U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

November 15, 2001

MEMORANDUM FOR JOHN BELLINGER, III
SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT
AND LEGAL ADVISER TO THE NATIONAL SECURITY COUNCIL

FROM: John C. Yoo
Deputy Assistant Attorney General

Robert J. Delahunty
Special Counsel

RE: *Authority of the President to Suspend Certain Provisions of the ABM Treaty*

This is to provide you with our views on the question whether the President has the constitutional authority to suspend certain articles of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 (the "ABM Treaty") insofar as is necessary to allow the development and testing of missile defenses. You have asked us to consider two cases: first, suspension of the relevant articles by mutual consent of both the United States and the Russian Federation; second, unilateral suspension by the United States. We conclude that the President has the constitutional authority to suspend the articles in either case.

We begin by setting out in Part I the relevant features of the ABM Treaty. In Part II, we review the President's constitutional authorities over treaties. In Part III, we address the President's specific powers of treaty termination and treaty suspension. Part IV illustrates these powers by reference to the practice of the United States. Part IV(A) addresses termination, and Part IV(B) suspension. Part V demonstrates that, whereas "amending" an Article II treaty requires Senate advice and consent, the partial suspension of a treaty does not.

I. *The ABM Treaty*

The ABM Treaty, which entered into force on October 3, 1972, originated as a bilateral treaty between the United States and the former Soviet Union. In general, the ABM Treaty set limits on the number and location of anti-ballistic missile systems of the former Soviet Union and the United States and prevented the deployment of defenses against long-range strategic ballistic missiles. Each side was originally permitted to have two deployment areas (later, by

protocol, reduced to one[1]), so restricted and located that the areas could not provide a nationwide ABM defense, or become the basis for one. Of the two deployment areas originally permitted to each side, one was for a limited ABM system to protect that Nation's capital, and one was to protect an intercontinental ballistic missile system launch area. Quantitative and qualitative limits were set on the ABM systems that could be deployed, and the Parties further agreed to limit qualitative improvements of their ABM technology.

In Article V, both Parties agreed to prohibit the development, testing, or deployment of sea-based, air-based, space-based or mobile land-based ABM systems and their components.

Certain provisions of the ABM Treaty concerned the breach, amendment,or abrogation of the Treaty. Article X provided that "[e]ach Party undertakes not to assume any international obligations which would conflict with this Treaty." Article XIV(1) authorizes each Party to propose amendments to the Treaty, which if agreed upon "shall enter into force in accordance with the procedures governing the entry into force of this Treaty." Article XV(1) provides that the Treaty "shall be of unlimited duration." Article XV(2) grants each Party "the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."

The dissolution of the former Soviet Union during the autumn and winter of 1991 required the United States to re-evaluate its bilateral treaties with the Soviet Union, including the ABM Treaty. On the whole, the United States operated on the general principle that the treaty rights and obligations of the former Soviet Union had passed to "successor" States, unless the terms or the object and purpose of a treaty required a different result. *See* Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Section 233(a) of S. 1745,* at 1-2 (June 26, 1996) ("1996 Dellinger Memo"); *see also* Edwin D. Williamson and John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 Va. J. Int'l L. 261, 264-65 (1993). Nevertheless, in the area of arms control treaties it was decided to treat succession issues on a case-by-case basis.

On September 26, 1997, the United States entered into a Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Anti-Ballistic Missile Systems of May 26, 1972, September 26, 1997, available at http://www.State.gov/www/global/arms/factsheets/missdef/abm_mou.html (the "MOU"). Four "successor" States were parties with the United States to the MOU: Belarus, Kazakhstan, the Russian Federation and Ukraine.[2] The MOU was intended to reflect the fundamental changes in the political situation caused by the dissolution of the Soviet Union and to preserve the viability of the ABM Treaty. Article I of the MOU provided that, "upon entry into force of this Memorandum," the United States together with the four other signatory States "shall constitute the Parties to the [ABM] Treaty." The four successor States assumed the rights and obligations of the former Soviet Union, subject to certain modifications. Only a single ABM

---

[1] *See* Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of the Anti-Ballistic Missile Systems, July 3, 1974, Art. 1, 27 U.S.T. 1645, 1646, T.I.A.S. 8276.

[2] Each of these four States possessed ABM Treaty-related assets on its territory, and each had demonstrated a desire to become a Party to the ABM Treaty.

deployment area was permitted for all of the four successor States combined, and only 15 ABM launchers collectively at ABM test ranges were permitted. Article IX(1) provided that "[t]his Memorandum shall be subject to ratification or approval by the signatory States, in accordance with the constitutional procedures of those States." *Id.*

During the last Administration, our Office took the position that the United States could enter into MOU without Senate advice and consent as a valid exercise of the President's constitutional authorities to recognize States and to implement and interpret treaties. *See* 1996 Dellinger Memo. While not conceding the constitutional point, President Clinton promised that "[t]he MOU . . . will be provided to the Senate for its advice and consent." Letter to Hon. Benjamin A. Gilman, Chairman, Comm. on International Relations, United States House of Representatives, from President William Jefferson Clinton (Nov. 21, 1997), *reprinted in* 144 Cong. Rec. H7276 (1998). The Clinton Administration did not submit the MOU to the Senate, and it remains unsubmitted. We are informed that the United States has not deposited its instrument of ratification of the MOU. We are also informed that all four successor States have ratified the MOU. The Russian Federation's ratification was conditional, however, on the United States' ratification of the START protocols. We understand that this condition has not been met, and that it appears unlikely that it will be met. Consequently, both because the United States has not deposited its instrument of ratification, and because the Russian Federation's ratification was contingent on an as-yet unmet condition, the MOU by its own terms has not yet entered into force.[3]

II. *The President's Constitutional Authority Over Treaties*

Presidential authority over treaties stems from the President's leading textual and structural position in foreign affairs generally, from the text and structure of Article II's vesting of *all* of the federal executive power in the President, and from the specific manner in which the Constitution allocates the treaty power. Construing the Constitution in this manner comports with the President's Article II responsibilities to conduct the foreign affairs of the nation, to act as its sole representative in international relations, and to exercise the powers of Chief Executive. Historical practice also plays an important role in resolving separation of powers questions relating to foreign affairs. Judicial decisions in the area are rare, while the need for discretion and speed of action favor deference to the arrangements of the political branches. The historical evidence supports the claim that the President has broad constitutional powers with respect to treaties, including the powers to terminate and suspend them. In light of considerations of all three kinds -- textual, structural and historical -- we conclude that the President has the constitutional authority to suspend a provision of the ABM Treaty.

[3] Whether the ABM Treaty remains in effect and, if so, who are the Parties to it are questions that continue to be disputed. The dissolution of the Soviet Union in December, 1991, arguably altered the fundamental conditions on which the ABM Treaty was predicated, and it may be argued with considerable force that the treaty did not survive that change. If the ABM Treaty were thought not to have survived, then the MOU would be without effect, because the MOU was designed to extend and multilateralize the treaty. Even on the view that the ABM Treaty did survive, the fact that the MOU has not entered into force appears to indicate that the treaty is at this point a bilateral treaty between the United States and the Russian Federation, rather than a multilateral treaty involving the four successor States and the United States.

We begin with constitutional text and structure. Article II, § 1 of the Constitution declares that the "executive Power shall be vested in a President." Article II, § 2 further makes clear that the President "shall be Commander in Chief," that he shall appoint, with the advice and consent of the Senate, and receive ambassadors, and that he "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. Art. II, § 2, cl. 2. Congress possesses its own plenary foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce.

From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington Administration: "[t]he constitution has divided the powers of government into three branches [and] has declared that 'the executive powers shall be vested in the president,' submitting only special articles of it to a negative by the senate." Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly." Thomas Jefferson, *Opinion on the Powers of the Senate* (1790), *reprinted in* 5 *The Writings of Thomas Jefferson* 161 (Paul Leicester Ford ed., 1895). In defending President Washington's authority to issue the Neutrality Proclamation of 1793, Alexander Hamilton came to the same interpretation of the President's foreign affairs powers. According to Hamilton, Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power." Alexander Hamilton, *Pacificus* No. 1 (1793), *in* 15 *The Papers of Alexander Hamilton* 33, 39 (Harold C. Syrett et al. eds., 1969). Hamilton further contended that the President was "[t]he constitutional organ of intercourse between the UStates & foreign Nations." Alexander Hamilton, *Pacificus* No. 7 (1793), *id.* at 135. As future Chief Justice John Marshall famously declared a few years later, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation. . . ." 10 Annals of Cong. 613-14 (1800). Given the agreement of Jefferson, Hamilton, and Marshall, it has not been difficult for the executive branch to consistently assert the President's plenary authority in foreign affairs ever since.

In the relatively few occasions where it has addressed foreign affairs, the Supreme Court has lent its approval to the executive branch's consistent interpretation of the President's powers. Responsibility for the conduct of foreign affairs and for protecting the national security are, as the Supreme Court has observed, "'central' Presidential domains." *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982). The President's constitutional primacy flows from both his unique position in the constitutional structure and from the specific grants of authority in Article II that make the President both the Chief Executive of the nation and the Commander in Chief. *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982). Due to the President's constitutionally superior position, the Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'" *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). This foreign affairs power is exclusive: it is "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations – a power

which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

In light of these basic principles, it should be understood that the treaty power is fundamentally executive in nature. Article II, § 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States." By contrast, Article I's Vesting Clause gives Congress only the powers "herein granted." U.S. Const. art. I, § 1. This difference in language indicates that Congress's legislative powers are limited to the list enumerated in Article I, § 8, while the President's powers include inherent executive powers that are unenumerated in the Constitution. Thus, as we will explain in detail later, any ambiguities in the allocation of a power that is executive in nature – particularly in foreign affairs – must be resolved in favor of the executive branch.

While Article II, § 1 vests the President with the general federal executive power, Article II, § 2 specifies other powers, such as the Commander in Chief and treaty powers, that are executive in nature. Some have argued that this either limits the executive power to those explicitly enumerated, or that it recognizes that the treaty power is legislative in nature. The powers specifically enumerated in Article II, however, are not subsumed within the Vesting Clause either because they have been divided between Articles I and II (such as the war power), or because they have been altered by inclusion of the Senate (as with treaties and appointments). The King's traditional powers with respect to war and peace (which, of course, were "executive" in nature) were disaggregated, in that the royal power to declare war was given to Congress under Article I, while the Commander in Chief authority was expressly reserved to the President in Article II.[4] Likewise, the Framers altered the plenary powers of the King as to treaties and appointments by including the Senate in the exercise of those powers.[5] Article II's enumeration of the Treaty and Appointments Clauses thus dilutes the unitary nature of the executive branch only in regard to the exercise of those powers. It does not transform them into quasi-legislative functions. A point of comparison can be drawn with the President's veto over legislation, which is vested in the executive by Article I of the Constitution. Just as the President's veto does not alter the legislative character of the lawmaking process, so too the Senate's advice and consent role cannot change the essential executive nature of the treaty power in Article II.

---

[4] Under the British constitution, as it existed at the time of the Constitution's Framing, the British Crown possessed the unilateral power over both making and terminating treaties. According to Sir William Blackstone, the King's prerogative subsumed the sole power to make treaties and other international agreements with foreign nations, and the sole power to make war and peace. 1 William Blackstone, *Commentaries on the Laws of England* 257 (1967 reprint of 1771 ed.). The British constitution recognized that the Crown also enjoyed the power to terminate treaties as well. "It is by the law of nations essential to the goodness of a league, that it be made by the sovereign power . . . . [I]n England the sovereign power . . . is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul." *Id.* at 257. *See also* James Madison, *Helvidius* No. 1 (1793), *reprinted in* 15 *The Papers of James Madison* 72 (Thomas A. Mason et al. eds., 1985) ("The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government,* and are accordingly treated as Executive prerogatives by *British commentators*.").

[5] *See Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 17 (1986) ("Nothing in the text of the Constitution or the deliberations of the Framers suggests that the Senate's advice and consent role in the treaty-making process was intended to alter the fundamental constitutional balance between legislative authority and executive authority.").

Several conclusions flow from this analysis of constitutional text and structure. First, the Treaty Clause's location in Article II makes clear that the treaty power remains an *executive* one. The Senate's advice and consent role merely acts as a check on the President's otherwise plenary power. It is the President who *makes* treaties, not the Senate and not the Senate and President. Second, Article II's structure confirms that executive power in this area is broader than the authorities listed in Article II, § 2. Simply because Article II, § 2's Treaty Clause does not specifically detail the location of relevant corollary powers does not mean that such powers lie in the hands of the Senate. Rather, these powers must remain within the President's general executive power. Third, Article II, § 1's Vesting Clause requires that we construe any ambiguities in the allocation of executive power in favor of the President. If Article II, § 2 fails to allocate a specific power, then Article II, § 1's general grant of the executive power serves as a catch-all provision that reserves to the President any remaining federal foreign affairs powers.

This understanding of the constitutional text and structure has led to the recognition that the President enjoys powers, such as the removal of executive branch officials, that may be unenumerated but that are an essential part of the executive power. *See Bowsher v. Synar*, 478 U.S. 714 (1986). As true as this principle is in domestic affairs, it must especially be the case in regard to foreign affairs, and thus treaties. Treaties represent a central tool for the exercise of the President's plenary control over the conduct of foreign policy: in the course of protecting national security, recognizing foreign governments, or pursuing diplomatic objectives, for example, the President may need to decide whether to perform, withhold, or terminate the United States' treaty obligations. As the U.S. Court of Appeals for the D.C. Circuit has observed, "the determination of the conduct of the United States in regard to treaties is an instance of what has broadly been called 'the foreign affairs power' of the President. . . . That status is not confined to the service of the President as a channel of communication . . . but embraces an active policy determination as to the conduct of the United States in regard to a treaty in response to numerous problems and circumstances as they arise." *Goldwater v. Carter,* 617 F.2d 697, 706-07 (D.C. Cir.) (en banc), *vacated and remanded with instructions to dismiss,* 444 U.S. 996 (1979). Construing the Constitution to grant unenumerated treaty authority to another branch could prevent the President from exercising his core constitutional responsibilities in foreign affairs. Even in the cases in which the Supreme Court has limited executive authority, it has also emphasized that we should not construe legislative prerogatives to prevent the executive branch "from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).[6]

Thus, treaty-related powers not specifically detailed in Article II, § 2, such as the powers to terminate or suspend treaties unilaterally, must remain with the President. This has been the general approach in regard to other treaty powers not mentioned in the Constitution. Article II, for example, does not expressly grant the President the power to interpret treaties on behalf of the United States. Yet, when the question arose concerning the proper interpretation of the 1778 Treaty of Alliance with France, President Washington issued the 1793 Neutrality Proclamation construing the treaty not to require United States entry into the European wars on France's side.

---

[6] Thus, even though the Court has an independent duty under Article III to determine the meaning of a treaty in a case in which such a question is properly presented, it gives the executive's interpretation of the treaty significant deference. *See United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

As noted earlier, Alexander Hamilton defended President Washington's authority to interpret the 1778 Franco-American Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., 8 Stat. 6, by arguing that this power stemmed from his control over the treaty process and the general vesting of the executive power in Article II, § 2. *See* Hamilton, *Pacificus* No. 1, *supra*. Even Hamilton's great opponent, James Madison, did not challenge the view that the Article II, § 2 gave the President unenumerated treaty powers, although he argued they could not be read to frustrate Congress's power to declare war. Madison, *Helvidius* No. 2, *supra,* at 80. Today, it is generally recognized that the President is the primary interpreter of international law and of treaties on behalf of the United States. *See Restatement (Third) of the Foreign Relations Law of the United States,* § 112 cmt. c (1987).

Other treaty powers similarly have been understood to rest within plenary presidential authority. Thus, it is the President alone who decides whether to *negotiate* an international agreement, and it is the President alone who controls the subject, course, and scope of negotiations. "In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's." *Issues Raised by Foreign Relations Authorization Bill,* 14 Op. O.L.C. 37, 40 (1990) (quoting 2 Pub. Papers of George Bush 1042, 1043 (1989) (President's veto message of July 31, 1989)); *see also United States Military and Naval Bases in the Philippines,* 41 Op. Att'y Gen. 143, 163 (1953) ("the President is authorized by the Constitution to negotiate on any appropriate subject for negotiation with a foreign government"). The President has the sole discretion whether to *sign* a treaty and whether to choose even to *submit it for Senate consideration.* The President may even choose *not to ratify* a treaty even after the Senate has considered and approved it. "[E]ven after [the President] 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." *Goldwater,* 617 F.2d at 705; *see also* Louis Henkin, *Foreign Affairs and the United States Constitution* 184 (2d ed. 1996).

III. *The Presidential Powers to Terminate and Suspend Treaties*

We turn now to two other unenumerated powers of the President with respect to treaties – the power to terminate and the power to suspend.[7]

The President's power to terminate treaties must reside in the President as a necessary corollary to the exercise of the President's other plenary foreign affairs powers. As noted before, the President is the sole organ of the nation in regard to foreign nations.[8] A President, therefore,

---

[7] In saying that the President has the power to terminate treaties, we do not of course deny that Congress has the power to enact legislation that abrogates a treaty as a matter of domestic law, or that effectively puts the United States in breach of its treaty obligations by making performance impossible. *See, e.g., La Abra Silver Mining Co. v. United States,* 175 U.S. 423, 460 (1899). But other than by declaring war, Congress has no power to extinguish the international obligations of the United States, and in that sense lacks the competence to terminate treaties. Moreover, Congress may not *direct* the President to terminate a treaty without impermissibly invading his authority to conduct foreign affairs.

[8] Indeed, because the President alone is able to communicate with foreign nations on behalf of the United States, it is the President who actually decides whether to terminate a treaty. Even if Congress or the Senate were to take action that had the effect of abrogating a treaty as a matter of domestic law, only the President can decide whether to

may need to terminate a treaty in order to implement his decision to recognize a foreign government. Or, for example, the President may wish to terminate a treaty in order to reflect the fact that the treaty has become obsolete, to sanction a treaty partner for violations, to protect the United States from commitments that would threaten its national security, to condemn human rights violations, or to negotiate a better agreement.

Authorities such as the Framers, judges, legal scholars, and government officials, have agreed upon the President's power to terminate treaties unilaterally. Alexander Hamilton, in his *Pacificus* No. 1, stated that although "treaties can only be made by the President and Senate [jointly], [but] their activity may be continued or suspended by the President alone." *Pacificus* No. 1, *supra,* at 42. Professor Louis Henkin, in his leading treatise on foreign affairs law, states that "it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty, whether such action on behalf of the United States is permissible under international law or would put the United States in violation." Henkin, *supra,* at 214.[9] Similarly, the drafters of the *Restatement (Third)* have acknowledged that the President has the power either "to suspend or terminate an [international] agreement in accordance with its terms," or "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

---

notify a foreign nation of a decision to abrogate the agreement. Thus, federal courts will treat the executive's declaration as to whether a treaty remains in effect as dispositive in litigation. *See, e.g., TWA, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984).

[9] Other scholars have taken this view. Professor Westel Willoughby, author of the most prominent constitutional law treatise of the first half of the twentieth century, observed that "it seems almost too clear for argument that Congress, not having been made by the Constitution a participant in the treaty-making power, has no constitutional authority to exercise that power either affirmatively or negatively, that is, by creating or destroying agreements. It would seem, indeed, that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification." 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 585 (2d ed. 1929) (footnote omitted). *See also* Edwin S. Corwin, *The President: Office and Powers 1787-1957,* at 196 (1957) ("as a matter of fact . . . treaties have been terminated on several occasions by the President, *now on his own authority*, now in accordance with a resolution of Congress, at other times with the sanction simply of the Senate") (emphasis added); *id.* at 435-36; Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice,* 42 Minn. L. Rev. 878, 887-88, 906 (1958); Laurence H. Tribe, *American Constitutional Law* 164-165 (1st ed. 1978) ("[T]he President . . . has exclusive responsibility for . . . terminating treaties or executive agreements . . . ."). Other scholars and government officials who have supported the President's unilateral power to terminate treaties are cited in the Brief for the Respondents (President James Earl Carter and Secretary of State Cyrus Vance) in Opposition at 19-20, n.7, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), No. 79-856 (the "Executive's *Goldwater* Brief"). Further, as Professor Tribe has noted, the President "may, of course, terminate a treaty in accord with its terms." 1 Laurence H. Tribe, *American Constitutional Law* 643-44 n. 1 (3d ed. 2000). Those who believe that the Senate can properly play a role in treaty termination must agree that when a treaty expressly authorizes termination, *e.g.*, after notice, and the President does terminate it in the prescribed manner, the President is acting at the apex of his constitutional authority.

To be sure, there is no scholarly consensus on the issue of treaty termination, and some have argued that congressional (or Senate) authorization is (at least usually) required. *See, e.g.*, Motion of Myres S. McDougal and W. Michael Reisman for Leave to File Brief Amici Curiae and Brief Amici Curiae in Support of Petition for Certiorari at 6, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), No. 79-856 ("In our opinion, the better constitutional view, confirmed by a careful examination of past instances of termination, is that in the absence of material breach or *rebus sic stantibus* and, arguably, in the absence of an overwhelming external crisis to the body politic, the presumption must be that the President requires congressional authorization to terminate any agreement other than a presidential agreement."); J. Terry Emerson, *The Legislative Role in Treaty Abrogation*, 5 J. Legis. 46 (1978); Edwin S. Corwin, *The President's Control of Foreign Relations* 115 (1917).

proceed to terminate or suspend the agreement on behalf of the United States." *Restatement (Third), supra,* at § 339.

The executive branch has long held the view that the President has the constitutional authority to terminate treaties unilaterally, and the legislative branch seems for the most part to have acquiesced in it. The Justice Department has consistently maintained that the President's constitutional authority over foreign affairs provides him with the power to unilaterally terminate treaties. "In particular, the President's plenary authority in the field of foreign relations includes his power to terminate treaties." Memorandum for Judith H. Bello, General Counsel, Office of the U.S. Trade Representative, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Authority to Terminate the International Express Mail Agreement with Argentina Without the Consent of the Postal Service* at 5 (June 2, 1988).[10] While some Members of Congress have questioned unilateral presidential termination of treaties,[11] and several Members in the past brought suit against the President to stop a termination (which will be discussed below), other congressional authorities have accepted the President's functional power over treaty termination. While claiming that "[w]hether the President alone can terminate a treaty's domestic effect remains an open question," a recent study by the Congressional Research Service concludes that "[a]s a practical matter, however, the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect." Senate Comm. on Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 201 (Comm. Print 2001) (prepared by Congressional Research Service, Library of Congress) (footnotes omitted).

---

[10] *See also* the Executive's *Goldwater* Brief at 20 ("The logic of the constitutional arrangement is compelling. Just as the Senate or Congress cannot bind the United States to a treaty without the President's active participation and approval, they cannot continue a treaty commitment that the President has determined is contrary to the security or diplomatic interests of the United States and is terminable under international law. The Senate or Congress cannot undertake, or revive or continue, a treaty obligation of the United States over the President's objection. That is the constitutional scheme."); Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, from Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty* at 8 n.14 (Nov. 25, 1996) (reviewing Office precedents) (the "1996 Schroeder Memo"); Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Authority to Modify the Conditions under which the United States Will Recognize the Compulsory Jurisdiction of the International Court of Justice Without Prior Congressional Approval* at 11-15 (Apr. 9, 1984) (reviewing judicial and other support for view that President may unilaterally terminate treaties); Memorandum for the Honorable Cyrus Vance, Secretary of State, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Reservation to Salt II Conditioning Termination on Senate Approval* (Nov. 13, 1979); *International Load line Convention,* 40 Op. Att'y Gen. 119, 123 (1941) ("it is proper that the President, as 'the sole organ of the nation in its external relations,' should speak for the nation" in declaring treaty inoperative)

[11] The Senate engaged in a lengthy debate over the President's prerogatives at the time of President Carter's termination of the Mutual Defense Treaty with Taiwan. Originally, a proposed Senate Resolution disapproved of unilateral presidential action, but that Resolution was amended and reported by the Senate Foreign Relations Committee to recognize at least fourteen bases of presidential termination. The amended Resolution was in turn amended to state the "sense of the Senate" claiming a consenting role for the Senate in the termination of treaties, but no final vote was ever taken on the Resolution and the Senate did not in the end place itself in conflict with the President. *See Goldwater,* 444 U.S. at 998 (Powell, J., concurring in judgment); *The Constitution of the United States of America: Analysis and Interpretation,* 517 & n.18 (Congressional Research Service, Library of Congress 1982 ed.).

The events surrounding President Carter's unilateral termination of the Mutual Defense Treaty with Taiwan in 1979 support this understanding of the President's powers. In that case, President Carter announced, without seeking or obtaining the consent of either the Senate or of Congress as a whole, that the United States would establish diplomatic relations with the People's Republic of China and abrogate the treaty with Taiwan. The Senate adopted a "sense of the Senate" resolution that the President could not terminate any mutual defense treaty without the advice and consent of two-thirds of its Members. Senator Goldwater and other individual Senators filed suit to block President Carter's unilateral termination of the Mutual Defense Treaty. The District Court agreed that the Constitution required both the President and Congress to take formal action before a treaty could be terminated. *Goldwater v. Carter*, 481 F. Supp. 949, 954 (D.D.C. 1979).

Sitting en banc, the Court of Appeals for the D.C. Circuit reversed and upheld the President's unilateral power to terminate treaties. *Goldwater v. Carter,* 617 F.2d 697 (D.C. Cir. 1979). The *per curiam* Court offered eight general reasons why the President enjoyed this authority:

1) the President had a unilateral power over removal of federal officials;
2) the constitutional text is silent as to treaty termination;
3) the Senate's advice and consent role is extraordinary and should not lightly be extended;
4) the President is the constitutional representative of the United States in its foreign relations;
5) Congress's power over domestic implementation of a treaty is irrelevant to the question of termination;
6) requiring Senate consent for the termination of treaties "would be locking the United States into all of its international obligations, even if the President and two-thirds of the Senate minus one firmly believed that the proper course for the United States was to terminate a treaty," 617 F.2d at 705;
7) even though historical evidence has provided many different examples of treaty termination, "in no situation has a treaty been continued in force over the opposition of the President." *Id.* at 706. Meanwhile, the conduct of the United States in regard to treaties is part of the executive's plenary power over the conduct of foreign affairs.
8) No judicially manageable standards exist for drawing distinctions among treaties based on their substance, in order to determine any implied role for the Senate in treaty termination in regard to particular treaties.

On appeal, the Supreme Court vacated the D.C. Circuit opinion and remanded the case to the District Court with directions to dismiss the complaint on the ground that the question raised was nonjusticiable. *See Goldwater v. Carter*, 444 U.S. 996 (1979). Justice Brennan, the only Justice who reached the merits, would have affirmed the D.C. Circuit. While the D.C. Circuit opinion has no precedential value, we believe its analysis is persuasive and provides the correct answer on the merits. The Supreme Court's *vacatur* of the lower court opinion, moreover, indicates that any presidential termination of a treaty would be unreviewable in the courts. Congressional opponents of a President's decision to withdraw from a treaty would have no cognizable injury with which to demonstrate standing, and, even if they did, most likely the courts would find the controversy to be nonjusticiable under the political question doctrine. This has the practical

result, of course, of leaving any unilateral presidential decision to terminate undisturbed. "By the decision in *Goldwater v. Carter* the President is, in effect, made his own judge of the scope of his powers to the extent that he may say what the law is." J. Terry Emerson, *Treaty Termination Revisited,* 4 Woodrow Wilson J. Law 1, 21-22 (1982).

Although it has been argued that the Supremacy Clause, U.S. Const. art. VI, § 2, by bracketing treaties together with the Constitution and federal statutes as "the supreme law of the land," precludes attributing a unilateral termination power to the President, see Emerson, *supra,* at 9-10, Congress has recognized that this claim is mistaken. The argument is that because treaties, like Acts of Congress, are "supreme law," the President may not terminate them unilaterally, any more than he can unilaterally repeal a statute. But, as the Senate Foreign Relations Committee noted in 1979, the making of treaties is treaties unlike the making of statutes in fundamental respects:

> Although . . . Congress has the last word in determining whether a statute is enacted, the Senate merely authorizes the ratification of a treaty; it is the President's role that is determinative. [The President] decides at the outset whether to commence treaty negotiations. He decides whether to sign a treaty. He decides whether to . .. . exchange instruments of ratification after a treaty has been approved by the Senate. At each of these stages, it is the President who has the power to determine whether to proceed – and thus whether treaty relations will ultimately exist.

S. Rep. No. 96-7, at 18 (1979). The President's broad power to *make* treaties, U.S. Const. art. II, § 2, cl. 2, qualified only by the Senate's carefully restricted power to grant or withhold its advice and consent, thus confers on him the authority to *unmake* treaties without Senate or congressional authorization. In the domestic sphere, Congress is the Nation's primary lawmaker, though its power is subject to the limited check of the President's veto. In the international sphere, the *President* is the Nation's primary lawmaker, subject only to the check, in treaty-making, of Senate advice and consent. Accordingly, the Supremacy Clause is, as one scholar put it, "a *status*-prescribing provision, not . . . a *procedure*-prescribing provision. That it assigns the same status – supreme law of the land – to each of the instruments denominated does not mean that it commands that the same procedure to be followed in their termination." Michael J. Glennon, *Constitutional Diplomacy* 150 (1990).

Against this background, it should be evident that the President must also have the power to *suspend* a treaty, whether in whole or in part. Suspension of a treaty is not nearly so drastic as termination; indeed, the power to suspend a treaty, in whole or in part, is *implied* from the power to terminate it. When a treaty is suspended, it remains formally in effect, and can be revived at a later time. Suspension consists merely in the withholding of performance of some or all of the obligations the suspending Party has under the treaty, and the non-assertion of some or all of its treaty rights. Termination, by contrast, extinguishes the United States' rights and obligations under a treaty, at least as a matter of domestic law. The power to extinguish obligations subsumes the lesser power to withhold performance of them. *Accord* 1996 Schroeder Memo at 8, n.14 ("Assuming that the President does have the power unilaterally to terminate a treaty, it appears to follow that he also has the authority to relieve the United States of the affirmative obligations imposed on it by particular treaty provisions.")

Again, as with the termination power, the power to suspend a treaty, whether wholly or in part, must be available to the President if he is to be fully able to conduct the Nation's foreign policy successfully: the President, for example, must be able credibly to threaten to suspend performance of the United States' treaty obligations in order to sanction a treaty partner for the non-performance of *its* treaty obligations, or in order to deter partners to other treaties from breaching them. Similarly, the President must be able to suspend a particular treaty obligation when a radical change in circumstances would cause performance to be a grave threat to the national security. Alexander Hamilton's opinion of 1793, discussed in detail below, in which he urged President George Washington to suspend the Franco-American Treaty of Alliance in the wake of the collapse of the French monarchy, rested on precisely this point. In effect, Hamilton argued, performance of our alleged treaty obligations towards France would have put the Nation's security at grave risk, and therefore that the treaty should be suspended. Renunciation of a treaty, Hamilton maintained, is justified if a revolutionary change in a treaty partner's government renders the treaty "useless or materially less advantageous, or more dangerous than before. . . . Reason . . . would dictate, that the party whose government had remained stationary would have a right under a *bona fide* conviction that the change in the situation of the other party would render a future connection detrimental or dangerous, to declare the connection dissolved. . . . A Treaty *pernicious* to the State is of itself void." Letter from Alexander Hamilton and Henry Knox to George Washington, May 2, 1793, *reprinted in* 14 *The Papers of Alexander Hamilton* 367, 377-78 (Harold C. Syrett et al. eds., 1969).

Secondary authorities support the view that the President has the authority unilaterally to suspend a treaty, whether in whole or in part. *See Restatement (Third), supra,* at § 339. "There is substantial authority for the proposition that the President has authority, acting alone, to suspend or terminate a treaty in whole or in part in response to prior breach of agreement. Indeed, it seems virtually certain constitutionally that, at least in the absence of congressional action, the President has authority, acting alone, to suspend a treaty in whole or in part for prior material breach of [an] agreement." John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 Va. J. Int'l L. 881, 1007-08 (1999); Henkin, *supra*, at 489 n. 138. As we have noted, the Congressional Research Service acknowledges that, because of judicial deference to the executive branch in treaty affairs, "as a practical matter the President has the power to suspend a treaty." *Treaties and Other International Agreements: The Role of the United States Senate, supra,* 190.

The President's power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so.[12] While the President will ordinarily take international law into account when deciding whether to suspend a treaty in whole or in part, his constitutional authority to suspend a treaty provision does not hinge on whether such suspension is or is not consistent with international law. If the exercise of the President's constitutional powers with respect to a treaty puts the United States in breach of treaty or other international law, the United States may have to face sanctions of some form from

[12] Of course, the President and Senate may not exercise their treaty powers corruptly. *See The Federalist* No. 66, at 374 (Alexander Hamilton) (Clinton Rossiter ed. 1999).

its aggrieved treaty partners.[13] Whether the considerations in favor of suspending, breaching or terminating a treaty are sufficient to outweigh the countervailing risks of sanctions or liability for those actions is for the President, as the Nation's constitutional representative in its foreign affairs, to decide.[14]

To summarize: the location of the treaty power in Article II, the general vesting of all of the federal executive power in the President, and the President's plenary authority over foreign affairs have led to a framework in which the executive exercises *all* unenumerated powers related to treaty making. The Senate's advice and consent function is to be read as a narrow exception to that broad grant of executive power. Thus, the President can choose to enter or withdraw from treaty negotiations; he can choose not to sign a treaty; he can choose not to submit it to the Senate; he can choose not to ratify the treaty even after senatorial consent; and he can choose to terminate or suspend a treaty that has already been ratified. The power unilaterally to suspend a treaty subsumes complete and partial suspension: both kinds of suspension authority are comprehended within the "executive Power," U.S. Const. art. II, § 1, cl. 1; both are necessary for the successful performance of the President's foreign affairs function, and both, as we shall show below, have been exercised in practice. These powers are discretionary and may be exercised on any occasion on which the President determines their exercise to be in the national interest. To read the Constitution otherwise not only would run counter to this general approach to the treaty power, it would also disrupt the President's ability to fulfill his other constitutional responsibilities in the field of foreign relations.

IV. *The Practice of the Executive Branch*

The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled.[15] (By "practice" we mean not only the acts and decisions of governmental decisionmakers, but also their considered statements and judgments about what they *could* do.) Both the Supreme Court and the political branches have often recognized that

---

[13] *See Head Money Cases*, 112 U.S. 580, 598 (1884) (A treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are part[y] to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war."); *Ex parte Peru*, 318 U.S. 578, 587 (1943) (Claims by a friendly foreign State "are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 669 n.16 (1992) (referring to the "advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations.").

[14] *See, e.g., The Paquete Habana,* 175 U.S. 677, 700 (1900) (courts must apply customary international law unless there is a treaty or controlling executive or legislative act to the contrary); *The Chinese Exclusion Case,* 130 U.S. 581, 602 (1889) ("[t]he question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts"); *Drown v. United States,* 12 U.S. (8 Cr.) 110, 128 (1814) (the "sovereign follows or abandons at his will" customary international law); *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cr.) 116, 145-46 (1812) (same); *Garcia-Mir v. Meese,* 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied,* 479 U.S. 889 (1986); *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 171 (1989) ("[T]he power in the Executive to override international law is a necessary attribute of sovereignty and an integral part of the President's foreign affairs power.").

[15] As the Supreme Court has noted, "the decisions of the Court in th[e] area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). Historical practice and the ongoing tradition of executive branch constitutional interpretation therefore play an especially important role in this area.

governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: "'the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.'" *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (citation omitted). The role of practice is heightened in dealing with issues affecting foreign affairs and national security, where "the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions." *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994).

Accordingly, we give considerable weight to the practice of the executive branch and the Senate in trying to determine the constitutional allocation of treaty-making powers between them. As we read the historical record, it supports the view that the President has the constitutional authority both to terminate and to suspend a treaty.

A.

It seems clear that the United States has terminated relatively few treaties.[16] It appears that several different methods of termination have been used. One review has found that of these terminations, the President acted alone nine times, seven were by congressional directive, and two by Senate command. *See* David Gray Adler, *The Constitution and the Termination of Treaties* 161 (1986). By the Solicitor General's count in Goldwater, "[o]f the 26 occasions on which the President has acted to terminate a treaty, 13 involved purely Presidential action without the participation of Congress. Several of the treaties in the latter group involved matters of considerable importance." Executive *Goldwater* Brief at 21. Rather than being the exception, unilateral Presidential termination has been more common than any other single form. Furthermore, the evidence does not show that the executive branch has, over time, ceded power over terminating treaties to the legislature. On the contrary, "the power has been asserted by Presidents Madison, McKinley, Wilson, Coolidge, Roosevelt, Eisenhower, Kennedy, and Johnson." *Id.* at 21, n.8. Although Presidents have prompted congressional or Senate action in treaty termination, they have at least sometimes done so for political or diplomatic reasons.[17] These examples represent the workings of practical politics, rather than acquiescence in a constitutional régime. Throughout our history, Presidents have used their independent foreign affairs and treaty powers to terminate treaties, without the consent of Congress or the Senate.

---

[16] We have not had the opportunity to conduct an independent review of the historical record to determine how far it supports a presidential power to terminate treaties unilaterally. It should be emphasized, however, in light of the best reading of the constitutional text and structure, critics would have to demonstrate an unbroken practice of executive acquiescence in a congressional role in treaty termination. This they cannot do.

[17] For example, in 1846, "[i]n response to strong pressure from the House of Representatives, President Polk recommended to Congress that he be given authority by law to provide notice of the . . . annulment" of the Convention on Boundaries with Great Britain. Emerson, *supra* n.9, at 53.

It appears that Abraham Lincoln was the first President to terminate a treaty in the absence of congressional authorization, although Congress gave after-the-fact approval in a joint resolution. In 1911, President Taft gave notice to the Russian government of United States withdrawal from an 1832 commercial treaty, although Congress later signified its approval. The historical record provides several other examples of presidential termination without any prior or subsequent congressional approval. In 1899, President McKinley terminated an 1850 treaty with Switzerland, without congressional authorization, although it appears that the treaty was inconsistent with a later statute. Authorities also state that Presidents, acting alone, have terminated: in 1927, a 1926 convention with Mexico to prevent smuggling; in 1933, a 1927 convention on the prohibition of import and export restrictions; in 1933, an extradition treaty with Greece; in 1936, an 1871 treaty of commerce and navigation with Italy; and in 1939, a 1911 commercial treaty with Japan. More recent examples include President Carter's termination of the Taiwan Mutual Defense Treaty and President Reagan's decision in 1985 to terminate the Treaty of Friendship, Commerce, and Navigation with Nicaragua. *See* Senate Comm. on Foreign Relations, 103d Cong., *Treaties and Other International Agreements: The Role of the United States Senate,* 165-66 (1993) (prepared by the Congressional Research Service, Library of Congress).

B.

Constitutional practice with respect to treaty suspension originates with the controversies surrounding President Washington's Neutrality Proclamation of 1793. That dispute centered on the effect of the French Revolution upon the 1778 Franco-American Treaty of Alliance.[18] In those debates, which several important Founders entered, Alexander Hamilton argued that "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone." Hamilton, *Pacificus* No. 1, *supra*, at 42.

Faced with the diplomatic and political difficulties that might ensue from receiving an Ambassador from the French Republic, on April 18, 1793, President Washington sought the advice of his Cabinet on several questions. He received separate replies from Secretary of State Jefferson[19] and Attorney General Randolph and a joint reply from Secretary of the Treasury Hamilton and Secretary of War Knox. Of particular relevance, Hamilton and Knox advised President Washington to consider suspending the French treaty. They argued that before receiving the new French Ambassador, the President should issue a declaration stating that "considering the origin, course and circumstances of the Relations contracted [in 1778] between the two Countries, . . . it is deemed adviseable and proper, on the part of the United States, to reserve to future consideration and discussion, the question – whether the operation of the Treaties, by which those relations were formed, ought not to be deemed temporarily and provisionally suspended." Letter from Alexander Hamilton and Henry Knox to George Washington, *supra*, at 368 (footnote omitted). The two Cabinet members argued that the

[18] For brief reviews of this controversy, *see* Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* 191-94 (rev. ed. 1962); Samuel B. Crandall, *Treaties: Their Making and Enforcement* § 178, at 423-25 (2d ed. 1916).

[19] *See* Thomas Jefferson, *Opinion on the French Treaties* (Apr. 28, 1793), *reprinted in Thomas Jefferson: Political Writings* 553 (Joyce Appleby and Terence Ball (eds.), 1999). Jefferson agreed that in some circumstances, suspension of treaty obligations was permissible. *See id.* at 555.

political changes in France and in Europe justified the conclusion that any mutual defense obligation imposed on the part of the United States should be considered suspended. "It is believed, that [the United States] have an option to consider the operation of the Treaties as suspended, and will have eventually a right to renounce them, if such changes shall take place as can *bona fide* be pronounced *to render* a continuance of the connections, which result from them, disadvantageous or dangerous." *Id.* at 372. While suggesting that a "revolution of Government" might, at least in some circumstances, render a treaty "*voidable*, at the option of the other party," *id.* at 378, Hamilton and Knox contented themselves with arguing that the uncertainty whether the King would be restored in France made suspension the soundest choice for the United States. "Is it not evident, that there must be an option to consider the operation of the alliance [with France] as suspended during the contest concerning the Government[?]" *id.* at 380. Because it was "impossible to foresee what the future Government of France will be," Hamilton and Knox argued, "the right to *renounce* resolves itself of course into a right to *suspend*. The one is a consequence of the other; *applicable* to the *undetermined* state of things. If there be a right to renounce, when the change of Government proves to be of a nature to render an alliance useless or injurious – there must be a right, amidst a pending revolution, to wait to see what change will take place." *Id.* at 385. Or, as Hamilton put it in *Pacificus* No. 1, *supra* at 41, "until the new Government [of France] is *acknowledged*, the treaties between the nations, as far at least as regards *public* rights, are of course suspended."[20]

Although Hamilton's and Knox's argument interweaves questions of domestic and international law with foreign policy concerns, several points emerge. First, they clearly believed that the President had the unilateral constitutional authority to suspend treaties with another nation. Indeed, the members of President Washington's cabinet agreed unanimously that the President did not have to recall Congress into special session to decide how to respond to the French Revolution's effect on the 1778 Treaties.[21] Second, they argued that this power derived by implication from the President's plenary power to terminate treaties, which itself was not enumerated but was inferred from the grant of executive power over foreign affairs. Third, they believed that changed circumstances – the uncertainty in France's form of government, and the outbreak of a continent-wide European war – justified unilateral suspension of the French treaty. Fourth, they concluded that the President could unilaterally suspend any treaty that threatened the national security, regardless of changed circumstances. It does not appear that any member of the Cabinet, including Secretary of State Thomas Jefferson, challenged either the President's constitutional authority to suspend treaties or the conclusion that the Senate need not be consulted. *Id.* at 337-41.[22]

---

[20] President Washington did not suspend or renounce the treaties with France, which remained in effect until "abrogated" by Congress in the Act of July 7, 1798, ch. 67, 1 Stat 578. *See Hooper v. United States*, 22 Ct. Cl. 408, 425 (1887); *The Brig William*, 23 Ct. Cl. 201 (1888). *But see Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 272 (1817) (treaty terminated for domestic purposes only).

[21] *See* Stanley Elkins & Eric McKitrick, *The Age of Federalism* 337 (1993).

[22] In a later phase of the debates over the Franco-American Treaty and the Neutrality Proclamation, James Madison took the view, in opposition to Hamilton's, that the President had no "more right to suspend the operation of a treaty in force as a law, than to suspend the operation of any other law." Madison, *Helvidius* No. 3, *supra*, at 99. Madison did not attempt to specify, however, what governmental bodies did, in his opinion, possess the power to suspend a treaty. Madison's view depended in part on the assumption – rejected in later constitutional law and practice – that the recognition of a foreign government was not a discretionary act within the President's power, but only a question of fact. *See id.* at 101.

Later practice by the United States confirms that the President has the constitutional power to suspend a treaty unilaterally. We begin with examples of complete suspension; we then consider examples of partial suspension. We conclude this Part by referring to our Office's past views.

Complete Suspension. In 1939, President Franklin Roosevelt suspended the operation of the London Naval Treaty of 1936, U.S.T.S. 919, 50 Stat. 1363, 184 L.N.T.S. 115. "The war in Europe had caused several contracting parties to suspend the treaty, for the obvious reason that it was impossible to limit naval armaments. The notice of termination was therefore grounded on changed circumstances." Adler, *supra,* at 187.[23] On August 9, 1941, President Roosevelt unilaterally suspended, for the duration of the emergency created by the Second World War, the International Load Line Convention, 47 Stat. 2228 et seq., a multilateral agreement that established comprehensive limits to which vessels could be loaded for international voyages. *See* 14 Marjorie Whiteman, *Digest of International Law,* 485 (1970). Acting Attorney General Biddle concluded that neither the approval of the Senate nor the Congress was required for treaty suspension. *International Load Line Convention*, 40 Op. Att'y Gen. at 123. In Biddle's view, if the treaty is not to be "denounc[ed]" or "otherwise abrogated," then "action by the Senate or by the Congress is not required." *Id.*[24] The President could unilaterally suspend the International Load Line Convention in wartime because the peacetime "[c]onditions essential to the operation of the convention, and assumed as a basis for it, are in almost complete abeyance." *Id.* at 120. Of course, at this time the United States was not at war; rather, President Roosevelt was suspending the agreement because of changed circumstances created by the war in Europe.

Another example of complete Presidential suspension concerned the U.S.-Cuba Convention on Commercial Relations, entered into force Dec. 27, 1903, 6 Charles I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776-1949* at 1106 (1971). The Senate had advised and consented to this Convention in 1903, and Congress had later implemented it legislatively. On October 30, 1947, President Truman entered into an executive agreement with Cuba suspending the Convention and declaring that it would be "inoperative" so long as the two countries remained parties to the General Agreement on Tariffs and Trade. Bevans, *supra,* at 1229, 61 Stat. 3699. Neither the suspension nor the executive agreement was submitted to the Senate or Congress for approval. *See* Adler, *supra*, at 189-90.

Partial Suspension. On June 20, 1876, President Grant informed Congress that he was suspending the extradition clause of the 1842 "Webster-Ashburton Treaty" with Great Britain, Convention as to Boundaries, Suppression of Slave Trade and Extradition, Aug. 9, 1842, U.S.-Gr. Brit., Art 10, 8 Stat. 572, 579. Grant advised Congress that the release of two fugitives whose extradition was sought by the United States amounted to the abrogation or annulment of the extradition clause, and that the executive branch in response would take no action to surrender fugitives sought by the British Government unless Congress signified that it do so. The clause remained suspended until it was reactivated by the British Government's resumed performance.

---

[23] Suspension was in this case by notice, pursuant to provisions of the treaty permitting suspension of the treaty. *See* 14 Marjorie M. Whiteman, *Digest of International Law,* 416-17 (1970); *see also* Emerson, *supra* n. 9, at 61.

[24] Acting Attorney General Biddle appears to have thought that congressional sanction was needed for treaty termination. But that was not the question to which his opinion was addressed. Nor does it reflect the later views of the executive branch.

See Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher,* 34 Va. J. Int'l L. 71, 125-30 (1993).[25]

A recent and significant example of partial treaty suspension occurred during the presidency of Ronald Reagan. In 1986, the United States suspended the performance of its security obligations under the 1952 "ANZUS Pact," Security Treaty Between Australia, New Zealand and the United States, 3 U.S.T. 3420, as to New Zealand but not as to Australia. *See* I Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law 1981-1988* at 1279-81. President Reagan's decision came in response to New Zealand's refusal of visitation rights to the *U.S.S. Buchanan*, unless the Navy disclosed whether the vessel was nuclear-powered (which the Navy declined to do). The United States treated this as a material breach of New Zealand's obligations under the ANZUS Treaty and suspended performance of our security obligations towards New Zealand. The suspension was only a partial suspension, because the security aspects of the Treaty in regard to Australia, the third ANZUS Pact partner, were left unaffected. Again, the President acted without the consent of either the entire Congress or the Senate. Indeed, "no senator has questioned the legality of the executive's suspension of aspects of the ANZUS Treaty." Gary Harrington, *International Agreements: United States Suspension of Security Obligations Toward New Zealand,* 28 Harv. Int'l L. J. 139, 145 n.23 (1987).[26]

<u>*OLC Precedent.*</u> Our Office has taken the position that the President has the unilateral power to suspend treaties. In commenting on proposed legislation that would have required the President to submit the multilateralization of the ABM Treaty to the Senate for advice and consent, we advised that the President had the power to decide unilaterally whether or not to suspend a treaty. "The responsibility to interpret and carry out a treaty necessarily includes the power to determine whether, and how far, the treaty remains in force. . . . Cases both before and after *Charlton v. Kelly*, [229 U.S. 447 (1913),] regard the Executive's views as determining whether and to what extent treaties remain in effect. [Citations omitted.] Hence, '[u]nder the law of the United States, the President has the power . . . to elect in a particular case not to suspend or terminate' a treaty." 1996 Dellinger Memo at 4 (citation omitted) (alterations in original) (quoting *Restatement (Third), supra,* at § 339(c)).

V. <u>*Partial Suspension Contrasted With Treaty Amendment*</u>

Critics might argue that the suspension of certain provisions of the ABM Treaty – especially if coupled with a corresponding, agreed-upon suspension of that provision by the Russian

---

[25] Even those who deny that the President has the unilateral power to terminate treaties recognize this episode as a precedent for a unilateral power to suspend them. *See* Emerson, *supra* n.9, at 56 ("[T]his is a precedent for Presidential authority to consider a breach of a treaty by the other party as having suspended it by making enforcement impossible, subject to correction of the President's judgment by Congress").

[26] The State Department has advised us of another recent example of the unilateral executive suspension of treaties in part. The case involved the suspension, as to Hong Kong alone, of the 1986 U.S.-U.K. Supplementary Extradition Treaty. *See* Extradition Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, entered into force Dec. 23, 1986, T.I.A.S. No. 12050. Hong Kong, then a British territory, was scheduled to revert to the People's Republic of China, and arrangements affecting future extradition to and from Hong Kong were still being negotiated between the British and Chinese governments. Accordingly, on December 31, 1987, both governments exchanged notes temporarily suspending the operation of the treaty as to Hong Kong until January 1, 1988, but leaving other covered British territory unaffected.

Federation – was effectively an amendment to the ABM Treaty, and hence that Senate advice and consent to such a measure was required. The Supreme Court held at an early date that "the obligations of [a] treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority." *The Amiable Isabella,* 19 U.S. (6 Wheat.) 1, 75 (1821) (Story, J.). That language certainly suggests that a treaty amendment must be submitted to the Senate. The State Department has also upon occasion taken the view that "a treaty to which the United States is a party cannot be modified except by an instrument brought into force through the treaty processes" (though it has also said that "the effect of modification may be achieved in some instances by a waiver of rights under a treaty or a failure to invoke the treaty in circumstances where it could be invoked"). Whiteman, *supra,* at 441. Furthermore, Article XV of the ABM Treaty authorizes each Party to propose amendments to the Treaty, which if agreed upon "shall enter into force in accordance with the procedures governing the entry into force of this Treaty." 23 U.S.T. at 3445. Because the ABM Treaty was subject to Senate approval, it would seem to follow that an amendment to the treaty must also be submitted to the Senate. Moreover, one could argue that even if the President had the constitutional authority to suspend a treaty *as a whole*, he need not therefore have the authority to suspend a material part of it. A treaty is naturally regarded as an integrated bargain, in which one party may have accepted one provision in exchange for another party's accepting a different provision. The Senate might not have approved a treaty unless it assumed that the treaty would stand or fall as a whole.

We do not disagree that an *amendment* to a Senate-approved treaty – in the sense explained below -- must be submitted to the Senate, exactly as the underlying treaty was. But the partial suspension of a treaty is clearly distinct from an amendment to it, and the power of partial suspension, like that of complete suspension, rests with the President.

An "amendment" to a treaty, like an amendment to the Constitution or to an Act of Congress, is a change in the text of a legal document. Any such textual change must be carried out in accordance with prescribed procedures (often the same procedures for adopting the original text). But partial "suspension" of a treaty leaves the text of the treaty unaltered, and does not vary the legal rights or obligations created by the text as a matter of international law. The treaty provision still exists. Suspension merely signifies a party's expressed intention not to perform some or all of its obligations, or not to assert some or all of its rights, under the treaty, for a period or until some condition is met. The treaty is capable of being revived after having been suspended, and need not at that point be renegotiated by the President, resubmitted to the Senate, and proclaimed once more by the President. So, for example, a state of war may suspend but not terminate a treaty, and the return of peace may cause the treaty to revive.[27]

Partial suspension by the President, like presidential treaty termination, in no way violates the Supremacy Clause, U.S. Const. art. VI, § 2. A critic might analogize suspension of a treaty provision to suspension of a statute, which generally is outside the powers of the executive due

[27] Treaties may be suspended, among other ways, by a declared war. *See Valk v. United States,* 29 Ct. Cl. 62, 67 (1894) ("war supersedes treaties of peace and friendship"), *aff'd,* 168 U.S. 703 (1897); Brien Hallett, *The Lost Art of Declaring War* 87 (1998); *cf. Matthews v. McStea*, 91 U.S. (1 Otto) 7 (1875) (state of civil war recognized by President could suspend commercial intercourse between belligerents). The return of peace may revive them. *See, e.g., In re Lo Dolce,* 106 F. Supp. 455, 458 (W.D.N.Y. 1952).

to the Take Care Clause, U.S. Const. art. II, § 3. But, as we have argued above, treaties do not automatically receive the same treatment as a constitutional provision or an Act of Congress. Treaties, for example, do not generate private causes of action, but instead are often non-self-executing. Because of his enhanced constitutional position in foreign affairs, the President has greater authority over treaties. The President, for example, can wholly terminate a treaty, which he cannot do in regard to a statute. Therefore, presidential power to suspend a treaty provision does not undermine the Supremacy Clause.[28]

Moreover, longstanding constitutional practice makes it clear that not every substantial modification of the United States' treaty rights and obligations counts as an "amendment" that has to be referred to the Senate for approval. "[T]he President can interpret the meaning of treaties by the mere exchange of diplomatic notes. . . . Moreover, there have been instances in which a President, 'acting through the Secretary of State, has tacitly acquiesced in action by foreign Governments which had the effect of modifying stipulations in our treaties.'" Robert A. Friedlander, *Separating the Powers: Constitutional Principles and the Treaty Process*, 16 Okla. City U. L. Rev. 257, 260-61 (1991) (citations and footnotes omitted). Were it to become effective, the 1997 MOU on succession to the ABM Treaty would surely represent a substantial modification of what had been merely a bilateral treaty. Indeed, one might see the multilateralization of what had previously been a bilateral agreement as a greater threat to the Senate's role in the treaty process than the suspension of a provision of the bilateral agreement. The 1997 MOU could have been entered into as a "sole" executive agreement based on the President's constitutional powers to apply and execute treaties and to recognize foreign governments. *See* 1996 Dellinger Memo. As a constitutional matter, the Clinton Administration could have refused to submit the MOU to the Senate because it was not a treaty amendment, although the MOU could have resulted in substantive changes in the United States' obligations under the ABM Treaty.

Again, the Supreme Court held in *Charlton,* 229 U.S. at 473, that if a partner to a treaty commits a material breach, the President has the option whether to void the treaty or to overlook

---

[28] Presidential suspension of a treaty (unlike treaty amendment) bears some resemblance to prosecutorial discretion, or an executive decision not to enforce a law. Presidents have declined enforcement for a variety of reasons, *e.g.*, because they considered a statutory provision unconstitutional, or because they determined that scarce resources were better used for other law enforcement activities, or because bringing a prosecution in particular cases would be harsh or unfair. It is well established that the Executive has substantial latitude in setting law enforcement priorities, allocating personnel and resources, and deciding whether to investigate or prosecute particular cases. "[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a discretion generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). "[T]he capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.' . . . [A] prosecutor can decline to charge [or] offer a plea bargain . . . in any particular case." *McCleskey v. Kemp*, 481 U.S. 279, 311-12 (1987) (citation omitted); *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 128 (1984). But a Presidential decision not to enforce a law does not, of course, amend the law; the law remains unchanged and in effect. Similarly, a Presidential suspension of a treaty does not amend the treaty. And just as Congressional action is not necessary when the President exercises his discretion not to enforce a law, so Senate approval is not necessary for a treaty suspension.

the breach and regard the treaty merely as voidable. *See also The Nereide,* 13 U.S. (9 Cr.) 388, 422 (1815) (decision whether to reciprocate treaty violation is a "political" measure "for the consideration of the government not of its Courts"). Acquiescing in a treaty partner's material violations while continuing to perform our own may well amount to a substantive modification of the treaty. Thus, had President Grant acquiesced in the British Government's refusal to extradite fugitives in accordance with the provisions (as the United States read them) of the Webster-Ashburton Treaty, the terms of that treaty would functionally have been remade. Similarly, had President Reagan acquiesced in New Zealand's refusal to permit nuclear-powered U.S. Navy vessels to dock in its ports, the ANZUS Pact would in practical effect have undergone substantive modification. Yet both Presidents unquestionably had the power to let such breaches stand and not to declare the treaties void because of them, without having to seek the Senate's approval.

Accordingly, we do not think that a partial suspension of the ABM Treaty should be considered a treaty "amendment" that is subject to Senate advice and consent.

Please let us know if we can be of further assistance.