

# CAN THE PRESIDENT “UNSIGN” A TREATY? A CONSTITUTIONAL INQUIRY

## I. INTRODUCTION

In May 2002, President Bush sparked controversy in the international community with his purported “unsigning”<sup>1</sup> of the Rome Statute of the International Criminal Court (ICC), a major multilateral treaty.<sup>2</sup> Although President Clinton had signed the Rome Statute on December 31, 2000—the last day in which the treaty remained open for signature—with much reservation about its contents,<sup>3</sup> and with explicit directions to his predecessor not to send the treaty to the Senate for ratification until the “significant flaws in the treaty” could be resolved,<sup>4</sup> President Bush’s decision to unsign the treaty was apparently unprecedented.<sup>5</sup> The President effected this unsigning through a cursory letter to the United Nations.<sup>6</sup>

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1. Throughout this Note, the term “unsigning” will be used to refer to the procedure by which a President attempts to undo or reverse the effects of a prior treaty signature. To date, President Bush’s unsigning of the Rome Statute of the ICC is the only national or international example of this procedure.

2. Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 5, 2002, at A18.

3. See Jean Galbraith, *The Bush Administration’s Response to the International Criminal Court*, 21 BERKELEY J. INT’L L. 683, 685 (2003); Eric P. Schwartz, *The United States and the International Criminal Court: The Case for “Dexterous Multilateralism,”* 4 CHI. J. INT’L L. 223, 224 (2003); David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033, 1038 (2004).

4. *Clinton’s Words: ‘The Right Action,’* N.Y. TIMES, Jan. 1, 2001, at A6.

5. See Cosmos Eubany, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT’L & COMP. L. REV. 103, 110 n.51 (2003); Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 336–37 (2005); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2064 (2003).

6. The letter, signed and delivered by John Bolton, then Under-Secretary of State for Arms Control and International Security, reads:

Dear Mr. Secretary-General:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.

Press Statement, Richard Boucher, U.S. Dep’t of State, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), <http://www.state.gov/tr/pa/prs/ps/2002/9968.htm> (last visited Mar. 5, 2006) [hereinafter Letter to U.N.].

The reaction of the international community to this purported unsigned has been mixed at best.<sup>7</sup> Scholars disagree about the precise legal effects, if any, that unsigned a treaty may have.<sup>8</sup> Commentators have speculated about whether other countries might also attempt to free themselves from international obligations by unsigned treaties, and if so, what effect such actions would have on international law.<sup>9</sup> In general, President Bush's decision has had a profound impact on the international community.<sup>10</sup>

Beyond the international implications of the decision to withdraw from the Rome Statute, President Bush's decision to unsigned a treaty also raises serious constitutional questions: Does the Constitution permit a President to unsigned a treaty? If so, what role, if any, should the Senate or the general Congress have in the process? While there has historically been much scholarly debate<sup>11</sup> and even some judicial consideration<sup>12</sup> of the

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7. For a discussion of the international reaction to the unsigned, see Swaine, *supra* note 5, at 2061–65.

8. Compare Michael J. Kelly, *Ignoring Criminal Treaty Harms U.S. Legacy*, USA TODAY, Apr. 16, 2002, at 12A, with Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, May 2002, <http://www.asil.org/insights/insigh87.htm> (last visited Feb. 9, 2007). See also Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1508 (2003) (“Under international law, it is unclear what the precise legal force of ‘unsigned’ a previously signed treaty should be.”).

9. See Angela R. Kircher, *Attack on the International Criminal Court: A Policy of Impunity*, 13 MICH. ST. J. INT'L L. 263, 268 (2005); Swaine, *supra* note 5, at 2064–65; Steven Mufson & Alan Sipress, *U.N. Funds in Crossfire over Court*, WASH. POST, Aug. 16, 2001, at A1; David J. Scheffer, Op-Ed, *A Treaty Bush Shouldn't 'Unsigned'*, N.Y. TIMES, Apr. 6, 2002, at A15.

10. See Koh, *supra* note 8, at 1508–09; Sadat, *supra* note 5, at 338.

11. See generally DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 84–113 (1986); ROYDEN J. DANGERFIELD, *IN DEFENSE OF THE SENATE: A STUDY IN TREATY MAKING* 1–27 (1933); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 216–43 (3d ed. 1991); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 123–63 (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 175–230 (2d ed. 1996); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979); Edward McGlynn Gaffney, Jr., *Goldwater v. Carter: The Constitutional Allocation of Power in Treaty Termination*, 6 YALE STUD. WORLD PUB. ORD. 81 (1979); Michael J. Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CINN. L. REV. 84 (1983); James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 CONN. J. INT'L L. 123 (1999); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991); Christopher C. Sabis, *Congress and the Treaty Power: An Originalist Argument Against Unilateral Presidential Termination of the ABM Treaty*, 31 DENV. J. INT'L L. & POL'Y 223 (2002); Alan C. Swan, *The Constitutional Power to Terminate Treaties: Who, When, and Why*, 6 YALE STUD. WORLD PUB. ORD. 159 (1979); John Yoo, *Politics as Law?: The Antibalistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001) (reviewing FRANCIS FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR* (2000)); Guy M. Miller, Note, *Treaty Termination Under the United States Constitution: Reassessing the Legacy of Goldwater v. Carter*, 27 N.Y.U. J. INT'L L. & POL. 859 (1995); Joshua P.

presidential and congressional roles in treaty formation and termination, there has been practically no discussion of the constitutionality of presidential unsigning of a treaty.<sup>13</sup> This lack of discussion may result in part from Congress’s near-unanimous acceptance of President Bush’s unsigning of the Rome Statute—the first and, so far, only example of unsigning.<sup>14</sup> However, the question of which branch has the power to unsign treaties is important for understanding the balance of power in our constitutional system. Additionally, the decision to unsign a treaty can have serious ramifications for American foreign policy.<sup>15</sup>

While the United States does not become formally bound to observe the terms of a treaty until the Senate has ratified the treaty, mere treaty signature does have important consequences under international law.<sup>16</sup> By signing a treaty, a nation agrees to refrain from actions that would defeat the object and purpose of the treaty.<sup>17</sup> Signing a treaty is also an important way for the United States and other countries to show commitment to common international goals without formally binding themselves to the specific terms of a particular undertaking.<sup>18</sup>

The United States is currently a signatory to many treaties that the Senate has not ratified. Unsigning would enable the President to unilaterally escape from the commitments resulting from these treaty signatures. Indeed, President Bush’s letter to the U.N. indicated that, by

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O’Donnell, Note, *The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President’s Authority to Terminate a Treaty*, 35 VAND. J. TRANSNAT’L L. 1601 (2002); David J. Scheffer, Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT’L L. J. 931 (1978); Comment, *Resolving Treaty Termination Disputes*, 129 U. PA. L. REV. 1189 (1981).

12. See *Goldwater v. Carter*, 444 U.S. 996 (1979); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979); *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979).

13. Only one scholarly paper has addressed the issue of whether the president can “un-sign” a treaty. See David C. Scott, Comment, *Presidential Power to “Un-Sign” Treaties*, 69 U. CHI. L. REV. 1447 (2002). Scott concludes that unilateral presidential unsigning is consistent with both international law and the Constitution. *Id.* at 1449. This Note offers an alternative perspective on the issue of unsigning and ultimately concludes that Scott’s arguments for unilateral presidential control over unsigning are not persuasive.

14. In addition to President Clinton’s reluctance about the ICC and President Bush’s outright hostility to the ICC, Congress expressed its opposition to the Rome Statute by passing several statutes designed to prevent American support of the ICC. See 22 U.S.C. § 7401 (2006); American Servicemembers’ Protection Act of 2002, 22 U.S.C. §§ 7421–7433 (2006); see also Galbraith, *supra* note 3, at 687; Adam Clymer, *House Panel Approves Measures to Oppose New Global Court*, N.Y. TIMES, May 11, 2002, at A3.

15. See, e.g., Koh, *supra* note 8, at 1508 (discussing the international political impact of President Bush’s decision to unsign the Rome Statute).

16. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; see also *infra* Part II.

17. Vienna Convention, *supra* note 16.

18. See, e.g., Swaine, *supra* note 5, at 2072–76; see also *infra* Part II.

unsigning the Rome Statute, the United States no longer considered itself bound by any “legal obligations arising from [President Clinton’s] signature on December 31, 2000.”<sup>19</sup> Moreover, since unsigning the Rome Statute, the United States has sought to immunize itself from the reach of the ICC and has actively lobbied against the new court, in direct contravention of the object and purpose of the Rome Statute.<sup>20</sup> If President Bush’s action of unsigning the Rome Statute were to establish a constitutional precedent for unsigning treaties, other previous American foreign policy commitments could be radically altered.<sup>21</sup> An American precedent of unsigning treaties might also encourage other countries to do likewise and thereby change the landscape of conventional international law.<sup>22</sup> As treaty unsigning can have such serious consequences, it is necessary to consider which branch or branches of government may have the power to unsign treaties.

This Note addresses the question of whether the President can unilaterally unsign a treaty and concludes that he cannot. Before considering the potential arguments for and against the unilateral presidential power to unsign treaties, it is necessary to consider both the international and historical context in which this question arises. Thus, Part II examines the legal consequences of treaty signature under international law. Part III, in turn, considers the historical development of the presidential and senatorial treaty powers. Having established this framework for the discussion, Part IV focuses on the various constitutional arguments that can be advanced in the debate. Part V considers what criteria might be relevant for evaluating the strength of such arguments and analyzes the arguments of Part IV in light of these criteria. Finally, the Note concludes with a proposal that the decision to unsign a treaty should not be made by unilateral presidential action but should require, at minimum, support by a majority of the Senate.

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19. Letter to U.N., *supra* note 6.

20. See Galbraith, *supra* note 3, at 693–96; Kircher, *supra* note 9, at 272–79; Schwartz, *supra* note 3, at 234–35; Tallman, *supra* note 3, at 1039–49; see also Eubany, *supra* note 5, at 119–29. But see *Let the Child Live*, *ECONOMIST*, Jan. 27, 2007, at 59.

21. See Koh, *supra* note 8, at 1508.

22. Consider the statement of the former head of the American delegation to the ICC: “[T]here is a whole list of treaties that we’ve ratified that other states have signed but not yet ratified. . . . If we ‘unsign’ the ICC, we give a signal that a new practice is acceptable, and we lay the groundwork for undermining a whole range of treaties.” Mufson & Sipress, *supra* note 9, at A1.

## II. LEGAL CONSEQUENCES OF TREATY SIGNATURE AND UNSIGNATURE UNDER INTERNATIONAL LAW

Historically, the mere act of signature was enough to bind a state to a treaty.<sup>23</sup> Because the rise of representative democracies has divided the treaty-making process into two phases (signature followed by ratification), contemporary international law does not give the same weight to treaty signature as it has in the past.<sup>24</sup> In noting this development, Professor Rogoff has observed, “While at one time signature played a more important role in the process whereby a state assumed treaty obligations, today the crucial event is ratification.”<sup>25</sup> Nonetheless, treaty signature has not become meaningless under international law.<sup>26</sup>

Today, the Vienna Convention on the Law of Treaties<sup>27</sup> (Vienna Convention) codifies<sup>28</sup> the customary international law rules<sup>29</sup> regarding treaty formation, termination, and interpretation. While the United States has only signed—and not yet ratified—the Vienna Convention, both the executive<sup>30</sup> and judicial<sup>31</sup> branches view the Vienna Convention as

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23. Swaine, *supra* note 5, at 2066; *see also* Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, 266 (1980).

24. *See* Swaine, *supra* note 5, at 2066.

25. Rogoff, *supra* note 23, at 266–67.

26. *See generally* Joni S. Charne, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT’L L. & ECON. 71, 88–93 (1992); Rogoff, *supra* note 23, at 267; Swaine, *supra* note 5, at 2067.

27. Vienna Convention, *supra* note 16.

28. *See* Territorial Dispute (Libya v. Chad), 1994 I.C.J. 4, 21 (Feb. 3); Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, 46–7 (June 21); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 608 (5th ed. 1998); LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 416 (1993); Charne, *supra* note 26, at 75; Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 443 (2004); Rogoff, *supra* note 23, at 284; Swaine, *supra* note 5, at 2065 n.20.

29. The Statute of the International Court of Justice describes customary international law as “general practice accepted as law.” Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (1945). A rule of customary international law binds all states which have not objected to the rule during the period of its formation. *See generally* BROWNLIE, *supra* note 28, at 4–11. Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT]. *See also* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 43–44 (Feb. 20).

30. *See* Secretary Rogers’s Report, *Vienna Convention on the Law of Treaties Transmitted to the Senate*, Oct. 18, 1971, 65 Dep’t St. Bull. 684, 685 (1971) (observing that the Vienna Convention was “generally recognized as the authoritative guide to current treaty law and practice”); *Contemporary Practice of the United States Relating to International Law*, 65 AM. J. INT’L L. 599, 605 (1971). *See also* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 295–301 (1988).

31. *See, e.g.*, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001) (“[W]e apply the rules of customary international law enunciated in the Vienna Convention on the Law of

expressing binding customary international law. Thus, for purposes of this analysis, the Vienna Convention serves as an authoritative statement of the international law rules regarding treaty signature.

The Vienna Convention suggests two types of obligations that a state undertakes during the formation of a treaty. The more important obligation, stemming from ratification, directly binds a state to comply with the terms of the treaty.<sup>32</sup> Article 18 of the Vienna Convention also indicates that a state assumes some obligations by merely signing a treaty. The article provides:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has *signed* the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.<sup>33</sup>

The main idea behind article 18 is that “the value of an undertaking ought not to be diminished prior to the transaction being completed.”<sup>34</sup> Writing well before the drafting of the Vienna Convention, Professor Crandall clarified that, after signature and prior to entry into force, “neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed.”<sup>35</sup> Both the International Law Commission<sup>36</sup> and the authors of the Harvard Draft,<sup>37</sup> the two

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Treaties.”); *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 309 (2d Cir. 2000) (“We therefore treat the Vienna Convention as an authoritative guide to the customary international law of treaties.”); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.40 (11th Cir. 1999); *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 638 n.9 (5th Cir. 1994) (“Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.”). See generally Frankowska, *supra* note 30.

32. Article 14 of the Vienna Convention provides:

The consent of a State to be bound by a treaty is expressed when . . . [t]he representative of the State has signed the treaty subject to ratification[,] or . . . the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

Vienna Convention, *supra* note 16, art. 14.

33. *Id.* art. 18 (emphasis added).

34. Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 294 (2001).

35. SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 343–44 (2d ed. 1916).

36. The General Assembly of the United Nations created the International Law Commission to codify existing customary international law and to participate in the progressive development of international law. See Statute of the International Law Commission, U.N. Doc. A/CN.4/4/Rev. 1 (1962).

original drafters of what eventually became article 18, also emphasized that signature imposes an obligation on a state to not perform acts that would render later ratification meaningless.<sup>38</sup> The interim obligation articulated in article 18 means that even when a state has not yet ratified a treaty, its signature still binds it not to act in a way inconsistent with eventual ratification.<sup>39</sup>

While the customary international law status of article 18 is subject to some debate,<sup>40</sup> over one hundred countries have ratified the Vienna Convention.<sup>41</sup> Further, prior to the drafting of the Vienna Convention, some international courts and arbitral tribunals had already recognized that treaty signature imposes an obligation not to defeat the object and purpose of the treaty.<sup>42</sup> For this reason, some scholars have argued that article 18 is simply a codification of customary international law regarding the consequences of treaty signature.<sup>43</sup> Regardless of whether article 18 is universally accepted as the codification of custom, the United States has expressed the view that article 18 represents customary international law.<sup>44</sup>

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37. Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. SPEC. SUPP. 653 (1935) [hereinafter Harvard Draft].

38. See Charme, *supra* note 26, at 91–93; see also Harvard Draft, *supra* note 37, at 680–81 (“[A] signatory state has a right to assume that the other [state] will regard its signature as having been seriously given, that ordinarily it will proceed to ratification, and that in the meantime, it will not adopt a policy which would render ratification useless or would place obstacles in the way of the execution of the provisions of the treaty, once its ratifications have been given.”).

39. For extended discussions of the meaning of article 18, see Charme, *supra* note 26, at 98–114; Klabbbers, *supra* note 34; Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT'L L. REV. 5, 9–28 (1985); Rogoff, *supra* note 23, at 283–88.

40. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 94 (2d ed. 2000); GLENNON, *CONSTITUTIONAL DEMOCRACY*, *supra* note 11, at 171–72; I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 38–40 (1973); Charme, *supra* note 26, at 76–77.

41. See Vienna Convention on the Law of Treaties, List of Participants, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp> (last visited Feb. 5, 2007).

42. See generally Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28); Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7 (May 25); Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30); Megalidis v. Turkey, 8 Recueil des Decisions des Tribunaux Mixtes 386, 395 (Turkish-Greek Mixed Arb. Trib. 1928), reprinted in 1927/28 ANN. DIG. PUB. INT'L L. 395 (Arnold D. McNair & H. Lauterpacht eds., 1931). For a more extensive discussion of these cases' holdings in regard to the effects of treaty signature, see Rogoff, *supra* note 23, at 275–80.

43. See Charme, *supra* note 26, at 77–84 (observing that in addition to the prior case law, the drafting history of article 18 suggests that it was meant to be a codification rather than an extension of customary international law); cf. Rogoff, *supra* note 23, at 272 (“While some commentators regard this line of decisions as establishing a legal obligation not to defeat the object and purpose of the treaty prior to its entry into force, others regard it as inconclusive at best.”).

44. See *supra* note 31; see also Robert E. Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States*, 78 AM. SOC'Y INT'L PROC. 276, 278 (1984); Frankowska, *supra* note 30, at 299 n.82.

Thus, as a practical matter, other countries that have signed treaties with the United States expect that it will not act against the object and purpose of those treaties, even when the United States has decided not to ratify those treaties.

Beyond invoking the interim obligation of article 18, treaty signature has other legal consequences for the signing state under international law. The Vienna Convention provides that “[t]he text of a treaty is established as authentic and definitive . . . by the signature, signature *ad referendum* or initialling by the representatives of [the signing] States of the text of the treaty.”<sup>45</sup> Signature also “establishes the terms by which a treaty is to come into force, such as by setting a time limit for ratification or stipulating the minimum number of signatories.”<sup>46</sup> Moreover, “[s]ignature may impose the obligation to comply with . . . provisions relating to the submission of the agreement for ratification in accordance with the internal law of the signatories [and] provisions relating to the exchange of ratifications or their deposit.”<sup>47</sup>

It is unclear how unsigning a treaty fits into this customary international law framework. While there is no established custom related to “unsignature,” the underlying notion that international law is based upon the consent of states<sup>48</sup> suggests that unsigning should be permissible under the Vienna Convention. Indeed, unsigning a treaty may simply clarify a country’s desire not to become a party to the treaty.<sup>49</sup> The Bush administration adopted such a view in its letter to the U.N. purporting to unsign the Rome Statute. The letter stated that “the United States does not intend to become a party to the treaty” and concluded that “[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”<sup>50</sup> Under this view, the act of unsigning would relieve a state of its obligations to abide by the object and purpose of the treaty.

On the other hand, unsigning could also be perceived as an action which “defeat[s] the object and purpose of [the] treaty.”<sup>51</sup> One of the major aims of multilateral treaty negotiation is to ensure that all states

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45. Vienna Convention, *supra* note 16, art. 10.

46. Swaine, *supra* note 5, at 2067.

47. Rogoff, *supra* note 23, at 267.

48. See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 338 (1958).

49. See Vienna Convention, *supra* note 16 (“A state is obliged to refrain from acts which would defeat the object and purpose of a treaty, . . . until it shall have made its intention clear not to become a party to the treaty . . .”) (emphasis added).

50. Letter to U.N., *supra* note 6.

51. Vienna Convention, *supra* note 16.



party to the negotiations reach a common understanding of the purpose and goals of the treaty. In this way, multilateral treaty negotiation is as much about international norm construction as it is about the mutual assumption of legal obligations.<sup>52</sup> Under this view, one of the very purposes of the treaty is to establish consensus about the ideals contained in the treaty.<sup>53</sup> Indeed, the reason that some countries sign multilateral treaties is to gain assurance that other countries are committed to the same goals.<sup>54</sup> From this perspective, a state’s unsigned of a treaty—as well as any declaration that the state opposes the treaty’s goals—would be a contradiction of the treaty process. As the Vienna Convention and other international instruments are silent about whether unsigned is permissible under international law, either interpretation is possible.

### III. HISTORY OF THE TREATY POWER UNDER THE CONSTITUTION

The text of the Constitution provides little guidance about the roles of the President and Congress in treaty formation and termination. Article II, Section 2 states, “He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>55</sup> From this general language, a complex procedure has developed for the formation of treaties. This Part traces this evolution of the treaty power and gives particular emphasis to the shifting roles of the President and Congress in both treaty formation and termination.

#### A. *The Development of Presidential and Congressional Roles in Treaty Formation*

The treaty-making process generally involves three major steps: (1) negotiation, (2) signature, and (3) ratification. Over time, the roles of both the President and the Senate have evolved with respect to each of these phases. In general, however, a historical practice has developed such that the President is solely responsible for the first two steps in the treaty formation process (negotiation and signature) while the Senate controls the

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52. See generally Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21 (Dinah Shelton ed., 2000).

53. See *id.*

54. See *id.*

55. U.S. CONST. art. II, § 2, cl. 2.

third step of ratification.<sup>56</sup> The problem with unsigning is that it falls between the second and third steps. Thus, it is not clear whether the unsigning falls within the President's exclusive responsibility during the signature phase or whether the unsigning is incident to the ratification process controlled by the Senate. Before considering the difficult issue of how to view unsigning,<sup>57</sup> it is necessary to understand the roles that the Senate and the President have historically played in these three phases of treaty creation.

The "advice and consent" language of the Constitution suggests that the Senate should have some role in negotiating treaties.<sup>58</sup> However, the notion that the Senate could assist in treaty negotiation was briefly tested and quickly rejected by President Washington.<sup>59</sup> After the initial failed involvement of the Senate in treaty negotiation, the practice of sole negotiation of treaties by the executive developed.<sup>60</sup> Treaty negotiation became associated with the President's power to conduct foreign relations.<sup>61</sup> While the President is now the exclusive negotiator of treaties,<sup>62</sup> in practice the executive branch often consults with Congress about ongoing multilateral treaty negotiations and the potential ramifications of contemplated treaties.<sup>63</sup> At times, disputes have arisen between Congress and the President regarding the effect of conflicting presidential and senatorial interpretations of a treaty during its negotiation stages.<sup>64</sup> However, the President's monopoly on treaty negotiation has never been seriously questioned.<sup>65</sup>

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56. PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 520 (1988).

57. See *infra* Parts IV and V.

58. See FISHER, *supra* note 11, at 217–18; SHANE & BRUFF, *supra* note 56, at 521 ("President Washington originally interpreted the Senate's 'advice and consent' power to mean that, before a treaty is negotiated, the Senate's advice must be sought on a preliminary basis.")

59. According to Professor Corwin, President Washington's attempt to seek the advice of the Senate regarding a treaty was an epic disaster: "The somber truth is that the conception of the Senate as presidential council in the diplomatic field broke down the first time it was put to the test." EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 239–40 (5th ed. 1984). For a thorough discussion of the minimal role of the Senate in treaty negotiation, see FISHER, *supra* note 11, at 217–31.

60. See CORWIN, *supra* note 59, at 240; Scott, *supra* note 13, at 1450.

61. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936); RESTATEMENT, *supra* note 29, at § 339 cmt. a.

62. See *Curtiss-Wright*, 299 U.S. at 319 ("He makes treaties with the advice and consent of the Senate; but he alone negotiates."); HENKIN, *supra* note 11, at 177.

63. See HENKIN, *supra* note 11, at 178; Phillip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT'L L. 55, 55–56 (1998).

64. These disputes have concerned whether the President's or the Senate's interpretation of the treaty is binding for the interpretation of treaty implementation. See generally Joseph R. Biden, Jr. & John B. Ritch, III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PA. L. REV.

Accompanying this power to negotiate, the executive has historically borne responsibility for the actual act of signing treaties. While the Constitution does not indicate the precise roles of the President and the Senate in the treaty-making process, it clearly envisions that the President will act as the representative of the United States before other sovereign governments.<sup>66</sup> Additionally, the need for a unitary voice in diplomatic and treaty engagements<sup>67</sup> has allowed the practice of presidential signature of treaties to remain unchallenged.<sup>68</sup>

In addition to sole negotiation and signature powers, some early Presidents, such as John Adams, also claimed an ability to enter into binding executive agreements<sup>69</sup> without congressional involvement.<sup>70</sup> Despite the Constitution’s clear statement that the formation of treaties requires approval of at least two-thirds of the Senate,<sup>71</sup> many Presidents since Adams have negotiated and enacted executive agreements with foreign governments.<sup>72</sup> As these agreements have the same binding force as treaties, scholars have argued that they should be formulated under the same conditions.<sup>73</sup> On the other hand, proponents of executive agreements contend that because these agreements are not technically treaties, they do not have to meet identical constitutional requirements.<sup>74</sup> A further justification for such agreements is that they fall under the President’s general executive power and thus are not subject to the requirements of the

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1529 (1989); Lawrence J. Block et al., *The Senate’s Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481 (1989); Harold Hongju Koh et al., *The Treaty Power*, 43 U. MIAMI L. REV. 101 (1988); Phillip R. Trimble & Jack S. Weiss, *The Role of the President, the Senate and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 CHI.-KENT L. REV. 645, 694–702 (1991).

65. Cf. William Whitwell Dewhurst, *Does the Constitution Make the President Sole Negotiator of Treaties?*, 30 YALE L. J. 478 (1920).

66. See *United States v. Curtiss-Wright Ex. Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President alone has the power to speak or listen as a representative of the nation.”).

67. See Glennon, *Treaty Process Reform*, *supra* note 11, at 85.

68. See HENKIN, *supra* note 11, at 177.

69. Scholars have used the term “executive agreement” to refer to treaty-like agreements with foreign governments entered into by the President without congressional involvement. See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 963 (2001).

70. As early as 1799, John Adams claimed to have authority to make executive agreements. Glennon, *Treaty Process Reform*, *supra* note 11, at 85 (citing R.B. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Lump Sum Agreement*, 69 AM. J. INT’L L. 837, 844 (1975)).

71. U.S. CONST. art. II, § 2, cl. 2.

72. See HENKIN, *supra* note 11, at 173–89.

73. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1276–78 (1995).

74. See Glennon, *Treaty Process Reform*, *supra* note 11, at 85.

treaty power.<sup>75</sup> However, the strongest argument for the constitutionality of these executive agreements is that they have been accepted by both presidential and congressional practice for, at least, the past fifty years.<sup>76</sup> Indeed, regardless of their constitutionality, executive agreements have become a powerful way for Presidents to circumvent the treaty power.<sup>77</sup>

Despite—or, perhaps, due to—the development of the presidential monopoly over treaty negotiation, treaty signature, and executive agreements, the Senate has always maintained control over the ratification process.<sup>78</sup> While the President ultimately ratifies treaties,<sup>79</sup> the constitutional text is clear that he can only do so with senatorial “Advice and Consent.”<sup>80</sup> However, the Senate “is not constrained to base its approval or disapproval decisions upon any particular criteria. Thus, the Senate may deny its consent not because it thinks a proposed treaty would contravene the national interest, but because, for example, of partisan politics.”<sup>81</sup> Today, the rules of Senate procedure<sup>82</sup> govern the process of Senate consent.

The ratification process begins when the President submits a signed treaty to the Senate. After an initial reading by the entire Senate,<sup>83</sup> the treaty is sent to the Committee on Foreign Relations (the Committee).<sup>84</sup> The Committee places the treaty on its calendar, where it can stay for years until the Committee takes action.<sup>85</sup> Once the Committee decides to consider the treaty, it may—and typically does—hold public hearings on the treaty, where all interested parties can comment on the treaty.<sup>86</sup> Based on these hearings or upon its own findings, the Committee can then recommend the treaty to the full Senate for consideration.<sup>87</sup> The Committee usually recommends a treaty to the Senate in one of four ways:

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75. *Id.*

76. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

77. See Spiro, *supra* note 69, at 962–63.

78. See HENKIN, *supra* note 11, at 179.

79. *Id.* at 184 (“Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it.”).

80. U.S. CONST. art. II, § 2, cl. 2.

81. SHANE & BRUFF, *supra* note 56, at 521.

82. United States Senate Committee on Rules & Administration, STANDING RULES OF THE SENATE, <http://rules.senate.gov/senaterules/> (last visited Mar. 5, 2006) [hereinafter SENATE RULES].

83. *Id.* R. XXX(1)(a).

84. *Id.* R. XXV(1)(j)(1)(17).

85. Rules of the Committee on Foreign Relations, R. 9(b), <http://www.access.gpo.gov/congress/senate/srules11.htm> (last visited Mar. 5, 2006).

86. *Id.* R. 9(d).

87. *Id.*

“(1) approval without change, (2) approval with conditions not altering the text, (3) approval if the text is amended, or (4) a combination of the last two possibilities.”<sup>88</sup>

Once the Committee has made its recommendation, the full Senate considers the Committee’s report and can propose its own amendments, which it incorporates into a ratification resolution.<sup>89</sup> The Senate then considers this ratification resolution, which it may “amen[d] in the form of reservations, declarations, statements, or understandings.”<sup>90</sup> After these final amendments to the resolution, the Senate votes on the ratification resolution. If the resolution receives votes from two-thirds of the senators, then the treaty is sent to the President for final ratification.<sup>91</sup> If the ratification resolution does not receive the required two-thirds majority approval, then the Senate may return the treaty to the President by adopting a resolution through simple majority vote.<sup>92</sup>

Thus, while in the Senate for ratification, a treaty can be “detoured” for extensive periods of time or even indefinitely. It is also important to note that even if a resolution for ratification passes the Senate with the required two-thirds vote, the President still retains ultimate discretion over whether to ratify the treaty.<sup>93</sup> In short, unlike the President’s control over treaty negotiation and signature that has carved out a sphere of exclusive presidential action in treaty-making, the Senate’s historic control over the ratification procedure has not resulted in a monopoly of the ratification power.

### *B. The Development of Presidential and Congressional Roles in Treaty Termination*

While the Constitution clearly gives both the President and one house of Congress a role in treaty formation, the Framers were silent about the issue of treaty withdrawal or termination. This constitutional silence has led to much dispute over the roles of Congress and the President in treaty termination, and a varied historical practice.<sup>94</sup> Because unsigning can in

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88. Scott, *supra* note 13, at 1452.

89. SENATE RULES, *supra* note 81, R. XXX(1)(c).

90. *Id.* The Senate’s ability to propose reservations to treaties has been the subject of much debate. For different considerations of this issue, see Block et al., *supra* note 64; Riesenfeld & Abbott, *supra* note 11; Trimble & Weiss, *supra* note 64.

91. SENATE RULES, *supra* note 82, R. XXX(1)(d).

92. *Id.*

93. *See id.*

94. *See* Sabis, *supra* note 11, at 235–43. For several discussions of the presidential and congressional roles in treaty termination, see generally *supra* note 11.

many respects be likened to treaty termination, this historical termination practice is relevant for evaluating the potential constitutional roles of Congress and the President in unsigning.

The United States' first treaty termination was carried out by an act of Congress. In the Act of July 7, 1798 (the Act), Congress terminated a series of trade treaties with France.<sup>95</sup> In *Hooper v. United States*,<sup>96</sup> the Court of Claims held that such a termination was valid.<sup>97</sup> Rejecting an argument that the Act had not effectively terminated the treaties, the court held that "[t]he 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]."<sup>98</sup> Thus, *Hooper* seemed to establish that "an Act of Congress, signed by the president, was the proper manner in which the U.S. could terminate a treaty."<sup>99</sup>

Following *Hooper*, subsequent practice confirmed the view that treaty termination should be accomplished by joint presidential and congressional action.<sup>100</sup> Prior to 1979, nearly all U.S. treaties were terminated with congressional direction or approval.<sup>101</sup> Even in cases where Presidents appeared to terminate treaties unilaterally, they were often acting subsequent to congressional approval.<sup>102</sup> Furthermore, several early Presidents explicitly acknowledged congressional control over treaty termination.<sup>103</sup> For example, "President Polk specifically requested that Congress legislatively approve his authority to give [the British termination] notice under the terms of the Oregon Territory Treaty with

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95. See *Hooper v. United States*, 22 Ct. Cl. 408, 418 (1887).

96. 22 Ct. Cl. 408 (1887).

97. *Id.*

98. *Id.* at 418.

99. Sabis, *supra* note 11, at 236.

100. See *id.* at 236-38.

101. See *Goldwater v. Carter*, 481 F. Supp. 949, 964 (D.D.C. 1979) ("The predominate United States' practice in terminating treaties, including those containing notice provisions, has involved mutual action by the executive and legislative branches."). When President Carter unilaterally terminated the Mutual Defense Treaty with Taiwan in 1978, the State Department cited only twelve prior instances of unilateral treaty termination. See Memorandum on President's Power to Give Notice of Termination of U.S.-R.O.C. Mutual Defense Treaty (Dec. 15, 1978), reprinted in STAFF OF SENATE COMM. ON FOR. REL., 95TH CONG., 2D SESS., TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER at 395 (Comm. Print 1978).

102. Several scholars have argued that, of the twelve examples cited by the State Department, the President acted without congressional authorization in only two cases. See, e.g., Sabis, *supra* note 11, at 236; Jonathan York Thomas, *The Abuse of History: A Refutation of the State Department Analysis of Alleged Instances of Independent Presidential Treaty Termination*, 6 YALE STUD. WORLD PUB. ORD. 27 (1979).

103. See Sabis, *supra* note 11, at 236.

Great Britain.”<sup>104</sup> President Grant also noted, with regard to the British Treaty of 1842, that “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.”<sup>105</sup>

Additionally, for many decades, federal courts seemed to confirm that treaty termination is best accomplished through congressional action. For example, in *Ropes v. Clinch*,<sup>106</sup> the Federal Circuit Court for the Southern District of New York observed:

There are three modes in which congress [sic] may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once, by express terms; and even where, as in this case, there is a provision for the notice, I think the government of the United States may disregard even that, and declare that “the treaty shall be, from and after this date, at an end . . . .”<sup>107</sup>

The Supreme Court also recognized that Congress can effectively repeal provisions of a treaty simply by passing a federal statute that is inconsistent with the terms of the treaty<sup>108</sup> and is clearly meant to repeal the treaty’s provisions.<sup>109</sup>

In *Neely v. Henkel*,<sup>110</sup> the Supreme Court suggested that Congress has the power to terminate treaties under the Necessary and Proper Clause.<sup>111</sup> The case required the Court to determine the validity of certain provisions

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104. *Goldwater v. Carter*, 617 F.2d 697, 724 (D.C. Cir. 1979).

105. *Id.* at 726 (citing 9 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 4324, 4327 (Washington, 1897)).

106. 20 F. Cas. 1171 (C.C. S.D.N.Y. 1871). The case involved the determination of the validity of a congressional act which appeared to conflict with a treaty. *See id.*

107. *Id.* at 1174.

108. *See Fong Yue Ting v. United States*, 149 U.S. 698, 719–21 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edey v. Robertson*, 112 U.S. 580, 599 (1884).

109. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (requiring that statutes not be construed to violate international law if any other plausible construction is available). This principle is known as the “Rule of Charming Betsy.” *See* RESTATEMENT, *supra* note 29, at § 114.

110. 180 U.S. 109 (1901).

111. *See Sabis*, *supra* note 11, at 238.

of the Act of June 6, 1900, which gave effect to parts of the Treaty of Paris.<sup>112</sup> In upholding the Act, the Court concluded:

The power of Congress to make all laws necessary and proper for carrying into execution [its] powers enumerated in section 8 of article I of the Constitution . . . 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.<sup>113</sup>

As some of the stipulations which the President and the Senate incorporate into treaties are termination clauses, the Court's conclusion in *Neely* suggests that the Constitution grants Congress the power to determine the method for treaty termination under the Necessary and Proper Clause.

The long-standing precedent of treaty termination by an act of Congress (or at least by action pursuant to congressional approval) was dramatically cut short in 1979 during the events surrounding *Goldwater v. Carter*.<sup>114</sup> The case resulted from President Carter's decision to unilaterally terminate the Mutual Defense Treaty of 1954 between the United States and Taiwan.<sup>115</sup> As the termination of the treaty involved a number of political issues,<sup>116</sup> several senators strongly disagreed with President Carter's decision. In response, Arizona Senator Barry Goldwater, along with others, filed a suit against President Carter in the Federal District Court in Washington, D.C.<sup>117</sup>

Senator Goldwater sought injunctive relief as well as a judgment declaring the President's termination of the Mutual Defense Treaty unconstitutional.<sup>118</sup> In particular, Senator Goldwater and the other plaintiffs argued that "President Carter's unilateral notice of termination violated [the senators'] legislative right to be consulted and to vote on the termination and also impaired the effectiveness of prior votes approving

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112. *Neely v. Henkel*, 180 U.S. at 110–11.

113. *Id.* at 121.

114. 444 U.S. 996 (1979).

115. Mutual Defense Treaty Between the United States and the Republic of China, U.S.-R.O.C., Dec. 2, 1954, 6 U.S.T. 433.

116. The termination of the treaty with the Republic of China was one of the conditions required by the People's Republic of China (P.R.C.) for the normalization of relations between the United States and the P.R.C. In this way, the termination of the treaty was designed to harmonize American relations with Communist China. See VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* 71 (1991); Scheffer, *supra* note 11, at 932–33.

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

118. *Id.* at 950.



the 1954 Mutual Defense Treaty.”<sup>119</sup> The district court found that the political question doctrine did not bar it from hearing the case and held that President Carter’s action was unconstitutional.<sup>120</sup> The court held that “[i]t would be incompatible with our system of checks and balances if the executive power in the area of foreign affairs were construed to encompass a unilateral power to terminate treaties.”<sup>121</sup> The court explicitly rejected President Carter’s arguments that he had the authority to unilaterally terminate treaties pursuant to the executive’s appointments power,<sup>122</sup> recognition power,<sup>123</sup> or general foreign affairs power.<sup>124</sup> Rather, the court reasoned that “[l]ike treaty formation, treaty termination is comprised of a series of acts that seek to maintain a constitutional balance.”<sup>125</sup> The court concluded that the President “alone cannot effect the repeal of a law of the land which was formed by joint action of the executive and legislative branches, whether that law be a statute or a treaty.”<sup>126</sup>

The Court of Appeals for the D.C. Circuit reversed, agreeing with the lower court’s finding that the political question doctrine was not a bar to justiciability, but concluding that President Carter acted within his foreign affairs power when he terminated the Mutual Defense Treaty.<sup>127</sup> The court of appeals disagreed with the lower court’s arguments that the Supremacy Clause prevented the president from unilaterally terminating treaties<sup>128</sup> and that treaty termination is properly analogized to treaty formation.<sup>129</sup> On the

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119. *Id.*

120. *Id.* at 963.

121. *Id.*

122. *Id.* at 960 (“The removal power . . . concerns the President’s administrative control over his subordinates and flows from the President’s obligations to see that the laws are faithfully executed. By contrast, treaty termination impacts upon the substantial role of Congress in foreign affairs—especially in the context of a mutual defense pact involving the potential exercise of congressional war powers—and is a contradiction rather than a corollary of the Executive’s enforcement obligations.”) (citations omitted).

123. *Id.* at 961 (“A holding that the recognition power incidentally confers the power to make an executive agreement settling property claims . . . does not justify an incidental power to terminate treaties without congressional approval.”).

124. *Id.* (“While the President may be the sole organ of communication with foreign governments, he is clearly not the sole maker of foreign policy. In short, the conduct of foreign relations is not a plenary executive power.”).

125. *Id.* at 962.

126. *Id.* at 963.

127. *Goldwater v. Carter*, 617 F.2d 697, 704 (D.C. Cir. 1979).

128. *Id.* at 705 (“The fact that the Constitution, statutes, and treaties are all listed in the Supremacy Clause as being superior to any form of state law does not mean that the making and unmaking of treaties can be analogized to the making and unmaking of domestic statutes any more than it can be analogized to the making or unmaking of a constitutional amendment.”).

129. *Id.* at 704 (“The constitutional institution of advice and consent of the Senate, provided two-thirds of the Senators concur, is a special and extraordinary condition of the exercise by the President of certain specified powers under Article II. It is not lightly to be extended in instances not set forth in

contrary, the court reasoned that as “[n]o specific role is spelled out in [] the Constitution . . . for the Senate or the Congress as a whole [to terminate treaties]. . . . [The] power consequently devolves upon the President, and there is no basis for a court to imply a restriction on the President’s power to terminate not contained in the Constitution.”<sup>130</sup>

On appeal, rather than resolving the dispute between the lower courts about the presidential and congressional roles in treaty termination, the Supreme Court dismissed the case as falling under the political question doctrine.<sup>131</sup> Addressing the political nature of the dispute, Justice Rehnquist wrote for a plurality of the Court:

In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties . . . the instant case in my view also “must surely be controlled by political standards.”

. . . [W]e are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests.<sup>132</sup>

In concurrence, Justice Powell refused to find that the issue was non-justiciable, but instead indicated:

The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.<sup>133</sup>

Only Justice Brennan would have reached the merits of the case and would have found President Carter’s action constitutional.<sup>134</sup> As for the rest of the court, the language of Justices Powell and Rehnquist suggest

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the Constitution. Such an extension by implication is not proper unless that implication is unmistakably clear.”).

130. *Id.* at 708.

131. *Goldwater v. Carter*, 444 U.S. 996, 996–97 (1979).

132. *Id.* at 1003–04 (Rehnquist, J., concurring) (citation omitted).

133. *Id.* at 997 (Powell, J., concurring).

134. *Id.* at 1007 (Brennan, J., concurring) (“Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China.”).

that the case was not yet ripe for decision by the Court. Thus, the Court did not foreclose discussion of the issue of which branch has power over treaty termination, but rather suggested that such a discussion must be initiated by the legislature and the executive.

Despite the Court’s non-holding on the issue of treaty termination, many subsequent scholars and Presidents have viewed *Goldwater* as establishing the President’s power to unilaterally terminate treaties.<sup>135</sup> For example, President Ronald Regan claimed to have unilaterally terminated the Treaty of Friendship, Commerce and Navigation Between the United States and Nicaragua.<sup>136</sup> However, he was actually acting “under the emergency provisions of the International Emergency Economic Powers Act of 1977, and, thus, with authorization from Congress.”<sup>137</sup> More recently, in 2001, President Bush sparked heated debate by unilaterally terminating the 1972 Anti-Ballistic Missile Treaty.<sup>138</sup> Additionally, the *Restatement (Third) of the Foreign Relations Law of the United States*<sup>139</sup> concludes:

[T]he President has the power: (a) to suspend or terminate an agreement in accordance with its terms; [and] (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States.<sup>140</sup>

However, many scholars have contested the accuracy of the *Restatement*’s view.<sup>141</sup>

In any case, the historical practice preceding *Goldwater* in which treaty termination only occurred with congressional approval has now given way

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135. Miller, *supra* note 11, at 868–70.

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

137. Sabis, *supra* note 11, at 237.

138. See David E. Sanger & Elisabeth Bumiller, *U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests*, N.Y. TIMES, Dec. 12, 2001, at A1. For a discussion of the treaty termination debates surrounding President Bush’s decision, see Sabis, *supra* note 11; O’Donnell, *supra* note 11; Scott, *supra* note 13.

139. The American Law Institute drafted the *Restatement* in an attempt to summarize domestic law impacting foreign relations as well as international law affecting the United States. The Supreme Court has consulted the *Restatement* in its discussion of international law. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004).

140. RESTATEMENT, *supra* note 29, § 339.

141. See generally Moriarty, *supra* note 11; Sabis, *supra* note 11; Miller, *supra* note 11. These scholars argue that the issue of which branch controls treaty termination was not decided by *Goldwater* and thus remains an open question.

to a new era of unilateral presidential termination. As Professor Henkin has observed, “At the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty. . . .”<sup>142</sup> The congressional and presidential roles in this post-*Goldwater* era are not yet well defined. The place of unsigning in such an era is also unclear. However, this historical understanding provides a useful framework in which to consider the various constitutional arguments that could be raised for and against unilateral presidential unsigning.

#### IV. CONSTITUTIONAL ARGUMENTS REGARDING UNSIGNING

While many scholars have considered the proper constitutional roles for the President and Congress in treaty formation and treaty termination,<sup>143</sup> unsigning does not fit nicely into either one of these categories. On the one hand, unsigning purports to simply undo the treaty signature which occurs during treaty formation.<sup>144</sup> On the other hand, unsigning may also repudiate the agreement that the treaty represents and thereby terminate (or breach) any obligations assumed by signature.<sup>145</sup> Because unsigning can have a function in both the treaty formation and termination processes, analogies to the constitutional roles of the executive and the legislature in these processes are helpful in considering the proper allocation of power between the President and Congress in unsigning. Using such analogies, this Part outlines the potential arguments for and against the President’s power to unilaterally unsign treaties.

##### A. *Originalist Arguments*

###### 1. *Textual Arguments*

The text of the Constitution is silent about unsigning. Only the language of Article II, Section 2 directly addresses treaty formation.<sup>146</sup> Despite this textual silence, a few observations can be made about the text of the Treaty Clause. The Constitution states that the President “*shall have Power . . . to make Treaties.*”<sup>147</sup> This language reveals an affirmative grant

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142. HENKIN, *supra* note 11, at 214.

143. *See supra* note 11.

144. *See supra* text accompanying notes 48–50.

145. *See supra* text accompanying notes 51–54.

146. U.S. CONST. art. II, § 2, cl. 2.

147. *Id.* (emphasis added).

of power to the President.<sup>148</sup> The placement of the Treaty Clause within Article II further emphasizes that the treaty power is primarily entrusted to the President.<sup>149</sup> Under this view, the requirement of senatorial advice and consent should be read narrowly. Indeed, historically, the President has signed treaties unilaterally and has ultimately decided whether to ratify treaties to which the Senate has consented.<sup>150</sup>

In order to *make* treaties, as part of his Article II duties, the President must decide whether to sign them.<sup>151</sup> Thus, the argument goes, incident to this power of signature is the power to unsign agreements. If the President has the authority to bind the United States to an agreement that the Senate has authorized him to ratify, then he must also have the power to determine that the United States no longer wishes to support particular agreements with its signature. Scott has argued that “[b]ecause it is clearly within his power to refuse to ratify the treaty, it follows that the President has the power to withdraw unilaterally a disfavored treaty from the Senate.”<sup>152</sup> Unsigning is an efficient way to withdraw a treaty not only from the Senate, but from further national consideration. Unsigning also frees the United States from the obligations assumed by signature. Because the Framers entrusted the President with the decision to bind the United States to international commitments, they surely must have also wanted the President to have the exclusive authority to unsign any contemplated agreements.

However, the Framers did not entrust the power to bind the nation solely to the President. On the contrary, the Constitution creates an important role for the Senate in assuming international obligations. The Treaty Clause permits the President to make treaties only “by and with the

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148. Scott, *supra* note 13, at 1458.

149. See *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir. 1979) (“It is significant that the treaty power appears in Article II of the Constitution, relating to the executive branch, and not in Article I, setting forth the powers of the legislative branch. It is the President as Chief Executive who is given the constitutional authority to enter into a treaty; and even after he has obtained the consent of the Senate it is for him to decide whether to ratify a treaty and put it into effect. Senatorial confirmation of a treaty concededly does not obligate the President to go forward with a treaty if he concludes that it is not in the public interest to do so.”); see also Scott, *supra* note 13, at 1461.

150. See *supra* text accompanying note 92.

151. HENKIN, *supra* note 11, at 177.

152. Scott, *supra* note 13, at 1458. *But see* GLENNON, *CONSTITUTIONAL DEMOCRACY*, *supra* note 11, at 174–75 (“Because the President (should the Senate give its consent) retains the discretion to decline to proceed to ratification, it might seem sensible that the President can withdraw a treaty from the Senate without its consent; after all, Senate consideration of the treaty would be pointless if it was clear from the outset that ratification by the President would not follow. Nonetheless, practicality argues against such presidential authority, since at that point the Senate, not the President, has custody of the official treaty documents; they are not then within the President’s control.”).

Advice and Consent of the Senate” and “provided two thirds of the Senators present concur.”<sup>153</sup> This language indicates that the treaty power was meant to be shared by both the President and the Senate. Such a reading of the Treaty Clause is confirmed by Alexander Hamilton’s analysis in *The Federalist*:

The power in question seems therefore to form a *distinct* department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of *making* them.<sup>154</sup>

By providing a role for both the executive and legislative branches in treaty formation, the Constitution ensures that the treaty formation process will be subject to checks and balances.<sup>155</sup> Yet, that the Framers incorporated a senatorial consent requirement into the procedure for assuming international commitments implies that they also thought such a check should exist during the termination of such commitments.<sup>156</sup> In this way, the constitutional text suggests that Congress, or at least the Senate, should have some role in actions which can terminate international obligations assumed through the treaty-making process.

This textual argument for having a senatorial role in unsigning faces a major critique. As the court of appeals noted in *Goldwater*:

The constitutional institution of advice and consent of the Senate, provided two-thirds of the Senators concur, is a special and extraordinary condition of the exercise by the President of certain specified powers under Article II. It is not lightly to be extended in instances not set forth in the Constitution. Such an extension by implication is not proper unless that implication is unmistakably clear.<sup>157</sup>

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153. U.S. CONST. art. II, § 2, cl. 2.

154. THE FEDERALIST NO. 75, at 505 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

155. See *Goldwater v. Carter*, 481 F. Supp. 949, 963 (D.D.C. 1979) (“This constitutional requirement [of consent of two-thirds of the Senate] reflects the concern of the Founding Fathers that neither political branch possess unchecked power.”).

156. *Id.* See also ADLER, *supra* note 11, at 84–113.

157. *Goldwater v. Carter*, 617 F.2d 697, 704 (D.C. Cir. 1979).

This criticism, however, seems to read the constitutional text too narrowly. The court of appeals ignores the fact that the constitutional language makes treaty-making a shared power.<sup>158</sup> Also, the court fails to explain how an implication from the constitutional text could be made “unmistakably clear.” An implication, by definition, is an inference that is not clear precisely because it is not explicitly stated.<sup>159</sup> Indeed, under the court’s analysis, the President should not be granted the exclusive right to unsign treaties since the Constitution does not “unmistakably” give him that power.

## 2. Framers’ Intent Arguments

As the above discussion illustrates, the constitutional text is open to different interpretations regarding who should be able to unsign treaties. While the text itself may be inconclusive, the writings of the Framers provide important insights into the concerns that the Treaty Clause was meant to address. The Supreme Court has often given the writings of the Framers great weight in interpreting the Constitution. For example, in *Ogden v. Saunders*,<sup>160</sup> the Court stated: “[T]he cotemporaries [sic] of the constitution have claims to our deference . . . because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them.”<sup>161</sup>

While the Framers probably never contemplated the unsigning of a treaty,<sup>162</sup> their writings illustrate whether unilateral presidential unsigning is consistent with the constitutional design.

Before considering the Framers’ commentary on the Constitution, a brief discussion of the drafting history of the Treaty Clause is appropriate.<sup>163</sup> The initial outline of the Constitution, the Virginia Plan, did not mention the treaty power.<sup>164</sup> The first version of the treaty power

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158. See *supra* text accompanying notes 151–52.

159. See 7 OXFORD ENGLISH DICTIONARY 723 (2d ed. 1989).

160. 25 U.S. 213 (1827).

161. *Id.* at 290. See also *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen’s intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.”).

162. Many international law scholars never even considered the possibility of unsigning until President Bush announced that he would unsign the Rome Statute. See *supra* notes 7–9.

163. For a more complete examination of the drafting of the treaty clause, see ADLER, *supra* note 11, at 85–88; Bestor, *supra* note 11, at 73–132; Sabis, *supra* note 11, at 245–46; see also THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966).

164. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 163, at 20–23.

appeared in the Committee on Detail's August 6, 1787, draft, which stated that "[t]he Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court."<sup>165</sup> This proposal to give the Senate control over treaty-making was rather controversial.<sup>166</sup> In particular, some delegates felt that the treaty power should be an executive function.<sup>167</sup> Thus, on August 20, 1787, the Committee of the Whole, while not taking the treaty power away from the Senate, recommended that the "Secretary of foreign affairs who shall also be appointed by the President" would have the "duty to correspond with all foreign Ministers, prepare plans of Treaties, and consider such as may be transmitted from abroad."<sup>168</sup> This compromise, however, was not acceptable to the Convention.<sup>169</sup> Finally, on September 4, 1787, the Committee of Eleven presented a draft which moved the treaty power to Article II and provided that "[t]he President, by and with the advice and consent of the Senate, shall have power to make treaties . . . But no Treaty (except Treaties of Peace) shall be made without the consent of two thirds of the Members present."<sup>170</sup> This compromise was deemed acceptable to the Convention delegates because it appropriately divided the treaty power among the executive and legislative branches.<sup>171</sup> With some modifications, this proposal became the final text of the Treaty Clause.

This drafting history indicates that the Framers did not want the treaty power to be either exclusively executive or exclusively legislative. On the contrary, the Framers sought to divide the power between the two branches. This intent to create checks and balances in the treaty power derived from several motivations.<sup>172</sup> Professor Adler notes that one of the Framers' primary motives in drafting the Treaty Clause was "to end the pervasive infidelity which the nation had shown to international obligations and treaty agreements under the Articles of Confederation."<sup>173</sup>

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165. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 163, at 183.

166. See ADLER, *supra* note 11, at 86–87.

167. *Id.*

168. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 163, at 336.

169. See Sabis, *supra* note 11, at 246.

170. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 163, at 495.

171. Consider, for example, the comments of Pennsylvania delegate James Wilson who stated: "Neither the President nor the Senate, solely can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." See ADLER, *supra* note 11, at 89–90.

172. For discussions of the intentions of the Framers when drafting the treaty clause, see ADLER, *supra* note 11, at 85–111; Bestor, *supra* note 11, at 46–72.

173. ADLER, *supra* note 11, at 85. John Jay's comments in *The Federalist* also indicate that the Framers wanted to ensure that the new nation would approach treaties with the seriousness they deserved:



To ensure that the nation would properly respect its treaty commitments, the Framers required a system which would prevent the nation from assuming such obligations lightly.<sup>174</sup> Additionally, the Framers were concerned that some treaty commitments might have a disparate effect on the various states.<sup>175</sup> Thus, they also sought to vest the treaty power in an authority that would not be swayed by sectarian interests.<sup>176</sup> For these reasons, the Framers decided to make the conclusion of treaties possible only by the concurrence of the President and the Senate.<sup>177</sup> This combination of executive and legislative roles ensured that the treaty power would be exercised with the utmost care.<sup>178</sup>

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

. . . .

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 as well as 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 without 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.

THE FEDERALIST NO. 64, at 432–37 (John Jay) (Jacob E. Cooke ed., 1961).

174. See HENKIN, *supra* note 11, at 175.

175. See ADLER, *supra* note 11, at 85–86.

176. *Id.*

177. *Id.* at 87.

178. Alexander Hamilton’s comments in *The Federalist No. 75* illuminate the issues faced by the Framers in vesting the treaty power. He wrote:

To have entrusted the power of making treaties to the senate alone, would have been to relinquish the benefits of the constitutional agency of the president, in the conduct of foreign negotiations. It is true, that the senate would in that case have the option of employing him in this capacity; but they would also have the option of letting it alone; and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation; and of course would not be able to act with an equal degree of weight or efficacy. While the union would from this cause lose a considerable advantage in the management of its external concerns, the people would lose the additional security, which would result from the co-operation of the executive. Though it would be imprudent to confide in him solely so important a trust; yet it cannot be doubted, that his participation in it would materially add to the safety of the society. It must indeed be clear to a demonstration, that the joint possession of the power in question by the president

The Framers' deliberations about where to vest the treaty power suggest that they would have opposed any proposal to give one branch of government exclusive authority to unsign treaties. Because of their concern with the United States' record for breaching treaties, the Framers probably would not have wanted the President to terminate treaties unilaterally. On the contrary, many of the Framers indicated that the termination of treaties should involve at least the Senate and the President.<sup>179</sup> For example, Alexander Hamilton stated:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.<sup>180</sup>

Years later, Justice Story, reflecting upon the Framers' constitutional design, also remarked:

[I]t is too much to expect, that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. . . . [T]here is no American statesman, but must feel, that such a prerogative in an American president would be inexpedient and dangerous.<sup>181</sup>

Likewise, Professor Bestor's historical analysis of the Constitutional Convention led him to conclude that "[t]here is no historical evidence whatever to suggest that [the Framers] intended the correlative power to terminate treaties to be other than a shared power. And a shared power is, by definition, a power that cannot be exercised by one of the partners without the concurrence of the other."<sup>182</sup>

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and senate would afford a greater prospect of security, than the separate possession of it by either of them. And whoever has maturely weighed the circumstances, which must concur in the appointment of a president will be satisfied, that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom as on that of integrity.

THE FEDERALIST No. 75, at 506 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

179. See ADLER, *supra* note 11, at 105–11.

180. THE FEDERALIST No. 75, at 505–06 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

181. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 341 (4th ed. 1873), *quoted in* ADLER, *supra* note 11, at 123 n.43.

182. Bestor, *supra* note 11, at 30.

These concerns about unilateral treaty termination apply with the same force to unilateral unsigning. Under international law, unsigning a treaty amounts to a repudiation of the state’s obligation to abide by the object and purpose of the treaty.<sup>183</sup> Yet, if it is dangerous to permit one branch to terminate American treaty commitments, then, arguably, it is also dangerous to let one branch terminate the United States’ commitments not to act against the object and purpose of a treaty.

Furthermore, the argument goes, unilateral unsigning would not encourage Presidents to approach treaty commitments with the seriousness that they deserve. Armed with the power to unilaterally unsign treaties, a President who did not like the terms of a treaty that his predecessor had signed could simply unsign it. Rather than representing the United States’ commitment to certain international goals, a treaty signature would simply be the expression of current American foreign policy, which could change with the next election. In such a system, other countries could not reliably view an American treaty signature as engaging international responsibility. Because the Framers’ goal in drafting the Treaty Clause was to ensure that the United States did not enter its treaty commitments lightly, unilateral presidential unsigning should be especially discouraged.

### *B. Structural Arguments*

In addition to examining both the text of the Treaty Clause and the Framers’ understandings of that text, one can also look to other provisions of the Constitution as well as the Constitution’s general structure to understand the treaty power. In particular, the Appointments Clause<sup>184</sup> and the Supremacy Clause<sup>185</sup> provide insight into the presidential and congressional exercise of the treaty power. Separation of powers principles and the “sole organ” doctrine<sup>186</sup> also offer compelling ways in which to understand unsigning. This Part considers each of these arguments in turn.

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183. See *supra* text accompanying notes 32–39.

184. The President “shall nominate, and 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.” U.S. CONST. art. II, § 2, cl. 2.

185. The “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” U.S. CONST. art. VI, § 1, cl. 2.

186. The “sole organ” doctrine is the notion that the President is the sole representative of the United States in foreign affairs. See *infra* Part IV.B.2.a.

## *I. Analogy to Other Constitutional Provisions*

### *a. The Appointments Clause*

Presidential authority to unsign treaties may be implicitly included in the Appointments Clause.<sup>187</sup> The Supreme Court has found that the ambassador-receiving power, which appears in the same paragraph as the treaty power,<sup>188</sup> entails the power to recognize foreign governments and to establish relations with them.<sup>189</sup> These powers further include the ability to remove obstacles to the recognition of foreign states.<sup>190</sup> President Carter argued that this power to recognize foreign governments also included the power to terminate any treaties which would be inconsistent with such recognition.<sup>191</sup> In particular, the Carter administration claimed that as part of normalizing American relations with the Peoples' Republic of China, the President needed to unilaterally terminate the Mutual Defense Treaty with Taiwan, which claimed to be the sole legitimate Chinese government.<sup>192</sup> While a majority of the Supreme Court refused to rule on the merits of such an argument, the D.C. Court of Appeals<sup>193</sup> and Justice Brennan (in dissent) found that the recognition power justified unilateral presidential termination of the Mutual Defense Treaty.<sup>194</sup>

Similarly, the recognition power could be used to justify unilateral presidential unsigning. For example, even if the United States had not yet ratified the Mutual Defense Treaty with Taiwan, President Carter might have found it necessary to unsign that treaty as part of its recognition of the Peoples' Republic of China as the sole legitimate Chinese government. While treaties are not binding until ratified, the mere fact that the United States has negotiated and signed an agreement with the government of another country indicates that the United States views that negotiating partner as the legitimate government of that nation. Unsigning such treaties would thus be an important part of recognizing new governments.

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187. See Scott, *supra* note 13, at 1460.

188. U.S. CONST. art. II, § 2, cl. 2.

189. Scott, *supra* note 13, at 1460. See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

190. *United States v. Pink*, 315 U.S. 203, 229 (1942).

191. *Goldwater v. Carter*, 481 F. Supp. 949, 961 (D.D.C. 1979).

192. *Id.* See also KRAFT, *supra* note 116, at 71-72.

193. *Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C. Cir. 1979).

194. *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) ("Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes.").

Because the President has the exclusive competence to recognize foreign governments, it follows that he must have the authority to unsign treaties that would be inconsistent with the exercise of this recognition power.

This argument, however, cannot justify unilateral presidential unsigning of all treaties. Indeed, when President Bush unsigned the Rome Statute, he did not claim to be acting pursuant to his recognition power.<sup>195</sup> Rather, his decision to unsign that treaty resulted from his own political conviction that subjecting Americans to the jurisdiction of the ICC would not be in the country’s best interests.<sup>196</sup> Future cases of unsigning will probably also result from such policy considerations rather than from the need to recognize new governments.

While the Appointments Clause may not directly grant the President the power to unilaterally unsign treaties, it can inform one’s reading of the treaty power. As Scott has observed, “The Framers’ decision to include the Treaty Clause and the Appointments Clause together in the same paragraph, sharing very similar language, supports their common interpretation.”<sup>197</sup> The Appointments Clause states:

[The President] shall nominate, and *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.<sup>198</sup>

Like the Treaty Clause, the Appointments Clause indicates that the President must exercise the appointments power in conjunction with the Senate. Also, analogous to the Treaty Clause’s textual silence about termination, the Appointments Clause is also silent about the President’s power to remove persons appointed under the clause. While other parts of the Constitution provide that some officials, such as federal judges, may only be removed for certain reasons,<sup>199</sup> the Supreme Court has found that the President has the exclusive power to remove executive officers exercising solely executive functions.<sup>200</sup>

Under this reasoning, it could be argued that if the president has unilateral removal power with respect to some officials appointed under

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195. See *supra* notes 2–6.

196. *Id.*

197. See Scott, *supra* note 13, at 1461.

198. U.S. CONST. art. II, § 2, cl. 2.

199. U.S. CONST. art. III, § 1.

200. See *Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52, 64 (1926).

the Appointments Clause, then he should also have power to unilaterally terminate some treaty obligations. While President Carter advanced such a claim, it does not necessarily follow from the Supreme Court's Appointments Clause rulings.<sup>201</sup> As the D.C. District Court observed:

The power to remove executive personnel cannot be compared with the power to terminate an important international treaty. The removal power is restricted in its exercise to "purely executive officers" charged with a duty unrelated to the legislative or judicial power. It concerns the President's administrative control over his subordinates and flows from the President's obligations to see that the laws are faithfully executed. By contrast, treaty termination impacts upon the substantial role of Congress in foreign affairs—especially in the context of a mutual defense pact involving the potential exercise of congressional war powers—and is a contradiction rather than a corollary of the Executive's enforcement obligation.<sup>202</sup>

Nevertheless, the Supreme Court's interpretation of the Appointments Clause as permitting unilateral presidential removal of executive officials does suggest that even though the Senate may have a constitutionally assigned role in treaty formation, it does not necessarily have a role in treaty termination. Thus, presidential power to unilaterally terminate, *or unsign*, a treaty would be consistent with the linguistic structure of the Treaty Clause.

Additionally, Scott has argued that the President's power to withdraw names submitted to the Senate for consideration under the Appointments Clause offers a further justification for the President's ability to unilaterally unsign treaties.<sup>203</sup> The President consistently exercises his power to withdraw nominations from the Senate.<sup>204</sup> However, "[b]ecause the withdrawal under the appointment power seems closely analogous to the withdrawal under the treaty power, the fact that the President can withdraw nominations at will supports the conclusion that he can also unilaterally withdraw treaties."<sup>205</sup> By withdrawing treaties from the Senate, the President ensures that their provisions will never become

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201. See *Goldwater v. Carter*, 481 F. Supp. 949, 960 (D.D.C. 1979).

202. *Id.*

203. Scott, *supra* note 13, at 1462.

204. *Id.* See also *Court in Transition: Text of Harriet Miers's Letter to President Withdrawing as Nominee*, N.Y. TIMES, Oct. 28, 2005, at A16.

205. Scott, *supra* note 13, at 1462–63.

binding on the United States. Unilateral presidential unsigning of treaties would accomplish the same result.

*b. The Supremacy Clause*

While reading the Treaty Clause in light of the Appointments Clause suggests that unilateral presidential unsigning is constitutional, a careful analysis of the Supremacy Clause might lead to the opposite conclusion. This clause provides that the Constitution, congressionally enacted laws, and “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>206</sup> While the Constitution explicitly provides a procedure for amending its own text,<sup>207</sup> it is silent about how laws and treaties should be amended or terminated.<sup>208</sup> Despite this silence, Congress has, without question, exercised the authority to repeal laws by following the same procedure required for making those laws.<sup>209</sup> By analogy, treaty termination should be effected by the same branches of government that create treaties. Indeed, as noted above, the Framers simply assumed that this was how treaty termination would occur.<sup>210</sup>

Furthermore, the structure of the Supremacy Clause indicates that treaties occupy the same position as statutes in the laws of the United States. Treaties and statutes being equal, the Supreme Court has held that the provisions of treaties may be effectively repealed by a statute which supersedes the treaty.<sup>211</sup> However, if Congress has the power to pass such a statute, then it should also be permitted to participate in treaty termination. Thus, at minimum, the operation of the Supremacy Clause provides for some congressional role in treaty termination.

These arguments for a congressional role in treaty termination can also apply to the unsigning of treaties. While a treaty does not become the law of the land until it has been ratified, treaty signature does bind the United States to refrain from acting in a way that would render later ratification meaningless.<sup>212</sup> Because this obligation applies to all branches of the government in the same way that eventual treaty obligations do, under the

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206. U.S. CONST. art. VI, § 1, cl. 2.

207. U.S. CONST. art V.

208. See Bestor, *supra* note 11, at 17–18.

209. *Id.*

210. See ADLER, *supra* note 11, at 105–10. See generally Bestor, *supra* note 11.

211. See *supra* note 107.

212. See *supra* text accompanying note 39.

above rationale, Congress should also have a role in reversing treaty signature.

## 2. *Structural Theory Arguments*

### a. *The “Sole Organ” Doctrine*

The placement of the treaty power within Article II potentially suggests that the President has the power to unilaterally unsign treaties.<sup>213</sup> The Constitution articulates the limited powers of Congress very differently than the way in which it presents the expansive powers of the President. Unlike Article I, which vests in Congress only those legislative powers “herein granted,”<sup>214</sup> Article II states that “[t]he executive power shall be vested in a President of the United States.”<sup>215</sup> This linguistic difference indicates that the President’s executive power is not limited by the enumeration of his powers in Article II.<sup>216</sup> Rather, the President possesses all of the executive powers of the United States, except where the Constitution indicates otherwise.<sup>217</sup> Because one of the key powers of the executive is control over foreign affairs, the President has exclusive competence to direct foreign relations.<sup>218</sup> Indeed, the Supreme Court has stated that “the President alone has the power to speak or listen as a representative of the nation.”<sup>219</sup> Furthermore, “as the sole organ of the federal government in the field of international relations,” the President has a “plenary and exclusive power” over foreign affairs.<sup>220</sup>

Unsigning is one way in which the President can exercise this plenary power. By unsigning treaties, the President expresses American unwillingness to commit to particular ideas or accept certain international legal norms as binding on the United States. For example, by unsigning the Rome Statute, President Bush communicated America’s desire not to be subject to the jurisdiction of the ICC.<sup>221</sup> Unsigning treaties could also enable the President to maintain more direct control over American

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213. See HAROLD J. KRENT, PRESIDENTIAL POWERS 106 (2005); JOHN YOO, THE POWERS OF WAR AND PEACE 18 (2005).

214. U.S. CONST. art. I, § 1, cl. 1.

215. U.S. CONST. art. II, § 1, cl. 1.

216. See *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (The language of Article II “does not mean *some* of the executive power, but *all* of the executive power.”).

217. See YOO, *supra* note 213.

218. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

219. *Id.*

220. *Id.* at 320.

221. See Letter to U.N., *supra* note 6.



relations with particular countries. For instance, while the President might negotiate a friendship treaty with a foreign state as a symbol of American commitment to cooperation with that state, future events could require the President to modify the tone of American relations with that state. If the friendship treaty has not yet been ratified, then unsigning the treaty might be an effective way to accomplish that goal.

Incident to his exclusive power over foreign affairs, “the President [also] has the power as Chief Executive under many circumstances to exercise functions regarding treaties which have the effect of either terminating or continuing their vitality.”<sup>222</sup> However, if the President can unilaterally terminate a treaty under his foreign affairs power, then logically he could also unilaterally unsign a treaty.<sup>223</sup> Indeed, by unsigning a treaty, the President escapes the commitment to act in a manner that is consistent with the object and purpose of the treaty.

#### *b. Separation of Powers*

While unsigning might be consistent with the President’s control over foreign affairs, separation of powers principles counsel against granting the President the power to unilaterally unsign treaties. The doctrine of “[s]eparation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.”<sup>224</sup> The inclusion of the Senate in treaty formation provides an important check on the executive’s power to bind the nation.<sup>225</sup> The President cannot unilaterally commit the United States to international agreements to which the American people, through their representatives in the Senate, do not consent. Indeed, placing the power over treaties in one branch alone would open the nation to serious dangers.<sup>226</sup> Likewise, entrusting just one branch with the power to terminate American international obligations would also be reckless. Unsigning, however, does involve the termination of an interim obligation not to act against the object and purpose of a treaty. Thus, under separation of powers principles, no single branch should exercise this power alone.

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222. *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979).

223. *See Scott*, *supra* note 13, at 1463 (“[T]he President appears to have the constitutional authority to terminate ratified treaties unilaterally. Because such an act nullifies the Senate’s grant of consent, it follows that he can unilaterally end Senate consideration of a signed treaty that has not yet received consent.”).

224. *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

225. *See supra* note 173.

226. *See supra* text accompanying notes 176–78.

While not directly addressing the issue of unsigning, Justice Jackson's view of presidential power in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>227</sup> also suggests that presidential unsigning of treaties would be best accomplished with congressional cooperation. Justice Jackson observed that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."<sup>228</sup> However, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. . . ."<sup>229</sup> Implicit in this analysis is the belief that governmental decisions carry more weight when they are made by more than one branch.<sup>230</sup> Thus, unless the Constitution clearly grants one branch the power to make certain decisions, important political decisions affecting the nation as a whole are best made by both legislative and executive action.<sup>231</sup>

The decision to unsign a treaty is one of these important political decisions that should be made by both Congress and the President. Like treaty termination, unsigning can have important effects upon America's international obligations. Moreover, unsigning a treaty is an especially powerful way to communicate the United States' rejection of a particular international legal norm or policy. To entrust this power to only one branch would certainly invoke all the dangers that the Framers feared.

### c. *Policy Arguments*

Beyond the textual and structural arguments regarding unsigning, both proponents and opponents of unilateral presidential unsigning can advance compelling policy arguments. On one hand, domestic foreign policy concerns suggest that the President should have the exclusive authority to unsign treaties. On the other hand, the international legal consequences of unsigning urge congressional involvement in the process.

In dealing with other countries, the United States requires a unified and coherent foreign policy. One of the chief concerns of the Framers in replacing the Articles of Confederation with the Constitution was to create a federal government that would have the ability to speak for the nation

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227. 343 U.S. 579 (1952).

228. *Id.* at 635 (Jackson, J., concurring).

229. *Id.* at 637.

230. Miller, *supra* note 11, at 886.

231. *See id.*

with one voice.<sup>232</sup> In the system they created, the executive provides this voice in the international arena.<sup>233</sup> The Framers endowed the presidential office with many practical advantages for conducting foreign affairs.<sup>234</sup> For this reason, the Supreme Court has stated:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . .

. . . [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.<sup>235</sup>

Not only is the President well-suited for foreign affairs, he has also historically exercised exclusive control over this field.<sup>236</sup> Other countries clearly view the President as representing the United States in international affairs.

Unsigning treaties could be said to fall within these foreign relations duties because it can have important consequences for American foreign policy.<sup>237</sup> By withdrawing from commitments, the United States expresses its disapproval of certain emerging norms in international law or of particular approaches to solving international problems.<sup>238</sup> An American failure to support particular international norms or transnational

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232. See ADLER, *supra* note 11, at 85.

233. See YOO, *supra* note 213, at 20.

234. Scott, *supra* note 13, at 1466. These advantages serve the President particularly well in making treaties. As John Jay observed:

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 useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions 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 manner as prudence may suggest.

THE FEDERALIST No. 64, at 434–35 (John Jay) (Jacob E. Cooke ed., 1961).

235. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (citations omitted).

236. See YOO, *supra* note 213, at 20.

237. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 511–19 (2004); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1588–92 (2005).

238. See Helfer, *supra* note 237, at 1588.

approaches to world problems might render further negotiations within the international community more difficult and time-consuming.<sup>239</sup> Thus, the choice to communicate American withdrawal from international commitments must be balanced against other American foreign policy goals and the need to garner international support for American projects and ideas. Such a balance is arguably best accomplished by the President, who already has the obligation of coordinating American foreign policy.

At the same time, unilateral presidential unsigning of treaties is repugnant to the democratic principles of American government. The senatorial advice and consent provided for in the Treaty Clause ensure that treaty formation is ultimately guided by the democratic political process. Indeed, the Framers envisioned that the people, through their senators, would have some control over treaty-making.<sup>240</sup> Alexander Hamilton found that “the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them.”<sup>241</sup> Granting the President the power to unsign treaties unilaterally would remove an element of this democratic control.

Unsigning a treaty can also have important political consequences for the nation as a whole. As Professor Helfer has observed:

[M]ultiple refusals to ratify [treaties]—as with multiple denunciations of previously ratified agreements—signal a state’s propensity to eschew multilateral cooperation and carry much the same reputational cost as a track record of violating treaty commitments. This effect is likely to be especially pronounced where the non-ratifying or exiting state participated in the negotiating conferences that helped to shape the treaties’ form and substance.

The unilateralist behavior of the United States provides a salient example. The United States has recently refrained from ratifying—or has withdrawn from—numerous multilateral agreements that are widely ratified by other nations and that it at one time championed. . . . By remaining outside these treaties through non-

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239. *See id.* at 1623.

240. *See* THE FEDERALIST No. 75, at 505 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

241. *Id.*

entry or exit, the United States has, according to many observers, cast doubt on its commitment to multilateral cooperation.<sup>242</sup>

While the President is ultimately responsible for American foreign policy, national discussion about international obligations is one of the hallmarks of democratic society. Indeed, one of the main purposes of granting senators a role in treaty-making is to profit from the wisdom and reflection that they bring to discussions about international matters.<sup>243</sup> Unilateral presidential unsigning would not allow this wisdom to fully affect American decisions to withdraw from international projects.

Furthermore, placing the power to unsign treaties in the hands of the President alone would unnecessarily expand presidential power. The President already dominates American foreign policy and in many respects determines our relations with other nations. The one unambiguous check that the Framers placed upon the President’s control over foreign affairs was the senatorial role in the treaty-making process. Permitting the President to dominate the unsigning process would go a long way toward eroding this limitation on presidential power over foreign affairs. As Justice Frankfurter so aptly warned, “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”<sup>244</sup>

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242. Helfer, *supra* note 237, at 1623–24.

243. Consider James Madison’s comments in *The Federalist*:

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 forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned; 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 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 unbiassed part of mankind?

THE FEDERALIST No. 63, at 422–23 (James Madison) (Jacob E. Cooke ed., 1961).

244. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

To give the President unilateral control over unsigning treaties would erode the few constitutional protections that the Framers left to future generations.

#### V. EVALUATION OF THE ARGUMENTS—SHOULD THE PRESIDENT REALLY BE ABLE TO UNILATERALLY UNSIGN TREATIES?

Having considered the potential arguments in the debate, it is now possible to answer the question of whether unilateral presidential unsigning is constitutional. Thus, this Part evaluates the various types of arguments presented in Part IV and concludes that the Constitution requires the President to obtain congressional authorization—or at least congressional acquiescence—in order to unsign a treaty. Before assessing these constitutional arguments, however, this Part will consider the context in which the question arises in order to identify the relevant criteria for such an analysis.

While the question of the President's constitutional power to unilaterally unsign treaties certainly involves legal considerations, it also arises within a political context that judges have previously refused to enter.<sup>245</sup> Like the issue of unilateral presidential treaty termination, the issue of unilateral presidential unsigning is “a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests.”<sup>246</sup> Indeed, even more than the issue of treaty termination, which was at least contemplated by the Framers, courts would probably consider the issue of unsigning not to be susceptible to resolution by judicially manageable standards.<sup>247</sup> Unsigning is a relatively new phenomenon in both international and domestic law.<sup>248</sup> International legal scholars are still trying to understand the legal effects of unsigning.<sup>249</sup> Although federal courts could analyze the constitutional dimension of the question,<sup>250</sup> the Supreme Court is not likely to “decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”<sup>251</sup> Thus, even though important constitutional issues are involved, federal courts will probably not resolve the “political question” of the

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

246. *Id.* at 1004 (Rehnquist, J., concurring).

247. See *Baker v. Carr*, 369 U.S. 186, 211–12 (1962).

248. See *supra* text accompanying notes 1–10.

249. See *supra* note 8.

250. See *supra* Part IV.

251. *Goldwater v. Carter*, 444 U.S. 996, 997 (Powell, J., concurring).

constitutionality of unilateral presidential unsigned. Rather, the resolution of this constitutional question will most likely occur in the course of the “normal political process.”<sup>252</sup>

Because the courts will probably not address this issue of unilateral presidential unsigned, the standard judicial techniques for evaluating constitutional arguments are not the only tools to be used in evaluating the arguments advanced in the debate.<sup>253</sup> An evaluation of the potential arguments must also consider the political concerns raised by unsigned. Viewed from a political perspective, the real issue in the debate is which branch should have *control* over the unsigned process. Having control over the decision to unsigned treaties would enable one branch to set the tone for American involvement in international projects and would thus increase that branch’s power.<sup>254</sup>

Although arguments based on traditional judicial criteria, such as the original intent of the Framers, will still be strongly persuasive in determining the constitutionality of unsigned,<sup>255</sup> such arguments will probably not be decisive. In a constitutional dispute resolved by the political branches, the determination of which branch should have control over unsigned will likely turn upon practical policy considerations.<sup>256</sup> In light of this fact, this Note proposes that the evaluation of the potential arguments regarding unilateral presidential unsigned should focus on two questions: (1) Is unilateral presidential unsigned consistent with the constitutional design of the Framers? (2) Is unilateral presidential unsigned wise in light of the international legal consequences of unsigned? Rather than concentrating on a technical linguistic interpretation of the Constitution, these two questions consider which approach to unsigned best serves constitutional design and contemporary realities, respectively. The rest of this Part will evaluate the arguments presented in Part IV in light of these two questions.

While direct textual arguments regarding unsigned are inconclusive,<sup>257</sup> the arguments based on the Framers’ intent<sup>258</sup> demonstrate that granting

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252. *Id.*

253. *See* Spiro, *supra* note 69, at 961.

254. *See* Brewster, *supra* note 237, at 502 (noting that one of the most interesting aspects of international agreements is their ability to “entrench policies that might otherwise be subject to change [and to] transfer agenda-setting power from the Congress to the President”).

255. Arguments based on the constitutional text as well as historical practice will certainly offer legal support for a branch’s claim to have a role in unsigned.

256. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

257. *See supra* Part IV.A.1.

258. *See supra* Part IV.A.2.

the President exclusive control over unsigning would be inconsistent with the constitutional design. These arguments are particularly persuasive because they highlight the Framers' fear of concentrating the treaty power in just one branch of government.<sup>259</sup> Even though unilateral presidential unsigning was not directly a concern of the Framers, their desire to ensure that the United States would respect its treaty commitments would surely have led them to provide for a congressional role in unsigning.<sup>260</sup> The structural arguments that support unilateral presidential unsigning do not rebut this conclusion.

Despite Scott's attempts to analogize the treaty power to the appointments power,<sup>261</sup> a closer examination of both of these powers reveals that they are quite distinct. Although the constitutional language granting the two powers is similar in structure, the powers function differently in practice.<sup>262</sup> The Appointments Clause is primarily concerned with the executive's responsibility to ensure that domestic laws are faithfully executed.<sup>263</sup> In such domestic matters, the President has complete control over the executive branch.<sup>264</sup> The Treaty Clause, in contrast, relates to the President's control over foreign affairs, which is not absolute.<sup>265</sup>

Even under "sole organ" theory,<sup>266</sup> the President would still not have definite control over unsigning. The language of the Treaty Clause ensures that the President can only make treaties with the advice and consent of the Senate.<sup>267</sup> Thus, while the President acts as the sole representative before other countries for purposes of negotiation, he does not exclusively represent the United States when it assumes treaty obligations. Withdrawing from international obligations is no less serious than engaging in them. Thus, if the constitutional design does not include an exclusive role for the President in assuming treaty obligations, then it also must not include an exclusive role for the President in exiting international obligations.

The policy arguments considered in Part IV also demonstrate that excluding the Senate from participation in unsigning would be unwise as a

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259. See *supra* text accompanying notes 176–79.

260. See *id.*

261. See Scott, *supra* note 13, at 1461–62.

262. See *Goldwater v. Carter*, 481 F. Supp. 949, 960 (D.D.C. 1979).

263. *Id.*

264. *Id.*

265. *Id.*

266. See *supra* Part IV.B.2.a.

267. U.S. CONST. art. II, § 2, cl. 2.



practical matter. Unsigning a treaty does more than just communicate a state's intent to no longer be bound by the obligation not to defeat the object and purpose of the treaty. Unsigning is a way, both symbolic and real, in which a state withdraws from the process of international norm construction that treaties represent.<sup>268</sup> Such withdrawals affect other states' views of America and also affect the ability of the United States to find international support for its own initiatives.<sup>269</sup> A process by which the President alone makes this decision might be efficient, but it would not allow for the thoughtful reflection or the multi-voice deliberations that characterize democratic decision-making.

Thus, a consideration of both constitutional and contemporary policy indicates that unilateral presidential unsigning should be unconstitutional. But if the President cannot constitutionally unsign treaties alone, what level of congressional involvement is required? Because the Treaty Clause requires the consent of two-thirds of the Senate to make treaties, symmetry would suggest that unsigning also requires a two-thirds concurrence.<sup>270</sup> However, “[t]he creation of a constitutionally obligatory role in all cases for a two-thirds consent by the Senate would give to one-third plus one of the Senate the power to deny the President the authority necessary to conduct our foreign policy in a rational and effective manner.”<sup>271</sup> Practical considerations would suggest that the Senate's required role in unsigning should not include a strict two-thirds vote.

To preserve the most flexibility for such a political decision, perhaps no set procedure should be established. Rather, the Senate might simply require the President to consult a majority of its members, at least informally, before beginning the unsigning process. For example, a supporting Senate resolution could be required as a precondition to presidential unsigning of a treaty. In this way, the Senate would maintain some control over unsigning while still allowing the President to act with a certain degree of flexibility. Viewed under this test, President Bush's unsigning of the Rome Statue was probably constitutional since Congress, and more importantly the Senate, acquiesced in that decision.<sup>272</sup> However, future Presidents who hope to constitutionally unsign treaties should seek Senate approval before acting unilaterally.

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268. See *supra* text accompanying notes 51–54.

269. See *supra* text accompanying note 239.

270. See Scheffer, *supra* note 11, at 1002.

271. *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979).

272. See *supra* note 14.

## VI. CONCLUSION

This Note has argued that the President does not have the power to unilaterally unsign treaties. However, the question of whether the Constitution permits the President to unilaterally unsign treaties has yet to be resolved by either the courts or the political branches of government. Since the courts will probably not resolve this issue because of its political implications, the burden rests on Congress to ensure that it has a voice in unsigning treaties. Congress would be wise to heed Justice Jackson's famous warning: "[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>273</sup>

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273. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

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