[*]

Abstract: This essay argues that Congress can —by a statute expressing the will of both houses— protect a treaty from presidential termination. Under this framework, when Congress expressly states its opposition to the termination of a particular treaty, it moves the president's order to terminate the treaty into this third category where the president can rely only upon enumerated powers. In *Goldwater v. Carter,* the Supreme Court found a challenge to presidential treaty termination non-justiciable without forming a majority opinion, However, a statutory protection of a treaty creates a different dispute which fails to implicate any of the political question factors articulated by the Court in *Baker v. Carr*. While, neither of the competing analogies employed by scholars in discussing the termination power are persuasive, the treaty power's inseparability from issues of war and peace suggest that the framers would not have vested the authority to terminate a treaty in a single individual. The framing generation's fear of executive corruptibility and desire that the new republic would be a reliable diplomatic partner permeate their justifications for the treaty ratification process; the irreconcilability of these concerns with a plenary termination power strongly suggest that Congress can insulate treaties from a president acting unilaterally.

I. INTRODUCTION

In January 17, 2019 three days after the New York Times reported that President Trump had discussed withdrawing the United States from the North Atlantic Treaty Organization,[1] a bipartisan band of eight Senators introduced a joint resolution stating, "The President shall not suspend, terminate, or withdraw the United States from the North Atlantic Treaty . . . except by and with the advice and consent of the Senate, provided that two thirds of the Senators present concur, or pursuant to an Act of Congress."[2] Why is this legislation, which reported out of the Senate Foreign Relations Committee eleven months later, needed to prevent a president

[*] Cormac H. Broeg earned his J.D. from the University of Iowa College of Law in May 2020. The author thanks Professor Andy Grewal and Humaa Siddiqi for their assistance on this project.

[1] Julian Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia*, N.Y. TIMES (Jan. 14, 2019) https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html.

[2] The bill was introduced by Senator Tim Kaine (D-VA), on behalf of himself and Senators Cory Gardner (R-CO), Lindsey Graham (R-SC), Marco Rubio (R-FL), Susan Collins (R-ME), Chris Coons (D-DE), Richard Blumenthal (D-CT), and Jack Reed (D-RI). S.J. Res. 4, 116th Cong (2019) https://www.congress.gov/bill/116th-congress/senate-joint-resolution/4/text?r=54&s=1.

unilaterally withdrawing from a treaty which has served as a core pillar of American foreign policy for seventy years?

Under the prevailing understanding of the treaty power pronounced in the Constitution, the president can unilaterally withdraw the United States from a treaty.[3] When the question of this practice's legality reached the Supreme Court in *Goldwater v. Carter*, it found the question non-justiciable without a majority agreeing about the reason for that justiciability.[4] This Article will not examine whether a president can terminate a treaty in the absence of a clear expression of congressional will, the specific situation addressed by the Court in *Goldwater.* Instead, this Article will address whether Congress can—by a statute expressing the will of both its houses—protect a treaty from presidential termination.

II. BACKGROUND

a. The History of Treaty Termination

The Constitution does not provide a treaty termination mechanism, but the framing generation regarded statutes as at least an appropriate means for terminating treaties.[5] The debates at the Constitutional Convention and state ratifying conventions provide no discussion of the treaty termination power.[6] While John Jay and Alexander Hamilton wrote Federalists 64 and 75 in

[3] *See infra* Part III.D.

[4] *See infra* Part III.C.

[5] Curtis Bradley, *Treaty Termination and Historical Gloss,* 92 TEX. L. REV. 773, 789 (2004). Vice President Thomas Jefferson presided over some of the proceedings of the Senate concerning the issue and wrote in 1800 that "an act of legislature alone" was the acceptable means for terminating a treaty. *Id.*

[6] David A. Schnitzer, *Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination*, 101 GEO. L.J. 243, 252 (2012). James Madison's extant writings lack any conclusive evidence of his opinion on the subject.

> A single Madison letter from 1791 with the passage 'the same authority precisely being exercised in annulling as in making a [t]reaty' has been used to suggest that his view was that it takes the same authority--action by the President and two-thirds of the Senate--to terminate a treaty as to make a treaty. However, the same letter continues to suggest that 'a question may perhaps be started' as to what authority is required to declare another nation in breach of a treaty and thus terminate it. This evidence suggests that Madison, for one, had no clear belief on the subject even post-ratification in 1791. Rather, he viewed several options as at least plausible and worthy of further discussion.

defense of the Constitution's treaty ratification process, neither provided a direct answer about how a ratification might be undone.[7] However the framing generation did address the issue of treaty termination in the first decade of the new constitutional system. In 1798, the United States terminated its 1778 treaty of alliance with France through statutory process.[8] On July 7, 1798 as Congress considered war against France, both houses of Congress passed a bill to terminate the treaty which President Adams then signed into law.[9] The United States Supreme Court has also recognized statutes as effective instruments for treaty termination.[10]

Throughout the nineteenth century, Congress passed and presidents signed joint resolutions authorizing—and sometimes even directing—the president to terminate treaties.[11] While presidents acknowledged this congressional authority over treaty termination, they disputed congressional authority to abrogate parts of treaties, rather than modify them outright.[12] When President Pierce wanted to terminate a commercial treaty with Denmark in 1855, he first sought Senate authorization to do so and then stated that he was acting within the authority granted to him by that resolution.[13] When nineteenth century presidents did withdraw from treaties without prior authorization, Congress subsequently consented to their terminations.[14] The first presidential

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Id. at 256–57 (2012) (quoting Letter from James Madison to Edmund Pendleton (Jan. 2, 1791)).

[7] Their justifications for the treaty ratification process do provide considerable guidance for answering the question. *See infra* Part V.C.

[8] Bradley, *supra* note 5, at 789. Five years earlier, President Washington refused to recognize the French ambassador without qualifications and thus avoided the question of whether the treaty of alliance remained in effect post-French Revolution. *Id*. at 797–98.

[9] Act of July 7, 1798, ch. 67, 5 Stat. 2 (declar[ing] the treaties heretofore concluded with France, no longer obligatory on the United States) http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=701.

[10] Schnitzer, *supra* note 6, at 254–56. *See* Whitney v. Robinson, 124 U.S. 190, 194 (1888). The fact that the treaty termination occurred in connection to the Congressional authorization for the Quasi War may have some constitutional significance. Since two states obviously cannot maintain a defensive alliance while at war with each other, an argument can be made that this act terminating the treaty was an exercise of Congress's power to declare war. Bradley, *supra* note 5, at 789–90.

[11] Bradley, *supra* note 5, at 790–91.

[12] *Id*. at 792.

[13] *Id*. at 793. Though it did not subsequently become common practice to only seek consent from the Senate, the Senate Foreign Relations Committee concluded the following year that the Senate's consent alone was sufficient to permit the president to withdraw from a treaty. *Id*. at 793–94.

[14] *Id*. at 794–795.

termination of a treaty provision without prior or post hoc authorization came in 1899 when President McKinley terminated a few clauses in a commercial treaty with Switzerland and McKinley argued the termination was required by their incompatibility with a new federal statute, rather than claiming a unilateral termination power.[15]

In the early twentieth century, the winds began to shift towards a unilateral presidential power. In 1909, the State Department drafted a memorandum for President Taft arguing that the Constitution implicitly granted the president a unilateral treaty termination power.[16] Four years later in *Charlton v. Kelly*, the Supreme Court held that the president could suspend treaty compliance upon determining that the other party had breached its obligations.[17] In 1927, President Coolidge became the first American president to unilaterally terminate a treaty when he withdrew the United States from a smuggling convention with Mexico.[18] The Franklin D. Roosevelt administration doubled-down on the unilateral termination authority by invoking the "sole organ" language of the Supreme Court's 1936 decision in *Curtiss-Wright*.[19] With the United States taking its role as superpower after the Second World War, unilateral terminations became increasingly common.[20]

b. The *Youngstown* Tripartite Framework

As unilateral treaty terminations became more common with the American president's ascension to the role as "leader of the free world", the Supreme Court adopted a framework to understand the limits of executive power. In his influential concurrence in *Youngstown Sheet &*

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[15] *Id*. at 799.
[16] *Id*. at 801.
[17] Charlton v. Kelly, 229 U.S. 447 (1913); Bradley, *supra* note 5, at 803. The record from the Senate debate about whether to consent to the Treaty of Versailles and thus join the League of Nations displays considerable confusion about which branch of government possessed the termination power. *Id*. at 803–05.
[18] Bradley, *supra* note 5, at 805–06.
[19] *Id*. at 806–09.
[20] *Id*. at 809–10.

Tube Co. v. Sawyer, Justice Robert Jackson presented a tripartite framework of presidential powers.[21] First "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."[22] Implicit authorization exists when "a systematic unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."[23] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority . . . there is a zone of twilight in which he and Congress may have concurrent authority."[24] Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[25] Under this framework, when Congress expressly states its opposition to the termination of a particular treaty, it moves the president's order to terminate the treaty into this third category where the president can rely only upon enumerated powers.

c. Political Question Doctrine

The Supreme Court has long held that some disputes between the executive and legislative branches are non-justiciable political questions. In *Baker v. Carr*, the Court identified six factors whose presence renders a dispute a non-justiciable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy

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[21] The Supreme Court has adopted Jackson's framework. Medellin v. Texas. 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

[22] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[23] *Id*. at 610–11. "Past practice does not, by itself create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent." Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474). In *Dames & Moore*, the Court held that Congress "implicitly approved the practice of claim settlement by executive agreement" since "at least 10 binding settlements" were achieved by executive renouncement or extinguishment of claims in the preceding three decades. *Id*. at 680.

[24] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[25] *Id*. Justice Jackson advised against a narrow construction of these powers; the Court ought to "giv[e] to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism." *Id*. at 640.

> determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[26]

While disputes "touching foreign relations" often invoke one of these factors and when doing so constitute political questions,[27] "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[28] The *Baker* Court briefly discussed a hypothetical dispute over treaty termination finding that "though a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action . . . must be regarded as of controlling importance,' if there has been no conclusive 'governmental action' then a court can construe a treaty and may find it provides the answer."[29]

d. Goldwater v. Carter

The political question doctrine was the deciding factor in the first and only case heard by the Supreme Court concerning the unilateral termination power. In *Goldwater v. Carter,* the Court found the dispute non-justiciable without a majority opinion. The diverging opinion among the concurring justices in *Goldwater* establish the fault lines of a debate about the justiciability of a treaty protection statute.

In 1979, President Carter unilaterally terminated the military alliance between the United States and the Republic of China pursuant to his decision to formally recognize the People's Republic of China as China's legitimate government.[30] The State Department drafted a

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[26] Baker v. Carr, 369 U.S. 186, 217 (1962).
[27] *Id.* at 211.
[28] *Id.*
[29] *Id.* at 212.
[30] Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198 (1979). The mutual defense treaty required one's year notice, yet Carter gave notice on December 23, 1978 with the termination to be effective on January 1, 1979, so it would occur simultaneously with recognition of the PRC.

memorandum arguing that historical practice established the president's unilateral treaty termination power.[31] In anticipation of the termination, the Senate Foreign Relations Committee debated a resolution presented by Senator Robert Byrd to require Senate approval before terminating any mutual defense treaty, but the resolution never received a floor vote.[32] Senator Barry Goldwater of Arizona and other members of Congress sued President Carter arguing that the termination was unconstitutional and violative of a recent statute requiring consultation with Congress before the termination of defense treaties.[33] Goldwater argued in the American Bar Association journal that Carter's termination of the treaty "not only usurped powers conferred on the Congress, but . . . exercise[d] a function . . . clearly reserved to the judicial branch, the power 'to say what the law is,'"[34] and contrary to the will of the framing generation who were "anxious to gain the respect and confidence of foreign nations by keeping our treaty commitments."[35]

The case's procedural history perhaps demonstrates the difficulty of the question. The district court found the case did "not present a non-justiciable political question" and that the termination of the treaty "cannot be constitutionally accomplished without the advice and consent of the United States Senate or the approval of both houses of Congress."[36] The administration

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[31] This memorandum's claim to historical practice has received considerable criticism from scholars. Bradley, *supra* note 5, at 811 n. 218.

[32] *Id*. at 811–12.

[33] Goldwater v. Carter, 481 F. Supp. 949, 950 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996, 100 S. Ct. 533 (1979); Goldwater, *supra* note 30, at 198.

[34] Goldwater, *supra* note 30, at 198–99 (quoting Nixon v. United States, 418 U.S. 683 (1974)). "[C]ontemporary materials and the text of the Constitution show that the termination of a treaty involving as it does the sacred honor of the country and serious policy interests, is a decision of such major importance that the Framers required the joint participation of both political departments . . . in making the decision." *Id*. at 198.

[35] *Id*. at 199 (citing statements made by James Wilson and James Madison). Treaties protected the early nation's commercial interests and were instrumental for ending wars. Goldwater argued that the requirement that the Senate consent to a treaty negotiated by the president was meant to secure the people from abusing of power and this same purpose was served by the check. *Id*. Goldwater also argued that "the term 'party' [as used in the statute] meant the president and Senate jointly" since both were necessary for the U.S. to join the treaty and observed that the North Atlantic Treaty used the same language. *Id*. at 201.

[36] *Goldwater*, 481 F. Supp. at 950–51. An earlier complaint was dismissed by the court for its lack of cognizable injury, "[i]n large part . . . due to what the [c]ourt perceived as a substantial likelihood of resolution of the treaty termination issue through the legislative process." *Id*. at 952.

appealed to the D.C. Circuit which, hearing the case en banc, affirmed the district court's finding of justiciability, but reversed the lower court's decision on the merits. The court held instead that requiring Senate consent for treaty termination would "deny the President the authority necessary to conduct our foreign policy in a rational and effective manner."[37] The president's power under Article II was "generalized in a manner that bespeaks no such limitation upon foreign affairs powers."[38]

The Supreme Court granted certiorari, vacated the D.C. Circuit's decision and remanded the case to the district court for dismissal.[39] A four-justice plurality of the Court found in an opinion delivered by Justice Rehnquist that the issue presented was a non-justiciable political question, "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[40] The text of the Constitution was not conclusive, since "while 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."[41] The claim of non-justiciability was more compelling than in other disputes between the political branches, "because it involves

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[37] Goldwater v. Carter, 617 F.2d 697, 705–06 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

[38] *Id.* at 704. The D.C. Circuit found little merit in the District Court's finding that since Senate consent was required to enter a treaty it was implicitly required to exit, since similar arguments had been rejected concerning the Appointments Power, and offered the political costs of termination without congressional support as an adequate safeguard against potential abuses of the termination power. *Id.* at 703, 708–09; *see* Myers v. United States, 277 U.S. 52 (1926). In dissent, Judge George MacKinnon argued that the Court had neglected the fact that "Congressional participation in termination has been the overwhelming historical practice." *Id.* at 723 (MacKinnon, J., dissenting). Justice MacKinnon of the D.C. Circuit found in his *Goldwater* dissent that of the 13 instances of unilateral termination claimed by the administration in *Goldwater*:

> [I]n five instances Congress by direct authorization, or inconsistent legislation supplied the basis for the President's action; in two instances the putative abrogation was withdrawn and no termination resulted; one treaty was already terminated by the demise of the country; one treaty had become void by a change in the basic facts upon which the treaty was grounded; four treaties had already been abrogated by the other party; and of the two that were non-functioning the Trademark Treaty was not terminated.

Id. at 733.

[39] Goldwater v. Carter, 444 U.S. 996 (1979).

[40] *Id*. at 1002 (Rehnquist, J., concurring).

[41] *Id*. at 1003.

foreign relations[,] specifically a treaty commitment to use military force in the defense of a foreign government if attacked."[42]

In his dissent, Justice Brennan argued that the plurality "profoundly misapprehend[ed] the political-question principle as it applies to matters of foreign relations."[43] The political question doctrine does not apply "when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decision-making power."[44] Since "[a]brogation of the defense treaty with Taiwan was necessary incident to Executive recognition of the" People's Republic of China as the government of China, President Carter had the authority to unilaterally withdraw from the treaty under the president's Art. 2, sec. 3 recognition power.[45]

Justice Blackmun, in an concurring opinion joined by Justice White, also rejected the plurality's political question analysis, finding instead that the question of whether the president possessed the power to unilaterally terminate a treaty was "a substantial issue" that required more "briefing and oral argument" to ascertain.[46]

In his concurrence, Justice Powell determined that the case was not ripe; finding that "a dispute between Congress and the President is not ready for judicial review unless and until each

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[42] *Id*. at 1004. Rehnquist's analysis was based in part on the Court's dicta in *Curtiss Wright*. In that case dealing with a Congressional delegation of power to the president to prohibit arms sales to combatants in ongoing conflict in South America, the Court made strong statements about the role of the president in foreign affairs. However, the case did not deal exclusively with presidential power, but with presidential powers in combination to an explicit delegation from Congress. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). Specifically, Rehnquist's plurality opinion distinguished *Goldwater* from *Youngstown* on the ground that *Youngstown* involved a suit by private litigants, not one "between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum." *Id*. at 1004.

[43] *Id*. at 1006 (Brennan, J., dissenting).

[44] *Id*. at 1007.

[45] *Id*. *See* U.S. CONST. art. 2, sec. 3 ("[H]e shall receive ambassadors and other public ministers."). "The text and structure of the Constitution grant the President the power to recognize foreign nations and governments" and this power is exclusive. Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 14 (2015).

[46] *Goldwater*, 444 U.S. at 1006 (Blackmun, J. dissenting in part). Justice Marshall concurred in the result but did not join the plurality or either of the concurrences. *Id*. at 996 (Powell, J., concurring).

branch has taken action asserting its constitutional authority" and reached a "constitutional impasse."[47] Since neither the Senate nor the House had passed any legislation challenging the president's authority to withdraw from the treaty, this condition had not been met.[48]

After providing this rationale, Powell applied the language of *Baker* to criticize the plurality's finding of non-justiciability. First, there was no "textually demonstrable constitutional commitment of the issue" to the president.[49] Second, the dispute could be resolved by "apply[ing] normal principles of interpretation to the constitutional provisions at issue."[50] Unlike a dispute over whether the treaty required a particular military action—which would lack such a standard and constitute an "impermissible interference" with the president's power as commander-in-chief and "sole organ" for the nation's diplomacy—the dispute over treaty termination "concern[ed] only the constitutional division of power between Congress and the President."[51] Under Rehnquist's overbroad interpretation of the political question doctrine, the president's declaration that a treaty was "in[] effect despite its rejection by the Senate" would be a political question, despite the plain text of the Constitution "clearly resolv[ing] the dispute."[52] Finally, if the dispute were ripe the avoiding "embarrassment from multifarious pronouncements" purpose would be harmed rather than promoted by a finding of non-justiciability.[53] Without judicial review, Congress and the President would continue to hold their "irreconcilable positions," denying the

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[47] *Id*.
[48] *Id*. at 998.
[49] *Id*. (quoting Powell v. McCormack, 395 U.S. 486, 519 (1969)).

> No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Art. II, § 2, of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that treaties shall be a part of the supreme law of the land. These provisions add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.

Id. at 999.
[50] *Id*.
[51] *Id*.
[52] *Id*. at 1000.
[53] *Id*. at 1000–01.

American people and the international community the clear resolution which the Court could provide.[54]

e. Treaty Termination Post-*Goldwater*

Since the Court's finding of non-justiciability in *Goldwater*, presidents have made unilateral treaty termination common practice.[55] The Fourth Restatement on Foreign Relations endorsed a unilateral presidential termination power, but found authority only in "established practice" since the Court never resolved the constitutional issue.[56] President Trump has withdrawn from several treaties unilaterally without legal challenge.[57] In *Kucinich v. Bush*, 32 House members filed suit to contest the Bush Administration's unilateral termination of the Anti-Ballistic Missile Treaty. The D.C. District Court granted the administration's motion for summary judgement on the grounds that the legislators lacked standing and that "the treaty termination issue is a non-justiciable 'political question.'"[58] While the court noted that this decision was "pursuant to *Goldwater*"[59] and that it found the plurality opinion "instructive and compelling,"[60] it also noted that since none of the opinions in *Goldwater* were expressly or implicitly endorsed by a majority of the justices, "no single rationale controls."[61]

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[54] *Id*. If such a dispute were ripe, the "resulting uncertainty could have serious consequences for our country." *Id*. at 1002.

[55] Bradley, *supra* note 5, at 815. With the exception of President Bush's withdrawal of the United States from the Anti-Ballistic Missile Treaty with Russia in 2002 the authority was relatively uncontroversial until the present administration.

[56] "According to established practice, the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments and in withdrawing the United States from treaties, either on the basis of terms in the treaty allowing for such action (such as a withdrawal clause) or on the basis of international law that would justify such action." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 313 (2018); *see* id., comment A.

[57] Nahal Toosi, et. al., *Trump makes it official: U.S. to quit missile treaty with Russia*, POLITCO (Feb. 1, 2019 8:52 AM) https://www.politico.com/story/2019/02/01/trump-inf-treaty-russia-1141617.

[58] Kucinich v. Bush, 236 F. Supp. 2d 1, 2 (2002).

[59] *Id*. at 1.

[60] *Id*. at 14.

[61] *Id*. at 13. The issue of whether the Goldwater plurality was controlling was also addressed in *Made in the USA Found v. United States*:

> While the nature of the issue presented in *Goldwater* differs somewhat from the present case, we nonetheless find the disposition in *Goldwater* instructive, if not controlling, for our purposes, in that

III. JUSTICIABILITY ANALYSIS

The political question doctrine provides the first hurdle for enforcing our hypothetical statute. While the *Goldwater* plurality opinion does not control, lower courts are likely to—as the D.C. District Court found in *Kucinich*—find Rehnquist's opinion persuasive. Thus, despite the distinguishing facts between *Goldwater* and our scenario, proving justiciability for enforcing our statute requires a refutation of the *Goldwater* plurality opinion. This section advances Justice Powell's opinion as the *Goldwater* concurrence most in line with modern political question jurisprudence and argues that a suit to prevent termination with this statute in place would be justiciable, because the hypothetical dispute does not implicate any of the *Baker* factors.

If Congress passes a law requiring the president to secure the consent of the Senate to terminate a particular treaty—like the North Atlantic Treaty—and the president still denounces the treaty without Senate consent, a legal challenge to that termination would not pose a political question.[62] This scenario can be clearly distinguished from that in *Goldwater*, because by passing the statute Congress exhausted its political remedies to protect the treaty from termination and achieved the "constitutional impasse" which under Justice Powell's analysis renders it ripe for judicial review.[63]

Only four of the nine justices in *Goldwater* joined the opinion whose reasoning would find this scenario non-justiciable and in the decades since *Goldwater*, the Court displayed its willingness to find disputes between the president and Congress justiciable. In *Zivotofsky*, the

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> the Supreme Court declined to act because the constitutional provision at issue does not provide an identifiable textual limit on the authority granted by the Constitution.

Made in the USA Found. v. United States, 242 F.3d 1300, 1315 (11th Cir. 2001) (finding that Treaty Clause fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements and therefore a suit to require those procedures posed a political question).

[62] I have not addressed the issue of whether a Congressional committee would have standing to bring this suit, since other parties could also have standing to challenge the termination.

[63] *See supra* notes 48–59 and accompanying text.

Court found justiciable a dispute between the president and Congress over a statutory requirement that the State Department list Israel as the birthplace of Jerusalem-born citizens.[64] In this conflict between Congress and president, the constitutionality of the statute to compel the executive branch to act was the matter at issue,[65] just as the constitutionality of the statute's restraint on president's authority would be at issue in our scenario. The *Zivotofsky* Court held that the statute infringed on the president's recognition power.[66] This opinion was consistent with the Court's expansive view of the actions authorized concerning recognition, but our scenario does not implicate the recognition power.[67]

In the face of express congressional opposition, a dispute concerning a president's unilateral treaty termination does not invoke the political question factors articulated by the Court in *Baker*. First, there is no "textually demonstrable constitutional commitment of the issue" to the executive,[68] since the Constitution is silent on the subject of treaty termination. Second, the Court can resolve the dispute by applying conventional judicial standards. The Court will apply the same interpretive tools in adjudicating the constitutionality of the termination power as it would for any other constitutional question.[69] Third, such a determination would not require "nonjudicial discretion."[70] While there could be secrets justifying the termination, the Court would not be asked to decide whether the United States *should* terminate the treaty, only whether the president could constitutionally do so. While Justice Rehnquist argued that adjudicating the termination of a treaty

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[64] Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 23 (2015).
[65] *See id.* at 28–31.
[66] *Id*. This was the same argument Justice Brennan made in his dissenting opinion in *Goldwater*. Goldwater v. Carter, 444 U.S. at 996, 1006–07 (Brennan, J., dissenting).
[67] United States v. Belmont, 301 U.S. 324, 330 (1937) ("The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between two governments.").
[68] *See* Baker v. Carr, 369 U.S. 186, 217 (1962).
[69] *See supra* note 49–50 and accompanying text.
[70] *Baker*, 369 U.S. at 217.

was comparable to adjudicating whether American troops should be deployed in accordance with its obligations, the logic of *Zivotofsky* distinguishes between those two questions and finds the former justiciable.[71] The *Zivotofsky* Court found that determining which branch had the power to decide whether the Jerusalem-born could list themselves as Israel-born was an appropriate exercise of judicial power, even though determining whether Jerusalem was in Israel would have required the Court to apply non-judicial standards.[72] Fourth, by simply determining whether the legislative branch can check the president's power the judiciary could not be construed as "expressing lack of the respect due coordinate branches of government" any more than it could by ruling on the constitutionality of line-item vetoes or special prosecutors.[73] It is the job of the Court "to say what the law is," even if that means venturing into territory the president claims as his exclusive domain.[74]

The fifth *Baker* factor provides the strongest argument for non-justiciability, but the argument also fails. Once a president denounces a treaty against the express will of Congress, a political decision has been made. However unlike in Justice Rehnquist's example of a troop deployment, there is no "unusual need for unquestioning adherence" to a treaty termination opposed by Congress, particularly if said treaty contains a notice provision.[75] The North Atlantic Treaty requires a year's notice of termination before withdrawal; for that year, continued membership in NATO would be undisputed.[76] Since the harm done to the perceived stability of

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[71] *See supra* note 68 and accompanying text.
[72] *See* Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 28–29 (2015).
[73] *See* Clinton v. City of New York, 524 U.S. 417, 438 (1998) (holding that the Line Item Veto Act of 1998 violated the presentment clause by granting the president the power to amend and repeal statutes passed by Congress); Morrison v. Olson, 787 U.S. 654, 660 (1988) (holding that an independent counsel removable only for cause does not "impermissibly interfere with the President's authority").
[74] United States v. Nixon, 418 U.S. 683, 703 (1974) (quoting Marbury v. Madison, 1 U.S. (Cranch) 137, 177 (1803)).
[75] *Baker*, 369 U.S. at 217.
[76] *See* North Atlantic Treaty, art. 13, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 https://www.nato.int/cps/en/natohq/official_texts_17120.htm.

American foreign relations from adjudicating the question could be little greater than the harm done by the legislatively disputed termination itself, there is no "unusual need for unquestioning adherence."

Sixth, the "potentiality of embarrassment from multifarious pronouncements" does not here—as Justice Powell believed it did not in *Goldwater*—provide a compelling reason for non-justiciability.[77] Without judicial review, considerable disagreement will remain about whether the U.S. remains in the treaty, but by resolving the dispute between the legislative and executive branches the judiciary can provide clarity as to what the law is, not only to the American people, but to allies—and potential enemies—abroad.[78] As Justice Powell discussed in his *Goldwater* concurrence, the question of whether a treaty has been terminated is not a question of whether the United States must send troops to honor the treaty's commitments.[79] A suit to compel the president to send troops to defend a NATO member from an invader would rightfully be classified as a political question under this factor, but the question of whether the U.S. is a party to a treaty should not.

IV. ANALYSIS ON THE MERITS

After finding justiciability, a court would proceed to the merits of the constitutional argument. Under Justice Jackson's *Youngstown* tripartite framework, a statutory protection of a treaty from unilateral presidential termination would move the president's denunciation of that treaty out of the "zone of twilight" and thus require a showing that unilateral termination was

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[77] *Id*. *See supra* notes 46–53 and accompanying text.
[78] *See supra* notes 46–53 and accompanying text.
[79] The obligatory nature of treaties under international law does not change this calculus. As the courts have long held, an international agreement is only binding on the United States so long as the federal government determines it ought to be. A treaty can be overridden by a statute. Whitney v. Robinson, 124 U.S. 190, 194 (1888) (holding that a treaty giving sugar imports from the Dominican Republic most favored nation status was overridden by a statute establishing new tariff rates). A non-self-executing treaty is not enforceable in United States courts, because Congress has not acted domestically to meet its international obligation. *See* Foster v. Neilson, 27 U.S. 253, 254 (1829).

within the "scope and elasticity afforded by what seem to be reasonable practical implications" of the president's enumerated powers.[80] This section examines whether the presidency can meet this standard and concludes that it cannot. While, neither of the competing analogies employed by scholars in discussing the termination power are persuasive, the treaty power's inseparability from issues of war and peace suggest that the framers would not have vested the authority to terminate a treaty in a single individual. The framing generation's fear of executive corruptibility and desire that the new republic would be a reliable diplomatic partner permeate their justifications for the treaty ratification process; the irreconcilability of these concerns with a plenary termination power strongly suggest that Congress can insulate treaties from a president acting unilaterally.[81]

a. The Dueling Analogies

The debate over treaty termination has been characterized as a contest between two analogies: one to the president's executive power to appoint principal officers and the other to Congress's legislative power to makes statutes.[82] Proponents of the appointment analogy have used it to argue for a unilateral termination power,[83] while proponents of the legislative analogy have used it to argue that two-thirds consent of the Senate should be required for termination. These dueling analogies attempt to resolve a deeper constitutional question: is the authority to make and therefore also to terminate treaties within the "executive power" vested in the

[80] *See supra* notes 18–22 and accompanying text.

[81] Even if the courts were to find our hypothetical case nonjusticiable, the reasoning which follows could still be persuasive for a president taking office after a legislatively contested termination by his or her predecessor. An incoming president could conclude that unilateral termination power does not exist when against the statutorily expressed will of Congress and pronounce his or her determination that the treaty remains valid. While establishing this new practice might not change the Court's political question calculus, it would communicate a greater commitment of the United States to its international agreements.

[82] Bradley, *supra* note 5, at 770.

[83] This is not always true. *See generally* Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247 (discussing how the Appointments Clause analogy shows the possibility of a for-cause restriction on presidential treaty termination).

president?[84] If the power to make treaties is entirely executive in nature, then the answer to this question is yes. If it is entirely legislative, then the answer is no. Unfortunately, the treaty power evades clear categorization in either camp. The treaty power was understood in the early republic and remains best understood today as an amalgamation of the two.

Under the analogy to the Appointments Clause, treaty termination would fall entirely within the president's discretion and thus within the "executive power" vested in the president by Article II.[85] The "with the Advice and Consent of the Senate" language of the Appointments Clause mirrors the language of the Treaty Clause.[86] In *Myers v. United States*, the Court held that a statute requiring Senate consent for presidential removal of postmasters appointed with Senate consent was unconstitutional, because the complete authority to remove executive officials was within "the executive power" granted to the president by Article II.[87]

If a treaty is reciprocal like a statute, then two-thirds of the Senate would be required to terminate a treaty just as the Constitution requires a majority of both houses of Congress to repeal a statute. The argument for the analogy is best summed up in Senator Goldwater's contention that though "[t]he constitution is silent as to how a treaty shall be terminated[,] [i]t is also silent on how

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[84] U.S. CONST. art 2.

[85] The Second Circuit applied the analogy in its *Goldwater* opinion rejecting the District Court's finding that the language of the treaty power implied senatorial consent for termination.

> It is that, since the President clearly cannot enter into a treaty without the consent of the Senate, the inference is inescapable that he must in all circumstances seek the same senatorial consent to terminate that treaty. As a matter of language alone, however, the same inference would appear automatically to obtain with respect to the termination by the President of officers appointed by him under the same clause of the Constitution and subject to Senate confirmation.

Goldwater v. Carter, 617 F.2d 697, 673 (D.C. Cir. 1979). In his article, Senator Goldwater distinguished between the removal of principal officers and treaty termination, contending that the removal of officials was an act by the president to improve the performance of his own duty to execute the laws, while a treaty was a law which he had the duty to execute. Goldwater, *supra* note 30, at 201.

[86] U.S. CONST. art. 2, sec. 2, cl. 2. The clause allows for the appointment of "inferior officers" by "courts of law" and "department heads" the Court has named those executive positions for which appointment requires Senate approval: "principal officers. *See e.g.* Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010).

[87] Myers v. United States, 272 U.S. 52, 165–66 (1926). While *Myers* was overruled in part by Humphrey's Executor v. United States, 295 U.S. 602 (1935), the modern Court continues to hold that the vesting of the "executive Power' in the President" informs "the separation-of-powers principle [which] guarantees the President the authority to dismiss certain Executive Branch officials at will." *Free Enterprise Fund*, 561 U.S. at 515–16.

a statute or any other shall be canceled[;] [y]et no one makes the argument that the president alone can repeal a statute."[88] Indeed, the Court has long-held that "no power was ever vested in the president to repeal an act of Congress."[89] Treaties can be abrogated by federal statute and vice versa under the same "last one in date will control" doctrine applied to inconsistent statutes.[90]

However, the Framers believed the treaty power to be neither a strictly executive nor a strictly legislative power. In Federalist 75, Alexander Hamilton wrote that—despite being more legislative than executive in character—the treaty power required the involvement of both branches, because belonged in neither category: [91]

> The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[92]

The lawmaking nature of treaties does not render them legislatives acts.[93] A treaty under the Constitution would be "just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government."[94]

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[88] Goldwater, *supra* note 30, at 199.

[89] The Confiscation Cases, 87 U.S. 92 (1873). Senator Goldwater expanded this argument by contending that since a president has a constitutional duty to "take care that the Laws be faithfully executed" a president cannot unilaterally terminate a treaty because it is the "supreme Law of the land." Goldwater, *supra* note 30, at 199. (discussing U.S. CONST. Art. II, Sec. 3; U.S. CONST. Art. VI cl. 2.).

[90] "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either, but if the two are inconsistent, the one last in date will control the other provided always the stipulation of the treaty on the subject is self-executing." Whitney v. Robinson, 124 U.S. 190, 194 (1888).

[91] THE FEDERALIST, NO. 75 (Alexander Hamilton) ("Its objects are *contracts* with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.").

[92] *Id.* (emphasis in original).

[93] In Federalist 64, John Jay dismissed the argument that because treaties carried the force of law, "they should be made only by men invested with legislative authority" by pointing out that court judgements and some executive actions also carried the force of law. THE FEDERALIST, NO. 64 (John Jay).

[94] *Id.*

Early treaty power jurisprudence was consistent with an understanding that the sovereignty of the United States in making treaties is not vested in the president alone. Chief Justice John Marshall declared in *Foster v. Neilson*, that "[a] treaty is in its nature a contract between two sovereigns, not a legislative act," and "regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself."[95] While the power to make and terminate treaties was exclusively the domain of the monarch in the English tradition, the *Foster* Court found that the Framers consciously broke from that tradition.[96]

b. War and Peace

Treatymaking as understood by the framing generation was intertwined with issues of war and peace. In 1787, peace treaties were the means to end wars. The great wars of Europe in the century preceding the American Revolution each ended with complex, multilateral treaties.[97] In 1783, the Treaty of Paris ended the Revolutionary War, drew the young nation's borders, and secured formal recognition from the British crown.[98] Thirteen years later, the Supreme Court held that the Confederation Congress could make treaties binding on individuals despite the lack of unanimous consent from the states to do so, because the Congressional "authority to make war, of necessity, implies the power to make peace; or the war must be perpetual."[99]

States have entered into agreements for collective self-defense, like the North Atlantic Treaty , for millennia.[100] In 1778, the United States entered into a treaty with France to form a

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95 Foster v. Neilson, 27 U.S. 253, 254 (1829).
96 *See id.*; U.S. CONST. art. II, sec. 2, cl. 2 & art. I, sec. 8, cl. 1.
97 *See e.g. Treaty of Paris*, OFFICE OF THE HISTORIAN, U.S. STATE DEPT. (last accessed April 5, 2019) https://history.state.gov/milestones/1750-1775/treaty-of-paris. *Treaties of Utrecht*, BRITANNICA (last accessed April 4, 2019) https://www.britannica.com/topic/treaties-of-Utrecht.
98 *Treaty of Paris*, LIBRARY OF CONGRESS (last accessed April 5, 2019) https://www.loc.gov/rr/program/bib/ourdocs/paris.html.
99 Ware v. Hylton, 3 U.S. (3 Dall.) 199, 232 (1796).
100 1 *Maccabees* 8.

"defensive alliance" against Great Britain.[101] While defensive alliances with foreign powers risked entangling the United States in future foreign conflicts, they also provided a powerful deterrent to powers considering military action against the fledging republic. The core considerations behind NATO membership were contemplated by the framing generation.

The Constitution explicitly grants Congress the power to declare war.[102] Since the termination of a peace treaty shortly after its ratification would likely lead to a resumption of hostilities, the treaty power is functionally inseparable from the power to declare war. As the Constitution does not distinguish between different types of treaties, there is no reason to conclude that the same logic would not apply to a collective self-defense treaty whose continued existence (or termination) could also lead to war.[103]

This denial of executive authority to unilaterally declare war was only one aspect of the Framers' imperative to distinguish the foreign relations power of the president from that of the English monarch.[104] Under English common law—as articulated by Blackstone—the making of war and peace was the "sole prerogative" of the monarch.[105] "For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power."[106]

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[101] Treaty of Alliance between the United States and France art 1–2, Feb. 6, 1778 http://avalon.law.yale.edu/18th_century/fr1788-2.asp. Not unlike NATO, this treaty contained a provision stating that other parties could be admitted to the alliance with the mutual consent of the United States and France. *Id*. at art. 10.
[102] U.S. CONST. art. I, sec. 8, cl. 11.
[103] Indeed, as previously discussed the termination of that first military alliance and a commercial treaty with France corresponded to the opening of maritime hostilities against the former ally. *See supra* notes 21–25.
[104] THE FEDERALIST NO. 69 (Alexander Hamilton) ("The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.").
[105] WILLIAM BLACKSTONE, COMMENTARIES *249.
[106] *Id*.

By this "same principle," the making and termination of treaties was within the royal prerogative, since "in England the sovereign power . . . is vested in the person of the king."[107] The English Parliament's only check on treatymaking was the power to impeach the king's treaty negotiators.[108]

This executive prerogative over issues of war, peace, and by extension the treaty power violated the Whiggish ideology of the framing generation. As Justice Jackson described in *Youngstown* regarding President Truman's claim that the authority to seize steel mills fell was among his war powers, "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."[109]

In this desire to distance American foreign policy decision-making from English royal prerogatives, the Framers required consent of the Senate for treatymaking and gave Congress the power to declare war. Would these same Framers have simultaneously intended to vest the president with a prerogative power to terminate treaties? No, by rejecting this underlying principle of a royal prerogative to make war and treaties, the Framers implied that the power to terminate treaties was not within the Constitution's grant of executive power.

c. Avoiding Corruptibility and Instability

Beyond the distrust of executive prerogatives, the treaty power's structure was also the product of functionalist considerations suggesting a legislative power to protect treaties from termination. The treaty power is the focus of Federalist 64 and Federalist 75 penned by John Jay

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[107] *Id.*
[108] *Id.*
[109] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

and Alexander Hamilton. Though neither Jay nor Hamilton provided an answer to the termination question, their defense of the treaty power's constitutional structure provides two arguments against a unilateral termination power which remain relevant today: the risk of undue foreign influence over American foreign affairs and the need for the United States to be perceived abroad as a trustworthy diplomatic partner.

The Framers feared that a foreign power might buy influence over the American president and their desire to combat that threat, clearly demonstrated by the Foreign Emoluments Clause,[110] also influenced the structure of the treaty power. Both Hamilton and Jay recognized the corruptibility of a single individual as a threat to the security of the nation;[111] identifying the threat as one of the reasons for the Constitution's requirement of Senate consent for treaty ratification:

> An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[112]

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[110] Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 644–45 (2017); s*ee* U.S. CONST. Art. I, Sec. 9, cl. 8 ("No Title of Nobility shall be granted by the United States and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

[111] THE FEDERALIST NO. 64 (John Jay) ("The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.").

[112] THE FEDERALIST NO. 75 (Alexander Hamilton). Hamilton recognized that unlike a monarch, a republican leader's finances are not intertwined with the success of the state and listed several examples from European history of republics destroyed by foreign bribery. THE FEDERALIST NO. 22 (Alexander Hamilton) ("Evils of this description ought not to be regarded as imaginary. One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption. An hereditary monarch, though often disposed to sacrifice his subjects to his ambition, has so great a personal interest in the government and in the external glory of the nation, that it is not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the state. The world has accordingly been witness to few examples of this species of royal prostitution, though there have been abundant specimens of every other kind. In republics, persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments.").

While this concern did not lead Hamilton to conclude that the president only serve as a "ministerial servant of the Senate" in treaty negotiations, it did lead him to conclude that the "joint possession of the [treaty power], by the President and Senate, would afford a greater prospect of security, than the separate position of it by either of them."[113] Though a real danger if the power was held in the president alone, when held jointly by the president and the Senate, Jay argued that the risk of corruption was "not supposable."[114]

Even setting aside the potential for corruption, leaving treaty termination at the sole discretion of the executive hinder another rationale for the constitutional structure of the treaty power by making the United States a less reliable negotiating partner. In Federalist 64, John Jay rejected the argument that treaties "should be repealable at pleasure," because "it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."[115] The Framers understood that republican politics could be more volatile than that of the European powers with which the young nation would negotiate; while a monarch may rule for decades and a royal family for centuries, American presidents would serve only four-year terms. Placing an

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[113] THE FEDERALIST NO. 75.

[114] THE FEDERALIST NO. 64 ("He must either have been very unfortunate in his intercourse with the world, or possess a heart very susceptible of such impressions, who can think it probable that the President and two thirds of the Senate will ever be capable of such unworthy conduct. The idea is too gross and too invidious to be entertained.") Jay still discussed an alternative fail-safe for corruption as well, finding that, if it should ever happen, "the treaty so obtained . . . would, like all other fraudulent contracts, be null and void by the law of nations." *Id*. The void for corruption rule under the law of nations has been enumerated in Article 50 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 50, May 23, 1969, 115 U.N.T.S. 331 (1969) ("If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.").

[115] THE FEDERALIST NO. 64. Jay continued:

> They who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them." While this quote has been offered as evidence of a requirement of dual consent from both the president and the Senate for termination, the "both" to which it refers are the states, as they are the "contracting parties.

Id. *See* Schnitzer, *supra* note 6, at 275–82. Congress does have the power to repeal treaties under the "last in time" doctrine. *See* Whitney v. Robinson, 124 U.S. 190, 194 (1888).

uncheckable treaty termination power in new hands every four years enables a fickle foreign policy and inspires little confidence abroad. The ability of Congress to thwart a president's desire to terminate a treaty promotes stability in foreign policy and communicates reliability.

In achieving this goal, a Congressional power to protect individual treaties does little harm to the functional benefits of a general doctrine allowing unilateral treaty termination as implicitly approved by Congressional inaction. There is a functionalist argument for unilateral treaty termination: it allows the president to react swiftly to a changing world. This purpose is achieved by the default placement of treaty termination within the *Youngstown* framework's "twilight zone."[116] Even without control over the treaty power, the modern president retains considerable flexibility in foreign policy since the overwhelming majority of the international agreements made by the United States today are executive agreements,[117] not treaties. A doctrine allowing the president to terminate treaties generally while recognizing congressional authority to thwart the termination of particular treaties vital to the national interest from presidential whim and the threat of foreign influence, avoids both the dangers of an unchecked executive and overbearing legislative shackles.

V. CONCLUSION

The Constitution does not provide the president with the authority to unilaterally terminate a treaty protected by statute. This executive power is irreconcilable with the rationale for the framing of the treaty ratification process articulated in the Federalist Papers. While a functionalist argument may favor a presidential power to unilaterally terminate a treaty when Congress is silent,

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[116] *See supra* Part II.B.

[117] David A. Wirth, *Is the Paris Agreement on Climate Change a Legitimate Exercise of the Executive Agreement Power?*, LAWFARE (Aug. 29, 2016 12:37 PM) https://www.lawfareblog.com/paris-agreement-climate-change-legitimate-exercise-executive-agreement-power. Over 90% of international agreements binding on the United States —including controversial compacts like the Paris Agreement—are executive agreements made by the president without the treaty power's Senate consent requirement.

the merits of this argument do not extend to terminations made despite express legislative disapproval. Though our world would be unrecognizable to the Framers, their concerns about placing the security of the nation's treaties entirely at the discretion of a single individual are as legitimate now as they were in 1787. By accepting the principle that Congress may shield a treaty from presidential termination, the United States can communicate to the world that it will honor its core international commitments no matter who is currently occupying the White House.