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Response

Treaty Termination as Foreign Affairs Exceptionalism

Jean Galbraith*

The written Constitution does not specify how treaties are to be terminated any more than it specifies how laws are to be terminated. So what process is required to terminate treaties? Back in the 1800s, the consensus among the political branches was that action by one or both houses of Congress was required, with debate centering on whether the appropriate action was a congressional statute, presidential action combined with the advice and consent of the Senate, or either of these approaches.¹

But today the constitutional practice is very different. The President now claims and regularly exercises the power to terminate treaties without any form of congressional approval, at least where this termination accords with international law. Presidents have unilaterally taken the United States out of many treaties, with the two most controversial instances being President Carter's termination of our mutual defense treaty with Taiwan and President George W. Bush's termination of the Anti-Ballistic Missile Treaty with Russia. In essence, constitutional practice has flipped from requiring congressional approval for treaty termination to now almost never including it.

In *Treaty Termination and Historical Gloss*, Curtis Bradley explores when, how, and why this shift has taken place.² He comprehensively examines the practice of treaty termination from the Founding to the present

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1. Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEXAS L. REV. 773, 789–90, 791–92, 793–96 (2014).

2. See Bradley, *supra* note 1.

day, looking over time at how treaties have been terminated and at the accompanying constitutional analysis used by government actors and scholars. Professor Bradley concludes that, starting around the end of the nineteenth century, intermittent, low-stakes actions by the Executive Branch in relation to treaty termination laid the foundation for broader claims of a presidential power to terminate treaties. From the 1930s onward, presidents increasingly exercised this power with regard to relatively uncontroversial termination decisions that received little, if any, attention from Congress. President Carter both relied on and further cemented this accrued practice in his high-stakes decision with respect to the Taiwan treaty.

By itself, Professor Bradley's description of the changing constitutional practice of treaty termination is an important contribution. His account is an exceptionally comprehensive, deeply researched, and evenhanded appraisal; one that will inform any further debates regarding treaty termination in the political branches (as well as in the courts, should they ever treat the issue as justiciable). There are other accounts out there,³ but this one is the most authoritative to date.

Professor Bradley goes further, however, in relating this account of treaty termination to broader themes of constitutional construction. This further contribution has two significant components. First, Professor Bradley places his account of treaty termination within a descriptive theory of how historical practice shapes constitutional norms. In prior work with Trevor Morrison, Professor Bradley developed a theory of how constitutional practice in the political branches tends to work to the President's advantage over time.⁴ Here, Professor Bradley offers treaty termination as an example of this theory in action and further illustrates how the constitutional evolution predicted by this theory can lie somewhere between gradualism and punctuated equilibrium. Second, Professor Bradley reflects on the legitimacy of such constitutional developments. He focuses more on identifying normative pros and cons than on assigning them weight, but as a descriptive matter he accepts that the President does indeed now have the constitutional power to terminate treaties when this termination complies with international law.

Professor Bradley thus combines a narrowly focused doctrinal account of treaty termination with a broad theory of historical practice in constitutional interpretation. I am largely sympathetic to this approach. But I think Professor Bradley's account underplays a crucial middle layer that mediates and shapes the connections between treaty termination and the

3. *E.g.*, DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* (1986); David A. Schnitzer, Note, *Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination*, 101 *GEO. L.J.* 243, 264–69 (2012).

4. *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 411 (2012).

historical gloss. This is the role that the foreign relations context of treaty termination has played in enabling the dramatic constitutional change that took place with regard to it.

In the first Part of this Response, I describe how the constitutional change that took place in treaty termination falls within three more general themes in the foreign affairs context. These are (1) the role of international law in constitutional interpretation; (2) the twentieth-century rise of executive power; and (3) the reluctance of the courts to interfere with executive decision making. These themes are acknowledged in Professor Bradley's article, but I believe they deserve even more emphasis.

In the second Part of this Response, I argue that the changing constitutional practice in treaty termination bears little resemblance to Justice Frankfurter's articulation of the "historical gloss." Rather, this practice reveals a far more dramatic shift than Justice Frankfurter would view as legitimate. I suggest that the foreign affairs context of treaty termination is crucial to understanding why such a significant shift in practice has been allowed to occur. In my view, it is an instance of what Professor Bradley has elsewhere called "foreign affairs exceptionalism"—specialized constitutional practice in the context of foreign affairs.⁵ Professor Bradley has been critical of foreign affairs exceptionalism, but his account of treaty termination may serve to support its validity. For foreign affairs exceptionalism is itself a creature of historical practice. Therefore, to the extent that historical practice serves as a descriptive—and potentially normative—basis of constitutional meaning, it can ground not only our current practice of treaty interpretation, but also foreign affairs exceptionalism more generally.

I. Treaty Termination in Context

What caused the practice of treaty termination to change? Here, I link this change to three broader themes in foreign relations law: the role of international law in constitutional interpretation, the rise of executive power in the first half of the twentieth century, and the reluctance of courts to challenge executive decision making. These are all themes that appear in Professor Bradley's article, but they do so largely in passing, in contrast to the attention given to his broader theory of presidential accruals of power in the face of congressional acquiescence.

5. E.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1582–86 (2003) [hereinafter Bradley, *International Delegations*]; Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096–97 (1999) [hereinafter Bradley, *Foreign Affairs*].

A. *International Law in Constitutional Interpretation.*

Like foreign relations law more generally, treaty termination involves issues both of international law and of U.S. domestic law. One can regard the boundary between these two areas of law as sealed, with the international and constitutional law issues having no influence on each other. Or, instead, one can regard this boundary as porous, with the international law issue influencing the constitutional one and, sometimes perhaps, vice versa.⁶

Professor Bradley frames his account in a way that initially suggests a sealed boundary. He describes the rules of international law on treaty termination but emphasizes that international law does not address the process by which the United States makes its treaty termination decisions.⁷ Yet, in reading his historical account, the impression of a far more porous boundary develops. International law appears to have influenced the resolution of the domestic constitutional question in at least two ways.

First, as Professor Bradley notes,⁸ the fact that international law often authorized treaty termination (as well as related issues like treaty suspension) made the constitutional issue appear murky and therefore reduced resistance to constitutional change. The fact that treaty termination decisions by the President complied with international law—and sometimes prevented conflicts between congressional statutes or policy and international law—offered a mantle of legitimacy that both explained presidential action and helped forestall criticism of it. As treaties increasingly came to include discretionary withdrawal clauses, the Executive Branch could frame withdrawal “as a mere normal incident in the conduct of foreign relations.”⁹ In essence, international law served as, what I have elsewhere called, a source of “extra-constitutional” legitimacy—a justification for presidential action that headed off political opposition that could otherwise have arisen around the constitutional question.¹⁰

Second, at points along the way, the Executive Branch explicitly relied on international law to legitimize its doctrinal view of executive constitutional power. Consider the following passage from a 1936 Department of State Memorandum:

6. This concept of a porous doctrinal boundary between international and domestic law resembles the political science concept of a “two-level game” whereby international negotiating conditions can influence domestic ones and vice versa. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 433–34 (1988).

7. Bradley, *supra* note 1, at 776–79.

8. *Id.* at 830–31 (“The overlay of a mix of international law rules governing treaty termination, as well as potential distinctions between suspension and termination . . . have also made presidential unilateralism relating to the issue a more complicated target to assess and criticize.”).

9. 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1520 (2d rev. ed. 1945).

10. Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 998–1001 (2013).

A contention that the action of the President in denouncing a treaty must be submitted to either the Senate or the Congress for ratification presupposes that action by one or the other of them is necessary to give validity to the action of the President. This argument, however, would seem to be questionable for the reason that when the President has given notice of the desire of this Government to terminate a treaty, the failure of the Congress or the Senate to approve does not alter the situation. The notice has already been given and the foreign government may decline to accept a withdrawal of such notice.¹¹

This passage elides the international and constitutional law questions, in essence bootstrapping the justification for the President's constitutional power to terminate treaties onto the methods recognized by international law for terminating treaties. Along these same lines, the Executive Branch relied on the President's sovereign power as the sole organ of foreign relations—a doctrine that is largely a creature of international law¹²—to justify his constitutional power to terminate treaties without congressional approval.¹³ Indeed, at times the Executive Branch even mischaracterized doctrinal precedents in international law as doctrinal precedents in constitutional law in order to justify its constitutional position.¹⁴

Such uses—and sometimes misuses—of international law to accrue constitutional power to the Executive Branch are common in foreign relations law. I have shown elsewhere how they help account for the rise in presidential power in the areas of recognition, war powers, and sole executive agreements—all of which, like treaty termination, are aspects of foreign relations law.¹⁵

11. Memorandum from Green Haywood Hackworth, Legal Advisor of the Dep't of State, Abrogation of Treaties (Jan. 27, 1936), *quoted in* 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 328 (1943).

12. Galbraith, *supra* note 10, at 1012–15.

13. *See, e.g.*, Letter from Robert Moore, Acting Sec'y of State, to Fred Biermann, U.S. Rep. (Aug. 19, 1939), *quoted in* 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 331–32 (1943) (rooting the President's power to terminate treaties in general concepts of sovereignty and in the Supreme Court's *Curtiss-Wright* decision, which emphasized the sole organ powers of the President).

14. *See* Bradley, *supra* note 1, at 796–97, 806 n.186 (describing how the Executive Branch points to treaties that ended during the Madison and Wilson Administrations as historical precedents for the constitutional power of the President to terminate treaties when, in fact, these treaties were terminated based on the international laws and customs of the time).

15. *See generally* Galbraith, *supra* note 10. Interestingly, international law continues to play a robust role in determining the boundary of what the President can and cannot do in treaty termination, *see* Bradley, *supra* note 1, at 823 (quoting *the Restatement (Third) of Foreign Relations Law* as providing the closest description of the current state of the U.S. constitutional law regarding treaty termination), while in these other areas of foreign relations law its role is now obscured, *see* Galbraith, *supra* note 10, at 1033–42.

B. The Twentieth-Century Rise in Executive Power.

The first half of the twentieth century brought about a sharp rise in the President's foreign affairs powers. This rise has many possible causes, including the energetic presidencies of Theodore and later Franklin Roosevelt; the growing importance of the United States on the world stage; the increased interconnectedness of world affairs; and the Supreme Court's embrace of executive foreign affairs powers in *Curtiss-Wright* and related cases.¹⁶

The shift in constitutional practice in treaty termination can be seen as one piece of this broader picture. Professor Bradley documents this shift as falling squarely within this same time period, as the caveated precursors to unilateral executive treaty termination are succeeded by straightforward exercise of that power beginning in 1927, and increasing rapidly during the FDR Administration.¹⁷ Indeed, this increased power with regard to treaty termination not only occurred amid a general expansion of the President's foreign affairs power but also within a specific expansion of his powers related to international agreements. During this same time period, the reach of sole executive agreements entered into by the President increased markedly;¹⁸ the President first asserted and exercised the power to use *ex post* congressional-executive agreements as a substitute for Article II treaties (thus enabling the United States to enter into major agreements where majority support in the Senate fell below the two-thirds mark),¹⁹ and the Supreme Court planted the seeds of its current, substantial practice of deference to the Executive Branch on treaty interpretation.²⁰

C. The Reluctance of Courts to Interfere with Executive Decision Making.

The third theme from broader foreign relations law reflected in the history of treaty termination is the traditional reluctance of the Supreme Court to interfere with presidential decision making in the foreign affairs

16. See generally David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499 (2012); David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491 (1999); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999). The President's domestic powers of course increased during this time period as well, but with this increase coming largely through explicit congressional delegations.

17. Bradley, *supra* note 1, at 805–07.

18. See, e.g., Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) (documenting a number of executive agreements entered into during the first half of the twentieth century).

19. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805–08 (1995) (discussing how several early twentieth century scholars intensely argued for the interchangeability between congressional-executive agreements and treaties).

20. Michael P. Van Alstine, *Treaties in the Supreme Court: 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 191, 217 (Davis L. Sloss, Michael D. Ramsey & William S. Dodge eds. 2011).

context. Professor Bradley mentions this theme,²¹ and it is on evident display in *Goldwater v. Carter*. Confronted with the chance to address the President's constitutional power to terminate treaties, the Court squarely declined to do so (though without a majority for any single theory of non-justiciability).²² The Court's reluctance here contrasts markedly with its willingness to interfere with historical practice in the domestic context, as illustrated a few years later in *I.N.S. v. Chadha*.²³

II. Treaty Termination, Foreign Affairs, and Historical Gloss

In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter defended constitutional practice as a “gloss” on executive power where this practice revealed “the way the [constitutional] framework has *consistently* operated” and “[d]eeply embedded traditional ways of conducting government.”²⁴ Interestingly, the historical practice on treaty termination explored here by Professor Bradley bears little resemblance to this gloss. This practice does not reveal deeply embedded, consistent interpretations, but rather striking *departures* from early interpretations.

What do we make of this? As a descriptive matter, Professor Bradley's account makes clear that historical practice can sometimes lead to truly dramatic shifts in the balance of power between branches. His work with Professor Morrison helps explain why the Executive usually gains in these shifts, but it does not provide much fine-tuned guidance as to *which* shifts will happen and which ones will not happen.

I suggest here that the fact that treaty termination is a matter of foreign relations law is crucial to understanding why such a dramatic shift in practice has been tolerated. It is an instance of what Professor Bradley has described elsewhere as “foreign affairs exceptionalism,” meaning “the idea that foreign affairs powers should be subject to different, and generally more relaxed, constitutional restraints than domestic powers.”²⁵ Professor Bradley roots this doctrine largely in developments from 1920–1940, although his discussions of its development have focused on Supreme Court decisions like *Curtiss-Wright* rather than changes in Executive Branch practice.²⁶

The rise of unilateral presidential power to terminate treaties bears clear indicia of foreign affairs exceptionalism. The themes outlined in the prior section—of entanglement with international law issues, of the growth of executive foreign affairs powers, and of judicial reluctance to interfere with

21. See Bradley, *supra* note 1, at 785–86.

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

23. 462 U.S. 919 (1983). As Justice White noted in dissent, the holding did implicate some foreign relations law statutes. *Id.* at 968 (White, J., dissenting).

24. 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasis added).

25. Bradley, *International Delegations*, *supra* note 5, at 1582–83.

26. See *id.* at 1583.

the Executive's foreign affairs decision making—are themes that seem collectively necessary to the constitutional change in treaty making, and that are largely particular to the foreign affairs context. Indeed, the very time period that Professor Bradley associates with the rise of foreign affairs exceptionalism—the 1920s to the 1940s—is exactly the same time period in which he grounds the shift in practice on treaty termination. The same principles that animated the *Curtiss-Wright* decision of deference to the Executive's powers on foreign affairs and emphasis on functionalism are on display in the shift to unilateral presidential power to terminate treaties, and the decision in *Curtiss-Wright* itself served to reinforce this reasoning.²⁷

Understanding the change in treaty termination as foreign affairs exceptionalism helps explain why practice in treaty termination has taken such a different turn from practice in statutory termination. The practice in treaty termination has changed dramatically; the practice in statutory termination has not. While the Constitution's text might offer stronger basis for presidential termination of treaties than of statutes,²⁸ the historical practice explored by Professor Bradley suggests that the foreign affairs context of treaty termination played an essential role. This context has made presidents more comfortable pushing the boundaries of past precedents; Congress more tolerant of these developments; and the Supreme Court more wary of intervening.

In my view, the change in practice in treaty termination is better explained by foreign affairs exceptionalism than by Professor Bradley and Morrison's generalized constitutional theory of how historical practice can develop. Of course, the answer is not a purely binary one. Professor Bradley notes the role of foreign affairs exceptionalism in explaining the shift in practice in treaty termination, observing that, “when constitutional controversies implicate foreign relations,” themes of practice-based presidential accruals of power “are particularly common.”²⁹ Conversely, I accept that these themes can be found in certain other areas of the separation of powers, of which Professor Bradley suggests some examples.³⁰ What makes the foreign affairs context unique is the frequency, scale, and importance of practice-based shifts in favor of presidential power.

27. See Letter from Robert Moore, *supra* note 13.

28. See Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 250–51 (2013) (noting the use of parallels to the Appointments Clause).

29. Bradley, *supra* note 1, at 785; see also Bradley & Morrison, *supra* note 4, at 461–76 (using two, out of a total of three, foreign affairs examples to illustrate their theory of practice-based constitutional change).

30. Bradley & Morrison, *supra* note 4, at 476–84 (discussing the power to remove officials whose appointment the Senate has advised and consented to, although noting that this example involves more judicial involvement than in the foreign affairs examples they offer); see also Bradley, *supra* note 1, at 785–86 (offering examples of the pocket veto, the pardon power, and executive privilege as areas where executive practice matters).

Indeed, foreign affairs exceptionalism is itself an instance of practice-based constitutional development. The historical practice that has led to unilateral presidential power to terminate treaties—and to stronger presidential war powers, recognition powers, and powers to make international agreements and set U.S. foreign policy—has also led more generally to specialized treatment of foreign affairs law within our constitutional framework. An important question today is whether foreign relations law should have such specialized treatment or instead be approached in the same way as purely domestic constitutional issues. In the past, Professor Bradley has been wary of foreign affairs exceptionalism.³¹ Yet if one accepts that historical practice gives rise to valid constitutional interpretations (even if reserving judgment on the normative desirability of shifts in historical practice),³² then historical practice can serve as a justification for foreign affairs exceptionalism. The sanction of history lies over foreign affairs exceptionalism, just as it does over the narrower matter of practice in treaty termination.

Of course, neither the current practice of treaty termination nor foreign affairs exceptionalism more generally may be well suited to the needs of the present day. Professor Bradley has criticized foreign affairs exceptionalism as out of date in light of “the erosion in recent years of the distinction between domestic and foreign affairs.”³³ The Supreme Court’s recent assertiveness in cases involving foreign affairs suggests that a majority of the Justices may be sympathetic to this view. A recent, striking example is the Court’s decision that the political question doctrine does not apply to the recognition power—a decision which nowhere cited Justice Rehnquist’s plurality opinion in *Goldwater v. Carter* and nowhere suggested that the foreign affairs context of the case mattered.³⁴ I think that there is still something to this distinction, and that, in any event, the best solution to its erosion may involve changes to *both* traditionally domestic and foreign affairs constitutional principles rather than only to the latter. If one accepts that foreign affairs exceptionalism should end, however, then this would suggest that the doctrines that have developed through foreign affairs exceptionalism—such as presidential power over treaty termination—should perhaps also end. Now that treaties have increased implications for domestic

31. *E.g.*, Bradley, *Foreign Affairs*, *supra* note 5, at 1104–05.

32. *E.g.*, Bradley, *supra* note 1, at 823 (accepting that the best description of the current state of constitutional law is that the President can terminate treaties without congressional approval if this termination accords with international law); *id.* at 827, 830 (declining to address normative implications).

33. Bradley, *Foreign Affairs*, *supra* note 5, at 1105.

34. *See* *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). The concurring opinion of Justice Sotomayor and the dissenting opinion of Justice Breyer do cite *Goldwater v. Carter* and note the foreign affairs context. *See id.* at 1433 (Sotomayor, J., concurring); *id.* at 1437 (Breyer, J., dissenting).

affairs (and now that at least some international agreements are done through *ex post* congressional–executive agreements that are akin to statutes), perhaps it is more important than formerly to have congressional sanction for their termination.

These issues await the future. Professor Bradley’s excellent article reminds us that constitutional practice can change dramatically, at least in the foreign affairs context. It remains to be seen whether such a change will affect how foreign relations law itself is understood within our broader constitutional structure.