

## THE YALE LAW JOURNAL FORUM

NOVEMBER 12, 2018

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# Presidential Power to Terminate International Agreements

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**ABSTRACT.** Could President Trump unilaterally remove the United States tomorrow from all of the thousands of international agreements to which the United States is currently a party? Commonsense would suggest no, but the conventional wisdom among legal academics has leaned the other way. This Essay argues that the conventional wisdom is wrong: the Constitution affords the President no general unilateral power to terminate or withdraw from any international agreement, without regard to its subject matter. Neither historical practice nor Supreme Court precedent dictates that conclusion, nor does the Court’s misunderstood nonjusticiable holding forty years ago in *Goldwater v. Carter*. Constitutional, functional, and comparative-law considerations all cut the other way. Instead of a blanket unilateral power of presidential termination, this Essay suggests that the Constitution requires a “mirror principle,” whereby the degree of legislative approval needed to exit an international agreement must parallel the degree of legislative approval originally required to enter it. Such a mirror principle makes the degree of legislative approval required to enter or exit any particular agreement “substance dependent,” turning on which branch of government has substantive constitutional prerogatives to make law in any particular area of foreign policy. The Essay concludes by suggesting better foreign policy mechanisms, more reflective of modern realities, to guide America’s process of agreement-unmaking in the future.

### INTRODUCTION

Could Donald Trump unilaterally withdraw the United States from the United Nations, the International Monetary Fund, the World Bank, and other major longstanding treaties and international organizations?

These scenarios are neither unforeseeable nor hypothetical. Less than four decades ago, a D.C. Circuit judge warned 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.”<sup>1</sup> Since 2017, the Trump Administration has announced its withdrawal from a host of bilateral and multilateral arrangements, including the Paris Climate Agreement; the Joint Comprehensive Plan of Action (JCPOA); the United Nations (UN) Educational, Scientific, and Cultural Organization; the Global Compact on Migration; the U.N. Human Rights Council; the Trans-Pacific Partnership (TPP); the 1955 Treaty of Amity, Economic Relations and Consular Relations with Iran; the 1961 Optional Protocol to the Vienna Convention for Diplomatic Relations on Dispute Settlement; the Universal Postal Union Treaty; and the Intermediate Nuclear Forces Treaty.<sup>2</sup> President Trump has also hinted at his desire to withdraw from the North American Free Trade Agreement (NAFTA), the Korea-U.S. Free Trade Agreement (KORUS), the World Trade Organization (WTO), and the North Atlantic

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1. Goldwater v. Carter, 617 F.2d 697, 739 (D.C. Cir. 1979) (MacKinnon, J., dissenting in part and concurring in part) (quoting David J. Scheffer, Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931, 1008 (1978)).
2. See generally Catherine Amirfar & Ashika Singh, *The Trump Administration and the “Unmaking” of International Agreements*, 59 HARV. INT'L L.J. 443, 444 (2018) (discussing “the balance of power between the President and Congress under the Constitution with respect to the termination of, or withdrawal from, international agreements”). Following the November 2016 election, the incoming Trump Administration declared its opposition to the TPP and formally withdrew by executive order on January 23, 2017. See Ellen Powell, *What Trump’s Vow to Quit TPP Trade Deal Means for Human Rights*, CHRISTIAN SCI. MONITOR (Nov. 22, 2016), <http://www.csmonitor.com/USA/Politics/2016/1122/What-Trump-s-vow-to-quit-TPP-trade-deal-means-for-human-rights> [https://perma.cc/QQ9J-YFZD]; see also Eric Bradner, *Trump’s TPP Withdrawal: 5 Things to Know*, CNN (Jan. 23, 2017, 2:52 PM), <https://www.cnn.com/2017/01/23/politics/trump-tpp-things-to-know/index.html> [https://perma.cc/VY2Y-2A7P] (describing the withdrawal). As discussed in Section IV.D, *infra*, the Trump Administration withdrew from the 1955 Treaty of Amity with Iran and the Optional Protocol to the Vienna Convention after the United States lost a provisional-measures ruling before the International Court of Justice. See Edward Wong & David E. Sanger, *U.S. Withdraws From 1955 Treaty Normalizing Relations With Iran*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/world/middleeast/us-withdraws-treaty-iran.html> [https://perma.cc/6KU3-3RJW]; see also Elena Chachko, *What to Make of the ICJ’s Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018), <https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case> [https://perma.cc/WJF6-JD58] (arguing that the ICJ ruling was “relatively balanced and does not affect the vast majority of sanctions the U.S. has and will re-impose”). The Trump Administration recently announced its intent to withdraw from the Universal Postal Union Treaty and the Intermediate Nuclear Forces Treaty. See David E. Sanger & William Broad, *U.S. to Tell Russia It Is Leaving Landmark I.N.F. Treaty*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/russia-nuclear-arms-treaty-trump-administration.html> [https://perma.cc/NW2V-ULSW]; Glenn Thrush, *Trump Opens New Front in His Battle with China: International Shipping*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/trump-china-shipping.html> [https://perma.cc/GY9A-KAMV].

Treaty Organization (NATO), the critical mutual defense alliance that the United States helped found almost forty years ago.<sup>3</sup>

If asked whether the President alone possesses a general, sweeping unilateral power to terminate every U.S. treaty in force, a layperson might well answer “no.” But among the legal academic community, the conventional wisdom seems to be “yes,” or at least “maybe.”<sup>4</sup> On closer study, however, that conventional wisdom rests not on constitutional text, structure, or Supreme Court precedent, but on the thin reed of historical practice that followed the Court’s summary disposition nearly four decades ago in *Goldwater v. Carter*.<sup>5</sup> In that case, the Court declined to review President Jimmy Carter’s unilateral termination of a

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3. See BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE* 135 (2018) (“Just do it. Just do it. Get out of NAFTA. Get out of KORUS. And get out of the WTO. We’re withdrawing from all three.” (quoting President Trump)); *see also id.* at 3 (describing how Gary Cohn, Director of the National Economic Council, removed a draft withdrawal letter from KORUS from the President’s desk and later told an associate, “I stole it off his desk . . . I wouldn’t let him see it. He’s never going to see that document. Got to protect the country.”); Bob Bryan, *Trump Reportedly Wants to Pull the US out of the WTO, A Move that Would Wreck the International Trade System*, BUS. INSIDER (June 29, 2018, 11:50 AM), <http://www.businessinsider.com/trump-leave-world-trade-organization-wto-2018-6> [<https://perma.cc/XC9N-XHBY>] (describing the President’s interest in withdrawing from the WTO); Ewen MacAskill, *Trump Claims Victory as NATO Summit Descends into Mayhem*, GUARDIAN (July 12, 2018, 1:16 PM), <https://www.theguardian.com/world/2018/jul/12/donald-trump-nato-summit-chaos-germany-attack-defence-spending> [<https://perma.cc/Q2V6-LRAJ>] (describing conflicting reports on whether the President threatened to withdraw from NATO).

4. See, e.g., *RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES* § 113 (AM. LAW INST., Tentative Draft No. 2, Mar. 20, 2017) [hereinafter *RESTATEMENT (FOURTH)*] (“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.” (emphasis added)). For further discussion of this concept, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 214 (2d ed. 1996) (“At the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty . . . .”); *see also* Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1625 (2018) [hereinafter Bradley, *Exiting CEA*s] (“[I]t is generally accepted—although not entirely settled—that the president has the unilateral authority to act for the United States in withdrawing the country from a treaty. This authority stems in part from the president’s power over diplomacy and role as head of state, as well as from longstanding historical practice.”); *id.* at 1644 (“[I]f presidents do have the legal authority to withdraw from Article II treaties, it is not clear why that authority would not extend to congressional-executive agreements.”); Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 773 (2014) [hereinafter Bradley, *Treaty Termination*] (“[T]oday it is widely (although not uniformly) accepted that presidents have a unilateral power of treaty termination.”). For additional discussion of this conventional wisdom, see *infra* Section III.A (“Historical Practice”).

5. 444 U.S. 996 (1979).

bilateral treaty with Taiwan in accordance with its terms, but—like the Constitution’s text—the Justices left undecided which branch of government has the power of treaty withdrawal, and under what circumstances.<sup>6</sup>

This Essay argues that the conventional wisdom is wrong. The President does not have a general unilateral power of treaty termination. *Goldwater* is a splintered nonjusticiability ruling, not controlling precedent on the merits of this question. The merits have now become a live judicial question because changes in the law of justiciability would allow a court today—unlike in *Goldwater*—to reach the merits of this issue. And on the merits, no blanket power authorizes a unilateral presidential power to terminate international agreements. The Constitution does not directly address treaty withdrawal. Nor does the relatively recent U.S. practice of permitting unilateral withdrawal confer a historical “gloss” suggesting that, as a constitutional matter, the President possesses such blanket unilateral authority.<sup>7</sup>

Given that the sitting President now actively considers disengaging from a wide range of international agreements, the time is ripe for both the academy and the courts to explore this issue afresh. A constitutional matter this important and complex cannot be addressed by a single rule that purports to be “transsubstantive,” in the sense of governing the mechanics of withdrawal, suspension, or termination of national participation from each and every international agreement addressing every subject matter.<sup>8</sup> On examination, the most apposite statement in *Goldwater* regarding the merits of treaty termination is the observation by four Justices of “the fact that different termination procedures may be appropriate for different treaties.”<sup>9</sup> That observation does not suggest a general rule

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6. *Id.* at 996.

7. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (noting that “systematic, unbroken, executive practice” provides a historical “gloss on ‘executive Power’” in Article II, if it has been “long pursued to the knowledge of the Congress and never before questioned”). For further discussion of historical gloss, see *infra* Section III.A.

8. As a general matter, this Essay uses the term “agreement” as an umbrella term to describe Article II treaties, congressional-executive agreements, sole executive agreements, and other agreements deployed by U.S. law, nearly all of which tend to function as “treaties” that create binding obligations under international law, subject to the Vienna Convention on the Law of Treaties. This Essay treats “withdrawal,” “suspension,” “abrogation,” and “termination” as related but not identical concepts. When one or two partners lawfully terminate or abrogate a bilateral agreement, it is dead. But when one partner lawfully withdraws from, or abrogates its legal duties to comply with, a multilateral treaty, the agreement continues, minus that partner. When one partner says it is “suspending” its commitment to a bilateral or multilateral agreement, it is not saying that it is leaving, just not fulfilling its agreement duties for now, with the consequence that it could later be held in breach or resume fulfillment of its international obligations.

9. 444 U.S. at 1003 (Rehnquist, J., joined by Burger, C.J., Stewart & Stevens, JJ., concurring).

authorizing unilateral presidential termination for all agreements. If anything, it should demand consideration of a commonsense “mirror principle,” whereby absent exceptional circumstances, the degree of congressional participation constitutionally required to exit any particular agreement should mirror the degree of congressional participation that was required to enter that agreement in the first place.<sup>10</sup>

Under the mirror principle, the Executive may terminate, without congressional participation, genuinely “sole” executive agreements that have lawfully been made without congressional input.<sup>11</sup> But the President may not entirely exclude Congress from the withdrawal or termination process regarding congressional-executive agreements or treaties that were initially concluded with considerable legislative input.<sup>12</sup> That principle would make Congress’s input necessary for disengagement even from such international agreements as the Paris Climate Agreement, which broadly implicate Congress’s commerce powers, and which—while never subjected to an up-or-down vote—were nevertheless enacted against a significant background of congressional awareness and support that implicitly authorized the presidential making, but not the unmaking, of climate change agreements.<sup>13</sup> Congress also should participate in an attempt to withdraw the United States even from such political agreements as the Iran Nuclear Deal (also known as the JCPOA), where the President is exercising plenary foreign commerce powers that were delegated by Congress and where the U.S. termination has now triggered actionable claims of violation of international law.<sup>14</sup>

In sum, the conventional wisdom must be re-examined. The policy stakes are simply too high to allow such a fundamental question to rest on an inapposite and outmoded case decided decades ago. This Essay thus closes by suggesting better policy mechanisms—which better reflect both changing legal doctrine and shifting political realities—to guide America’s process of agreement-unmaking in the future.

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10. See *infra* Section III.B.

11. See *infra* Section IV.A.

12. See *infra* Section IV.B. But see Bradley, *Exiting CEAs*, *supra* note 4 (challenging the claim that the President lacks unilateral authority to terminate congressional-executive agreements concluded with majority congressional approval).

13. See *infra* Section IV.C.

14. See *infra* Section IV.D.

## I. GOLDWATER AND THE “CONVENTIONAL WISDOM” REGARDING UNILATERAL WITHDRAWAL

Today’s conventional wisdom favoring unilateral presidential withdrawal from treaties is of surprisingly recent vintage. The Constitution empowers the President to “make Treaties, provided two thirds of the Senators present concur,” but it says nothing about which branch of government may unmake those treaties.<sup>15</sup> Yet as one commentator summarized after extensive historical review, “[w]hereas 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.”<sup>16</sup>

But standing alone, this breakdown of consensus favoring congressional involvement in treaty termination does not explain the dramatic shift in the opposite direction, toward a conventional wisdom *favoring* unilateral termination. That sea-change was driven by the Supreme Court’s 1979 ruling in *Goldwater v. Carter*. In *Goldwater*, the Court dismissed a challenge by a group of Senators, led by Barry Goldwater, to President Carter’s unilateral termination of the 1954 Taiwan Mutual Defense Treaty. Since then, the Reporters of the *Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties* note, “the United States has terminated dozens of treaties, and almost all of the terminations have been accomplished by unilateral presidential action.”<sup>17</sup> But closer study reveals that neither *Goldwater* nor this recent historical practice offer sufficient legal basis to support a blanket, unilateral presidential power to terminate any and all international agreements.

### A. The Court’s Decision in *Goldwater v. Carter*

On December 15, 1978, President Carter announced his intention to recognize and establish diplomatic relations with the People’s Republic of China and to terminate, as of January 1, 1980, the 1954 Mutual Defense Treaty between the

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<sup>15</sup>. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

<sup>16</sup>. Bradley, *Treaty Termination*, *supra* note 4, at 773.

<sup>17</sup>. RESTATEMENT (FOURTH), *supra* note 4, § 113, Reporters’ Note 3. The Reporters of this *Restatement* section were Professors Curtis Bradley of Duke, Sarah Cleveland of Columbia, and Edward Swaine of George Washington University. I served as an Adviser to the Fourth Restatement and as a member of the American Law Institute Council, which passed only on the black letter and comments of the provisions under discussion.

United States and Taiwan.<sup>18</sup> Seven U.S. Senators and eight Members of the House of Representatives sued the President and the Secretary of State in the U.S. District Court for the District of Columbia. They sought an injunction and a declaration that the President's attempt to unilaterally terminate the treaty was "unconstitutional, illegal, null and void" unless "made by and with the full consultation of the entire Congress, and with either the advice and consent of the Senate, or the approval of both Houses of Congress."<sup>19</sup>

When the 96th Congress opened, several Senators introduced resolutions asserting that the President had encroached on Congress's constitutional role with respect to treaty termination generally and the Taiwan Mutual Defense Treaty in particular. In October 1979, the district court held that to be effective under the Constitution, the President's notice of termination had to receive the approval of either two-thirds of the Senate or a majority of both houses of Congress.<sup>20</sup> A fragmented D.C. Circuit, sitting *en banc*, heard the case on an expedited basis on November 13 and just seventeen days later ruled for the President.<sup>21</sup> Declining to treat the matter as a political question, the circuit court instead held on the merits that the President had not exceeded his authority in terminating the bilateral treaty in accordance with its terms.<sup>22</sup> Pressed to decide the case before the designated January 1, 1980 termination date, the Supreme

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18. David J. Scheffer, Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931, 931 (1978). President Carter's notice of termination, signed by the Acting Secretary of State on December 23, 1978, was transmitted that same day to the ROC Ministry of Foreign Affairs in Taipei and to the Embassy of the ROC in Washington. For a detailed account of this notification and its historical background, see *id.* at 937-66.

19. Edward M. Gaffney, Jr., *Goldwater v. Carter: The Constitutional Allocation of Power in Treaty Termination*, 6 YALE J. INT'L L. 81, 82 (1980) (quoting Complaint for Declaratory and Injunctive Relief at 14-15, *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979)).

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

21. 617 F.2d 697, 697 (D.C. Cir. 1979) (*en banc*) (per curiam).

22. *Id.* Chief Judge Wright, joined by Judge Tamm, concurred in the result of dismissal for lack of standing. *Id.* at 709 (Wright, C.J., concurring in the result). Judge MacKinnon concurred in part but would have forbidden the termination without the consent of a majority of both houses of Congress. *Id.* at 739 (MacKinnon, J., dissenting in part and concurring in part). Plaintiffs-appellees sought certiorari on December 3—only 29 days before the notice of termination was to take effect—and three days later, the Solicitor General filed a brief for respondents in opposition. A week later, on December 13, the Supreme Court granted the petition, vacated the judgment, and remanded to the district court with directions to dismiss the complaint. For a review of the *Goldwater* litigation's frantic timeline, see Edward M. Gaffney, Jr., *Goldwater v. Carter: The Constitutional Allocation of Power in Treaty Termination*, 6 YALE J. INT'L L. 81, 91-92 (1979). For further analysis of the D.C. Circuit's reasoning, see Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 257-61 (2013).

Court issued no majority opinion. Instead, in a 6-3 per curiam decision, the Court dismissed the complaint without oral argument as nonjusticiable.<sup>23</sup>

The Justices splintered around several rationales, with only one Justice reaching the merits. Four Justices—Chief Justice Burger and Justices Rehnquist, Stewart, and Stevens—found that the case raised a political question.<sup>24</sup> Justice Powell agreed that the case should be dismissed, but on the grounds that it was not ripe and because it was unknown “whether there ever will be an actual confrontation between the Legislative and Executive branches” constituting a “constitutional impasse.”<sup>25</sup> Justice Brennan voted on the merits to uphold the President’s power to terminate the Taiwan treaty, based on the peculiar fact that the case involved derecognition of a foreign government, an issue over which he argued the President exercises textual plenary constitutional power.<sup>26</sup> Justice Marshall simply concurred in the dismissal without explaining why.<sup>27</sup> Only Justices Blackmun and White dissented, voting that the Court should “set the case for oral argument [to] give it the plenary consideration it so obviously deserves.”<sup>28</sup>

#### *B. The Thin Goldwater Precedent*

Not surprisingly, *Goldwater* has been consistently overread, particularly by executive branch lawyers. On its face, *Goldwater* is not a precedent supporting a unilateral presidential power of treaty termination. Rather, *Goldwater* simply supports the *nonreviewability* of one attempted unilateral termination, and, even then, on splintered grounds: four finding a political question and one finding nonripeness.<sup>29</sup> Even at the time, *none* of the nine Justices embraced a rule favoring a general unilateral transsubstantive power of presidential termination. To

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<sup>23.</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>24.</sup> *Id.* at 1002 (Rehnquist, J., joined by Burger, C.J., Stewart and Stevens, JJ., concurring).

<sup>25.</sup> *Id.* at 997, 998 (Powell, J., concurring).

<sup>26.</sup> *See id.* at 1006-07 (Brennan, J., dissenting).

<sup>27.</sup> *Id.* at 996 (Marshall, J., concurring in the result of dismissal).

<sup>28.</sup> *Id.* at 1006 (Blackmun, J., dissenting) (“In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness.”).

<sup>29.</sup> It remains unclear whether after full briefing and argument the *Goldwater* Court could have mustered a majority to sustain dismissal on political question grounds, much less on the merits. Both Justices Powell and Brennan thought the issue of treaty termination did not present a political question. *See id.* at 998, 1001 (Powell, J., concurring in the judgment); *id.* at 1006 (Brennan, J., dissenting). Justice Powell concurred in dismissal but strenuously dissented from Justice Rehnquist’s claim on behalf of four Justices that the case involved a political question. *Id.* at 998, 1001 (Powell, J., concurring in the judgment). Justices Blackmun and

the contrary, four Justices observed “that different termination procedures may be appropriate for different treaties,” which logically should have led to consideration of a more context-dependent rule such as the mirror principle discussed further below.<sup>30</sup> Only one Justice opined that the President had the constitutional power to terminate even the particular treaty at issue in that case, and this was only because the unilateral termination of the bilateral treaty happened to have been conducted both in accordance with international law *and* within the scope of the President’s exclusive constitutional authority.<sup>31</sup>

Fairly read, *Goldwater* offers no precedent on the merits regarding a claimed general unilateral right to terminate bilateral treaties in all circumstances. It says nothing at all about three different factual scenarios: (1) terminations of or withdrawals from agreements that are not bilateral, but rather *multilateral*; (2) terminations or withdrawals that arguably are *not* implemented in accordance with the agreement’s terms or that otherwise arguably violate international law;<sup>32</sup> or (3) terminations or withdrawals that are carried out within the scope of concurrent legislative-executive authority or *Congress’s* plenary authority, such as over international trade or foreign commerce, particularly when those agreements were initially adopted against a general background of congressional awareness and approval.<sup>33</sup> At most, *Goldwater* suggests only that, for a variety of reasons, one particular presidential treaty termination decision should not be judicially reviewed. But in the four intervening decades, the law on the issue of justiciability has significantly changed.

## II. JUSTICIABILITY LAW SINCE *GOLDWATER*

The discussion in *Goldwater* addressed itself almost entirely to the justiciability issues of standing, ripeness, and political question. But doctrinal develop-

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White kept all options open pending fuller briefing, and Justice Marshall gave no reasons, but pointedly declined to join any of the other Justices’ opinions.

<sup>30</sup>. *Id.* at 1003 (Rehnquist, J., concurring) (Burger, Stewart, Stevens, JJ., joining in the concurrence).

<sup>31</sup>. *See id.* at 1006–07 (Brennan, J., dissenting). Justice Brennan also strenuously denied that the case involved a political question, a position given additional weight by the fact that he had authored the foundational political question ruling, *Baker v. Carr*. 369 U.S. 186 (1962). *See infra* note 49. As noted below, when withdrawal is not conducted in accordance with international law nor within the scope of the President’s exclusive constitutional authority, as in the case of the Iran Nuclear Deal, it is unclear why Congress should be entirely excluded from the termination decision. *See infra* Section IV.D.

<sup>32</sup>. *See infra* Section IV.D.

<sup>33</sup>. *See infra* Section IV.C.

ments during the four intervening decades suggest that next time around, plaintiffs should be able to reach the merits to challenge an attempted unilateral presidential treaty termination.

#### A. Standing and Ripeness

In *Goldwater*, five Justices voted to dismiss based on three threshold inquiries: first, whether Congress as a whole had challenged the President's action; second, if not, whether the plaintiffs had standing to bring the action; and third, whether the case was genuinely ripe for decision absent what Justice Powell's concurrence deemed a true "constitutional impasse."<sup>34</sup> Precisely how these issues will be answered in any particular case depend upon the particular subject matter and the agreement at issue.

For example, Congress has recently introduced two bipartisan bills that would prevent President Trump from withdrawing the United States from NATO without congressional consent.<sup>35</sup> Should either of those bills receive a majority vote in both houses, and should the President nevertheless attempt to withdraw the United States unilaterally from NATO, there can be little doubt that Congress, as a whole, will have properly challenged the President's action; the political branches will have reached the kind of "constitutional impasse" that Justice Powell envisioned as necessary for ripeness.

Recently, the threshold issues of standing and ripeness have arisen most immediately with respect to the Paris Climate Agreement, from which the Trump Administration has announced its pending withdrawal, to start in November

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34. *Goldwater*, 444 U.S. at 997 (Powell, J., concurring).

35. On July 26, 2018, Congressmen Panetta (D-CA) and Knight (R-CA) introduced the No NATO Withdrawal Act, H.R. 6530, 115th Cong., § 3 (2018) ("It is the sense of Congress that (1) the President shall not unilaterally withdraw the United States from NATO; and (2) the case *Goldwater v. Carter* is not controlling legal precedent with respect to the unilateral withdrawal of the United States from a treaty.") [hereinafter No NATO Withdrawal Act]. Just days later, Senators Graham (R-SC), Menendez (D-NJ), Gardner (R-CO), Cardin (D-MD), McCain (R-AZ), and Shaheen (D-NH) introduced the Defending American Security from Kremlin Aggression Act of 2018, S. 3336, 115th Cong. (2018) (specifying, *inter alia*, a requirement for two-thirds of the Senate to vote in favor in order to leave NATO); *see also* Karoun Demirjian, *Bipartisan Bill Would Prevent Trump from Exiting NATO Without Senate Consent*, WASH. POST (July 26, 2018), [https://www.washingtonpost.com/powerpost/bipartisan-bill-would-prevent-trump-from-exiting-nato-without-senate-consent/2018/07/26/4ca1b206-9106-11e8-bcd5-9d91c784c38\\_story.html](https://www.washingtonpost.com/powerpost/bipartisan-bill-would-prevent-trump-from-exiting-nato-without-senate-consent/2018/07/26/4ca1b206-9106-11e8-bcd5-9d91c784c38_story.html) [<https://perma.cc/2JEP-4T6P>]; Press Release, Senator Lindsey Graham, Graham, Menendez, Gardner, Cardin, McCain, Shaheen Introduce Hard-Hitting Russia Sanctions Package (Aug. 2, 2018), <https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=E4AC5E4C-EFD0-4F25-9808-745E1737EF65> [<https://perma.cc/S4UR-RF8E>].

2019.<sup>36</sup> If that attempted withdrawal were challenged in court, standing and ripeness would plainly be satisfied. Under its 2007 decision in *Massachusetts v. EPA*, the Supreme Court found that—in part due to the “special solicitude” granted to a sovereign state in a standing inquiry—a state had standing to sue the EPA to defend its “stake in protecting its quasi-sovereign interests” over potential damage caused to its shoreline as a result of global warming.<sup>37</sup> Nothing in that decision should limit the standing of private citizens—such as local land-owners suffering from lost property value from diminishing coastlines—to challenge a national climate change policy decision that exacerbated sea-level rise by accelerating the rate of melting of the polar icecap.<sup>38</sup> This would constitute both injury in fact and redressable injury for the purposes of the Supreme Court’s current environmental standing test stated in *Lujan v. Defenders of Wildlife*.<sup>39</sup> By enduring measurable sea-level rise, affected state and local governmental and nongovernmental plaintiffs could argue that they suffered a concrete and particularized, actual and imminent injury in fact that is fairly traceable to President Trump’s attempt to withdraw from the global collaborative efforts to address

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36. See generally *infra* Section IV.C (discussing the Paris Climate Agreement).

37. 549 U.S. 497, 520, 523 (2007). Justice Stevens, writing for the Court, held that

[b]ecause the Commonwealth [of Massachusetts] “owns a substantial portion of the state’s coastal property,” it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be “either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.”

*Id.* at 522-23 (citations omitted) (quoting the declaration of a Massachusetts environmental official).

38. In many parts of the country, sea level rise has already caused local homeowners to lose current value on their homes. See John Tibbetts & Chris Mooney, *Sea Level Rise Is Eroding Home Value, and Owners Might Not Even Know It*, WASH. POST (Aug. 20, 2018), [https://www.washingtonpost.com/national/health-science/sea-level-rise-is-eroding-home-value-and-owners-might-not-even-know-it/2018/08/20/ff63fa8c-a0d5-11e8-93e3-24d1703d2a7a\\_story.html](https://www.washingtonpost.com/national/health-science/sea-level-rise-is-eroding-home-value-and-owners-might-not-even-know-it/2018/08/20/ff63fa8c-a0d5-11e8-93e3-24d1703d2a7a_story.html) [<https://perma.cc/C2KL-XAYM>].

39. 504 U.S. 555, 560-61 (1992) (“[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’’’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ By particularized, we mean that the injury must affect the plaintiff in a personal and individual way. Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’’’ (alterations in original) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 38, 43 (1976))).

those concerns embodied in the Paris Agreement. This injury would be redressable by a favorable Court decision requiring legislative input before such a withdrawal could be finalized.<sup>40</sup> Such a matter would also be ripe for immediate judicial consideration, since potential plaintiffs could document that measurable sea level rise is occurring in real time.

Whether Congress could establish ripeness in a lawsuit attempting to require legislative participation in disengagement from the Paris Agreement would depend on two factors: first, the state of the law regarding congressional standing, and second, the state of enacted legislation at the time of the lawsuit regarding the Paris Agreement specifically. With respect to the first factor, the Supreme Court has only twice directly confronted the issue of legislative standing, recently rejecting it in *Raines v. Byrd*,<sup>41</sup> while earlier accepting it in *Powell v. McCormack*.<sup>42</sup> However, the D.C. Circuit—the most likely venue for a congressional suit—has historically been more inclined to recognize congressional standing on a discretionary basis.<sup>43</sup> The D.C. Circuit’s inclinations could draw support from a recent Supreme Court decision, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which found state legislative standing to sue—with reasoning arguably authorizing congressional standing as well—when “an institutional plaintiff asserting an institutional injury” commences an “action after authorizing votes in both of its chambers.”<sup>44</sup> Thus, sometime before November 4, 2019—the earliest date the United States could give notice of its withdrawal from the

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40. As Justices Blackmun and White noted in *Goldwater*, “if the President does not have the power to terminate the treaty . . . the notice of intention to terminate surely has no legal effect.” *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Blackmun, J., dissenting in part).

41. 521 U.S. 811 (1997) (holding that individual members of Congress do not have standing to litigate the constitutionality of laws that they voted against when they had suffered no injury distinct from that affecting Congress as a whole). *Raines* narrowed the doctrine of legislative standing to cases where “legislators whose votes would have been *sufficient to defeat (or enact)* a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Id.* at 823 (emphasis added).

42. 395 U.S. 486 (1969). There, the Court allowed a suit against the House Speaker by a Congressman who had been excluded from the House of Representatives on charges of corruption, in part because the House had ceased to pay the Congressman’s salary.

43. After *Raines*, the D.C. Circuit suggested that the plaintiffs must “allege that the necessary majorities in the Congress voted to block” the executive action in question in order to claim that their votes as legislators “were effectively nullified by the machinations of the Executive.” *Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999); *accord* *United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (holding that Congress had standing to sue the President for violating federal law). For a discussion of the relevant D.C. Circuit doctrine, see Jonathan R. Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 358–63 (2015).

44. 135 S. Ct. 2652, 2664 (2015).

Paris Agreement—a similar bill could be introduced and voted on in one or both houses of Congress with respect to the Paris Agreement, and if enacted, the ripeness threshold would be met.

### B. The Political Question Doctrine

In the wake of *Goldwater*, several lower courts followed the lead of the *Goldwater* plurality by finding nonjusticiable suits challenging executive power to unilaterally withdraw from treaties.<sup>45</sup> But in an important recent case, *Zivotofsky v. Clinton* (*Zivotofsky I*), the Supreme Court declined to apply the political question doctrine to bar review of the President’s power to recognize foreign states in the face of a contrary congressional statute.<sup>46</sup> Later, in *Zivotofsky v. Kerry* (*Zivotofsky II*), the Court held on the merits that the same statute was unenforceable because it was an unconstitutional intrusion on the President’s exclusive power of recognition.<sup>47</sup>

Chief Justice Roberts’s opinion for the *Zivotofsky I* Court called the political question doctrine a “narrow” exception to the general rule that the judiciary has the “responsibility to decide cases properly before it.”<sup>48</sup> The opinion notably omitted mention of the six-factor political question test originally introduced in *Baker v. Carr*.<sup>49</sup> Instead, the Court narrowed that test to its first two “textual”

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45. See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (dismissing a challenge by thirty-two congressmen to President Bush’s decision to withdraw from the Anti-Ballistic Missile Treaty with Russia for raising a nonjusticiable political question); *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1199 (D. Mass. 1986), *aff’d on other grounds*, 814 F.2d 1 (1st Cir. 1987) (holding with regard to President Reagan’s unilateral termination of the United States’ Treaty of Friendship, Commerce, and Navigation with Nicaragua that a “[constitutional] challenge to the President’s power vis-a-vis treaty termination raise[s] a nonjusticiable political question”); *see also generally Eichensehr, supra* note 22, at 261-62.

46. 566 U.S. 189 (2012).

47. 135 S. Ct. 2076, 2091 (2015). Section 214 of the Foreign Relations Authorization Act, enacted in 2002, allowed passports issued by the U.S. State Department to list “Jerusalem” or “Jerusalem, Israel” as the place of birth. The parents of a boy born in Jerusalem sued Secretary of State Hillary Clinton, invoking § 214 to challenge the State Department’s long-held policy that no country holds sovereignty over Jerusalem. In *Zivotofsky I*, the D.C. Circuit held that the case presented a nonjusticiable political question, but the Supreme Court disagreed and remanded. 566 U.S. at 201-02. The D.C. Circuit then held on the merits that the statute was an unconstitutional violation of the executive branch’s exclusive recognition power, a ruling that Justice Kennedy, writing for the majority, went on to affirm in *Zivotofsky II*, 135 S. Ct. at 2091.

48. *Zivotofsky I*, 566 U.S. at 194-95.

49. 369 U.S. 186 (1962). The *Baker* Court famously introduced the following six-factor test for political question determinations:

elements, explaining that a political question exists only “[1] where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it.’”<sup>50</sup>

Under *Zivotofsky I*’s narrowed two-pronged political question test, treaty termination is not a political question. First, it is not a decision “textually committed” by the Constitution to a branch other than the judiciary. Article II, Section 2 of the Constitution authorizes the President to “make” treaties with the advice and consent of two-thirds of the Senators present,<sup>51</sup> but no constitutional text expressly authorizes any branch to *unmake* such treaties, whether through suspension, termination, or withdrawal. Second, there is no “lack of judicially discoverable and manageable standards for resolving” the question. A court need only decide whether the President’s action – standing alone – is legally sufficient to terminate an international treaty obligation. As Justice Powell noted in *Goldwater*, in such a case, “the Court would interpret the Constitution to decide whether congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law[,] an inquiry [that] demands no special competence or information beyond the reach of the Judiciary.”<sup>52</sup>

Whether the President may enter or withdraw from any agreement against the will of Congress may not be an easy case; surely, it would be a political case. But that does not make the contested issue a *political question*. To decide it, a court need only apply entirely familiar principles of constitutional interpretation – text, structure, and historical evidence about the nature of law and the constitutional powers at issue. As proof, when the *Zivotofsky* case returned to the Supreme Court a few years after the justiciability ruling, following full examination before the D.C. Circuit, the *Zivotofsky II* majority used precisely

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Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

<sup>50</sup>. *Zivotofsky I*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

<sup>51</sup>. U.S. CONST. art. II, § 2.

<sup>52</sup>. *Goldwater v. Carter*, 444 U.S. 996, 1000 (Powell, J., concurring).

these “judicially manageable tools” to hold that the passport statute in question violated the President’s exclusive recognition power.<sup>53</sup>

In *Zivotofsky II*, the Court affirmatively answered the question whether a statute enacted by Congress had unconstitutionally encroached on the President’s foreign affairs power. The parallel question here would be whether the President’s unilateral termination of the agreement at issue unconstitutionally encroached on Congress’s foreign affairs power. That question should now fall outside the Court’s newly limited political question doctrine. Indeed, if the Court can decide on the merits such thorny separation-of-powers issues as were presented in *Marbury v. Madison*,<sup>54</sup> *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>55</sup> *Myers v. United States*,<sup>56</sup> *INS v. Chadha*,<sup>57</sup> *Morrison v. Olson*,<sup>58</sup> and *Zivotofsky*, it should be equally competent to decide the merits of the fundamental constitutional question of whether the President’s unitary action is legally sufficient to bind other branches of government and the world.<sup>59</sup> After all, as Chief Justice Roberts reminded us in *Zivotofsky I*, enforcing the separation of powers “is what courts do.”<sup>60</sup>

In short, today, a contested presidential effort to terminate an important international agreement would not be insulated from judicial review. Fairly read, *Goldwater* itself offers slim precedent on the merits to support the legality of such a unilateral termination. Whatever constitutional case exists for the President’s power to unilaterally terminate any agreement cannot rest on *Goldwater* or any other recent Supreme Court decision. Instead, it must rest exclusively on recent historical practice.

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53. See *Zivotofsky II*, 135 S. Ct. 2076, 2086 (2015). Previously, only one Justice, Justice Brennan, would have decided *Goldwater* on a similar proposition. See *supra* note 26 and accompanying text.

54. 5 U.S. (1 Cranch) 137 (1803).

55. 343 U.S. 579 (1952).

56. 272 U.S. 52 (1926).

57. 462 U.S. 919 (1983).

58. 487 U.S. 654 (1988).

59. Cf. *Goldwater v. Carter*, 444 U.S. 996, 1001 (Powell, J., concurring) (“In my view, the suggestion that this case presents a political question is incompatible with this Court’s willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another.”).

60. *Zivotofsky v. Clinton (Zivotofsky I)*, 566 U.S. 189, 201 (2012).

### III. MAY THE EXECUTIVE UNILATERALLY WITHDRAW FROM ANY INTERNATIONAL AGREEMENT?

#### A. Historical Practice and “Functional Considerations”

Historical practice offers the strongest argument to support expansive application of a unilateral termination “rule.” Since the 1930s, Presidents have unilaterally terminated several international agreements, including “a few dozen” since *Goldwater*.<sup>61</sup> But as the Reporters to the recent *Restatement (Fourth) of the Foreign Relations Law of the United States* correctly noted, “[m]ost of these terminations have not generated controversy in Congress.”<sup>62</sup>

The mere fact that the President may have unilaterally terminated agreements that Congress did not care about tells us little about what would happen if Congress were to actively *contest* a withdrawal, as in the NATO example discussed above. In fact, the appellate briefs in *Goldwater* debated whether there were genuinely more than three contested treaty withdrawals in all of American history.<sup>63</sup> Admittedly, the Supreme Court has at times recognized “historical practice” as a basis for normative reinterpretation of structural constitutional provisions.<sup>64</sup> But as Justice Frankfurter’s famous discussion of historical practice in *Youngstown* made plain, “systematic, unbroken, executive practice” places a historical “gloss on the ‘executive power’” in Article II, only if—

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61. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1224 (2018); see Office of the Legal Adviser of the U.S. Dep’t of State, *Digest of United States Practice in International Law*, INT’L L. INST. 202-06 (Sally J. Cummins & David P. Stewart eds., 2002), <https://www.state.gov/documents/organization/139638.pdf> [https://perma.cc/4KGC-8F7K] (listing twenty-three bilateral treaties and seven multilateral treaties terminated by presidential action since the termination of the Taiwan treaty). See generally Bradley, *Treaty Termination*, *supra* note 4, at 821 (“[W]ith the important exception of the debate over the termination of the Taiwan Treaty, Congress has not seriously opposed exercises of this presidential authority.”).

62. RESTATEMENT (FOURTH), *supra* note 4, § 113 Reporters’ Note 3. As the Reporter of the *Restatement (Third)*, Louis Henkin, put it, “[c]ontroversy as to who has authority to terminate treaties has been infrequent, if only because the United States has not often been disposed to terminate treaties.” HENKIN, *supra* note 4, at 213.

63. Compare Brief for the United States in Opposition to Certiorari at 28, *Goldwater v. Carter*, 444 U.S. 996 (1979) (No. 79-856), with Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 38 n.20, *Goldwater v. Carter*, 444 U.S. 996 (1979) (No. 79-856). In December 1979, Judge MacKinnon argued that there had only been two genuinely unilateral terminations up to that point. *Goldwater v. Carter*, 617 F.2d 697, 734 (D.C. Cir. 1979) (MacKinnon, J., concurring in part and dissenting in part).

64. See, e.g., *Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2091 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (acknowledging, in the context of the Recess Appointments Clause, that “*in interpreting the Clause, we put significant weight upon historical practice*” (emphasis added)).

like adverse possession in property law<sup>65</sup>—that practice has been “long pursued to the knowledge of the Congress and *never before questioned* . . . .”<sup>66</sup> Even four decades of consistent executive practice would not rise to the level of historical “gloss,” unless the other affected branch of government “acquiesced” in the legality of the executive acts by some unmistakable affirmative act. This plainly would not be the case with respect to important multilateral agreements that enjoy bipartisan congressional support, such as the NATO agreement.

Even more glaring, no statutory provisions currently require the President to notify Congress of an executive decision to terminate or withdraw from any treaty or international agreement.<sup>67</sup> Nor is there any easily available listing of agreements or treaties that may have been unilaterally terminated.<sup>68</sup> Although the State Department Legal Adviser’s annual *Digests of United States Practice in International Law* voluntarily report on some terminations, there is no legal requirement that the Office of the Legal Adviser or the State Department do so, and the *Digests* are not published until after the incidents they describe.<sup>69</sup> Finally, the 1972 Case-Zablocki Act,<sup>70</sup> which ostensibly requires the executive branch to notify Congress of all foreign agreements, has prominently failed to ensure the complete reporting of all agreements and political commitments that Presidents may actually make.<sup>71</sup> Thus, following Trump’s recent “one-on-one” Helsinki meeting with Russian President Vladimir Putin, no one other than President Trump, Putin, or their interpreter knew for sure whether Trump had made or attempted to make, suspend, terminate, abrogate, or withdraw from any treaties

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65. Cf. Ruth Lee Johnson, *The Shocking Law of Adverse Possession*, PSYCHOL. TODAY, (May 7, 2018), <https://www.psychologytoday.com/us/blog/so-sue-me/201805/the-shocking-law-adverse-possession> [<https://perma.cc/H38R-WDCR>].

66. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasis added).

67. See Bradley & Goldsmith, *supra* note 60, at 1293.

68. See *The President, Congress, and Shared Authority Over International Accords, Hearing Before the S. Foreign Relations Comm.*, 115th Cong. 4 (2017) (statement of Curtis A. Bradley, William Van Alstyne Professor, Duke Law School), [https://www.foreign.senate.gov/imo/media/doc/120517\\_Bradley\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/120517_Bradley_Testimony.pdf) [<https://perma.cc/RJM8-M3YZ>] (“[T]here is currently no mandated reporting of presidential decisions to suspend, terminate, or withdraw from treaties, and no readily accessible catalogue of terminated agreements.”).

69. See, e.g., Office of the Legal Adviser, *Digest of United States Practice in International Law 2017*, U.S. DEP’T OF STATE (CarrieLyn D. Guymon ed., 2017), <https://www.state.gov/documents/organization/284000.pdf> [<https://perma.cc/B8WM-NM6N>].

70. Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b).

71. See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 166-67 (2009).

or agreements with Russia.<sup>72</sup> It would be very odd indeed to treat as accepted “customary constitutional practice” executive branch activity in which Congress could not possibly have “acquiesced” because it was entirely unaware.

Accordingly, the text of Section 113 of the recent draft of the *Restatement (Fourth) of the Foreign Relations Law* regarding “Authority to Suspend, Terminate, or Withdraw from Treaties” carefully states that “[a]ccording 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 . . . .”<sup>73</sup> The accompanying Comment makes clear that “[t]he Supreme Court has not resolved the constitutional authority to terminate a treaty.”<sup>74</sup> Thus, the *Restatement (Fourth)* rests its acknowledgement of presidential authority exclusively on *historical practice*. The question is how “established” that practice really is.

Like *Goldwater* itself, the *Restatement*’s black letter comes with significant limitations. First, as discussed further below with respect to the Iran Nuclear Deal, whatever unilateral termination power may be recognized by historical practice, the *Restatement* does not recognize it as extending to unilateral acts by the President to suspend, terminate, or withdraw from treaties *not* in accordance with their terms or otherwise not in accordance with international law.<sup>75</sup> Second, the *Restatement* nowhere “suggest[s] that Congress or the Senate lack the ability to limit suspension, termination, or withdrawal,” for example, by the No NATO Withdrawal Act described above.<sup>76</sup> Third, the accompanying Reporters’ Notes reaffirm that “[a]lthough historical practice supports a unilateral presidential power to suspend, terminate, or withdraw the United States from treaties, it does not establish that this is an *exclusive* presidential power.”<sup>77</sup> Thus, if the President were to attempt a treaty termination within zones of either concurrent congressional-executive foreign affairs authority or exclusive legislative power—such as the foreign commerce power<sup>78</sup>—the Senate could presumably limit

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72. Gregory H. Fox, *Must the Trump Administration Report Any Agreements Reached at Helsinki to Congress?* OPINIO JURIS (July 24, 2018, 12:11 PM), <http://opiniojuris.org/2018/07/24/must-the-trump-administration-report-any-agreements-reached-at-helsinki-to-congress> [https://perma.cc/7A4R-E7EJ].

73. RESTATEMENT (FOURTH), *supra* note 4, § 113 (emphasis added).

74. *Id.* at cmt. b.

75. *Id.* at cmt. c; *see infra* Section IV.D.

76. *Id.* at cmt. d; *see id.* at Reporters’ Note 6.

77. *Id.* at Reporters’ Note 6 (emphasis added); *see also* *Techt v. Hughes*, 229 N.Y. 222, 243 (1920), *cert. denied*, 254 U.S. 643 (1920) (Cardozo, J.) (The “President and Senate may denounce the treaty, and thus terminate its life.”).

78. U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

executive discretion pre-emptively in its advice and consent to a particular treaty, as could Congress, by enacting a “no unilateral exit” statute with respect to that international agreement.

Apart from historical practice, the only other support offered for the *Restatement (Fourth)*’s black letter is that “structural and functional considerations are consistent with the general ability of the President to act unilaterally, as it has been exercised in practice.”<sup>79</sup> But looked at from a dynamic perspective, this statement no longer seems true. If anything, structural and functional considerations now cut the other way. As a matter of constitutional structure, the foreign affairs power is generally a power shared: unilateral powers are the exception, not the rule, so whenever the Constitution’s text does not explicitly assign a plenary power to one branch, the multiple, overlapping grants of foreign affairs authority should presumptively dictate that powers be shared between Congress and the Executive.<sup>80</sup>

As a functional matter, an overbroad unilateral executive withdrawal power would not only risk overly hasty, partisan, or parochial withdrawals by Presidents, but would also tend to weaken systemic stability and the negotiating credibility and leverage of *all* Presidents. The most prominent recent example is President Trump’s abrupt withdrawal from the Iran Nuclear Deal at the precise moment that he is attempting to negotiate a similar denuclearization deal with North Korea.<sup>81</sup> Whatever functional sense a cross-cutting *Goldwater* approach—strong unilateral presidential termination rights coupled with minimal judicial review—might have made when first articulated, the world has plainly changed in ways that call into question its normative logic. Back when “politics stopped at the water’s edge”—and a presumption of basic foreign policy continuity dominated whenever the White House changed hands—academics and justices might well have believed that their approach would *minimize* foreign policy conflict and make the United States *more* compliant overall with international norms. But the rise of a post-Cold War political era marked by radical foreign policy discontinuities from Presidents Clinton to Bush to Obama, and now to Trump, has dramatically undermined this assumption.<sup>82</sup> As the current moment illustrates well, unless

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79. RESTATEMENT (FOURTH), *supra* note 4, § 113, cmt. d.

80. See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69-71 (1990).

81. See HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 471-81 (2018).

82. For a discussion of the “life cycle” of legal theories and how “[p]rescriptive legal theories . . . become not only increasingly complicated but also increasingly compromised,” see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1819 (2016).

blessed by Congress in some fashion, unilateral presidential withdrawals based on individual presidential caprice are highly disruptive of both foreign (and increasingly domestic) policy. That very disruptiveness and unpredictability will, in turn, make it harder for future Presidents and Congresses to negotiate valuable international agreements.

Perhaps most important, in separation-of-powers disputes, such functional considerations have not historically proven determinative in dictating structural answers to questions of constitutional interpretation. In *INS v. Chadha*, for example, the Court famously invalidated the legislative veto, even in the face of longstanding congressional practice in using the device.<sup>83</sup> Although 295 legislative vetoes had been inserted into nearly 200 statutes since 1932,<sup>84</sup> Chief Justice Burger held not only that the matter was justiciable,<sup>85</sup> but also that whether

a given law or procedure is efficient, convenient, and *useful in facilitating functions of government*, standing alone, will not save it if it is contrary to the Constitution. . . . [P]olicy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised.<sup>86</sup>

In sum, the historical practice is far from “established” in constitutional law. The best reading of that practice is that *Goldwater* has functioned as a piece of “quasi-constitutional custom” that is “perennially subject to revision.”<sup>87</sup> Much of the more recent historical practice of unilateral presidential termination since *Goldwater* can be attributed to path-dependence and conventional wisdom, rather than to serious substantive review of the constitutional arguments on the

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**83.** 462 U.S. 919, 944 (1983) (“Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government, and our inquiry is sharpened, rather than blunted, by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.”).

**84.** *Id.* at 944-45.

**85.** *Id.* at 942-43 (“The presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts simply because the issues have political implications . . . .”).

**86.** *Id.* at 944-45 (emphasis added).

**87.** KOH, *supra* note 80, at 70-71 (“These customary rules represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters . . . . At the same time, however, both the informal process that governs the creation of these customary norms and the difficulties inherent in establishing their existence suggest that they should have only persuasive, not conclusive, force as to what the constitutional allocation of authority in foreign affairs should be . . . . [Hence] *this large body of quasi-constitutional custom . . . is perennially subject to revision.*” (emphasis added)).

merits. Any rule suggested by the most recent historical practice could be swiftly revised either by judicial decision or by altered interbranch practice going forward.<sup>88</sup> In the modern era, an agreement-specific “mirror” principle—requiring parity of constitutional authority for entry and exit from an international agreement—represents a far better functional reading of the Constitution than a claimed general unilateral right of the president to terminate any and all international agreements.

### B. *The Mirror Principle in Comparative Constitutional Practice*

Of course, the constitutional issue of treaty exit arises not just in the United States, but in every other country in the world. As Justice Breyer noted nearly two decades ago, the Supreme Court “has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”<sup>89</sup> In *Printz v. United States*, he elaborated that the “experience [of other nations] may . . . cast an *empirical light* on the consequences of different solutions to a common legal problem.”<sup>90</sup>

The recent foreign decision casting the most relevant empirical light on the termination of multilateral agreements whose provisions are deeply intertwined with domestic law is the United Kingdom’s famous Brexit litigation, *R v. Secretary of State for Exiting the European Union*.<sup>91</sup> There, the Supreme Court of the United Kingdom held that the U.K. government may not use its executive prerogative powers but rather must seek parliamentary approval to trigger Article 50, the withdrawal provision of the Treaty of the European Union.<sup>92</sup> The court reasoned that prior parliamentary approval was required because Brexit

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<sup>88.</sup> For that reason, the ALI’s Executive Director took pains to state in his Foreword to the published *Restatement (Fourth)* extract governing treaties (including § 113): “in the not-too-distant future, [when] we will undertake a new project designed to complete the Restatement Fourth . . . the sections published here will be incorporated into the full volume and updated *if intervening case law or practice makes that necessary*.” RESTAMENT (FOURTH), THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY, Foreword, at xvii-xviii (AM. LAW INST. 2018) (emphasis added) (clarifying that the relatively brief “completed” sections of the much larger unfinished comprehensive revision of the *Restatement (Fourth)* should not be considered to be set in stone).

<sup>89.</sup> *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari); *see also* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015) (discussing the Supreme Court’s increasing level of interaction with foreign affairs).

<sup>90.</sup> 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (emphasis added) (citations omitted).

<sup>91.</sup> [2017] UKSC 5, [36], [2017] 2 WLR 583 (appeal taken from England and Northern Ireland).

<sup>92.</sup> *Id.* at [77].

would require fundamental constitutional changes, including the repeal of the 1972 European Communities Act, which expressly allowed for E.U. treaties to take effect within U.K. domestic law.<sup>93</sup> This is particularly the case, the court noted, because fundamental rights would undeniably be affected within the country once the treaty withdrawal was completed. As one commentator put it, “the years of [treaty] membership, the weaving of the [intertwined fabric of domestic and international legal rules], have constructed a reality that is hard to change.”<sup>94</sup> Since the British executive would not have the power to effect the removal of the Act unilaterally as a source of U.K. domestic law, the court reasoned, neither should the Prime Minister have the power to unilaterally withdraw from the treaty without legislative participation.<sup>95</sup>

Similarly, in *Democratic Alliance v. Minister of International Relations and Cooperation*,<sup>96</sup> the High Court of South Africa for the Gauteng Division recently held that the executive branch could not unilaterally withdraw from the Rome Statute of the International Criminal Court without parliamentary approval.<sup>97</sup> The court stated:

[W]here a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well. In the context of this case, the power to bind the country to the Rome Statute is expressly conferred on parliament. It must therefore, perforce, be parliament which has the power to decide whether an international agreement ceases to bind the country.<sup>98</sup>

The court’s decision suggests a “mirror principle”: the commonsense notion that the degree of legislative participation necessary to exit an international agreement should mirror the degree of legislative participation required to enter it in the first place. Relying on this mirror principle, the court held that South Africa could withdraw from the Rome Statute only on approval of parliament and after the repeal of the statute implementing the treaty. In response, the South

<sup>93.</sup> *Id.* at [78]-[93].

<sup>94.</sup> Sam Knight, *Theresa May’s Impossible Choice*, NEW YORKER (July 30, 2018), <https://www.newyorker.com/magazine/2018/07/30/theresa-mays-impossible-choice> [https://perma.cc /WGZ3-K2MV] (“During its forty-five years in the E.U., Britain has imported around nineteen thousand European laws and regulations. The fabric of the *acquis* [short for *acquis communautaire*, the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law] . . . is the fabric of political life . . . [T]he years of membership, the weaving of the *acquis*, have constructed a reality that is hard to change . . .”).

<sup>95.</sup> [2017] UKSC 5 at [88]-[101].

<sup>96.</sup> 2017 (3) SA 212 (GP) (S. Afr.).

<sup>97.</sup> *Id.* at 247.

<sup>98.</sup> *Id.* at 236 (emphasis added).

African government complied with the court’s order and revoked the instrument of withdrawal.<sup>99</sup>

The reasoning of these and other foreign precedents<sup>100</sup> cast “empirical light” on—and cut strongly against—the view that functional considerations should sanction a general unilateral termination rule. Instead, these cases suggest that U.S. withdrawal from a long-standing treaty or international organization—such as the United Nations or the World Trade Organization, whose rules have also been deeply internalized into U.S. law—should not become effective without congressional involvement.<sup>101</sup> Such a withdrawal or termination would similarly necessitate unwinding many domestic law statutes that the executive could not repeal alone.

Under the mirror principle, there should be parity of authority for entry and exit from an international agreement. Absent exceptional circumstances, a treaty entered into with substantial legislative participation cannot be lawfully terminated by the President alone. The same degree of legislative participation

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99. Letter from the U.N. Sec’y Gen. to Treaty Servs. of Ministries of Foreign Affairs and Int’l Orgs. Concerned (Mar. 7, 2017), <https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf> [https://perma.cc/LJQ7-EBPM].

100. Similar mirror reasoning may be found in Canadian law, for example. Unless the royal prerogative has been limited by legislation, the Canadian executive may make and unmake treaties without parliamentary involvement. *Cf. Turp v Minister of Justice*, [2012] F.C. 893, para. 31 (Fed. Ct.) (allowing the executive to withdraw from the Kyoto Protocol because the Protocol’s Implementation Act did not limit the royal prerogative). But where legislation does limit the prerogative, the prerogative power to withdraw from a treaty must be exercised in accordance with the legislated limits. Thus, where a Canadian treaty has been implemented internally with substantial legislative input, and the government seeks to withdraw from the treaty without securing the necessary legislative amendments, those laws would remain effective and in force until repealed by Parliament. See Maurice Copithorne, *National Treaty Law and Practice: Canada*, in *NATIONAL TREATY LAW AND PRACTICE: CANADA, EGYPT, ISRAEL, MEXICO, RUSSIA, SOUTH AFRICA* 1, 11-12 (Monroe Leigh et al. eds., 2003); see also Pierre-Hugues Verdier & Mila Versteeg, *Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey* 4 (Univ. of Va. Sch. of Law Pub. Law and Legal Theory Paper Series, Research Paper No. 2018-56, 2018), <https://ssrn.com/abstract=3251582> (“In recent decades, several national legal systems have introduced constraints on that [executive] power, usually by requiring parliamentary approval of withdrawal from treaties whose conclusion required such approval.”); *id.* at 15 (citing such provisions from Belgium, China, Denmark and the Netherlands). A recent survey reports that parliamentary approval for withdrawal is required by organic laws in ten Eastern European countries (Belarus, Bosnia and Herzegovina, Estonia, Latvia, Lithuania, Russia, Slovenia, Tajikistan, Turkmenistan, and Ukraine) and Mexico, *id.* at 16 n.47, and by constitutional or administrative interpretation or presidential decree in nine others (Austria, Czech Republic, Ethiopia, Hungary, Iran, Japan, Norway, Slovakia, and South Africa), *id.* at 16 n.48.

101. See Ellyn Ferguson, *Congress Can Stop Trump from Ditching WTO, Analysts Say*, ROLL CALL (July 5, 2018, 1:28 PM), <https://www.rollcall.com/news/policy/congress-stop-trump-ditch-wto> [https://perma.cc/37PG-568P].

is legally required to exit from as to enter an international commitment. By embodying that principle, the U.K. Supreme Court's Brexit ruling recognized an important functional truth: that in the modern era, international agreements are *not just transactional, but relational*. These agreements do not authorize sequential, one-off transactions so much as they create organic, evolving relationships that generate a deeply interconnected set of rights, duties, expectations, and reliance for all parties. Momentary lapses may be forgiven if a fundamental commitment to the enduring relationship has been demonstrated. But the disruptive act of termination engages the interests of all parties, both participating and represented, who accordingly should be as much involved in the decision to exit as they are in the initial decision to enter.

As the British polity has learned since its June 2016 Brexit referendum vote, breaking up is hard to do. Particularly in legal systems where treaties are the supreme law of the land, they confer legal rights that have direct effect on domestic actors. Those treaties lay a foundation upon which, over time, sedimentary layers of legal acts, executing legislation, and court decisions build a deeply internalized framework of transnational law that embeds treaty membership strongly into the domestic fabric of political life.<sup>102</sup> Withdrawing abruptly from such an organic treaty framework becomes akin to trying to pull out only the red threads from a multi-colored tapestry. Withdrawal rips the fabric of domestic law and disrupts all manner of domestic rights and expectations. As proof, even as President Trump daily invokes a transactional approach to international affairs, condemning all manner of international agreements as "bad deals," his Administration recently made the exact opposite relational argument before the Supreme Court. In *Jam v. International Finance Corp.*, Solicitor General Noel Francisco responded to the Court's invitation to participate not by rejecting agreements as "bad deals," but by arguing that the "United States' participation in international organizations is a critical component of the Nation's foreign relations [that] reflects an understanding that robust multilateral engagement is a crucial tool in advancing national interests."<sup>103</sup>

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<sup>102.</sup> Compare Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 566 (2007) (labeling this body of law "transnational legal substance"), with Knight, *supra* note 94 (describing this European "*acquis communautaire*").

<sup>103.</sup> See Brief of the United States as Amicus Curiae Supporting Reversal at 1, *Jam v. Int'l Fin. Corp.* No. 17-1011 (U.S. 2018) ("The United States participates in or supports nearly 200 international organizations and other multilateral entities, including major international financial institutions such as the International Monetary Fund (IMF) and the World Bank. The United States contributes billions of dollars annually to those organizations and entities. In recognition of the United States' leadership role, nearly 20 international organizations are headquartered in the United States, and many others have offices here.").

Should the unilateral termination issue soon arise in the U.S. context, the reasoning from this comparative precedent should prove instructive. Many Supreme Court Justices, including current Justices Breyer<sup>104</sup> and Ginsburg,<sup>105</sup> as well as seven departed Justices – Kennedy,<sup>106</sup> Stevens,<sup>107</sup> Souter,<sup>108</sup> O’Connor,<sup>109</sup> Blackmun,<sup>110</sup> Scalia,<sup>111</sup> and Rehnquist<sup>112</sup> – have all famously referenced constitutional practice from other democratic countries.

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<sup>104</sup>. See sources cited *supra* notes 89-90.

<sup>105</sup>. See, e.g., Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDozo L. REV. 253, 282 (1999) (“In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.”).

<sup>106</sup>. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas law banning consensual sodomy between adults of the same sex on the ground that *Bowers v. Hardwick* was wrong when decided). Writing for the Court in *Lawrence*, Justice Kennedy wrote, “To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision[s] . . . .” *Id.* at 576.

<sup>107</sup>. See *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (invalidating the death penalty of individuals with intellectual disabilities and noting that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (invalidating the death penalty for fifteen-year-old offenders, evaluating the Eighth Amendment’s “civilized standards of decency” in part by looking to the prohibition of the execution of minors by the Soviet Union and nations of Western Europe).

<sup>108</sup>. See *Washington v. Glucksberg*, 521 U.S. 702, 785-86 (1997) (Souter, J. concurring) (examining Dutch constitutional practice on physician-assisted suicide).

<sup>109</sup>. See *Emmund v. Florida*, 458 U.S. 782, 797 n.22 (1982) (“[T]he doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”); *see also Thompson*, 487 U.S. at 851 (O’Connor, J., concurring in the judgment) (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, 75 U.N.T.S. 287, 330 (entered into force Oct. 21, 1950)); Sandra Day O’Connor, *Keynote Address*, 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002) (“Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.”).

<sup>110</sup>. See generally Harold Hongju Koh, *Justice Blackmun and the World “Out There,”* 104 YALE L.J. 23 (1994) (citing Justice Blackmun opinions).

<sup>111</sup>. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) (observing that Australian, Canadian, and English statutes banning anonymous campaign speech suggest that such bans need not impair democracy).

<sup>112</sup>. See, e.g., *Glucksberg*, 521 U.S. at 710, 718 n.16 (declaring that “[i]n almost every State – indeed, in almost every western democracy – it is a crime to assist a suicide”; and noting that “[o]ther countries are embroiled in similar debates” concerning physician-assisted suicide, with citations to the Supreme Court of Canada, the British House of Lords Select Committee on Medical Ethics, the New Zealand Parliament, the Australian Senate, and the Constitutional Court

The constitutional issue raised by *Goldwater* may well be relitigated in the context of an attempted executive withdrawal from a multilateral treaty whose provisions are deeply internalized within our domestic law. If so, we could expect the reasoning of these and other comparative law precedents – particularly the notion of a mirror principle requiring parallel legislative participation for entry and exit – to be prominently cited by both the litigants and Justices of the Supreme Court.

### C. Constitutional and Functional Considerations

By suggesting that withdrawals from international agreements whose provisions have been deeply internalized into domestic law should be dictated by a “mirror principle,” the foreign precedents embrace a view long acknowledged by U.S. constitutional jurisprudence.<sup>113</sup> As a constitutional matter, the mirror principle is simply a variant of the famous “last-in-time rule,” first stated in the *Head Money Cases*<sup>114</sup> and *Whitney v. Robertson*.<sup>115</sup> Those cases long ago settled that, however made, a binding international agreement can only be superseded by an agreement or statute that is adopted with a comparable degree of legislative input. Because such a superseding legal enactment effectively exits the United States from a prior international commitment, for all practical purposes, the mirror principle was the law long before *Goldwater* and

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of Colombia); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing abortion decisions by the West German Federal Constitutional Court and the Supreme Court of Canada); William H. Rehnquist, *Constitutional Courts: Comparative Remarks* (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM 411-12 (Paul Kirchhof & Donald P. Kommers eds., 1993) (emphasis added) (“[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”).

- <sup>113</sup>. Cf. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821), where a ship was captured under the claim that its passport was not in accordance with the terms of a bilateral 1795 U.S. treaty with Spain. Even if one or both parties were willing to dispense with the treaty’s requirements, Justice Joseph Story noted, that would not constitute “solemn renunciation,” in part because the “obligations of [a] treaty could not be changed or varied but by the same formalities with which they were introduced, or at least by some act of as high an import, and of as unequivocal an authority.” *Id.* at 75.
- <sup>114</sup>. 112 U.S. 580, 599 (1884) (“[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of the country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.”).
- <sup>115</sup>. 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . . [I]f 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.”).

remains so today. After all, self-executing treaties are the law of the land, no less than congressionally enacted statutes.<sup>116</sup> If the President cannot enact or repeal a statute alone, why should he be able to repeal the duly enacted law of the land—and its accompanying framework of deeply internalized domestic law—just because the initiating juridical act happened to be in treaty form?<sup>117</sup>

Executive branch lawyers have tried to escape this reasoning by arguing—by analogy to executive appointments—that the President alone should be able to terminate a treaty that was made with the advice and consent of the Senate, because the President alone can fire a cabinet member appointed with the advice and consent of the Senate.<sup>118</sup> But the analogy to appointment of subordinates is inapposite, not least because it is a largely internal matter regarding control of

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<sup>116</sup>. *Id.* at 194 (“When the stipulations [of a treaty] are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation . . .”).

<sup>117</sup>. Compare *Goldwater v. Carter*, 617 F.2d 697, 738 (D.C. Cir.) (MacKinnon, J., dissenting in part and concurring in part) (“[U]nder Article VI of the Constitution, treaties, together with the Constitution and United States statutes, are made the ‘supreme Law of the Land.’ Subsequent legislative power over such laws is in Congress as the legislative body, hence, as ‘laws,’ legislation is necessary to repeal or terminate them.”), *vacated per curiam*, 444 U.S. 996 (1979), *with R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [36], [2017] 2 WLR 583 (appeal taken from England and Northern Ireland) (“[W]hen Notice [of withdrawal] is given, the United Kingdom will have embarked on an irreversible course that will lead to much of E.U. law ceasing to have effect in the United Kingdom . . . . [S]ome of the legal rights which the applicants enjoy under E.U. law will come to an end . . . . It . . . would be tantamount to altering the law by ministerial action, or executive decision, without prior legislation, and that would not be in accordance with our law.”); *see also id.* [81] (“A complete withdrawal [from the E.U. treaty] represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from E.U. law . . . . It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the U.K. constitutional arrangements to be brought about by ministerial decision or ministerial action alone.”).

<sup>118</sup>. See, e.g., Brief for the United States in Opposition to Certiorari at 17, *Goldwater v. Carter*, 444 U.S. 996 (1979) (No. 79-856) (evaluating “the virtually identical language of the appointments clause” to support the President’s argument that Congress had no role in consenting to the termination of a Mutual Defense Treaty with the Republic of China); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., and Robert J. Delahunt, Special Counsel, to John Bellinger, III, Senior Assoc. Counsel to the President and Legal Adviser to the Nat’l Sec. Council (Nov. 15, 2001), <http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf> [https://perma.cc/2YGW-CDG4] (concerning the authority of the President to suspend certain provisions of the AMB Treaty).

the executive branch.<sup>119</sup> The removal power also rests partially on the Article II Vesting Clause<sup>120</sup> and the Take Care Clause,<sup>121</sup> insofar as the President cannot properly discharge executive power or take care that the law be faithfully executed if he cannot use the threat of unilateral removal to hold subordinates accountable.<sup>122</sup> But unilateral treaty abrogation, by contrast, runs afoul of the Take Care Clause, because the President is unilaterally undoing, not enforcing, the law that has been made.

Other commentators have made a functional “quick divorce” argument: that foreign affairs exigencies may require the United States to exit quickly entangling alliances that were entered deliberately, and with extensive congressional awareness and participation, over a much longer period of time. Under this functional theory, the President alone is best positioned to decide whether and when a quick divorce is necessary.<sup>123</sup> This theory argues that a constitutional rule that makes it harder to exit agreements will make future executives less keen to enter into them in the first place. But if anything, today, these structural and functional considerations should support the mirror principle, not a general rule of unilateral executive termination. Even if the short term, first-order “functional” effect of the mirror proposal would be to constrain the executive, the second- and third-order functional effects would strengthen

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<sup>119.</sup> Cf. Eichensehr, *supra* note 22, at 275 (“Taking the Appointments Clause analogy to its logical conclusion shows that presidential power proponents err by . . . argu[ing] that the Appointment Clause jurisprudence means that the President can unilaterally terminate treaties.”).

<sup>120.</sup> U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

<sup>121.</sup> U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”).

<sup>122.</sup> See, e.g., *Myers v. United States*, 272 U.S. 52 (1926) (President has exclusive power to remove executive branch officials, even without the approval of the Senate or any other legislative body).

<sup>123.</sup> See *Goldwater v. Carter*, 617 F.2d 697, 705–06 (D.C. Cir.) (“[T]o hold that . . . a treaty could only be terminated [with Senate consent] would . . . ‘lock[] the United States into all of its international obligations, even if the President and two-thirds of the Senate minus one firmly believed that the proper course for the United States was to terminate a treaty. Many of our treaties in force, such as mutual defense treaties, carry potentially dangerous obligations . . . . The creation of a constitutionally obligatory role in all cases for a two-thirds consent by the Senate would give to one-third plus one of the Senate the power to deny the President the authority necessary to conduct our foreign policy in a rational and effective manner.’”), vacated, 444 U.S. 996 (1979); HENKIN, *supra* note 4, at 212 (“[P]erhaps the Framers were concerned only to check the President in ‘entangling’ the United States; ‘disentangling’ is less risky and may have to be done quickly, and is often done piecemeal, or *ad hoc*, by various means and acts.”); Bradley, *Exiting CEAs*, *supra* note 4, at 1624 (“[T]here are originalist and functionalist reasons to resist the conclusion that the process for making treaties must necessarily be followed for their unmaking . . . U.S. interests might be best served by having unilateral presidential termination authority.”).

the Executive's hand in future international negotiations. As recent denuclearization talks with North Korea and Iran show, the negotiating credibility of an executive who wishes to enter into a new agreement will be strengthened, not weakened, if such agreements are made harder to break by their successors, thereby giving their negotiating partners greater assurance regarding the continuity and stability of the proposed arrangement.

In any event, as noted above with respect to *INS v. Chadha*, which invalidated the legislative veto, such fundamental issues of constitutional interpretation cannot be resolved by functional concerns alone. But even setting *Chadha* aside, it would be wildly overbroad to allow the exception to swallow the rule. There is no reason to extrapolate from the narrow notion that, in a genuine emergency, a President may be best positioned to decide whether an exit from a treaty is urgently required, to the blanket proposition that the Constitution authorizes any President, on impulse, to withdraw the United States from any and all bilateral and multilateral arrangements with which it has engaged over the centuries. As Judge MacKinnon presciently warned in *Goldwater*: "In future years, a voracious President and Department of State may easily use this grant of absolute power [of unilateral termination] to the President to develop other excuses to feed upon congressional prerogatives that a Congress lacking in vigilance allows to lapse into desuetude."<sup>124</sup>

#### IV. A TYPOLOGY OF WITHDRAWALS

By now it should be clear that the question that opened this Essay—whether President Trump could unilaterally withdraw the United States from any and all international treaties and organizations—is readily contestable. On the merits, only one U.S. court has ever endorsed an unnuanced rule of unilateral presidential termination—the en banc D.C. Circuit decision in *Goldwater*<sup>125</sup>—and that ruling was vacated less than a month later by the U.S. Supreme Court.<sup>126</sup>

Given the United States' admitted interests in international organizations and multilateral treaties, what constitutional test should govern the President's power to withdraw unilaterally from such arrangements? While this issue has arisen most recently with respect to the Paris Agreement and the Iran Nuclear Deal, this constitutional question should also be asked with respect to potential withdrawal from a broad range of global arrangements, including international

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<sup>124</sup>. *Goldwater*, 617 F.2d at 739 (MacKinnon, J., dissenting in part and concurring in part) (emphasis omitted).

<sup>125</sup>. *Id.* at 699. *But see id.* at 716 (MacKinnon, J., dissenting in part and concurring in part).

<sup>126</sup>. *Goldwater v. Carter*, 444 U.S. 996 (1979).

organizations, international tribunals, mutual security organizations, and trade agreements. Applying a general unilateral rule of termination, across these varied cases, would potentially allow one man to disengage from most of our international commitments, devastating the post-World War II international order that many administration and treaties helped to construct.

If and when the Supreme Court finally considers this issue on the merits, it should conclude that no single “transsubstantive” rule governs whether and how each and every international agreement may be terminated or withdrawn from as a matter of U.S. domestic law.<sup>127</sup> As Laurence Tribe reasoned at the time of *Goldwater*, “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.”<sup>128</sup> In *Goldwater* itself, the four Justices who voted to dismiss on political question grounds expressly “decline[d] the invitation to set in concrete a particular constitutionally acceptable arrangement by which the President and Congress are to share treaty termination.”<sup>129</sup> In contrast to an overbroad unilateral presidential termination “rule,” the mirror principle does not mandate a “one-size-fits-all” mode of agreement termination. Instead, depending on the substance and entry process, the mirror principle requires varying degrees of congressional and executive participation to exit from various kinds of international agreements. Such an approach reflects the fundamental constitutional wisdom in Justice Jackson’s famous concurrence in *Youngstown Sheet & Tube Co.*: that “[p]residential powers”—in this case, to terminate or withdraw from binding international agreements of the United States—“are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>130</sup>

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<sup>127.</sup> See Amirfar & Singh, *supra* note 2, at 451 (“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 presidential power . . . .”).

<sup>128.</sup> Laurence H. Tribe, *A Constitutional Red Herring: Goldwater v. Carter*, NEW REPUBLIC, Mar. 17, 1979, at 14-16; *Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 589 (1979).

<sup>129.</sup> 444 U.S. at 1006, n.1 (Rehnquist, J., concurring) (quoting Chief Judge Wright’s concurrence below). The only *Goldwater* opinion favoring termination on the merits, by Justice Brennan, turned on the connection of the facts to the peculiar context of derecognition. *See id.* at 1006-07 (1979) (Brennan, J., dissenting).

<sup>130.</sup> Justice Jackson’s landmark concurrence in *Youngstown* famously set forth three familiar categories of executive action:

*Youngstown* Category One: “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate”;

Last year in these pages, I made the case against simplistic application of the traditional transsubstantive “triptych” by which scholars have artificially divided the constitutional spectrum of U.S. international agreements into three categories: Article II treaties, congressional-executive agreements, and so-called “sole” executive agreements, made solely pursuant to the President’s constitutional powers.<sup>131</sup> If an agreement entails new, legally binding obligations, I argued, we should examine first, “the degree of congressional approval for the executive lawmaking,” and second, “the constitutional allocation of institutional authority over the subject matter area at issue.”<sup>132</sup> The first factor—the *degree of congressional approval* legally required to enter an agreement—roughly maps onto the three *Youngstown* categories.<sup>133</sup> But whether that degree of congressional approval is constitutionally mandated depends on a second factor as well: which branch of government has *substantive constitutional prerogatives* regarding that area of foreign policy. In the area of recognition, for example, the President’s plenary power eliminates the need for congressional approval to enter an agreement; but in the area of foreign commerce, his discretion is limited and could even be barred by Congress’s foreign commerce powers.<sup>134</sup> Under the mirror principle, the degree of congressional and executive

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*Youngstown* Category Two: “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain”; and

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

343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). For a thoughtful application of these three categories to the agreement termination issue, see Amirfar & Singh, *supra* note 2, at 451-58. *But see* Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Re-appraisal of Separation of Powers Doctrine*, 126 YALE L.J.F. 86, 92 (2016) (noting weaknesses of *Youngstown* framework).

<sup>131</sup> Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J.F. 337 (2017).

<sup>132</sup> *Id.* at 344.

<sup>133</sup> As Professor Tribe has noted, *Youngstown*’s rigid tripartite framework has clear limitations. Tribe, *supra* note 130, at 92 (“Nothing in *Youngstown*, including Jackson’s classic concurrence, sets out a normative framework for deciding: (1) which kinds of presidential action in the relevant sphere are void unless plainly authorized by Congress *ex ante*; (2) which are valid unless plainly prohibited by Congress *ex ante*; and (3) which are of uncertain validity when Congress has been essentially ‘silent’ on the matter although dropping hints about its supposed ‘will.’ Nor does the canonical Jackson concurrence speak to (4) what considerations should guide the resolution of cases within this uncertain third category.”).

<sup>134</sup> See, e.g., United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) (“The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the

participation required to exit from an international agreement should turn on these same two factors: the *subject matter* of an agreement at issue and the *degree of congressional approval* involved in both the entry into and exit from it. Thus, as with entry into any particular international agreement, the degree of legislative participation required to exit that same agreement is *substance-dependent*. Because the mirror principle requires for exit only the degree of legislative participation required for entry, it is flexible enough to vary according to the subject matter.

To be workable, of course, any constitutional approach must be able to accommodate all political exigencies.<sup>135</sup> To accommodate bona fide emergency situations, the U.S. Supreme Court could recognize the President's unilateral authority to suspend U.S. treaty obligations for a limited period, long enough for the President to make the case to Congress as to why withdrawal is warranted "for cause."<sup>136</sup> But recognizing a very limited exception to the mirror principle for genuinely exceptional circumstances is to acknowledge a decidedly narrower—and functionally, far more appropriate—authority than according a single person a blanket unilateral power to terminate, withdraw, or suspend all agreements in all situations, emergency or otherwise.

The balance of this Essay reviews how the mirror principle would apply in four situations: (1) agreements lawfully concluded with *no* legislative input—genuine "sole executive agreements"; (2) agreements initially concluded with *considerable* legislative input, such as congressional-executive agreements and treaties; (3) agreements initiated by the executive with general congressional awareness and approval in a zone of congressional subject matter authority, such as the Paris Climate Agreement; and (4) agreements arguably terminated in violation of international law in an area of congressional subject-matter authority, such as the Iran Nuclear Deal. I conclude by suggesting policy mechanisms to guide the conduct of agreement-unmaking as the future unfolds.

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executive may not exercise the power by entering into executive agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of such agreements.”).

<sup>135</sup>. Cf. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW, at xii-xiii (2010) (arguing that the role of constitutional interpretation must be “maintaining a *workable* constitutional system of government”—not simply declaring a set of formal rules, but pragmatically evaluating an existing architecture of cooperation that allows each branch of government to “build the necessary productive working relationships with other institutions”).

<sup>136</sup>. See Eichensehr, *supra* note 22, at 281-86 (describing possible “for cause” justifications for treaty terminations).

### A. Agreements Concluded with No Legislative Input: Sole Executive Agreements

There are undeniably subject-matter areas where the President has plenary authority to make agreements acting alone. In those subject-matter areas, the mirror principle would suggest that the President alone has the power to unmake those same agreements so long as Congress has been silent on the matter.<sup>137</sup> That said, historically, true “sole executive agreements”<sup>138</sup>—agreements based solely on the President’s plenary constitutional authorities—have been extremely rare. Consider, for example, Franklin Delano Roosevelt’s 1941 Destroyer-for-Bases deal with the United Kingdom<sup>139</sup> or the early twentieth-century agreements recognizing the new Soviet Union,<sup>140</sup> affirmed in *United States v. Belmont*<sup>141</sup> and *United States v. Pink*.<sup>142</sup>

In practice, however, few modern presidents ever claim to be making a controversial agreement based solely on their own plenary constitutional authority, particularly in cases where Congress has legislated extensively elsewhere regarding the same subject. As elaborated below, recent accords like the Paris Climate Agreement and the Iran Nuclear Deal are not sole executive agreements in this narrow constitutional sense because they were not concluded solely within the zone of the President’s exclusive constitutional authorities.<sup>143</sup> Thus, just because the President may appear to “make” an agreement alone does not necessarily mean that he is constitutionally empowered to break it alone. As noted below, those agreements are not sole executive agreements, but were premised on a broader history of legislative authorization in a particular direction. During that same period, Congress expressed no general approval for

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<sup>137</sup>. See Amirfar & Singh, *supra* note 2, at 446 n.16 (“[T]he subject of a sole E[xecutive] A[greement] 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.”).

<sup>138</sup>. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (AM. LAW INST. 1987) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”); HENKIN, *supra* note 4, at 219-24 (describing international agreements entered into solely by the executive).

<sup>139</sup>. Arrangement between the United States of America and Great Britain Respecting Naval and Air Bases, Gr. Brit.-U.S., Sept. 2, 1940, 54 Stat. 2405; see also William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-for-Bases Deal*, 52 AM. J. LEGAL HIST. 1 (2012) (providing historical context for the Destroyers-for-Bases deal).

<sup>140</sup>. See General Relations, U.S.-U.S.S.R., Nov. 16, 1933, 11 Bevans 1248.

<sup>141</sup>. 301 U.S. 324, 330-33 (1937) (upholding the constitutionality of an executive agreement made as part of a transaction that included recognition of the Soviet Union).

<sup>142</sup>. 315 U.S. 203, 222-23 (1942) (reaffirming *Belmont*).

<sup>143</sup>. Koh, *supra* note 131, at 349-55.

presidential actions *disrupting* climate change negotiations or re-imposing economic sanctions absent a breach by Iran. Thus, for the President, acting alone, to terminate such agreements would flout and disrupt congressional expectations and approbation in a way that a prior President's initial entry in the agreement did not.

*B. Agreements Concluded with Considerable Legislative Input: Treaties and Congressional-Executive Agreements*

Since World War II, the number of Article II treaties approved by two-thirds of the Senate has declined dramatically, with a sharp attendant rise in congressional-executive agreements as “interchangeable instruments of national policy” approved by a majority of both houses of Congress.<sup>144</sup> Both kinds of legal instruments require substantial legislative input for entry. The mirror principle would accordingly suggest that, ordinarily, comparable legislative input should be required to exit the same agreements.<sup>145</sup>

Applying Justice Jackson's *Youngstown* test to the termination of congressional-executive agreements could reflect three distinct political realities: congressional approval, disapproval, or ambivalence towards executive action. If Congress were to *approve* the President's termination, explicitly or implicitly, then the President's power would obviously be at its zenith, and the President could terminate either a congressional-executive agreement or ratified treaty

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<sup>144</sup>. Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 187 (1945) (“[O]ur constitutional law today makes available two parallel and completely interchangeable procedures, wholly applicable to the same subject matters and of identical domestic and international legal consequences, for the consummation of intergovernmental agreements.”); *accord* HENKIN, *supra* note 4, at 217 (“[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress rather than by two-thirds of the Senate.” (citation omitted)); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1287 (2008) (“The average number of treaties concluded each year has grown from slightly over one per year during the first fifty years of the republic to about twenty-five per year during the 1990s. Executive agreements, on the other hand have gone from one on average every two years during the first fifty years of the republic to well over three hundred per year.” (citation omitted)).

<sup>145</sup>. If a court were to require legislative approval of the President's effort to withdraw from an international agreement or treaty, the question would become: what degree of legislative approval is constitutionally necessary? In *Goldwater* itself, District Judge Oliver Gasch held that the President's notice of termination would not be constitutionally effective unless it had received either the approval of two-thirds of the U.S. Senate (the number necessary for advice and consent) or a majority of both houses of Congress (the number needed for enacting a congressional-executive agreement). 481 F. Supp. 949, 964-65 (D.D.C. 1979).

without controversy. But if Congress were expressly to *disapprove* of the President's attempted termination, the legal conclusiveness of the termination would become substance-dependent. That executive termination could only stand if the President were operating within a zone of exclusive presidential authority, such as state recognition, as illustrated by *Zivotofsky II*<sup>146</sup> or Justice Brennan's dissent in *Goldwater*.<sup>147</sup> Finally, if Congress were silent, or could not organize itself to make a collective statement, the President would be operating within what Justice Jackson famously referred to in *Youngstown* as the "twilight zone," where the President's power to terminate agreements unilaterally would depend on proof that Congress did more to approve that action than merely acquiesce.<sup>148</sup>

In *Goldwater* itself, for example, the President—in the face of collective congressional inaction—terminated the Taiwan Treaty, which as Justice Brennan noted, fell into the heart of the President's exclusive power of recognition.<sup>149</sup> Such a unilateral termination would invoke the President's exclusive and plenary constitutional power respecting recognition. Indeed, *Zivotofsky II* later similarly invoked the exclusive recognition power to negate a contrary congressional statute. But it would be quite another matter if the President tried to act alone to terminate an agreement that was both made by and fell within the heart of Congress's concurrent or exclusive constitutional authority over a subject matter (for example, foreign commerce). For that reason, commentators have persuasively argued that President Trump's threat to terminate or withdraw from NAFTA would be barred by Congress's Commerce Clause authority.<sup>150</sup> The same could be said for a treaty that affected Congress's exclusive power of the purse.<sup>151</sup> Again, the mirror principle should apply. If the President lacked the constitutional authority to make an agreement in a subject-matter area without congressional approval, the President would lack authority to unmake unilaterally an agreement that Congress helped substantially to create in the same subject-matter area.

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<sup>146.</sup> 135 S. Ct. 2076 (2015).

<sup>147.</sup> 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

<sup>148.</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>149.</sup> *Goldwater*, 444 U.S. at 1007 (Brennan, J., dissenting).

<sup>150.</sup> See, e.g., Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty* (Oct. 16, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3015981>; Julian Ku & John Yoo, *Trump Might Be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html> [<https://perma.cc/Q64Y-A354>] (stating that Trump cannot unilaterally withdraw from NAFTA or the WTO).

<sup>151.</sup> See generally WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994) (analyzing the scope of Congress's power of the purse in the sphere of national security).

C. “*Executive Agreements Plus*,” Adopted Against a Background of Legislative Approval in a Zone of Congressional Power: *The Paris Climate Agreement*

The 2015 Paris Climate Change Agreement was not a sole executive agreement but what some have called an “executive agreement plus,” a bundle of commitments made by executive initiative, but with general congressional awareness and approval in a zone of significant congressional power.<sup>152</sup> While there is considerable debate regarding the Paris Agreement’s status under U.S. law, no one doubts that the Agreement constitutes a “treaty” under international law, for purposes of the Vienna Convention on the Law of Treaties (VCLT).<sup>153</sup> Some provisions of the Paris Agreement are legally binding under international law.<sup>154</sup> But they “are largely procedural in nature and in many instances are duplicative of existing U.S. obligations under the [UNFCCC], and, therefore, could be fully implemented based on existing U.S. law.”<sup>155</sup> This feature allowed President Obama to enter the Paris Agreement without submitting it for Senate approval, because he had sufficient domestic authority to implement any legal obligations assumed under the agreement merely by carrying out preexisting domestic legal obligations.

But exiting the same agreement is not so straightforward. International law makes clear that U.S. presidents cannot simply delete prior signatures from

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<sup>152</sup>. Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885, 887 (2016). The Paris Agreement was negotiated under the U.N. Framework Convention on Climate Change (UNFCCC), a treaty with 195 parties to which the Senate gave its advice and consent in 1992. Paris Agreement of the United Nations Framework Convention on Climate Change, Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016) [hereinafter Paris Agreement]. The Paris Agreement secured meaningful commitments to address climate change from developed and developing countries alike on several key elements, including a global aspirational temperature goal, international assessment procedures, and provided that the global “Green Climate Fund” originally established under the UNFCCC would serve the Agreement. As concluded, the Paris Agreement states no legally binding emissions caps, declaring only that member states “should” meet such targets. Nor are the financial commitments of the Agreement binding, but rather, only follow “in continuation of their existing obligations under the [UNFCCC].” *Id.* art. 9.

<sup>153</sup>. See, e.g., Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. & INT'L ENVTL. L. 142, 150 (2016); see also 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> [<https://perma.cc/643L-WSN2>] (“[The Paris Agreement] is a treaty as far as U.S. commitments to the other states parties are concerned.”).

<sup>154</sup>. See Koh, *supra* note 131, at 351; Bridgeman, *supra* note 153 (“[The Paris Agreement has] provisions that create *binding* legal obligations for the parties. These provisions, which are largely procedural in nature, are important to the goals of the Agreement as a whole . . . [and] govern the mechanics and timeline of withdrawal . . . .”).

<sup>155</sup>. Koh, *supra* note 131, at 351 (citation omitted).

treaties.<sup>156</sup> Nor under the VCLT can a single state party invalidate an entire multilateral agreement. Nevertheless, on June 1, 2017, President Trump announced his intent to withdraw from the Paris Agreement in more than two years' time.<sup>157</sup>

Curiously, a recent *Harvard Law Review* article discussing presidential control over international law stated that “[t]here was significant controversy about the policy wisdom of this decision, *but no one questioned the President's legal authority to terminate in this context.*”<sup>158</sup> Putting to one side the factual inaccuracy of this statement,<sup>159</sup> even if true, it tells us little, for the simple reason that President Trump's announcement in June 2017 was thirty months premature. No one questioned the President's legal authority in that context because in June 2017, Trump neither terminated nor withdrew U.S. acceptance of the Paris Agreement, nor has he done so today. His announcement simply stated a future intent; it did not in any sense *legally* disengage the United States from the Paris Agreement. The Paris Agreement only recognizes withdrawal under the terms

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<sup>156</sup>. President George W. Bush demonstrated the futility of announcing a withdrawal under terms not prescribed by an international agreement when he tried to “unsign” President Clinton’s 2000 signature from the Rome Statute, which established the International Criminal Court. *See Letter from John R. Bolton, Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, Sec'y Gen., United Nations* (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> [<https://perma.cc/3263-CE6Y>] (“[T]he United States does not intend to become a party to the [International Criminal Court] treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”). The “unsigning” letter that the Bush Administration sent to the United Nations—signed by then-Under Secretary of State (and current National Security Adviser) John Bolton—left the U.S. signature unchanged on the Rome Statute, allowing the Obama Administration to simply ignore the Bolton letter and to reengage with the Rome Statute parties during the next eight years. Much the same pattern seems likely to recur with respect to National Security Advisor John Bolton’s recent hostile speech on the International Criminal Court. *Compare* Harold Hongju Koh, *International Criminal Justice* 5, 0, 38 YALE J. INT’L L. 525, 537 (2013) (noting the United States’ continuing international legal obligations as a treaty signatory not to defeat the object and purpose of the Rome Statute) *with* Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, GUARDIAN (Sept. 10, 2018), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech> [<https://perma.cc/ACF3-78JQ>] (quoting Bolton describing the International Criminal Court as an “illegitimate court”).

<sup>157</sup>. President Donald Trump, *Statement by President Trump on the Paris Climate Accord* (June 1, 2017, 3:32 PM), <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord> [<https://perma.cc/3H7X-6SFG>].

<sup>158</sup>. Bradley & Goldsmith, *supra* note 61, at 1225 (emphasis added).

<sup>159</sup>. *See, e.g.*, Koh, *supra* note 131, at 357 (arguing in January 2017, five months before President Trump’s Paris Agreement withdrawal announcement that, “as a matter of domestic law, [it] is [not] entirely clear that the President has constitutional power to withdraw from . . . the Paris Agreement . . . without congressional participation”); *see also* KOH, *supra* note 81, at 48–51 (discussing the possible consequences of an attempt by President Trump to unilaterally withdraw from the Paris Agreement).

specified in its text, which plainly declares that a party cannot give notice of withdrawal to the U.N. Secretary General until “three years from the date on which this Agreement has entered into force.”<sup>160</sup> Since the Paris Agreement entered into force on November 4, 2016, the earliest date that the United States could even give such legal notice would be November 4, 2019. That notification would then take another year to take legal effect. Thus, the earliest that the United States could legally withdraw from the Paris Agreement is November 4, 2020, the day *after* the next U.S. presidential election – and even that assumes that such an attempted unilateral withdrawal would be upheld following constitutional litigation. The obvious reason why no one questioned the President’s legal authority “in this context” or launched any legal challenge against it simply because such a challenge was not yet remotely ripe for judicial examination.

Until November 2019, President Trump’s announced intent to withdraw in the future has no more legal force than an employee’s empty threat to leave his job in three years’ time.<sup>161</sup> The United States has not “virtually” or “preemptively” withdrawn or otherwise formally disengaged in any way as a party from the Paris Agreement. At this writing, the U.N. Treaty Depository page on the Paris Agreement still lists the United States as a party.<sup>162</sup> While the State Department website indicates that it has notified the U.N. Depository of its “intent to withdraw,” a “[m]edia [n]ote” makes clear that all the United States has done is communicate “the U.S. intent to withdraw from the Paris Agreement *as soon as it is eligible to do so, consistent with the terms of the Agreement.*”<sup>163</sup> In August 2017, then-U.S. Ambassador to the United Nations Nikki Haley informed the U.N. Secretary-General of the United States’ intent “to exercise its right to withdraw from the Agreement . . . . *[u]nless the United States identifies suitable terms for reengagement,*” a condition subsequent that plainly leaves wiggle room

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<sup>160</sup>. Paris Agreement, *supra* note 152, at art. 28.1-28.2 (“At any time after three years from the date on which this Agreement has entered into force for a Party [for the United States, November 4, 2016], that Party may withdraw from this Agreement by giving written notification to the Depository . . . . Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depository of the notification of withdrawal . . . .”).

<sup>161</sup>. This is particularly true given that under Article 68 of the Vienna Convention, a notice of withdrawal of the kind that the Trump Administration submitted with respect to the Paris Agreement could be revoked at any time before it takes effect. Vienna Convention on the Law of Treaties art. 68, May 23, 1969, 1155 U.N.T.S. 331, (“A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.”).

<sup>162</sup>. *Status of Treaties: Paris Agreement*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en) [https://perma.cc/VXV7-SLD8].

<sup>163</sup>. Press Release, Communication Regarding Intent to Withdraw from Paris Agreement, U.S. DEP’T OF STATE (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/2017/08/273050.htm> [https://perma.cc/V8GP-XD6U] (emphasis added).

to call off the proposed withdrawal.<sup>164</sup> So in the words of a coalition of Paris Agreement supporters, “We Are Still In.”<sup>165</sup> So long as the United States continues to participate in the Paris process,<sup>166</sup> it will remain a state party for the balance of Trump’s first term; it has not yet withdrawn from the Paris Agreement. The United States has only “resign[ed] without leaving,” thereby prematurely identifying itself as a lame duck.<sup>167</sup>

If, in November 2019, the Administration should finally carry through on its stated intent to give notice of its desire unilaterally to withdraw from the Paris Agreement in one year’s time, new litigation brought by states, leading environmental groups, and others would almost certainly ensue. Plaintiffs would then surely argue that the notice is legally ineffective because the President lacks constitutional power to withdraw from the Paris Agreement without congressional participation.<sup>168</sup> Only then would the broader constitutional question addressed in this Essay finally be joined.

At that time, the Trump Administration would likely reply that the President possesses unilateral authority to withdraw from the Paris Agreement because—as fourteen Senators argued in a 2016 letter to then-Secretary of State John Kerry—the Paris Agreement could be dissolved by the next President alone as a “sole executive agreement[]” [which is] . . . one of the lowest forms of commitment the United States can make and still be considered a party to an [international] agreement.”<sup>169</sup> But the Senators’ statement is legally inaccurate.

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<sup>164</sup>. Letter from Nikki R. Haley, U.S. Ambassador to the United Nations, to António Guterres, Sec’y Gen., United Nations (Aug. 8, 2017), <https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf> [<https://perma.cc/YCV3-CFV3>] (emphasis added). The State Department announcement, Press Release, *supra* note 163, made clear that the United States would continue to participate in the UNFCCC through its Conference of Party meetings. Moreover, since the announcement, the Administration has sent confusing messages to U.S. allies as to whether it will follow through with withdrawal when the appointed time comes.

<sup>165</sup>. See *We Are Still in*, WEARESTILLIN, <https://www.wearestillin.com> [<https://perma.cc/8PGN-VLJ3>].

<sup>166</sup>. See Emre Peker, *Trump Administration Seeks to Avoid Withdrawal from Paris Climate Accord*, WALL ST. J. (Sept. 17, 2017, 5:16 PM), <https://www.wsj.com/articles/trump-administration-wont-withdraw-from-paris-climate-deal-1505593922> [<https://perma.cc/4VPP-K83J>] (noting statements by a Trump Administration official at a diplomatic meeting that the United States would stay in the Paris Agreement “under the right conditions”).

<sup>167</sup>. See generally KOH, *supra* note 81, at 39–70 (discussing President Trump’s default pattern of “resigning without leaving”).

<sup>168</sup>. See *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Blackmun, J., dissenting in part) (“[I]f the President does not have the power to terminate the treaty . . . the notice of intention to terminate surely has no legal effect.”).

<sup>169</sup>. Letter from Senator James M. Inhofe et al. to Sec’y of State John Kerry (Nov. 3, 2016), [https://www.epw.senate.gov/public/\\_cache/files/2/4/244c9583-e2ec-47cf-a329-28c7c9f64fe3/F973A463A10E2353E3D4F5C33A4045C6.letter-to-unfccc-re-paris-agreement-final.pdf](https://www.epw.senate.gov/public/_cache/files/2/4/244c9583-e2ec-47cf-a329-28c7c9f64fe3/F973A463A10E2353E3D4F5C33A4045C6.letter-to-unfccc-re-paris-agreement-final.pdf)

As others have correctly noted, “the dividing line between sole [executive agreements] and *ex ante* [congressional-executive agreements], in particular, can be difficult to divine, which necessarily has important ramifications for termination.”<sup>170</sup> As noted above, the Paris Agreement is not a “sole executive agreement,” adopted under the President’s plenary constitutional powers, but rather was expressly preauthorized<sup>171</sup> by a duly ratified Article II treaty, one negotiated within the scope of the Senate’s original advice and consent to the 1992 U.N. Framework Convention on Climate Change. In addition, the Paris Agreement followed a general statutory landscape that envisioned future efforts at international lawmaking to regulate climate change. Congress had expressed its support for climate change negotiations in: (1) the Global Climate Protection Act of 1987, which asserted the need for “international cooperation aimed at minimizing and responding to adverse climate change;”<sup>172</sup> (2) the Clean Air Act (which the Supreme Court held in *Massachusetts v. EPA*<sup>173</sup> authorized the EPA to regulate carbon dioxide emissions from motor vehicles as a pollutant, thereby allowing the President to argue that he could negotiate international agreements as a necessary adjunct to regulating domestic emissions); and (3) Section 115 of the Clean Air Act, which authorizes federal action reciprocally with other nations to address “international air pollution,” namely, transboundary pollution causing international damage.<sup>174</sup>

Thus, the Paris Agreement was not a sole executive agreement in the traditional sense, but rather, an *agreement approved by Congress through both ex ante treaty and general legislative preauthorization*. Under the Supreme Court’s decision in *Dames & Moore v. Regan*,<sup>175</sup> the Paris Agreement represents a form of

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[<https://perma.cc/SX93-PP9G>]; see also Avaneesh Pandey, *Donald Trump Wants to ‘Cancel’ the Paris Climate Deal – Here’s How He Could Do It*, INT’L BUS. TIMES (Nov. 9, 2016, 6:46 AM), <http://www.ibtimes.com/donald-trump-wants-cancel-paris-climate-deal-heres-how-he-could-do-it-2444026> [<https://perma.cc/EKL8-4ECT>] (quoting Donald Trump as saying “President Obama entered the United States into the Paris Climate Accords – unilaterally, and without the permission of Congress”).

<sup>170</sup> Amirfar & Singh, *supra* note 2, at 448 n.25. Thus, a second possible reading of the “context” referred to in Curtis Bradley and Jack Goldsmith’s statement, *see supra* note 158 and accompanying text, is that no one questioned the President’s authority to terminate the Paris Agreement alone, because President Obama had arguably made it alone. Yet as noted in text, President Obama entered the Paris Agreement against a general background of congressional awareness and approval within a zone of considerable congressional authority: domestic and foreign commerce.

<sup>171</sup> *See generally* Koh, *supra* note 131, at 350-52.

<sup>172</sup> Pub. L. No. 100-204, tit. XI, § 1102, 101 Stat. 1331, 1408 (1987).

<sup>173</sup> *See* 549 U.S. 497, 528-32 (2007).

<sup>174</sup> 42 U.S.C. § 7415 (2018).

<sup>175</sup> 453 U.S. 654 (1981). As I previously argued in these pages, in *Dames & Moore*, the Court upheld the Iran Hostage Accords on similar ground, reasoning:

congressional-executive agreement made within the scope of *Youngstown* Category One: because “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.”<sup>176</sup> Allowing the president alone to break an agreement supported by such legislative approval at the time of entry would violate the mirror principle by undermining Congress’s long-stated intent and approval for agreement-making to mitigate the effects of climate change.

Under the mirror principle, the degree of congressional and executive participation required to exit from an international agreement turns on two factors: the *subject matter* of an agreement at issue and the *degree of congressional approval* involved in both the entry and exit from it. Because the Paris Agreement strongly implicates Congress’s powers over commerce—here, the authority to regulate greenhouse gases—under the mirror principle, significant legislative input should also be required before the United States may constitutionally withdraw from it. Over time, the degree of legislative input into the making of the Paris Agreement was significantly higher than the degree of congressional input into a sole executive agreement. Moreover, Congress expressed no general approval for unilateral presidential actions disrupting future climate change negotiations. When an agreement is premised on such a broad history of legislative authorization in a particular direction (here, *toward* climate change negotiation), unilateral presidential termination of such an agreement would flout congressional will and expectations in a way that the making of the agreement would not.

#### *D. The Iran Nuclear Deal: Terminating Agreements Regarding Economic Sanctions in Violation of International Law*

Finally, it should not casually be assumed that the President has unilateral authority to withdraw from the JCPOA, commonly known as the Iran Nuclear

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that so long as the Executive acts consistently with “the general tenor of Congress’s legislat[ive framework] in th[e]” particular issue area, and there is “a history of congressional acquiescence in conduct of the sort engaged in by the President” and “no contrary indication of legislative intent,” Congress has effectively licensed a permissible space for executive action in that particular issue area. In that space, the President has greater constitutional freedom to negotiate and conclude certain kinds of international accords without having secured prior, specific congressional approval. By so saying, the Court seems to have recognized a fundamental truth: that Congress now expresses its approval for international lawmaking in many more than three formal mechanisms.

Koh, *supra* note 131, at 344-45 (quoting *Dames & Moore*, 453 U.S. at 678-79).

<sup>176</sup>. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Deal.<sup>177</sup> To be sure, under domestic and international law, the JCPOA is a politically, not legally, binding arrangement, that was made by the President acting alone.<sup>178</sup> But for two reasons, that fact alone does not dictate that the President should be able to terminate it unilaterally, without congressional participation. First, under the Iran Nuclear Deal, the President exercises not his own constitutional powers, but *Congress's* delegated power to regulate foreign commerce by imposing or waiving economic sanctions. Congress is constitutionally entitled to review whether he is exercising its delegated sanctions power appropriately. Second, it has now been argued by Iran that the President terminated the Iran Nuclear Deal in violation of international law without congressional approval, potentially subjecting the United States to international law liability. A decision in violation of international law plainly falls outside the scope of *Goldwater v. Carter*, will directly affect many constituents, and thus should engage Congress's institutional responsibility.

The JCPOA envisioned actions by Iran, the International Atomic Energy Agency (IAEA), and a group of states known as the P5+1.<sup>179</sup> After extended negotiations, Iran agreed to specified limits on its nuclear development program in exchange for the P5+1's joint undertaking to lift some domestic and international sanctions that had been imposed through the United Nations.<sup>180</sup> The JCPOA has been implemented on the U.S. side largely through executive orders that suspended nuclear-related sanctions, in exchange for Iran's dismantling of key elements of its nuclear program under the watchful eye of the IAEA.<sup>181</sup> Under the JCPOA, the United States and the European Union

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<sup>177</sup>. For the full text and annexes of the JCPOA, see Joint Comprehensive Plan of Action, July 14, 2015, 55 I.L.M. 108 [hereinafter JCPOA]. The Annexes include: Annex I—Nuclear Related Commitments; Annex II—Sanctions Related Commitments; Annex III—Civil Nuclear Co-operation; Annex IV—Joint Commission; and Annex V—Implementation Plan.

<sup>178</sup>. See Koh, *supra* note 131, at 351–55; see also Bodansky & Spiro, *supra* note 152, at 917 n.178.

<sup>179</sup>. The P5+1 includes the five permanent U.N. Security Council members—the United States, the United Kingdom, France, China, and Russia—plus Germany, as a European Union representative speaking on behalf of the three European countries.

<sup>180</sup>. As concluded, the JCPOA verifiably reduced Iran's stockpiles of enriched uranium by ninety-eight percent, forcing shipment of twenty-five thousand pounds out of the country. The JCPOA increased the “breakout” time that it would take for Iran to acquire a bomb from two to three months to at least one year, reduced the number of Iran's installed centrifuges by two-thirds, prevented Iran from producing weapons-grade plutonium, and verified the compliance with robust IAEA monitoring and inspections. See generally JCPOA, *supra* note 177.

<sup>181</sup>. See Letter from Denis McDonough, Assistant to the President and Chief of Staff, to the Honorable Bob Corker, Chairman, Senate Comm. on Foreign Relations (Mar. 14, 2015), <http://big.assets.huffingtonpost.com/CokerLetter.pdf> [<https://perma.cc/2XBT-SZS3>] (reviewing a broad range of bilateral and multilateral cooperative arrangements regarding arms control and nonproliferation that have been developed by nonbinding political commitments); Duncan

committed to removing their nuclear-related domestic sanctions, and to proposing and voting for a new U.N. Security Council Resolution, which terminated and replaced past resolutions,<sup>182</sup> thereby changing the nature of the other countries' legal obligations under Chapter VII of the U.N. Charter to provide sanctions relief to Iran.

Like the Paris Agreement, the Iran Nuclear Deal derives from far more legislative input and support than is generally recognized. The Constitution plainly grants Congress subject matter authority over foreign commerce, and hence, economic sanctions. In turn, Congress delegated implementation of these authorities to the President. Congress also granted the President specific statutory authority to waive existing domestic law sanctions against Iran if he determines that it is in the national interest. Those laws gave President Obama ample statutory authority to enter a deal to waive the sanctions in question, as well as constitutional authority to make the nonbinding political commitment that the United States would not re-impose such sanctions under the terms of the JCPOA, so long as Iran kept its part of the bargain.<sup>183</sup> In addition to preexisting statutory sanctions authority, while the JCPOA was under consideration, Congress enacted the Iran Nuclear Agreement Review Act ("Corker-Cardin" bill), which did not undermine the President's legal authorities, and arguably added to them.<sup>184</sup> Nothing in the Corker-Cardin bill authorized a future President to violate the Iran Nuclear Deal in a manner inconsistent with international law.

But on May 8, 2018, President Trump announced that the United States would withdraw from the JCPOA. In essence, Trump announced that he would no longer exercise his statutory option to waive U.S. statutory sanctions, "instituting the highest level of economic sanction" on Iran and "[a]ny nation

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B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 567 (2009) (citing other political commitments that promoted denuclearization).

<sup>182</sup>. S.C. Res. 2231, ¶ 2 (July 20, 2015), <https://undocs.org/S/RES/2231> (2015) [<https://perma.cc/WZW6-LJBS>].

<sup>183</sup>. See Koh, *supra* note 131, at 351-55.

<sup>184</sup>. Pub. L. No. 114-17, 129 Stat. 201 (2015) (codified as amended at 42 U.S.C. § 2160e (2018)). The Act requires the President to submit any agreement with Iran to Congress, delays implementation of any agreement for sixty days so that Congress can decide whether to act on it, and provides Congress with an opportunity to vote its disapproval. The Corker-Cardin bill was a classic "report and wait" provision that postponed the exercise of the President's existing statutory waiver authority over Iran sanctions until sixty days had passed without Congress enacting a joint resolution of disapproval, which it did not enact. For an argument that the Iran Nuclear Review Act de facto authorized the President to enter into a legally binding JCPOA with Iran, see David Golove, *Congress Just Gave the President Power to Adopt a Binding Legal Agreement with Iran*, JUST SECURITY (May 14, 2015, 4:12 PM), <https://www.justsecurity.org/23018/congress-gave-president-power-adopt-binding-legal-agreement-iran> [<https://perma.cc/9B24-7EF6>].

that helps Iran in its quest for nuclear weapons.”<sup>185</sup> But his withdrawal alone has not killed the deal, nor has it eliminated the reasons for Congress to review the withdrawal.

At the international level, the other partners to the JCPOA—the Europeans, the Russians, and the Chinese—did not rush to default on their own obligations just because President Trump did. Nor did they return unilaterally to reimposing sanctions on Iran. To the contrary, these other parties initially all responded by saying that despite the Trump Administration’s action, they still intended to comply with the Iran Deal. Thus, at this writing, the JCPOA remains fragile, but functioning. Trump acknowledges that his withdrawal will take until at least the end of 2018 to fully implement. Thus, the United States has again resigned from an international agreement, but not yet fully left.

At least until the end of 2018, Iran will likely keep fulfilling its JCPOA nuclear commitments to benefit from the continued sanctions relief from the United Nations and the European Union. And significantly, Trump’s May announcement of withdrawal did not state that the United States would unilaterally trigger the so-called “snapback” mechanism of U.N. Security Council Resolution 2231. That mechanism allows any permanent member of the Security Council—without a vote by the full Council—to cancel U.N. sanctions relief provided under that resolution within thirty days by claiming a violation. What probably constrained President Trump from doing so was that the other stakeholders would not likely agree that an Iranian violation has occurred. The IAEA has repeatedly reported that Iran is in compliance with the JCPOA.<sup>186</sup> Trump’s lawyers plainly advised him that if the United States exercised the snapback provision, Iran could plausibly argue that the United States lacked a good-faith basis for accusing Iran of a breach, and that any diminution in Iran’s performance came in response to the U.S. unilateral withdrawal announcement.<sup>187</sup>

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<sup>185</sup>. *Read the Full Transcript of Trump’s Speech on the Iran Nuclear Deal*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/politics/trump-speech-iran-deal.html> [https://perma.cc/F3HJ-6TAJ].

<sup>186</sup>. *See Statement by IAEA Director General Yukiya Amano*, INT’L ATOMIC ENERGY AGENCY (May 9, 2018), <https://www.iaea.org/newscenter/statements/statement-by-iaea-director-general-yukiya-amano-9-may-2018> [https://perma.cc/F7PP-6VH6].

<sup>187</sup>. *See* JCPOA, *supra* note 177, at art. 37 (any complaining party must include “a description of the good-faith efforts the participant made to exhaust the dispute resolution process”); *see also id.* at art. 26 (“The United States will make best efforts in good faith to sustain this JCPOA . . .”). The standard for action is whether “the JCPOA participant State believes [another’s action] constitutes significant non-performance of commitments under the” agreement, a standard that Iran has probably not breached. Jean Galbraith, *The End of the Iran Deal and the Future of the Security Council Snapback*, OPINIO JURIS (May 9, 2018, 1:43 PM),

The irony, of course, is that the entire structure of the JCPOA rested on the once-reasonable assumption that Iran, not the United States, would be the likely violator. But instead of exiting the deal, Iran sued the Trump Administration before the International Court of Justice (ICJ), which recently issued a provisional measures order that could lead to a final judgment that the United States violated international law by unilaterally abrogating the JCPOA.<sup>188</sup> Iran asked the court to issue provisional measures on the ground that renewing sanctions would violate multiple provisions of a 1955 bilateral Treaty of Amity between the United States and Iran.<sup>189</sup> The court ordered the parties to commit to “the non-aggravation of their dispute” and directed the United States to remove any impediments, resulting from re-imposed sanctions, previously lifted within the framework of the JCPOA, to the free export to Iran of humanitarian goods, equipment, and services to ensure civil aviation safety. Shortly after the court issued its order, the executive branch announced that it would terminate the 1955 Treaty of Amity with Iran in one year’s time,<sup>190</sup> under the terms of Article XXIII(3) of the Treaty, and soon thereafter terminated the Optional Protocol on Dispute Settlement to the Vienna Convention on Diplomatic Relations.<sup>191</sup>

This legal background is doubly significant. First, historical practice does not recognize any right of the President unilaterally to breach an agreement in violation of international law. Even those who rely on recent historical practice only argue that it condones a President’s power to unilaterally terminate an agreement *in accordance with its terms*. Congress has undeniable constitutional authority to implement and monitor the lawful implementation of treaty commitments, as illegal implementation or termination inevitably affects many

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<http://opiniojuris.org/2018/05/09/the-end-of-the-iran-deal-and-the-future-of-the-security-council-snapback> [<https://perma.cc/Z426-CJNX>] (quoting U.N. Security Council Resolution 2231 (July 20, 2015)). If the United States withdraws from the Iran Deal, it might no longer qualify as a “JCPOA participant State” authorized to trigger the snapback clause. *Id.*

<sup>188</sup>. See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Order on Request for the Indication of Provisional Measures, 2018 I.C.J. 175 (Oct. 3); Elena Chachko, *What to Make of the ICJ’s Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018), <https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case> [<https://perma.cc/3GPK-T7P8>].

<sup>189</sup>. Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Ir.-U.S., Aug. 15, 1955, 8 U.S.T. 899.

<sup>190</sup>. Michael R. Pompeo, Sec’y of State, Remarks to the Media, (Oct. 3, 2018), <https://www.state.gov/secretary/remarks/2018/10/286417.htm> [<https://perma.cc/V347-L5EF>].

<sup>191</sup>. *U.S. Withdrawing from Vienna Protocol on Dispute Resolution - Bolton*, REUTERS (Oct. 3, 2018), <https://www.reuters.com/article/usa-diplomacy-treaty/u-s-withdrawing-from-vienna-protocol-on-dispute-resolution-bolton-idUSW1N1UJooV> [<https://perma.cc/53CT-QZUU>]; *see* Optional Protocol on Dispute Settlement to the Vienna Convention on Diplomatic Relations, Apr. 24, 1963, 596 U.N.T.S. 487.

constituents and many facets of the national interest. To be sure, Iran's legal claims before the ICJ against the United States have been challenged as weak, and may well not ultimately prevail.<sup>192</sup> But as this episode illustrates, termination of a deal in a manner inconsistent with its terms can lead to cascading claims of international law violation and the termination of other international agreements. One of the principal aims of the U.S. Constitution was undeniably to give the federal government authority to comply with its international legal commitments.<sup>193</sup> Thus, even in cases where the President alone may have the power to make an agreement that binds the United States, the Constitution still requires that an attempted termination of that same agreement be subject to congressional review under circumstances where that termination would render the nation as a whole externally liable for an international law violation that could implicate many areas of congressional responsibility.

Under this reasoning, Congress would have a strong claim to challenge the President's authority to breach JCPOA unilaterally on the grounds that Iran, the other partner, had engaged in no such breach. Congress acquiesced in the adoption of the Iran Nuclear Deal through the delegated use of sanctions relief, but in so doing, anticipated that the President would grant or withhold the sanctions relief in accordance with the deal's terms. Even when a President makes an international agreement without congressional participation, if a subsequent President's disengagement from that same agreement would expose the United States as a nation to claims of international law violation, that disengagement should not be finalized without congressional participation and oversight.

Second, in the case of the JCPOA, the need for congressional participation is particularly strong, because the President is not exercising his own plenary

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<sup>192.</sup> See John Bellinger, *Thoughts on the ICJ's Decision in Iran v United States and the Trump Administration's Treaty Withdrawals*, LAWFARE (Oct. 5, 2018), <https://www.lawfareblog.com/thoughts-icjs-decision-iran-v-united-states-and-trump-administrations-treaty-withdrawals> [https://perma.cc/TY95-NED3] ("Rather than attack the Court, the [Trump] administration should move forward to the merits phase, where the Court is more likely to accept the strong U.S. arguments and to decline Iran's request that the Court block further economic sanctions on Iran.").

<sup>193.</sup> The framers of the Constitution granted Congress the power to "define and punish . . . Offences against the Law of Nations" on the understanding that the law of nations included both custom and treaties. U.S. CONST. art. I, § 8, cl. 10. Congress and the Supreme Court have shared this understanding of the Offences Clause through most of our nation's history. Under both this provision and the Take Care Clause, Congress has a special power and duty to oversee and remedy international law violations committed by the United States through any of its three branches, an authority that exists separately and independently of any constitutional authority over exit that may be afforded to it by the mirror principle. *See generally* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015).

constitutional powers, but rather, exercising delegated congressional foreign commerce powers to adjust sanctions in a case where the agreement partner has apparently complied with its international commitments. Congress could undoubtedly revoke its delegation and use its foreign commerce power to decline to re-impose economic sanctions on Iran despite Trump's decision to withdraw, on the ground that it sees no basis for an executive claim of retaliatory breach.<sup>194</sup> Or if, as Trump claims, he wants a better deal with Iran, Congress could entirely withdraw his statutory rights to waive sanctions in this setting and require—as a condition of giving consent to any new agreement with respect to Iran—a presidential undertaking to terminate or withdraw from that same agreement only in accordance with congressionally prescribed procedures, which could include specified modes of congressional notification, consultation, and participation. Now that the House of Representatives is under opposition control after the November 2018 midterm elections, one or both houses of Congress could now assert a constitutional right, under the mirror principle, to review and participate in the decision to withdraw from the Iran Nuclear Deal before it becomes final.<sup>195</sup>

#### **V. REGULATING WITHDRAWALS GOING FORWARD**

This brings us to a final question: how best to regulate America's withdrawals from international agreements going forward? In *INS v. Chadha*, the Court made clear that Congress cannot affect the rights of persons outside the legislative branch unless it acts by a joint resolution, which is enacted by both

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<sup>194</sup>. On August 6, 2018, Trump issued an Executive Order “Reimposing Certain Sanctions with Respect to Iran.” Exec. Order No. 13,846, 83 Fed. Reg. 38,949 (Aug. 7, 2018). While some of those renewed sanctions became effective immediately, others will not take effect until November 5, 2018. See OFAC FAQS: *Iran Sanctions*, U.S. DEP’T OF THE TREASURY (Aug. 9, 2018, 1:12 PM), [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_iran.aspx](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx) [<https://perma.cc/X439-2QN6>].

<sup>195</sup>. In an “open letter, forty-seven Republican Senators challenged President Obama’s right to enter the Iran Nuclear Deal and suggested that “[a]nything not approved by Congress is a mere executive agreement,” that the next “president could revoke [it] . . . at any time with the stroke of a pen.” Open Letter from Forty-Seven United States Senators to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), reprinted in *Letter From Senate Republicans to the Leaders of Iran*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/interactive/2015/03/09/world/middleeast/document-the-letter-senate-republicans-addressed-to-the-leaders-of-iran.html> [<https://perma.cc/MK2S-UB95>]. But as the discussion in text indicates, their characterization of the Iran Nuclear Deal as a “mere executive agreement” is incomplete. In fact, implicit in their argument are two important concessions: first, the implication that significant congressional participation *would* be required to revoke an Article II treaty or congressional-executive agreement; and second, the unambiguous suggestion that “future Congresses could modify the terms of the [Iran Nuclear] agreement at any time.” *Id.*

houses and presented to the President for either her signature or veto.<sup>196</sup> But that formal constitutional rule does not prevent Congress from developing new and better ways to direct how presidential attempts at agreement termination or withdrawal should be managed in the future.

Congress could, for example, enact general laws prospectively limiting the President's discretion to unilaterally terminate all Article II treaties and congressional agreements. Or, it could adopt specific statutes limiting that executive discretion with respect to particularly important named treaties. Either kind of legislative enactment would place any such unilateral termination into *Youngstown* Category Three, where the President's "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."<sup>197</sup> Thus for example, Congress could pass a law *ex ante* opposing the President's effort to unilaterally withdraw from a mutual defense treaty, like NATO, which does not involve the President's plenary power.<sup>198</sup> Alternatively, the Senate could impose a reservation, understanding, or declaration on new or existing treaties, limiting future efforts at unilateral presidential terminations unless the termination is plainly "for cause."<sup>199</sup>

If Congress wished to address this issue more broadly, it could adopt a "framework statute" to govern all requests for agreement withdrawal or termination.<sup>200</sup> In such a framework statute, Congress could specify that the President may not terminate an important treaty or congressional-executive agreement without meaningful consultation with or notification of Congress, including the relevant congressional committees or congressional leaders. If the President claimed that an emergency situation required immediate disengagement from a particular treaty or agreement, Congress could revise its internal rules to enable him to submit the matter of withdrawal or termination to Congress for speedy congressional action, under a "fast-track" procedure of

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<sup>196.</sup> 462 U.S. 919, 952-59 (1983); *see also* U.S. CONST. art. I, § 7, cl. 2-3 (Bicameralism and Presentment Clauses).

<sup>197.</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see supra* note 130 (explaining Justice Jackson's tripartite framework).

<sup>198.</sup> *See, e.g.*, No NATO Withdrawal Act, H.R. 6530, 115th Cong. (2018); Demirjian, *supra* note 35.

<sup>199.</sup> *See* Eichensehr, *supra* note 22, at 279-307 (arguing for the constitutionality of such a substantive "for-cause" limitation for termination).

<sup>200.</sup> *See* KOH, *supra* note 80, at 69 (quoting Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976)) (noting that a framework statute is a law "that Congress enacts and the president signs within their zone of concurrent authority not simply to 'formulate policies and procedures for the resolution of specific problems, but rather . . . to implement constitutional policies'").

the kind used in international trade laws.<sup>201</sup> If the President proposed to withdraw or terminate U.S. participation from a particular treaty regime, he could ask to have a bill introduced in Congress under these specialized, expedited “fast track” legislative procedures, which would require Congress to vote on a joint resolution of approval or disapproval of the action within a specified number of legislative days, without amendment or extended debate in committee. This procedure would, in effect, force Congress to approve or reject the proposed withdrawal or termination by affirmative expedited action, not merely by silence.

Executive branch lawyers should recognize that creating such a protocol to govern terminations or withdrawals, operating under such generic procedures, would serve the executive branch’s long-term interests. A legislated “agreement withdrawal” protocol would lift particular presidential decisions to terminate or withdraw out of *Youngstown*’s Categories Two and Three and into Category One, where they would be “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”<sup>202</sup> Such presidential actions would thus become endowed with the highest available degree of constitutional legitimacy, as opposed to the uncertain legal status that would inevitably accompany a series of ad hoc executive efforts to disengage from longstanding treaty arrangements through less formal means.

## CONCLUSION

In sum, the conventional wisdom that the President possesses a general unilateral power to terminate or withdraw from international agreements is mistaken. A claimed transsubstantive rule of withdrawal and termination cannot explain why key multilateral treaties, such as the WTO, NAFTA, and IMF Articles of Agreement—which lie squarely within the zone of Congress’s exclusive foreign commerce power—should be terminable by the President acting alone, when a high degree of congressional input was constitutionally required to create those obligations in the first place. This Essay has argued that this issue is in fact governed by an agreement-specific “mirror” principle—reflected in early U.S. constitutional jurisprudence and the functional reasoning of parallel foreign decisions—that requires parity of constitutional authority for entry and exit. Absent exceptional circumstances, that mirror principle requires that the degree of congressional participation legally necessary to exit an

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<sup>201</sup>. For discussion of how this fast track legislative process works in the trade context, see generally Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143 (1992).

<sup>202</sup>. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

agreement should mirror the degree of congressional and executive participation that was required to enter that agreement in the first place.

If nothing else, the foregoing analysis should make plain that *Goldwater v. Carter* cannot be considered controlling with respect to most of the termination or withdrawal scenarios that may lie ahead.<sup>203</sup> The President possesses no general unilateral power of treaty termination. In future cases, the constitutional requirements for termination should be decided based on the type of agreement in question, the degree of congressional approval and subject matter in question, and Congress's effort to guide the termination and withdrawal process by framework legislation. It would thus be grievous error for the President or his lawyers to assume that our Constitution confides in him alone the power entirely to disengage the United States from the post-World War II legal order.

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*Parts of this Essay derive from thoughts first expressed in my most recent book, The Trump Administration and International Law. This Essay completes a trilogy on Twenty-First Century international lawmaking and breaking that also includes Harold Hongju Koh, Twenty-First Century International Lawmaking, 101 GEO. L.J. 742 (2013), and Harold Hongju Koh, Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking, 126 YALE L.J.F. 337 (2017).*

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<sup>203</sup>. See No NATO Withdrawal Act, H.R. 6530, 115th Cong. § 3(2) (2018) ("It is the sense of Congress that . . . the case *Goldwater v. Carter* is not controlling legal precedent with respect to the unilateral withdrawal of the United States from a treaty.")

<sup>204</sup>. See *Historical Society of the District of Columbia Circuit, DC Courts Goldwater to Zivotofsky*, YOUTUBE (Apr. 15, 2018), <https://www.youtube.com/watch?v=nDelJeNU9IU> (recording the conversation).