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Revisiting *Goldwater v. Carter*: The Executive's Right to Rescind Treaties in Light of President Bush's 2002 Termination of the ABM Treaty

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This paper examines the constitutional power of the President to terminate treaty obligations. It centers on President Bush's recent renunciation of the 1972 Anti-Ballistic Missile Treaty with the Soviet Union. It focuses on the balance of power between the legislative and executive branches in light of the *Goldwater v. Carter* and *Kucinich v. Bush* decisions. The paper is divided into six sections: (1) the international legal ramifications of unilateral executive treaty rescission; (2) the role of standing; (3) the impact of the political question doctrine; (4) arguments for and against permitting the President to terminate treaties; (5) a discussion of the process that should be used to terminate treaties, as between the President and Congress; and, finally, (6) an examination of alternative strategies that Congress may employ when the President chooses to rescind a treaty. The paper concludes that the decision to terminate a treaty should not be one-sided, and that joint action from both branches should be required whenever the United States wishes to relieve itself of treaty obligations.

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INTRODUCTION

In 1972, the United States and the Soviet Union ratified the Anti-Ballistic Missile Treaty (ABM Treaty). In so doing, each state promised not to deploy ABM systems in defense of its territory,[1] nor "develop, test, or deploy ABM systems or components which [were] sea-based, air-based, space-based, or mobile land-based" (ABM Treaty, arts. I, V). Finally, each state agreed not to position ABM systems on any other state's national territory or transfer ABM technology to other states (ABM Treaty, art. IX). These promises were part of a commonly understood deterrence policy known as mutually assured destruction (MAD), based on the belief that it was in the interests of neither the United States nor the Soviet Union to launch a nuclear attack because the other side would then retaliate "massively and unacceptably" (Parrington 1997). Likewise, if either side were permitted to develop an ABM defense capability, the result would be the same: the strategic landscape would be altered and each state would then have an incentive to procure a first-strike capability. The ABM Treaty was, in essence, an effort to preserve the fear of mutually assured destruction by creating an effective balance against the danger of a first-strike (Parrington 1997).

By 2002, the balance of power between the United States and the Russian Federation was vastly different, and the desire to maintain the MAD strategic framework was diminished. The primary threat to the United States was no longer from the Soviet Union but from rogue states and non-state actors. Accordingly, President Bush announced that the United States would withdraw from the ABM Treaty, pursuant to its power under Article XV of that treaty and in the belief that "extraordinary events" had "jeopardized [the] supreme interests" of the United States (Transcript 2002; ABM Treaty, art. XV(2)).[2] Although the legality of the President's decision was not challenged by the Russian Federation, the unilateral withdrawal prompted questions within the United States about the constitutional power of the executive to rescind treaty commitments. Certain members of Congress, led by Representative Kucinich (D-Ohio), contested this power by seeking judicial resolution; however, their case was dismissed when Judge Bates held that (a) the Representatives lacked standing to bring the action and (b) the action involved a nonjusticiable political question (*Kucinich v. Bush*, 236 F. Supp. 2d 1). In declining to address the merits of the case, Judge Bates invoked the 1979 Supreme Court decision in *Goldwater v. Carter*, where a challenge by members of Congress to the authority of the President to unilaterally withdraw from a mutual defense treaty failed (*Goldwater v. Carter*, 444 U.S. 996).[3]

Despite the similar holdings in *Kucinich* and *Goldwater*, it remains unclear what threshold showing is necessary to satisfy the standing and political question requirements that accompany any challenge to the executive's treaty termination power. More importantly, there is virtually no controlling precedent on the merits of this question.[4]

This paper has six sections: (1) the international legal ramifications of unilateral executive treaty rescission; (2) the role of standing; (3) the impact of the political question doctrine; (4) arguments in favor and against permitting the President to terminate treaties; (5) a discussion of which process should be used to terminate treaties, as between the President and Congress; and, finally, (6) an examination of alternative strategies that Congress may employ when the President chooses to rescind a treaty. This paper analyzes each of these sections in the context of President Bush's withdrawal from the ABM Treaty, and in light of the *Kucinich* and *Goldwater* decisions. It will not discuss whether the ABM Treaty obligations lapsed after the collapse of the Soviet Union, nor will it address whether the Russian Federation is a successor state to the Soviet Union.[5] It will also not discuss the more normative, policy-oriented arguments concerning the effectiveness of the ABM Treaty as a bilateral agreement, or whether it was in the best interests of the United States to terminate the agreement.

Instead, this paper focuses on the balance of power between Congress and the executive with respect to the termination of treaty obligations. At the heart of this conflict are (a) the President's foreign affairs powers as "the sole organ of the federal government in the field of international relations" (*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320) and (b) the constitutional authority of Congress "[t]o make all Laws which shall be necessary and proper," along with the Article VI guarantee that treaties are part of the "supreme Law of the Land"[6] (U.S. CONST. art. I, § 8, art. VI). For the purposes of this analysis, the question of treaty termination has less to do with public international law than with constitutional interpretation. This paper concludes that the decision to terminate a treaty should not be one-sided, and that joint action from both branches should be required whenever the United States wishes to relieve itself of treaty obligations.

Interpreting the ABM Treaty: A Close Reading of Article XV

When examining the power of a state to withdraw from a treaty, the explicit language and terms of that treaty are often most instructive. This section considers the termination provisions of the ABM Treaty, specifically Articles

XV and XVI, and examines them in the context of (a) international legal obligations under the Vienna Convention on the Law of Treaties, and (b) U.S. judicial precedent in *Goldwater v. Carter*.

The ABM Treaty is a bilateral treaty between the United States and the Soviet Union, and this paper assumes that only these two states may derive rights and obligations from the text of that Treaty.[7] Article XV(2) of the Treaty provides:

> Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that *extraordinary events* related to the subject matter of this Treaty have jeopardized its *supreme interests*. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests (emphasis added) (ABM Treaty, art. XV(2)).

Thus, in order for either Party to terminate its obligations under the Treaty, it must show that "extraordinary events" have jeopardized its "supreme interests." It is sufficient to assume that the U.S. government could make the requisite showing based on the events of September 11, 2001. Indeed, the emerging threat of non-state actors and ballistic missile attacks seems to satisfy the Article XV requirement (Sabis 2003, 232). However, the real question concerns the precise legal mechanism by which a Party can terminate the Treaty. According to Article 54 of the Vienna Convention on the Law of Treaties, "[t]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States" (Vienna Convention, art. 54). Therefore, under international law, the first step in analyzing the right of a state to withdraw from a treaty is to simply follow the procedure set forth by that treaty's termination provisions.

The ABM Treaty enunciates this procedure clearly in Article XV but makes no mention of how individual governments should satisfy this process within their own constitutional systems. In this regard, the U.S. Court of Appeals decision in *Goldwater* is instructive. The *Goldwater* court made extensive reference to Article X of the Mutual Defense Treaty between the United States and the Republic of China, which stated: "This Treaty shall remain in force indefinitely. Either Party may terminate one year after notice has been given to the other Party" (Mutual Defense Treaty, art. X). The court noted that the treaty, including the Article X termination provision, had been approved by the Senate, and that the Senate did

not reserve a role for itself in the renunciation process. As a result, based on the terms of the treaty, the court interpreted the legal question to be whether the President, in these precise circumstances, was empowered to terminate the treaty, and its conclusion was that the President was indeed empowered to do so (*Goldwater v. Carter*, 617 F.2d 697, 699).

The court made a critical misinterpretation, however, in basing its decision on what action would placate the Taiwanese government, rather than on what action would satisfy the demands of the U.S. Constitution. Even though the Mutual Defense Treaty provided that either Party may terminate the Treaty, it is illogical to conclude that the President has the sole authority, independent of Congress, to carry out that termination. Under no circumstances can the terms of a treaty dictate the manner in which the United States withdraws—indeed, a treaty may not be cited as a means of resolving any U.S. constitutional ambiguities. Judge MacKinnon, in his dissenting opinion, noted correctly that "the United States of America, not the President, is treaty-bound."[8] Neither the Mutual Defense Treaty nor the Anti-Ballistic Missile Treaty states explicitly that the "President" is granted the power of treaty termination. Even if they did, it is doubtful that such language would override the U.S. Constitution (especially if it is determined that the Congress must play some role in treaty termination). In short, the language of Article XV of the ABM Treaty is not dissimilar from the language of Article X of the Mutual Defense Treaty—in neither treaty can one assume that the President has the power to withdraw. That right has been afforded to the Parties, not the Presidents. To be sure, the Preamble defines the Parties as "[those] nations involved in the Treaty … [and] not their executives" (Sabis 2003, 232). Article XV may therefore not be used itself as a justification for proving that the executive has the sole power to terminate a treaty. That question can only be resolved by the U.S. Constitution (Sabis 2003, 232).[9]

The Role of Standing: The Threshold Showing Necessary to Challenge the President's Unilateral Termination of Treaties

Of all the arguments supporting the executive's authority to renounce treaty obligations, standing is perhaps the most difficult to refute. In both *Raines v. Byrd* (521 U.S. 811 (1997)) and *Goldwater*, members of Congress were prevented from discussing the merits of their cases because they failed to allege the requisite injuries necessary to establish standing (*Kucinich*, 236 F. Supp. 2d at 1). This section attempts to distinguish these cases from ABM Treaty termination by arguing two main points: (a) institutional

plaintiffs, such as members of Congress, should not be prevented from bringing claims in an official capacity, as long as they can prove a "personal, particularized, concrete, and otherwise judicially cognizable" injury; and (b) cases that involve challenges to recently ratified legislation are fundamentally different than cases that challenge the method by which treaties may be terminated (*Kucinich*, 236 F. Supp. 2d at 1).

Standing is a threshold jurisdictional matter (*Whitmore v. Arkansas*, 495 U.S. 149, 155). Article III of the Constitution restricts the jurisdiction of the federal courts to "Cases and Controversies" (*Kucinich*, 236 F. Supp. 2d at 3, citing U.S. CONST. art. III, § 2). According to *Lujan v. Defenders of Wildlife*, the following criteria are necessary to establish standing:

> 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. Third, it must be likely, [rather than] speculative, that the injury will be redressed by a favorable decision (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61).

In other words, the courts have held that a plaintiff may not bring a general grievance against the government—the matter must affect a "threatened concrete interest of his own" to satisfy the Article III case or controversy requirement (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556). In *Kucinich*, the court held that a group of Representatives did not have standing to bring their suit, a decision consistent with a similar jurisdictional holding in *Raines*. In that case, members of Congress were not permitted to challenge the constitutionality of the Line Item Veto Act (*Raines*, 521 U.S. at 816). The Supreme Court held that the "standing inquiry [is] … especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional" (*Raines*, 521 U.S. at 816). The *Kucinich* court relied on *Raines* in holding that any "institutional" challenge to the executive branch which involved an abstract injury was insufficiently "personal" to establish standing (*Kucinich*, 236 F. Supp, 2d at 6). Representatives and Senators would have to demonstrate a personal injury that did not apply equally to all members of Congress to meet the standing requirement (Memorandum 2002, 2). As further

evidence that *Raines* is dispositive, the court cited *Chenoweth v. Clinton*, in which members of Congress were held not to have standing to challenge an environmental program enacted through executive order rather than legislation (*Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999)).

What these cases fail to acknowledge, however, is that it is possible for an institutional plaintiff to establish standing, as long as that plaintiff can demonstrate a personal and concrete injury. In *Coleman v. Miller*, for example, the Supreme Court upheld legislative standing for institutional inquiries (*Coleman v. Miller*, 304 U.S. 433 (1939)). Even if an injury is not limited to a particular Representative or Senator, if one can show that the President has deprived an individual of the right to cast a vote, the requisite injury may be demonstrated. In this regard, the D.C. Court of Appeals *per curiam* opinion in *Goldwater* creates useful categories:

> This court has carefully drawn a distinction between (1) a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner which, we have found, constitutes injury in fact; and (2) a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislator's vote, where the plaintiff-legislator still has power to act through the legislative process to remedy the alleged abuses in which situations we do not find injury in fact (*Goldwater*, 617 F.2d 697, at 702).

In other words, where there has been a virtual "disenfranchisement," a plaintiff-legislator can show "personal" injury, in such a way as to satisfy the standing requirement. In the context of the ABM Treaty, it is clear that legislators were denied the right to vote on treaty termination, since President Bush did not ask for their consent before invoking Article XV measures. Although such an injury may be "institutional," legislators should not be prohibited from bringing a claim.

The judges in *Kucinich* might respond to these arguments by explaining that legislators, unlike other individuals, are better suited to resolve this "injury" by taking advantage of the legislative process and seeking a "political self-help" (*Kucinich*, 236 F. Supp. 2d at 9-10). Even if a legislator can prove personal injury, standing may still be refused since that individual is in a superior position to challenge authority and settle differences. This argument is flawed in several respects. Concerning the President's power to terminate the ABM Treaty, it is important to note that legislators have been denied the right to vote entirely—in other words, they possess "no

legislative power to exercise an equivalent voting opportunity" (*Goldwater*, 617 F.2d 697 at 703). When members of Congress are effectively disenfranchised, they no longer have the type of "political leverage" necessary to overcome the excesses of the President (*Kucinich*, 236 F. Supp. 2d at 9). As a result, a distinction must be drawn between executive action that impedes legislative *effectiveness* and executive action that impairs the legislative *process* itself. In the latter situation, a showing of injury should be enough to satisfy the standing requirement.

There is a fundamental difference between cases like *Raines* and *Chenoweth*, and others such as *Goldwater* and *Kucinich*. In the former group, legislators were correctly prohibited from challenging recently enacted legislation (an Act in *Raines* and an Executive Order in *Chenoweth*). In both instances, members of Congress were not prohibited from employing other political means to resolve their frustrations because those cases dealt with legislative effectiveness (*Goldwater*, 617 F.2d 697 at 703). Judicial resolution was not the only option available to the petitioners, so it was in the court's interest to remain aloof from the matters.[10]

Both *Goldwater* and *Kucinich* are different, however, because they deal with a more *process*-oriented question, namely the President's power to unilaterally terminate treaties. Rather than impeding legislative effectiveness, such questions go a step further and actually *prevent* alternative means of resolution; after all, one cannot mount a political challenge if one does not have the right to vote. Thus, where an institutional plaintiff can show personal injury (demonstrating that the process itself has caused disenfranchisement) and the absence of a political remedy, the claim should be cognizable for standing purposes. The District Court in *Kucinich* was therefore wrong in holding that members of Congress lacked standing to bring their suit challenging the President's withdrawal from the ABM Treaty.

The Political Question Doctrine: Is There a Constitutional Impasse?

Courts have often taken a cautious position with respect to claims that can be resolved between the legislative and executive branches. Indeed, unless there is a genuine constitutional impasse, courts will deem the claim to be a nonjusticiable political question (*Goldwater*, 444 U.S. 996 at 996). This section contends that the political question doctrine is inapplicable in the case of ABM Treaty termination for three reasons: (a) there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (b) there is no lack of "judicially discover-

able" standards for resolving the case; and (c) prudential considerations do not counsel otherwise (*Powell v. McCormack*, 395 U.S. 486, 519; *Baker v. Carr*, 369 U.S. 186, 217).

When the Supreme Court heard the *Goldwater* case, it offered a confusing result, since only Justice Brennan reached the merits, while the other Justices maintained very different opinions on the political question doctrine. Justice Rehnquist, writing for himself and three others, dismissed the matter because it involved political rather than legal considerations (*Goldwater*, 444 U.S. 996 at 996). Justice Powell, however, disagreed with this position and argued vehemently that his main concern was with the issues of standing and ripeness and not with the political question doctrine (Sabis 2003, 243). Meanwhile, Justice Brennan argued that neither standing nor the political question doctrine should prohibit the Court from reaching the merits. Despite these divergent opinions, the Court essentially agreed that the judicial branch should not decide cases that involve the separation of powers between Congress and the executive unless there is a real constitutional impasse. In other words, unless the two branches have exhausted all other political remedies and a genuine constitutional bottleneck continues to exist, the courts may not resolve the issue (Sabis 2003, 243). The Court relied heavily on *Baker v. Carr*, the case on the political question doctrine cited most often. In *Baker*, the Supreme Court framed its doctrine as three separate questions:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
>
> (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise [or involve judicially unmanageable standards]?
>
> (iii) Do prudential considerations counsel against judicial intervention? (*Baker*, 369 U.S. 186 at 217).

The real confusion in the Supreme Court's *Goldwater* decision is in the divergent ways in which the Justices answered these questions. Both Justice Rehnquist in *Goldwater* and the majority in *Kucinich* concluded that the President should have wide discretion to conduct his policies in the realm of foreign affairs. They emphasized that as the "sole organ of the federal government in the field of international relations," the President should be accorded certain privileges whose connection with foreign affairs tends to make them political questions, although they might otherwise interfere with the nondelegation doctrine. (*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320; *Goldwater*, 444 U.S. 996 at 1000). As such,

whenever a separation of powers question involves the conduct of foreign policy, the matter is best left in the hands of the executive. The *Kucinich* court noted that although only four of the Justices in *Goldwater* had expressly agreed that the matter was a nonjusticiable political question, the *Goldwater* conclusion is persuasive, even though it is not binding.

Building off Justice Rehnquist's arguments, Judge Bates examined each of the *Baker v. Carr* questions and found that all three suggested that the matter of ABM Treaty termination is a political question. First, he correctly noted that the Constitution does not address the matter of treaty termination. He said, however, that if the Constitution favors one particular branch, it clearly favors the executive because treaty termination is a matter which falls within the ambit of the President's foreign affairs power, and it is not for the courts to "second-guess" foreign policy decisions (*Kucinich*, 236 F. Supp 2d at 14). With respect to the second question, Judge Bates warned that different treaties may require different termination procedures, and therefore the courts should refrain from addressing matters that are best left to the political tendencies of the other two branches. He held that treaty termination procedures are outside the scope of judicial expertise, particularly because they are questions that can be better controlled by "political standards." Finally, his third argument was that prudential considerations counsel that the courts should not take action unless each branch has already asserted its authority and there remains a constitutional impasse.

In keeping with the *Baker v. Carr* model, this paper addresses, and attempts to refute, each of Judge Bates' points separately. First, with regard to there being no textual commitment to a coordinate branch of government, Judge Bates said correctly that the Constitution does not provide a definite answer with respect to treaty termination; yet, both he and Justice Rehnquist conclude that the *Curtiss-Wright* decision provides enough justification for holding that the President should have the presumptive right to withdraw from treaties. This manner of thinking is very dangerous. One should not assume that any question relating to foreign affairs is a political question that should be left in the hands of the executive. As *Baker v. Carr* warns, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance" (*Baker v. Carr*, 369 U.S. 186 at 211). Contrary to Justice Rehnquist's *Curtiss-Wright* analysis, Justice Powell provides an equally compelling argument which favors the right of Congress to terminate treaties (*Goldwater*, 444 U.S. 996 at 999). For example, Article II, Section 2 says that the President may only ratify treaties with the advice and consent of the Senate, and Article

VI provides that treaties are part of the "supreme Law of the Land." These clauses suggest that the President's power is not unbounded; the President is not necessarily authorized to terminate treaties simply because the matter involves foreign affairs.

As for Judge Bates's second point, with respect to judicially manageable standards, it is unclear why he assumed that the resolution of this question would be outside the scope of the court's authority. It is by no means certain that courts will hold that any decision would require different answers for different treaties—it is therefore wrong to dismiss the question without exploring the available options.[11] More likely than not, courts are prone to hold that the treaty termination power belongs in the hands of the executive or should be shared between Congress and the executive—such outcomes would not create a judicially unmanageable standard. Treaty termination involves a conflict between the separate constitutional powers of Congress and the President, and is therefore not outside the scope of judicial review, even if the President plays a dominant role in foreign affairs (*Goldwater*, 444 U.S. 996 at 999).

Judge Bates third argument was that prudential considerations counsel against answering these questions. He said, for example, that states may act on the basis of the President's notice of treaty termination, and that "foreign governments must be able to rely on the pronouncements of the United States regarding its treaties" (*Kucinich*, 236 F. Supp. 2d at 16). Were the courts to become involved every time there was a question concerning which branch was entitled to terminate treaties, this could lead to some potentially embarrassing situations. For these reasons, he held that the President should have the last word on treaty termination since the President is the lone representative of the state in its external relations. In addressing this third component of the *Baker v. Carr* political question doctrine, Judge Bates missed the point. To hide behind the veil of "prudential considerations" is to neglect a fairly serious gap in the Constitution. Resolving this case would in no way impinge upon the President's ability to conduct foreign policy, nor would it apply retroactively to prior treaty terminations. Again, it is worth noting that the international legal ramifications of withdrawing from the ABM Treaty are non-existent; on the contrary, it is entirely a matter of U.S. constitutional law. As Justice Brennan correctly pointed out, the political question doctrine does not apply when a court "is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decision-making power" (*Goldwater*, 444 U.S. 996 at 1000 (Brennan, J., dissenting)). Here, the courts would not impermissibly interfere in the

field of foreign affairs if they chose to address this constitutional question. Nor would judicial resolution generate political embarrassment or "grave disturbance at home" (*Baker v. Carr*, 369 U.S. 186 at 226). Were the courts to resolve this question, only the process of withdrawing from treaties would change; the treaty commitments themselves would remain the same.

In short, the political question doctrine should not prohibit the courts from determining which branch has the power to terminate the ABM Treaty. Because there is (a) no textually explicit answer to this question in the Constitution, and (b) resolving this question will not create judicially unmanageable standards, and (c) prudential considerations should not warrant judicial impotence, the courts should address the merits of this question.

Which Branch Should be Permitted to Terminate the ABM Treaty?: An Analysis of the Merits

Neither *Goldwater* nor *Kucinich* reached the merits, leaving the courts with no controlling precedent with respect to the power to terminate treaties. This section identifies four main arguments that support an even distribution of power between Congress and the executive, and then offers a look at the ways in which the two branches might share this authority. It breaks the discussion into four categories: (1) the distinction between treaty termination power and the President's authority to recognize foreign governments and appoint ambassadors; (2) the notion that a treaty is a form of legislation under Article VI; (3) historical precedent, which includes a role for Congress in terminating treaties; and (4) the danger of leaving this power in the hands of one individual. This section concludes with a glimpse at how the power to terminate treaties may be shared evenly between Congress and the executive.

(1) The Distinction between Treaty Termination Power and the President's Authority to Recognize Foreign Governments and Appoint Ambassadors

One of the most popular arguments used to support the President's right to unilaterally withdraw from treaties is that such a power is a logical extension of the executive's other foreign policy powers, namely the right to recognize governments and appoint ambassadors. The President's power to appoint ambassadors is subject to senatorial consent, but the President retains the power to unilaterally remove ambassadors from office without

this consent. Since the Senate does not play a role in removing ambassadors from office, many contend that the Senate should also not have the power to terminate treaties. This type of reasoning is faulty for two reasons: (a) it ignores the fundamental difference between the treaty making power and the appointment power, and (b) it fails to view the question in the context of the Article VI Supremacy Clause.

The power to remove ambassadors is a matter that concerns the everyday functions of the executive (Sabis 2003, 240). As leader of the executive branch, the President should be empowered to remove any individuals that fail to meet his or her standards, in order to keep the executive running smoothly. The power to terminate treaties, on the other hand, does not only concern the executive; rather, it is of great importance to the legislative branch as well. Treaties, unlike ambassadors, are considered the "supreme Law of the Land" under Article VI. Thus, the reason why some favor Senate approval for treaty termination is "not because treaties are ratified … but because, under Article VI of the Constitution, treaties … are the 'supreme Law of the Land,' [and are on the same footing as other pieces of legislation]" (*Goldwater*, 617 F.2d 697 at 738 (MacKinnon, J., dissenting)).

It is also worth noting here the factual differences between *Goldwater* and the current question involving the ABM Treaty. In *Goldwater*, the President wished to terminate the Mutual Defense Treaty with Taiwan after recognizing the People's Republic of China as the sole legitimate authority of China. Justice Brennan, the lone Supreme Court Justice to reach the merits of that case, asserted in his dissent that the President's power to terminate the Treaty was a logical extension of his power to recognize the government of China. Since the Constitution grants the President alone the power to recognize and withdraw recognition from foreign governments, Brennan concluded that treaty termination should not be any different. Even if Justice Brennan was correct to make the logical connection between withdrawing recognition of governments and terminating treaties, however, the ABM Treaty presents a different set of facts. Unlike the Mutual Defense Treaty, the ABM Treaty does not involve the recognition of governments. The latter situation must therefore be viewed in isolation of the former, since President Bush's termination of the ABM Treaty was not a logical extension of his de-recognition of a government. So even if Justice Brennan's dissent is compelling, it can be easily distinguished from the ABM Treaty.

(2) A Treaty is a Form of Legislation under Article VI

As noted earlier, treaties are similar to legislation in the sense that they are both mentioned in Article VI as "the supreme Law of the Land." Since the United States requires an Act of Congress to repeal domestic laws, why should it not require an equivalent procedure for repealing international laws (Sabis 2003, 265)? Judge MacKinnon, in his dissent, argued that treaties are protected by both the Supremacy Clause and the Necessary and Proper Clause, and that Article I, Section 8 confers upon Congress the right to pass a law to terminate treaties. Since the Constitution places treaties and federal laws on the same footing under Article VI, Judge MacKinnon stated that "a treaty is to be terminated in the same manner as any other 'law' by a formal act of Congress approved by the President" (*Goldwater*, 617 F.2d 697 at 717) (MacKinnon, J., dissenting)). Because treaties, like statutes, are considered to be "the supreme Law of the Land," many courts have held that Congress has the right to amend or repeal treaties, in the same way it has the right to amend or repeal statutes. Christopher Sabis, author of a compelling piece on unilateral executive treaty termination, bolsters this argument by adding, "It is one thing to change individuals that enforce the law, but [quite] another to change the law itself" (Sabis 2003, 240). This view recognizes the inherent distinction between a legislative branch that is responsible for making laws and an executive branch that is responsible for enforcing those laws. Indeed, "changing the law itself" seems much more like a job for Congress. To this end, terminating treaty obligations is virtually identical to amending the law. If the President has the unilateral power to rescind treaties, he can not only single-handedly dictate the external relations with other states, but he can also dictate the laws in force between those states. If the President does not retain this power on a domestic level, why should international laws and treaty commitments be any different?[12]

(3) Historical Precedent: Congressional Power to Terminate Treaties

Over the last two hundred years, Congress has indeed played a major role in withdrawing from treaty obligations. For example, through an Act passed on July 7, 1798, Congress carried out the very first treaty termination. In *Hooper v. United States*, the act was confirmed by the Court of Claims, which held that because a treaty was considered to be "the supreme Law of the Land," it could only be repealed by a legislative act (*Hooper v. United States*, 22 Ct. Cl. 408, 418 (1887)). Since this case occurred soon after the drafting of the Constitution, it is indicative of what the Framers in-

tended. The Court of Claims stated that an Act of Congress, signed by the President, was the appropriate method by which the United States should terminate a treaty; its early interpretation of the Constitution provides a favorable precedent for those supporting an active congressional role in treaty termination (Sabis 2003, 236).

Not every case, however, has mimicked the reasoning in *Hooper*. President Carter, for example, has argued that there have been thirteen episodes in American history in which the President has unilaterally terminated a treaty without the consent of Congress. Prior to the *Goldwater* case, however, Senator Goldwater's attorney countered this argument by asserting that "of [fifty-five] treaties terminated by the United States, fifty-two were broken with congressional approval" (Meyer 1979). In his dissenting opinion, Judge MacKinnon concurred with the latter statistics and challenged virtually every one of President Carter's examples of unilateral executive power (*Goldwater*, 617 F.2d 697 at 733 (MacKinnon, J., dissenting)).[13]

Given Judge MacKinnon's powerful refutation of the evidence, it is unclear whether the President has truly ever terminated a treaty without congressional consent or approval. It is clear, however, that historical precedent supports at least some congressional role in the process (Sabis 2003, 237). To strengthen this point, Sabis cites *Neely v. Henkel* as another case which lends support to a congressional role in treaty termination. In that case, Justice Harlan uses the Necessary and Proper Clause in reaching his decision. Sabis explains:

> In *Neely*, the Supreme Court acknowledged Congress's power to enforce clauses within ratified treaties. In the ABM Treaty case, Bush claims he has the authority as [P]resident to affect the termination clause found in Article XV. This claim of authority contradicts the outcome in *Neely*, since the Court, through Justice Harlan, approved the Congress's claim of authority in executing treaty provisions (Sabis 2003, 239).

Coupled with *Hooper*, the *Neely* case provides ample precedent for the Congress to play a role, whether in implementing a treaty's provisions or in passing a law to repeal a treaty.

(4) Dangers Inherent in Leaving the Treaty Termination Power with the Executive

Perhaps the most important policy argument against permitting unilateral executive treaty withdrawal is that the power will be subject to the whims of a single individual. If the Constitution explicitly requires two-thirds of Senators to ratify a treaty before it will enter into force, then how can

it be possible for the very same Constitution to vest "absolute power" in one official, with respect to terminating a treaty? Rather than giving sole authority to the President, many prefer a more cautious approach—indeed, allowing a supporting role for Congress might prevent the potential for abuse. As Judge MacKinnon cautions, "we should not allow the few prior instances where Presidents … may have acted alone to be magnified into a truly awesome power and a dangerous precedent." Acknowledging an executive power to unilaterally terminate treaties would allow a single individual to repeal multilateral treaties "on a whim, or in a moment of intense pressure" (Sabis 2003, 224). Put differently, there would be no constitutional distinction between the President's power to terminate a treaty and his or her power to terminate an executive agreement. Surely, the only difference between a treaty and an executive agreement cannot be the manner in which it becomes U.S. law. Otherwise, the President would have an incentive to call every treaty an "executive agreement" so that its termination and execution would be controlled by the executive branch.

According to Sabis, there are two broad policy justifications for refusing to recognize the unilateral power to end treaties: (a) the Framers' fear that one faction or party could impose its views on the whole country, and (b) the Framers' desire to process the treaty power in a way that maintained the "national character" of the United States (Sabis 2003, 244). On his first point, Sabis asserts that an incorrect legal interpretation of the President's treaty termination powers might provide incentives for the President to make decisions based on partisan interests. The Framers could not have envisioned this result when they made treaties a part of "the supreme Law of the Land" (Sabis 2003, 256). Other countries must understand that they are entering into agreements with the United States, not with a single individual. Placing a congressional check on the executive's power to terminate treaties will make it more difficult for the President to end treaty obligations; by requiring the consent of Congress, the President will not be able to withdraw from a treaty on a whim (Sabis 2003, 258).[14]

Sabis' second point is that requiring congressional consent would help to preserve the "national character" of the United States, along with a sense of continuity. Since the Senate and Congress are more "continuous" bodies than the presidency, giving Congress a role in treaty termination would help preserve the "character and image" of the United States (Sabis 2003, 259). In other words, a treaty should reflect the values and beliefs of the U.S. polity as a whole, rather than the peculiar preferences of whichever President happens to be in power.

For these reasons, the executive's power to terminate treaties should

be subject to a congressional check. Although this check will not always prevent squabbles with other countries, it will send a clear message that treaties and executive agreements are not the same kinds of commitments, and that any treaty termination will be a reflection of the "national character" of the United States, rather than the whims and partisan preferences of a single President.

(5) Balancing the Power to Terminate Treaties: What Form Should it Take?

Since the Constitution does not explicitly reserve a role for Congress in the treaty termination process, any judicial decision that advocates a power-sharing arrangement must involve the creation of a new procedure. Although the Constitution provides guidance, it is unclear how a court would balance textual arguments with policy concerns. The central question is whether a treaty should be unmade by "(1) the same process by which it was made, or (2) the alternative means by which a statute is made or terminated" (*Goldwater*, 617 F.2d 697 at 704). This section suggests that the most efficacious way to terminate treaties is through a Joint Resolution of Congress (passed by majority vote), along with a presidential signature.

Some argue that Article II, Section 2, of the Constitution should be extended to include both treaty ratification and termination. After all, if the President cannot enter into a treaty without the consent of two-thirds of the Senate, then why is this process not required for the President to withdraw from a treaty? The problem with this argument is that it ignores the inherent difference between adding and removing international treaty commitments. The Framers, to be sure, feared that the United States would become involved in too many entangling alliances; that is why they incorporated the rather imposing two-thirds senatorial ratification requirement as a meaningful check on the power of the President. Likewise, when a treaty is amended, senatorial consent is also required so the President alone will not have the power to single-handedly expand U.S. treaty obligations. Although there is a fear that the President might retract important treaties, it is not of the same magnitude as when a President creates "entangling alliances." Indeed, if courts held that the only way a treaty could be terminated was via the same exact process by which it was ratified, the United States would effectively be "locked into all of its international obligations" (*Goldwater*, 617 F.2d 697 at 704). Because of this concern, courts should favor a less rigorous standard than the two-thirds Senate majority. The Court of Appeals *per curiam* opinion in

the *Goldwater* case uses this line of reasoning to further argue that there should be no two-thirds senatorial consent requirement. Since treaties carry "potentially dangerous obligations," and the President must often take immediate action to relieve the United States of unfavorable international commitments, the two-thirds voting requirement would trap the country into certain obligations, rather than serve as an effective check on the President's power. Although this line of reasoning is persuasive, it should only be used to suggest that the congressional check should be less demanding, not that it should be non-existent.

A second question involves whether this congressional check should be limited to the Senate, or whether it should involve both the Senate and the House. Those opposed to House participation in treaty termination argue that there is no role for the House in treaty ratification, so there should be no role in treaty termination. This argument, however, ignores a fundamental aspect of all treaties—the fact that under Article VI, treaties become part of "the supreme Law of the Land." Since neither the Senate nor the President may repeal a statute without the participation of the House, the same requirement should hold with respect to treaties. For this reason, requiring a Joint Resolution of Congress seems like the most reasonable way to end treaty obligations.[15] While not as exacting as the two-thirds Senate requirement, it nevertheless acknowledges that congressional participation is necessary for the President to withdraw from treaties. At the same time, it recognizes the basic distinction between creating "entangling alliances" and eliminating international commitments.

Congressional Activism: A Response to Judicial Inaction

In the event that courts fail to reach the merits of future treaty termination cases, there is still much that Congress can do to express its displeasure with the current process. This section addresses four legislative options, in the context of President Bush's renunciation of the ABM Treaty.

First, Congress can pass a resolution that condemns the termination of the Treaty and declares that the President may not terminate the Treaty (Sabis 2003, 263). With this option, Congress would not only send a disapproving message to the executive, but may also create a genuine "constitutional impasse" and thereby make it easier to gain standing in a courtroom.

Second, Congress can pass a resolution that authorizes the President to terminate the ABM Treaty—such a move would indicate approval of executive action without making Congress irrelevant. More importantly,

it would create a positive precedent by signaling that Congress did not implicitly consent to unilateral executive action (Sabis 2003, 263).

A third option is for Congress to bring as many claims as possible, in the hopes that the right combination of facts and judges will lead to a more favorable outcome. While it is too difficult to forecast the types of cases that will be heard by the Supreme Court, if members of Congress challenge executive authority persistently, the Court will be put on notice and, at some point, it may well acknowledge this Constitutional dispute.

A fourth option is for Congress to do nothing at all. By refraining from bringing suits or passing resolutions on treaty termination, Congress will, in effect, provide the courts with an executive-friendly precedent (Sabis 2003, 264). Inaction, in this regard, has a worse effect than if Congress were to pass a resolution in which it permitted unilateral Presidential treaty termination. By doing nothing, Congress implicitly accepts the supremacy of executive power in the field of treaty withdrawal. For this reason, no matter which of the three aforementioned options it chooses, taking some action is always better than inaction, if Congress intends to move the discussion in a more legislature-friendly direction.

Apart from these options, Congress may also be more aggressive in the early stages of treaty negotiation. If, for example, Congress insists on a treaty termination provision that incorporates a role for the legislative branch, courts may view these efforts favorably. Such a provision would pit the two branches against one another and presumably create a separate means by which a "constitutional impasse" could be attained.

Conclusion

The question of executive unilateral withdrawal from the ABM Treaty is one of constitutional law, not public international law. And while the courts have often used standing and the political question doctrine as justifications for refusing to hear the merits, their reasons for doing so are rather murky. On both constitutional and public policy grounds, there is a clear difference between the act of ratifying a treaty and the act of terminating a treaty. This paper has argued that President Bush's termination of the ABM Treaty was illegal, and that the treaty termination power should be evenly divided between the legislative and executive branches. The matter of treaty withdrawal, however, is truly a question that has yet to be resolved. The courts have refused to address the question directly, and have instead responded by framing their arguments in muddled *Curtiss-Wright* rhetoric and a confusing interpretation of the *Baker v. Carr* criteria. Until the Court reaches the merits, it is imperative for Congress to use its powers to chal-

lenge the President's authority. Although it is unclear whether there will ever be a power-sharing arrangement for terminating treaties, one thing is certain: congressional inaction will favor the status quo and promote an augmented executive role, while congressional action will almost always help to decrease the President's unilateral power to terminate treaties.

Notes

[1] This restriction is subject, however, to Article III, which provides an exception: "(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites." For a more detailed description of these exceptions, see Article III.

[2] ABM Treaty, art. XV(2) - "Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that *extraordinary events* related to the subject matter of this Treaty have jeopardized its *supreme interests*. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests" (emphasis added).

[3] *Goldwater v. Carter*, 444 U.S. 996 (1979). The case involved President Carter's power to terminate a mutual defense treaty with the Republic of China (Taiwan), congruent with his decision to recognize the People's Republic of China as the sole legal government of China.

[4] Indeed, the only Supreme Court opinion which discusses the merits of this question is Justice Brennan's dissenting opinion in *Goldwater*, in which he argues that the President's power to withdraw from treaties is not a political question. ("The issue of decision-making authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.") *Goldwater*, 444 U.S. 996 at 1007 (Brennan, J., dissenting).

[5] Many books and papers have been written on this very subject. Most prominently, see *The Legal Status of the ABM Treaty Before the Senate Comm. On Foreign Relations*, 106th Cong. 231-260 (1999) (statement of Douglas J. Feith, former Deputy Assistant Secretary of Defense for Negotiation Policy) (concluding that after the collapse of the Soviet Union, the ABM Treaty did not become an effective treaty between the United States and the Russian Federation because [since it was a bilateral, non-dispositive treaty], it lapsed once the U.S.S.R. ceased to be a state). But, see also *The Legal Status of the ABM Treaty Before the Senate Comm. On Foreign Relations*, 106th Cong. 276-280 (1999) (statement of Michael J. Glennon, professor of law at the Univ. of Cal. Davis) (arguing

that the Russian Federation was indeed the successor state to the Soviet Union since executive statements from both the United States and U.S.S.R. indicate that the treaty did not lapse, and Presidents Bush and Clinton both had the implicit consent of Congress).

[6] U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all *Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

[7] However, non-party states could bring forth the argument that the ABM Treaty affords them certain rights which are violated by a denunciation of the Treaty's terms, by either the United States or U.S.S.R. *See* Chigara, Ben, Trade Liberalization: Savior or Scourge of SADC Economies? 10 *U. Miami Int'l & Comp. L. Rev.* 7, 16 ("Non-party States would not have a right to object unless they could make the highly unlikely showing that they were intended beneficiaries of the Treaty, that they relied on the Treaty's continuation in force (in the sense that they did or refrained from doing something significant that they otherwise would or would not have done), and that they would suffer material detriment if the Treaty is terminated.")

[8] *Id.* ("Thus the President is not named in the Treaty to give notice of termination, as the majority opinion infers, without exactly saying so. The sole issue in this case is who can act for the United States; that issue is not determined by the Treaty but by the Constitution of the United States.")

[9] Curiously, Article XVI of the ABM Treaty provides that the Treaty "shall be subject to ratification in accordance with the constitutional procedures of each Party." It is unclear why the drafters of this Treaty chose to use that language with respect to treaty ratification, and not with respect to Article XV termination. Perhaps it is because the U.S. procedure for treaty ratification is understood to involve both the President and the Senate, as explicitly mentioned in the Constitution. Conversely, since the treaty termination power is not defined by the Constitution, the Parties chose not to make reference to "constitutional procedures." Still, the very mention of "constitutional procedures" in Article XVI seems both irrelevant and redundant because it relates to aspects that are traditionally reserved by the State Parties, and not to "international" decision makers.

[10] *See Poe v. Ullman*, 367 U.S. 497, 506 (stating that "it never was thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.")

[11] *See Goldwater*, 617 F.2d 697 at 707 ("We cannot find an implied role in the

Constitution for the Senate in treaty termination for some but not all treaties in terms of their relative importance. There is no judicially ascertainable and manageable method of making any distinction among treaties on the basis of their substance, the magnitude of the risk involved, the degree of controversy which their termination would engender, or by any other standards. We know of no standards to apply in making such distinctions.")

[12] It is worth noting that despite these (and several other) arguments to the contrary, the Restatement (Third) of Foreign Relations Law of the United States § 339 (1987) states that the President has the power "to suspend or terminate an agreement in accordance with its terms." In making this determination, the drafters of the Restatement rely almost exclusively on the *Curtiss-Wright* case. Christopher Sabis questions the importance of this source by saying it is not "a binding legal document … [it is simply an attempt] to summarize the state of the law in the view of [most] of its authors." Sabis, *supra* note 15, at 233. Therefore, the extent to which one agrees with the Restatement should depend solely on the strength of the drafters' supporting arguments.

[13] *Goldwater*, 617 F.2d 697 at 733 (MacKinnon, J., dissenting) ("In five instances Congress by direct authorization, or inconsistent legislation supplied the basis for the President's action; in two instances the putative abrogation was withdrawn and no termination resulted; one treaty was already terminated by the demise of the country; one treaty had become void by a change in the basic facts upon which the treaty was grounded; four treaties had already been abrogated by the other part; and of the two that were non-functioning, the Trademark Treaty was not terminated.")

[14] *Id*. at 258. ("For example, if President Bush were to enter a similarly formatted treaty next week and a Democrat who did not approve of the treaty was elected [P]resident in the next election, there would be no legal impediment to that [P]resident terminating that treaty. The idea that a [P]resident could unilaterally erase the ABM Treaty … violates the theory of checks and balances on the power of partisans in the United States and presents an opportunity for one man or party to damage the national character and image of the United States the Framers hoped to promote through a legislative role in making treaties.")

[15] Asking Congress for a Joint Resolution is not without precedent. *See Goldwater*, 617 F.2d 697 at 724 ("[I]n 1846 … President Polk specifically requested that Congress legislatively approve his authority to give notice under the terms of the Oregon Territory Treaty with Great Britain. By Joint Resolution of April 27, 1846, Congress then authorized the President to notify the British Government of the abrogation of the Convention of August 6, 1827.")

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