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Congress and the Treaty Power: An Originalist Argument against Unilateral Presidential Termination of the ABM Treaty

Keywords

Congress, Constitutional Law, Treaties, Weapons, International Law: History, Legal History, Military, War and Peace

CONGRESS AND THE TREATY POWER: AN ORIGINALIST ARGUMENT AGAINST UNILATERAL PRESIDENTIAL TERMINATION OF THE ABM TREATY*

*Christopher C. Sabis***

I. INTRODUCTION

Despite over 200 years of American legal jurisprudence and political precedent, the vital question of how the United States can legally terminate international treaties under the Constitution remains undecided. The Constitution of the United States is silent on this issue. Historically, the executive and legislative branches have each been inconsistent at best in their approaches to treaty termination. The Supreme Court balked in 1979 when given the opportunity to settle the issue, splitting badly and issuing no majority opinion. Academics have written widely on the topic, but with diverse approaches, considerations, and conclusions.

With this history of indecision and confusion, what proponents of legislative power might consider a worst-case scenario has unfolded. A president elected without a majority of the popular vote has pulled the United States out of a major nuclear arms control treaty that has been in force since 1972. To further complicate the scenario, the pullout occurred in the wake of the terrorist attacks of September 11, 2001. While the popularity that traditionally accompanies an American president during wartime has minimized the domestic political dissent surrounding the withdrawal, the legal questions remain.

* The author dedicates this paper to the memory of his beloved grandfather Edward Ciarleglio (1915-2002). “[H]e was an orphan. . . He was a strong-willed man, yet a gentle man. . . He was intelligent and smart, not school smart but self-taught. His mind was a sponge that eagerly soaked up every written word. Only when his eyes could no longer see did he lay down his books. . . He was a Marine who enlisted when others were called to serve. . . He was an intricate man who in some ways was difficult to know. . . I pray that you have found peace in the hands of God. May he bless you and keep you forever.” Joyce E. Sabis, Eulogy for Edward Ciarleglio (Aug. 26, 2002). Edward, you personified an *Invictus*-like spirit. May the lessons you tried to teach enlighten the happy few who had the privilege of your company, counsel, and love.

** J.D., Georgetown University Law Center 2003. Chris would like to thank Professor David Koplow for suggesting this topic and commenting on multiple drafts. Chris would also like to thank the attorneys representing the members of Congress in *Kucinich v. Bush* for allowing him to help in a very small way with their preparation of that case, especially John Burroughs, Esq., Peter Weiss, Esq., and Professor Bruce Ackerman, Esq. Finally, Chris would like to acknowledge the Congressman who filed suit on this issue, showing political courage during an important period in our nation’s history.

The purpose of this paper is to add a new perspective to the debate over the power to terminate treaties in the United States. Following this introduction, the second section of this paper will provide background and a much abbreviated policy analysis of the treaty at issue. This paper's third section will summarize the current law governing treaty withdrawal, including the seminal case of *Goldwater v. Carter*,¹ and illustrate why this law does not effectively support the proposition that a President can terminate a treaty without Congressional action.

Once this analysis is completed, the fourth section of this paper provides originalist arguments for and against a legislative role in treaty termination, and a conclusion consistent with both policy considerations and intent of the Framers of the Constitution. While the majority and dissent in *Goldwater v. Carter*, and past academic works on the issue, have made practically every textual and policy argument feasible, this paper will analyze both direct and indirect originalist evidence from sources such as *The Federalist* and *The Records of the Federal Convention of 1787*. The paper will also put these arguments in the present context and illustrate why the policy concerns of the Framers are still relevant today. In its final section, the paper analyzes the options Congress had in addressing the termination of the ABM Treaty, and has in looking ahead to the potential termination of future treaties, and recommends a course of action based on the current legal and political climate.

In summary, this paper argues that terminating an international treaty is too important to world stability and to the national character of the United States to leave in the hands of a single individual (or party). If the Constitution were to permit the executive branch to terminate a treaty, it would allow one individual to destroy legally binding multilateral agreements on a whim, or in a moment of intense pressure. The termination of a treaty would be no different from that of an executive agreement. Such a construction of the Constitution would also eliminate the formal dialogue and debates that provide a check against the impetuosity of the party in power. Requiring an Act of Congress to terminate a treaty makes sense on legal, historical, policy, and political levels.

II. BACKGROUND

A. *The ABM Treaty and its History*

On October 3, 1972, the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (hereinafter "ABM Treaty") went into force.² The parties agreed to limit themselves to two ABM deployment areas, and further agreed that these areas would be located so that they could not provide a full national defense, nor the

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

2. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Oct. 3, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 [hereinafter ABM Treaty].

basis for developing one.³ The treaty went on to prescribe the possible locations for the two systems and the quantity of missiles that could be present at each one.⁴ The general idea behind these limitations was to maintain the doctrine of “mutual assured destruction” and, consequently, the balance of power.⁵ If one nation developed a defensive system that would render the other nation’s nuclear arsenal useless, the theory held, that nation would no longer fear retaliation upon launching a first strike.

Two provisions of the ABM Treaty are of paramount importance. The first, Article I, Paragraph 2, provides the limitation that prompted President George W. Bush’s desire to withdraw. The language reads, “Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.”⁶

President Bush believes that this provision is fatal to his plans to develop a National Missile Defense system (hereinafter, NMD), an idea with its roots in the Reagan Administration’s “Star Wars.”⁷ Further discussion of this system and the arguments for and against it follow in the next part of this section.

The second relevant section of the ABM treaty bears on the legality of United States withdrawal. Paragraph II of Article XV reads:

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.⁸

This Article raises several questions. Does this clause give the President of the United States the legal authority to terminate the ABM Treaty unilaterally, without any action from Congress?⁹ What are “extraordinary events?” What are a nation’s “supreme interests?” Did the Senate, in giving its consent to a treaty with this escape clause, waive any rights it has under the Constitution to participate in

3. See ABM Treaty, *supra* note 2, at art. I, III.

4. See *id.* at art. III.

5. See, e.g., Jack Spencer, Editorial, *ABM Treaty Exit Makes Us Safer*, BALTIMORE SUN, Dec. 28, 2001, at 15A.

6. ABM Treaty, *supra* note 2, at art. I.

7. See Editorial, *More Trouble For Star Wars*, HARTFORD COURANT, Jan. 7, 2002, at A6.

8. See ABM Treaty, *supra* note 2, at art. XV. It is common for modern treaties to contain such termination provisions. Thus, the issue discussed in this paper is important, not just in this case, but for future potential treaty termination procedures.

9. Some commentators have maintained that it does. See, e.g., Steven Mufson and Dana Milbank, *U.S. Sets Missile Treaty Pullout; Bush to Go Ahead With Defense Tests*, WASH. POST, Dec. 14, 2001, at A01. While the Post provides no reason for this conclusion, the DC Circuit made a similar argument in *Goldwater v. Carter*. See *infra* notes 61-68 and accompanying text of this paper for analysis and debunking of this argument.

the decision to withdraw from the Treaty?¹⁰ Would such a waiver also apply to the House of Representatives? These questions are all important to the analysis of the issue of treaty termination as it applies to this particular agreement.

B. Termination of the ABM Treaty.

1. Facts

On December 13, 2001, at 4:30 a.m. ET, the United States Ambassador to Moscow delivered formal word to Russia that President Bush was giving 6 months notice of United States termination of the ABM Treaty, invoking Article XV of that document.¹¹ While Bush did not formalize this decision until December 13, he had been considering it long before that date.¹² Secretary of State Colin Powell, throughout that year, had been in discussions with Russian President Vladimir Putin in an attempt to convince him that the termination of the ABM Treaty was in the best interests of both nations; these overtures failed.¹³ "This step was not a surprise for us," President Putin reflected following Bush's announcement, "However, we consider it a mistake."¹⁴

The notice of termination also came without the consent or concurrence of either house of Congress.¹⁵ Bush maintained that the executive branch alone had the power to terminate treaties between the United States and foreign powers. However, many members of Congress expressed concern about the president's decision,¹⁶ and some legal scholars questioned the legality of the withdrawal.¹⁷

2. Policy Arguments

While the policy arguments for and against adhering to the ABM Treaty are not determinant of the legal issues of unilateral presidential termination, they do provide a context in which to frame constitutional arguments for and against that power.¹⁸ The fact that there are different positions on the issue provides a reason to scrutinize the methods used to make a final decision on the termination of the

10. See Mufson, *supra* note 9.

11. See Barry Schweid, Associated Press, ABCNews.com Dec. 13, 2001, at http://abcnews.go.com/sections/politics/DailyNews/bush_abm011213.html (last visited Oct. 31, 2002).

12. See Mufson, *supra* note 9.

13. See David E. Sanger and Elisabeth Bumiller, *U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests*, N.Y. TIMES, Dec. 12, 2001, at A1.

14. *America Withdraws From ABM Treaty*, BBC News, Dec. 13, 2001, available at http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1707000/1707812.stm (last visited Oct. 31, 2002).

15. See Susan Milligan, *Bush Gives Notice US to Drop ABM Pact*, BOSTON GLOBE, Dec. 14, 2001, at A31.

16. See, e.g., Mufson, *supra* note 9.

17. See, e.g., Bruce Ackerman, Opinion, L.A. TIMES, Dec. 16, 2001, at M5.

18. These arguments are not exhaustive of those presented in the debate over the ABM Treaty. The positions mentioned are some of the major arguments and are included here simply to provide very basic background information and context.

Treaty, since the final decision will be binding and will affect the international reputation of the United States.

a. Arguments for Termination

President Bush and those who support the decision to terminate the ABM Treaty argue that it is a relic; it is an anachronism from a Cold War over a decade past.¹⁹ This belief seemed to gain validity after the attacks on the World Trade Center and the Pentagon on September 11, 2001. While these were not missile strikes, supporters of the termination argue that no one knows what methods terrorists may use in the future, and that there is a threat of a nuclear attack from “rogue states.”²⁰ They maintain that developing nations like North Korea would not tax their economies by making weapons that the United States could destroy before they reach their targets.²¹ In this way, NMD will promote nonproliferation and protect the United States from a missile attack from a rogue-state. “I have concluded,” said President Bush, “the ABM Treaty hinders our government’s ability to develop ways to protect our people from future terrorist or rogue-state missile attacks.”²² “It’s a great move at a great time,” believes Kenneth Adelman, Director of the Arms Control and Disarmament Agency under Ronald Reagan, “It shows we are sensitive to the greatest terrorist threat to the country, which is weapons of mass destruction on top of ballistic missiles.”²³

When confronted with the fear that the destruction of the Treaty will lead to a renewed arms race, particularly with Russian and China, proponents of the missile defense system give different responses. Some maintain that the ABM Treaty did not work as an arms reduction measure even when it was timely.²⁴ They point to the fact that, after the signing of the ABM Treaty, the Soviet ballistic missile arsenal grew 10,000 missiles by 1990, while the number of U.S. missiles also

19. This is not a new argument. After the fall of the Soviet Union, the Clinton Administration was confronted with the question of whether the ABM Treaty was legally dissolved by the breakup, or whether the Treaty applied to the new relationship between Russia and the United States. While the Clinton Administration decided the Treaty was still valid, there are those who have argued that the abrogation by President Bush is meaningless because the ABM Treaty is inapplicable. See George Miron, *Did the ABM Treaty of 1972 Remain in Force After the USSR Ceased to Exist in December 1991 and Did It Become a Treaty Between the United States and the Russian Federation?*, 17 AM. U. INT’L L. REV. 189 (2002); David B. Rivkin, Jr., Lee A. Casey, & Darin R. Bartram, *The Collapse of the Soviet Union and the End of the 1972 Anti-Ballistic Missile Treaty: A Memorandum of Law Prepared for the Heritage Foundation*, 4 J. NAT’L SECURITY L. 1 (2000); see also Robert Stewart, ABM: NO PENALTY FOR EARLY WITHDRAWAL, ORLANDO SENTINEL, Dec. 31, 2001, (Editorial), at A9. But see, SAMUEL B CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 423-25 (2d ed. John Byrne & Company 1916).

20. See Peter Brown, *Decision to Scrap ABM Treaty Recognizes Reality*, ORLANDO SENTINEL, Dec. 21, 2001, (Editorial), at A21; see also Bill Nichols, *Bush Confirms ABM Treaty Withdrawal*, USA TODAY, Dec. 14, 2001, at 7A; Milligan, *supra* note 15.

21. See Spencer, *supra* note 5.

22. *America Withdraws From ABM Treaty*, *supra* note 14.

23. Susan Milligan, *supra* note 15.

24. See, e.g., Spencer, *supra* note 5.

skyrocketed.²⁵ Others simply maintain that the abrogation will not provide fuel for an arms race in today's international environment and cite the tame reactions to the termination of the ABM Treaty from Russia and China as evidence of this assertion.²⁶

Proponents of the termination also maintain that President Bush and Russian President Putin have a close relationship—President Bush has often referred to him as “my friend.”²⁷ “The United States and Russia have developed a new, much more hopeful and constructive relationship,” Bush maintains.²⁸ In fact, almost immediately following Bush's announcement of the termination, President Putin proposed that the United States and Russia reduce the size of their nuclear stockpiles to between 1,500 and 2,200 warheads.²⁹ Putin has conceded, in spite of his opposition to the ABM Treaty termination, that it will not affect “the spirit of partnership and even alliance” between the two nations.³⁰

Proponents also believe that a renewed arms race with China is unlikely. President Bush phoned China immediately following his announcement of termination in an attempt to assure the Chinese that they should not interpret the termination as an offensive move toward China.³¹ Perhaps because of this gesture, Ralph A. Cossa, writer for *The Orlando Sentinel*, insists that conversations between Cossa and Chinese officials indicate that the Chinese are willing to talk about improved Sino-U.S. relations.³² In light of recent tensions between the two nations, this is a positive sign.³³

b. Arguments Against Termination

Opponents of the termination counter President Bush's arguments on several grounds. They contend that the missile defense system for which Bush has abandoned the ABM Treaty is impractical and that the termination will cause global instability and a renewed arms race. They further maintain that the termination has increased the danger of weapons proliferation and that the withdrawal has damaged the image and reputation of the United States among the nations of the world. “Winning the peace and achieving stability in the 21st century,” write Robert McNamara and Thomas Graham, Jr., “is all about international cooperation and strengthening international law, not about U.S.

25. See, Spencer, *supra* note 5.

26. See William Safire, Editorial, *That Dog Won't Bark*, N.Y. TIMES, Jan. 24, 2002, at A27.

27. Milligan, *supra* note 15; see also Jackson Diehl, Editorial, *Dynamic Duo of World Policy*, WASH. POST, Dec. 24, 2001, at A17.

28. Milligan, *supra* note 15; see also Diehl, *supra* note 27.

29. See Milligan, *supra* note 15. See also Mufson, *supra* note 9; Stewart, *supra* note 19.

30. Editorial, *Putin on the ABM Treaty*, BOSTON HERALD, Dec. 20, 2001, at 32.

31. See Ralph A. Cossa, Editorial, *A Blessing in Disguise for Sino-U.S. Ties?*, ORLANDO SENTINEL, Jan. 14, 2002, at A11.

32. See *id.*

33. In recent months, the Chinese found 27 spying devices hidden in a Boeing 767 that it purchased from the United States. Even after the United State mistakenly bombed the Chinese Embassy in Belgrade, the Chinese said little upon finding the bugs. See Safire, *supra* note 26.

unilateralism.”³⁴

Individuals opposed to the termination maintain that the proposed missile defense system will not work. On December 14, 2001, one day after the notice of intent to withdraw, the Pentagon cancelled one of the U.S. Navy’s missile-defense development programs because of “poor performance.”³⁵ While this is not the only NMD program and many are still receiving funding with some measure of progress, the Hartford Courant claims this is evidence that, “A missile-defense system as conceived by military planners won’t work, can never be foolproof, and would be prohibitively expensive to deploy.”³⁶ The Denver Post, after a missile defense test was delayed due to inclement weather, sarcastically lamented, “[H]eaven help us if our enemies decide to attack during a rain storm.”³⁷

Even assuming the United States could develop and deploy such a shield, opponents argue it would not be worth the costs for the limited protection it would provide. The National Intelligence Council estimates that by 2015, China will have enough nuclear missiles to overwhelm any such shield; Russia already has more than enough.³⁸ However, it is true that “rogue nations” like Iran, Iraq, and North Korea will likely have long-range delivery systems by 2015,³⁹ and Bush maintains that it is these nations, and not China and Russia, for which the United States should deploy NMD.

In response to this assertion, Australian diplomat and arms-control advocate Richard Butler argues that, if confronted with NMD, these nations, as well as Russia and China, will simply develop a better missile designed to penetrate America’s defense system.⁴⁰ If nothing else, this would lead to a technological arms race. Moreover, while there is terrorism, the CIA disagrees with President Bush’s claim that terrorists provide an incentive to develop a missile defense. The CIA maintains that terrorists “are unlikely to employ long-range missiles, preferring non-missile delivery systems such as suitcases, trucks or ships.”⁴¹

Termination supporters are quick to point out that the reactions to the termination of the ABM Treaty, by Russia and China in particular, have been tame, but opponents maintain that the ABM situation has increased tensions between the world powers. There are indications that Bush’s announcement has angered the

34. Robert S. McNamara and Thomas Graham, Jr., Op-Ed, *Bush ABM Stance Endangers America*, BOSTON GLOBE, Jan. 13, 2002, at E11.

35. *More Trouble for Star Wars*, *supra* note 7.

36. *Id.*

37. Editorial, *ABM Withdrawal Pains*, DENVER POST, Dec. 19, 2001, at B6.

38. See Holger Jensen, *China Might be Able to Overwhelm U.S. Missile Shield by 2015*, ROCKY MOUNTAIN NEWS, Jan. 12, 2002, (Local), at 4A. See also NATIONAL INTELLIGENCE COUNCIL AND FEDERAL RESEARCH DIVISION, CONFERENCE REPORT: CHINA AND WEAPONS OF MASS DESTRUCTION: IMPLICATIONS FOR THE UNITED STATES, available at http://www.odci.gov/nic/pubs/conference_reports/weapons_mass_destruction.html (last visited Oct. 31, 2002).

39. Jensen, *supra* note 38. For a brief argument maintaining that a missile defense system does not address the policy issues governing the U.S. relationship with any of these three countries see McNamara, *supra* note 34.

40. See Vernon Loeb, Book World, *Armed and Dangerous*, WASH. POST, Jan. 20, 2002, at T5.

41. Jensen, *supra* note 38.

Russian Government beyond the reserved response from President Putin. On Wednesday, January 16, 2002, the lower house of Russia's parliament voted 326-3 for a resolution condemning the United States' withdrawal from the ABM Treaty.⁴² Termination opponents believe that President Bush might cause Putin to lose face with military commanders who have supported him.⁴³ While President Bush and President Putin may appear to have a great relationship, the nations they lead will interact long after their terms in office. A short-term muted response does not forestall a medium or long-term negative response.⁴⁴

Symptoms of a potential rift have surfaced quickly.⁴⁵ Even as the United States and Russia discussed decreasing their nuclear stockpiles, Col. Gen. Yuri Baluyevsky, the head of the Russian delegation, maintained that the American termination of the ABM Treaty had damaged the atmosphere for the talks.⁴⁶ The Bush Administration fostered this distrust with its decision to put nuclear warheads into storage rather than destroy them as part of a U.S.-Russian agreement, a position that angered Russia because it would allow the United States to "unilaterally and rapidly reconstitute its arsenal of 6,000 strategic warheads."⁴⁷ Eventually, the two nations did reach an agreement on an arms reduction treaty despite the Russian opposition to storage of warheads.⁴⁸ It is clear, however, that the U.S.-Russian relationship is not without tension in light of Russian arms sales to Iran.⁴⁹ Furthermore, Russia plans to form a new \$40 billion economic pact with Iraq even as the U.S. contemplates war against Saddam Hussein's dictatorship.⁵⁰

Russia is not the only nation that seems uncomfortable.⁵¹ China is concerned about the possibility that an American missile shield will render its current arsenal useless.⁵² On December 26, 2001, China announced that it would increase its

42. See Paul Richter, Foreign Desk, *Russia, U.S. Arms Talks End on Chill Military*, L.A. TIMES, Jan. 17, 2002, at A5.

43. See *ABM Withdrawal Pains*, *supra* note 37.

44. See McNamara, *supra* note 34; see also Mufson, *supra* note 9.

45. See McNamara, *supra* note 34.

46. See Richter, *supra* note 42.

47. McNamara, *supra* note 34; Robert Cottrell and Judy Dempsey, *The Americas, US Plan to Store Nuclear Weapons Vexes Russia*, FINANCIAL TIMES (LONDON), Jan. 11, 2002, at 6; see also Richter, *supra* note 42, Jensen, *supra* note 37.

48. See, e.g., James Gerstenzang, *Bush and Putin Sign Nuclear Arms Treaty*, L.A. TIMES, May 25, 2002 (Foreign Desk), at A1.

49. See, e.g., *id.*

50. See Peter Baker, *Russia, Iraq Plan Economic Deal to Bolster Ties; Moscow's Aid Sought on Energy, Infrastructure; Pact May Complicate U.S. Action Against Baghdad*, WASH. POST, Aug. 18, 2002, at A09. Russia has also joined France in announcing it would veto any United Nations resolution proposed by the United States that would authorize a war with Iraq. Elizabeth Neuffer and John Donnelly, *Confronting Iraq: US Support Lags; Vote Put Off Vetoes Vowed; Compromise on Iraq Eyed*, THE BOSTON GLOBE, March 11, 2003 at A1.

51. For further commentary on Russia's negative perceptions of U.S. intentions, see Howard Witt, *News, U.S. Throws Wrench into Russia Ties; ABM, Disarmament Moves Irk Kremlin*, CHI. TRIB., Jan. 17, 2002, at 3N.

52. See Vivien Pik-Kwan Chan, *Mainland to Increase Budget for the Military*, S. CHINA MORNING POST, Dec. 27, 2001, at 1; see also McNamara, *supra* note 34.

military spending this year.⁵³ While this alone may not be news, Beijing sources indicated that China, “would like the news to serve as a warning to the United States over its recent decision to abandon the Anti-Ballistic Missile Treaty.”⁵⁴ Even Europe has shown anger toward the U.S. In what may have been an attempt to maintain his relationship with Putin, Bush proposed to include Russia in decision-making procedures of NATO.⁵⁵ After criticism from Europe and Washington, Bush and Putin shelved the proposal.⁵⁶

III. THE CURRENT STATE OF THE LAW

A. *The ABM Treaty*

1. The Nature of the Treaty

In *Goldwater v. Carter*, the majority in the D.C. Circuit, and Justice Brennan at the Supreme Court level, maintained that the type of treaty involved could bear on how the United States should terminate.⁵⁷ However, the situation involving the ABM Treaty does not contain the features of mutual defense or executive ability to recognize foreign nations that were present in the *Goldwater* case. Termination of the ABM Treaty does not change U.S. commitments to defending its allies, nor does it invoke any specific executive powers already recognized by the Supreme Court other than the president’s authority in foreign affairs.⁵⁸ Since the issue is tangential to the issue of the ABM Treaty, this paper will note it, but, for the sake of brevity, will not analyze it any further.

2. The Termination Clause

The termination clause of the ABM Treaty⁵⁹ provides that each party shall have the right to terminate the Treaty on six months notice if “extraordinary events related to the subject matter of [the] Treaty have jeopardized its supreme interests.” For the purposes of this paper alone, the author concedes that the relatively new

53. See Chan, *supra* note 52.

54. *Id.* This agitation seems particularly undesirable in light of ongoing tension between the United States and China due to U.S. strategic alliances in the region. See, e.g., Michael A. Lev, *Taiwan’s Contradictory Behavior Toward China Raises Confusion*, SAN DIEGO UNION-TRIB., Apr. 14, 2002, at A21; Craig Skehan, *Howard Told To Confront Japanese PM On Whaling*, SYDNEY MORNING HERALD, May 1, 2002, at 4.

55. See Diehl, *supra* note 27.

56. See *id.*

57. See *Goldwater v. Carter*, 617 F.2d 697, 707 (1979), *vacated by* 444 U.S. 996 (1979). This is particularly apparent in Justice Brennan’s dissenting opinion, where he maintained that President Carter could terminate the Mutual Defense Treaty with Taiwan on the narrow grounds that, as a mutual defense treaty, it was inexorably connected with his derecognition of Taiwan and recognition of mainland China. See *infra* p. 252.

58. See *infra* p. 252.

59. See *supra* p. 227.

threat of rogue states developing ballistic missiles and the September 11, 2001 attacks were "extraordinary events related to the subject matter" of the Treaty, and that they have jeopardized the "supreme interests" of the United States.⁶⁰ Thus, the prominent legal question for the purposes of this clause is whether a party has properly terminated the ABM Treaty.

3. Does the ABM Language Support President Bush's Termination?

Proponents of terminating the ABM Treaty, naturally, maintain that it does.⁶¹ However, the language of the ABM Treaty dictates that a "Party" shall have the power to terminate the Treaty.⁶² The Treaty Preamble defines the Parties as the nations involved in the Treaty, not their executives;⁶³ thus, the United States is the party to the Treaty, not George W. Bush or the office of the presidency. No provision of the ABM Treaty provides for the executive having sole power to terminate the Treaty.⁶⁴

Since the ABM Treaty does not provide an answer to the question of what branch of the United States government has the power to terminate, it is necessary to turn to the Constitution to make this determination. After all, if the Senate already had the constitutional authority to play a role in the termination of the ABM Treaty during the ratification process, it would not need to reserve that right when it gave its advice and consent. It follows that President Bush can terminate the ABM Treaty only if he has the power to terminate treaties on behalf of the United States under the U.S. Constitution.⁶⁵

B. The Constitution of the United States: Relevant Provisions

The Constitution is silent on how the United States should terminate a treaty. While it confers upon the President the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," it does not elaborate any further on the treaty power.⁶⁶ However, the Constitution does proclaim that, ". . . all Treaties made, or which shall be made,

60. Bush's statement upon announcing the termination of the ABM Treaty lists these as the predominant factors in the decision. See *America Withdraws from ABM Treaty*, *supra* note 14 ("I have concluded the ABM Treaty hinders our government's ability to develop ways to protect our people from future terrorist or rogue-state missile attacks.").

61. See, e.g., Mufson, *supra* note 9. The Court of Appeals in the *Goldwater* case maintained that a termination clause was important to its decision that President Carter could terminate the Mutual Defense Treaty with Taiwan unilaterally because the Senate, when giving its advice and consent, did not state that it wanted to maintain a say in termination of the treaty. *Goldwater*, 617 F.2d at 708, *vacated by* 444 U.S. 996 (1979). Therefore, there is some precedent for this position. However, the decision of the Court of Appeals, having been vacated, it is not binding on any court. For further discussion of this case, see *infra* text accompanying notes 125-155.

62. See ABM Treaty, *supra* note 2, at art. XV, §2, 23 U.S.T. 3435.

63. See ABM Treaty, *supra* note 2, at Preamble, 23 U.S.T. 3435.

64. See *id.*

65. See *Goldwater*, 617 F.2d at 699.

66. U.S. CONST. art. II, § 2, cl. 2.

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," thus associating treaties with the Constitution and the laws of the United States.⁶⁷ While these are the only clauses that specifically address treaties, the lack of a specific procedure for treaty termination also makes the Necessary and Proper Clause of interest in resolving this issue. The Constitution dictates that the U.S. Congress has the power, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."⁶⁸

C. *The Restatement (Third) of Foreign Relations Law of the United States*

1. The Restatement's Position

The Restatement (Third) of Foreign Relations Law of the United States § 339 (1987) (hereinafter "Restatement") maintains that the President of the United States has the power, amongst other things, "[T]o suspend or terminate an agreement in accordance with its terms."⁶⁹ In reaching this conclusion, the drafters of the Restatement relied largely on *United States v. Curtiss-Wright Export Corp.*^{70 71} The following section examines this case in relation to treaty termination.

2. Does the Restatement Support President Bush's Termination?

Restatements are not binding legal documents; they are attempts to summarize the state of the law in the view of the majority of its authors. Thus, the support the Restatement lends to President Bush's unilateral termination of the ABM Treaty depends upon the strength of its argument and the sources from which it draws its conclusion.

Curtiss-Wright involved a conspiracy on the part of the appellants to sell arms to Bolivia during that nation's conflict in the Chaco.⁷² The United States asserted that this violated both a Joint Resolution passed by Congress, which authorized President Roosevelt to criminalize arms sales that would affect foreign conflicts, and the subsequent proclamation issued by Roosevelt.⁷³ The appellees challenged the indictment, in relevant part, on the grounds that the Joint Resolution violated

67. U.S. CONST. art. VI, cl. 2.

68. U.S. CONST. art. I, § 8, cl. 18.

69. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 cmt. a (1987) [hereinafter RESTATEMENT].

70. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

71. RESTATEMENT § 339 at cmt. a. The Comment cites only *Curtiss-Wright*. While the Reporter's Notes cite a couple of other cases, these cases (other than *Goldwater*) are tangential to the main issue and are cited to support points not questioned in this paper.

72. See *Curtiss-Wright*, 299 U.S. at 311.

73. See *id.* at 311.

the Nondelegation Doctrine.⁷⁴

The Court, in an opinion by Justice Sutherland, found that Congress had not violated the Nondelegation Doctrine.⁷⁵ The Court, without deciding whether such an order concerning domestic affairs would violate Nondelegation, held that there was no delegation issue because of the president's traditional powers in foreign affairs and the tradition of Congress passing such authorizing legislation in relation to foreign affairs. Justice Sutherland wrote,

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁷⁶

The Restatement's use of *Curtiss-Wright* as the only support for the position that the President can terminate a treaty unilaterally is weak. The actual issue had nothing to do with the power to make or terminate treaties.⁷⁷ While the Court used broad-sounding dicta in discussing the power of the executive in foreign relations, the real question was one of Congressional authority to delegate such power to the President.⁷⁸ If the Court hinted that the President would not have needed the Act of Congress to take action, it did not directly say or hold so.⁷⁹ Even if it had, terminating a binding legal treaty between nations is different from criminalizing an arms sale. In fact, Justice Sutherland only mentioned the treaty power as one example of the President's responsibilities in the area of foreign affairs.⁸⁰ Nothing in the opinion that would support unilateral presidential termination of treaties is binding legal precedent.⁸¹

74. See *id.* at 315. The Nondelegation Doctrine is the legal conception that Congress may not make excessive delegations of its power to make laws to another branch of Government. See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Art. I, § 1 of the U.S. Constitution vests all legislative power in the Congress. Thus, when Congress confers decision-making authority it must lay down an "intelligible principle.").

75. See *Curtiss-Wright*, 299 U.S. at 329.

76. *Id.* at 319-20.

77. See *id.* at 315. Furthermore, Justice Sutherland's argument for nearly unilateral presidential discretion in foreign affairs in general is questionable. Many scholars have offered strong critiques of the *Curtiss-Wright* reasoning. See, e.g., G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 102 (1999); Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 416 (1996); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 11-16 (1988).

78. See *id.* at 315.

79. See *id.*

80. See *Curtiss-Wright*, 299 U.S. at 319.

81. While many sources cite the *Curtiss-Wright* dicta for the proposition of expansive executive authority in foreign relations, there are historical considerations that weigh against interpreting this case too broadly. *Curtiss-Wright* was decided in 1936. At that time, Franklin D. Roosevelt received an electoral mandate for his New Deal. The Supreme Court, since the 1930's had struggled with the delegation powers to the Executive Branch essential to carrying out the New Deal. It is logical to

D. Historical Precedents

In a case such as this, where the Constitutional language is unclear, the methods of treaty termination the United States has used in the past may be important in determining how the Court will rule. Unfortunately, the United States has not developed a uniform method of treaty termination since its formation. There have been many different methods used to terminate treaties. However, the vast majority of these instances show that Congress has played an important role in treaty termination.

1. The First U.S. Treaty Termination

Congress carried out the first treaty termination accomplished by the United States through an Act passed on July, 7 1798. In *Hooper v. United States*,⁸² the court of claims validated the act. The case evolved from Congress' termination of the first series of treaties with France. A French frigate sunk a registered schooner from the United States.⁸³ Hooper, the administrator of an estate of one of the co-owners of the schooner, claimed that the French Treaties of 1778 remained in force and could be used as the basis of a spoliation claim against the U.S. Government for the loss of the ship.⁸⁴ The Government maintained, however, that Congress had terminated the treaties by its Act of July 7, 1798.⁸⁵

In rendering its decision, the court of claims held Congress was the correct U.S. authority to abrogate a treaty and had properly issued the terminating act, apparently on the grounds that a treaty was the supreme law of the land and thus, a legislative Act was needed for its termination.⁸⁶ "The treaties therefore ceased to be a supreme law of the land," the court maintained, ". . . The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was within the power of one party to abrogate these treaties it was undisputedly done by the Act of July 7, 1787."⁸⁷

While the facts of this case and that of the ABM Treaty are not identical, the case is particularly relevant because both the termination and the case took place soon after the Federal Convention of 1787.⁸⁸ Courts have always viewed actions taken in close proximity to the framing of the Constitution "as a contemporaneous

conclude that the *Curtiss-Wright* decision, being at heart a Nondelegation Doctrine decision, resulted in part from this environment and a hope of the Court to appease, not only President Roosevelt, but also a public that needed programs it had recently invalidated on Nondelegation grounds. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 457 (1996); see also *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

82. *Hooper v. United States*, 22 Ct. Cl. 408 (1887).

83. *Id.* at 409-10.

84. *Id.* at 409-11.

85. *Id.* at 411.

86. *Id.* at 418.

87. *Hooper*, 22 Ct. Cl. at 418.

88. *Id.*

exposition of the highest authority.”⁸⁹ In *Hooper*, the Court of Claims clearly stated that an Act of Congress, signed by the president, was the proper manner in which the U.S. could terminate a treaty.⁹⁰

2. Subsequent Precedents

In 1979, Senator Barry Goldwater’s attorney maintained that, “of 55 treaties terminated by the United States, 52 were broken with congressional approval.”⁹¹ President Jimmy Carter, in contrast, pointed to thirteen instances where the president, purportedly, had acted to terminate a treaty without Congress in an attempt to justify his unilateral termination of the Mutual Defense Treaty with Taiwan. Upon closer examination of these cases, it is evident that they do not provide precedent for unilateral presidential termination of a treaty.⁹²

In nine of these instances the other party or parties to the treaty either no longer existed, chose to terminate the treaty, violated the treaty, or the president at the time merely took notice of these conditions.⁹³ In one, Congress never questioned the legality of the termination because the president had the approval of several prominent Congressmen before the termination of a minor treaty with Mexico, with whom U.S. relations in general had greatly deteriorated. In one other case Carter pointed to, no termination ever actually took place. Finally, in two of the occasions alluded to by Carter, Congress had already passed a law superceding the treaty or implicitly authorizing its termination.⁹⁴ An example of such Congressional authorization, as well as examples of explicit Presidential acknowledgement of Congress’ authority to terminate treaties, will provide a foundation for the conclusion that historical precedent supports Congress’ authority in this field.

Carter claimed that President McKinley terminated the 1850 Convention of Friendship, Commerce, and Extradition with Switzerland after negotiating a

89. See, e.g., Goldwater, 617 F.2d at 719 citing *Patton v. United States*, 281 U.S. 276, 300-01 (1930); *Powell v. McCormack*, 395 U.S. 486, 547 (1960).

90. See *Hooper*, 22 Ct. Cl. at 416.

91. Lawrence Meyer, *Suit on Taiwan a Political Issue, Bell Tells Court; Bell Says Taiwan Treaty a Political Issue*, WASH. POST, May 9, 1979, at A1. See also Walter C. Clemens, Jr., *Who Terminates a Treaty*, BULL. ATOM. SCI., Nov./Dec., 2001, Vol. 57, No. 6. For more on *Goldwater*, see *infra* text accompanying notes 125-155. For examples of treaties terminated by Acts of Joint Resolutions of Congress, see, e.g., 37 Stat. 627 (1911) (Joint Resolution Providing for the termination of the treaty of 1832 between the United States and Russia); 22 Stat. 641 (1883) (Joint Resolution providing for the termination of certain articles of the treaty between the United States of America and Her Britannic Majesty); 13 Stat. 568 (1865) (Joint Resolution to terminate the Treaty of 1817, regulating the naval Force on the Lakes).

92. Goldwater, 617 F.2d at 727, citing Jonathan York Thomas, *The Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination*, 6 YALE J. STUD. WORLD PUB. ORD. 27, 79 (1979). See these sources for a full account of each supposed termination.

93. Goldwater, 617 F.2d at 727-32.

94. Goldwater, 617 F.2d at 728-32.

reciprocity agreement with France in the late Nineteenth Century.⁹⁵ However, in the Tariff Act of July 24, 1897, Congress authorized the President to negotiate such agreements.⁹⁶ This Act conflicted with the 1850 Treaty and, since Congress passed it after the ratification of the Treaty, it superceded the Treaty as the law of the land.⁹⁷ Thus, this was not a case of unilateral presidential treaty termination, the President simply acknowledged the fact that the legislation superceded the Treaty.

In fact, the executive branch has acknowledged Congress' power to terminate treaties on multiple occasions. For example, President Polk recognized Congress' authority in this area in relation to the Oregon Territory Treaty in 1846.⁹⁸ After President Polk had specifically asked Congress for its permission for him to terminate the Treaty, Congress responded with a joint resolution authorizing Polk to give notice to Great Britain.⁹⁹ Thirty years later, President Grant, in the context of the British Treaty of 1842, stated, "it is for the wisdom of Congress to determine whether the article of the treaty . . . relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land."¹⁰⁰ Grant went further, maintaining that, even if Great Britain continued to act in counter to the spirit of the Treaty, he would not extradite any person "without an expression of the wish of Congress."¹⁰¹

In recent years, the United States has terminated few treaties. In 1985, President Reagan announced he was terminating the Treaty of Friendship, Commerce, and Navigation Between the United States and Nicaragua.¹⁰² However, he did so under the emergency provisions of the International Emergency Economic Powers Act of 1977, and, thus, with authorization from Congress.¹⁰³ Looking back from today to the first treaty terminated by the United States, historical precedent establishes a congressional role in treaty termination.

95. *Id.* at 727

96. *Id.*

97. *Id.*

98. *Id.* at 724.

99. See 9 Stat. 109-10 (1846) (Joint resolution concerning the Oregon Territory).

100. Goldwater, 617 F.2d at 726 *citing* 9 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 4324, 4327 (1897). President Grant, during a June 20, 1876 message to Congress, asked if he should regard the treaty's article on extradition as void on "account of certain acts of the British government."

101. *Id.* at 726.

102. See Stuart Taylor, Jr., *Reagan's Power Wide Under Emergency Law*, N.Y. TIMES, May 2, 1985, at A10.

103. International Emergency Economic Powers Act, §202, 91 Stat. 1626 *codified at* 50 U.S.C. 1701 (1977). Congress specifically limited the Act to national emergencies in order to narrow the scope of the authority it granted to the president. "The authorities granted to the President . . . may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat."

E. Other Supreme Court Precedents

Goldwater v. Carter is the primary Supreme Court precedent on this issue and will be discussed in the next section. However, only Justice Brennan's dissenting opinion reached the merits. Judges in the lower courts considered other Supreme Court cases relevant to the *Goldwater* case. It is important to consider these as legal precedents in considering the ABM Treaty case.

1. *Neely v. Henkel*¹⁰⁴

There is Supreme Court precedent that supports reading of the Necessary and Proper Clause to give Congress the treaty termination power.¹⁰⁵ In *Neely v. Henkel*, Charles F.W. Neely was charged with embezzling funds in Cuba while the United States occupied the country after the Spanish-American War.¹⁰⁶ Neely filed a writ of *habeas corpus*, arguing that the June 6, 1900 Act under which he was charged was unconstitutional on several grounds.¹⁰⁷

One of the major questions before the Court in determining if the Act was constitutional was whether the sections that gave effect to the provisions of the Treaty of Paris between the United States and the Kingdom of Spain were valid.¹⁰⁸ In concluding that the June 6, 1900 Act was valid, Justice Harlan wrote

The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.¹⁰⁹

Justice Harlan used the Necessary and Proper Clause in reaching the decision in this case. The issue here is one of implementation, and not of treaty termination as in *Hooper*. However, since Bush's claim of authority comes, at least in part, from the termination clause in the ABM Treaty, the two cases read together form a strong argument for Congressional authority in the termination of the ABM Treaty.¹¹⁰

In *Neely*, the Supreme Court acknowledged Congress' power to enforce clauses within ratified treaties.¹¹¹ In the ABM Treaty case, Bush claims he has the

104. *Neely v. Henkel*, 180 U.S. 109 (1901).

105. See *Goldwater*, 617 F.2d at 718; see also *Van Der Weyde v. Ocean Transport Co.*, 297 U.S. 114, 116-18 (1936) (holding valid an Act of Congress that "requested and directed" the President to terminate treaty provisions inconsistent with the Seaman's Act of Mar. 4, 1915).

106. See *Neely*, 180 U.S. at 112-13.

107. *Id.* at 114.

108. *Id.* at 121.

109. *Neely*, 180 U.S. at 121.

110. *Accord Hooper*, 22 Ct. Cl. at 418 with *Neely*, 180 U.S. at 121.

111. See *Neely*, 180 U.S. at 122.

authority as president 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' claim of authority in executing treaty provisions. Unless both the executive and legislative branches, independently, have the power to enforce treaty provisions, a court reaching the merits would have to overturn or distinguish *Neely*, as well as *Hooper*, in order to maintain that Bush has the power to act under Article XV of the ABM Treaty.

2. *Myers v. United States*¹¹²

In *Myers*, the Court decided a case involving the appointments clause of Article II, which reads in a similar manner as the Treaty clause and maintains that the president

...by and with the Advice and Consent of the Senate... shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹¹³

The president removed Myers as a postmaster through an order from the postmaster general.¹¹⁴ Myers sued, maintaining that the President did not have the power to remove him.¹¹⁵ The Court, through Chief Justice Taft, held that, "In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal."¹¹⁶

Myers stands for the proposition that, unless a power granted to the executive by the Constitution is specifically circumscribed, it belongs to that branch alone.¹¹⁷ Chief Justice Taft, in *Myers*, maintained that, "The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended."¹¹⁸ If one reads the treaty clause in light of *Myers*, it would appear that the only power the Congress has related to treaties is the Senate's advice and consent power in creating them, since the wording of the two powers is nearly identical.

The issue of treaty termination is different in nature from that of executive

112. *Myers v. United States*, 272 U.S. 52 (1926).

113. U.S. Const. art. II, § 2.

114. *See Myers*, 272 U.S. at 106.

115. *Id.*

116. *Id.* at 126.

117. It is interesting to note that the Supreme Court has narrowed this opinion somewhat through its disposition in the case of Humphrey's Executor, *Rathburn v. United States*, 295 U.S. 602, 631-32 (1935).

118. *Myers*, 272 U.S. at 128.

appointments.¹¹⁹ The executive can argue that it needs the power to remove its own officials in order to manage its own internal bureaucracy.¹²⁰ This control makes the president better able to carry out his duty to execute the laws of the United States. In contrast, the power to terminate treaties affects, not only the United States, but also the other nation(s) involved in the treaty.¹²¹ Furthermore, the Congress has historical claims to a role in treaty termination.¹²²

There is also a very concrete, textual difference between terminating a treaty and dismissing an executive official. An executive official may help the president execute a law and, thus, is important to the executive branch in executing the law as it reads it. In contrast, a ratified treaty is part of the supreme law of the land. It is one thing to change individuals that enforce the law, but another to change the law itself.¹²³ Changing the law itself looks more like a legislative duty for the Congress.

Congress' function is to make laws, while the executive branch has the job of enforcing them. Giving the president power over confirmed executive officials furthers the president's capacity to perform the executive function of law enforcement. In contrast, giving the president total control over treaty termination extends the executive's power past this primary function. For this reason, unilateral presidential treaty termination requires closer scrutiny than the Court gave dismissal of executive appointees in *Myers*. Nevertheless, the judges in *Goldwater* clashed about the relevancy and scope of the *Myers* decision in respect to the treaty termination issue.

F. *Goldwater v. Carter*

1. The Case

The Supreme Court has faced the treaty termination power only once, in *Goldwater v. Carter*.¹²⁴ The Court issued no majority opinion and declined to reach the merits.¹²⁵ However, the district and circuit courts did issue opinions on the merits.¹²⁶ While the Supreme Court decision is paramount in considering the issue of the ABM Treaty termination, a brief description of all of the opinions is useful for bringing out the textual and policy arguments as background for this

119. See David J. Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L. J. 931, 990 (1978); but see Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 887 (1958).

120. See Scheffer, *supra* note 120, at 990.

121. *Id.* at 990.

122. See *supra* pp. 241-55.

123. See Nelson, *supra* note 119, at 888.

124. *Goldwater*, 444 U.S. 996 (1979).

125. *Id.*

126. See *Goldwater v. Carter*, 481 F. Supp. 949 (1979), *reversed by Goldwater*, 617 F.2d 697 (1979).

paper's analysis of the intent of the Framers.¹²⁷

The District Court for the District of Columbia, in an opinion authored by Judge Gasch, held that President Carter's notice of treaty termination needed to receive approval from two-thirds of the Senate or a majority of both houses of Congress in order to be effective under the Constitution of the United States.¹²⁸ Gasch ruled that the senators challenging Carter's termination of the Mutual Defense Treaty with Taiwan had standing.¹²⁹ He also held that deciding the case on the merits would not violate the Political Question Doctrine.¹³⁰ After addressing these preliminary issues, Gasch ruled that, under Article VI, clause 2 of the Constitution, treaties are part of the supreme law of the land that the president is responsible to execute.¹³¹ In order to repeal the supreme law of the land, the president needs Congress.¹³² Judge Gasch believed that the historical precedents, at the least, supported some form of cooperative action.¹³³ He also refused to apply the *Myers* rationale to treaty termination.¹³⁴ As a matter of policy, the court was concerned about providing the president with such a broad, unchecked power as treaty termination.¹³⁵ While the court decided that either two-thirds of the Senate or a majority vote of both houses of Congress could legally approve the action, Judge Gasch discussed only briefly, and somewhat unclearly, why he reached that exact determination.¹³⁶

A divided DC Circuit Court reversed. Five of the judges wrote the *per curiam* opinion of the court.¹³⁷ The majority agreed with Judge Gasch that the appellees had standing,¹³⁸ but reversed on the merits.¹³⁹ While they gave several reasons for this decision, all of these, in some part, revolved around the President's

127. The facts of *Goldwater* are not very different from those at issue here. The two most relevant differences are that the Mutual Defense Treaty at issue in *Goldwater* did not contain a supreme interests clause within its termination provision and that President Carter terminated the Mutual Defense Treaty incident to derecognizing Taiwan, the other party to the Treaty, and recognizing China. Justice Brennan would have rendered an opinion on this narrow basis. For more details concerning the facts of *Goldwater*, see, e.g., Daniel Horwitch, *The Unresolved Question of Unilateral Treaty Terminations: Goldwater v. Carter*, 100 *S.Ct.* 533 (1979), 4 *SUFFOLK TRANSNAT'L. L. REV.* (1980).

128. See *Goldwater*, 481 F. Supp. at 965.

129. *Id.* at 955-56. The basic requirements for standing are "(1) that he has suffered injury in fact; (2) that the interests being asserted are within the zone of interests to be protected by the statute or constitutional guarantee in question; (3) that the injury is caused by the challenged action; and (4) that the injury is capable of being redressed by a favorable decision." *Id.* at 951.

130. *Id.* at 956-58.

131. *Id.* at 962.

132. *Id.*

133. *Id.* at 960.

134. *Id.* at 960-61.

135. *Goldwater*, 481 F. Supp. at 963, citing THE FEDERALIST NO. 75 (Alexander Hamilton).

136. *Id.* at 965.

137. Two of the justices, Chief Justice Wright and Judge Tamm, concurred in the result but never reached the merits because they believed that appellees lacked standing. See *Goldwater v. Carter*, 617 F.2d at 699-709 (1979). For the sake of brevity, discussion of this opinion is omitted.

138. See *Goldwater*, 617 F.2d at 708. The majority did not believe the Political Question Doctrine applied because the issue before them, as they interpreted it, was extremely narrow.

139. *Id.* at 699.

power in foreign affairs. The majority specifically noted its disagreement with Judge Gasch on the Article VI issue, maintaining that by labeling treaties the "supreme law of the land," the Framers were merely telling state judges that they took precedence over state law.¹⁴⁰ The majority also noted that this was a narrow decision, in light of the nature of the treaty and the fact that the Senate had ratified it with a termination clause and had not placed any special conditions on a possible future termination.¹⁴¹

Judge MacKinnon wrote a lengthy and vigorous dissent in which he would have affirmed the District Court to the extent that its decision required a majority of both houses of Congress to effect the termination of a treaty.¹⁴² MacKinnon relied on Article VI, providing that treaties are the supreme law of the land, read in conjunction with the Necessary and Proper Clause in reaching his decision. MacKinnon saw treaty termination as "an implied power vested in the government." Since the Constitution did not expressly grant the Government the power to terminate treaties, it had to be implied under the Necessary and Proper Clause.¹⁴³

The Supreme Court vacated the decision of the DC Circuit and ordered the case to be dismissed. Six justices agreed that the Court should vacate the decisions below without reaching the merits, but only four agreed on the reasoning for the move. Of the three justices who disagreed with the outcome, two would have set the case for oral argument, and one would have affirmed the decision of the DC Circuit on very narrow grounds.¹⁴⁴

Then-Justice Rehnquist, writing for himself and three other justices, invoked the Political Question Doctrine.¹⁴⁵ Rehnquist concluded that, since there is no constitutionally proscribed procedure for treaty termination and different types of termination procedures might be appropriate for different types of treaties, the issue should be decided by "political standards" rather than judicial ones.¹⁴⁶ Justice Powell provided the fifth and decisive vote to vacate the judgment below. However, Justice Powell wrote that the issue was a matter of standing.¹⁴⁷ Justice Powell expressly disagreed with the idea that the issue presented a Political Question that the Court could never address.¹⁴⁸ Justice Brennan would have affirmed the Court of Appeals on the very narrow grounds that the termination of the treaty at issue was incidental to the power to recognize a nation, which belongs to the executive branch.¹⁴⁹ The remaining justices would have scheduled the case

140. See *Goldwater*, 617 F.2d at 704.

141. *Id.* at 708.

142. *Id.* at 716-40.

143. *Id.* at 717 *citing* U.S. CONST. art. I, § 2, cl. 18.

144. While Justice Marshall concurred in the result, he did not write an opinion expressing his reasons, nor did he join the opinion of Justice Powell or that of Justice Rehnquist. See *Goldwater*, 444 U.S. at 996.

145. See *Goldwater*, 444 U.S. at 998.

146. *Id.* at 1003 *citing* *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (three-judge court).

147. *Id.* at 996.

148. *Id.* at 999.

149. See *Goldwater*, 444 U.S. at 1006. It is interesting to note that Justice Brennan wrote the

for oral argument.¹⁵⁰

2. Does The Court's Opinion Support Bush's Position?

Commentators often cite *Goldwater* as supporting the ability of the president to terminate a treaty without Congress,¹⁵¹ but there was only one opinion on the merits given on very narrow grounds and no opinion commanded a majority. The Political Question Doctrine has fallen out of favor with the Supreme Court since it decided *Goldwater v. Carter*.¹⁵² Thus, then-Justice Rehnquist's position is on even more questionable ground than it was in 1979, when it could not command a majority of the Court.

Aside from the Political Question Doctrine, Justice Powell's opinion on standing received no other support from the Court, and that of only two judges at the appellate level.¹⁵³ Justice Brennan's opinion also stood alone.¹⁵⁴ The *Goldwater* case provides clues to both sides to a potential litigation on what issues to argue and how to argue them, as well as what Constitutional arguments may be convincing. However, the case does not appear to provide any specific or binding, legal support to either branch of the Federal Government on this issue, despite Carter's ultimate success in terminating the Taiwan Mutual Defense Treaty.

IV. AN ORIGINALIST ARGUMENT AGAINST UNILATERAL PRESIDENTIAL TERMINATION

The arguments concerning treaty termination traditionally center around policy. One can interpret the textual provisions like the majority of the Court of Appeals in *Goldwater*, and say that the treaty power is an executive function under the president's authority in foreign affairs.¹⁵⁵ In the alternative, one can interpret the Necessary and Proper Clause, in conjunction with Article VI, section 2, to say that the Congress must play a role in terminating treaties.¹⁵⁶ In either case, an evaluation of the typical constitutional policies of checks and balances and separation of powers drives the interpretation. Because of the need for this interpretation, it is useful to attempt to understand how the Framers of the Constitution balanced these considerations.

Supreme Courts opinion in *Baker v. Carr*, 369 U.S. 186 (1962), the case in which the Court laid out the modern-day criteria of the Political Question Doctrine. Brennan did not believe this case fell under the test he announced in *Baker*.

150. *Id.* at 1006.

151. See, e.g., Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1132 (1992); Ronald A. Lehmann, *Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties*, 98 YALE L. J. 885, 890 n.24 (1989).

152. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

153. See *Goldwater*, 617 F.2d at 709.

154. See *Goldwater*, 444 U. S. at 1006.

155. See *Goldwater*, 617 F.2d at 704.

156. See *id.*, at 717 (MacKinnon, J. dissenting).

A. The Difficulty in Determining the Intent of the Framers

As Judge Gasch said in his opinion in *Goldwater*, the intent of the Framers concerning the termination of treaties is unclear.¹⁵⁷ However, at least one author has formulated an argument that the Framers intended the Executive Branch to predominate in the realm of treaties based on Originalist evidence.¹⁵⁸ The remainder of this paper will present the opposite thesis. It will illustrate that the Framers' desire for treaties to be part of the supreme law of the land, their fear of the possibility that one faction or party might impose its views and positions on the whole nation, and their desire for the treaty power to be executed in such a way as to maintain the "national character" support a constitutional desire for a Congressional check on the termination of international treaties.

Yet, in formulating an argument from Originalist sources, one must be careful about what one takes as evidence of the intent of the Framers. The political positions of the Founders motivated their post-ratification statements and positions. Perhaps the best example is Thomas Jefferson, whom Judge MacKinnon cited as a source of originalist evidence in his dissent in *Goldwater*. However, Jefferson's position changed from 1793, when he was the Secretary of State in the Executive Branch, to when he wrote *A Manual of Parliamentary Practice for the Use of the Senate of the United States* as President of the Senate during the presidency of John Adams.¹⁵⁹ In 1793, six years after the framing of the Constitution, Secretary of State Jefferson told M. Genet that the Constitution, "had made the President the last appeal" concerning the termination of treaties, since the legislature was supreme in "making the laws only."¹⁶⁰ In contrast, in 1812, when Jefferson had a vested interest in the powers of the legislative branch, Jefferson's manual reads, "Treaties being declared. . . to be the supreme law of the land, it is understood that an act of the legislature alone can declare them to be infringed and rescinded."¹⁶¹

Statements by Madison and Hamilton present similar issues of credibility when one tries to determine what the individual really thought at the time of the framing before their political stations influenced their judgment. Both changed positions on several issues, including the meaning of the text of the Constitution and methods of constitutional interpretation during the debates over the Jay Treaty in the first Congress. Both were attempting to gain political advantage for their

157. See *Goldwater*, 481 F. Supp. at 958.

158. See Frances Fitzgerald, *Politics as Law? The Antiballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation: Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War*, 89 CALIF. L. REV. 851, 899-901 (2001). For discussion of Fitzgerald's argument, see *supra* p. 257-59.

159. See JOHN NORTON MOORE, FREDRICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW 798-99 (Carolina Academic Press 1990). Moore actually refers to the second edition of the Manual, which was released in 1812. However, Jefferson was Adam's Vice President, and thus the President of the Senate in 1801.

160. See MOORE, *supra* note 159, at 798 for a full excerpt of Jefferson's recollection of the conversation.

161. *Id.* at 799.

newly formed parties in the forthcoming election.¹⁶² Madison, for example, argued that the treaty-making provision of Article II was in conflict with Article I. He maintained that the President and the Senate, if not subject to House consent, could use treaties to usurp the proper powers of the House to do things such as make the US a party to a foreign war, furnish troops for overseas use, and keep a standing army for mutual security projects. He argued for a construction of the Constitution in light of the overall theme of Separation of Powers and, thus, the House should have some power regarding the making of treaties.¹⁶³

This position, however, contradicted an argument Madison had made in 1793 under the pseudonym Helvidius.¹⁶⁴ In the Helvidius writings, he had maintained that the President could not unilaterally pull out of a treaty, but that the consent of the Senate served as a proxy for that of the House.¹⁶⁵ Thus, while denying the House any role in his earlier writing, he argued for giving the House a say in the treaty power when he served in that body. This tension between these two positions caused Madison to lose a great deal of respect from his fellow representatives.¹⁶⁶

In the end, Judge Gasch was right. There is no definitive originalist evidence that directly states how the United States should terminate treaties. Despite these difficulties, a wealth of indirect evidence indicates that unilateral presidential termination flies in the face of what the Framers would have wanted. While evidence from other sources is not rendered completely useless by post-ratification politics, this paper focuses on *The Records of the Federal Convention of 1787* and *The Federalist*, sources not as tainted by post-ratification politics, in analyzing the intent of the Framers on this issue.

B. The Chronology of the Treaty Power in the Framing

The Federal Convention of 1787 opened on May 14, 1787.¹⁶⁷ There was no treaty power mentioned in the Virginia Plan, the first outline of a Constitution proposed at the convention.¹⁶⁸ A Constitutional provision on treaties did not appear in the work of the convention until the Committee on Detail conducted its work, which started on June 19, 1787.¹⁶⁹ According to Madison's papers, the final draft of the Committee of Detail that the Convention received on August 6, 1787, stated that, "The Senate of the United States shall have the power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."¹⁷⁰ The product

162. See JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 146 (1999).

163. *Id.* at 149.

164. *Id.* at 150.

165. *Id.*

166. See Lynch, *supra* note 162, at 157.

167. See MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, [hereinafter *RECORDS*], Vol. I, 1 (1966).

168. *Id.* at 20.

169. See *RECORDS*, Vol. II, 129, 132 (1966).

170. *Id.* at 183.

gave no power concerning treaties to the Executive Branch.¹⁷¹ This was very different from Alexander Hamilton's plan to put the treaty making power in the President, with the Senate playing the role of advice and consent, which he had proposed to the Convention.¹⁷²

The first mention of any form of Treaty power in the executive branch in any proposal did not come until August 20, 1787. On that day, the Committee of the Whole recommended to the Committee of Five that there be, "The Secretary of Foreign Affairs who shall also be appointed by the President during pleasure— It shall be his duty to correspond with all foreign ministers, prepare plans of Treaties, and consider such as may be transmitted from abroad."¹⁷³ This proposal, however, did not change the powers of the Senate. It is obvious that the Convention had difficulty with the powers of the Senate in general, as it often tabled such provisions until later in the Convention while it went through the other provisions of the work of the Committee on Detail mostly in order.¹⁷⁴

The Convention seemed to determine it did not like the treaty clause as it stood, giving sole power to the Senate, but did not know how to alter it. At the end of August 23, it referred it to the Committee of Five.¹⁷⁵ On Tuesday, September 4, 1787, the Committee of Eleven reported to the House. This report included the language, "The President by and with the advice and consent of the Senate, shall have the power to make treaties. . . But no Treaty except Treaties of Peace shall be made without the consent of two thirds of the members present."¹⁷⁶ While the convention made other changes, the important alteration became permanent, and the treaty power moved to the executive branch, "by and with the advice and consent of the Senate."¹⁷⁷

C. Arguments for Strong Presidential Authority in Treaties

Frances Fitzgerald argues that the evolution of the treaty power in the Federal Convention of 1787 supports the idea that the executive branch should dominate the treaty power.¹⁷⁸ She maintains that, when the form of the Senate changed because of the Great Compromise,¹⁷⁹ the idea of investing the treaty power in the Senate became distasteful to the Framers because it had less of an executive nature.¹⁸⁰ To support this conclusion, she relied on some debates in the state conventions, other anti-Senate moves by the Framers near the end of the convention (such as taking away its role in electing the President) and a belief that

171. RECORDS, *supra* note 169, at 185-86.

172. See RECORDS, Vol. III, 624 (1966).

173. RECORDS, *supra* note 169, at 336.

174. *Id.* at 176-339.

175. *Id.* at 394.

176. RECORDS, *supra* note 169, at 495.

177. US CONST. art. II, § 2, cl. 2.

178. See Fitzgerald, *supra* note 159, at 883.

179. See generally MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91 (1913) (explaining the Great Compromise).

180. See Fitzgerald, *supra* note 159, at 889, 898.

Hamilton specifically felt the treaty power was inherently executive and that the Senate was merely a “safeguard on executive power.”¹⁸¹ Fitzgerald also relied on evidence of the traditional English treaty power, in which the Crown enjoyed a monopoly over treaty making but only Parliament could change domestic law related to the treaties.¹⁸²

Fitzgerald’s position also receives some bolstering from Convention records that she does not cite. Delegate Mercer maintained that, “[The treaty] power belong[ed] to the Executive department,”¹⁸³ rather than the legislative. Pennsylvania Delegate Morris expressed the same view, saying that the Senate should have no power in relation to treaties.¹⁸⁴ In spite of the statements of these delegates, however, a closer examination of the Convention records and a thorough analysis of *The Federalist* appear to create a more powerful argument for a congressional role in terminating treaties. This is especially true when one views the statements of these Framers in the context of the ABM Treaty controversy.

D. Arguments for a Check on Presidential Treaty Power

An assertion of a congressional role in treaty termination does not question the President’s critical role in negotiating the formation of treaties. The Framers recognized the importance of the executive’s ability to negotiate treaties for the reasons stated by John Jay in Federalist 64.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most usefull (sic) intelligence may be obtained, if the persons possessing it can be relieved from apprehension of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest. . . Thus, we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.¹⁸⁵

However, even while reinforcing the necessity of executive treaty making, Jay was careful to include the role of the Senate. Furthermore, while Fitzgerald claims that

181. See Fitzgerald, *supra* note 159, at 889-93.

182. *Id.* at 887.

183. RECORDS, *supra* note 169, at 297. Though Mercer qualified his position to state that, when domestic law was affected, the treaty would have to be ratified by law, which does not appear to apply in the case of the ABM Treaty. This is also true of Morris’ position in the next sentence.

184. *Id.*, at 392.

185. THE FEDERALIST NO. 64 (John Jay).

Hamilton believed in a purely executive treaty power, Hamilton's own words in Federalist 75 prove that position an inaccurate one.

Though several writers on the subject of government place that power [treaties] in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to compromise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws nor to the action of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department and to belong properly, neither to the legislative nor to the executive . . . However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust (sic) that power to an elective magistrate of four year's duration.¹⁸⁶

Of course, all of these passages refer to the treaty *making* power; the Framers never directly discussed the power to terminate treaties in the Federalist or in the Convention. Thus, in attempting to determine how the Framers would have reacted to the ABM Treaty termination, two questions are paramount. First, why did the Framers put the treaty power in Article II of the Constitution? This is important, not only in how we characterize the power, but also in determining how persuasive the *Myers* rationale relating to the President's power to unilaterally remove his appointments should be in construing the treaty clause of the Constitution. The second question is what the Framers really intended concerning treaty termination. In answer to this question, the available evidence indicates that the Framers would have wanted a Congressional check on President Bush's ability to terminate the ABM Treaty, though what type of Congressional action is unclear.

1. Why did the Framers Put the Treaty Power in the Executive Branch?

While Fitzgerald argues that the Framers intended the treaty power to be predominantly executive, Hamilton's opinion in Federalist 75, and the majority of the other evidence available from reliable originalist sources, contradicts this theory. The Convention termed the treaty power as purely legislative until nearly the end of the Convention; and, even when they did move it into Article II, they maintained the role of the Senate in making treaties.¹⁸⁷ Furthermore, analysis of

186. THE FEDERALIST NO. 75 (Alexander Hamilton) (italics added).

187. See RECORDS, *supra* note 167, at 495.

the Convention records indicates that the Framers did not intend this last-minute move to be a major change in policy. They moved the provision because of concerns about how much cumulative power the Senate had, not because of a sudden epiphany that the treaty power should be inherently executive. In addition, throughout the Convention, even those who wanted the power placed in the executive qualified that desire with a commitment to legislative checks on that executive authority, especially when international treaties would have a direct impact on existing domestic law.¹⁸⁸

Fitzgerald's argument also encounters difficulty in the reasons some of the delegates expressed for not wanting the treaty power vested in the legislature. For example, Delegate Mason expressed concern about giving the Senate power as related to the budget because the Senate "could already sell the whole Country by means of Treaties."¹⁸⁹ Mason later clarified that his concern was that the Senate could sell territories through treaties without action from the full Congress.¹⁹⁰ This expresses less of a concern that the Executive did not have enough power, as that the Senate had too much. Changing the provision to share this power between the two branches, rather than giving it solely to the Senate, likely satisfied this concern. Putting the power to make (or terminate) a treaty solely in the hands of the executive would have caused precisely the inverse problem to the one that the Framers were attempting to remedy by moving the treaty provision to Article II.

This also explains the concern of many anti-Federalists, cited by Fitzgerald, that the Senate would become an aristocracy.¹⁹¹ In fact, this had little to do with the treaty power. On September 6, 1787, Delegate Wilson noted that, with all the powers the Senate was to have, including the Treaty power, there was a concern that an aristocracy would result. When Delegate Morris failed to understand this view, Mr. Williamson clarified that it came from the Senate's role in selecting the President, which would make the President beholden to the Senate.¹⁹² The Convention, of course, subsequently eliminated this power. However, the discussion shows that concerns about the treaty power in the Senate stemmed more from the powers that had, to that point, been given to that particular body, not a belief that the treaty power was executive more than legislative.

In fact, while Delegate Mason expressed concerns about giving the Senate power over the budget and treaties, it is clear that he and Morris did not want the president to have any power over treaties. This is evident from Madison's notes of August 7, reporting that they did not want treaties to be subject to the Executive veto.¹⁹³ Though they seemed to disagree on how to accomplish this in the language of the Constitution, both agreed on the desired result.¹⁹⁴ Thus, while there were members of the convention who felt the treaty power should be

188. *See id.*, at 297.

189. *See id.*

190. *Id.* at 297.

191. *See* Fitzgerald, *supra* note 158 at 891.

192. *See* RECORDS, *supra* note 169 at 522-24.

193. *Id.* at 197.

194. *Id.* at 197.

executive, there were clearly those who believed that many of the state constitutions were correct in having the power vested in the legislature.¹⁹⁵ The final treaty making power appears to be exactly what it sounds like, a compromise.

Then why did the Convention place the power within the executive article of the Constitution with so little debate? When the final draft came back, the only real issue questioned was whether consent should require two-thirds of the Senate or a majority.¹⁹⁶ Perhaps the best answer to this comes from the foremost authority on the records of the Convention, Max Farrand.

It was evident that the convention was growing tired. The committee had recommended that the power of appointment and the making of treaties be taken from the senate and vested in the president 'by and with the advice and consent of the senate.' With surprising unanimity and surprisingly little debate, these important changes were agreed to. The requirement of the concurrence of two-thirds of the senate in treaties was amended at Madison's suggestion to except treaties of peace. It was then adopted and the next day reconsidered and re-adopted after striking out the exception of treaties of peace.¹⁹⁷

Farrand recognized that this debate would have been more heated if it had come earlier in the Convention. However, given the lateness in the convention and the amount of difficulty the convention had experienced with the powers of the Senate in general, it is not surprising that, what to us now appears as a major change went through with little debate. It was a compromise, and one that scholars today should not view as an endorsement of exclusive executive power over treaties.

In addition to the policy and textual critiques of using *Myers* to decide the issue of treaty termination,¹⁹⁸ the condition of the convention at the time it adopted the treaty provision argues against expanding *Myers* to this area of law. The idea that limits on powers given to the executive under Article II should be construed as narrowly as possible is not evident from the Constitution itself, but is a Court-designed method of interpretation based on form, not substance.¹⁹⁹ While Article II does contain express restrictions on the authority of the executive branch, the treaty provision entered this Article late in the Convention as part of a compromise. The absence of a termination clause is not an indication that the Convention meant to delegate that power to the executive branch, but was a result of exhaustion and an understandable lack of attention to detail and all possible scenarios. Even if one accepts the *Myers* interpretation of Article II in general, it would not be reasonable to apply this doctrine broadly to the treaty provision in light of its history.

195. See Fitzgerald, *supra* note 158, at 888.

196. See FARRAND, *supra* note 178, at 171.

197. *Id.*

198. See *infra* pp. 247-8.

199. See Myers, 272 U.S. at 128 (discussed, *infra* pp. 24-25); see also Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 884-85 (1958).

Despite the move of the clause to Article II, passages from *The Federalist* indicate that the Framers still saw treaties as legislative in nature, though an executive role in creating them was necessary.²⁰⁰ Even if one dismisses *The Federalist*, the provision itself still required the ascent of the legislative branch. It is unlikely the Framers considered all the potential future interpretive implications of the form it was using when it put a still-shared treaty power in Article II. Given the evidence that the Framers did not see the treaty power as purely executive and that its placement in Article II did not effect such a belief, it is prudent to back off the *Myers* reasoning in the context of the treaty making power.

This reasoning gains support from the policy-oriented argument that U.S. involvement in international treaties is different from a President's ability to control his subordinates.²⁰¹ It is important that the president be able to terminate purely executive officials in order to fulfill his charge of executing the laws. But even the Supreme Court recognized the limits to this broad executive power in the case of *Humphrey's Executor v. United States*,²⁰² where the Court held that this unilateral power did not extend to officers whose duties were "quasi judicial or quasi legislative."²⁰³ However, if the treaty power were not a purely executive function, using the *Myers* rationale to resolve the issue of treaty termination would actually defeat the intent of the Framers rather than affect it.

In sum, there is no direct evidence of why the Framers put the treaty power in Article II. However, it happened far too quickly and suddenly near the end of the Convention to think that it marked an abandonment of the consensus that the treaty power, even if not purely legislative, required the legislature to play a substantial role. While there is evidence that some delegates of the convention believed the treaty making power was executive in nature, even these individuals desired legislative checks on the president's authority. Furthermore, there were individuals who believed the power was purely legislative. Hamilton's statement above from *Federalist 75* seems to indicate that the final decision was a compromise. In any case, it only concerns making treaties. Determining who the Framers intended to have the power to terminate treaties requires examining the whole of *The Federalist* to find all allusions to treaties, and putting these observations together to form coherent policy on international agreements.

200. For the quotation and discussion of these passages in THE FEDERALIST, see *infra* p. 271-74.

201. See, e.g., Scheffer, *supra* note 119.

202. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). In this case, the plaintiff, the executor of an estate, filed suit against the Government for the deceased's salary from the time the president relieved him of his duties as Federal Trade Commissioner until his death. The plaintiff contended that the estate was entitled to the back pay because the president did not have the power to remove the Commissioner of the FTC under the Federal Trade Commission Act, 15 U.S.C. § 41. The Court held that the president had violated the Act, and that the Act was constitutional.

203. See *Humphrey's Ex'r*, 295 U.S. 602 (1935). See also Nelson, *supra* note 119, at 885.

2. What was the Intent of the Framers Concerning Treaty Termination?

a. The Framers Wanted a Congressional Check

Some argue that a congressional check on unilateral presidential treaty termination would not make sense because it would make it too difficult for the United States to exit "international obligations."²⁰⁴ However, *The Federalist* provides evidence that the Framers believed that, once the United States entered into a treaty, it was important that it keep its bond and approach treaty issues with the utmost seriousness.²⁰⁵ This was not only a consideration for the future, but was important to the Framers as they wrote the Constitution.

The just causes of war, for the most part, arise either from violations of treaties or from direct violence. America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us. She has also extensive commerce with Portugal, Spain, and Britain, and, with respect to the two latter, has, in addition, the circumstance of neighborhood to attend to. It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies."²⁰⁶

204. See, e.g., *Goldwater*, 617 F.2d at 705.

205. The discussion that follows proves this point. However, Madison perhaps did the best job of explaining the need for stability in the Federal government in general.

In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconsistent government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy. But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.

THE FEDERALIST NO. 62 (James Madison).

Proponents of the termination of the ABM Treaty will quickly respond that the United States has not broken its bond, but has terminated the treaty in accordance with the termination clause in Article XV of the Treaty. However, as stated previously and restated in the subsequent argument, if the Constitution does not authorize the president to terminate a treaty, than Article XV has not been legally invoked. Furthermore, the seriousness with which the Framers approached treaty obligation is significant to how they should be terminated, as this paper argues in its subsequent analysis on pages 268-71.

206. THE FEDERALIST NO. 3 (John Jay).

The Framers discussed the treaty power mostly in the context of Federalism, maintaining that one national government could better maintain treaties than 13 individual states.²⁰⁷ However, the principles applied by the Framers in their hypothetical discussions of Federalism are applicable to the unilateral presidential termination of treaties today. The evidence of the intent of the Framers, coupled with standard policy and textual arguments against presidential termination make a strong case that the withdrawal from the ABM Treaty should be more difficult to accomplish than through the unilateral action of George W. Bush or any other chief executive.

i. Treaties Are Part of the Supreme Law of the Land

A Congressional role in terminating a treaty, of course, does not guarantee that the United States will maintain all of its international obligations indefinitely. This would not a desirable result, since many treaties reach a point where they should be terminated. Furthermore, by providing a termination clause, the parties to the ABM Treaty acknowledged that the Treaty might not have a perpetual life.²⁰⁸ However, because the United States is party to the treaty, the dictates of the Constitution are paramount, and thus the intent of the Framers is a necessary consideration.

John Jay expressed the Framers' belief that a treaty is binding compact

207. See, e.g. THE FEDERALIST NO. 22 (Alexander Hamilton).

The treaties of the United States under the present Constitution are liable to the infraction of the thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

208. It is of interest that Hamilton likely would have thought this provision to be an invitation to trouble. He believed that it was key that treaties leave nothing to future considerations.

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity, leaving nothing to future discretion, and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and nonobservance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and peace of that part of the world, all the resources of negotiations were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.

THE FEDERALIST NO. 15 (Alexander Hamilton). However, the wisdom of the termination clause is not the issue this paper addresses.

between nations that the United States should not dismiss lightly.

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, and new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, no doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period, or under any form of government.²⁰⁹

Proponents of the president's ability to terminate a treaty unilaterally will immediately point to the fact that the ABM Treaty has a withdrawal clause that authorizes both parties to terminate the Treaty at will with six months notice.²¹⁰ Jay, obviously, did not contemplate such a clause in a treaty when he wrote this passage. However, even if today's readers cannot read the passage literally in light of the ABM Treaty withdrawal clause, especially the last sentence about treaties being out of the reach of legislative acts,²¹¹ it does serve as an illustration that the Framers labeled treaties as the supreme law of the land for reasons other than instructing judges that they were to supercede state law.²¹² Jay makes it clear that the Framers made treaties the Supreme Law of the Land so that they could not be "repealable at pleasure."²¹³

The situation concerning ABM Treaty termination justifies the fears expressed by Jay. If the President Bush can terminate the ABM Treaty without a congressional check, he is doing so at his pleasure. While he may or may not be deciding to terminate the ABM Treaty on a "whim" in this particular instance, if his legal interpretation of his powers is correct, there is no Constitutional mechanism to prevent a president from making such a decision based more on special or partisan interests than the merits of the treaty.²¹⁴ This is precisely what

209. THE FEDERALIST NO. 64 (John Jay).

210. See ABM Treaty, *supra* note 2.

211. It is likely that, with this phrase, Jay was really referring to state legislatures. This is especially true in light of the actions of the first Congress in terminating a treaty as is recounted by the Court of Claims in *Hooper v. United States*, 22 Ct. Cl. 408 (1887), see *supra* note 82.

212. Compare Jay, *supra* note 210 with Goldwater, 617 F.2d at 704.

213. Jay, *supra* note 209.

214. The ABM Treaty termination clause maintains that termination must be in the nation's "supreme interests." See ABM Treaty, *supra* note 2. However, not all treaties will necessarily contain such a provision, this provision is not the issue addressed in this paper, and such a clause is open to interpretation based on partisan perceptions and interests.

Jay maintains the Framers wanted to avoid by making treaties part of the Supreme Law of the Land.

Jay correctly points out that a treaty is a “bargain” or contract between nations, and that our actions in terminating a treaty will reflect on the United States and, in part, dictate whether other nations will continue to enter agreements with us (and, if they do, if they will trust us to honor them and, thus, honor them themselves). If one individual has to power to terminate a treaty, how will other nations know with whom they are reaching an agreement? After all, making an agreement with a nation is only a valuable undertaking if you can trust that nation to maintain it.

A role for Congress does not preclude termination, but guarantees the representation of all citizens, states, and parties of the Federal Government in a considered deliberative process. Jay makes it clear that the Framers did not intend treaties to be repealable at will in the way President Bush has done, but to be repealed in a similar manner as other laws of the United States—with congressional authorization. This proposition gains support from other passages in the Federalist Papers.

ii. A Check on Treaty Termination Serves to Minimize the Impact of Partisanship

Much of the evidence that the Framers did not want the president to have unilateral treaty termination power stems from the basic conclusion long drawn from the Federalist papers that the Constitution, in part, was meant to minimize the impact of partisanship. Hamilton asked,

Is it not... the true interest of all nations to cultivate...benevolent and philosophic spirit? If this be their true interest, have they in fact pursued it? Has it not, on the contrary, invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?²¹⁵

Madison and the rest of the Framers shared this fear of one party or faction taking control over the course of the nation, and that that controlling faction would routinely change, lending the nation to inconsistency and instability. Madison wrote, “Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . our governments are too unstable.”²¹⁶

While this fear of partisan control pervades the Federalist papers, only Jay discussed its role in the treaty power. The Framers, as noted by Jay, recognized that faction, if given an unchecked hand, could control foreign as well as domestic policy. Jay wrote,

215. THE FEDERALIST NO. 6 (Alexander Hamilton).

216. THE FEDERALIST NO. 10 (James Madison).

But the safety of the people of America against dangers from *foreign* force depends not only on their forbearing to give *just* causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to *invite* hostility or insult; for it need not be observed that there are *pretended* as well as just causes of war. It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, that absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or PARTISANS. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people. But, independent of these inducements to war, which are most prevalent in absolute monarchies, but which well deserve our attention, there are others which affect nations as often as kings; and some of them will on examination be found to grow out of our relative situation and circumstances."²¹⁷

This particular except speaks of war, but the paper dealt with foreign affairs in general, including treaties.

Giving the President unilateral power to withdraw from a treaty gives exclusive power to terminate treaties to a single ruling party, in President Bush's case, the Republican Party that Bush leads. By requiring action from Congress to terminate a treaty, this executive power is controlled, but not eliminated. At the time of the ABM termination, for example, Bush would only need to convince one Democrat in the Senate that termination of the ABM treaty is the proper course, and maintain his party base, in order to affect his desire to terminate the ABM Treaty. This hardly seems an unreasonable or insurmountable check on executive power. If the Republicans controlled the Senate as well, Bush's task would be even easier. There are, of course, instances in which one party will be in the majority in each branch of the government.

Even in this situation, however, a legislative check would still bring the debate to the forefront and allow all parties in the government a formal say in the termination process. Legislative action is not warranted in order to prevent treaty termination through gridlock, but to ensure that the Nation and its government debate the issue thoroughly and that the Government makes its decision in the best interests of the entire nation. Congressional action in treaty termination would not preclude treaty termination, but it would recognize the Framers' desire that United States not be able to dismiss treaties on a whim, as illustrated by Jay and in Article VI.

Treaties should be harder to vacate than by the stroke of one individual's pen, with or without a termination clause. If partisanship on any given issue is so great that a president cannot get a simple majority in both houses of Congress or two-thirds of the Senate, it is clear that there is no national consensus to terminate the treaty in that case. The United States Constitution requires this procedure to repeal its normal statutes and Congress passes bipartisan measures on a regular basis; it

217. THE FEDERALIST NO. 4 (John Jay).

makes sense to require it to repeal international treaties that are part of the Supreme Law of the Land.

The Framers put checks and balances into the Constitution to avoid the absolute power of parties, partisans, and individual branches of the Federal Government.²¹⁸ Such checks were necessary concerning the treaties to accomplish the Framers' goal of improving on the monarchical system of treaty power in the British government. Hamilton, while discussing the treaty power, observed that under the Constitution, "there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature."²¹⁹ Since the British Parliament had control over treaties only as they affected the law of the land, and not foreign relations, the Senate's role of advice and consent added a foreign relations power the legislature's role in treaties.²²⁰ It is difficult to believe that the Framers would have endorsed eliminating such a check in terminating treaties.

iii. A Congressional Role in Treaty Termination Will Help to Protect the National Character and the United States' Reputation Amongst Nations

Action by Congress in terminating a treaty is warranted, not only because of the importance of checks and balances on executive and factional power that Jay pointed to, or because of the desire to check the type of executive power exhibited by the British monarchy, but because presidents serve a term of four years, and a maximum of ten years.²²¹ The Senate, in particular, but also Congress as a whole today, is a more continuous body. Some individuals are there for decades and, even when individuals leave, there are dozens of incumbents left behind within the body. Providing Congress with a role in treaty termination would help to assure that the character and image of the United States as perceived by foreign powers endures over time. Madison recognized the importance of this "national character" as a reason for giving the Senate such a prominent role in making treaties when he wrote,

A fifth desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be fortified by an unenlightened and variable policy. . . but the national councils will not possess that sensibility to the opinion of the world which is perhaps not less necessary in order to merit than it is to obtain its respect and confidence. An attention to the judgment of other nations

218. Obviously, not everything should require a check. The Supreme Court in *Myers* and the constitution itself both recognize this. However, the preponderance of the evidence, as well as the binding and multilateral nature of international treaties, lends credence to the argument in this case.

219. THE FEDERALIST NO. 69 (Alexander Hamilton).

220. See Fitzgerald, *supra* note 158, at 887.

221. A president would serve the maximum if he gained the office upon the death of a sitting president and, won the next two presidential elections.

is important to every government for two reasons: the one is that independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?²²²

The case of unilateral executive treaty termination embodies these concerns of the Framers about the character and image of the Nation at their zenith. Madison points out that, without “a select and stable member of the government” involved in making treaties, U.S. foreign policy will be inconsistent. He finds this particularly important because it will affect the image of the United States among other nations. Should a president have the power to terminate a treaty without Congress, this potential for inconsistency reaches a zenith.

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 president in the next election, there would be no legal impediment to that president terminating that treaty. The idea that a president could unilaterally erase the ABM Treaty, a fixture of nonproliferation and a supreme law of the land, violates the theory of

222. THE FEDERALIST NO. 63 (James Madison). It is interesting to note that Hamilton also saw the importance of this national character as it related to the Senate's role in appointing and relieving advisors to the president.

It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconsistency than any other member of the government.

THE FEDERALIST NO. 77 (Alexander Hamilton).

This seems to put the idea of applying the *Myers* rationale to the treaty power on even shakier ground, since *Myers* is open to at least some measure of originalist criticism. Hamilton states that a Senate check on the dismissal of executive officers would provide consistency and promote the national character. He concludes that this, therefore, is a desirable characteristic of the Federal Government. *Myers* maintains that this check is unnecessary in the interest of the president's power over his own employees. If the Framers believed applying the Constitution's Congressional check on appointments to dismissals as well, it makes no sense from an Originalist standpoint to extend the *Myers* rationale to the treaty provision.

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.

Aside from these general concerns, which would apply in any case of presidential treaty termination, there are specific reasons to be concerned about Bush's termination of the ABM Treaty. The United States, as a superpower, will always be subject to some criticism from other nations. The policy concerns the Framers expressed would apply to any president's decision to terminate a treaty unilaterally. However, in discussing the ABM Treaty Specifically, Bush's reputation as a unilateralist appears to be having a serious effect on the reputation of the United States in international affairs.²²³ While the specific criticisms vary, most have something to do with a perceived U.S. unilateralism and a belief that the U.S. has become "trigger-happy" since the September 11 attacks.²²⁴

Even American commentators observe that, "Administration officials no longer offer even the pretense that the U.S.-Russia relationship is a partnership of equals."²²⁵ Foreign commentators are less diplomatic. Many criticize the United States by looking at President Bush's "unilateralist" moves as a representation of the mood of the American people. For example, a commentator in Singapore wrote,

History will one day judge the United States' decision to withdraw from the Anti-Ballistic Missile treaty in the same way it views today the US failure in 1919 to join the League of Nations – as an abdication of responsibility, a betrayal of humankind's best hopes, an act of folly. . . [T]he Bush administration has also displayed a cynicism which will adversely affect the mood of cooperation that has characterized international relations since the September 11 attacks. It was not by accident that the announcement came on the same day that the videotape of Osama bin Laden, confirming his complicity in the attacks, was released. That juxtaposition served at once to bury the ABM story, as well as provide missile defense with an altogether spurious emotional justification to cover up its intellectual and strategic nullity. . . President George W. Bush is doing well to make the world safe from terrorism, but under the cover of that good fight, he has

223. See, e.g., *US Nuclear Deception*, THE STRAITS TIMES (SINGAPORE), Jan. 21, 2002, 1; News and Features, *Star-Spangled President*, SYDNEY MORNING HERALD, Jan. 19, 2002, at 32; Vincent J. Schodolski, *Blair Feeling Heat as U.S.-Europe Bridge*; News, *Critics Question Political Priorities*, CHIC. TRIB., Jan. 18, 2002, at 3N; Patrick E. Tyler, *Russia Rejects U.S. Plan to Store Warheads*, N.Y. TIMES, Jan. 11, 2002, at 8A; Elisabeth Bumiller and David E. Sanger, *A Nation Challenged: Dealing with the Crisis*, N.Y. TIMES, Jan. 1, 2002, at A1; Martin Walker, Opinion, *New Europe: Uneasy, Necessary Ally*, SAN DIEGO UNION-TRIBUNE, Dec. 30, 2001, at G5; *A Gentler America*, Commentary, THE STRAITS TIMES (SINGAPORE), Dec. 20, 2001, at 16; Suzanne Daley, Foreign Desk, *The War on Terror Finds Wary Support in France*, N.Y. TIMES, Oct. 4, 2001, at A3.

224. See Michael Binyon, Overseas News, *West Offers Putin Support As Criticism Grows in Moscow*, THE TIMES (LONDON), Jan. 25, 2002. Much of the criticism of the United States on the international scene has been for not entering into multilateral treaties, such as the Kyoto Accords. The ABM Treaty provides an example of the inverse of this common problem.

225. Witt, *supra* note 51.

just made the world a far more dangerous place.²²⁶

Criticisms such as this one illustrate how a particular leader who makes a certain series of moves can make America's international reputation better or worse at any given time.

A Congressional role in treaty termination will not ensure that the United States would never face international criticism. However, it would provide a necessary safeguard to ensure that, when the United States does make itself susceptible to criticism from the world community, it is doing so for the right reasons and on behalf of a clear majority of its citizens and representatives. The character and image of the United States in the ever-shrinking world we live in is at least as important as a small domestic spending bill. Madison and the rest of the Framers recognized this, and the evidence indicates they would be in favor of requiring an Act of Congress to terminate a treaty.

b. What kind of Congressional Check?

The words of the Framers, combined with the other evidence and arguments restated in this paper and those it cites, dictate that the President does not have the constitutional power to terminate a treaty without congressional action. However, this does not clarify what kind of congressional action the Constitution requires. In the *Goldwater* case, Judge Gasch maintained that either the consent of two-thirds of the Senate, or an Act of Congress passed by a majority of each houses of Congress, would suffice. Judge MacKinnon disagreed, deciding that only an Act of Congress could accomplish the termination of a treaty. Again, originalist analysis provides no concrete answers. The necessary and proper clause and Article VI, section 2, read in light of the Framers' statements about treaties being the supreme law of the land, support Judge MacKinnon's position.

In ruling that two-thirds of the senate alone could authorize a termination, Judge Gasch, though he never explicitly said so, appears to have reasoned that giving that body power in making treaties also gave it power in terminating them. However, a ratified treaty is very different from one under consideration. A ratified treaty is binding, and under Article VI, section 2, is the supreme law of the land. The Senate has no power to repeal any kind of law on its own. However, Article I does grant Congress as a whole that power. Thus, by the terms of the Constitution and differences between treaties under consideration and those already made, MacKinnon has the better position on the question.

However, there is evidence that the Framers did not want the House of Representatives involved in making treaties. During the Constitutional Convention, the Pennsylvania Delegation moved unsuccessfully that the House of Representatives also be involved in the treaty-making process.²²⁷ The reason for this failure seemed to be, at least in part, that the representatives served such short

226. *American Betrayal*, THE STRAITS TIMES (SINGAPORE), Dec. 15, 2001, at 1.

227. See Lynch, *supra* note 162, at 144.

terms. As Jay put it,

They who wish to commit the power under consideration to a popular assembly composed of members constantly coming and going in quick succession seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the convention, to provide not only that power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them.²²⁸

Many of the framers also expressed concerns that including the larger House of Representatives in treaty making would jeopardize the secrecy necessary in treaty negotiations.

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by the best qualified for the purpose, and in the manner most conducive to the public good.²²⁹

These concerns are inadequate to deny the House of Representatives its role in treaty termination. First, while the members of the House serve short terms, many are there for many years in today's House, as modern politicians tend to be "career politicians." Furthermore, the United States now elects senators by popular vote in the same way it elects members of the House.²³⁰ This eliminates the main feature the Framers used to make the Senate a more secure, enlightened body than the House. These practical, modern-day considerations, coupled with the textual requirement that treaties be "considered as part of the law of the land,"²³¹ validate Judge MacKinnon's conclusion that an Act of Congress is the proper step the United States should take in order to terminate a treaty.

V. WHAT SHOULD CONGRESS HAVE DONE?

This paper has put forth originalist evidence and argument to supplement standard policy and textual arguments that President George W. Bush cannot terminate the ABM Treaty without an Act of Congress. However, even after one accepts this argument, the question before Congress at the beginning of 2002 was what it could do to preserve its authority. This question is likely to resurface with future treaty terminations.

228. THE FEDERALIST NO. 64 (John Jay).

229. THE FEDERALIST NO. 64 (John Jay).

230. See U.S. CONST. amend. XVII.

231. THE FEDERALIST NO. 22 (Alexander Hamilton).

A. *The ABM Treaty*

As I see it, the members of Congress opposed to the termination of the ABM Treaty had four avenues they could have pursued. First, the members could have done nothing and allow the termination to take effect. While this would not have any definitive legal impact on the issue, it would set another, arguably a first, precedent of unilateral presidential termination of an international treaty.

A second option was that Congress pass legislation condemning President Bush's action and declaring that the United States may not withdraw from the ABM Treaty. This would have created the complete impasse between the branches that Justice Powell's deciding opinion maintained was necessary for members of Congress to have standing.²³² Once one considers political reality, however, it becomes clear that it was impossible for opponents to the treaty termination to accomplish this feat.

The third option was that both houses pass legislation authorizing the termination of the ABM Treaty. It was feasible that the leadership in Congress could have formed a coalition of Democrats and Republicans who believed in legislative power in treaty termination. This would have prevented a precedent in favor of sole executive branch authority with respect to this issue. Proponents of multilateral international agreements and legislative power in foreign affairs, by forming what might have been an unappetizing coalition to some, would have prevented a dangerous precedent.

The fourth option was that a handful of members sue, as was the case in *Goldwater v. Carter*. On June 11, 2002, a group of representatives filed a complaint in United States District Court for the District of Columbia seeking a declaratory judgment that President Bush's termination of the ABM Treaty was unconstitutional.²³³ On December 30, 2002, Judge John D. Bates signed a memorandum opinion in *Kucinich v. Bush* dismissing the suit on both standing and political question grounds.²³⁴ While the plaintiffs decided not to appeal the case, Judge Bates' decision did acknowledge that *Goldwater* was not controlling and hinted that the president's authority to terminate a treaty unilaterally is justiciable, given the proper factual circumstances.²³⁵

B. *An Option for Future Treaties*

Current authority indicates that the Senate has the power, in ratifying a treaty, to do so with conditions.²³⁶ Presumably, the Senate could assent to a treaty on the

232. See *Goldwater v. Carter*, 444 U.S. 996, 999 (1979).

233. Electronic copies of court documents in *Kucinich v. Bush* are available at <http://www.lcnp.org/disarmament/ABMlawsuit/indexoflinks.htm> (last visited Jan. 28, 2003).

234. *Kucinich v. Bush*, 2002 U.S. Dist. LEXIS 24691 at *48 (D.D.C. 2002).

235. See Peter Weiss, *Judge Bates' Decision In Kucinich v. Bush: Is the Glass Half Empty Or Half Full?*, available at <http://www.lcnp.org/disarmament/ABMlawsuit/BatesDecisionArticle.htm> (last visited Jan. 28, 2003.)

236. See RESTATEMENT § 303 at cmt. d.

condition that, should the president wish to affect a termination clause in the future, the executive would need the approval of the Congress (or a portion of the Senate) in order to do so. Should the Senate make this a standard procedure, it may avoid the constitutional question of treaty termination for future international agreements.²³⁷

VI. CONCLUSION

Ultimately, neither historical precedent, the current state of U.S. law, nor the evidence of the Framers' intent lends any strong support President Bush's unilateral termination of the ABM Treaty. With the ever-shrinking world and the growing importance of multilateral agreements, it is more important than ever that the United States take its international obligations seriously. This paper has put forth evidence that unilateral presidential termination violates founding principles of American government.

However, treaty termination is a matter of politics as well as law. With the current political climate, President Bush was able to achieve his goal of terminating the ABM Treaty. Given the highly political nature of international treaties, the record of the judiciary branch not properly addressing the issue, and a majority of scholars moving toward acceptance of unilateral presidential termination²³⁸ it is of vital importance that when the Senate ratifies future treaties it requires congressional consent of some form in their termination. This is easier than being forced into court by the executive and, at least for treaties not yet ratified, will achieve the same ultimate result as the Supreme Court holding that Congress has a role in treaty termination.

There will be occasions when terminating a treaty will be necessary. However, the United State must recognize, as its Framers did, the importance on international agreements. The United States requires an Act of Congress to nullify its domestic laws. It is only fitting that it requires at least an equivalent procedure to eliminate its international ones.

237. See David A. Gottenborg, *Treaty Termination and the Separation of Powers: The Constitutional Controversy Continues in Goldwater v. Carter*, 100 S. Ct. 533 (1979) (Mem.), 9 DEN. J. INT'L L. & POL'Y 239, 258 (1980). The issue of treaty termination, of course, could still come before the courts in treaties that the Senate has already ratified.

238. See, e.g., John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum. L. Rev. 2218, 2242 (1999) ("... [T]oday most commentators, courts and government entities accept that the president unilaterally may terminate treaties."); Michael J. Glennon, *1997 Survey of Books Relating to the Law: I. Constitutional Law: Process Versus Policy in Foreign Relations: Foreign Affairs and the United States Constitution*, 95 Mich. L. Rev. 1542, 1544 (1997) ("The President's power to terminate a treaty without Senate or congressional approval is now generally accepted.").

