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### Rejoining Treaties

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REJOINING TREATIES

*Jean Galbraith\**

*Historical practice supports the conclusion that the President can unilaterally withdraw the United States from treaties which an earlier President joined with the advice and consent of two-thirds of the Senate, at least as long as this withdrawal is consistent with international law. This Article considers a further question that to date is deeply underexplored. This is: does the original Senate resolution of advice and consent to a treaty remain effective even after a President has withdrawn the United States from a treaty? I argue that the answer to this question is yes, except in certain limited circumstances. This answer in turn has important consequences. It means that, as a matter of U.S. domestic law, a future President can rejoin treaties without needing to return to the Senate for advice and consent. The Article concludes by situating this claim within a broader account of the distribution of foreign affairs powers.*

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This Article focuses on a single doctrinal question: what domestic legal process is necessary for the United States to *rejoin* a treaty from which it has been unilaterally withdrawn by the President? More specifically, may a President seeking to rejoin a treaty do so in reliance of the original resolution of advice and consent passed by the Senate, or must he or she return to the Senate for a second resolution?

This is a question that has received no sustained attention in scholarship or in practice. This itself is a cause for celebration, a reflection of the fact that unilateral treaty withdrawals by Presidents historically have been rare and usually well-founded. It was controversial when President Carter unilaterally withdrew the United States from its mutual defense treaty with Taiwan, but his successor quickly came to recognize the value of normalized relations with mainland China.<sup>1</sup>

Since coming to office, President Trump has pursued a policy of international disengagement on many fronts. To date, he has focused mainly on rolling back international commitments made by President Obama which the United States had joined not as “treaties” in the constitutional sense of the word, but rather through other constitutional pathways.<sup>2</sup> Yet he and his administration have also shown a willingness to terminate treaties—legal instruments that received the advice and

<sup>1</sup> Compare Carter’s Vow on Taiwan Is Demanded by Reagan, *N.Y. Times* (Feb. 11, 1979), <https://perma.cc/MB97-MVMN> (describing Ronald Reagan’s expressed support for a lawsuit challenging this withdrawal in 1979), with Katharine Macdonald & Robert G. Kaiser, Reagan Declares He Seeks Only To Hold to Taiwan Relations Act, *Wash. Post* (Aug. 26, 1980), <https://perma.cc/6FXF-TCHB> (describing Reagan’s shift during his campaign to a commitment that he “would not try to fundamentally alter the U.S. relationship with Peking or Taiwan”).

<sup>2</sup> E.g., Stephen P. Mulligan, Cong. Research Serv., R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement* 17–23 (2018), <https://perma.cc/3Y4K-NB8D> (describing President Trump’s withdrawal from the Iran nuclear deal and his announced future withdrawal from the Paris Agreement on climate). For a discussion of the alternative pathways that exist under U.S. domestic law for joining international commitments, see Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 *U. Chi. L. Rev.* 1675, 1684–97 (2017).

consent of two-thirds of the Senate and thus commanded, at least at one point in history, strong bipartisan support.<sup>3</sup> Specifically:

- News reporting early in the Trump administration indicated that it planned to conduct a widespread review of all multi-lateral treaties other than those “directly related to national security, extradition, or international trade” in order to assess “whether the United States should continue to be a party . . . .”<sup>4</sup>
- In October 2018, the Trump administration announced the immediate or planned U.S. withdrawal from three treaties: the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes; the Treaty of Amity, Economic Relations, and Consular Rights with Iran; and the Intermediate-Range Nuclear Forces (INF) Treaty with Russia and other former Soviet Republics.<sup>5</sup>
- In remarks related to two of these withdrawals, then-National Security Advisor John Bolton signaled that the Trump administration would more generally consider withdrawing from treaties or treaty provisions in which the United States had consented to the jurisdiction of the International Court of Justice.<sup>6</sup>

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<sup>3</sup> Here and throughout this Article, I use “treaty” and “treaties” to refer to international agreements for which the advice and consent of two-thirds of the Senate is being sought or has been obtained. See Restatement (Fourth) of Foreign Relations Law pt. 3, intro. note (Am. Law Inst. 2018) (“In U.S. domestic law, . . . the term ‘treaties’ refers . . . to international agreements concluded by the President with the advice and consent of two-thirds of the Senate.”).

<sup>4</sup> Read the Trump Administration’s Draft of the Executive Order on Treaties, Wash. Post, <https://perma.cc/B555-4VXG> (posting a leaked draft of an executive order under consideration that contained this language); see also Max Fisher, Trump Prepares Orders Aiming at Global Funding and Treaties, N.Y. Times (Jan. 25, 2017), <https://perma.cc/REE9-GPQ9> (reporting on the draft executive order).

<sup>5</sup> Contemporary Practice of the United States Relating to International Law, Trump Administration Announces Withdrawal from Four International Agreements, 113 Am. J. Int’l L. 132, 132 (Jean Galbraith ed., 2019); Contemporary Practice of the United States Relating to International Law, United States Initiates Withdrawal from Intermediate-Range Nuclear Forces Treaty, 113 Am. J. Int’l L. 631, 632 n.5 (Jean Galbraith ed., 2019).

<sup>6</sup> Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor, White House (Oct. 3, 2018), <https://perma.cc/D99Y-X4AW>.

- President Trump has repeatedly expressed doubts about NATO and has indicated some interest in withdrawing from the North Atlantic Treaty which underlies it.<sup>7</sup>

As a matter of U.S. domestic law, the executive branch considers itself authorized to withdraw from treaties without receiving explicit approval to do so from Congress or the Senate, at least provided that the withdrawal is consistent with international law. Although his position has never received the explicit blessing of the U.S. Supreme Court, it is now well-grounded in executive branch practice and it has been accepted both by the *Restatement (Third)* and the recent *Restatement (Fourth) of Foreign Relations Law*.<sup>8</sup> The prospect of landmark treaties being terminated at the whim of President Trump has motivated some scholarly reexamination of this issue.<sup>9</sup> But requiring the explicit approval of Congress or two-thirds of the Senate for treaty withdrawal raises its own normative concerns and in any event is an uphill argument in light of past practice. And unless and until such a claim succeeds with the courts (or Congress explicitly legislates to block termination), President Trump and his successors will continue to possess the putative power of treaty withdrawal.

This Article therefore focuses on the issue of *rejoining treaties*. The more polarized the office of the Presidency becomes—and the more it is held by individuals who act based on caprice rather than expertise—the greater the likelihood there is that one President will withdraw from treaties that a later President will wish to rejoin. Such rejoining would

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<sup>7</sup> See, e.g., The President's News Conference with Prime Minister Theresa May of the United Kingdom in Buckinghamshire, United Kingdom, 2018, Daily Comp. Pres. Doc. No. DCPD-201800483, at 6 (July 13, 2018) ("NATO is really there for Europe, much more so than us. It helps Europe whether—no matter what our military people or your military people say, it helps Europe more than it helps us."); Julian E. Barnes & Helene Cooper, Trump Discussed Pulling U.S. from NATO, Aides Say Amid New Concerns over Russia, N.Y. Times (Jan. 14, 2019), <https://perma.cc/S8TP-59V3> (reporting that President Trump has privately expressed interest in withdrawing from NATO on multiple occasions).

<sup>8</sup> Restatement (Third) of Foreign Relations Law § 339 (Am. Law Inst. 1987); Restatement (Fourth) of Foreign Relations Law § 313 (Am. Law Inst. 2018). In *Goldwater v. Carter*, the Supreme Court deemed nonjusticiable the question of whether President Carter could terminate the mutual defense treaty with Taiwan in a manner consistent with its termination clause but without approval from two-thirds of the Senate or from Congress. 444 U.S. 996, 1002 (1979) (plurality opinion) (finding that the case posed a political question); *id.* at 997 (Powell, J., concurring in judgment) (viewing the case to be unripe).

<sup>9</sup> E.g., Harold Hongju Koh, Presidential Power to Terminate International Agreements, 128 Yale L.J. F. 432, 435 (2018).

have to be not only feasible at the international level (i.e., consistent with international law and receiving any necessary approval from treaty partners), but also legal as a matter of domestic law.

This Article is not the first piece to consider the issue of the process for rejoining treaties. Back in 1986, for example, shortly after President Reagan withdrew the United States from the general jurisdiction of the International Court of Justice, a student comment on the subject stated without analysis that rejoining “would be contingent on the advice and consent of the Senate.”<sup>10</sup> More recently and more significantly, a former leading practitioner for the State Department in the climate context, Sue Biniiaz, sketched out some thoughts about the legal process for rejoining in a conference thought paper. Raising the possibility that President Trump might withdraw from the U.N. Framework Convention on Climate Change, she floated the idea that “a new Administration [could] take the position that the Senate’s original resolution of advice and consent had not expired and, as such, the President was free to [resubmit] an instrument of ratification.”<sup>11</sup> Yet while the idea of rejoining treaties is not new to this paper, it is a subject that to date has not received sustained scholarly treatment, unlike the issue of treaty withdrawal.

There are three ways by which the President might rejoin a treaty as a matter of domestic law. One obviously lawful way would be to go back to the Senate for another round of advice and consent by a supermajority. But getting treaties through the Senate has always been challenging and is now even harder than it used to be, due both to increased partisanship and to changed procedural norms. Indeed, from 2001 through 2010, the Senate advised and consented to only *one* treaty where there were *any* recorded dissenting votes.<sup>12</sup> To require another round of Senate advice and consent to rejoin treaties would cause such rejoining to range from challenging to effectively impossible.

A second option would be to rejoin the international agreement not as a treaty but rather through some other domestic process. U.S. constitutional practice has developed several domestic pathways distinct

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<sup>10</sup> Douglas J. Ende, Comment, Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration, 61 Wash. L. Rev. 1145, 1162 n.117 (1986).

<sup>11</sup> Susan Biniiaz, U.S. Intent to Withdraw from the Paris Agreement: A Round-up of Interesting Legal Issues that Either Arose or *Might* Have Arisen 8 (unpublished paper from the 2017 Duke-Yale Foreign Relations Law Roundtable, on file with author); see also *id.* at 8–9 (elaborating on this point).

<sup>12</sup> Jean Galbraith, Prospective Advice and Consent, 37 Yale J. Int’l L. 247, 287 (2012).

from that set out in the Treaty Clause by which the United States can join international agreements.<sup>13</sup> Some important agreements are made by the executive branch without specific legislative approval, such as President Obama's decision to join the United States to the Paris Agreement on climate.<sup>14</sup> Others, such as most major trade agreements, receive specific approval from Congress.<sup>15</sup> There is considerable uncertainty about the extent to which the uses of these other pathways are constitutionally permissible. Accordingly, these alternative pathways might be available as a matter of law for some or even all international agreements which the United States initially joined as treaties but later withdrew from based on unilateral presidential action.<sup>16</sup> Even if lawful, however, rebranding a former treaty as an agreement that could be joined in a manner akin to the Paris Agreement rather than as an Article II treaty would likely raise procedural concerns within the State Department, face congressional pushback, and potentially complicate the agreement's implementation. Going to Congress for statutory approval prior to rejoining would reduce concerns about legality and implementation. But obtaining such approval would likely prove difficult as a matter of legislative process, particularly if the shift from treaty to congressional-executive agreement triggered resistance from the Senate Foreign Relations Committee.

The third option, whose legality and availability are the focus of this Article, would be to treat the Senate's pre-existing resolution of advice and consent as still operative. The President could therefore rejoin the international agreement as a *treaty*, but without having to go again to the Senate for advice and consent. This approach would presumptively put rejoining on equal footing with withdrawing in terms of the domestic legal process. The presumption would be overcome, however, if rejoining would be inconsistent with the language of the original resolution, with any modifications to this resolution made by two-thirds of the Senate, or with an intervening congressional statute. The President's ability to rejoin

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<sup>13</sup> For an overview of these kinds of agreements, see Galbraith, *supra* note 2, at 1684–97.

<sup>14</sup> See *id.* at 1731–43 (analyzing the process by which the United States joined the Paris Agreement and discussing the extent to which this process contained constraints on executive power).

<sup>15</sup> *Id.* at 1703, 1727 (noting that the success of this process relies heavily on pre-existing legislation that ensures an up-and-down congressional vote for trade agreements).

<sup>16</sup> This is a complex issue even for entirely new international agreements and would be even more complicated with respect to the rejoining of international agreements previously made as treaties. In those cases, it would present the further question of whether the initial treatment of the agreement as a “treaty” might limit the availability of other options as a matter of law.

the treaty would also be contingent on this being an available option at the international level.

The doctrinal basis for treating original Senate resolutions of advice and consent as still operative rests on these resolutions' text, on broader constitutional practice, and on structural principles. As a textual matter, while the Senate often puts substantial conditions into its resolutions of advice and consent, it typically does not include language that renders them ineffective for purposes of rejoining. As a matter of constitutional practice, while there is no specific practice on point for the issue of rejoining, two related strands suggest that the original resolutions should be taken to remain operative. First, these resolutions are already understood to remain operative well after the end of the Senate session in which they are passed, as the executive branch often does not ratify treaties until years after the Senate's advice and consent has been given. Second, with respect to international agreements other than treaties that rely on some form of congressional authorization, the executive branch has used pre-existing authorizations as a basis for rejoining such agreements following withdrawal. In 2003, for example, President George W. Bush rejoined the United States to UNESCO (from which President Reagan had withdrawn the United States) in apparent reliance on the statutory authorization that has justified the *initial* U.S. entry into UNESCO many years earlier.<sup>17</sup> Finally, as a structural principle, treating original Senate resolutions of advice and consent as remaining effective prevents the President from being singlehandedly able, through withdrawal, to undo the actions of a coordinate branch. It is one thing for the President to be able to withdraw the United States unilaterally from a treaty—after all, the President has unilateral discretion over whether to ratify the treaty. It is quite another thing for the President thereby to effectively erase a Senate resolution, unless the Senate or Congress expressly authorized this result.

The claim that a President can rely on the initial resolution of advice and consent to rejoin a treaty fits into a broader framework for the distribution of foreign affairs powers. Foreign relations law rests in an uneasy space between contrasts—foreign and domestic, congressional and presidential, flexible and constrained. A long-standing strand of scholarship raises concerns about the rise of presidential power and about

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<sup>17</sup> See Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 *Duke L.J.* 1615, 1639 (2018) (describing the withdrawal from UNESCO by the Reagan administration and its rejoining by the George W. Bush administration).



the implications of this rise for U.S. international engagement.<sup>18</sup> The approach advocated for here in some ways both advances presidential power and brings uncertainty to international law. It advances presidential power by advocating an understanding of Senate resolutions that gives the President the power to treat them as ongoing authorizations, and it brings uncertainty by creating a pathway whereby presidents can zig-zag their way through treaties, if they so choose. In other ways, however, the approach advocated for here both serves as a check on presidential power and a mechanism for continuing international engagement on the part of the United States. For a legal framework in which the President can unilaterally withdraw from a treaty but not unilaterally rejoin it would be a legal framework that puts a heavy thumb on the scale against international engagement and that limits rebalancing by a future President. The approach advocated for here, by contrast, relies on a broader, developing alignment between U.S. foreign relations law and U.S. administrative law. In both cases, the executive branch wields considerable power, but in both cases the decisions of one administration can be revisited by another administration and thus are subject to the long-term checks of democracy.

In terms of structure, this Article has three parts. Part I is descriptive, identifying existing law and practice with respect to treaty formation and withdrawal. Part II is the core of the Article. It elaborates on and defends the doctrinal argument sketched above with respect to treaty rejoining. It argues that Senate resolutions of advice and consent can constitutionally authorize rejoining and, as a matter of their interpretation, should presumptively be read to do so. It also discusses limitations stemming from domestic law, international law, and international relations that might prevent rejoining with respect to particular treaties. Finally, it assesses the practical effect of a presidential power to rejoin treaties and emphasizes that this power is much more likely to be workable with respect to multilateral treaties which are open broadly to membership than with respect to bilateral treaties, which cannot be re-established without the consent of the other nation. Part III situates the doctrinal argument made in Part II within a broader theory of the constitutional distribution of foreign affairs powers.

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<sup>18</sup> For a recent and important piece in this vein, see Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 *Harv. L. Rev.* 1201 (2018).

## I. TREATY FORMATION AND WITHDRAWAL

To rejoin a treaty, the United States must first have joined and left it. In this Part, I describe the substantial U.S. law and practice that exists with respect to the formation of treaties and the more meager law and practice that exists with respect to withdrawal. The concepts set forth here are foundational for understanding how the United States might rejoin a treaty.

*A. Formation*

The Constitution's Treaty Clause provides that 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>19</sup> In the years since the Framing, the political branches have developed a set of practices for treaty-making based partly on this sparse text, partly on international legal practice, and partly on their own process choices.

The formation of most treaties involves five stages in the following order: international *negotiation* by the executive branch, *signature* by the President or an authorized executive branch official, *advice and consent* by two-thirds of the Senate, *ratification* by the President or an authorized executive branch official, and finally *entry into force* as a legally binding instrument.<sup>20</sup> (I defer discussion of a further important issue—treaty implementation—until later in this Article.<sup>21</sup>) Negotiation, signature, ratification, and entry into force all take place on the international plane, involve international counterparts, and are subject to the ground rules of

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<sup>19</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>20</sup> See Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate* 6–12, 97–156 (2001) [hereinafter CRS Report for the Senate Foreign Relations Committee] (providing an extensive discussion of these processes). There has been plenty of variation throughout history, including situations where the Senate has called for the initiation of negotiations, see *id.* at 100–01; where members of Congress have been among those signing a treaty, see *id.* at 111; where the international process for treaty approval is not ratification in the technical sense but rather some variant like accession, see *id.* at 147; and even some instances where the Senate's advice and consent has preceded the conclusion of negotiations, see Galbraith, *supra* note 12, at 261–63, 271–73. I return to the distinction between ratification and accession later in this Article. See *infra* Subsection II.B.2.

<sup>21</sup> See *infra* Subsection II.B.3.

international law.<sup>22</sup> By contrast, the Senate's advice and consent is a purely domestic legal procedure.<sup>23</sup>

In giving advice and consent, the Senate's typical practice is to pass a resolution that states: "*Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of*" the treaty in question.<sup>24</sup> Sometimes the Senate attaches additional qualifications—reservations, understandings, declarations, and conditions—as part of its resolution of ratification.<sup>25</sup> These qualifications are understood to be intrinsic parts of the Senate's consent, such that the President can only proceed to ratification pursuant to their terms.<sup>26</sup>

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<sup>22</sup> The Vienna Convention on the Law of Treaties sets forth these ground rules. See generally Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 332 (stating that disputes over treaties should be settled in conformity with international law principles). While the United States is not a party to the Vienna Convention, it "considers many of the provisions of the Vienna Convention . . . to constitute customary international law on the law of treaties." U.S. Dep't of State, Frequently Asked Questions, Vienna Convention on the Law of Treaties, <https://perma.cc/3AHS-UBTE>.

<sup>23</sup> The Vienna Convention does not discuss what domestic legal procedures are needed as a precursor to ratification, and it makes clear that, as a matter of international law, a nation's consent to a treaty is presumptively valid even if that nation has failed to follow its domestic legal procedures. Vienna Convention on the Law of Treaties, *supra* note 22, art. 46 (noting an exception if the failure to follow domestic legal procedures "concerned a rule of its internal law of fundamental importance" and "would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith").

<sup>24</sup> E.g., S. Exec. Journal, 89th Congress, 1st Sess. 824 (1965) (using this format to provide advice and consent to the Vienna Convention on Diplomatic Relations, together with its Optional Protocol); see also CRS Report for the Senate Foreign Relations Committee, *supra* note 20, at 123 (noting that this is the usual form of such resolutions).

<sup>25</sup> E.g., S. Exec. Journal, 100th Cong., 2d Sess. 366–70 (1988) (providing the Senate's advice and consent to the Intermediate-Range Nuclear Forces Treaty subject to various conditions, understandings, and declarations); see also CRS Report for the Senate Foreign Relations Committee, *supra* note 20, at 124–36 (discussing practice in this regard).

<sup>26</sup> See Restatement (Fourth) of Foreign Relations Law § 305 cmt. d (Am. Law Inst. 2018) ("If the President does proceed to ratify the treaty, he or she is deemed to have accepted any conditions that the Senate has included with its advice and consent that relate to the treaty and are not inconsistent with the Constitution."); see also Restatement (Third) of Foreign Relations § 303 cmt. d (Am. Law Inst. 1987) ("But a condition having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper, and if the President proceeds to make the treaty he is bound by the condition."); *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring in judgment) ("If [conditions given by the Senate] are not agreed to by the President, his only constitutionally permissible course is to decline to ratify the treaty . . ."); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 403 (2000) ("[R]egardless of the legality of [reservations, understandings, and declarations] under international law, they are valid under domestic constitutional law . . .").

Four features of the treaty formation process are especially noteworthy for purposes of this Article. First, the stages of treaty formation are not subject to time limits as a matter of constitutional text or practice.<sup>27</sup> Often these stages happen in close temporal proximity, but sometimes years or even decades pass between them. In a recent article, Saikrishna Prakash has questioned the constitutionality of these time lags, but he acknowledges their apparent endlessness as a matter of practice.<sup>28</sup> The Vienna Convention on Diplomatic Relations and its Optional Protocol, for example, were signed during the Kennedy administration in 1961, advised and consented to by the Senate in 1965 during the Johnson administration, and ratified by the United States in 1972 during the Nixon administration.<sup>29</sup> The Genocide Convention took over thirty-seven years from signature to the Senate's advice and consent.<sup>30</sup> Four treaties relating

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<sup>27</sup> By contrast, the Constitution contains a timing rule for the passage of statutes. See U.S. Const. art. I, § 7, cl. 2 (providing that if “any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law”).

<sup>28</sup> Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 Harv. L. Rev. 1220, 1248 (2019) (“Although one cannot say for certain, it seems as if there is no limit on when, after Senate consent, the President may sign a ratification instrument.”); cf. *id.* at 1285 (arguing that the Senate’s advice and consent should be deemed to expire if much longer than seven years passes between the Senate resolution and ratification). Prakash’s argument for limited time frames turns on the view that “[o]ne crucial element of majority rule is the requirement that those in favor of some proposition—be it a bill, constitutional amendment, or some candidate—actually constitute a majority at a *given moment in time*.” *Id.* at 1224. He infers this position from structural premises about democracy, while saying relatively little about the fact that the two processes whose current timing rules he most criticizes—treaty-making and constitutional amendments—are non-democratic in the sense that they require heavy supermajorities. See *id.* (not addressing this issue in the overview of his argument); see also *id.* at 1252 (mentioning only in passing that there is a two-thirds requirement for treaties “because the Constitution says as much”). Were Prakash’s approach to be adopted, it would have the effect of making treaty-making and constitutional amendments even more challenging to accomplish. This in turn would be in tension with Prakash’s broader concern about “dead-hand” rule, see *id.* at 1224 n.25, as it would make our existing Constitution, laws, and treaties even harder to amend.

<sup>29</sup> See U.N. Treaty Collection, Vienna Convention on Diplomatic Relations 3, <https://perma.cc/56X8-N4WH> (containing depository information); U.N. Treaty Collection, Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes 2, <https://perma.cc/Z75L-EKJR> (containing depository information); see also S. Exec. Journal, 89th Cong., 1st Sess. 824 (1965) (recording that eighty-five senators voted to ratify the Convention and its optional protocol).

<sup>30</sup> 95 Cong. Rec. 7825 (1949) (transmitting the treaty to the Senate for advice and consent and noting that signature occurred on Dec. 11, 1948); 132 Cong. Rec. 2349–50 (1986) (containing the resolution of advice and consent). See generally Lawrence J. LeBlanc, *The*

to nuclear security received the Senate's advice and consent in 2008 but were not ratified until 2015.<sup>31</sup> Another treaty—the Basel Convention on the Transportation of Hazardous Waste—received advice and consent in 1992 and is still a candidate for ratification.<sup>32</sup> And these are just a few of many possible examples.

Second, although timing limits on treaty formation are not constitutionally imposed, as a matter of choice the political branches can adopt them. In the nineteenth century, the executive branch often negotiated deadlines for the international exchange of ratifications into the text of treaties. When these deadlines were missed despite timely advice and consent from the Senate—as happened not infrequently—presidents commonly returned to the Senate for a second round of advice and consent.<sup>33</sup> Separate from these incidents, there is at least one instance where a President chose to return to the Senate for further advice and consent simply because of a long passage of time between the Senate's advice and consent and ratification. This was in 1889, when President Grover Cleveland returned to the Senate for a second round of advice and consent to a naturalization treaty with Turkey. The Senate had initially advised and consented to this treaty in 1875, but the conditions which it

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United States and the Genocide Convention (1991) (describing the laborious efforts to obtain the Senate's advice and consent).

<sup>31</sup> 154 Cong. Rec. 21,775–77 (2008); The White House, Fact Sheet: U.S. Ratification of Nuclear Security Treaties (Apr. 1, 2016), <https://perma.cc/7SHC-KYAD> (noting that these treaties were all ratified in 2015).

<sup>32</sup> U.S. Dep't of State, Basel Convention on Hazardous Wastes Share (Feb. 11, 2019), <https://perma.cc/8GCV-PBMG> (explaining that “before the United States can ratify the Convention, there is a need for additional legislation to provide the necessary statutory authority to implement its requirements.”).

<sup>33</sup> As one example, Spain was late in ratifying the 1819 treaty with the United States regarding the sale of Florida, and President Monroe therefore sought and received a second round of advice and consent from the Senate. See S. Exec. Journal, 15th Cong., 2d Sess. 177–78 (1819) (containing the initial resolution of advice and consent); S. Exec. Journal, 16th Cong., 2d Sess. 242–43 (1821) (containing President Monroe's letter requesting further advice and consent, which explained that “[b]y the sixteenth article of that treaty, it was stipulated, that the ratifications should be exchanged within six months from the day of its signature; which time having elapsed, before the ratification of Spain was given, a copy, and translation thereof, are now transmitted to the Senate, for their advice and consent to receive it in exchange for the ratification of the United States, heretofore executed”); *id.* at 244 (containing the Senate's subsequent advice and consent to ratification). This is one of a fair number of instances of nineteenth-century treaties whose ratifications were exchanged after the deadlines contained in their own text. The usual but not invariable practice was to return to the Senate for further advice and consent. See Samuel B. Crandall, *Treaties, Their Making and Enforcement* 80–82 (Columbia Univ. Political Sci. Faculty eds., 1904) (describing this practice and variations upon it).

had attached to that resolution took Turkey fourteen years to accept.<sup>34</sup> In returning again to the Senate in 1889, Cleveland explained that “in view of the long period that has elapsed since the Senate formerly considered the treaty, I have deemed it wiser that, before proclaiming it, the Senate should have an opportunity to act upon the matter again, my own views being wholly favorable to the proclamation.”<sup>35</sup> This choice was framed on its face as matter of prudence (“I have deemed it wise”) rather than law, and in 1908 the Solicitor for the Department of State took the position regarding a treaty with a similar lapse of time that there was no legal obligation to resubmit it to the Senate.<sup>36</sup>

A third notable feature of the process of treaty formation is that the Senate’s advice and consent has become increasingly hard to obtain. The two-thirds requirement has always been a high bar, effectively requiring bipartisan support. Nonetheless, in the nineteenth and twentieth centuries, many important treaties were able to get through the Senate successfully and in a timely manner. In the last twenty years, however, the difficulties of getting any but the most routine treaties through the Senate have risen starkly, presumably due to the rise of partisanship and the increased willingness of Senators to use procedural rules to block the approval even of treaties that would command a two-thirds majority.<sup>37</sup> In a particularly

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<sup>34</sup> S. Exec. Journal, 50th Cong., 2d Sess. 467 (1889) (containing President Cleveland’s letter of the prior day).

<sup>35</sup> *Id.* The Senate unanimously provided its advice and consent on that same day, *id.* at 469, but subject to a further condition regarding one article in the treaty. See W. Stull Holt, *Treaties Defeated by the Senate* 130–31 (1933) (discussing this incident and noting that “[n]ot to be outdone by the Senate the Turkish Government repeated its former action, or inaction, and seven more years went by before it offered to exchange ratifications. But apparently the Senate’s amendments were not fully accepted by Turkey and the treaty ended its unduly protracted career.”).

<sup>36</sup> 5 Green Haywood Hackworth, *Digest of International Law* 63–64 (1943) (quoting Memorandum of the Solicitor for the Department of State (Scott) of July 30, 1908) (observing that “[s]o far as the legal questions are concerned, it is believed that [ratification without resubmission to the Senate] can be legally done” and noting as precedent that “treaties have heretofore been proclaimed by the President after a lapse from the date of signing of from three to sixteen years, and ratifications have been exchanged after a like lapse of time”). At issue was the potential ratification of an extradition treaty with France which had received the Senate’s advice and consent fifteen years earlier in 1893. *Id.* at 63.

<sup>37</sup> Senator Rand Paul, for example, single-handedly blocked a group of tax treaties for years by withholding his consent to close debate on the treaties (which in turn had the effect of preventing the treaties from receiving a floor vote unless floor debate is held over the treaties). Diane Ring, *When International Tax Agreements Fail at Home: A U.S. Example*, 41 *Brook. J. Int’l L.* 1185, 1197–207 (2016); see also Jim Tankersley, *Senate Approves Tax Treaties for First Time in Decade*, *N.Y. Times* (July 17, 2019), <https://perma.cc/CDJ7-9CHA> (noting that

striking example, the United Nations Convention on the Law of the Sea advanced out of the Senate Foreign Relations Committee *twice* during the George W. Bush administration—unanimously in 2004 and by a 17-4 vote in 2007—but it never received a floor vote.<sup>38</sup> Indeed, between 2001 and 2010, the Senate gave advice and consent to just one treaty where there were any recorded dissenting votes.<sup>39</sup> The challenge of getting treaties through has become so pronounced that Curtis Bradley, Oona Hathaway, and Jack Goldsmith recently observed that “the Article II treaty process may be dying.”<sup>40</sup>

The fourth important feature is that even after the Senate has given its advice and consent, the President has discretion over whether or not to ratify the treaty. Unlike legislation, for which Congress is the primary actor, the Treaty Clause entrusts the leading role of “mak[ing]” treaties to the President.<sup>41</sup> It is rare, to be sure, for a President to decline to ratify a treaty once the Senate’s resolution of advice and consent is in place.<sup>42</sup> But such incidents have happened in practice, and the President’s constitutional discretion over ratification is well-recognized in commentary.<sup>43</sup> Unlike the Presentment Clause applicable to legislation,

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the Senate finally succeeded in advising and consenting to four tax treaties in the summer of 2019).

<sup>38</sup> Galbraith, *supra* note 12, at 302.

<sup>39</sup> See *id.* at 287 (noting only one such treaty, the New START treaty with Russia, from 2001 to 2010).

<sup>40</sup> Curtis Bradley, Oona Hathaway & Jack Goldsmith, *The Death of Article II Treaties?*, *Lawfare* (Dec. 13, 2018, 10:00 AM), <https://perma.cc/27N2-KNFY> (providing further information about the downward trend with respect to treaties).

<sup>41</sup> See U.S. Const. art. II, § 2, cl. 2.

<sup>42</sup> Predictable reasons would include the President’s dissatisfaction with conditions attached to the Senate’s resolution of advice and consent; issues that arise with respect to the other treaty party or parties, such as their resistance to any conditions added by the Senate; and the President’s decision to delay ratification until the passage of implementing legislation.

<sup>43</sup> E.g., Restatement (Fourth) of Foreign Relations Law § 303 (Am. Law Inst. 2018) (“After the Senate provides its advice and consent, the President determines whether to ratify or otherwise make the treaty on behalf of the United States.”); Restatement (Third) of Foreign Relations Law § 303 reporters’ note 3 (Am. Law Inst. 1987) (“The President may decline to make the treaty after the Senate has approved it.”); CRS Report for the Senate Foreign Relations Committee, *supra* note 20, at 152 (observing that “U.S. law does not impose any legal obligation on the President to ratify a treaty after the Senate has given its advice and consent” and noting that “[n]umerous historical examples of Presidential non-ratification have been cited by scholarly sources”); Louis Henkin, *Foreign Affairs and the United States Constitution* 184 (2d ed. 1996) (stating that “[o]nce 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”).

the Treaty Clause does not specify any way for the Senate or Congress to override the President's decision not to ratify a treaty.

### *B. Withdrawal*

The text of the Constitution is silent on what domestic legal process is necessary for treaty withdrawal. We have well-developed standards for determining when withdrawal is consistent with *international law*—such as where this withdrawal follows the process set forth in a withdrawal provision in the treaty itself—but far less guidance about what process is sufficient as a matter of domestic law.<sup>44</sup> May the President unilaterally withdraw the United States from a treaty, or does he or she need the approval of either Congress or two-thirds of the Senate to do so?<sup>45</sup>

Those who think that the approval of Congress or two-thirds of the Senate is required for treaty withdrawal can draw analogies to statutes. While the Constitution contains no provision about statutory termination, our constitutional practice does not authorize the President to terminate statutes as a general rule.<sup>46</sup> As Thomas Jefferson's manual of practice for the Senate stated, "[t]reaties being declared, equally with the laws of the

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<sup>44</sup> The Vienna Convention on the Law of Treaties sets forth situations under which withdrawal is permissible as a matter of international law, including where withdrawal is consistent with the withdrawal clause, Vienna Convention on the Law of Treaties, *supra* note 22, art. 54, where there is no withdrawal clause but sufficient notice is given and either the parties intended a right of withdrawal or such right "may be implied by the nature of the treaty," *id.* art. 56; where there is material breach and certain other circumstances are satisfied, *id.* art. 60; where there is supervening impossibility of performance, *id.* art. 61; or where there is a fundamental change of circumstances, *id.* art. 62. Most treaties contain withdrawal clauses. See Barbara Koremenos, *The Continent of International Law* 124 (2016) (finding that 70% of a sample of international agreements contain withdrawal clauses). See generally Laurence R. Helfer, *Exiting Treaties*, 91 *Va. L. Rev.* 1579 (2005) (discussing the practice of treaty exit under international law).

<sup>45</sup> I do not address the unresolved question of whether the President could withdraw from a treaty in the face of congressional legislation or a condition in the Senate resolution of advice and consent that explicitly barred him or her from doing so. See Restatement (Fourth) of Foreign Relations Law § 313 reporters' note 6 (Am. Law Inst. 2018) (observing that if "treaty termination is a concurrent, rather than exclusive, power, it is possible that it could be limited by the Senate in its advice and consent to a particular treaty, and possibly also by Congress through statute").

<sup>46</sup> *Clinton v. City of New York*, 524 U.S. 417, 438–39 (1998) (observing that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes" and striking down as unconstitutional a statute delegating power to the President to cancel certain portions of a statute after it had become law). See generally David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 *Colum. L. Rev.* 265 (2013) (noting that Congress frequently delegates to the President the authority to waive portions of a statute).



U[nited] States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded.<sup>47</sup> Recently Harold Koh has called for a “commonsense ‘mirror principle,’ whereby absent exceptional circumstances, the degree of congressional participation constitutionally required to exit any particular agreement should mirror the degree of congressional participation that was required to enter that agreement in the first place.”<sup>48</sup> Koh argues that “[a]s a functional matter, an overbroad unilateral executive withdrawal power would not only risk overly hasty, partisan, or parochial withdrawals by Presidents, but would also tend to weaken systemic stability and the negotiating credibility and leverage of *all* Presidents.”<sup>49</sup>

Those who consider that, when done in accordance with international law, the President has the power to withdraw from a treaty point out that the prior act of ratification is entirely at the President’s discretion (unlike for statutes, where the veto can be overridden).<sup>50</sup> They may also note that the Framers appeared more concerned with foreign entanglement than its opposite,<sup>51</sup> that the President’s ability to threaten exit may facilitate renegotiation and improve compliance in ways that advance U.S. interests,<sup>52</sup> and more generally that requiring a congressional statute or a two-thirds resolution from the Senate could choke the ability of the United

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<sup>47</sup> Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* 98 (U.S. Gov’t. Printing Office 1993) (1801), <https://perma.cc/97XX-3EGP>; see also Barry M. Goldwater, *Treaty Termination Is a Shared Power*, 65 *A.B.A. J.* 198, 199–200 (1979) (citing this in making an argument against unilateral presidential withdrawal).

<sup>48</sup> Koh, *supra* note 9, at 436; cf. *id.* at 452–55 (noting as a matter of comparative constitutional law that legislative approval for treaty withdrawal is required in various other countries). I discuss Koh’s argument here only in the context of treaties, but he also takes up the termination of other kinds of international agreements.

<sup>49</sup> *Id.* at 450.

<sup>50</sup> Restatement (Fourth) of Foreign Relations Law § 313 cmt. d (Am. Law Inst. 2018) (“[T]reaties are not fully analogous to legislation in their formation: most notably, unlike statutes, treaties can never take effect for the United States unless approved by the President.”). As a structural matter, proponents of unilateral presidential termination sometimes draw parallels to the Appointments Clause, as the advice and consent of the Senate is also required for appointments and the President’s authority to terminate an appointment is well-established. See Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 *Va. J. Int’l L.* 247, 250–51 & n.3, 275–86 (2013) (citing commentary on this issue and building on the analogy still further).

<sup>51</sup> Henkin, *supra* note 43, at 212.

<sup>52</sup> Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 *Tex. L. Rev.* 773, 823 (2014).

States to respond deftly and appropriately to developments on the world stage.<sup>53</sup>

As a matter of both practice and mainstream wisdom, these latter arguments currently prevail. As Curtis Bradley has documented, in the nineteenth century treaty termination was generally taken to require Congress or the Senate as well as the President, but practice started shifting towards unilateral presidential termination starting around 1910.<sup>54</sup> By the time President Carter invoked the withdrawal provision of the mutual defense treaty with Taiwan—a controversial decision that sparked constitutional concern among Senators and scholars—the executive branch could point to a handful of prior unilateral terminations.<sup>55</sup> In *Goldwater v. Carter*, the Supreme Court deemed the issue non-justiciable and therefore declined to intervene in the termination.<sup>56</sup> Since then, “the United States has terminated dozens of treaties, and almost all of these terminations have been accomplished by unilateral presidential action.”<sup>57</sup> Both the *Restatement (Third)* and the *Restatement (Fourth) of Foreign Relations Law* consider that the President has the authority as a matter of constitutional law to withdraw the United States from treaties, provided this withdrawal is consistent with international law.<sup>58</sup>

The shift to unilateral presidential power has been smoothed by the fact that, so far, Presidents have typically been sensible in their uses of it. Most of the withdrawals to date have been low-profile and non-controversial. The most significant one—the withdrawal from the Taiwan treaty—was

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<sup>53</sup> Henkin, *supra* note 43, at 212.

<sup>54</sup> Bradley, *supra* note 52, at 788–810 (discussing practice leading up to President Carter’s termination of the Taiwan treaty); see also Jean Galbraith, Treaty Termination as Foreign Affairs Exceptionalism, 92 *Tex. L. Rev.* 121, 126 (2014) (situating this shift within a broader narrative of rising presidential powers in the first half of the twentieth century).

<sup>55</sup> Bradley, *supra* note 52, at 811–14 (discussing the controversy and the role that practice played in the debates).

<sup>56</sup> 444 U.S. 996, 997, 1002 (1979) (dismissing the case without a controlling opinion, as a plurality of four justices deemed the case to present a political question and Justice Powell found the issue not ripe for review).

<sup>57</sup> Bradley, *supra* note 52, at 814.

<sup>58</sup> *Restatement (Fourth) of Foreign Relations Law* § 313 (Am. Law Inst. 2018) (“According to established practice, the President has the authority to act on behalf of the United States . . . in withdrawing the United States from treaties [where permitted by international law.]”); *Restatement (Third) of Foreign Relations Law* § 339 (Am. Law Inst. 1987) (“Under the law of the United States, the President has the power . . . to suspend or terminate an agreement in accordance with its terms.”).

accepted by Carter's successor and has withstood the test of history.<sup>59</sup> Other notable withdrawals include President George W. Bush's decision to withdraw the United States from the Anti-Ballistic Missile Treaty with Russia<sup>60</sup> and decisions by the Reagan administration and the George W. Bush administration to withdraw the United States from treaty commitments accepting the jurisdiction of the International Court of Justice ("ICJ").<sup>61</sup> These choices have been controversial, but they have not upended the world order or triggered robust conversations about rejoining to date. The Trump administration has not yet announced treaty withdrawals that are more dramatic than those announced by the George W. Bush administration. But the prospect remains. Here, as in many other areas, the Trump administration makes acutely salient how legal rules designed to provide flexibility to reasonable actors can also provide opportunities to erratic ones.<sup>62</sup>

## II. REJOINING TREATIES—CAN IT BE DONE WITHOUT RETURNING TO THE SENATE?

Unlike for treaty formation and treaty withdrawal, the domestic legal process required for treaty rejoining has received no sustained attention in scholarship or the public sphere. This fact is reassuring rather than surprising. There have been only a few controversial withdrawals by presidents, and none have been so problematic as to trigger serious conversations about the constitutional process for rejoining. But the tea leaves suggest that this equilibrium may shift, which in turn makes it time to consider whether a President may rejoin the United States to a treaty without returning to the Senate for a second round of advice and consent.

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<sup>59</sup> See *supra* note 1.

<sup>60</sup> Bradley, *supra* note 52, at 815–16.

<sup>61</sup> Letter from George P. Shultz, Sec'y of State to U.N. Sec'y-Gen. (Oct. 7, 1985), in 24 I.L.M. 1742 (1985) (withdrawing the U.S. acceptance of ICJ jurisdiction, which it had generally accepted in 1946 pursuant to a declaration under article 36 of the U.N. Charter); U.N. Treaty Collection, Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, <https://perma.cc/PC6G-GHH9> (recording, in n.1, the U.S. letter of March 7, 2005, giving notice of its withdrawal from this Protocol).

<sup>62</sup> Cf. W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 *Yale L.J. F.* 825, 847 (2018) (describing how difficulties can arise when "a President wakes up one morning and decides to change a policy by tweet without involving [the] extensive apparatus" of "a full array of experts at the National Security Council, the State Department, the Central Intelligence Agency, the Department of Homeland Security, the Department of Justice and other agencies").

This Part takes up this fascinating doctrinal question. Drawing on text, related practice, structure, and function, it determines that, as a general rule, the President can rejoin a treaty without further advice and consent. It then discusses several important limits on this general rule. It ends by describing the practical significance of the conclusions reached here.

### *A. Treaty Rejoining as a Matter of Doctrine*

The President would not need to return to the Senate for another round of advice and consent to rejoin a treaty if the Senate's initial resolution of advice and consent was sufficient for rejoining as a matter of law. For this to be the case, two further propositions in turn would need to be satisfied. The first is that, as a *constitutional* matter, an initial resolution of advice and consent *could* serve as advice and consent for rejoining after a unilateral presidential withdrawal. The second is that, as a matter of their *interpretation*, existing Senate resolutions of advice and consent *do* in fact serve as such. In what follows, I argue that the first proposition is correct and that the second proposition is presumptively correct. I take each proposition in turn, although there is some overlap in the justifications.

#### *1. The Senate's Constitutional Authority to Authorize Rejoining*

Before determining whether existing resolutions of advice and consent do authorize rejoining, it is important to address whether they can do so as a matter of constitutional law. To put it in a different way, suppose that the Senate attached a condition to a resolution of advice and consent that stated: "This resolution of advice and consent further authorizes the rejoining of this treaty subsequent to a withdrawal undertaken unilaterally by the executive branch." Under this circumstance, we would have no doubt that the Senate had authorized rejoining, but we would still have to consider whether it falls within the constitutional scope of the Senate's advice and consent power to authorize not only joining but rejoining. Can the Senate authorize rejoining, or does withdrawal from a treaty have the effect of obligating the political branches to start from scratch?

The text of the Treaty Clause is indeterminate on this question, just as it is indeterminate on when advice and consent should occur in the process of joining a treaty; on whether the Senate's advice and consent can include reservations, understandings, declarations and conditions; and on the circumstances under which the President can unilaterally withdraw the United States from a treaty. We can get only so much from "[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>63</sup> This text is an example of how the “nature [of the Constitution], therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”<sup>64</sup> In its most recent major case on the separation of foreign affairs powers, the Supreme Court emphasized the importance of historical practice and structural principles as additional tools of constitutional interpretation.<sup>65</sup> These tools readily support the conclusion that the Senate has the constitutional authority to authorize rejoining a treaty as part of its initial resolution of advice and consent.

Although there is no historical practice either way on the specific issue of rejoining, historical practice under the Treaty Clause more generally supports broad flexibility for the President and the Senate. As discussed earlier, this practice makes clear that a Senate resolution of advice and consent can remain operative for years or decades, long after the end of the session in which it is passed.<sup>66</sup> Practice under the Treaty Clause also includes forward-looking resolutions focused on future contingencies. In practice that dates back to the Washington administration, for example, the Senate has sometimes conditioned its advice and consent on the renegotiation of certain treaty terms.<sup>67</sup> Upon obtaining these renegotiated

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<sup>63</sup> U.S. Const. art. II, § 2, cl. 2. Even with this scant text, however, it is notable that the “advice and consent” modifies not the actual making of the treaties, but rather simply the President’s “power” to make them. See Galbraith, *supra* note 12, at 264 (making this point). This in turn suggests that the Senate’s advice and consent need not be narrowly tailored to the specific treaty and moment at hand, but rather can cover longer-term authorizations akin to delegations. *Id.*

<sup>64</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.).

<sup>65</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (looking to the “Constitution’s text and structure, as well as precedent and history” to determine whether the power of recognizing foreign nations is exclusive to the President or shared concurrently with Congress). *Zivotofsky* notes the significance of precedent, but unsurprisingly there is an absence of precedent relevant to the rejoining of treaties.

<sup>66</sup> See *supra* notes 27–32 and accompanying text; see also *supra* note 20 (observing that practice also demonstrates flexibility with respect to the ordering of the steps of treaty-making).

<sup>67</sup> Galbraith, *supra* note 12, at 261–63 (discussing several examples of this practice during the Washington administration). For a more recent example, see 124 Cong. Rec. 7187–88 (1978) (containing the Senate’s advice and consent to the Panama Canal Neutrality Treaty, which was made conditional on the executive branch obtaining two amendments to the text of the treaty).

terms, presidents have felt themselves free to ratify the treaties without further advice and consent.<sup>68</sup> This practice demonstrates that Senate resolutions of advice and consent are constitutionally permitted to have long time horizons and to be contingent on future developments—both features that would be applicable to an initial resolution of advice and consent that authorizes the rejoining of a treaty.

Indeed, treaty practice in the modern era now tacitly accepts that U.S. treaty relations can be de-established and re-established without subsequent rounds of Senate advice and consent. At the international level, the rise of multilateral treaties has radically changed treaty practice since the Founding. For almost all multilateral treaties, the Senate does not specifically approve the formation of treaty relations between the United States and particular other countries.<sup>69</sup> Rather, the Senate advises and consents to U.S. entry into a multilateral treaty with an awareness of what other countries are authorized to join that treaty pursuant to its own terms and of which of these countries have already joined it, but without certainty as to which of the other authorized countries will or will not join in the future. (The process would be unworkable otherwise.) On occasion, another country will join the treaty, then exit it, and then rejoin it. By way of example, since the United States joined the Whaling Convention, eleven other countries have joined, exited, and rejoined—Belize, Brazil, Dominica, Ecuador, Iceland, the Netherlands, New Zealand, Norway, Panama, Sweden, and Uruguay.<sup>70</sup> When this occurs, the U.S. treaty

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<sup>68</sup> Galbraith, *supra* note 12, at 261–63 (discussing the precedent established in the Washington administration); see also J. Reuben Clark, Jr. et al., Solicitor’s Opinion of August 5, 1911, *in* Dep’t of State, Lettering for Solicitor’s Opinions, Part 2, at 33–34 (1911) (on file with author) (noting that when the Senate conditions its advice and consent on future amendments to a treaty, this effectively “constitutes the negotiation of a new treaty” but that “it is unnecessary to submit the treaty again for [the Senate’s] advise [sic] and consent when finally drawn”).

<sup>69</sup> See CRS Report for the Senate Foreign Relations Committee, *supra* note 20, at 154 (noting how this shift has affected practice with respect to reservations made by treaty partners in multilateral treaties). An exception is the North Atlantic Treaty, where President Truman committed that the United States would deem the admission of every new member (beyond the initial signatories) “as the conclusion of a new treaty with that member and would seek the advice and consent of the Senate to each such admission.” S. Exec. Rep. No. 81-8, at 18 (1949) (further noting that the “committee considers this an obligation binding upon the Presidential office”); see also Dean Acheson, *Present at the Creation* 285 (1969) (discussing this presidential commitment).

<sup>70</sup> Dep’t of State, Status of International Convention for the Regulation of Whaling (May 22, 2018), <https://web.archive.org/web/20180530212930/https://www.state.gov/documents/organization/191051.pdf> (also noting that Costa Rica temporarily withdrew its adherence for

relations with the country are severed and then re-established *without intervening action by the Senate*. In these cases, of course, the withdrawal is initiated and effected not by the President but by the other country, and typically the President will not have control over that country's ability to reenter.<sup>71</sup> This practice nonetheless makes clear that the treaty relations can be—and have been—re-established without further proceedings from the Senate following the termination of these relations between the United States and other countries.<sup>72</sup>

Practice with respect to international agreements other than treaties also provides strong support for the conclusion that the Senate can authorize the rejoining of a treaty as well as the joining of it. In the years since the Founding, the United States has come to make many international agreements through domestic law procedures other than those specified in the Treaty Clause. International agreements are now most commonly done as *ex ante* congressional-executive agreements, where Congress passes statutes authorizing or otherwise signaling support for executive branch officials to enter into future international agreements

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domestic legal reasons). The Netherlands has twice exited and twice rejoined. *Id.* The Senate advised and consented to the Whaling Convention on July 2, 1947, see 93 Cong. Rec. 8080–81 (1947), and the United States ratified it on July 18, 1947, see Status of International Convention for the Regulation of Whaling, *supra*. As another example, subsequent to the U.S. ratification of the International Convention for the Conservation of Atlantic Tunas, Senegal withdrew from and later rejoined this treaty. See U.N. Food & Agric. Org., International Convention for the Conservation of Atlantic Tunas, <https://perma.cc/NV4Q-39HQ> (last updated June 26, 2019) (containing depository information); see also 113 Cong. Rec. 4915 (1967) (containing the Senate's advice and consent to this treaty).

<sup>71</sup> There are some treaties that give existing treaty members a say over new members, which might provide the President with a mechanism for blocking another country from rejoining. Under the U.N. Charter, for example, any permanent member of the Security Council (including the United States) can veto an applicant for new membership. See U.N. Charter arts. 4, 27. As a formalist matter, however, to date no nation has been deemed to have withdrawn from and then sought to rejoin the United Nations. See Egon Schwelb, *Withdrawal from the United Nations: The Indonesia Intermezzo*, 61 *Am. J. Int'l L.* 661, 665–69, 671 (1967) (describing how this issue was finessed with respect to Indonesia in the mid-1960s).

<sup>72</sup> A related strand of practice has to do with state succession. In past practice, the executive branch has often deemed an existing treaty to apply to a state successor to the original other treaty party without returning to the Senate for a second round of advice and consent. With the fall of the Soviet Union, for example, the executive branch presumptively viewed existing Senate-approved treaties as continuing in force between the United States and the successor states to the Soviet Union. See Edwin D. Williamson & 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) (explaining that “[i]n sum, while we recognized that the law in this area is somewhat unsettled, we decided that the better legal position was to presume continuity in treaty relations”).

on particular topics.<sup>73</sup> For such agreements, the executive branch takes the congressional authorization not merely to apply to the creation of an initial agreement, but also to later renegotiations.<sup>74</sup>

In addition, some international agreements are done as ex post congressional-executive agreements, where Congress legislates in support of the agreement *after* it has been fully negotiated.<sup>75</sup> On at least two occasions, the executive branch has withdrawn from an ex post congressional-executive agreement and then rejoined it without returning to Congress for further approval. In one of these instances, President Ford withdrew the United States from the international agreement underlying the International Labor Organization in 1975, and President Carter then rejoined the United States to it in 1980.<sup>76</sup> In the other instance, President Reagan withdrew the United States from the international agreement underlying UNESCO in 1984, and President George W. Bush rejoined it in 2003.<sup>77</sup> (The Trump administration has now withdrawn the United States yet again from UNESCO.<sup>78</sup>) Both of these rejoins were with respect to multilateral international agreements that set up international organizations.<sup>79</sup> If such pre-authorizations are constitutionally

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<sup>73</sup> See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *Yale L.J.* 140, 155–67 (2009) (discussing ex ante congressional-executive agreements in detail).

<sup>74</sup> To give just one example, an ex ante congressional-executive agreement with Mexico regarding screwworm eradication was made in 1972, see *Screwworm Eradication Program*, U.S.-Mex., Aug. 28, 1972, 23 *U.S.T.* 2467–68, and then amended without intervening congressional action in 1990, see *Amending the Agreement of August 28, 1972*, U.S.-Mex., Dec. 7, 1990, T.I.A.S. 12427. The congressional statutes that give rise to ex ante congressional-executive agreements effectively operate as delegations to the executive branch.

It is worth noting that some international agreements, known as sole executive agreements, do not involve Congress. For these agreements, it is self-evident that the executive branch should be able to rejoin them as a matter of domestic law following withdrawal.

<sup>75</sup> See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799, 897–907 (1995) (describing uses of such agreements in the years after World War II).

<sup>76</sup> Bradley, *supra* note 17, at 1639.

<sup>77</sup> *Contemporary Practice of the United States Relating to International Law*, United States Gives Notice of Withdrawal from UNESCO, Citing Anti-Israel Bias, 112 *Am. J. Int'l L.* 107 (Jean Galbraith ed., 2018) (describing the withdrawal from UNESCO by the Reagan administration and its rejoining by the George W. Bush administration).

<sup>78</sup> *Id.* (noting that the requisite one-year notice of withdrawal was given in 2017).

<sup>79</sup> There is no reason to think that U.S. constitutional practice with respect to rejoining should be different for international agreements establishing international organizations than for other kinds of international agreements. As a matter of international law there are some differences between treaties setting up international organizations and other kinds of multilateral treaties. With regard to joining, however, these differences run in the direction of



permissible with respect to these alternative pathways for making international agreements, then it would be strange, to say the least, to deem a similar approach constitutionally foreclosed under the Treaty Clause process, which the Framers intended to make the primary vehicle for international commitments.

Structural considerations also favor the conclusion that the Senate may authorize rejoining as a constitutional matter. The concept of checks and balances lies at the heart of our constitutional system. Under the current practice, a President can unilaterally withdraw the United States from a treaty pursuant to its terms—and thus unmake a “supreme law of the land” that was made initially not just with presidential authority but also with a bipartisan super-majority of the Senate. To hold, as a constitutional matter, that the Senate may not authorize rejoining would be to enhance the reach of this unchecked power of withdrawal. By contrast, if the Senate can authorize rejoining, then it has available to it a tool that can blunt the long-term impact of the unilateral presidential power of withdrawal.

Collectively, these reasons readily support the conclusion that withdrawal from a treaty does not necessarily obligate the political branches to start from scratch under the Treaty Clause. This is not a hard constitutional question—and therefore not one that should trigger the canon of constitutional avoidance with respect to how to interpret existing resolutions. Rather, the text of the Treaty Clause, related practice, and structural considerations all support the conclusion that an initial Senate resolution of advice and consent can, as a constitutional matter, apply to the rejoining of a treaty as well as to the initial joining of it.

It is worth noting that these reasons are specific to the Treaty Clause and do not justify a comparable conclusion with respect to the Appointments Clause. While the two clauses are often read in parallel, the text of the Treaty Clause is far more flexible than the Appointments Clause. It does not specify how the “mak[ing]” of treaties shall occur or when, as a matter of timing, the Senate’s advice and consent shall occur in the treaty-making process, whereas the Appointments Clause makes

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being more restrictive for treaties setting up international organizations. Customary international law with regard to state succession, for example, has been understood by U.S. executive branch lawyers to be narrower with respect to membership in international organizations due to “the fact that membership in an international organization creates multiple rights and obligations that extend beyond the comparatively limited and explicit obligations found in most treaties.” Williamson & Osborn, *supra* note 72, at 267.

clear that advice and consent must come between nomination and appointment, suggesting that a fresh nomination would trigger a fresh need for advice and consent.<sup>80</sup> Moreover the practice under the Appointments Clause does not support the long time horizons for advice and consent that exist under the Treaty Clause,<sup>81</sup> and structural concerns about the effect of unilateral presidential power of termination are less significant for appointments, which are by nature transient for executive branch officials, than they are for treaties, which are the supreme law of the land. For appointments, therefore, the extent to which the Senate can delegate power, make decisions that will bear fruit only many years hence, and attach conditions is limited—or, at best, a difficult constitutional question. For treaties, by contrast, the authority of the Senate easily extends to advising and consenting to the future rejoining of treaties.

## *2. Existing Resolutions as Authorizations to Rejoin*

Unsurprisingly, as a matter of practice Senate resolutions of advice and consent have no specific language regarding their applicability for purposes of rejoining treaties. They do not say “this advice and consent remains available for purposes of rejoining the treaty” nor do they say “this advice and consent is applicable only for the initial joining of a treaty and not for any subsequent rejoining.” So, should we read these resolutions to apply to the rejoining of treaties as a matter of domestic law? This is a matter of statutory interpretation—or, more accurately, resolution interpretation. I argue here that these resolutions presumptively authorize rejoining as a matter of domestic law. As with joining, rejoining

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<sup>80</sup> Compare U.S. Const. art. II, § 2, cl. 2 (providing that 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”), with *id.* (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” officers of the United States).

<sup>81</sup> The Standing Rules of the Senate draw these distinctions sharply as a matter of practice. If a treaty has not gone through the advice and consent process during one congressional term, it remains pending for consideration during the next congressional term (although it must go back to the beginning of the committee consideration process). See Standing Rules of the Senate, S. Doc. No. 113-18, R. XXX(2) (2013). By contrast, nominations do not remain pending before the Senate from session to session and from term to term; rather, “[n]ominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President.” *Id.* XXXI(6).

would be of course subject to whatever reservations, understandings, declarations and conditions are set forth in the resolution.

Although Senate resolutions have no specific language with respect to rejoining, that does not mean that the text is silent on this issue. As noted earlier, a typical Senate resolution expresses the Senate's advice and consent to the joining of a particular treaty. By way of example: "*Resolved (two-thirds of the Senators present concurring therein)*" that the "Senate advises and consents to the ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded on May 14, 1954 (Treaty Doc. 106-1(A)), subject to the understandings . . . and the declaration [that follow]."<sup>82</sup> On its face, the text provides consent to ratification, clearly identifies the treaty at issue, and sets forth some understandings and declarations (that are irrelevant to the issue of rejoining). As long as the President is ratifying this treaty in keeping with these understandings and the declaration, then he or she is acting consistent with the plain text of this treaty—whether or not it is an initial ratification or a subsequent one.<sup>83</sup>

This approach to plain language has been applied by the executive branch in the closely related context of ex post congressional-executive agreements. As noted earlier, the United States joined, exited, and then rejoined UNESCO and the International Labour Organization ("ILO") pursuant to pre-existing congressional authorizations. With respect to UNESCO, for example, in 1946 Congress passed a law providing that

[T]he President is hereby authorized to accept membership for the United States in the United Nations Educational, Scientific, and Cultural Organization . . . , the constitution of which was approved in London on November 16, 1945, by the United Nations Conference for the establishment of an Educational, Scientific, and Cultural Organization, and deposited in the Archives of the Government of the United Kingdom.<sup>84</sup>

As with Senate resolutions, this law provides consent to joining, clearly identifies the international agreement at issue, and has no specific

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<sup>82</sup> 154 Cong. Rec. 21,776 (2008). This is another example of a treaty that took the United States a long time to join.

<sup>83</sup> I return later to the important issue of how to understand the word "ratification" in relation to the international legal process for joining and rejoining multilateral treaties. See *infra* Subsection II.B.2.

<sup>84</sup> Pub. L. No. 79-565, 60 Stat. 712 (1946) (codified at 22 U.S.C. § 287m (2012)); see also 22 U.S.C. § 271 (2012) (using similar language with respect to the ILO).

language going either way on the issue of rejoining. When the George W. Bush administration rejoined UNESCO in 2003, it must have interpreted this language not as a one-time permission, but rather as a continuing authorization to choose to join UNESCO.<sup>85</sup>

There is no reason to take a different approach for interpreting Senate resolutions of advice and consent.<sup>86</sup> The Senate presumably advises and consents to treaties because it *wants* the United States to become a party to these treaties. Interpreting a Senate resolution of advice and consent to authorize the rejoining of a treaty advances this underlying purpose.

In light of the practical unimportance of rejoining to date, we are unlikely to have specific evidence of whether Senators thought that a resolution to which they were advising and consenting would authorize the rejoining of a treaty as well as the initial joining of it. Indeed, at least prior to President Carter's termination of the Mutual Defense Treaty with Taiwan, some or most Senators would likely have assumed that treaty withdrawal would require Senate approval.<sup>87</sup> We thus cannot do more than speculate with respect to the issue of rejoining. But it does seem plausible that Senators who oppose a unilateral presidential power to withdraw from treaties would prefer that such a power, given its existence in practice, be coupled with a presidential power to rejoin treaties. It also seems plausible that Senators who approve of the unilateral presidential

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<sup>85</sup> The Bush administration announcement rejoining UNESCO did not discuss the statutory basis for rejoining. See U.S. Dep't of State, *The United States Rejoins UNESCO* (Sept. 22, 2003), <https://perma.cc/ZJ74-TRL9>; United Nations Framework Convention on Climate Change art. 25(1)–(2), *opened for signature* June 4, 1992, 1771 U.N.T.S. 107.

<sup>86</sup> The usefulness of this related practice is especially valuable where, as here, there is likely to be no legislative history that sheds light on how to interpret Senate resolutions of advice and consent with respect to rejoining. Before President Carter's withdrawal from the mutual defense treaty with Taiwan, the Senate paid virtually no attention to the predicate issue of unilateral treaty withdrawal, and I am unaware of any attention paid by the Senate Foreign Relations Committee or other actors in the Senate to the legal process for rejoining. Even the 293-page report on the treaty-making process produced in 2001 for the Senate Foreign Relations Committee by the Congressional Research Service is silent on this issue. See generally CRS Report for the Senate Foreign Relations Committee, *supra* note 20 (not addressing the issue of rejoining).

<sup>87</sup> After Carter's decision, a large number of Senators signaled their view that Senate approval was required for withdrawal from the mutual defense treaty. While the Senate Foreign Relations Committee advanced a resolution that supported the President's legal authority, the Senate voted 59-35 to substitute this resolution for one providing that it was "the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." Bradley, *supra* note 52, at 811–12 (quoting S. Res. 15, 96th Cong. (1979)) (noting that the Senate never ultimately voted on the substituted resolution).

power to withdraw from treaties in light of the added flexibility conveyed by that power would also approve of a presidential power to rejoin treaties in light of the added flexibility conveyed by that power.

It is true that the rejoining may occur many years after the original Senate resolution of advice and consent and at a time when two-thirds of the current Senate might not desire re-entry into the treaty at issue. But this can also be true with respect to the initial joining of treaties, which can occur long after the Senate has given its advice and consent. Indeed, as between (1) a treaty that the United States initially joins many years after the Senate's advice and consent and (2) a treaty that the United States initially joins immediately after the Senate's advice and consent but that the President unilaterally withdraws from many years later, the case may well be stronger for rejoining the latter treaty than for joining the first one. When a President rejoins the United States to a long-standing treaty, that President returns the United States to a status quo that had earlier received the approval of both a prior President and two-thirds of the Senate.

Finally, interpreting the Senate resolutions of advice and consent to authorize rejoining avoids structural concerns. Unilateral presidential withdrawal from treaties is justified on the grounds that the President previously had unilateral discretion to ratify, and that it provides useful flexibility for the advancement of U.S. foreign policy interests.<sup>88</sup> Yet it also carries the risk of abuse, and it is particularly problematic to the extent that presidential withdrawal is taken to nullify the actions of the Senate, a separate and coordinate branch. This concern is alleviated by interpreting Senate resolutions to apply to rejoining treaties. It cabins the President's withdrawal power to just that—withdrawal—rather than giving the President the further unilateral power to force the process back to square one. If withdrawal is justifiable on the grounds that ratification

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<sup>88</sup> For those treaties with withdrawal clauses, another justification offered is that the Senate knew about a withdrawal clause in a treaty when advising and consenting to a treaty—and therefore somehow impliedly accepted that the executive branch has the power to be the actor within the U.S. government who can trigger that withdrawal clause. See *Goldwater v. Carter*, 617 F.2d 697, 708 (1979), vacated, 444 U.S. 996 (1979) (arguing that “the President’s authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year’s notice, and the President’s action is the giving of notice of termination”). An analogous although not precisely similar logic could be offered with respect to rejoining treaties. Although treaties typically do not have clauses specific to rejoining, they always have clauses about how the treaty is to be joined—and these clauses are presumably known to the Senate. To the extent that rejoining falls under the broader category of joining, the treaty itself thus provides for it.

lies with the President and that flexibility is crucial as a functional matter, then rejoining should be justifiable for precisely these same reasons.

In general, the effect of rejoining will be to restore the United States to the status quo that existed prior to exit. For some treaties, however, rejoining may have the effect of causing the United States to make international commitments with respect to timing that are greater than they were at the time of exit. This is because some treaties require entering parties to commit to an initial period of years before they can withdraw. The U.N. Framework Convention on Climate Change, for example, provides that a party must give one year of notice of withdrawal and that it cannot give this notice within the first three years “from the date on which the Convention has entered into force for a Party.”<sup>89</sup> As another example, when the Senate advised and consented to U.S. acceptance to the general jurisdiction of the International Court of Justice, it did so with the condition that this acceptance would “remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate” the acceptance.<sup>90</sup> Assuming these provisions are measured by the date of rejoining rather than backdated to the initial joining—an issue on which practice is absent—then the commitment on rejoining will be greater as a matter of time than was true at the time of exit, although equivalent to the commitment made at the time the United States initially joined the treaty.

As a practical matter, interpreting existing resolutions of advice and consent to authorize rejoining may help preserve the future relevance of the Treaty Clause. If the resolutions of ratification are not read to authorize rejoining as a matter of domestic law, then a President who wishes to rejoin faces a difficult choice. Should he or she return to the Senate for another round of advice and consent or instead try to rejoin the international agreement through another domestic legal pathway? As mentioned earlier, it has become very difficult to get even slightly controversial treaties through the Senate—and any treaty from which one President withdraws the United States is likely to count as at least slightly controversial. If the President cannot rejoin the treaty on the basis of the prior resolution of advice and consent, then he or she will be strongly incentivized to pursue other domestic pathways for joining it, such as seeking ex post congressional-executive approval or perhaps by simply

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<sup>89</sup> United Nations Framework Convention on Climate Change art. 25(1)–(2), *opened for signature* June 4, 1992, 1771 U.N.T.S. 107.

<sup>90</sup> S. Exec. Journal, 79th Cong., 2d. Sess. 719–20 (1946).

relying on sole executive powers or on language in a pre-existing statute. By contrast, interpreting existing resolutions of advice and consent to authorize rejoining not only places a check on the withdrawing President, but also provides later presidents with incentives to continue to act under the Treaty Clause, which contains the one process for making international agreements that is specifically set forth in the Constitution.

### *B. Limiting Situations*

Assuming the Senate's original resolution of advice and consent presumptively authorizes rejoining a treaty and the President wishes to rejoin this treaty, there may still be legal or practical barriers to rejoining. Broadly speaking, there are three types of potential barriers. The first is that either Congress or two-thirds of the Senate has expressly or impliedly repealed the Senate's original advice and consent. The second is that the President is unable as a matter of international relations or international law to rejoin the treaty, or at least unable to rejoin it in a manner consistent with the Senate's original resolution of advice and consent. The third is that intervening changes in U.S. law may limit the implementation of the treaty, which in turn can affect whether and when the United States rejoins it. In what follows, I discuss each of these potential barriers in turn.

#### *1. The Senate Resolution Is No Longer Legally Operative*

I have argued that, as a general matter, Senate resolutions authorize rejoining as well as joining. But before relying on a particular Senate resolution of advice and consent, the executive branch must undertake a case-specific inquiry into whether this resolution does in fact remain legally operative. The original resolution is unlikely to contain an order for its own self-destruction,<sup>91</sup> but it would need to be reviewed as a matter of due diligence. The more likely basis of concern—though still infrequent—is that the Senate or Congress will have taken some subsequent action that expressly or impliedly negates the original resolution of advice and consent.

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<sup>91</sup> It is not the practice for Senate resolutions of advice and consent to contain sunset clauses with respect to their own lifespan, and I am unaware of any resolutions that do so. A more frequent source of concern, which I discuss in the next Subsection, is that the international legal process needed to rejoin the treaty might not be precisely the same as the international legal process specified in the resolution of ratification.

On rare occasions, the Senate has reconsidered a resolution of advice and consent or itself approved the President's decision to withdraw from a treaty. In 1874, for example, the Senate unanimously passed a resolution stating that its resolution from several weeks earlier giving advice and consent to an extradition treaty was "hereby, reconsidered, and that the President [was] requested to return the said convention and resolution to the Senate."<sup>92</sup> With respect to authorizing withdrawal, in 1921 the Senate advised and consented by a two-thirds majority to U.S. withdrawal from the International Sanitary Convention.<sup>93</sup> Where the Senate takes such actions, it is effectively repealing its own resolution of advice and consent. In such situations, the President would need to obtain afresh the advice and consent of two-thirds of the Senate to rejoin a treaty pursuant to the Treaty Clause.

More common than subsequent action by the Senate—though still fairly uncommon—is subsequent congressional legislation that effectively invalidates a Senate resolution of advice and consent. Treaties and statutes are understood to have equal status as the "supreme Law of the Land" under the Supremacy Clause, and under the "last-in-time rule" a subsequent statute will supersede a prior treaty as a matter of domestic law.<sup>94</sup> Sometimes Congress legislates in favor of withdrawal from a treaty, as with the Comprehensive Anti-Apartheid Act of 1986, which directed the Secretary of State to "terminate immediately" a tax treaty

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<sup>92</sup> S. Exec. Journal, 43rd Cong., 1st Sess. 289 (1874). This resolution itself was subsequently rescinded two days later. *Id.* at 291; see also Crandall, *supra* note 33, at 74 (describing this incident). Some have suggested that rescission of advice and consent cannot occur once the resolution has been transmitted to the President. See CRS Report for the Senate Foreign Relations Committee, *supra* note 20, at 143. But see Henkin, *supra* note 43, at 179 ("There is no authoritative decision or precedent on the question, but the Senate can probably withdraw, modify, or impose conditions on consent it had given, before the President concludes the treaty."). I think Louis Henkin is correct on this point and therefore that the President may not rejoin a treaty on the basis of the original resolution if two-thirds of the Senate has passed an intervening resolution retracting this resolution.

<sup>93</sup> Bradley, *supra* note 52, at 794 (noting that this is one of two known examples whereby the Senate advised and consented to withdrawal, as distinct from legislative action undertaken by Congress as a whole); see also 61 Cong. Rec. 1793 (1921) (providing the text of the resolution).

<sup>94</sup> U.S. Const. art. VI; *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." (citation omitted)). The Supreme Court has not addressed a situation where the conflicting statute is passed between the Senate's advice and consent and the treaty's entry into force. Cf. Restatement (Third) of Foreign Relations Law § 115 cmt. c (Am. Law Inst. 1986) (noting various questions related to timing). For a treaty to supersede a statute as a matter of domestic law, it must be self-executing, see *id.*, which many multilateral treaties are not.



between the United States and South Africa.<sup>95</sup> Such a law should be taken to amount to a repeal of the Senate's original advice and consent, and the President would need new approval for the Senate in order to rejoin the treaty.

More subtle congressional enactments present more difficult legal questions. What if, after the treaty withdrawal, Congress legislates in a manner that appears to rely on this withdrawal? Consider the Taiwan Relations Act of 1979, which was effectively premised on the withdrawal of the Mutual Defense Treaty with Taiwan and the recognition of mainland China, but which did not endorse these actions.<sup>96</sup> Given this and subsequent legislation premised on normalized relations with mainland China and non-treaty relations with Taiwan, could the President today just rejoin the mutual defense treaty with Taiwan (after re-recognizing Taiwan as "China")? This is the kind of issue that, as a legal matter, would require close and case-specific analysis to determine whether the intervening congressional legislation rises to the level of an implied repeal of the treaty or of the Senate's original advice and consent to it. It is also the kind of issue where, law aside, the President is highly unlikely to have any interest in revisiting the current status quo.<sup>97</sup>

## *2. International Relations or International Law Makes the Senate Resolution No Longer Usable*

A second set of limitations on rejoining treaties may arise from international relations or international law. In practice, these are the limitations that a President who wishes to rejoin a treaty will most commonly encounter. For issues of international relations, how surmountable these limitations are will turn on the attitudes of treaty partners. For issues of international law, the import of these limits will depend on how willing executive branch lawyers are to view international legal practice capaciously or to read the language of Senate resolutions of advice and consent broadly.

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<sup>95</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 313, 100 Stat. 1086, 1104 (repealed 1993).

<sup>96</sup> See generally Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14 (codified at 22 U.S.C. §§ 3301–3316 (2012)) (outlining relations between the United States and Taiwan).

<sup>97</sup> As a matter of constitutional law, as established in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015), the President has the exclusive power to decide whether to recognize Taiwan or mainland China as "China." In practice, however, geopolitical shifts since 1979 make it highly unlikely that a President would return to recognizing Taiwan as "China," which in turn would be a precondition for rejoining the mutual defense treaty.

As a matter of international relations, rejoining a bilateral treaty is likely to be harder than rejoining a multilateral treaty. Bilateral relations likely have greater variation over time than multilateral relations, which in turn reduces the likelihood that both states will wish to revive an old treaty. President Trump's successor is very unlikely to want to rejoin the 1955 Treaty of Amity, Economic Relations, and Consular Rights with Iran, which had been "defunct *de facto* for decades" even before the Trump administration formally triggered withdrawal.<sup>98</sup> President Trump's withdrawal from an important arms control treaty with Russia—the Intermediate-Range Nuclear Forces Treaty—came following years of Russian non-compliance with the treaty,<sup>99</sup> and it therefore seems unlikely that Russia would be willing to rejoin the treaty in good faith and comply with the obligations set forth in it. Even where the bilateral relationship and the interest in the treaty's subject matter has remained relatively stable, the negotiation of an updated treaty might be more appealing than rejoining the original one. On average, bilateral treaties are easier to renegotiate than are multilateral treaties—since they involve only one other party—and have better prospects of getting through the Senate.<sup>100</sup>

For multilateral treaties, by contrast, rejoining will typically be smoother as a matter of international relations. Many multilateral treaties are open to any country wishing to join, including most treaties that form the bedrock of the global world order. If President Trump's successor wishes to rejoin the Optional Protocol to the Vienna Convention on Diplomatic Relations, for example, then as a matter of international law this can be done simply by providing the proper notification to the U.N. Secretary-General.<sup>101</sup> For a few crucial treaties, as discussed later, rejoining might require the affirmative consent of state parties. As a general rule, however, the President will have a straightforward path vis-

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<sup>98</sup> Chimène Keitner, What Are the Consequences of the Trump Administration's Recent Treaty Withdrawals?, *Just Security* (Oct. 17, 2018), <https://perma.cc/MP65-BTPG>.

<sup>99</sup> See Hilary Hurd & Elena Chachko, U.S. Withdrawal from the INF Treaty: The Facts and the Law, *Lawfare* (Oct. 25, 2018, 11:03 AM), <https://perma.cc/AS3C-LM7V> (noting evidence of Russian non-compliance since 2008). The United States officially provided Russia with the requisite six months of notice of withdrawal in February 2019. Michael R. Pompeo, Sec'y of State, U.S. Intent to Withdraw from the INF Treaty, U.S. Dep't of State (Feb. 2, 2019), <https://perma.cc/W2UT-7BHB>.

<sup>100</sup> Galbraith, *supra* note 12, at 248, 276 (noting that certain types of routine bilateral treaties fare reasonably well in the Senate, unlike multilateral treaties and non-routine bilateral treaties).

<sup>101</sup> See Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations arts. 6–7, Apr. 18, 1961, 500 U.N.T.S. 95.

à-vis other states with respect to rejoining treaties that are open to world-wide membership. And even in cases where the consent of treaty partners to re-entry may be required, it will almost certainly be easier for the President to rejoin a multilateral treaty than to try to negotiate a new multilateral treaty and then obtain the advice and consent of the Senate to this treaty.

Turning from international relations to international law, the latter also sets some potential limits on rejoining treaties—and in particular on rejoining them in a manner that is consistent with the text of the original Senate resolution of advice and consent. How substantial these limits are in practice will turn on how broadly or narrowly executive branch lawyers either construe their options under international law or the scope of the Senate resolutions of advice and consent. For the reasons I give below, my view is that these limits are generally surmountable, but there is room for disagreement.

As a matter of international law, if one party lawfully withdraws from a bilateral treaty, then this treaty is terminated.<sup>102</sup> The Vienna Convention on the Law of Treaties does not specify whether termination *obligates* the parties to start the treaty-making process from scratch if they want to re-institute the treaty.<sup>103</sup> This is important because Senate resolutions of advice and consent typically identify a treaty by the date of its signature. If, as a matter of international law, the parties must sign the treaty anew, then this will raise the question of whether the Senate’s advice and consent applies to the newly signed treaty.<sup>104</sup>

In my view, the parties have potential avenues available for re-instituting the expired treaty without starting from scratch with new

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<sup>102</sup> The Vienna Convention on the Law of Treaties provides that the “termination of a treaty . . . may take place . . . in conformity with the provisions of the treaty.” Vienna Convention on the Law of Treaties, *supra* note 22, art. 54. Termination clauses in U.S. bilateral treaties typically specify that either party may terminate the treaty after appropriate notice is given to the other party. E.g., Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., art. XXIII, Aug. 15, 1955, 8 U.S.T. 899 (providing that either party “may . . . terminate the present Treaty” subject to certain timing rules).

<sup>103</sup> See generally Vienna Convention on the Law of Treaties, *supra* note 22 (discussing termination and suspension of the operation of treaties). As noted *supra* note 22, the United States is not a party to the Vienna Convention but regards many of its provisions as reflecting customary international law.

<sup>104</sup> There is a touch of practice on this question as well. See *infra* note 126 (describing an occasion on which the President interpreted a Senate resolution of ratification to be applicable to a later treaty that contained the identical text to the treaty to which the Senate had advised and consented).

signatures. One possibility, although without international legal precedent as far as I am aware, would be to exchange new instruments of ratification to the original treaty. It would be perfectly acceptable and probably more natural as a matter of international legal process for them to do new signatures, but the Vienna Convention does not require this approach. The Vienna Convention does have a provision—Article 70—on what the consequences of termination are as a matter of international law. But this article does not provide that termination has the effect of erasing a treaty signature. Instead, it simply states as relevant that “Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty . . . [r]eleases the parties from any obligation further to perform the treaty.”<sup>105</sup> There is no prohibition against relying on the original signature for purposes of rejoining. And indeed Article 70 indicates that, whatever the default rule is on the effect of termination, the parties are free to “otherwise agree.”<sup>106</sup> The United States and another country would therefore be free to re-institute a bilateral treaty by simply by exchanging new ratifications. In doing so, the executive branch would fully comply with the plain language of the Senate’s resolution of advice and consent.

Another related possibility is that the parties could enter into a separate international agreement providing for the resuscitation of the initial treaty. This practice has analogies in the context of state succession.<sup>107</sup> This approach could only be justified as a matter of U.S. domestic law, however, if the executive branch were to conclude that it had the independent constitutional authority to make the separate international agreement resuscitating the initial treaty. The more the separate agreement is framed as procedural rather than substantive in nature, the more easily the executive branch could conclude that it had such authority. Thus, a separate agreement in which the parties agree that a renewed exchange of ratifications of the prior treaty will have the effect of resuscitating it might be more defensible than a separate agreement in

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<sup>105</sup> Vienna Convention on the Law of Treaties, *supra* note 22, art. 70(1). Unless the parties agreed otherwise, Article 70 would have the effect of removing the legal obligations that flow from signature—namely, the obligation not to “defeat the object and purpose of a treaty . . . pending the entry into force of the treaty,” see *id.* art. 18, but that is different from undoing the fact of signature.

<sup>106</sup> Vienna Convention on the Law of Treaties, *supra* note 22, art. 70(1).

<sup>107</sup> See, e.g., Andreas Zimmermann, State Succession in Respect of Treaties, *in* State Practice Regarding State Succession and Issues of Recognition 80, 110 (Jan Klabbers et al. eds., 1999) (describing examples from the break-up of Czechoslovakia and of Yugoslavia).

which the parties state that they accept the substantive obligations contained in the prior treaty.

A similar set of issues arises for multilateral treaties. As a matter of international law, states typically join a multilateral treaty through either ratification or accession, formerly known as adherence.<sup>108</sup> (Joining can also happen through definitive signature, acceptance, approval, or other agreed means, but I focus for convenience on ratification and accession.<sup>109</sup>) Ratification is typically done by states who have signed the treaty, while accession is done by states who have not signed the treaty.<sup>110</sup> Signature is a step with international legal significance, as it constitutes a commitment not to “defeat the object and purpose of a treaty . . . pending the entry into force of the treaty.”<sup>111</sup> But the difference between

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<sup>108</sup> See Vienna Convention on the Law of Treaties, *supra* note 22, arts. 14–15. On the older terminology, see Law of Treaties: Article 12. Accession, 29 Am. J. Int’l. L. (Supplement: Res. Int’l L.) 812, 812–15 (1935) (stating that “adhesion,” “accession,” and “adherence” are “words being using interchangeably in practice” although noting some variation on this front).

<sup>109</sup> The Vienna Convention recognizes that signature can be sufficient for a state to join a treaty when a specific set of conditions is met, Vienna Convention on the Law of Treaties, *supra* note 22, art. 12, and that sometimes the “consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.” *Id.* art. 14(2).

<sup>110</sup> See *id.* arts. 14–15; see also U.N. Office of L. Affairs, Treaty Section, Handbook on Final Clauses of Multilateral Treaties, at 35–41, U.N. Sales No. E.04.V3 (2003) [hereinafter *Final Clauses Handbook*] (discussing this difference).

<sup>111</sup> Vienna Convention on the Law of Treaties, *supra* note 22, art. 18. This obligation persists prior to entry into force unless the state “shall have made its intention clear not to become a party to the treaty.” *Id.* Where such intention is made clear (as was done by the George W. Bush administration with respect to the Rome Statute), it is sometimes referred to as “unsigned.” See generally Edward T. Swaine, *Unsigned*, 55 Stan. L. Rev. 2061, 2061 & n.1, 2066, 2071–72 (2003) (discussing the consequences of signature and legitimacy of unsigned). Technically, however, the Vienna Convention does not describe the signature as erased. In its depository role for the Rome Statute, the U.N. Secretary-General’s office continues to list the United States as a “signatory” but mentions in a footnote the U.S. communication making clear its intention not to become a party. U.N. Treaty Collection, Rome Statute of the International Criminal Court, <https://perma.cc/4KME-EB5M> (containing depository information); see also Presentation & Discussion of the ASIL Task Force Report on U.S. Policy Towards the International Criminal Court, 103 Am. Soc. Int’l. L. Proc. 311, 317 (2009) (concluding, drawing upon the analysis of treaty expert Duncan Hollis, that while “the United States no longer has any obligations to refrain from acts that would defeat the Rome Statute’s object and purpose, it remains a Signatory to that treaty” and could “proceed to ratify the treaty . . . if so decided”). If the United States were to join the Rome Statute, it remains to be seen whether the U.N. Secretary-General’s office would view that as a ratification or as an accession. If the latter, it would support the conclusion that signature can remain meaningful in determining whether ratification or accession is appropriate even where that signature no longer carries international law obligations with it.

ratification and accession is purely a matter of form and does not affect the substantive obligations taken on by the state once the treaty enters into force.<sup>112</sup> It is nonetheless a difference, and one that can matter to the treaty depository—the actor specified under the treaty to whom states are to officially communicate decisions to join or withdraw from a treaty.<sup>113</sup> In 1994, for example, the office of the U.N. Secretary General took the position that, when the Secretary-General is acting as treaty depository, “[n]ormally, an instrument of accession cannot be substituted for the required instrument of ratification when the agreement has already been signed by the plenipotentiary of the Government concerned, any more than an instrument of ratification can be validly deposited if only an instrument of accession is acceptable.”<sup>114</sup>

The Vienna Convention on the Law of Treaties has no provision that expressly deals with rejoining treaties. It thus does not specify whether a country that is originally a signatory to a treaty, then ratifies the treaty, and then withdraws from the treaty should rejoin it through ratification or accession. Nor is the specific treaty in question likely to address this issue, though, if it does, this would answer the question.<sup>115</sup> There is limited practice on this issue. Some practice indicates that accession is appropriate for the rejoining of a treaty by a country that originally ratified a treaty but later withdrew from it, although there is at least a touch of practice to support re-ratification.<sup>116</sup>

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<sup>112</sup> Vienna Convention on the Law of Treaties, *supra* note 22, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); Final Clauses Handbook, *supra* note 110, at 37 (“Accession has the same legal effect as ratification, acceptance or approval.”).

<sup>113</sup> See Vienna Convention on the Law of Treaties, *supra* note 22, at arts. 76–77 (describing the role of treaty depositories).

<sup>114</sup> U.N. Office of L. Affairs, Treaty Section, Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, at 39, U.N. Doc. ST/Leg/7/Rev.1, U.N. Sales No. E.94.V.15 (1994), <https://perma.cc/5VSL-JRUF> [hereinafter 1994 Depository Practice of the U.N. Secretary-General].

<sup>115</sup> For an example of a treaty that does specify the answer, see Consolidated Version of the Treaty on European Union art. 50(5), Oct. 26, 2012, 2012 O.J. (C 326) 13 (providing that if a State which has withdrawn from the Union asks to rejoin, “its request shall be subject to the procedure referred to in Article 49,” which in turn specifies that a new state can join the European Union only with the unanimous agreement of member states, all of whom must ratify a treaty of admission).

<sup>116</sup> For example, prior depository information for the Whaling Convention indicated that New Zealand is considered to have ratified the treaty, withdrawn from it, and then acceded to it. Status of International Convention for the Regulation of Whaling, *supra* note 70. In 2019, the State Department streamlined its online depository information for the Whaling Convention and removed mention of past withdrawals for countries that had since rejoined,

All this may matter because the Senate sometimes advises and consents to the *ratification* of a treaty and sometimes to *accession* to a treaty. If it has advised and consented to accession in the first place—as is the case with some important multilateral treaties<sup>117</sup>—then this would pose no textual concern for rejoining, as rejoining would also be done through accession. But what if the Senate’s original resolution of advice and consent is to the ratification of a multilateral treaty? Will this present a bar to rejoining?

The most straightforward way around this issue would be for the executive branch to rejoin the treaty by submitting an instrument of ratification (rather than accession) to the treaty depository. This approach would be in tension with some practice, but in keeping with other practice. A treaty depository might well accept such an instrument as valid, either independently or in the absence of objection from state parties.<sup>118</sup> As mentioned above, the Vienna Convention has no specific provision

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see Dep’t of State, International Convention for the Regulation of Whaling, <https://perma.cc/D6PY-DH9D>, so this information is drawn from an earlier version. By contrast, Sweden is listed on the depository website as having “ratified” on its second go-round the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality. See Anthony Aust, *Modern Treaty Law and Practice* 160 (2d ed. 2007) (noting Sweden’s prior round of ratification and describing this second joining as a “re-acceding”); Chart of Signatures and Ratifications of Treaty 043, Council of Europe (last updated Sept. 20, 2019), <https://perma.cc/PUU3-NRQW> (not marking Sweden as having “acceded” the second time round and not giving any indication that Sweden re-signed the treaty following its initial withdrawal). In his treatise, Anthony Aust uses both “re-ratification” and “re-accession” as terms. Aust, *supra*, at 121, 159–60.

<sup>117</sup> See, e.g., S. Exec. Journal, 73rd Cong., 2d Sess. 799 (1934) (advising and consenting “to the adherence by the United States” to the Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the Warsaw Convention); S. Exec. Journal, 90th Cong., 2d Sess. 596–97 (1968) (advising and consenting “to accession to the Protocol Relating to the Status of Refugees”); 114 Cong. Rec. 29,605 (1968) (advising and consenting “to accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” commonly known as the New York Convention).

<sup>118</sup> It strikes me as unlikely that other states would object to the use of ratification rather than accession by the United States. Where states have registered objections to the rejoining of treaties by other states, it is likely to be because of a new reservation attached by the rejoining state. See, e.g., U.S. Dep’t of Comm., National Oceanic and Atmospheric Admin., Iceland Rejoining International Whaling Commission (May 15, 2002), <https://perma.cc/-S4TW-FXB5> (describing how the United States and other countries resisted Iceland’s attempt to rejoin the Whaling Convention conditional on a reservation allowing it to engage in commercial whaling notwithstanding a moratorium imposed under the Convention); U.N. Treaty Collection, Optional Protocol to the International Covenant on Civil and Political Rights, <https://perma.cc/8M6P-4JGZ> (recording various objections to a new reservation entered on August 26, 1988 by Trinidad & Tobago as it rejoined the Optional Protocol, from which it had withdrawn that same day).

regarding the correct international legal process for rejoining and nor is the specific treaty in question likely to resolve this issue. The general default in international law is to find state behavior permissive in the absence of a specific prohibition,<sup>119</sup> and here the lack of international legal clarity suggests that either accession or ratification should be permitted.<sup>120</sup> Indeed, the practice of the U.N. Secretary-General's office, as described by it in 1994, left open the prospect that instruments of ratification and accession might be interchangeable in some circumstances.<sup>121</sup> The treaty depository might therefore be willing to treat the rejoining as a ratification or, in the alternative, accept the deposit of the instrument of ratification but then reclassify this instrument as it saw fit.

Even were an instrument of accession the only option for rejoining a treaty as a matter of international law, domestic practice suggests that the executive branch likely has the latitude to interpret accession to be authorized by a Senate resolution advising and consenting to ratification. The Senate's core interest in a treaty, after all, lies in its content rather than the form by which it will be joined as a matter of international law. Indeed, the words "ratified" and "ratification" are often used in U.S. practice to refer broadly to joining a treaty rather than to the specific international legal process of ratification.<sup>122</sup> As a matter of past practice,

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<sup>119</sup> See *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 19 (Sept. 7).

<sup>120</sup> Cf. Termination or Suspension by Notice, 14 *Whitman Digest of Int'l L.*, ch. 42, § 37, at 446 (quoting a 1961 memorandum from the State Department's Assistant Legal Adviser for Treaty Affairs that "if as a result of the notice of termination, [a] state has ceased to be a party to the treaty, it can become a party again only by depositing an instrument of ratification or an instrument of adherence as required by the terms of the treaty").

<sup>121</sup> 1994 Depository Practice of the U.N. Secretary-General, *supra* note 114, at 39 (qualifying the non-interchangeability of instruments of ratification and accession with the word "normally" and also noting that, in deciding how to act on this issue in a particular instance, "the Secretary-General is guided by the relevant provisions of the agreement involved and by the intent of the Government in this regard").

<sup>122</sup> The Senate generally refers to its resolutions of advice and consent as "resolutions of ratification." S. Doc. No. 113-18, 113th Cong., 1st Sess. 43 R. XXX(2) (2013) (providing only for treaty "ratification" and containing no provision for accession or other forms of joining); see also CRS Report for the Senate Foreign Relations Committee, *supra* note 20, at 123 (discussing the form of committee recommendations on treaties). This includes some occasions on which the Senate is advising and consenting to accession. E.g., 114 Cong. Rec. 29,605 (1968) (making the "resolution of ratification" the question for a vote, although the text of the resolution was advising and consenting to accession to the New York Convention); see also Function of Legislative Body, 14 *Whitman Digest of Int'l L.*, ch. 42, § 8, at 57 ("With rare exceptions, the Senate has followed [its rule for acting through a "resolution of ratification"] regardless of the terms of the treaty, which may provide for adherence or accession in the case of a nonsignatory or for acceptance or approval by either signatories or



on occasion the executive branch has seen fit to interpret Senate resolutions with a margin of flexibility for the international legal formalities. The *Digest of International Law* prepared in 1970 under the direction of the Assistant Legal Adviser for Treaty Affairs observes that “[u]sually, in transmitting the treaty to the Senate for advice and consent, the President will follow the terminology of the treaty itself,” but that “it would not be considered improper, however, regardless of the terminology of the treaty, for the President to request advice and consent to ratification, bearing in mind particularly the Senate’s standing rule [which refers only to ratification].”<sup>123</sup> To give a few examples: the executive branch has ratified a treaty where the Senate advised and consented to accession,<sup>124</sup> accepted a treaty where the Senate advised and

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nonsignatories.”). Nor is the Senate the only branch of government to use “ratification” broadly. The Supreme Court, for example, had described the United States as having ratified the Warsaw Convention, although acceding would be the correct term as a matter of international law. See *Olympic Airways v. Husain*, 540 U.S. 644, 649 n.4 (2004) (remarking on the text that “was before the Senate when it consented to ratification of the [Warsaw] Convention in 1934”); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 245 (1984) (describing the Warsaw Convention as “an international air carriage treaty that the United States has ratified”). Indeed, the Supreme Court has even on occasion inaptly described the Senate as the ratifying actor, even though ratification (and accession) are done by the executive branch. See *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (describing the Senate as having “ratified the [Warsaw] Convention in 1934”); *Air France v. Saks*, 470 U.S. 392, 397 (1985) (mentioning the text that was “before the Senate when it ratified the [Warsaw] Convention in 1934”).

<sup>123</sup> Function of Legislative Body, 14 *Whiteman Digest of Int’l L.*, ch. 42, § 8, at 57 (observing more generally that “[i]n the United States, when the agreement is one that has been sent to the Senate as a treaty, it has been customary for the President, after Senate advice and consent, to execute an instrument of ratification, then for such instrument to be deposited in accordance with the relevant terms of the treaty as constituting an instrument of ratification, adherence, acceptance, accession, or approval, as the case may be”).

<sup>124</sup> Compare S. Exec. Journal, 92d Cong., 2d Sess. 597–98 (1972) (recording the Senate’s advice and consent “to accession to the Protocol to the International Convention for the Northwest Atlantic Fisheries”), with Protocol Relating to the Facilitation of Entry into Force of Amendments to the International Convention for the Northwest Atlantic Fisheries, Oct. 6, 1970, 1082 U.N.T.S. 276, 279 (identifying the United States as having ratified this treaty rather than joined it through some other process). For another example, compare S. Exec. Journal, 90th Cong., 2d Sess. 218, 220 (1968) (recording the Senate’s advice and consent “to accession by the United States of America to the Convention on the International Hydrographic Organization”), with Convention on the International Hydrographic Organization, Sept. 13, 1967, 21 U.S.T. 1857, 1928 (describing the Senate as having given its “advice and consent to the ratification of [this] Convention” and proclaiming the treaty to have been “ratified by the President of the United States”).

consented to ratification,<sup>125</sup> and even in one instance joined the United States to a treaty where the Senate's advice and consent applied to an earlier, though substantively identical, version of the treaty.<sup>126</sup> This practice constitutes pragmatic recognition that the international legal process specified in the Senate resolution may differ from the process actually employed.

A further set of considerations tied to international law has to do with material changes to the treaty that have occurred since the Senate's advice and consent. If the Senate has advised and consented to the INF Treaty "between the United States of America and the Union of Soviet Socialist Republics,"<sup>127</sup> could the President take that advice and consent as applicable to rejoining the INF Treaty with Russia and the other former Soviet Republics in light of international law on state succession?<sup>128</sup> What if a schedule to the treaty or the treaty itself is amended by the parties after the U.S. withdrawal and before its rejoining? What if the treaty turns on some underlying predicate assumption that no longer applies? These are the kinds of international issues that lawyers in the U.S. State Department would have to consider on a case-by-case basis in deciding whether the President could lawfully rejoin a treaty on the basis of the original resolution of advice and consent. These are also issues on which there would likely be prudential concerns as well as legal ones.

One last international legal issue bears mention with respect to the rejoining of some multilateral treaties. There are some foundational multilateral treaties that condition the entry of new members on the consent of existing members. The U.N. Charter and the North Atlantic

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<sup>125</sup> Compare 118 Cong. Rec. 27,925 (1972) (advising and consenting "to the ratification of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property"), with UNESCO Depository Information, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, <https://perma.cc/GCP7-2B8D> (listing the United States as having joined by an instrument of acceptance rather than ratification).

<sup>126</sup> Proclamation on the Agreement Between the United States and Other Powers for the Repression of the Trade in White Women, 35 Stat. 1979 (1908) (noting that the eventual treaty was comparable "word for word, and without change" to the one to which the Senate advised and consented); see also Adherence, 5 Hackworth Digest of Int'l L., ch. 16, § 474, at 78 (describing this incident). For other examples of flexibility with respect to terminology, see those listed in Function of Legislative Body, 14 Whiteman Digest of Int'l L., ch. 42, § 8, at 57-58.

<sup>127</sup> S. Exec. Journal, 100th Cong., 2d Sess. 366 (1988).

<sup>128</sup> See Williamson & Osborn, *supra* note 72 (discussing how the executive branch relied on the law of state succession to deem such treaties as continuing in force with the successors to the Soviet Union following its fall).

Treaty are two exceptionally important examples. The U.N. Charter provides that those countries that participated at its negotiating conference, signed, and ratified it are “original Members,” while all other countries require the approval of both the General Assembly and the Security Council to join.<sup>129</sup> The North Atlantic Treaty uses the term “Parties” to describe the original signatories who ratified the treaty plus any “European state” that subsequently accedes with the unanimous agreement of the existing parties.<sup>130</sup> Neither treaty has any specific language about original members who withdraw and then seek to rejoin.<sup>131</sup> Should the United States withdraw from one of these treaties and then seek to rejoin it, there would be complex diplomatic and legal conversations about whether it would need the same consent from other states that a truly new member would need. (Decision-making on this front might well fall in the first instance to the depository, which, for both the U.N. Charter and the North Atlantic Treaty, happens to be the government of the United States.<sup>132</sup>) This is an international legal issue that is independent from the domestic legal question of whether further advice and consent of the Senate is needed for the United States to rejoin a treaty, but it is nonetheless a very important issue.

### *3. New Legislation Is Needed to Implement the Treaty*

A third set of limits on rejoining treaties has to do with their implementation. As a matter of practice—and sometimes as a condition

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<sup>129</sup> U.N. Charter arts. 3–4.

<sup>130</sup> North Atlantic Treaty art. 10, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>131</sup> By contrast, the Treaty on European Union makes clear that rejoining states shall be treated as new members on rejoining. See Consolidated Version of the Treaty on European Union art. 50(5), Oct. 26, 2012, 2012 O.J. (C 326) 13. The U.N. Charter does not even have a withdrawal clause, although there was an understanding at its negotiating conference that withdrawal was permissible under exceptional circumstances, though strongly discouraged. For discussion, see generally Hans Kelsen, *Withdrawal from the United Nations*, 1 *W. Pol. Q.* 29, 29–30 (1948) (noting that “the Charter does not contain provisions for withdrawal” and the ability of member states to withdraw because of “exceptional circumstances”).

The North Atlantic Treaty permits a country to withdraw “[a]fter the Treaty has been in force for twenty years” upon one year’s notice. North Atlantic Treaty art. 13, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>132</sup> See U.N. Charter art. 110; North Atlantic Treaty arts. 10–11, 13, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; cf. *Termination or Suspension by Notice*, 14 *Whiteman Digest of Int’l L.*, ch. 42, § 37, at 459 (noting that the “denunciation by a depository government of a multilateral treaty . . . to which it is a party does not affect its status under the provisions of the treaty . . . as the depository authority”).

of the Senate's resolution of advice and consent—the President typically does not ratify a treaty in the absence of legal authority to implement it.<sup>133</sup>

For some treaties, congressional legislation is required for their implementation. By way of example, the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) obligates state parties to “enact . . . the necessary legislation . . . to provide effective penalties for persons guilty of genocide.”<sup>134</sup> Prior to ratification by the United States, Congress implemented this provision through the passage of the Genocide Convention Implementation Act of 1987.<sup>135</sup> Sometimes implementing legislation is passed not to create new enforcement mechanisms but rather to modify pre-existing legislation that might otherwise present a barrier to the treaty's implementation. For example, prior to the ratification of two bilateral treaties related to trade in defense-related materials, the executive branch needed to obtain congressional legislation that modified a pre-existing law on defense-related exports.<sup>136</sup>

Implementing legislation has a complex relationship with treaty withdrawal—one whose contours are not fully defined. On the one hand, implementing legislation might serve as a barrier to withdrawal if it is interpreted to prohibit withdrawal without congressional approval<sup>137</sup> or if

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<sup>133</sup> Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 *Am. Soc’y Int’l L. Proc.* 412, 414 (2008) (“[T]he Executive almost always waits for Congress to enact [implementing] legislation *before* joining the treaty.”). For an example of a Senate resolution of advice and consent conditioned on the passage of future implementing legislation, see 132 *Cong. Rec.* 2349–50 (1986) (requiring “[t]hat the President will not deposit the instrument of ratification until after the implementing legislation . . . has been enacted”).

<sup>134</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 5, Dec. 9, 1948, 78 *U.N.T.S.* 277.

<sup>135</sup> Pub. L. No. 100-606, 102 *Stat.* 3045 (current version at 18 *U.S.C.* § 1091 (2018)). While the Supremacy Clause makes treaties the supreme law of the land, a non-self-executing treaty such as the Genocide Convention does directly give rise to judicially enforceable law. Implementing legislation is often passed to fill this gap. For a discussion of the complicated and controversial distinction between self-executing and non-self-executing treaties, see *Restatement (Fourth) of Foreign Relations Law* § 310 (*Am. Law. Inst.* 2018). For a discussion of ways in which statutes implement treaty obligations, see generally John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 *Va. J. Int’l L.* 655 (2010) (discussing methods of incorporation).

<sup>136</sup> See Jean Galbraith, *Making Treaty Implementation More Like Statutory Interpretation*, 115 *Mich. L. Rev.* 1309, 1357–58 (2017) (discussing these bilateral treaties with Australia and the United Kingdom and the passage of the implementing legislation).

<sup>137</sup> No U.S. court has addressed whether or under what conditions implementing legislation might serve as implied congressional disapproval of unilateral presidential withdrawal. Looking across the Atlantic, the U.K. Supreme Court recently held that the government of the

it remains operative after withdrawal and thereby limits the impact of withdrawal.<sup>138</sup> The legislation implementing the Genocide Convention, for example, has no sunset provision, and it seems reasonable to assume that genocide would remain a crime under U.S. law even were President Trump to withdraw the United States from the Genocide Convention.<sup>139</sup> On the other hand, there are situations in which presidential withdrawal from a treaty will have the secondary effect of suspending or potentially terminating the implementing legislation. The implementing legislation for extradition treaties, for example, provides that it “shall continue in force only during the existence of any treaty of extradition with [a] foreign government.”<sup>140</sup>

Just as the executive branch plans for implementation prior to joining a treaty, so the executive branch will need to plan for implementation prior to rejoining a treaty. In most cases, this will not present a substantial barrier. Many treaties do not need implementing legislation,<sup>141</sup> and, for those treaties that do need implementing legislation, it is likely that the pre-existing implementing legislation will remain operative and continue to suffice for implementation. Nonetheless, there will need to be treaty-

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United Kingdom needed the consent of Parliament to withdraw from the European Union in light of pre-existing legislation that had implemented the U.K. participation in the European Union. *R v. Sec’y of State for Exiting the European Union* [2017] UKSC 5, [88]–[93] (appeals taken from Eng. and N. Ir.).

<sup>138</sup> Koh, *supra* note 9, at 454 (expressing skepticism of unilateral termination where it “would similarly necessitate unwinding many domestic law statutes that the executive could not repeal alone”); see Catherine Amirfar & Ashika Singh, *The Trump Administration and the “Unmaking” of International Agreements*, 59 *Harv. Int’l L.J.* 443, 457–58 (2018) (arguing that in the absence of an express termination clause in implementing legislation, treaty withdrawal may not necessarily trigger the expiration of implementing legislation). It is an open question whether, as a constitutional matter, the President could withdraw the United States from a treaty despite the existence of a statute (or Senate resolution of advice and consent) obligating him or her to obtain legislative approval prior to withdrawal. See *Restatement (Fourth) of Foreign Relations Law* § 313 reporters’ note 6 (Am. Law. Inst. 2018).

<sup>139</sup> See *Genocide Convention Implementation Act of 1987*, Pub. L. No. 100-606, 102 Stat. 3045 (current version at 18 U.S.C. § 1091 (2018)).

<sup>140</sup> 18 U.S.C. § 3181 (2018). For a past example in the tariff context of a law whose applicability is tied to the non-termination of a treaty, see *An Act to Reduce Internal-Revenue Taxation*, ch. 121, 22 Stat. 488, 525–26 (1883) (“Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any treaty, so long as such treaty shall remain in force . . . ; but whenever any such treaty . . . shall expire or be otherwise terminated, the provisions of this shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage hereof.”).

<sup>141</sup> See, e.g., *Treaty Concerning Defense Trade Cooperation*, Austl.-U.S., Sept. 5, 2007, S. Treaty Doc. 110-10 (2007) (“[T]his Treaty is self-executing in the United States.”).

specific due diligence to assess whether any implementing legislation might be needed and, if so, what course of action should be pursued.

### *C. Practical Implications*

The President's authority to rejoin treaties is not a complete counterweight to the President's authority to withdraw from treaties. Of the limitations discussed above, the most common ones will be international rather than domestic. Most importantly, rejoining may be difficult or impossible for bilateral treaties and for multilateral treaties where rejoining requires the consent of the treaty partners. But for most of the multilateral treaties that undergird the global order, rejoining will be readily available to the President at the international level—just as it was when the United States rejoined UNESCO and the ILO. Presidents who so choose can re-engage the United States with these multilateral treaties and the international organizations to which they give rise.

To date, presidents have been cautious in withdrawing from core multilateral treaties. The main exception has been with respect to treaties and treaty provisions through which the United States accepts the jurisdiction of the International Court of Justice. In 1985, the Reagan administration withdrew the general U.S. acceptance of ICJ jurisdiction, following the ICJ's decision on jurisdiction in a case brought by Nicaragua against the United States.<sup>142</sup> In 2005, following the ICJ's decision in a case brought by Mexico against the United States, the

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<sup>142</sup> Article 36(2) of the ICJ Statute provides that parties “may at any time declare that they recognize . . . the jurisdiction of the Court” with respect to international legal disputes between themselves and other states that have made similar declarations. Statute of the International Court of Justice art. 36(2). In 1946, the Senate passed a resolution of advice and consent “to the deposit by the President of the United States . . . of [such] a declaration.” S. Exec. Journal, 79th Cong., 2d Sess. 719 (1946) (including the condition, discussed supra note 90 and accompanying text, that the declaration would apply for five years and then be withdrawable by the United States upon six months of notice); see also Michael J. Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 Am. J. Int'l L. 682, 682 (1985) (noting that “the weight of the evidence suggests that [this declaration] was seen by the Senate as a treaty”). President Truman accordingly deposited this declaration. See Declaration Respecting Recognition by the United States of the Compulsory Jurisdiction of the International Court of Justice, 61 Stat. 1218 (1946). The Reagan administration added a further condition (without having obtained additional advice and consent) just before Nicaragua filed its case. See Letter from U.S. Secretary of State to the U.N. Secretary-General, Apr. 6, 1984, 23 I.L.M. 670 (1984). After the ICJ held it had jurisdiction in the case, the executive branch gave notice in 1985 that the United States was terminating its acceptance of the ICJ's general jurisdiction (effective six months later in 1986). See Letter from Secretary of State George P. Shultz to U.N. Secretary-General, Oct. 7, 1985, 24 I.L.M. 1742 (1985).

George W. Bush administration gave notice of U.S. withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, a treaty that provided for ICJ jurisdiction with respect to disputes involving consular relations.<sup>143</sup> And in 2018, the Trump administration withdrew the United States from the equivalent protocol for the Vienna Convention on Diplomatic Relations, following Palestine filing a case against the United States.<sup>144</sup> In October 2019, John Bolton, President Trump's then national security advisor, announced that the United States is considering withdrawing from more treaties or optional clauses to treaties that provide for ICJ jurisdiction.<sup>145</sup>

Just as Presidents Reagan, George W. Bush, and Trump unilaterally undertook these withdrawals, so could a future President reverse these decisions and rejoin. There has been no intervening action by the Senate or Congress with respect to the ICJ that would have the effect of rendering the original resolutions of advice and consent ineffective. In a 1990 statute, Congress did mention that in 1985 the United States had terminated its general acceptance of ICJ's compulsory jurisdiction.<sup>146</sup> But this was in the course of a statutory section whose purpose was to convey the "Sense of Congress" that it "commends and strongly supports efforts by the United States to broaden, where appropriate, the compulsory jurisdiction and enhance the effectiveness of the International Court of

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<sup>143</sup> See U.N. Treaty Collection, Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, <https://perma.cc/RRA3-4QXZ> (containing depository information); John Bellinger, Thoughts on the ICJ's Decision in Iran v United States and the Trump Administration's Treaty Withdrawals, *Lawfare* (Oct. 5, 2018, 11:30 AM), <https://perma.cc/ZW9H-ZJP3> (quoting the letter of withdrawal sent by the United States).

<sup>144</sup> Contemporary Practice of the United States Relating to International Law, Trump Administration Announces Withdrawal from Four International Agreements, 113 *Am. J. Int'l L.* 132, 133–34 (Jean Galbraith ed., 2019). The withdrawal from the bilateral treaty with Iran was also largely in response to a case brought by Iran against the United States in the ICJ pursuant to the dispute settlement provision in the treaty. *Id.* at 132–34.

<sup>145</sup> Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor, White House (Oct. 3, 2018), <https://perma.cc/Y8HP-WLNL> ("[W]e will commence a review of all international agreements that may still expose the United States to purported binding jurisdiction dispute resolution in the International Court of Justice.").

<sup>146</sup> Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246 § 411, 104 Stat. 15, 69 (1990).

Justice.”<sup>147</sup> In deciding whether to rejoin, however, the President would have to consider the risk that the ICJ would issue a judgment adverse to the United States that the executive branch lacked the capacity to implement. No immediate implementing legislation would be needed to accept the jurisdiction of the ICJ, but the Supreme Court held in 2008 that congressional legislation would be needed for enforcement of ICJ judgments to be given effect as such by the courts of the United States.<sup>148</sup> The executive branch might well be able to give effect to most ICJ decisions respecting diplomatic relations on its own, but ICJ jurisdiction over international legal issues generally and over consular rights specifically might result in judgments that the executive branch would lack the power to implement. If a future President was interested in rejoining one or more of these ICJ jurisdictional provisions—and that would of course be a policy judgment—he or she would presumably consider these issues of implementation as a matter of prudence.

As to other multilateral treaties, the practical significance of the authority to rejoin depends on what President Trump does next. I am hopeful that President Trump will not withdraw the United States from the North Atlantic Treaty. If he does, then this might be the exceptional treaty that could command a veto-proof majority from Congress to oppose removal or two-thirds of the Senate to swiftly approve rejoining.<sup>149</sup> If such support failed to materialize, however, then his successor could rely as domestic legal authority for rejoining on the original Senate resolution of advice and consent (and the subsequent Senate resolutions approving the accession of additional member states). More generally, if President Trump does not withdraw the United States from other treaties, then the

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<sup>147</sup> *Id.* This same statute also noted the fact of U.S. withdrawal from UNESCO and expressed the “sense of the Congress” that the Secretary of State should seek to “promote the progress necessary to justify United States consideration of reentry into UNESCO.” *Id.* § 408, 104 Stat. at 67–68.

<sup>148</sup> See *Medellin v. Texas*, 552 U.S. 491, 526–27, 532 (2008) (holding that the executive branch could not require Texas to act in a manner that would satisfy the international legal obligations of the United States that stemmed from an ICJ decision regarding the Vienna Convention on Consular Relations unless Congress enacted statutes implementing the decision as domestic law).

<sup>149</sup> The Countering America’s Adversaries Through Sanctions Act, for example, passed Congress with veto-proof majorities and included a section expressing Congress’s “sense” that it wished “to affirm that the United States remains fully committed to the North Atlantic Treaty Organization.” Pub. L. No. 115-44, § 292, 131 Stat. 886, 939–40 (2017). As noted *supra* note 132 and accompanying text, there is an initial question of whether the United States would need the consent of the other treaty parties to rejoin.



power to rejoin can continue to lie mainly on the shelf. If President Trump pulls out the wrecking ball, then this power will take on far greater import.

### III. REJOINING TREATIES AND THE BROADER DISTRIBUTION OF FOREIGN AFFAIRS POWERS

Dean Acheson, the Secretary of State for President Truman, emphasized the essential need for norms of non-partisanship with respect to foreign policy. He wrote in his memoirs:

The perhaps apocryphal sign in the Wild West saloon—“Don’t Shoot the Piano Player”—was the basic idea of nonpolitical foreign policy. [Foreign policy] must be built on a broad conception of the national interest . . . . The Constitution makes the President the piano player of foreign policy, but unless his immunity from assault with intent to kill is extended to members of either party who work with him in the legislative branch, no consistent foreign policy is possible under the separation of powers.<sup>150</sup>

Acheson then acknowledged and celebrated the impressive degree of bipartisan cooperation between the President and the Senate in forging of the post-World-War-II world order.

That era is now gone, and we do not know if, when, or how it will return. There is no immunity in foreign policy, for the President or anyone else. A far more fragmented set of views about what constitutes the national interest inevitably makes the President appear as a combatant rather than a piano player. This in turn gives rise to two unappealing alternatives under our constitutional system. On the one hand, to require new approval from Congress or two-thirds of the Senate for major foreign policy decisions is to leave these decisions unmade. The presidential system of government, the requirement of bicameralism (for legislation) or two-thirds of the Senate (for a treaty), and committee control over legislation makes such legislative action challenging under any circumstances and nearly impossible under conditions of severe partisanship. Yet on the other hand, to allow the President full and free rein in the foreign policy space raises concerns about the rule of law, fulfils Acheson’s prediction of inconsistent foreign policy, and risks making our foreign relations as good—or as bad—as the person who holds the office.

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<sup>150</sup> Acheson, *supra* note 69, at 95–96.

The scholarly debates over the President's power to withdraw the United States from treaties demonstrate the unsatisfying nature of both alternatives. In a recent article, Curtis Bradley and Jack Goldsmith give treaty termination as an example of the rise of presidential power with respect to U.S. engagement with international law.<sup>151</sup> Yet while they express normative concerns with the rise of presidential control,<sup>152</sup> they do not seem eager to develop or return to a legal framework by which the President cannot undertake major foreign policy actions without legislative approval. Rather, the main reform they are willing to propose is more transparency. For treaty termination, that would take the form of requiring the executive branch to "publish all treaty terminations once they become effective" in some searchable manner.<sup>153</sup> By contrast, Harold Koh would require the approval of Congress or two-thirds of the Senate for treaty withdrawal under his proposed mirror image rule. But he implicitly acknowledges the functional difficulties that would come with this approach in certain contexts and argues that President Carter's unilateral withdrawal from the mutual defense treaty with Taiwan was in fact constitutionally defensible.<sup>154</sup>

The doctrinal argument made here about rejoining treaties does not negate the difficult question of whether we should trust more in congressional or presidential control. But it does suggest that there are meaningful checks on presidential power for treaty rejoining, even where current congressional oversight is limited. In addition to the political check of public opinion, there are four checks grounded in law and legal process.

The first check on rejoining treaties is the need for the original Senate resolution of ratification. The power to rejoin treaties discussed here is not an unbounded power with respect to treaty-making. It is not the power to make new international agreements or to modify the terms of existing ones. (The President does have important powers along these lines, but

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<sup>151</sup> Bradley & Goldsmith, *supra* note 18, at 1224 ("Since the early twentieth century . . . Presidents have come to dominate treaty termination just as they have the making and interpretation of treaties.").

<sup>152</sup> See *id.* at 1272–79.

<sup>153</sup> *Id.* at 1293; see also *id.* at 1294 (discussing the possibility of more robust reporting requirements with respect to withdrawal but noting that the value of them "is difficult to speculate about in general terms").

<sup>154</sup> Koh, *supra* note 9, at 466 (defending the constitutionality of this unilateral treaty termination, notwithstanding his mirror principle, on the ground that this decision was tied to the exercise of the recognition power, which is an exclusive presidential prerogative).

not based on the doctrine discussed in this piece.) Rather, the power to rejoin treaties is the power to do again something that a bipartisan supermajority of the Senate specifically authorized and never repealed. The original Senate resolution of advice and consent is an authorization, but it is also a check, bounded and consistent with how the rule of law operates.

The second check with respect to rejoining treaties is the mostly democratic electoral process that governs the selection of U.S. Presidents. This check is an important one—so important, indeed, that Eric Posner and Adrian Vermeule have suggested that it is the main check on modern presidential power.<sup>155</sup> If presidents can not only unilaterally withdraw the United States from treaties but also unilaterally rejoin these treaties, then the democratic process provides an eventual check on both withdrawal and rejoining. Presidents who withdraw the United States from treaties based on an ill-informed, erroneous, or even malevolent reasoning can have their judgments reversed through rejoining by their successors. And presidents who rejoin the United States to treaties based on ill-informed, erroneous, or even malevolent reasoning can have their judgments reversed through later withdrawal by their successors.

The third check with respect to rejoining treaties stems from administrative and potentially judicial legal process. There is a formalized process within the State Department, known as the C-175 Procedure, that applies to the making and termination of international agreements.<sup>156</sup> The C-175 Procedure sets forth a framework for internal deliberation, calls for congressional consultation with respect to process, requires due diligence to consider whether implementing legislation is needed, and provides for publication of the treaty.<sup>157</sup> The C-175 Procedure would likely be used for rejoining treaties. Although it does not specifically state that it is applicable in this context, it is an umbrella process applied to international agreements generally. As it is silent on the specific issue of rejoining treaties, it seems likely that it would be used in such a situation. The C-175 Procedure reduces the likelihood that treaties will be arbitrarily rejoined and provides an administrative process through which

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<sup>155</sup> See Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 4–5 (2010). This check is of course tied to public opinion, but implemented through the legal framework of the Constitution's provisions on presidential elections.

<sup>156</sup> See U.S. Dep't of State, 11 Foreign Affairs Manual §§ 720–27, <https://perma.cc/AT2S-KFZB> (last updated Sept. 25, 2006); see also Coordination, Reporting, and Publication of International Agreements, 22 C.F.R. § 181 (2018) (setting forth regulatory provisions that complement this process).

<sup>157</sup> See 11 Foreign Affairs Manual, *supra* note 156, §§ 722(2–5), 723.3(3–5), 723.4, 727.

consideration of treaty-specific limitations on rejoining will be considered. In addition to the C-175 process, the legality of rejoining might be subject to judicial review, conditional on there being a plaintiff with standing. Although *Goldwater v. Carter* found the issue of treaty withdrawal to be non-justiciable, the reasoning underlying that decision is in tension with subsequent Supreme Court precedent.<sup>158</sup> Future courts might well find both treaty withdrawal and treaty rejoining to be justiciable questions.

These three checks are neither new nor unique to the issue of treaty rejoining. They lie more generally at the heart of the domestic administrative state. The U.S. domestic regulatory apparatus relies on a combination of decades-old statutes, implementation through delegated authority that varies across administrations, and checks based on both administrative process and judicial review.<sup>159</sup> It may not be the best system that one could devise, but it is a system that strikes a reasonable balance between the presidential system established in the Constitution, the values of the rule of law, and the need for functioning government. It is a balance that is not found in all issues of foreign relations law. Some areas of foreign relations law, most notably the President's power to authorize the use of force abroad, rely heavily on unregulated presidential power. Other areas of foreign relations law, such as the President's power to make international agreements other than treaties, strike a well-calibrated balance but do so in ways that have only partial parallels to the administrative state. But where the parallels are direct, as with rejoining

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<sup>158</sup> Justice Powell's concurrence in *Goldwater v. Carter*, 444 U.S. 996, 997 (1979), rested on ripeness grounds and on concerns about challenges by individual members of Congress to presidential actions. This concern would not appear to apply to private plaintiffs with standing. As for the plurality opinion in *Goldwater*, it relied on a broad view of the political question doctrine. See id. at 1002 (Rehnquist, J., concurring in judgment) (deeming "the basic question" to be "'political' and therefore nonjusticiable because it involve[d] the authority of the President in the conduct of [the] country's foreign relations and the extent to which the Senate or the Congress [was] authorized to negate the action of the President"). By contrast, in its 2012 decision in *Zivotofsky v. Clinton*, the Supreme Court found that the issue of whether the President or Congress had ultimate control over the power to recognize foreign nations was not a political question. 566 U.S. 189, 196 (2012) (noting that "the Judiciary must decide if Zivotofsky's interpretation of [a] statute is correct, and whether the statute is constitutional" and that "[t]his is a familiar judicial exercise"). Notably, the majority opinion in *Zivotofsky v. Clinton* did not discuss or cite *Goldwater v. Carter*. See id. at 191–202.

<sup>159</sup> Indeed, just as the issue of withdrawal is becoming increasingly important in the treaty context, so too is it receiving increased attention in regulatory context. See, e.g., Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, Unrules 8 (Aug. 3, 2018) (unpublished manuscript) (on file with author).

treaties, then we can feel confident that we are operating under a system that is known to work, even if imperfectly.

The fourth check to treaty rejoining comes from the international legal process. The consequences of withdrawal and rejoining a treaty are different from withdrawing and then remaking a regulatory rule. Both situations give rise to uncertainty and risk-management challenges for those affected. But unlike in the regulatory context, rejoining may not always be legally possible for treaties, particularly bilateral ones. Also unlike in the regulatory process, treaty withdrawal and rejoining affects U.S. relations not simply with regulated entities, but also with sovereign partners. The reputation of the United States in terms of stability and trustworthiness would likely be damaged by a high degree of treaty withdrawal and re-entry. A President deciding whether to rejoin the United States to a treaty would have to consider whether rejoining would be worth it as a matter of international relations given the ability of a later President to re-exit the treaty.

The checks identified here with respect to treaty rejoining may seem individually weak, but they are almost certainly stronger than the checks on presidential treaty withdrawal. And in the context of treaty withdrawal, it has been striking how rarely presidents have exercised this power over time. Perhaps this is because most treaties entered into with the advice and consent of the Senate are in fact good for the United States; perhaps this is because of an innate preference for the status quo by presidents and the institutions within which they operate; or perhaps it is because of domestic or international checks along the lines outlined above. If President Trump does follow through more generally on his signaled interest in treaty withdrawal, this will be a departure from traditional norms. It will not be his only such departure from existing norms.<sup>160</sup> Understanding future presidents to have the power to rejoin treaties provides a mechanism for revisiting any departures from norms with respect to treaty withdrawal. To return to Dean Acheson's analogy, this will save the piano for the next player.

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<sup>160</sup> See generally Daphna Renan, *Presidential Norms and Article II*, 131 *Harv. L. Rev.* 2187 (2018) (discussing various presidential norms that President Trump has not followed).

## IV. CONCLUSION

Much of constitutional practice focuses on making law. There is less on how to dismantle law, and still less on how to rebuild it. We know how to do, but what does it take to redo the undone?

The Trump administration has yet to run its course, but it seems clear that there will be rebuilding on many fronts at the end of it. With respect to treaties, we do not yet know how many will be undone before the end of President Trump's tenure. By the time the next President takes the oath of office, however, the tally will be clear. Should that President deem certain treaty withdrawals by President Trump or his predecessors to be unwise, then, subject to the limitations discussed earlier, he or she may promptly rejoin the United States to these treaties without the need for a second round of advice and consent from the Senate. This conclusion is textually supported, well-grounded in cognate practice, and structurally sound. If President Trump has the unilateral power to withdraw, then his successor does and should have the unilateral power to rejoin.