

## WITHDRAWING FROM CONGRESSIONAL- EXECUTIVE AGREEMENTS WITH THE ADVICE AND CONSENT OF CONGRESS

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*As President Donald J. Trump withdrew the United States from one international agreement after another, many began to question whether these withdrawals required congressional approval. The answer may depend on the type of agreement. Based on history and custom, it appears that the president may unilaterally withdraw from agreements concluded pursuant to the treaty process outlined in the U.S. Constitution. However, the United States also has a long history of concluding international agreements as congressional-executive agreements, which use a different approval process that does not appear in the Constitution. But while academics have spilled ink on Article II treaties for decades, the congressional-executive agreement has received relatively little attention. It is neither clear nor well settled whether the president has the constitutional authority to withdraw unilaterally from this type of agreement.*

*This Note proposes applying Justice Robert H. Jackson's tripartite framework, first articulated in a concurring opinion to *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure), to determine whether or not a president may constitutionally withdraw from a congressional-executive agreement without Congress's consent. However, in certain dire emergency situations or when Congress is physically unable to convene and vote, the president should be permitted to eschew the framework and withdraw the United States from a congressional-executive agreement without waiting for Congress's consent—so long as the president reasonably believes that withdrawal is in the country's best interest. To support this approach, this Note also calls for a new reporting statute, similar in structure to the War Powers Resolution, to address the significant information asymmetries between the executive and legislative branches.*

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## INTRODUCTION

After weeks of accusing the World Health Organization (WHO) of collaborating with the Chinese government to conceal the beginnings of the COVID-19 pandemic, President Donald J. Trump announced on May 29, 2020, that the United States would withdraw.<sup>1</sup> The announcement drew swift condemnation from public health officials and Democrats,<sup>2</sup> but on July 6, 2020, the United States formally notified the United Nations of its withdrawal from the WHO, effective on July 6, 2021.<sup>3</sup>

Trump's foreign policy has been marked by a slew of U.S. withdrawals from international agreements. While there are far too many to name here,<sup>4</sup> notable examples include Trump's high-profile withdrawals from the Joint Comprehensive Plan of Action ("the Iran Nuclear Deal"),<sup>5</sup> the 1987 Intermediate Nuclear Forces Agreement ("the INF Agreement"),<sup>6</sup> and the Paris Agreement on Climate Change ("the Paris Agreement").<sup>7</sup> Trump has also reportedly mused about withdrawing from the North Atlantic Treaty Organization (NATO).<sup>8</sup>

Trump's actions reignited a debate over whether the president has the constitutional authority to withdraw from U.S. international obligations without congressional approval.<sup>9</sup> The U.S. Constitution, succinct as it is,

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1. Donald G. McNeil Jr. & Andrew Jacobs, *Blaming China for Pandemic, Trump Says U.S. Will Leave the W.H.O.*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/health/virus-who.html> [<https://perma.cc/X3WC-G3H6>].

2. *Id.*

3. Stéphane Dujarric, *Note to Correspondents in Answer to Questions Regarding the World Health Organization*, UNITED NATIONS SEC'Y-GEN. (July 7, 2020), <https://www.un.org/sg/en/content/sg/note-correspondents/2020-07-07/note-correspondents-answer-questions-regarding-the-world-health-organization> [<https://perma.cc/QQ5V-4HS4>].

4. For a more comprehensive list of international agreements from which Trump has withdrawn as of February 1, 2019, see Zachary B. Wolf & JoElla Carman, *Here Are All the Treaties and Agreements Trump Has Abandoned*, CNN (Feb. 1, 2019, 11:50 AM), <https://www.cnn.com/2019/02/01/politics/nuclear-treaty-trump/index.html> [<https://perma.cc/G374-Z579>].

5. S.C. Res. 2231 (July 20, 2015); see *Fact Sheets: President Donald J. Trump Is Ending United States Participation in an Unacceptable Iran Deal*, THE WHITE HOUSE (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/> [<https://perma.cc/TZ5K-UATQ>].

6. The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, S. TREATY DOC. NO. 100-11 [hereinafter INF Treaty]; see Press Statement, Michael R. Pompeo, U.S. Dep't of State, U.S. Withdrawal from the INF Treaty (Aug. 2, 2019), <https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/> [<https://perma.cc/8TK4-9KFJ>].

7. Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104; see Press Statement, Michael R. Pompeo, U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> [<https://perma.cc/8PKU-JGLQ>].

8. 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://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html> [<https://perma.cc/7BF8-FJR6>].

9. See generally Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615 (2018) (arguing that presidents may generally withdraw unilaterally from certain international agreements); Harold Hongju Koh, *Presidential Power to Terminate*

does little to resolve the debate. It devotes only a sentence to entering into agreements with foreign governments,<sup>10</sup> and it only mentions treaties.<sup>11</sup>

Based on this, a casual observer might assume that all of the international agreements that the United States has made or entered into over the centuries are “treaties”—that is, agreements concluded<sup>12</sup> pursuant to the process described in the Constitution, i.e., Article II treaties.<sup>13</sup> In fact, this is far from the truth. Of the agreements mentioned above, only the INF Agreement and the agreement that created NATO are Article II treaties.<sup>14</sup> The Iran Nuclear Deal is a “nonbinding political commitment” that President Barack Obama made independently of Congress.<sup>15</sup> Scholars cannot seem to agree on what to call the Paris Agreement.<sup>16</sup> The agreement that made the United States a member of the WHO (“the WHO Agreement”),<sup>17</sup> however, is a congressional-executive agreement (CEA). Other notable CEAs include the North American Free Trade Agreement (NAFTA);<sup>18</sup> its successor, the United States-Mexico-Canada Agreement (USMCA);<sup>19</sup> and the instruments by

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*International Agreements*, 128 YALE L.J.F. 432 (2018) (arguing that the agreement’s subject matter informs the inquiry); Catherine Amirfar & Ashika Singh, *The Trump Administration and the “Unmaking” of International Agreements*, 59 HARV. INT’L L.J. 443 (2018) (arguing for a case-by-case approach); Robbie Gramer, *Trump Can’t Do That. Can He?*, FOREIGN POL’Y (Jan. 16, 2019, 11:20 AM), <https://foreignpolicy.com/2019/01/16/trump-cant-do-that-can-he-nato-russia-congress> [<https://perma.cc/8SCJ-GJH8>] (summarizing perspectives on a potential withdrawal from NATO).

10. See U.S. CONST. art. II, § 2, cl. 2 (“[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 . . .”). This is often referred to as the Treaty Clause. See, e.g., STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 3 (2018).

11. *But see* U.S. CONST. art. I, § 10, cl. 3 (forbidding states from entering into “Agreement[s] or Compact[s] . . . with a foreign Power”).

12. This Note uses “conclude” to refer to the act of reaching or negotiating an agreement.

13. See *supra* note 10 and accompanying text.

14. See INF Treaty, *supra* note 6, at III (submitting the treaty to the Senate for its advice and consent); North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

15. Samuel Estreicher & Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 FORDHAM L. REV. 1199, 1202 (2017).

16. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1248–49 (2018) (summarizing differing opinions). Professors David Bodansky and Peter Spiro, for example, classify the Paris Agreement as an “executive agreement+,” or an agreement the president concludes alone and outside the independent presidential powers granted in the Constitution. See David Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT’L L. 885, 887 (2016).

17. Act of June 14, 1948, Pub. L. No. 80-643, ch. 469, 62 Stat. 441 (codified as amended at 22 U.S.C. §§ 290–290e); Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679.

18. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended in scattered sections of the U.S.C.); Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 298.

19. See United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020) (to be codified in scattered sections of the U.S.C.); Agreement Between the United States of America, the Mexican States, and Canada, Nov. 30, 2018, <https://can-mex-usa-sec.org/secretariat/assets/pdfs/usmca-aceum-tmec/agreement-eng.pdf> [<https://perma.cc/EAA4-UG2H>] (entered into force July 1, 2020).

which the United States joined the International Monetary Fund (IMF) and the World Bank.<sup>20</sup>

Unlike Article II treaties, which do not bind the United States until the Senate consents by a two-thirds majority vote,<sup>21</sup> CEAs require simple majority votes from both the Senate and the House of Representatives either before or after the agreement is concluded.<sup>22</sup> The approval is usually memorialized in a statute.<sup>23</sup> Together with their sole executive agreement<sup>24</sup> cousins, CEAs vastly outnumber Article II treaties: the Congressional Research Service found that the United States concluded 12,880 executive agreements and a mere 1501 Article II treaties between 1789 and 1989.<sup>25</sup>

History seems to demonstrate a general acceptance that the president may withdraw from an Article II treaty without congressional approval.<sup>26</sup> Only one serious challenge to the president's unilateral withdrawal or termination<sup>27</sup> authority has reached the U.S. Supreme Court.<sup>28</sup> The Court

20. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 215 (2d ed. 1996); see Bretton Woods Agreements Act, Pub. L. No. 79-171, ch. 339, 59 Stat. 512 (1945) (codified as amended at 22 U.S.C. §§ 286–286zz); Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401; Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440.

21. U.S. CONST. art. II, § 2, cl. 2.

22. CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 76 (2d ed. 2015); see *infra* Part I.A.

23. See, e.g., Bretton Woods Agreements Act, § 2, 59 Stat. at 512 (“The President is hereby authorized to accept membership for the United States in the International Monetary Fund . . . and in the [World Bank] . . .”).

24. Presidents conclude sole executive agreements without congressional approval pursuant to authority derived from independent grants of power under Article II. CONG. RSCH. SERV., 106TH CONG., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 1 (Comm. Print 2001). CEAs and sole executive agreements are two different types of executive agreements, which bind the United States to international obligations but are concluded outside the Article II treaty process. MULLIGAN, *supra* note 10, at 6; Bradley, *supra* note 9, at 1616–17. Together, Article II treaties, CEAs, and sole executive agreements constitute the traditional trichotomy of international agreements. Bodansky & Spiro, *supra* note 16, at 886–87. Although some disagree, see, e.g., *id.* at 887 (calling the traditional framework “inadequate both conceptually and historically”); Bradley & Goldsmith, *supra* note 16, at 1207–08 (listing five types of international agreements); Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 *YALE L.J.F.* 338 (2017) (arguing that the trichotomy is obsolete), this Note utilizes the traditional three-part framework.

25. See CONG. RSCH. SERV., *supra* note 24, at 39 tbl.II-§1. The table does not divide executive agreements further into CEAs and sole executive agreements.

26. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 *TEX. L. REV.* 773, 798–816 (2014) (recounting a history of unilateral presidential treaty terminations); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 313(1) (AM. L. INST. 2018) (“According to established practice, the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments and in withdrawing the United States from [Article II] treaties . . .”); *infra* Part I.D.

27. A party that terminates a treaty (or other international agreement) according to the treaty’s terms announces that it “will no longer adhere” to the otherwise valid and enforceable agreement. CONG. RSCH. SERV., *supra* note 24, at 413. “Withdrawal” generally refers to the act of “terminating the obligations of an international agreement with respect to a withdrawing party.” *Id.* This Note generally uses “termination” and “withdrawal” interchangeably.

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

remanded the case without issuing a majority opinion, but individual Justices wrote splintered concurring opinions that did not address the merits.<sup>29</sup> Federal district courts dismissed two later cases that brought similar challenges—also without reaching the merits of either case.<sup>30</sup> However, all three cases concerned Article II treaties; whether the president has the constitutional authority to withdraw from or terminate a CEA without congressional consent “has not been seriously challenged in the past.”<sup>31</sup>

In an era as turbulent and polarized as the current one, resolving this key question of presidential authority is crucial.<sup>32</sup> Given the apprehension toward global involvement that accompanied Trump’s election<sup>33</sup> and that past U.S. presidents have also displayed isolationist tendencies,<sup>34</sup> one wonders what other global institutions might someday land in the crosshairs.

This Note argues that Congress should have the opportunity to participate in the decision to withdraw from CEAs, except in emergency situations implicating U.S. national security or vital security interests, or when Congress physically cannot convene<sup>35</sup> and the president reasonably deems it necessary to withdraw immediately.<sup>36</sup> Additionally, because no current federal statute requires the president “to notify Congress of an executive decision to terminate or withdraw from any treaty or international

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29. *Id.* at 996–97. Justice William H. Rehnquist argued that the case raised a nonjusticiable political question. *Id.* at 1002 (Rehnquist, J., concurring). Justice Lewis F. Powell Jr. raised ripeness issues. *Id.* at 997 (Powell, J., concurring).

30. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1199 (D. Mass. 1986), *aff’d*, 814 F.2d 1 (1st Cir. 1987).

31. CONG. RSCH. SERV., *supra* note 24, at 199.

32. It is important to note that presidents from both parties have withdrawn from or unilaterally terminated CEAs. *See, e.g.,* Bradley, *supra* note 9, at 1638–39 (discussing how the Obama administration unilaterally terminated a CEA by entering into another agreement).

33. *See Public Uncertain, Divided over America’s Place in the World*, PEW RSCH. CTR. (May 5, 2016), <https://www.pewresearch.org/politics/2016/05/05/public-uncertain-divided-over-americas-place-in-the-world/> [<https://perma.cc/EAA4-UG2H>] (reporting that 57 percent of Americans surveyed say the United States should let other countries “[d]eal with their own problems” and 41 percent say the United States does “[t]oo much” to solve world problems).

34. *See, e.g.,* WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES MDCCXCVI 22 (Houghton Mifflin Co. 1913) (“It is our true policy to steer clear of permanent alliances with any portion of the foreign world . . . .”); President Warren G. Harding, Inaugural Address (Mar. 4, 1921), *reprinted in* 60 CONG. REC. 4533, 4533 (1921) (“[The United States] can enter into no political commitments, nor assume any economic obligations which will subject our decisions to any other than our own authority.”).

35. Although the author has not found any particular time in history when it was physically impossible for Congress to meet, such a situation is not especially difficult to imagine. For example, had United Airlines Flight 93 hit its intended target, the U.S. Capitol building, on September 11, 2001, hundreds of members of Congress could have been killed or incapacitated—this would have “eliminat[ed] the constitutionally required quorum until special elections could be held to replenish the House.” Norm Ornstein, *Congress Desperately Needs a Contingency Plan*, ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/congress-needs-contingency-plan-right-now/607933> [<https://perma.cc/W2DQ-53VE>]; *see also* U.S. CONST. art. 1, § 5, cl. 1 (“[A] Majority of each [chamber] shall constitute a Quorum to do Business . . . .”).

36. This Note only discusses withdrawing from CEAs on the international plane and does not discuss terminating any related domestic obligations. This Note does not discuss breaches of international law or particular withdrawal terms in any given CEA.

agreement,”<sup>37</sup> this Note also calls for a new reporting statute to support the proposed framework.

Part I explores the history of CEAs, compares CEAs to Article II treaties, and broadly summarizes the current state of the law surrounding unilateral presidential withdrawal from international agreements. Part II presents opposing scholarly arguments discussing a president’s constitutional authority to withdraw unilaterally from a CEA. Part III argues for a middle ground approach between the opposing viewpoints discussed in Part II and outlines the proposed reporting statute.

### I. CONGRESSIONAL-EXECUTIVE AGREEMENTS: A PRIMER

Presidents negotiate CEAs with congressional “authorization or approval” that may concern “any matter that falls within the powers of Congress and of the President under the Constitution.”<sup>38</sup> CEAs require only simple majorities of both the Senate and the House of Representatives.<sup>39</sup> Though not contemplated in the Constitution, CEAs constitute the vast majority of international agreements to which the United States is a party.<sup>40</sup>

As a threshold matter, international law does not distinguish among Article II treaties, CEAs, and sole executive agreements as U.S. domestic law does.<sup>41</sup> The Vienna Convention on the Law of Treaties (“the Vienna Convention”) considers all three types of agreements to be “treaties.”<sup>42</sup> There also seems to be relative consensus in U.S. domestic law that Article II treaties and CEAs are interchangeable instruments.<sup>43</sup>

Part I.A describes the two different types of CEAs. Part I.B briefly traces the history of CEAs. Part I.C compares CEAs and Article II treaties. Part

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37. Koh, *supra* note 9, at 448.

38. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 (AM. L. INST. 1987).

39. HENKIN, *supra* note 20, at 217.

40. Bradley, *supra* note 9, at 1616–17.

41. See Vienna Convention on the Law of Treaties art. 2, ¶ 1(a), May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention has awaited Senate approval since February 23, 1978. Off. of Treaty Affs., *Treaties Pending in the Senate*, U.S. DEP’T OF STATE (Oct. 22, 2019), <https://www.state.gov/treaties-pending-in-the-senate/> [https://perma.cc/5DE3-RWQ5]. Regardless, the executive branch and the courts generally see the Vienna Convention as a reflection of customary international law. MULLIGAN, *supra* note 10, at 2 n.13.

42. See Vienna Convention on the Law of Treaties, *supra* note 41, at 333 (defining a “treaty” as “an international agreement concluded between [countries] in written form and governed by international law”).

43. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. e (“Since any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty . . . either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”). *But see generally* Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 AM. J. INT’L L. 54 (2019) (arguing that the distinct Article II treaty and CEA processes should be preserved); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001) (arguing against complete interchangeability); *infra* Part I.C (detailing differences between Article II treaties and CEAs).

I.D summarizes the current law surrounding unilateral presidential withdrawal from Article II treaties.

#### A. *Types of Congressional-Executive Agreements*

There are two types of CEAs: *ex ante* and *ex post*.<sup>44</sup> Congress usually approves *ex ante* CEAs via legislation before the president even sets out to negotiate the agreement.<sup>45</sup> Congress also usually grants the president broad discretion to “negotiate, conclude, and ratify [an agreement],” and the agreement rarely returns to Congress for review or approval.<sup>46</sup> The authorization is often “vague and enacted many years before the agreement.”<sup>47</sup> Authorizing statutes also rarely contain expiration or sunset provisions, so a president might negotiate an agreement based on a decades-old authorization granted “in a completely different political reality and climate.”<sup>48</sup> Congress may only reject an *ex ante* CEA by passing a law to abrogate the agreement or by enacting a joint resolution.<sup>49</sup> A presidential veto, however, could surmount any such efforts.<sup>50</sup>

Unlike *ex ante* CEAs, Congress does not delegate negotiating authority for *ex post* CEAs to the president.<sup>51</sup> Instead, Congress approves *ex post* CEAs after the executive branch has finished negotiating an agreement with a foreign power.<sup>52</sup> Congress then uses “accompanying implementing legislation” to approve an *ex post* CEA.<sup>53</sup> Both the House and the Senate must approve the proposed agreement by majority vote for the agreement to take effect.<sup>54</sup>

#### B. *The Congressional-Executive Agreement in History*

While Article II treaties received a great deal of attention during the 1787 Constitutional Convention, there was apparently little to no consideration of CEAs.<sup>55</sup> This, however, has not deterred the United States from using CEAs

44. See BRADLEY, *supra* note 22, at 80.

45. *Id.*; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1255 (2008).

46. Bradley & Goldsmith, *supra* note 16, at 1213.

47. *Id.*

48. Ryan Harrington, *A Remedy for Congressional Exclusion from Contemporary International Agreement Making*, 118 W. VA. L. REV. 1211, 1223 (2016).

49. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 167 (2009).

50. *Id.* As a result, scholars have criticized the *ex ante* CEA as “possess[ing] the form of congressional-executive cooperation without the true collaboration it implies.” *Id.* at 213; accord Bradley & Goldsmith, *supra* note 16, at 1214.

51. Yoo, *supra* note 43, at 766.

52. BRADLEY, *supra* note 22, at 80.

53. Jean Galbraith, *The President's Power to Withdraw the United States from International Agreements at Present and Future*, 111 AJIL UNBOUND 445, 447 (2018).

54. HENKIN, *supra* note 20, at 217; see also U.S. CONST. art. I, § 7, cl. 2; Ryan Harrington, *Understanding the “Other” International Agreements*, 108 LAW LIBR. J. 343, 347 (2016) (comparing the ordinary legislative process to the CEA approval process).

55. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 798, 808–13 (1995).

throughout its history. Congress passed statutes as early as 1790 that granted the president *ex ante* approval to conclude agreements with foreign governments.<sup>56</sup> One early CEA helped to establish an international postal system.<sup>57</sup> The fledgling United States also employed CEAs for a slew of other actions.<sup>58</sup> Article II treaties still, however, outnumbered CEAs and sole executive agreements in the nation's early days.<sup>59</sup>

CEAs became more common in the late 1890s as the William McKinley administration slowly abandoned protectionism and negotiated bilateral trade agreements.<sup>60</sup> Additionally, the United States joined many postwar multilateral institutions using CEAs<sup>61</sup>—examples include the United Nations Educational, Scientific, and Cultural Organization (UNESCO),<sup>62</sup> the WHO,<sup>63</sup> and the IMF and the World Bank<sup>64</sup>—and as Congress expanded the president's authority to negotiate trade agreements with minimal congressional involvement under certain sections of the Trade Act of 1974.<sup>65</sup> Several members of Congress introduced measures during the Dwight D. Eisenhower administration to exercise more control over the use of executive agreements, but those efforts ultimately failed without Eisenhower's support.<sup>66</sup> And while Congress has at times directed the president to

56. CONG. RSCH. SERV., *supra* note 24, at 78 (citing Assumption Act (State Debts), ch. 34, § 2, 1 Stat. 138, 139 (1790)).

57. Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, § 26, 1 Stat. 232, 239 (1792).

58. *See* Hathaway, *supra* note 45, at 1290–91. The United States used CEAs to, for example, establish diplomatic relations, authorize maritime and admiralty actions, settle claims or cases, conclude territorial agreements based on previous treaties, exchange prisoners of war, create joint occupations, and colonize territory. *Id.*

59. *See id.* at 1287. From 1789 to 1839, the United States entered into sixty Article II treaties compared to twenty-seven executive agreements. CONG. RSCH. SERV., *supra* note 24, at 39 tbl.II-1.

60. *Id.* at 1293.

61. *Id.* at 1300.

62. Act of July 30, 1946, Pub. L. No. 79-565, 60 Stat. 712 (1946) (codified as amended at 22 U.S.C. §§ 287m–287t); Constitution of the United Nations Educational, Scientific and Cultural Organisation, *opened for signature* Nov. 16, 1945, 61 Stat. 2495. The United States withdrew from UNESCO under President Ronald Reagan but rejoined under President George W. Bush. Letter from George Schultz, U.S. Sec'y of State, to Amadou-Mahtar M'Bow, Dir. Gen., United Nations Educ., Sci., & Cultural Org. (Dec. 28, 1983), *reprinted in* 23 I.L.M. 220, 220–21 (1984); President George W. Bush, President's Remarks at the United Nations General Assembly (Sept. 12, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html> [<https://perma.cc/Y3KB-NZCJ>]. The United States withdrew again under Trump, citing “anti-Israel” bias. Press Statement, Heather Nauert, U.S. Dep't of State, The United States Withdraws from UNESCO (Oct. 12, 2017), <https://www.state.gov/the-united-states-withdraws-from-unesco/> [<https://perma.cc/VC6T-UB5Y>].

63. *See supra* note 17 and accompanying text.

64. *See supra* note 20 and accompanying text.

65. Pub. L. No. 93-618, §§ 151–154, 88 Stat. 1978, 2001–08 (codified as amended at 19 U.S.C. §§ 2191–2194). Under this “fast-track authority,” presidents may submit trade agreements for consideration under special rules that prohibit amendments and strictly limit debate in both chambers; filibusters are impossible under the statutory time limits. 19 U.S.C. § 2191(d), (f)–(g); *see also* Hathaway, *supra* note 45, at 1304–05.

66. *See* GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS

withdraw from a CEA,<sup>67</sup> these actions appear to be the exception rather than the norm.<sup>68</sup>

### C. Comparing Congressional-Executive Agreements and Article II Treaties

The executive branch decides whether an international agreement will be concluded as an Article II treaty, CEA, sole executive agreement, agreement pursuant to a treaty, or a political commitment.<sup>69</sup> Part I.C.1 discusses an example of how the Supreme Court has treated Article II treaties and CEAs for statutory interpretation purposes. Parts I.C.2 through I.C.6 discuss how CEAs and Article II treaties differ in terms of: (1) efficiency, (2) democratic legitimacy, (3) self-execution, (4) public relations value, and (5) ease of identification and frequency of reporting.

#### 1. Congressional-Executive Agreements and Statutory Interpretation

Although both the Restatement (Third) of the Foreign Relations Law of the United States<sup>70</sup> and modern scholarship endorse the CEA as a constitutional form of international agreement,<sup>71</sup> the Supreme Court has never directly ruled on its constitutionality. In *Weinberger v. Rossi*,<sup>72</sup> however, the Court did hold that CEAs can qualify as treaties when interpreting a federal statute.<sup>73</sup> The case arose when a group of U.S. citizens employed at the U.S. naval base at Subic Bay in the Philippines sued the secretary of defense after learning that their employment would be

44–45 (2009). One notable effort, the Bricker Amendment, sought to eliminate executive agreements and establish Article II treaties as the only legal method to conclude international agreements, but it failed in the Senate by one vote. *Id.* at 44.

67. MULLIGAN, *supra* note 10, at 24 (“For example, in the Comprehensive Anti-Apartheid Act of 1986 . . . Congress instructed the Secretary of State to terminate an air services agreement with South Africa.”).

68. *See infra* Part II.

69. *See* 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 723.3 (2006), <https://fam.state.gov/FAM/11FAM/11FAM0720.html> [<https://perma.cc/VG78-C4F4>] (listing all of the criteria that the State Department considers when making this determination).

70. THE RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. (AM. L. INST. 2018), is only a “partial” revision of the third restatement and does not address executive agreements.

71. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303(2) (AM. L. INST. 1987) (“[T]he President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution.”); *see also, e.g., id.* cmt. e (“The prevailing view is that the [CEA] can be used as an alternative to the [Article II] treaty method in every instance.”); HENKIN, *supra* note 20, at 217 (“[It] is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use . . .”). *See generally* Ackerman & Golove, *supra* note 55 (arguing that the CEA is constitutional); Yoo, *supra* note 43 (finding support for the CEA in the Constitution’s text, structure, and history). *But see* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections of Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (disagreeing with Ackerman and Golove and concluding that CEAs are inconsistent with the Constitution).

72. 456 U.S. 25 (1982).

73. *See id.* at 36.

terminated pursuant to an agreement<sup>74</sup> that created a preference for employing Filipino citizens (“the Base Labor Agreement”).<sup>75</sup> The Base Labor Agreement supplemented an earlier agreement<sup>76</sup> that allowed the United States to use several Filipino military facilities<sup>77</sup> (“the Military Bases Agreement”). The Military Bases Agreement was itself a CEA concluded under the president’s statutory ex ante authority “to acquire . . . military bases ‘he may deem necessary for the mutual protection of the Philippine Islands and of the United States.’”<sup>78</sup> The employees alleged that the Base Labor Agreement’s hiring preference and the impending termination of their employment violated a 1971 employment discrimination statute, which provided:

*Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any [U.S. military] facility . . . in any foreign country because such person is a citizen of the United States.*<sup>79</sup>

The Court noted that when the 1971 statute was enacted, there were twelve other agreements similar to the Base Labor Agreement instituting preferences for hiring local nationals on U.S. military bases and that four other similar agreements were subsequently enacted.<sup>80</sup> Citing a long-standing principle of statutory construction that avoids construing statutes in ways that violate international law when other constructions are available,<sup>81</sup> the Court surveyed the legislative history of the employment discrimination statute and found no indication that Congress intended to abrogate existing U.S. obligations under the Base Labor Agreement and its brethren.<sup>82</sup> As a result, the Court held that “treaty” as used in the 1971 statute included both Article II treaties and what it called “executive agreements.”<sup>83</sup>

## 2. Efficiency Considerations

Turning to the functional differences between CEAs and Article II treaties, because CEAs only require simple majorities from both chambers of Congress,<sup>84</sup> the president may find it much easier to get a CEA approved as

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74. *Military Bases in the Philippines: Employment of Philippine Nationals*, Phil.-U.S., May 27, 1968, 19 U.S.T. 5892.

75. *Id.* at 5892–93; *see also Weinberger*, 456 U.S. at 27.

76. *Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases*, Phil.-U.S., Mar. 14, 1947, 61 Stat. 4019.

77. *Id.* at 4020; *see also Weinberger*, 456 U.S. at 27.

78. *See Weinberger*, 456 U.S. at 26 (quoting 22 U.S.C. § 1392).

79. *Id.* at 28–29 (quoting Act of Sept. 28, 1971, Pub. L. No. 92-129, § 106, 85 Stat. 348, 355§).

80. *Id.* at 32.

81. *See Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

82. *Weinberger*, 456 U.S. at 32–36.

83. *Id.* at 36; *see also B. Altman & Co. v. United States*, 224 U.S. 583, 600–01 (1912) (holding that a trade agreement concluded as an ex ante CEA was a “treaty” as defined in the Judiciary Act of 1891).

84. HENKIN, *supra* note 20, at 217.

compared to an Article II treaty.<sup>85</sup> The Senate approval process can be especially vulnerable to partisan politics.<sup>86</sup> A perfect storm might arise in an election year if the president's rival party were to control the Senate and decline to approve a significant treaty "in order to deny a President a political advantage."<sup>87</sup> Because the Constitution requires a two-thirds Senate majority vote to approve an Article II treaty, the one-third minority can wield enormous negotiating power and force concessions from the president.<sup>88</sup> Professor Lawrence Margolis's study of presidents from Franklin D. Roosevelt to Jimmy Carter seems to support this theory.<sup>89</sup> These presidents negotiated 13.7 executive agreements for every Article II treaty when their own political party controlled two-thirds of the Senate; however, when the opposite party controlled two-thirds, these presidents averaged 24.4 executive agreements for every Article II treaty.<sup>90</sup>

Modern times are not so different. The current political climate is incredibly divided and fractious.<sup>91</sup> Former Secretary of State John Kerry, who previously served as chairman of the Senate Committee on Foreign Relations, once remarked, "I spent quite a few years trying to get a lot of treaties through the United States Senate, and, frankly, it has become physically impossible . . . [Y]ou can't pass a treaty anymore."<sup>92</sup> At the time

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85. *Id.* at 178.

86. *Id.*

87. *Id.*

88. CONG. RSCH. SERV., *supra* note 24, at 19. The Treaty of Versailles, which ended World War I and established the League of Nations, is perhaps the most famous example of a polarized Senate defeating an Article II treaty. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevens 43; CONG. RSCH. SERV., *supra* note 24, at 3. However, President Woodrow Wilson refused to negotiate with Senator Henry Cabot Lodge, the Republican leader and chair of the Senate Foreign Relations Committee, after Lodge sent fourteen reservations that would have affected how the treaty was interpreted after ratification. *Senate Leaders: Henry Cabot Lodge: Senate Leader, Presidential Foe*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/generic/People\\_Leaders\\_Lodge.htm](https://www.senate.gov/artandhistory/history/common/generic/People_Leaders_Lodge.htm) [<https://perma.cc/2Y35-ATU2>] (last visited Oct. 3, 2020). The United States never became a party to the Treaty of Versailles after the Senate failed to reach the required two-thirds vote. *See* 50 CONG. REC. 4599 (1919).

89. *See* LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 46 (1986).

90. *Id.* Margolis analyzed all international agreements and treaties listed in the Treaties and Other International Agreements of the United States of America series, which Congress recognized as an official collection. *Id.* at 25. His study does not, however, distinguish between CEAs and sole executive agreements. *See id.* at 24–27. He also acknowledged that the series did not contain oral agreements and may also have excluded secret agreements. *Id.* at 25.

91. *See The Partisan Divide on Political Values Grows Even Wider*, PEW RSCH. CTR. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/A5U7-6RMA>] ("Across 10 measures that Pew Research Center has tracked on the same surveys since 1994, the average partisan gap has increased from 15 percentage points to 36 points.")

92. *The Iran Nuclear Agreement: The Administration's Case: Hearing Before the H. Comm. on Foreign Affs.*, 114th Cong. 83 (2015) (statement of John Kerry, Secretary of State).

of this Note's publication, approximately forty Article II treaties still await Senate approval.<sup>93</sup>

### 3. Democratic Legitimacy

Unlike Article II treaties, CEAs notably assign the House of Representatives a role in the international agreement-making process.<sup>94</sup> The Framers excluded the House from the Article II treaty process based on their concerns about the House's constant fluctuations in membership and the need to maintain secrecy.<sup>95</sup>

Professor Oona A. Hathaway explains that excluding the House from the Article II treaty process is especially democratically troubling today because it ignores democratic procedure.<sup>96</sup> Only the United States, Mexico, and Tajikistan relegate part of their national legislatures to significantly smaller treaty-making roles as compared to their legislative roles, yet still make the end result binding on domestic law.<sup>97</sup> Furthermore, modern international law has expanded beyond diplomatic relations and border disputes to encompass matters relevant to domestic law and policy (such as education and tax policy), and legislating in these areas would necessarily require House participation.<sup>98</sup>

Hathaway also points out significant costs to the two-thirds supermajority requirement. As of 2008, Senators representing 8 percent of the U.S. population could stymie the Article II treaty process.<sup>99</sup> To win a two-thirds majority vote, presidents must cater to the "polarized extremes of modern American politics."<sup>100</sup> By contrast, requiring House participation and simple majority votes in each chamber, as CEAs do, could capture a broader swath

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93. Off. of Treaty Affairs, *supra* note 41 (listing thirty-seven treaties pending before the Senate as of October 22, 2019); see also *Treaty Documents Received in the Senate During the Current Congress*, U.S. SENATE (June 18, 2020), [https://www.senate.gov/legislative/trty\\_rcd.htm](https://www.senate.gov/legislative/trty_rcd.htm) [<https://perma.cc/7GBA-6R7M>] (listing three additional treaties submitted in 2020).

94. See U.S. CONST. art. II, § 2, cl. 2.

95. See, e.g., THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing how the treaty process requires "[a]ccurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, [all of which] are incompatible [sic] with the genius of a body [i.e., the House] so variable and so numerous"). On September 7, 1787, the Constitutional Convention soundly rejected a motion to insert "and the House of Representatives" after "Senate" in the Treaty Clause. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 538 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

96. See Hathaway, *supra* note 45, at 1308–12.

97. *Id.* at 1309.

98. *Id.*

99. *Id.* at 1310. Hathaway "add[ed] the populations of the eighteen least populous states and divid[ed] by the total U.S. population." *Id.* at 1310 n.218. "[I]n 1788 it would have taken states accounting for at least fourteen percent of the country's population" to present the same hurdle. *Id.* (citing EDWARD S. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 48–49 (1944)).

100. *Id.* at 1310.

of the country's views on any particular international agreement by requiring appeals to a middle ground.<sup>101</sup>

#### 4. Self-Execution

Another distinguishing factor of CEAs as compared to Article II treaties is that CEAs are self-executing and “have the force of law without the need for subsequent congressional action.”<sup>102</sup> A single CEA both approves the international agreement and its obligations and contains the “necessary domestic implementing legislation.”<sup>103</sup> Conversely, many other Article II treaties and agreements are considered non-self-executing and require additional legislation to incorporate the obligations into U.S. domestic law.<sup>104</sup>

This distinction between self-executing and non-self-executing agreements does not come directly from the Constitution.<sup>105</sup> Rather, Chief Justice John Marshall crafted the distinction in *Foster v. Neilson*,<sup>106</sup> where the Supreme Court held that when treaty terms “import a contract” and a treaty party agrees to “perform a particular act,” then the legislature must “execute the contract” before courts will enforce the treaty terms.<sup>107</sup> Much later, the Court clarified that “[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”<sup>108</sup>

Even though the House does not formally participate in approving Article II treaties, it plays an important functional role because Article II treaties often require “legislative implementation (if only by appropriation of funds).”<sup>109</sup> Many Senate-approved Article II treaties have languished unfulfilled without implementing legislation.<sup>110</sup> The CEA avoids this problem because both chambers cooperate to approve the agreement.<sup>111</sup> Furthermore, CEAs “are generally presumed [to be] self-executing unless specified otherwise . . . . The legislation [creating CEAs] provides, in effect,

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101. *See id.*

102. MULLIGAN, *supra* note 10, at 38.

103. John C. Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 36–37 (2011).

104. MULLIGAN, *supra* note 10, at 38. A non-self-executing agreement might, for example, contain a provision obligating the United States to pass laws to meet the agreement's objectives. *See* HENKIN, *supra* note 20, at 199–200.

105. Under the Supremacy Clause, all Article II treaties are considered “the supreme law of the land.” U.S. CONST. art. VI, cl. 2.

106. 27 U.S. (2 Pet.) 253 (1829), *abrogated on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

107. *Id.* at 314.

108. *Medellin v. Texas*, 552 U.S. 491, 525–26 (2008). Such responsibility necessarily requires House participation. *See* U.S. CONST., art. I, § 7, cl. 2. *But see* DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* 7–8 (2016) (summarizing how understandings of “self-executing” and “non-self-executing” have changed over the centuries).

109. HENKIN, *supra* note 20, at 217.

110. CONG. RSCH. SERV., *supra* note 24, at 20.

111. HENKIN, *supra* note 20, at 217.

one-stop shopping: the same act that provides the authority to accede to the international agreement can also make the necessary statutory changes to implement the obligation incurred.”<sup>112</sup>

### 5. Constitutional Legitimacy

Despite the CEA’s features,<sup>113</sup> the Article II treaty may still enjoy greater constitutional legitimacy. Because it is the only type of international agreement mentioned in the Constitution<sup>114</sup> and one that requires a high degree of bipartisan cooperation,<sup>115</sup> some argue that the Article II treaty sends a strong signal about U.S. intentions.<sup>116</sup> Although the CEA pathway is readily available,<sup>117</sup> the Article II treaty remains the overwhelmingly preferred method for peace treaties and agreements concerning mutual defense, security arrangements, arms control, human rights, extradition, and the environment.<sup>118</sup> Professor Harold Hongju Koh, who served as the State Department’s legal adviser during the Obama administration, once remarked that, given the high vote threshold, entering into an Article II treaty “send[s] the world . . . a powerful political message about how united our nation is behind a particular international obligation.”<sup>119</sup>

An Article II treaty’s public relations value was especially evident in 2002 after President George W. Bush finished negotiating new nuclear arms limitations with Russian President Vladimir V. Putin. Bush would have preferred an informal “gentleman’s agreement” and contemplated concluding the agreement as an executive agreement.<sup>120</sup> Pentagon officials also wanted to avoid a “legally binding” agreement to retain the necessary flexibility to adjust U.S. nuclear arms in response to international security developments.<sup>121</sup>

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112. Hathaway, *supra* note 45, at 1321.

113. *See supra* Parts I.C.2–4.

114. *See supra* note 11 and accompanying text.

115. *See supra* notes 88, 100 and accompanying text.

116. *See* Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440, 445 (2005) (“While an agreement’s form likely has a number of consequences, one of the most important may be its impact on the beliefs of other parties to it. That is, agreements are signaling devices.”). *But see* Yoo, *supra* note 103, at 37 (arguing that CEAs are stronger signals of U.S. intent because they are more difficult to terminate than Article II treaties); *infra* notes 213–14 and accompanying text.

117. *See supra* note 43 and accompanying text.

118. Yoo, *supra* note 43, at 803–13. The Paris Agreement, which was concluded outside the Article II treaty process, is a notable counterexample. *See* Bradley & Goldsmith, *supra* note 16, at 1203–04 (“President Obama made [the Paris Agreement] unilaterally without seeking congressional approval.”); *supra* note 16 and accompanying text.

119. Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 728 (2013).

120. KRUTZ & PEAKE, *supra* note 66, at 71; *see also* The President’s News Conference with President Vladimir Putin of Russia, 1 PUB. PAPERS 1391, 1395–96 (Nov. 13, 2001), <https://www.govinfo.gov/content/pkg/PPP-2001-book2/pdf/PPP-2001-book2-doc-pg1391-2.pdf> [<https://perma.cc/YMJ4-JY69>] (quoting Bush: “I looked the man in the eye and shook his hand, but if we need to write it down on a piece of paper, I’ll be glad to do that”).

121. AMY F. WOOLF, CONG. RSCH. SERV., RL31448, NUCLEAR ARMS CONTROL: THE STRATEGIC OFFENSIVE REDUCTIONS TREATY 3 (2011).

Putin, however, wanted a “full-blown” Article II treaty.<sup>122</sup> Secretary of State Colin L. Powell agreed an Article II treaty would “provide political cover for President Putin” when the State Duma (the lower house of the Russian national legislature) considered ratifying the agreement because “a formal treaty carried more weight with the Russians.”<sup>123</sup> The Senate Committee on Foreign Relations also preferred a formal Article II treaty since the agreement “would most likely include significant obligations by the United States.”<sup>124</sup> Bush ultimately acquiesced and submitted the agreement to the Senate for approval as an Article II treaty.<sup>125</sup>

#### 6. Ease of Identification and Frequency of Reporting

CEAs, unlike Article II treaties, are shrouded in opacity. Article II treaties are relatively visible because they are labeled as treaties when sent to the Senate and publicly approved and ratified.<sup>126</sup> Ex post CEAs, however, merely receive a bill number when submitted to Congress and require locating both the agreement and the authorizing statute or resolution.<sup>127</sup> Ex ante CEAs may never reach Congress at all.<sup>128</sup>

Locating an ex post CEA and the authorizing statute or resolution can be complicated because the State Department’s treaty database, Treaties and Other International Acts Series (TIAS), lists Article II treaties and non-Article II treaties without clearly distinguishing between the two.<sup>129</sup> TIAS is also an incomplete list—the relevant reporting statute permits the secretary of state to refrain from publishing international agreements binding the United States that: (1) are not Article II treaties; (2) are unlikely to attract sufficient public interest (or the “public disclosure of the text . . . would, in the [President’s] opinion . . . be prejudicial to [U.S.] national security”); and

122. KRUTZ & PEAKE, *supra* note 66, at 71 (citing Martin, *supra* note 116, at 448).

123. *Id.* at 72.

124. Letter from Sen. Joseph R. Biden Jr., Chairman, U.S. Senate Comm. on Foreign Rels., & Sen. Jesse Helms, Ranking Member, U.S. Senate Comm. on Foreign Rels., to Colin L. Powell, Sec’y of State (Mar. 15, 2002), <https://data.bloomberglp.com/assets/sites/2/20020315-LETTER-Biden-Helms-to-Powell.pdf> [<https://perma.cc/5FYQ-FP2A>].

125. Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, Russ.-U.S., May 24, 2002, S. TREATY DOC. NO. 107-8, at III (transmitting the Strategic Offensive Reductions Treaty to the Senate for its advice and consent).

126. Bradley & Goldsmith, *supra* note 16, at 1209.

127. Harrington, *supra* note 54, at 354–58. This process does not apply to ex ante CEAs, because those agreements are concluded after Congress grants statutory authority to the president and the agreement rarely returns to Congress for consideration. *See supra* notes 45–46 and accompanying text.

128. Bradley & Goldsmith, *supra* note 16, at 1213.

129. *The President, Congress, and Shared Authority over International Accords: Hearing Before the S. Foreign Rels. Comm.*, 115th Cong. 8 n.12 (2017) (testimony of Curtis A. Bradley, William Van Alstyne Professor, Duke Law School), [https://www.foreign.senate.gov/imo/media/doc/120517\\_Bradley\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/120517_Bradley_Testimony.pdf) [<https://perma.cc/KXS4-K3H6>]. TIAS also does not distinguish between the different types of executive agreements. *Id.*; *see, e.g.*, 2020 *Treaties and Agreements*, U.S. DEP’T OF STATE, <https://www.state.gov/2020-TIAS/> [<https://perma.cc/NN6Y-ECNG>] (last visited Oct. 3, 2020).

(3) will be provided to outside parties upon request.<sup>130</sup> Furthermore, only unclassified agreements and treaties are published in TIAS.<sup>131</sup>

The executive branch also routinely fails to satisfy its statutory reporting obligations.<sup>132</sup> In response to repeated instances of presidents concluding secret agreements,<sup>133</sup> Congress passed the Case-Zablocki Act<sup>134</sup> in 1972. Under this Act, the U.S. secretary of state must send Congress the text of any non-Article II treaty binding the United States within sixty days of the agreement's effective date.<sup>135</sup> If the president determines that transmission would jeopardize U.S. national security interests, the agreement must be sent to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs in a classified manner.<sup>136</sup> Furthermore, executive agencies and departments entering into an international agreement on the United States's behalf must also transmit the agreement to the State Department within twenty days of the signing.<sup>137</sup>

The legislative history of the Case-Zablocki Act reflects Congress's concern that the executive branch's deficiencies in reporting non-Article II treaties were hindering Congress's foreign policy responsibilities.<sup>138</sup> Unfortunately, administrative agencies actually often take more than twenty days to transmit agreements to the State Department.<sup>139</sup> If an agreement does reach the State Department, it often languishes in a backlog before being organized and published; if the agreement is published, it may not be clearly labeled as a non-Article II treaty.<sup>140</sup> Professors Curtis A. Bradley and Jack

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130. 1 U.S.C. § 112a. Outside of Freedom of Information Act requests, however, the State Department does not "provide the texts of treaties or international agreements in response to individual inquiries." Off. of Treaty Affs., *How to Find Treaty and Agreement Texts*, U.S. DEP'T OF STATE (Nov. 29, 2018), <https://www.state.gov/texts-of-agreements> [<https://perma.cc/E3CG-U48S>].

131. See Harrington, *supra* note 54, at 354. Federal regulations also exempt certain types of international agreements from publication in TIAS. 22 C.F.R. § 181.8(a)–(b) (2019). The State Department must submit an annual report to Congress detailing any international agreements excluded from TIAS. *Id.* § 181.8(d).

132. See Bradley & Goldsmith, *supra* note 16, at 1273 (arguing that Case-Zablocki Act "duties are often honored in the breach").

133. See CONG. RSCH. SERV., *supra* note 24, at 22. The 1945 Yalta Agreement is a prominent example. *Id.* Presidents Lyndon B. Johnson and Richard M. Nixon also entered into secret international agreements without informing Congress. KRUTZ & PEAKE, *supra* note 66, at 46.

134. Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b).

135. 1 U.S.C. § 112b(a).

136. *Id.*

137. *Id.*

138. See S. REP. NO. 92-591, at 3 (1972) ("[T]he principle of mandatory reporting of agreements with foreign countries to the Congress is more than desirable; it is, from a constitutional standpoint, crucial and indispensable. For the Congress to accept anything less would represent a resignation from responsibility and an alienation of an authority which is vested in the Congress by the Constitution. If Congress is to meet its responsibilities in the formulation of foreign policy, no information is more crucial than the fact and content of agreements with foreign nations."). *But see* H.R. REP. NO. 92-1301, at 3 (1972) ("Congress does not want to be inundated with trivia. At the same time, it would wish to have transmitted all agreements of any significance.").

139. Bradley & Goldsmith, *supra* note 16, at 1273.

140. *Id.* at 1273–74.

L. Goldsmith argue that this lack of internal organization results in “reporting of non-Article II agreements to Congress [that] is often late and is perpetually incomplete.”<sup>141</sup> Additionally, instruments failing to satisfy certain criteria, as determined by the State Department, do not constitute “international agreements” that need to be reported in TIAS or to Congress.<sup>142</sup>

The State Department does have internal procedures governing the conclusion and signing of international agreements.<sup>143</sup> Commonly called the “Circular 175 Procedures,” they require federal agencies to draft legal memoranda detailing the legal bases for any proposed international agreements and to submit these memoranda to the State Department’s Office of the Legal Adviser.<sup>144</sup> Circular 175 memoranda “take[] into account the views of the relevant government agencies and interested bureaus within the Department” and are also required when the executive branch considers terminating an international agreement.<sup>145</sup> However, the department generally withholds the memoranda from both Congress and the general public.<sup>146</sup> This secrecy and lack of transparency only widens the information gap between the executive branch and Congress—a major reason for the significant accumulation of executive power in foreign affairs.<sup>147</sup>

#### D. Unilateral Presidential Termination of Article II Treaties

Before delving into the law surrounding unilateral presidential withdrawal from CEAs, surveying the law surrounding unilateral presidential withdrawal from Article II treaties is a vital starting point. What looms largest in the Article II treaty debate, however, are the actions—or inactions—of Congress and the federal courts.<sup>148</sup> Today, it appears that a president possesses the

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141. *Id.* at 1274. For example, in 2004, the House learned that the State Department had failed to transmit over 600 classified and unclassified international agreements to Congress since 1997. 150 CONG. REC. 25,704 (2004) (statement of Rep. Henry Hyde). Representative Henry Hyde, then the Chairman of the House Committee on Foreign Relations, said, “The full knowledge of these agreements by the Congress . . . is critical to the ability of Congress to execute Constitutional oversight responsibilities.” *Id.*

142. 22 C.F.R. §§ 181.2, 181.3(a) (2019).

143. CONG. RSCH. SERV., *supra* note 24, at 234–35.

144. 11 U.S. DEP’T OF STATE, *supra* note 69, § 724.3; Off. of Treaty Affs., *Treaty Procedures*, U.S. DEP’T OF STATE (Nov. 26, 2018), <https://www.state.gov/treaty-procedures/> [<https://perma.cc/C979-676T>].

145. 11 U.S. DEP’T OF STATE, *supra* note 69, § 724.8.

146. Bradley & Goldsmith, *supra* note 16, at 1209 n.16. For a rare example of a released Circular 175 memorandum, see Memorandum of Law from the Department of State on Circular 175 Procedure: Request for Authority to Negotiate and Conclude an Agreement (May 15, 1981), <https://www.cia.gov/library/readingroom/docs/CIA-RDP85-00024R000400170003-6.pdf> [<https://perma.cc/YD5B-YFDT>].

147. See MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 146–57 (2019) (discussing the information asymmetries between the executive and legislative branches in foreign affairs); *infra* notes 162–66 and accompanying text.

148. See generally Bradley, *supra* note 26 (arguing that the general consensus on presidential termination of Article II treaties emerged over a long period of executive power accumulation and congressional inaction). But see generally Jean Galbraith, Response, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. SEE ALSO 121 (2014)

authority to withdraw unilaterally from an Article II treaty.<sup>149</sup> Part I.D.1 reviews the arguments in favor of the president's unilateral withdrawal power. Part I.D.2 summarizes how Congress and the federal courts have reacted to prior unilateral presidential withdrawals. Part I.D.3 discusses *Goldwater v. Carter*,<sup>150</sup> the only case challenging a president's authority to withdraw unilaterally from an international agreement to reach the Supreme Court.

### 1. Arguments Supporting the President's Unilateral Withdrawal Authority

There are three main arguments often cited to support the president's constitutional authority to withdraw unilaterally from an Article II treaty. Part I.D.1.a describes one argument based on the Vesting Clause.<sup>151</sup> Part I.D.1.b focuses on another argument based on the Appointments Clause.<sup>152</sup> Part I.D.1.c examines a third argument based on the president's unique position in foreign affairs.

#### a. *The Vesting Clause Argument*

The Vesting Clause argument contends that any authority that is “‘executive’ in nature” and not specifically assigned to Congress or the judiciary rests with the president, even if not specifically assigned in Article II.<sup>153</sup> The Framers would have understood that “executive power” included foreign affairs power.<sup>154</sup> That the Constitution requires the president to share the treaty power with the Senate “does not transform [the treaty power] into [a] quasi-legislative function[.]”<sup>155</sup> Additionally, because the Treaty Clause

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(framing the general consensus instead as a product of a gradual custom of deference to the executive branch in matters involving foreign affairs, known as foreign affairs exceptionalism).

149. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 313(1) (AM. L. INST. 2018) (“According to established practice, the President has the authority to act on behalf of the United States in . . . terminating U.S. treaty commitments and in withdrawing the United States from treaties.”).

150. 444 U.S. 996 (1979) (mem.).

151. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

152. *Id.*, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States”).

153. See Bradley, *supra* note 26, at 780; see also MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 158 (2007) (applying this thesis to Article II treaty termination). Alexander Hamilton, writing under the pen name “Pacificus,” also described the president as the “organ of intercourse between the Nation and foreign Nations.” Alexander Hamilton, *Pacificus No. 1 (June 29, 1793)*, reprinted in 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT 634, 636 (Scott J. Hammond et al., eds., 2007).

154. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001).

155. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen. & Robert J. Delahunty, Special Couns., to John Bellinger III, Senior Assoc. Couns. to the President & Legal Adviser to the Nat’l Sec. Council, on the Authority of the President to Suspend Certain Provisions of the ABM Treaty 5 (Nov. 15, 2001) [hereinafter ABM Treaty Termination Memo], <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memoabmtreaty>

is located in Article II, executive branch lawyers argue “that the treaty power remains an *executive* one.”<sup>156</sup> Therefore, because the power to withdraw from or terminate an Article II treaty is not mentioned in the Constitution, let alone assigned to a specific branch, it must rest with the president.<sup>157</sup>

*b. The Appointments Clause Argument*

The Appointments Clause argument analogizes the treaty power to the Appointments Clause and asserts that the president does not need congressional approval to withdraw from an Article II treaty.<sup>158</sup> Proponents of this argument point to Article II, Section 2, Clause 2, where the Constitution enables the president to enter into Article II treaties and make appointments but also limits those powers through the requirement for Senate advice and consent.<sup>159</sup> The president takes initiative in both settings and waits for Senate consent, and both the Treaty Clause and the Appointments Clause “govern instrumentalities by which the President carries out other presidential powers.”<sup>160</sup> Therefore, the power to withdraw unilaterally from Article II treaties “is necessary to allow the President to conduct foreign affairs pursuant to his constitutional obligations.”<sup>161</sup>

*c. The “Sole Organ” Argument*

This third argument supporting a presidential power to withdraw unilaterally from an Article II treaty rests on the view that the president is the “sole organ” of diplomatic affairs and therefore should receive greater

11152001.pdf [https://perma.cc/L5WR-EEE3]; accord RAMSEY, *supra* note 153, at 159 (“[P]ower over treaties was a traditional ‘executive’ function. To enhance checks and balances, the [Constitution] gave the Senate a role in treaty-making. It did not give the Senate a role in treaty withdrawal, so that power remained part of the President’s executive power.”). A later memorandum disavowed certain parts of the ABM Treaty Termination Memo discussing the president’s unilateral authority to *suspend* treaty obligations. See Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., on the Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 8–9 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memostatusolcopinions01152009.pdf> [https://perma.cc/F4RF-66MQ].

156. ABM Treaty Termination Memo, *supra* note 155, at 6.

157. *Id.* But see generally Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (levying textual and historical challenges against the Vesting Clause argument).

158. Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247, 268–71 (2013).

159. U.S. CONST. art. II, § 2, cl. 2; Eichensehr, *supra* note 158, at 269.

160. Eichensehr, *supra* note 158, at 269–70. The president carries out the foreign affairs power partly through the treaty mechanism, and the president carries out the power to execute laws by appointing subordinate officers. *Id.* The Supreme Court has previously upheld the president’s power to remove executive officers without Senate approval. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629, 631–32 (1935); *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

161. Eichensehr, *supra* note 158, at 270; see also *id.* at 272 (arguing that much of the *Myers* reasoning could be extended to the treaty termination question).

deference in that area.<sup>162</sup> This argument traces its origins to an 1800 speech in which then congressman John Marshall called the president “the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>163</sup> The Supreme Court picked up this thread over a century later in *United States v. Curtiss-Wright Export Corp.*,<sup>164</sup> when the Court reviewed presidential conduct in foreign affairs with greater leniency and referred to “the very delicate, plenary and exclusive power of the President as the *sole organ* of the federal government in the field of international relations.”<sup>165</sup> The sole organ argument draws its strength from “both the unitary nature of the Executive Branch as well as the President’s constitutional authority to make treaties and appoint and receive ambassadors.”<sup>166</sup> Deciding to terminate an Article II treaty necessarily requires alerting the other treaty party or parties—a responsibility that undoubtedly falls to the executive branch.<sup>167</sup>

Professor Bradley, who also served as a reporter for the Restatement (Fourth) of the Foreign Relations Law of the United States, writes that the sole organ argument may not necessarily establish a president’s unilateral withdrawal authority but suggests “that Congress cannot validly require the President to terminate a[n] [Article II] treaty.”<sup>168</sup> Professor Kenneth C. Randall doubts that the president is the “sole organ in [Article II] treaty making” at all because the Constitution requires the Senate to provide its advice and consent to treaties.<sup>169</sup> Executive branch lawyers argue differently: the power to terminate an Article II treaty rests with the president as a “necessary corollary” to exercising the president’s other plenary foreign affairs powers.<sup>170</sup> Therefore, recognizing “that the Senate or the Congress also has a right to participate in treaty termination would be inconsistent with the President’s constitutional authority over foreign affairs.”<sup>171</sup>

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162. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); Bradley, *supra* note 26, at 782.

163. 10 ANNALS OF CONG. 613 (1800); see Bradley, *supra* note 26, at 782.

164. 299 U.S. 304 (1936).

165. *Id.* at 320 (emphasis added). The *Curtiss-Wright* ruling has apparently inspired many executive branch justifications along the lines of “*Curtiss-Wright*, therefore I (the President) am right.” The author thanks Professor Martin S. Flaherty for this anecdote. *Curtiss-Wright*, however, did not implicate withdrawal from Article II treaties; instead, the case challenged a presidential action taken pursuant to authority delegated from Congress. *Id.* at 312–15; Alison Peck, *Withdrawing from NAFTA*, 107 GEO. L.J. 647, 665 (2019).

166. Bradley, *supra* note 26, at 782.

167. *Id.*

168. *Id.*

169. Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1109 (1990).

170. ABM Treaty Termination Memo, *supra* note 155, at 7. The ABM Treaty Termination Memo lists two examples: a president terminates a treaty as part of recognizing a foreign government or to “reflect the fact that the treaty has become obsolete, to sanction a treaty partner for violations, to protect the United States from commitments that would threaten its national security, to condemn human rights violations, or to negotiate a better agreement.” *Id.* at 7–8.

171. *Goldwater v. Carter*, 481 F. Supp. 949, 960 (D.D.C. 1979) (summarizing the government’s argument defending the unilateral termination), *rev’d*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), and *vacated*, 444 U.S. 996 (1979) (mem.).

## 2. Congressional Reactions to Unilateral Withdrawals

Despite the lively academic debate, Congress's actions (or lack thereof) loom large. Save for two notable occasions where senators sued in federal court to enjoin unilateral presidential treaty terminations,<sup>172</sup> presidents have generally been able to withdraw from Article II treaties without much protest from Congress since 1927.<sup>173</sup> Both federal lawsuits were dismissed without reaching the merits, so neither sheds much light on the question.<sup>174</sup>

According to Bradley's extensive review of the history of treaty terminations in the United States, up until the twentieth century, Congress generally approved of presidents' decisions to withdraw from treaties either before or after the actual withdrawal; sometimes, Congress even directed presidents to withdraw.<sup>175</sup> The Calvin Coolidge administration broke new ground when it withdrew from a U.S.-Mexican smuggling convention in 1927 without congressional approval.<sup>176</sup> Unilateral presidential withdrawal continued under President Franklin D. Roosevelt, whose administration withdrew from extradition and commercial treaties based on the *Curtiss-Wright* "sole organ" argument<sup>177</sup> and the rise of fascism abroad.<sup>178</sup> This trend continued generally unchallenged for roughly the next four decades.<sup>179</sup>

As Justice Felix Frankfurter argued in his concurring opinion to *Youngstown Sheet & Tube Co. v. Sawyer*<sup>180</sup> (*Steel Seizure*), custom can be a powerful interpretive tool because how government branches have previously exercised authority can lend meaning to the Constitution and inform our understandings of how the separation of powers is supposed to operate: "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents . . . may be treated as a gloss on 'executive Power' vested in the

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172. *Kucinich v. Bush*, 236 F. Supp. 2d. 1, 2 (D.D.C. 2002); *Goldwater*, 481 F. Supp. at 949.

173. See Bradley, *supra* note 26, at 805–16 (recounting a history of unilateral presidential terminations of or withdrawals from Article II treaties).

174. See *Goldwater*, 444 U.S. at 997 (remanding the case back to the district court with directions to dismiss the complaint); *Kucinich*, 236 F. Supp. 2d at 2 (granting defendants' motion for summary judgment due to nonjusticiability, lack of standing, and political question doctrine).

175. Bradley, *supra* note 26, at 789–96.

176. *Id.* at 805.

177. See *supra* notes 164–65 and accompanying text.

178. Bradley, *supra* note 26, at 806–08.

179. *Id.* at 809–10 (summarizing how the Harry S. Truman, Eisenhower, and John F. Kennedy administrations each withdrew from various international agreements).

180. 343 U.S. 579 (1952).

President by [Article II].”<sup>181</sup> In *Dames & Moore v. Regan*,<sup>182</sup> the Court interpreted a history of congressional acquiescence to presidential settlement of claims to be quasi-approval of the challenged executive action.<sup>183</sup> Some argue that acquiescence could be considered either agreement that the president’s action is lawful and constitutional or a waiver of Congress’s institutional rights.<sup>184</sup> Granted, there may be underlying reasons behind congressional inaction: the legislative process is slow and cumbersome, and depending on the situation, there may have been time constraints;<sup>185</sup> alternatively (or additionally), Congress may not have known that the president intended to terminate an Article II treaty.<sup>186</sup>

### 3. Challenges to Unilateral Withdrawals from Article II Treaties in Federal Court

The first (and, to date, only) serious challenge to the president’s authority to withdraw unilaterally from an Article II treaty arose after President Jimmy Carter announced in 1978 that the United States would terminate the bilateral Mutual Defense Treaty<sup>187</sup> with Taiwan.<sup>188</sup> Carter’s decision was part of a long campaign to normalize diplomatic relations with the People’s Republic of China.<sup>189</sup> Several proposed Senate resolutions accused the president of “encroach[ing] on Congress’s constitutional role with respect to treaty termination generally and the Taiwan Mutual Defense Treaty in

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181. *Id.* at 610–11 (Frankfurter, J., concurring); *see also* FLAHERTY, *supra* note 147, at 99–100. The Supreme Court later endorsed this view of historical practice in a 9-0 majority opinion and cited Frankfurter’s *Youngstown* concurrence. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2550–60 (2014). Justice Frankfurter held that the challenged presidential action was unconstitutional because Congress had not explicitly authorized the action *despite* a long history of approving prior similar actions *ex post*. *Youngstown*, 343 U.S. at 602–05 (Frankfurter, J., concurring).

182. 453 U.S. 654 (1981).

183. *Id.* at 681, 688.

184. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 433–36 (2012) (summarizing various arguments).

185. Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 140–41 (1984) (suggesting, for example, that a tight time frame might explain the lack of congressional response to the deployment of U.S. Marines to retake a merchant ship in 1975 because “[t]he entire incident took place in less than forty-eight hours, ending before a report was transmitted to Congress under the War Powers Resolution”).

186. *See supra* notes 37, 132–42 and accompanying text.

187. Mutual Defense Treaty Between the United States of America and the Republic of China, Taiwan-U.S., Dec. 2, 1954, 6 U.S.T. 433.

188. Terence Smith, *Link to Taiwan Ends*, N.Y. TIMES (Dec. 16, 1978), <https://www.nytimes.com/1978/12/16/archives/link-to-taiwan-ends-carter-in-tv-speech-says-we-recognize-reality.html?searchResultPosition=3> [<https://perma.cc/W6DK-4FLY>].

189. *See, e.g.*, Memorandum from Cyrus Vance, U.S. Sec’y of State, et al., to President Jimmy Carter (May 10, 1978), *reprinted in* 13 U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1977–1980: CHINA 357, 358 (David P. Nickles & Adam M. Howard, eds., 2013) (listing terminating the Mutual Defense Treaty as one of China’s conditions for establishing diplomatic relations with the United States); *China Policy*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1977-1980/china-policy> [<https://perma.cc/2N8A-2NWD>] (last visited Oct. 3, 2020).

particular.”<sup>190</sup> Senator Barry M. Goldwater and a group of twenty-five then current and former lawmakers sued in federal court seeking declaratory and injunctive relief on the ground that Carter’s announcement “violated their legislative right to be consulted and to vote on the termination.”<sup>191</sup> The district court held that Carter needed either the Senate’s advice and consent or majority approval from both chambers of Congress to terminate the treaty.<sup>192</sup> The appellate court considered the merits and reversed, holding that Carter had not exceeded his constitutional authority.<sup>193</sup> The Supreme Court, however, vacated the appellate court’s judgment and remanded the case back to the district court with instructions to dismiss—without offering a majority rationale for the dismissal.<sup>194</sup> The Court was fractured: Justice Lewis F. Powell Jr. argued that the case was “not ripe for judicial review” because Congress had not taken action;<sup>195</sup> Justice William H. Rehnquist and three others argued that the case presented a “nonjusticiable political dispute” for the political branches to resolve;<sup>196</sup> Justice Harry A. Blackmun (whom Justice Byron R. White joined) and Justice William J. Brennan Jr. would have heard the case on the merits.<sup>197</sup>

In *Goldwater*’s wake, the executive branch has continued to terminate Article II treaties without congressional approval or participation.<sup>198</sup> In 2002, the State Department Office of the Legal Adviser disclosed that the United States had terminated thirty Article II treaties through unilateral presidential action since 1980,<sup>199</sup> apparently with little congressional or academic protest.<sup>200</sup> Since 1979, only two federal cases have challenged unilateral presidential withdrawals from Article II treaties.<sup>201</sup> History

190. Koh, *supra* note 9, at 438.

191. *Goldwater v. Carter*, 481 F. Supp. 949, 950 (D.D.C. 1979), *rev’d*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), *vacated*, 444 U.S. 996 (1979) (mem.).

192. *Id.* at 950–51.

193. *Goldwater*, 617 F.2d at 699.

194. *Goldwater*, 444 U.S. at 996.

195. *Id.* (Powell, J., concurring). The Court later recognized that congressional objection falls along a “spectrum.” *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). Professor Michael J. Glennon notes that “the enactment of a statute expressly prohibiting the action in question” would be the strongest evidence of congressional objection; rejecting or amending a bill authorizing the challenged action could also qualify as objection. Glennon, *supra* note 185, at 139. Therefore, the proposed Senate resolutions that protested Carter’s termination of the Mutual Defense Treaty were not official congressional objections because the resolutions were never approved by the Senate, let alone the House. *See id.*

196. *Goldwater*, 444 U.S. at 1003 (Rehnquist, J., concurring).

197. *Id.* at 1006 (Blackmun, J., dissenting in part); *id.* at 1006–07 (Brennan, J., dissenting).

198. *But see* Koh, *supra* note 9, at 439–40 (arguing that *Goldwater* is actually a narrow precedent that “supports the *nonreviewability* of one attempted unilateral termination”).

199. Treaties terminated by the President, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, § B(4)(b), at 202–06.

200. Bradley, *supra* note 26, at 815.

201. *See generally* *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (challenging George W. Bush’s withdrawal from the 1972 U.S.-U.S.S.R. Anti-Ballistic Missile Treaty); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191 (D. Mass. 1986), *aff’d*, 814 F.2d 1 (1st Cir. 1987) (challenging President Ronald Reagan’s withdrawal from the Treaty of Friendship, Commerce, and Navigation with Nicaragua); Bradley, *supra* note 26, at 815.

repeated itself twice: the district courts dismissed both cases for raising nonjusticiable political questions.<sup>202</sup>

Based on the history of Article II treaty terminations and how Congress and the courts have reacted (or not reacted), it appears that the other branches of government now generally accept that a president may unilaterally terminate or withdraw from an Article II treaty. If the trend continues to solidify into a custom, it may eventually sway a judge should a case challenging a president's unilateral withdrawal from an Article II treaty ever arise, surmount the hurdles that its predecessors faced, and elicit a written opinion on the merits.<sup>203</sup> Ultimately, the longer Congress and the courts wait to address this issue, "the more entrenched the practice becomes."<sup>204</sup>

## II. OPPOSING VIEWPOINTS ON UNILATERAL PRESIDENTIAL WITHDRAWAL FROM CONGRESSIONAL-EXECUTIVE AGREEMENTS

If international law were the only relevant legal regime to consider, this Note would be moot. Under international law, withdrawal from international agreements is generally governed by the agreements themselves (via specific provisions authorizing parties to withdraw) or the Vienna Convention.<sup>205</sup> Unilateral withdrawals by heads of state are uncontroversial because the Vienna Convention recognizes a country's head of state as a "sufficient national representative for purposes of treaty termination and withdrawal."<sup>206</sup> Under international law, any unilateral withdrawal by a U.S. president is an effective withdrawal and cancels obligations on the international plane.<sup>207</sup>

Whether a president may withdraw unilaterally from a CEA is not as well settled in U.S. domestic law.<sup>208</sup> Part II.A presents one viewpoint: Congress must be involved in the decision to withdraw from a CEA. Part II.B presents a second viewpoint that analogizes CEAs to Article II treaties: presidents may withdraw unilaterally because unilateral withdrawal from Article II treaties has become generally accepted.

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202. *Kucinich*, 236 F. Supp. 2d at 2; *Beacon Prods. Corp.*, 633 F. Supp. at 1199.

203. See Bradley, *supra* note 26, at 785 ("When constitutional controversies implicate foreign relations, invocations of historical practice are particularly common, in part because of the lower level of judicial review in that area."); *supra* notes 181–83 and accompanying text.

204. Bradley, *supra* note 26, at 822.

205. Galbraith, *supra* note 53, at 446. If an agreement lacks a withdrawal provision, then article 56 of the Vienna Convention governs and parties may withdraw if they intend to withdraw or the nature of the agreement implies a withdrawal right. Vienna Convention on the Law of Treaties, *supra* note 41, at 345.

206. Bradley, *supra* note 9, at 1624–25. The Vienna Convention defines "treaty" differently from U.S. domestic law. See *supra* note 42.

207. *Id.* at 1625.

208. See *supra* note 31 and accompanying text. The author is unaware of any litigation challenging a president's unilateral withdrawal from a CEA. This Note focuses on situations where the CEA or relevant underlying statute does not dictate the permitted manner of withdrawal and where Congress has not directed the president to withdraw from a CEA. See MULLIGAN, *supra* note 10, at 24; *supra* notes 67–68 and accompanying text.

A. *Viewpoint One: Withdrawals Require Congressional Approval*

Although the scholars discussed in this section agree that Congress must approve a president's decision to withdraw from a CEA, they disagree as to *why* Congress should be involved. Part II.A.1 summarizes one argument that focuses on the similarities between the process used to pass a bill and the process used to conclude a CEA. Part II.A.2 presents an argument that focuses on the importance of an agreement's subject matter. Part II.A.3 describes the "mirror principle" argument, which focuses on the amount of congressional involvement in concluding a CEA.

1. Congressional-Executive Agreements Are (Virtually) Equivalent to Statutes

One school of thought relies on the procedural similarities between passing a statute and concluding a CEA—some commentators even view CEAs as statutes themselves.<sup>209</sup> Although the Constitution does not prescribe a specific procedure for terminating statutes, the Supreme Court has spoken definitively on the issue: "Amendment and repeal of statutes, no less than enactment, must conform with" the bicameralism and presentment requirements of Article I.<sup>210</sup> To terminate a federal statute, therefore, Congress must pass a bill abrogating the first statute and the president must sign that abrogating bill.<sup>211</sup> Therefore, this school argues, the only way to withdraw from a CEA is to enact a statute repealing the agreement.<sup>212</sup> In practice, this might prove to be infeasible: when Professor John C. Yoo broke down the math behind a hypothetical repeal, he found that "[i]f the twenty-five smallest states oppose [withdrawal], the President may need to persuade Senators [representing up to] 84% of the population to consent."<sup>213</sup> Considering the possibility of a filibuster, the president might actually need to sway Senators representing up to 90 percent of Americans.<sup>214</sup> Because the

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209. See, e.g., Yoo, *supra* note 103, at 36 ("Congressional-executive agreements . . . are statutes. They are passed using the same process as other laws enacted within Congress's Article I, Section 8 powers."). But see John K. Setear, *The President's Rational Choice of a Treaty's Prereatification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5, S34-S35 (2002) (arguing that because there is no veto mechanism for CEAs and the President may ultimately "invalidate the congressional action," CEAs should not be considered statutes).

210. *INS v. Chadha*, 462 U.S. 919, 954 (1983); cf. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

211. Yoo, *supra* note 103, at 37.

212. *Id.*; see also Christopher B. Stone, *Signaling Behavior, Congressional-Executive Agreements, and the SALT I Interim Agreement*, 34 GEO. WASH. INT'L L. REV. 305, 353 (2002).

213. Yoo, *supra* note 103, at 37.

214. *Id.* These proportions lead Yoo to conclude that CEAs are actually stronger signals of U.S. commitment to international obligations. *Id.*; accord Hathaway, *supra* note 45, at 1337 (stating that while Article II treaties may appear to require greater consensus (by virtue of the requisite two-thirds Senate vote) than that ordinarily needed to pass a law, "it is far from clear that a majority vote in the Senate and House requires any less of a consensus").

president cannot enact a statute unilaterally, according to this argument the president effectively cannot unilaterally withdraw from a CEA.

## 2. The Role of Subject Matter

A second school of thought takes a structural stance and focuses on the subject matter of the CEA at issue and where that subject matter appears in the Constitution. Professor Randall argues that when an international agreement concerns a topic found exclusively in Article I of the Constitution or alluded to in both Articles I and II, then any agreement concerning that topic could only be concluded as an Article II treaty or a CEA (as opposed to a sole executive agreement).<sup>215</sup> Because any agreement involving such a topic required legislative approval when first concluded, Congress must also approve the withdrawal.<sup>216</sup> This process encourages reciprocity at both the inception and termination of an international agreement because Congress participates at all three steps of an agreement's life: when it is created, when it is in force, and when it ends.<sup>217</sup>

Randall then applies his theory to five different subject matter categories.<sup>218</sup> In his view, the president may not withdraw unilaterally from disarmament agreements;<sup>219</sup> mutual defense agreements;<sup>220</sup> or humanitarian agreements (including agreements that protect basic human rights, terrorism agreements, and hijacking agreements)<sup>221</sup> because the president and Congress share authority over those areas.<sup>222</sup> Although the president is the commander in chief, Congress's authority over disarmament and mutual defense stems from its Article I powers.<sup>223</sup> Because humanitarian agreements implicate criminal law by "defin[ing] and prohibit[ing] certain types of egregious conduct as being international crimes," they fall within Congress's power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."<sup>224</sup> The president may, however, withdraw from international agreements concerning the recognition of foreign governments, because that authority rests with the

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215. See Randall, *supra* note 169, at 1114–15. Randall believes CEAs and Article II treaties are "interchangeable." *Id.* at 1115.

216. See *id.*

217. *Id.*

218. *Id.* at 1116–22.

219. *Id.* at 1116–17; see Arms Control and Disarmament Act, 22 U.S.C. § 2573(b) ("No action shall be taken . . . that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States . . . except pursuant to the [President's] treaty-making power . . . or unless authorized by the enactment of further affirmative legislation by the Congress . . .") (emphasis added).

220. Randall, *supra* note 169, at 1117–18.

221. *Id.* at 1119–21.

222. See generally *id.* at 1116–22.

223. *Id.* at 1117. Congress is charged with raising and maintaining an army and navy as well as regulating the military. U.S. CONST. art. I, § 8, cls. 12–16. Congress also provides for the nation's "common Defence and general Welfare." *Id.* cl. 1. Randall even argues that Congress's power to declare war grants it shared authority over disarmament and mutual defense. Randall, *supra* note 169, at 1117; see U.S. CONST. art. I, § 8, cl. 11.

224. Randall, *supra* note 169, at 1120 (quoting U.S. CONST. art. I, § 8, cl. 10).

president alone,<sup>225</sup> and from military agreements concluded during a declared war, because the president is the commander in chief.<sup>226</sup>

One commentator, Professor Joel P. Trachtman, expands on this argument and contends that the Commerce Clause's placement in Article I effectively bars the president from unilaterally withdrawing from trade agreements.<sup>227</sup> By negative inference, the "dormant" Commerce Clause precludes states from exercising authority over interstate commerce.<sup>228</sup> Another negative inference, which Trachtman calls the "presidential dormant Commerce Clause," similarly precludes the president from exercising authority over interstate and foreign commerce<sup>229</sup> and deprives the president of independent constitutional authority "either to remove barriers to trade or to impose barriers to trade, without congressional authorization."<sup>230</sup> Trachtman also finds support in *American Insurance Ass'n v. Garamendi*,<sup>231</sup> where the Supreme Court appeared to draw a distinction between foreign commerce powers and other foreign affairs powers.<sup>232</sup> The *Garamendi* distinction implies that the president may not independently take commerce-related actions without congressional approval.<sup>233</sup>

### 3. The "Mirror Principle"

Professor Koh argues that, in addition to considering the agreement's subject matter, one must also consider the degree of congressional participation needed to enter into the agreement.<sup>234</sup> He rejects a one-size-

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225. *Id.* at 1118–19 ("The [President's] recognition power impliedly comes from the President's authority to 'receive Ambassadors and other Public Ministers' and perhaps from the authority to 'appoint Ambassadors [and] other public Ministers and Consuls.' Article I does not afford the Congress any recognition power." (second alternation in original) (footnotes omitted) (quoting U.S. CONST. art. II, § 2, cl. 2)).

226. *Id.* at 1121–22 ("[T]he President is commander in chief of the armed forces . . . [so] the executive branch may govern the topics of military strategy, war prisoners, and armistice. Although article I empowers the Congress to declare war and to raise and arm the military, it does not permit Congress to oversee or implement military decisions once the troops have been committed." (footnote omitted)).

227. See Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty*, 51 INT'L LAW. 445, 447–49 (2018). The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST., art. I, § 8, cl. 3. Recall that trade agreements are often concluded as CEAs. See *supra* note 65 and accompanying text.

228. Trachtman, *supra* note 227, at 447–48.

229. *Id.* at 448. The Supreme Court seemed to endorse this approach when it stated that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994) (quoting U.S. CONST. art. I, § 8, cl. 3).

230. Trachtman, *supra* note 227, at 448.

231. 539 U.S. 396 (2003).

232. Trachtman, *supra* note 227, at 448–49 ("While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act.").

233. See *id.* at 449.

234. See Koh, *supra* note 9, at 455.

fits-all approach<sup>235</sup> and cautions that “an overbroad unilateral executive withdrawal power” could lead to “overly hasty, partisan, or parochial withdrawals” and weaken *all* future presidents’ “negotiating credibility and leverage.”<sup>236</sup> He argues for the “mirror principle,” which states that if the agreement’s subject matter required congressional approval, then Congress must also approve the withdrawal.<sup>237</sup> The Constitution’s silence on international agreements, therefore, suggests the Framers favored resolving these issues on a case-by-case basis.<sup>238</sup>

To apply the mirror principle to CEAs, Koh utilizes Justice Robert H. Jackson’s famous tripartite framework, which was first articulated in his own *Youngstown* concurring opinion.<sup>239</sup> According to Jackson’s framework, presidential power is at its “zenith” if Congress has explicitly or implicitly approved the president’s unilateral withdrawal; therefore, the president may withdraw from the CEA without issue.<sup>240</sup> If Congress expressly disapproves of the president’s withdrawal, then the president’s power is at its “low ebb” and a withdrawal could survive only if the “President were operating within a zone of exclusive presidential authority, such as state recognition.”<sup>241</sup> But if Congress has not expressed any approval or disapproval (“or could not organize itself to make a collective statement”),<sup>242</sup> then the president falls within the “twilight zone” and whether the president may withdraw unilaterally “depend[s] on proof that Congress did more to approve that action than merely acquiesce.”<sup>243</sup>

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235. *See id.* at 461; *see also* Amirfar & Singh, *supra* note 9, at 451 (“The best answer may be that there is no one right answer—the President’s power to withdraw from international agreements exists on a continuum, like any presidential power.”).

236. Koh, *supra* note 9, at 450. As an example, Koh cites Trump’s denuclearization negotiations with North Korea against the backdrop of his withdrawal from the Iran Nuclear Deal. *Id.*

237. *See id.* at 455. Hathaway articulates a similar view arguing for reciprocal congressional participation but does not weigh the significance of an agreement’s subject matter. Hathaway, *supra* note 45, at 1334.

238. *See* Koh, *supra* note 9, at 461 (quoting Laurence H. Tribe, *A Constitutional Red Herring: Goldwater v. Carter*, NEW REPUBLIC, Mar. 17, 1979, reprinted in *Treaty Termination: Hearings on S. Res 15 Before the S. Comm. on Foreign Rels.*, 96th Cong. 588, 589 (1979)). Catherine Amirfar and Ashika Singh advocate for a similar approach. *See generally* Amirfar & Singh, *supra* note 9, at 445 (calling Jackson’s framework “helpful”).

239. Koh, *supra* note 9, at 465–66.

240. *Id.*

241. *Id.* at 466; *see also* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (holding that the president holds the exclusive authority to recognize foreign governments).

242. Koh, *supra* note 9, at 466. In January 2019, for example, the House of Representatives passed the NATO Support Act, which was presumably aimed at the executive branch and would prohibit using appropriations to withdraw from NATO. H.R. 676, 116th Cong. § 5 (2019). That same month, senators introduced a resolution to require Senate advice and consent or majority approval from both chambers of Congress before any U.S. withdrawal from NATO. S.J. Res. 4, 116th Cong. § 1 (2019). Neither act can be considered a cohesive congressional action without approval from the other chamber. *See* *INS v. Chadha*, 462 U.S. 919, 944–51 (1983) (concluding that because the Constitution requires legislative action via bicameralism and presentment, Congress may only act using this procedure).

243. Koh, *supra* note 9, at 466.

*B. Viewpoint Two: The President Does Not Need Congressional Approval*

Professor Bradley advances a very different argument. If one acknowledges that a president may terminate<sup>244</sup> an Article II treaty unilaterally, then a president may also terminate a CEA unilaterally.<sup>245</sup> Bradley responds to three arguments from Trachtman's article supporting congressional participation, particularly as they relate to international trade: (1) CEAs involving trade implicate "exclusive" congressional powers, (2) a president essentially terminates a statute when terminating a CEA, and (3) the sparse history of presidential terminations of CEAs does not endorse unilateral presidential terminations.<sup>246</sup>

Bradley responds to each argument in turn. First, he distinguishes between authority to conclude an agreement and authority to terminate it.<sup>247</sup> Just because trade agreements require congressional approval does not necessarily mean that Congress must also approve the president's decision to terminate an agreement.<sup>248</sup> Rather, an "exclusive" congressional power to regulate in a certain subject area (such as commerce) merely precludes a president from entering into a sole executive agreement pertaining to that subject area.<sup>249</sup>

Second, Bradley argues that CEAs cannot be considered statutes—despite their procedural similarities—because CEAs "bind the United States to international commitments," which Congress cannot accomplish alone.<sup>250</sup> Furthermore, that any legislation implementing a CEA may survive the agreement "does not itself disallow a [unilateral] presidential termination authority."<sup>251</sup>

Finally, Bradley argues that there is no convincing reason to consider the historical practice of terminating CEAs independently from the practice of terminating Article II treaties.<sup>252</sup> Presidents have terminated Article II treaties, even those relating to trade or commerce, throughout history,<sup>253</sup> and

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244. Bradley uses "termination" and not "withdrawal." For a brief discussion of the distinction between the two terms, see *supra* note 27.

245. See Bradley, *supra* note 9, at 1617.

246. See *id.* at 1627–28. Trachtman's article was still a working paper when Bradley's article was published. *Id.* at 1617 n.6 (citing Trachtman's article as an unpublished manuscript). Bradley's article is still notable as one of the few scholarly articles that exclusively addresses the issue of unilateral presidential withdrawals from CEAs.

247. *Id.* at 1632.

248. *Id.*

249. See *id.* at 1631.

250. *Id.* at 1632–33.

251. See *id.* at 1634. Although the legislation itself may remain in place, Bradley argues that the president alone would not have the authority to terminate the treaty's domestic effects. *Id.* at 1641. But see Julian Ku & John Yoo, Opinion, *Trump Might Be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html> [<https://perma.cc/P5Q8-PS63>] (arguing that agreements enacted as statutes "can be reversed only by another, repealing statute enacted by the House and the Senate and then signed by the president"); *supra* Part II.A.1.

252. Bradley, *supra* note 9, at 1638.

253. *Id.* Only three Article II treaty terminations generated protest from individual lawmakers in the form of federal lawsuits—all of which were dismissed. See *supra* Part I.D.3.

the United States has also terminated many CEAs without incident.<sup>254</sup> For Bradley, the existing custom of unilateral presidential terminations is a sufficient constitutional basis for future unilateral terminations.<sup>255</sup>

Bradley also argues that an international agreement's formality affects a president's unilateral withdrawal authority.<sup>256</sup> While some commentators see CEAs as more resistant to unilateral termination based on the majority congressional vote necessary to approve them,<sup>257</sup> Bradley takes the inverse view: the more formal the agreement, the less constitutional authority a president possesses to terminate the agreement unilaterally.<sup>258</sup> Because "Article II treaties are the most formal means of concluding international agreements and involve what is in practice the most difficult procedure," presidents have less constitutional authority to terminate Article II treaties unilaterally.<sup>259</sup> Since CEAs are less formal than Article II treaties (presumably because they are not mentioned in the Constitution), presidents have greater constitutional authority to terminate CEAs unilaterally.<sup>260</sup>

### III. FINDING MIDDLE GROUND AND A WAY FORWARD

This part argues for a middle ground between the approaches presented in Part II. In certain situations where U.S. national security interests are at risk, the president should be able to withdraw from relevant CEAs unilaterally because applying Koh's *Youngstown*-type analysis that gauges congressional response would be impractical, dangerous, and inefficient. In all other cases, Koh's framework is the appropriate analytical method to determine whether congressional participation is required in withdrawing from an agreement. This middle ground, however, will fall short of its objectives unless the current reporting deficiencies<sup>261</sup> are addressed.

Part III.A discusses the shortcomings of each of the arguments reviewed in Part II. Part III.B proposes a middle-of-the-road approach that utilizes the *Youngstown* framework with exceptions for emergency situations. This Note concludes with Part III.C, which calls for a new reporting statute to support the proposal advanced in Part III.B.

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254. See Bradley, *supra* note 9, at 1638–39; Bradley & Goldsmith, *supra* note 16, at 1225.

255. See Bradley, *supra* note 9, at 1638–39. The Supreme Court has stated that long-standing governmental practice may be afforded great weight when determining the distribution of authority between the legislative and executive branches in the face of silent or ambiguous constitutional text. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014). *But see infra* notes 268–74 and accompanying text (challenging the idea of a custom of uncontested, unilateral presidential withdrawals from CEAs).

256. See Bradley, *supra* note 9, at 1628.

257. See *supra* notes 211–12, 234, 237 and accompanying text.

258. See Bradley, *supra* note 9, at 1628.

259. *Id.*

260. See *id.* Bradley does note that international law may pose additional constraints on a president's ability to withdraw unilaterally if the president violates international law principles when withdrawing. See *id.* at 1640–41; *supra* notes 205–07 and accompanying text.

261. See *supra* note 37 and accompanying text.

*A. Addressing the Shortcomings*

The overarching argument described in Part II.A—that presidents may only withdraw from CEAs with approval from both chambers of Congress<sup>262</sup>—has a significant weakness: it does not account for emergency scenarios where time is of the essence and a president may deem it necessary to terminate an agreement immediately. Professor Louis Henkin speculated that the Framers were primarily concerned with restricting the president’s ability to bind the United States to international commitments.<sup>263</sup> Shaking off these commitments, by contrast, “is less risky and may have to be done quickly, and is often done piecemeal, or *ad hoc*, by various means and acts.”<sup>264</sup>

In the event of an armed attack on the United States or U.S. interests (or another equally dangerous emergency scenario), a president may need to withdraw from agreements rapidly to defend the country and may not have the luxury of time to wait for Congress to organize itself and make its wishes clear. Given the lackluster state of the current reporting regime, Congress may not be informed about the nature of the agreement, the unfolding emergency scenario, or the implications of withdrawing from the agreement—or that the agreement even exists at all—adequately enough to issue a meaningful statement of its wishes.<sup>265</sup> Allowing the president to withdraw unilaterally would be more practical, but this authority should be strictly limited to these dire situations to assuage Koh’s articulated concerns about “overly hasty, partisan, or parochial withdrawals” at the whim of a president.<sup>266</sup>

Bradley’s arguments in favor of unilateral withdrawal authority have their own weaknesses<sup>267</sup>—namely, that the available history of unilateral presidential withdrawals from CEAs is too sparse to support his argument.<sup>268</sup> Any number of factors could be responsible for the sparse history: the executive branch’s tardiness in reporting concluded agreements,<sup>269</sup> the State Department’s own organizational shortcomings in publishing the agreements,<sup>270</sup> the lack of a statutory obligation to report decisions to terminate international agreements,<sup>271</sup> or Congress’s own failure to monitor CEAs in general.<sup>272</sup> Considering the difficulties in challenging a withdrawal

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262. See *supra* Part II.A.

263. See HENKIN, *supra* note 20, at 212.

264. *Id.*

265. See *supra* notes 88, 100 and accompanying text.

266. See Koh, *supra* note 9, at 450.

267. See *supra* Part II.B.

268. To date, the author is unaware of any extensive study or tabulation of the number of times a president has withdrawn from a CEA without participation from Congress.

269. See *supra* note 139 and accompanying text.

270. See *supra* note 140 and accompanying text.

271. See *supra* note 37 and accompanying text.

272. See *Treaties: A Historical Overview*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> [<https://perma.cc/7AM3-AVFH>] (last visited Oct. 3, 2020) (implying that many international agreements are too trivial to warrant

via a lawsuit,<sup>273</sup> that courts have not seen serious challenges to the president's ability to withdraw should not be construed as congressional acquiescence.<sup>274</sup>

Additionally, Bradley is too quick to dismiss the striking similarities between the process used to pass legislation and the process used to approve CEAs.<sup>275</sup> Claiming that CEAs cannot be considered statutes merely because the agreements impose international commitments on the United States is unpersuasive. Domestic statutes also impose commitments on the United States government—commitments to appropriate federal dollars for foreign aid, for example—and Congress cannot create these commitments without the president's participation.<sup>276</sup>

Bradley is also too hasty in arguing that accepting unilateral withdrawal or termination authority for Article II treaties means that the president may also withdraw unilaterally from CEAs.<sup>277</sup> First, despite a decades-long custom of congressional silence in the face of a unilateral withdrawal from or termination of an Article II treaty,<sup>278</sup> the nation's highest court has never directly ruled on the question.<sup>279</sup> The Supreme Court dismissed its only case challenging this type of action and did so based on fractured reasoning that did not reach the merits.<sup>280</sup> Second, CEAs are not Article II treaties. Though theoretically interchangeable,<sup>281</sup> the agreements are very distinct. As compared to Article II treaties, CEAs use a different approval process<sup>282</sup> and are generally used to address different subject areas.<sup>283</sup> CEAs and Article II treaties also differ in terms of efficiency, democratic legitimacy, self-execution, and constitutional legitimacy.<sup>284</sup> Furthermore, granting the president blanket unilateral withdrawal authority cedes more congressional power to the president. This adds another dimension to the reservoir of

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senators' attention); *see also* CONG. RSCH. SERV., *supra* note 24, at 23 ("Members and committees of Congress do not want to be deluged with trivia . . .").

273. Individual Justices raised concerns about nonjusticiable political questions and ripeness in *Goldwater*, 444 U.S. 996 (1979). Any member of Congress bringing suit would also likely have trouble demonstrating Article III standing. *See Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (holding that senators and congressmen alleging an injury to Congress did not have a "sufficient 'personal stake' in the dispute" and failed to allege the "concrete injury" required to establish Article III standing).

274. *But see Dames & Moore v. Regan*, 453 U.S. 654, 681 (1952) (stating that Congress's custom of indirectly acknowledging settlements via executive agreement by "frequently amend[ing] [a statute] to provide for particular problems arising out of settlement agreements," together with legislative history, "reveal[ed] that Congress has accepted the authority of the Executive to enter into settlement agreements").

275. *See* Bradley, *supra* note 9, at 1632.

276. *See* U.S. CONST. art. I, § 7, cl. 2.

277. *See supra* note 245 and accompanying text.

278. *See supra* Part I.D.2.

279. *See supra* Parts I.D.2–3.

280. *See supra* notes 194–97 and accompanying text.

281. *See supra* note 43 and accompanying text.

282. *See supra* note 22 and accompanying text.

283. *See supra* notes 117–18 and accompanying text.

284. *See supra* Part I.C.

power that the president already wields in foreign affairs and tips the balance of power even further in the president's favor.<sup>285</sup>

*B. Proposing a Youngstown-Inspired Middle Ground Approach*

Determining whether or not a president may withdraw unilaterally from any particular CEA requires a combination of the two main approaches laid out in Part II. As Koh suggests, this question should be resolved on a case-by-case basis using Justice Jackson's *Youngstown* analytical framework.<sup>286</sup> Not only is this framework already the preferred method for tackling separation of powers issues,<sup>287</sup> but it also acknowledges a role for Congress. By looking to Congress's actions at the termination of a CEA, this framework respects Congress's role in approving the agreement in the first place.<sup>288</sup> Using Justice Jackson's framework and evaluating congressional approval or disapproval also acknowledges the striking procedural similarities between passing a bill and concluding a CEA.<sup>289</sup>

An example may be illustrative here. Suppose a future president has determined that membership and participation in the IMF is no longer in the United States's best interest<sup>290</sup> and decides to end the country's membership.<sup>291</sup> Some protesting commentators will argue that the United States may only withdraw if Congress passes and the president signs a new statute abrogating the earlier statute that authorized joining the IMF.<sup>292</sup> Other commentators will look to the subject matter of the CEA through which the United States joined the IMF<sup>293</sup> and perhaps argue that participating in the IMF, with its goal of "ensur[ing] the stability of the international monetary system" and practice of lending money to countries,<sup>294</sup> falls under Congress's exclusive foreign commerce authority; therefore, Congress must approve the proposed withdrawal.<sup>295</sup> Commentators endorsing Bradley's view will argue that all of this deliberation is unnecessary because the president has the constitutional authority to withdraw unilaterally from the CEA based on the apparent

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285. See FLAHERTY, *supra* note 147, at 146–57 (discussing information asymmetries between the executive branch and Congress in foreign affairs).

286. See *supra* notes 239–43 and accompanying text.

287. See *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (calling Justice Jackson's framework "analytically useful"); see also *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (noting that "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in" separation of powers issues).

288. See *supra* notes 38–39 and accompanying text.

289. See *supra* Part II.A.1.

290. Recall that the United States entered into the IMF by way of a CEA. See *supra* note 20.

291. For purposes of this example, assume that the president's withdrawal complies with any withdrawal requirements under the IMF membership agreement and international law.

292. See *supra* Part II.A.1.

293. See *supra* Part II.A.2.

294. *About the IMF*, INT'L MONETARY FUND, <https://www.imf.org/en/About> [<https://perma.cc/3STG-SLEC>] (last visited Oct. 3, 2020) (choose "What We Do" from dropdown).

295. See *supra* Part II.A.3.

authority to withdraw unilaterally from Article II treaties.<sup>296</sup> Still others might determine that the IMF concerns foreign affairs more than it does foreign commerce and decide that the president may withdraw unilaterally.<sup>297</sup>

Using Justice Jackson's framework here would acknowledge that Congress was partly responsible for the United States' membership in the IMF. If Congress has explicitly or implicitly expressed its approval (e.g., by passing a resolution) of the president's plan to withdraw from the IMF, then the president's authority would be at its "zenith" and the president could withdraw without issue.<sup>298</sup> If Congress has expressly disapproved of the president's intention to withdraw from the IMF (again, by way of a resolution, a bill rider, or voting down a proposed withdrawal), then the president's authority would be at its "low ebb."<sup>299</sup> In this case, the president's withdrawal would be unconstitutional unless it fell squarely within the president's exclusive Article II authority.<sup>300</sup>

If, however, Congress was silent on the issue of withdrawing from the IMF, then the president's authority would fall within the "twilight zone."<sup>301</sup> One might investigate whether Congress has a history of expressing approval or disapproval in similar situations or whether similar withdrawals have been attempted in the past.<sup>302</sup> Ultimately, one would have to determine if Congress's inaction constitutes acquiescence.<sup>303</sup>

One important consideration that the *Youngstown* approach does not capture is the possibility that emergency circumstances may require the president to withdraw from a CEA even before Congress has had a chance to express its approval or disapproval. This concern echoes a similar one raised at the 1787 Constitutional Convention, where the Framers worried about imposing too many limits on the president's ability to respond to emergency situations.<sup>304</sup>

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296. See *supra* Part II.A.3.

297. See *supra* note 162 and accompanying text.

298. See *supra* note 240 and accompanying text.

299. See *supra* note 241 and accompanying text.

300. *Id.* Cf. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). Whether withdrawing from an international institution falls within exclusive presidential authority is outside the scope of this Note.

301. See *supra* note 243 and accompanying text.

302. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 597–603, 609 (1952) (Frankfurter, J., concurring) (finding the challenged presidential action to be unconstitutional because Congress had not explicitly authorized the action *despite* a long history of approving prior similar actions *ex post*).

303. See *supra* note 243 and accompanying text. Such a question lays outside the scope of this Note.

304. FARRAND'S RECORDS, *supra* note 95, at 318. An early draft of the Constitution granted Congress the power to "make" war. *Id.* Charles Pinkney expressed concerns that Congress acted too slowly and was rarely in session and that the House of Representatives "would be too numerous for such deliberations," and Roger Sherman remarked that the President should "be able to repel . . . war." *Id.* The Framers approved a change from "make" to "declare." *Id.*; see also U.S. CONST. art. I, § 8, cl. 11.

Emergency situations demand some contingency plan. In the direst of situations—when the United States faces a serious national security threat or a vital U.S. security interest is endangered, or when a natural disaster, terrorist attack, or other calamity physically prevents Congress from meeting for the foreseeable future—the president should have the latitude to act in the best interests of the nation and withdraw from CEAs unilaterally if the situation demands it. Handcuffing the president and impeding the country’s defense just because Congress cannot physically meet would be irresponsible and dangerous and would completely disregard the Framers’ desire to allow the president to repel attacks or respond to emergency situations.<sup>305</sup> This carveout should not be taken lightly; the president should consider the implications thoughtfully and must be reasonably sure that a unilateral withdrawal will protect national security or U.S. security interests.

To illustrate, consider the IMF example once again. When pledging funds, IMF members essentially extend a line of credit to the institution; the IMF then draws on this credit when loaning money to other members.<sup>306</sup> The United States retains “special drawing rights” (SDRs) based on a variety of widely circulated currencies.<sup>307</sup> The IMF generally repays its loans with interest, but the United States may withdraw its committed funds at any time.<sup>308</sup>

Suppose that the world has plunged into a new economic crisis that rivals the Great Recession. Global liquidity markets are so frozen that the U.S. government is having unprecedented trouble borrowing money to pay its expenses. Then suppose that disaster strikes, and a terrorist group has unleashed a devastating attack on a vital U.S. military base. At the same time, the IMF has decided to draw on the U.S. commitment, among others, to loan funds to another member country that is known to sympathize with and harbor the terrorist group within its borders. Additionally, corruption plagues the member country’s government and many high-ranking figures are suspected of having ties to the terrorist group. Despite being the largest shareholder in the IMF and holding the largest share of voting rights,<sup>309</sup> the United States is overruled and the IMF decides to proceed with the loan.

Tensions are high, and the American public, already short-tempered due to the ongoing financial crisis, is reeling from the base attack. The idea of U.S. funds being loaned via the IMF to the member nation that willingly

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305. See *supra* note 304 and accompanying text.

306. CONG. BUDGET OFF., THE BUDGETARY EFFECTS OF THE UNITED STATES’ PARTICIPATION IN THE INTERNATIONAL MONETARY FUND 5 (2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51663-IMF.pdf> [<https://perma.cc/Y343-CAQD>]. The United States’s pledges to the IMF totaled approximately \$164 billion as of June 2016. *Id.*

307. *Id.*

308. *Id.*

309. *IMF Members’ Quotas and Voting Power, and IMF Board of Governors*, INT’L MONETARY FUND (Oct. 13, 2020), <https://www.imf.org/external/np/sec/memdir/members.aspx#1> [<https://perma.cc/W3BV-FRWG>] (showing that the United States holds approximately 8.3 billion SDRs, or 17.45 percent of total SDRs, as well as the largest voting share (16.51 percent)).

harbors the terrorist group responsible is repulsive to all. National security is at stake because those funds could eventually wind up in the hands of the terrorist group and finance future attacks. The president has determined that withdrawing from the IMF is necessary to avoid seeing that committed sum sent to this other member nation and to avoid future untimely commitments. Time is of the essence, but Congress is on an extended recess and unable to convene quickly due to nationwide responses to a new pandemic that severely restrict travel and in-person gatherings.<sup>310</sup> Per the CEA by which the United States joined the IMF, a U.S. withdrawal would take effect once the IMF receives notice in writing.<sup>311</sup>

Under the proposed carveout, the president would have the constitutional authority to withdraw from the IMF without approval from Congress because national security interests are at stake and Congress is on recess and physically unable to reconvene to vote and offer its approval or disapproval. This approach leaves the president free to respond to the emergency situation but, out of respect for Congress's role in the agreement-making process, is limited in scope.

### C. *The Need for a New Reporting Statute*

Any proposed solution to this issue will fail to live up to its full potential if it does not address the deficiencies in the current reporting regime.<sup>312</sup> Congress cannot respond effectively to a president's decision to withdraw from a CEA if it does not know that the agreement exists in the first place<sup>313</sup> or that the president intends to withdraw from it. Therefore, this Note calls for a new statute that will finally require presidents to formally notify Congress of any intent to withdraw from an Article II treaty or CEA. This new statute would ideally be similar in structure to the War Powers Resolution,<sup>314</sup> which permits certain types of limited responses to emergency situations but also requires the president to seek congressional approval before engaging U.S. troops in prolonged conflicts abroad.<sup>315</sup>

Like the War Powers Resolution, this new statute should require the president "in every possible instance" to submit to Congress a formal notice of any intent to withdraw from a CEA.<sup>316</sup> This formal notice should contain the legal and policy justifications for the withdrawal.<sup>317</sup> If the president

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310. During the COVID-19 pandemic, the House adopted special rules that allowed members to vote by proxy. H.R. Res. 965, 116th Cong. (2020) (as agreed to in the House). For purposes of this example, assume that neither the House nor the Senate has adopted similar rules.

311. Articles of Agreement of the International Monetary Fund, *supra* note 20, at 1421.

312. *See supra* Part I.C.6.

313. *See id.*

314. 50 U.S.C. §§ 1541–1548.

315. *See generally id.*

316. *See id.* § 1542.

317. Considering that State Department procedures already require Circular 175 memoranda to be drafted whenever the executive branch contemplates terminating an Article II treaty or other type of international agreement, this should not impose a major burden on the executive branch. *See supra* notes 143–47 and accompanying text.

reasonably believes that public notification would jeopardize national security interests, then the notice should be submitted only to the chairs of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. Congress should then issue a response by a certain deadline—for example, within ninety days of receiving the notice. If time is of the essence and national security or U.S. security interests are threatened, that window should be shortened—perhaps to fifteen days.<sup>318</sup> There should not be any extensions unless some extenuating circumstance prevents Congress from convening and voting. The House and Senate should not be permitted to pass new procedural hurdles that effectively create any such extenuating circumstance.

If Congress agrees that the United States should withdraw from the CEA and grants its institutional approval, then the president is operating at the “zenith” of presidential power and may withdraw from the agreement without constitutional implications.<sup>319</sup> If Congress fails to respond coherently within the statutory time period, then the congressional silence could be construed as “congressional inertia, indifference or quiescence”<sup>320</sup>—in which case the president has the constitutional authority to withdraw. In the event of express disapproval, the president could only withdraw if the subject matter of the agreement fell squarely within a specific Article II power.<sup>321</sup> Furthermore, if a situation analogous to the example provided above arises and the president makes the decision to withdraw from a CEA unilaterally, the president should still submit the formal notice in order to inform Congress of the rationale and legal basis for the withdrawal.<sup>322</sup> This mandatory information sharing is crucial because the spirit of the new statute seeks to alleviate the information asymmetries between the executive and legislative branches.

There are several benefits to this type of statutory regime. First, it respects Congress’s role in entering into the CEA by allowing Congress to opine on withdrawing from the agreement that it approved.<sup>323</sup> Second, terminations or withdrawals with congressional approval are more likely to reflect the broader will of the U.S. population,<sup>324</sup> particularly in situations where a president has won the Electoral College but lost the popular vote.<sup>325</sup> Third,

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318. The shortened timeline could also reduce the ability of special interest groups to organize and lobby for and against the decision.

319. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring); *supra* note 240 and accompanying text.

320. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). *But see supra* note 274.

321. See *supra* note 241 and accompanying text.

322. Recall that the State Department’s internal Circular 175 Procedure requires department lawyers to draft legal memoranda whenever the executive branch considers terminating an international agreement. See *supra* notes 143–47 and accompanying text.

323. See *supra* note 39 and accompanying text.

324. See *supra* notes 96–101 and accompanying text.

325. See, e.g., *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/5SJC-GW9Z>] (showing that Trump amassed more Electoral College votes while Hillary Clinton won the popular vote).

the new statute could make significant strides in closing the knowledge gap between the executive branch and Congress regarding existing CEAs.<sup>326</sup> Fourth, if Congress knows that it may be forced to revisit the issue of any particular CEA in the future, Congress might be encouraged to be more circumspect with its grants of authority in statutes authorizing ex ante CEAs<sup>327</sup> and to insist on specific termination mechanisms for ex post CEAs.

This Note would be remiss if it did not pause to consider enforcement implications for the new statute. After all, the Case-Zablocki Act has failed to bring about the desired reporting results<sup>328</sup> in part because it does not impose any sanctions for deficient compliance.<sup>329</sup> In the wake of *Raines v. Byrd*,<sup>330</sup> any senators or members of Congress suing to enjoin a president's unilateral withdrawal and alleging an injury to Congress would likely have trouble satisfying Article III standing requirements.<sup>331</sup> In fact, in *Kucinich v. Bush*,<sup>332</sup> members of Congress framed their injury as "institutional" in nature and involving "a[n] . . . alleged loss of legislative power to the Executive Branch" rather than as injuries personal to the members themselves—the same injury, in fact, as that dismissed in *Raines*.<sup>333</sup> Although Congress could create causes of action for private parties to challenge a president's unilateral withdrawal,<sup>334</sup> it is not clear that individual challenges would survive the political question doctrine hurdle that has permeated through *Goldwater*, *Kucinich*, and *Beacon Products Corp v. Reagan*.<sup>335</sup> The War Powers Resolution also lacks an enforcement mechanism<sup>336</sup> but presidents have nevertheless generally complied with its reporting requirements.<sup>337</sup> Perhaps the only enforcement mechanism that could survive is the president's duty to execute the law under the Take Care Clause.<sup>338</sup>

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326. See *supra* Part I.C.6.

327. See *supra* note 48 and accompanying text.

328. See *supra* notes 132–41 and accompanying text.

329. See Catherine H. Gibson, *Frankfurter's Gloss Theory, Separation of Powers, and Foreign Investment*, 36 N. KY. L. REV. 103, 128 (2009).

330. 521 U.S. 811 (1997) (concerning a lawsuit brought by individual lawmakers who alleged an injury to Congress and dismissing that lawsuit for lack of standing).

331. See *supra* note 273; see also Peck, *supra* note 165, at 692.

332. 236 F. Supp. 2d 1 (D.D.C. 2002).

333. *Id.* at 8.

334. See Peck, *supra* note 165, at 692; see also *Made in USA Found. v. United States*, 242 F.3d 1300, 1307 (11th Cir. 2001) (holding that unions and a nonprofit organization had standing to challenge the constitutionality of the process by which the United States joined NAFTA).

335. 633 F. Supp. 1191 (D. Mass. 1986), *aff'd*, 814 F.2d 1 (1st Cir. 1987); see *supra* Part I.D.3.

336. See generally War Powers Resolution, 50 U.S.C. §§ 1541–1548.

337. See RICHARD F. GRIMMETT, CONG. RSCH. SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 14 (2012) (stating that, from when the War Powers Resolution was published to the time the report was published, presidents had submitted 132 War Powers Resolution reports to Congress).

338. U.S. CONST., art. II, § 3, cl. 5 ("[The President] shall take Care that the Laws be faithfully executed.").

## CONCLUSION

CEAs may not be as flashy as Article II treaties or the nonbinding political commitments that have dominated the headlines in recent years. While they let other agreements soak up the spotlight, CEAs also bind the United States to international obligations and multilateral institutions and deserve an equal amount of attention and analysis. Although the president does deserve some flexibility when deciding to withdraw from a CEA in the face of an emergency, to say that a president is always authorized to withdraw without congressional input is irresponsible. Because the CEA could not exist without Congress's approval—whether *ex ante* or *ex post*—Congress should also participate in the decision to withdraw from a CEA. Ultimately, the question of unilateral presidential withdrawal from CEAs should be resolved on a case-by-case basis using the framework proposed in this Note. No solution, however, will be completely effective unless the information asymmetry between the president and Congress is addressed. Therefore, a new reporting statute is needed to narrow the information gap and draw back the curtain on these agreements.