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# Separation of Powers and NATO Withdrawal

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## Separation of Powers and NATO Withdrawal

In 2023, Congress enacted a law that prohibits the President from “suspend[ing], terminat[ing], denounc[ing], or withdraw[ing] the United States from the North Atlantic Treaty”—which established the North Atlantic Treaty Organization (NATO)—without the advice and consent of the Senate or an act of Congress. *See* Section 1250A of the 2024 National Defense Authorization Act, Pub. L. No. 118-31. This provision emerged against the backdrop of debates concerning the United States’ policy toward NATO and whether the President possesses the power to withdraw the United States from treaties without receiving the legislative branch’s approval.

Prior to Section 1250A’s enactment, the Department of Justice’s Office of Legal Counsel (OLC) published an opinion in 2020 concluding that the President has *exclusive* power over treaty withdrawal and that Congress is constitutionally prohibited from intruding upon this power. In contrast to the OLC’s legal position, which neither courts nor Congress are bound to consider as authoritative, Section 1250A’s sponsors stated that the legislation “ensures that no President can unilaterally dissolve our bond to this invaluable alliance without Senate approval.” If the President decided to unilaterally withdraw from the North Atlantic Treaty, irrespective of Section 1250A, there are at least two ways in which the statute might affect a court’s analysis of any challenge to the President’s action. First, the statute may influence a court’s decision on whether to hear such a challenge at all, and second, the statute could affect the court’s evaluation of the President’s action in the event it decides to hear a case.

With respect to whether a court would hear a challenge, two doctrines are relevant: the political question doctrine and standing. Historically, courts have generally left the issue of the constitutional distribution of treaty-withdrawal power to the political branches, concluding that challenges to unilateral treaty withdrawal by the President present a nonjusticiable political question. *See, e.g., Goldwater v. Carter*, 444 U.S. 996, 1003 (1979). More recent Supreme Court jurisprudence suggests that courts may be less likely to dismiss a challenge to a President’s withdrawal from the North Atlantic Treaty in violation of Section 1250A on political question grounds. In a case involving another question of separation of foreign policy powers, the Court held that, where a President acts contrary to a statute on the ground that it interferes with the President’s Article II authority, the constitutional question is one properly resolved by the judiciary rather than left to the political branches. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

Another issue is who would have standing to bring a legal challenge to an alleged violation of Section 1250A. This doctrine may present greater hurdles than the political question doctrine, as it would ultimately depend on whether the plaintiff is able to allege that they suffered an injury that meets the standards the Supreme Court has established—i.e., that the injury is unique to them rather than shared by the general population, is sufficiently tied to the alleged violation, and is redressable by a court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In the past, courts have often found that plaintiffs, including Members of Congress, fail to meet one or more of these requirements in cases involving foreign policy issues, including that of treaty withdrawal. *See, e.g., Kucinich v. Bush*, 236 F. Supp. 2d 1, 18 (D.D.C. 2002).

In the event that a court were to hear a challenge to a President’s unilateral withdrawal from the North Atlantic Treaty, it may likely apply the well-established framework for analyzing separation of powers issues derived from Justice Robert Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If a court were to determine that a President’s withdrawal was contrary to a congressional prohibition, it may conclude that the action could be upheld only if the President has exclusive authority, a claim that the *Youngstown* framework instructs courts to “scrutinize[] with caution.” *Zivotofsky ex rel. Zivotofsky v. Kerry* 576 U.S. 1, 10 (2015). In assessing whether such authority exists, a court might draw on the Constitution’s text and structure as well as other relevant judicial precedent. Courts also often consider the historical practice of the political branches in separation of powers cases. *See id.* at 23. During the 19th century, the political branches often treated the treaty withdrawal power as a shared one in which both Congress and the President played a role. In the 20th century, the executive branch increasingly asserted independent authority to withdraw from treaties, and Congress periodically regulated U.S. participation in treaties. The executive branch does not appear to have asserted a claim of *exclusive* presidential authority until the 2020 OLC opinion, and Section 1250A appears to be the first statutory prohibition of unilateral presidential withdrawal from a treaty. Ultimately, given the absence of directly controlling judicial precedent, in a case challenging a Section 1250A violation, both parties would be able to present arguments in support of their positions.

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## Introduction

The Constitution expressly sets forth the roles of Congress and the Executive in the making of treaties, but is silent on the matter of treaty withdrawal.<sup>1</sup> During the 19th century, the legislative and executive branches often treated the treaty withdrawal power as a shared one in which both branches played a role.<sup>2</sup> In the 20th century, the executive branch increasingly asserted independent authority to withdraw from treaties, and Congress, periodically and to varying extents, regulated U.S. participation in treaties.<sup>3</sup>

In 2023, Congress passed, and the President signed into law, the first statute prohibiting the President from unilaterally withdrawing from a Senate-approved treaty. Section 1250A of the 2024 National Defense Authorization Act<sup>4</sup> (2024 NDAA) prohibits the President from “suspend[ing], terminat[ing], denounc[ing], or withdraw[ing] the United States from the North Atlantic Treaty”<sup>5</sup>—which established the North Atlantic Treaty Organization (NATO)<sup>6</sup>—without the advice and consent of the Senate or an act of Congress.<sup>7</sup> This statute is in tension with the position taken by the Department of Justice’s Office of Legal Counsel (OLC) in a 2020 opinion maintaining the President has authority to withdraw the United States from treaties without congressional approval, and that this authority is *exclusive* to the presidency.<sup>8</sup> The OLC’s claim of exclusive presidential authority over treaty withdrawal appears to go beyond the executive branch’s long-standing position that the President had independent authority to withdraw from treaties absent congressional restriction.<sup>9</sup>

Prior to the enactment of Section 1250A, reviewing courts generally decided that challenges to unilateral treaty withdrawal by the President presented a nonjusticiable political question—meaning that the issue needed to be resolved by the politically accountable legislative and executive branches rather than in the courts.<sup>10</sup> The OLC’s 2020 opinion provided the executive

<sup>1</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>2</sup> See *infra* “Historical Practice.”

<sup>3</sup> See *id.*

<sup>4</sup> National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 1250A, 137 Stat. 136, 464–65 (2023) (codified at 22 U.S.C. § 1928f).

<sup>5</sup> 22 U.S.C. § 1928f(a). While a *suspension* generally refers to a temporary pause in compliance with a treaty, *withdrawal*, *termination*, and *denunciation* all refer to a permanent exit from the treaty. See, e.g., RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (AM. L. INST. 2018). Furthermore, a *withdrawal* occurs in the context of a multilateral agreement in which one party may withdraw from the agreement, but the agreement remains in place. A *termination* occurs in the context of a bilateral agreement in which the withdrawal of a single party effectively terminates the agreement. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 155 cmt. c (AM. L. INST. 1965). Lastly, *denunciation* is largely synonymous with termination, but frequently follows an accusation that the treaty was breached. See, e.g., Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT’L L. 51, 53 (1974).

<sup>6</sup> North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>7</sup> 22 U.S.C. § 1928f(a). The statute provides that “two-thirds of the Senators present” must concur. This statutory language is similar to the constitutional provision found at Article II, Section 2, clause 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.”).

<sup>8</sup> Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. (2020), <https://www.justice.gov/olc/file/1348136/download>.

<sup>9</sup> See *infra* “The Executive Branch’s 2020 Claim to Exclusive Treaty Withdrawal Power.”

<sup>10</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002–03 (1979) (plurality opinion) (concluding that a challenge to the President’s authority to unilaterally withdraw from the United States’ mutual defense treaty with Taiwan presented a nonjusticiable political question); *infra* note 116 and accompanying text. The political question doctrine is discussed (continued...)

branch’s response to this question; in Section 1250A, Congress provided a different response in the context of a specific treaty—the North Atlantic Treaty. If a President were to withdraw from the North Atlantic Treaty without congressional approval as required by Section 1250A, and a challenge were brought that a court agreed to hear, the executive branch might argue, consistent with the 2020 OLC opinion, that Section 1250A interferes with the President’s exclusive authority to withdraw from treaties and is thus unconstitutional.<sup>11</sup>

This report examines the issues that U.S. courts could potentially address if a President were to assert the authority to withdraw unilaterally from the North Atlantic Treaty notwithstanding Section 1250A. It begins by providing the background and legal framework governing the process for treaty withdrawal at the international and U.S. domestic levels. Next, this report examines historical practices related to treaty withdrawal, which began as a cooperative, interbranch process, but has evolved into sometimes conflicting legislative and executive branch positions. This report then analyzes how a court might determine whether it could hear a challenge to an alleged violation of Section 1250A by applying the political question or standing doctrines. This report next analyzes how courts might approach the question of whether Section 1250A violates constitutional separation of powers principles if they were to agree to hear a challenge to a President’s unilateral withdrawal from the North Atlantic Treaty. Finally, this report proffers some considerations for Congress as it continues to exercise its legislative and oversight authorities related to treaties.

## Background and Legal Framework

Treaties operate under separate international and domestic legal frameworks, and these frameworks create distinct sets of rules governing how countries enter into, perform, and withdraw from treaties.<sup>12</sup> Generally, under international law, a nation’s head of state has authority to withdraw from a treaty, provided the treaty permits withdrawal and the specified withdrawal process is followed.<sup>13</sup> Article 13 of the North Atlantic Treaty permits parties to withdraw one year after providing a “notice of denunciation.”<sup>14</sup> Under U.S. domestic law, the legal rules governing treaty withdrawal are less straightforward and have been the subject of changing practices and interpretation, as discussed in the following sections.

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further *infra* “Political Question Doctrine.” See also Cong. Rsch. Serv., *Overview of the Political Question Doctrine*, Constitution Annotated, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE\\_00001283/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE_00001283/) (last visited Feb. 9, 2026).

<sup>11</sup> See *infra* “The Executive Branch’s 2020 Claim to Exclusive Treaty Withdrawal Power.”

<sup>12</sup> Compare, e.g., Vienna Convention on the Law of Treaties, arts. 7–17, May 23, 1969, 1155 U.N.T.S. 33 (defining the rules under international law in which all countries, regardless of their domestic legal system, may consent to be bound by a treaty), with U.S. CONST. art. II, § 2, cl. 2 (defining a specific procedure in U.S. domestic law in which the United States may become a party to a treaty only after receiving the Senate’s advice and consent). See also Int’l Law Comm’n, Draft Articles on the Law of Treaties with Commentaries, 1966, arts. 2 cmts. 1, 9, in II YEARBOOK OF THE INT’L L. COMM’N, 1966, at 187–88, [http://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf) [hereinafter Commentary on the Law of Treaties] (“[T]he international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.”).

<sup>13</sup> See Vienna Convention, *supra* note 12, art. 67.

<sup>14</sup> North Atlantic Treaty, *supra* note 6, art 13. The full text of Article 13 provides, “After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.” *Id.*

## Constitutional Framework

Article II of the Constitution sets forth a specific procedure through which the President has the power to make treaties with the advice and consent of the Senate,<sup>15</sup> but is silent as to how treaties may be terminated. Both Congress and the President possess other constitutional powers related to foreign affairs, which complicates the analysis of where the power to terminate treaties resides.

Article I of the Constitution grants Congress several foreign-affairs-related powers, including the power to declare war; establish, fund, and regulate federal armed forces; regulate commerce with foreign states; “provide for the common Defence”; “define and punish violations of the law of nations”; “grant Letters of Marque and Reprisal”; “make Rules concerning Captures on Land and Water”; and “make all laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers Vested by this Constitution in the [federal] government.”<sup>16</sup> Article II vests the “executive Power” in the President, makes the President “Commander in Chief” of the armed forces, and authorizes the President to “receive Ambassadors and other public Ministers . . . .”<sup>17</sup>

Apart from these textual sources, the Supreme Court has stated that both the executive and legislative branches have broad powers over foreign affairs that are not limited to “affirmative grants of the Constitution.”<sup>18</sup> With regard to the President, the Court has further suggested that such inherent foreign affairs authority includes certain powers inherent in the role as head of a sovereign state that appear not to be shared with the legislative branch, such as “the power to speak or listen as a representative of the nation.”<sup>19</sup> Although the Court recognized this presidential “power to act in foreign affairs does not enjoy any textual detail” in Article II, it determined that the President’s “executive power” under Article II includes the “vast share of responsibility for the conduct of our foreign relations.”<sup>20</sup>

At the same time, the Court has also recognized that the legislative branch has a role in foreign affairs, emphasizing that Presidents are “not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”<sup>21</sup> The Court has further explained that Congress’s role in foreign affairs must “be understood and respected,” because only Congress holds the power to make the law regarding both domestic and foreign matters.<sup>22</sup>

Applying these principles to treaty withdrawals, scholars generally accept that Presidents, by virtue of their “unique role in communicating with foreign governments,”<sup>23</sup> are responsible for *communicating* the United States’ intention to withdraw from a treaty.<sup>24</sup> Beyond that act of

<sup>15</sup> 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[.]”). For background on the treaty-making process and Supreme Court cases interpreting the Treaty Clause, see Cong. Rsch. Serv., *Overview of the President’s Treaty-Making Power*, [https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE\\_00012952/](https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE_00012952/) (last visited Feb. 10, 2026).

<sup>16</sup> U.S. CONST. art. I, § 8, cls. 1, 3, 10, 11, 14, 18.

<sup>17</sup> U.S. CONST. art. II, §§ 1, 2. Article II also permits the President “to make Treaties” and “appoint Ambassadors [and] other public Ministers and Consuls,” but only after receiving the Senate’s advice and consent. U.S. CONST. art. II, § 2.

<sup>18</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

<sup>19</sup> *Id.* at 318–19.

<sup>20</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

<sup>21</sup> *Zivotofsky ex rel. v. Kerry*, 576 U.S. 1, 21 (2015).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *See, e.g.*, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(1) (AM. L. INST. 2018); (continued...)

communication, however, there is long-standing debate over which branch (or branches) of government have the power to *decide* that the United States will withdraw from a treaty as a matter of U.S. domestic law. In particular, the degree to which the Constitution contemplates a role for the legislative branch to participate in treaty withdrawal decisions has been the source of changing practices and disagreement among the legislative and executive branches and legal scholars.

## Historical Practice

The past practices related to treaty termination have varied over the years.<sup>25</sup> The first time that the United States terminated a treaty after the Constitution was ratified was in 1798. On the eve of possible hostilities with France, Congress passed, and President Adams signed, legislation stating that four U.S. treaties with France “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”<sup>26</sup> Thomas Jefferson referred to the episode as support for the notion that only an “act of the legislature” can terminate a treaty;<sup>27</sup> however, many commentators since have come to view this 1798 statute as a historical anomaly because it is the only instance in which Congress purported to terminate a treaty directly through legislation without relying on the President to provide a notice of termination to the foreign government.<sup>28</sup> Moreover, because the 1798 statute was part of a series of congressional measures authorizing limited hostilities against the French Republic, some view the statute as an exercise of Congress’s war powers rather than precedent for a congressional power to terminate treaties.<sup>29</sup>

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CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. RPT. 106-71, at 199 (2001) (citing *Curtiss-Wright*, 299 U.S. at 319); WESTEL WOODBURY WILLOUGHBY, 1 CONSTITUTIONAL LAW OF THE UNITED STATES 587 (1929)) (describing the “noncontroversial observation” that, “as the official spokesperson with other governments, the President is the person who communicates the notice of impending termination” of international agreements).

<sup>25</sup> See, e.g., DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES 190 (1986) (“There has been no predominant method of termination, or even a discernible trend. Indeed, the record is checkered.”); V GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 330 (1943) (“The question as to the authority of the Executive to terminate treaties independently of the Congress or of the Senate is in a somewhat confused state. . . . No settled rule or procedure has been followed.”).

<sup>26</sup> Act of July 17, 1798, 5 Cong. Ch. 67, 1 Stat. 578 (An Act to declare the treaties heretofore concluded with France, no longer obligatory on the United States).

<sup>27</sup> See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 312 (Washington City, Samuel Harrison Smith ed., 1801) [hereinafter JEFFERSON’S MANUAL].

<sup>28</sup> See, e.g., Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 782 (2014); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313, reporters n.2 (AM. L. INST. 2018); CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. RPT. 106-71, at 207 (2001).

<sup>29</sup> See S. REP. NO. 34-97, at 5 (1856) (Senate Foreign Relations Committee describing the 1798 treaty abrogation statute as a “rightful exercise of the war power, without viewing it in any manner as a precedent establishing in Congress alone, and under any circumstances, the power to annul a treaty.”). Cf. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.) (treating the 1798 statute as one in a bundle of congressional acts declaring a limited “public war” on the French Republic).

During the 19th century, the general practice was to treat the power to terminate treaties as shared between the legislative and executive branches.<sup>30</sup> Congress often authorized<sup>31</sup> or instructed<sup>32</sup> the President to provide notice of treaty termination to foreign governments during this time. On rare occasions, the Senate alone passed a resolution authorizing the President to terminate a treaty.<sup>33</sup> Presidents regularly complied with the legislative branch's authorization or direction. For example, after Congress enacted a joint resolution calling for the termination of the Oregon Territory Treaty, then-Secretary of State (and future President) James Buchanan informed the U.S. Ambassador to Great Britain that "Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President's) and your duty to conform."<sup>34</sup> On other occasions, Congress or the Senate approved the President's termination after-the-fact, when the executive branch had already provided notice of termination to the foreign government.<sup>35</sup>

At the turn of the 20th century, the practice regarding treaty termination began to change, and a new form emerged: unilateral termination by the President without approval by the legislative branch. This method first occurred in 1899, when the McKinley Administration terminated certain articles in a commercial treaty with Switzerland,<sup>36</sup> and again in 1927, when the Coolidge Administration withdrew the United States from a convention with Mexico regarding the prevention of smuggling.<sup>37</sup> Some Members of Congress questioned the constitutionality of this practice,<sup>38</sup> and the executive branch acknowledged in a 1909 memorandum that joint action between the President and Congress was the more "effective and unquestionable" method to terminate a treaty.<sup>39</sup> Despite these mixed views, unilateral presidential termination increased

<sup>30</sup> For analysis of 19th century understanding and practice related to treaty termination, see Bradley, *supra* note 28, at 788–801; SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 423–66 (2d ed. 1916).

<sup>31</sup> See, e.g., Joint Resolution of Apr. 27, 1846, 9 Stat. 109 (concerning the Oregon Territory, providing that the President "is hereby authorized, at his discretion, to give to the government of Great Britain the notice required by" a convention allowing for joint occupancy of parts of the Oregon Territory); Joint Resolution of June 17, 1874, 18 Stat. 287 (authorizing the President to give notice of termination of a Treaty of Commerce with Belgium).

<sup>32</sup> See, e.g., Joint Resolution of Jan. 18, 1865, 13 Stat. 566; Joint Resolution of Mar. 3, 1883, 22 Stat. 641.

<sup>33</sup> In 1855, the Senate authorized President Franklin Pierce to terminate a Friendship, Commerce, and Navigation Treaty with Denmark, and the President subsequently relied on the Senate's action in carrying out the termination. Franklin Pierce, Third Annual Message (Dec. 31, 1855), in 7 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 2860, 2867 (James D. Richardson ed., 1897).

<sup>34</sup> S. DOC. NO. 29-489, at 15 (1846).

<sup>35</sup> See, e.g., Joint Resolution to Terminate the Treaty of 1817 Regulating the Naval Force on the Lakes, 13 Stat. 568 (1865).

<sup>36</sup> See Letter from John Hay, U.S. Sec'y of State, to Ambassador Leishman (Mar. 8, 1899), in *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES*, 753–54 (1901).

<sup>37</sup> See Letter from Frank B. Kellogg, U.S. Sec'y of State, to Ambassador Sheffield (Mar. 21, 1927), in 3 *PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES*, 1927, at 230, 230–31 (1942).

<sup>38</sup> Compare, e.g., 58 CONG. REC. 8076 (1919) (statement of Sen. Walsh) ("I cannot believe that anybody would entertain any serious doubt" that the President must obtain congressional authorization for treaty withdrawal); *with id.* at 8122 (statement of Sen. Spencer) ("[I]f the President of the United States saw fit to give notice of withdrawal, that withdrawal would be effective. If it was in violation of or in contradiction of the wishes of the Congress at the time . . . it would not deprive him of his power."); *and id.* at 8125 (statement of Sen. Robinson) (contending that the "customary method" of treaty withdrawal involves concurrence of the President and both Houses of Congress, but there may be exceptional cases where the President has unilateral termination power).

<sup>39</sup> Memorandum from James Brown Scott, Solicitor, U.S. Dep't of State (June 12, 1909), in V *DIGEST OF INTERNATIONAL LAW*, *supra* note 25, at 319 (1943). See also Memorandum from R. Walton Moore, Acting U.S. Sec'y of State, to President Roosevelt 2 (November 9, 1936) (on file with author) ("The question as to the authority of the Executive to terminate treaties independently of Congress or of the Senate is in a somewhat confused state.").

during the Franklin Roosevelt Administration and World War II.<sup>40</sup> Over the course of the 20th century, unilateral presidential termination generally became the norm<sup>41</sup>—both for treaties that contain withdrawal clauses and those that do not.<sup>42</sup>

While the U.S. practice since the turn of the 20th century has trended toward unilateral presidential treaty withdrawal, the practice has not been uniform. Congress has enacted legislation authorizing or instructing the President to terminate treaties and other international agreements,<sup>43</sup> and there are a number of cases in which Presidents relied upon and complied with these congressional directives.<sup>44</sup> Members of Congress have also occasionally raised constitutional objections to the President’s unilateral treaty withdrawal.<sup>45</sup> In 2019, Congress enacted legislation requiring the President to notify Congress at least 120 days before withdrawing the United States from the Treaty on Open Skies.<sup>46</sup> In 2020, President Trump notified the treaty parties of the United States’ intent to withdraw without complying with the statutorily required 120-day congressional notice period.<sup>47</sup> As discussed below, the OLC argued in

<sup>40</sup> See, e.g., Withdrawal of the United States from the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, June 14, 1933, in U.S. DEP’T OF STATE, I FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1933, at 783 (1950); Telegram from the Acting Secretary of State to the U.S. Ambassador in Italy, Dec. 10, 1936, in U.S. DEP’T OF STATE, II FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1936, at 356 (1954) (terminating commercial treaty with Italy); Armament Reduction, 1 DEP’T ST. BULL. 354 (1939) (suspending obligations under the London Naval Treaty); Int’l Load Line Convention, 40 U.S. Op. Atty. Gen. 119 (1941) (opining that the President could declare the International Load Line Convention inoperative).

<sup>41</sup> See, e.g., OFFICE OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, at 202-206 (compiling a list of treaties terminated unilaterally by the President since 1980).

<sup>42</sup> Compare, e.g., OFFICE OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, 2018, at 112-13 (termination of Treaty of Amity, Economic Relations, and Consular Rights with Iran pursuant to termination clause); with OFFICE OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, 2005, at 30-31 (withdrawal from Optional Protocol to the Vienna Convention on Consular Relations, which does not include a withdrawal clause).

<sup>43</sup> See, e.g., Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 313, 100 Stat. 1086, 1104 (mandating that “[t]he Secretary of State shall terminate immediately” a tax treaty and protocol with South Africa), *repealed by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, § 4, 107 Stat. 1503, 1505; Fishery Conservation and Management Act of 1976, Pub. L. No., 94-265 § 202(b), 90 Stat. 331, 340-41 (authorizing the Secretary of State to renegotiate certain fishing treaties and expressing the “sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment”); Trade Agreements Extension Act of 1951, Pub. L. No. 82-50 § 5, 65 Stat. 72, 73 (directing the President to “take such action as is necessary to suspend, withdraw or prevent the application of” trade concessions contained in prior trade agreements regulating imports from the Soviet Union and “any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement.”).

<sup>44</sup> See *South African Airways v. Dole*, 817 F.2d 119, 121 (D.C. Cir. 1987) (discussing the Reagan Administration’s termination of an air services agreement with South Africa as required by the Comprehensive Anti-Apartheid Act of 1986), *cert denied*, 484 U.S. 896 (1987); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 reporters’ n. 3 (AM. L. INST. 2018) (discussing the Truman and Ford Administration’s reliance on statutory authorities to terminate certain treaties).

<sup>45</sup> See, e.g., Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198, 198-201 (1979).

<sup>46</sup> See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1234, 133 Stat. 1198, 1649 (codified at 22 U.S.C. § 2593a note) (requiring the President to notify the appropriate congressional committees “[n]ot later than 120 days before the provision of notice of intent to withdraw the United States from the Open Skies Treaty to either treaty depository pursuant to Article XV of the Treaty.”)

<sup>47</sup> The Trump Administration notified Congress of the President’s intent to withdraw on the same day that it notified the treaty parties of the United States’ intent to withdraw. Compare Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. 184, 196-98 (2020), <https://www.justice.gov/olc/file/1348136/dl?inline> (“On May 22, 2020, the Secretary of State and the Secretary of Defense advised Congress that the President had determined that it was no longer in the national security interest for the United States to remain a party to the Open Skies Treaty.”), with U.S. Dep’t of State, United States Withdrawal (continued...)

a 2020 opinion that this statutory notice requirement was an unconstitutional infringement on the President’s exclusive power to withdraw from treaties.<sup>48</sup> Most unilateral withdrawals have not generated congressional opposition, and Congress did not enact legislation or a resolution formally opposing the President’s withdrawal from a particular treaty until it enacted Section 1250A in 2023; however, some Members have filed suit challenging the constitutionality of unilateral withdrawal.<sup>49</sup> As discussed in more detail below, courts thus far have dismissed these challenges on justiciability grounds without reaching the merits of the constitutional question.<sup>50</sup>

## Competing Constitutional Interpretations

Government officials in the legislative and executive branches and scholars have expressed differing views about the branches’ respective roles in treaty termination. Some have argued that the President possesses the powers to withdraw unilaterally from treaties based on Supreme Court case law describing the President as the “sole organ”<sup>51</sup> of the nation in matters related to foreign affairs<sup>52</sup> and pursuant to the “executive Power” conveyed to the President in Article II, Section 1 of the Constitution.<sup>53</sup> Other proponents of executive authority have likened the power to withdraw from treaties to the President’s power to remove executive officers.<sup>54</sup> Although the Appointments Clause requires senatorial advice and consent for the appointment of certain executive officers, the Supreme Court has held that the President has significant unilateral authority to remove those

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from the Treaty on Open Skies (July 6, 2020), <https://2017-2021.state.gov/united-states-withdrawal-from-the-treaty-on-open-skies/> (“On May 22, the United States provided [the treaty depositaries] notice of its decision to withdraw from the Treaty on Open Skies pursuant to paragraph 2 of Article XV.”).

<sup>48</sup> See Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. at 194; *infra* “The Executive Branch’s 2020 Claim to Exclusive Treaty Withdrawal Power.”

<sup>49</sup> See, e.g., *Goldwater v. Carter*, 481 F. Supp. 949 (1979); Complaint for Declaratory Relief Preliminary Statement at 4, *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (No. 1:02CV01137), 2002 WL 32968622 (“In this action 31 Members of Congress seek a declaratory judgment that the President’s proposed termination of the Treaty on the Limitation of Anti-Ballistic Missile Systems (“the ABM Treaty”) is unconstitutional and of no effect because of the President’s failure to seek and obtain the assent of Congress.”); see also *infra* notes 100–105 and accompanying text; *infra* note 116.

<sup>50</sup> See *infra* “Justiciability Issues in Enforcing Section 1250A.”

<sup>51</sup> *United States v. Curtiss Wright Export Corp.* 299 U.S. 304, 319–20 (1936) (“[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . .”).

<sup>52</sup> See, e.g., Bradley, *supra* note 28, at 782 (discussing the application of the President’s role as the “sole organ” of communications to the concept of treaty termination); MEMORANDUM FROM JOHN C. YOO, DEPUTY ASSISTANT ATT’Y GEN. & ROBERT J. DELAHUNTY, SPECIAL COUNSEL, OLC, U.S. DEP’T OF JUSTICE, TO JOHN BELLINGER, III, SENIOR ASSOC. COUNSEL TO THE PRESIDENT & LEGAL ADVISER TO THE NAT’L SEC. COUNCIL, AUTHORITY OF THE PRESIDENT TO SUSPEND CERTAIN PROVISIONS OF THE ABM TREATY 7 (Nov. 15, 2001) [hereinafter YOO & DELAHUNTY MEMORANDUM], <http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf> (“The President’s power to terminate treaties must reside in the President as a necessary corollary to the exercise of the President’s other plenary foreign affairs powers.”). The OLC in the Department of Justice later disavowed unrelated portions of the Yoo & Delahunty Memorandum, but it continued to maintain that the President may unilaterally suspend a treaty where suspension is permitted “by the terms of the treaty or under recognized principles of international law.” See MEMORANDUM OF STEVEN G. BRADBURY, PRINCIPAL DEPUTY ASSISTANT ATT’Y GEN., 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/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf>.

<sup>53</sup> See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 158–59 (2007); YOO & DELAHUNTY MEMORANDUM, *supra* note 52, at 3–13.

<sup>54</sup> See Bradley, *supra* note 28, at 781–82; Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247, 269–71 (2013).

officers.<sup>55</sup> The Treaty Clause immediately precedes the Appointments Clause, and some executive branch officials and legal scholars have argued the same principles that allow the President to undo appointments that are made with the Senate’s consent support the view that the President may unilaterally terminate treaties, which are also entered into with the Senate’s consent.<sup>56</sup>

Since the turn of the 20th century, officials in the executive branch have adopted variations of these arguments and consistently taken the position that the Constitution permits the President to withdraw from treaties without receiving express approval from the legislative branch.<sup>57</sup> The prevailing view among foreign relations law scholars appears to be that the President may unilaterally withdraw from treaties if it is permitted by the treaty or other international laws and Congress has not expressly prohibited it.<sup>58</sup>

Some Members of Congress and a smaller group of observers have advanced a more limited view of presidential power, arguing that the Constitution requires the legislative branch’s approval for the President to withdraw from a treaty that received the Senate’s advice and consent. According to these advocates for a congressional role, treaty termination should be considered analogous to the termination of federal statutes because the Supremacy Clause includes both treaties and statutes as sources of the “supreme Law of the Land.”<sup>59</sup> Thus, those advancing this view reason that, because domestic statutes may be terminated only through the same process in which they were enacted—i.e., through a majority vote in both houses and with the signature of the President or veto override<sup>60</sup>—treaties must be terminated through a procedure that is symmetrical to their making and that includes, at a minimum, the Senate’s consent.<sup>61</sup>

Although there was little direct discussion of the treaty termination power at the Constitutional Convention,<sup>62</sup> some documents from the early constitutional era arguably support the view that

<sup>55</sup> See, e.g., *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 238 (2020) (holding that Congress does not have authority to limit the President’s authority to remove “principal officers who, acting alone, wield significant executive power”); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary.”). For background on the President’s removal power, see *Overview of Removal of Executive Officers*, Constitution Annotated, [https://constitution.congress.gov/browse/essay/artII-S2-C2-3-15-1/ALDE\\_00013107/](https://constitution.congress.gov/browse/essay/artII-S2-C2-3-15-1/ALDE_00013107/) (last visited Feb. 20, 2025).

<sup>56</sup> See, e.g., YOO & DELHUNTY MEMORANDUM, *supra* note 52, at 3–13; Bradley, *supra* note 28, at 781–82.

<sup>57</sup> See CRS Report R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, by Stephen P. Mulligan, at 9 n.70 (2018) (citing memoranda from the executive branch from 1909 through 2001); see also Authority to Withdraw from the North American Free Trade Agreement, 42 Op. O.L.C. 133, 142, 145 (2018) (“Over the course of time, historical practice shifted towards the view that the President could terminate a treaty without congressional authorization. . . . The President . . . need not return to Congress before terminating or withdrawing from a treaty according to its terms.”).

<sup>58</sup> See, e.g., RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(1) (AM. L. INST. 2018); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 214 (2d ed. 1996).

<sup>59</sup> U.S. CONST. art. VI, cl. 2; see, e.g., Goldwater, *supra* note 45, at 199–200 (analyzing “evidence that the framers linked the repeal of treaties to the repeal of statutes”); Petition for Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit at 15, *Goldwater v. Carter*, 444 U.S. 996 (1979) (No. 79-856) (“Federal statutes are part of the Supreme Law of the Land, yet they are repealed by the same process by which they are made (although the Constitution does not expressly say so). Why should treaties, which are on an equal footing with statutes, be any different?”); ADLER, *supra* note 25, at 106–10 (arguing that the Framers would have understood treaties to be terminable pursuant to a “symmetrical rule of construction” whereby they could be unmade only in the same way that they were made).

<sup>60</sup> See, e.g., *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.”); *INS v. Chadha*, 462 U.S. 919, 954 (1983) (“[R]epeal of statutes, no less than enactment, must conform with Art. I.”).

<sup>61</sup> See, e.g., Goldwater, *supra* note 45, at 199–200; ADLER, *supra* note 25, at 106–10.

<sup>62</sup> See Eichensehr, *supra* note 54, at 249; ADLER, *supra* note 25, at 84.

the legislative branch should participate in treaty withdrawal.<sup>63</sup> In a 1791 letter, James Madison questioned whether a treaty with Great Britain could be terminated by the President and Senate or whether the “whole Legislature” must participate in its annulment—but he did not mention the possibility of unilateral termination by the Executive.<sup>64</sup> In *Ware v. Hylton*, a 1796 Supreme Court decision concerning the legal effect of treaties on conflicting state laws, one Justice expressed the view that only Congress has the ability to declare a treaty void as a result of a breach.<sup>65</sup> In his *Manual of Parliamentary Practice*, Thomas Jefferson wrote in 1801 that “[t]reaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded.”<sup>66</sup>

Proponents of executive authority have responded to this proposition by arguing that the Supremacy Clause’s purpose was to establish the primacy of treaties and federal statutes over state law—not to deem treaties and statutes identical in all respects.<sup>67</sup> In addition, they argue, treaties do not share every feature of federal statutes.<sup>68</sup> Whereas statutes can be enacted over the President’s veto, treaties can never be concluded without the Senate’s advice and consent.<sup>69</sup> Moreover, when exercising its veto-override power, Congress is the final actor in making U.S. domestic laws. In the treaty-making process, however, the President must take the final step in committing that the United States will be bound by the terms of the treaty by submitting a signed instrument of ratification after the Senate provides its advice and consent.<sup>70</sup>

## The Executive Branch’s 2020 Claim to Exclusive Treaty Withdrawal Power

In a 2020 opinion from the Department of Justice’s OLC, the executive branch publicly took the view, for what appears to be the first time,<sup>71</sup> that the President’s authority to withdraw from

<sup>63</sup> For analysis of founding-era history, see Raoul Berger, *The President’s Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577, 580-89 (1980); HENKIN, *supra* note 58, at 212 & n.139.

<sup>64</sup> Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), [http://press-pubs.uchicago.edu/founders/documents/a6\\_2s20.html](http://press-pubs.uchicago.edu/founders/documents/a6_2s20.html).

<sup>65</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (opinion of Iredell, J.) (“[I]f a treaty be violated by one party, it is at the option of the other party . . . to declare . . . that the treaty is void. If Congress, therefore, (who, I conceive, alone have such authority under our Government) shall make such a declaration . . . I shall deem it my duty to regard the treaty as void, and then to forbear any share in executing it as a Judge.”); Goldwater, *supra* note 45, at 201 (discussing Justice Iredell’s opinion in *Ware*). *But see* *Charlton v. Kelly*, 222 U.S. 447, 473-76 (1913) (stating that, because the “Executive Department . . . elected to waive any right to free itself” from its obligations under an extradition treaty, the Supreme Court must enforce the treaty even if it had been breached and made voidable, and thereby suggesting that, at least in the absence of direction from Congress, the President has the power to waive treaty violations).

<sup>66</sup> JEFFERSON’S MANUAL, *supra* note 27, at 312.

<sup>67</sup> *See, e.g.*, Louis Henkin, *Litigating the President’s Power To Terminate Treaties*, 73 AM. J. INT’L L. 647, 653 (1979) (“One of the arguments made against presidential power is that treaties are the supreme law of the land and it takes a legislative act to repeal a law. This argument, I submit, plays with words. The provision in Article VI that treaties are ‘the supreme law of the land’ is addressed to the courts, and principally for the purpose of declaring treaties supreme in relation to state law and policy.”); Eichensehr, *supra* note 54, at 267 (“[T]he Supremacy Clause’s purpose is to establish the primacy of treaties and federal statutes over state law and that their equivalence vis-à-vis state law does not indicate that their method of termination is or should be identical.”).

<sup>68</sup> *See, e.g.*, John Yoo, *Politics As Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 878 (2001).

<sup>69</sup> Compare U.S. CONST. art. I, § 7 with *id.* art. II, § 2, cl 2.

<sup>70</sup> *See, e.g.*, CRANDALL, *supra* note 30, at 81; RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(3) (AM. L. INST. 2018). For examples of treaties approved by the Senate that Presidents have declined to ratify, see CRANDALL, *supra* note 30, at 97–99.

<sup>71</sup> *See supra* note 57.

treaties is an exclusive presidential power that Congress cannot restrict through legislation.<sup>72</sup> The opinion addressed a statutory provision that required the President to provide notice to Congress at least 120 days before notifying the other state parties that the United States intended to withdraw from the Treaty on Open Skies.<sup>73</sup> Contending that congressional control of treaty withdrawal interferes with the President’s “exclusive authority to execute treaties and to conduct diplomacy,” OLC concluded that the statutory requirement of a congressional-notice period was unconstitutional.<sup>74</sup> Deciding whether to withdraw from a treaty is a “quintessentially executive” choice that is committed to the President’s discretion, OLC opined.<sup>75</sup> Although not binding on courts or Congress,<sup>76</sup> OLC legal opinions have historically been treated as binding within the executive branch.<sup>77</sup>

Following the United States’ withdrawal in contravention of the statutory notice requirement,<sup>78</sup> some Members of Congress expressed criticism of the executive branch’s decision not to comply with the congressional notification requirement,<sup>79</sup> and bill text was introduced expressing the sense of Congress that the withdrawal violated federal law, but that text was not enacted.<sup>80</sup> In addition, Congress did not take any formal action after the withdrawal.

<sup>72</sup> Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. 184, 196–98 (2020), <https://www.justice.gov/olc/file/1348136/dl?inline>.

<sup>73</sup> National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1234, 133 Stat. 1198, 1649 (codified at 22 U.S.C. § 2593a note).

<sup>74</sup> Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. at 213–14.

<sup>75</sup> *Id.* at 196.

<sup>76</sup> *See, e.g.,* *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and explaining that such opinions are entitled to some weight but do not have the force of judicial decisions).

<sup>77</sup> MEMORANDUM FROM DAVID J. BARRON, ACTING ASSISTANT ATT’Y GEN., OLC, TO ATT’YS OF THE OFFICE, RE: BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS 1 (July 16, 2010), <https://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>. For a discussion of the statutory and historical underpinnings of the authority of OLC opinions for the executive branch, see Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2012).

<sup>78</sup> *See supra* notes 46–48 and accompanying text.

<sup>79</sup> *See, e.g.,* Engel & Smith Denounce Trump Administration’s Illegal Withdrawal from Open Skies Treaty (May 22, 2020), <https://democrats-foreignaffairs.house.gov/2020/5/engel-smith-denounce-trump-administration-s-illegal-withdrawal-from-open-skies-treaty>; Letter from Rep. Adam Smith et al. to Mark T. Esper, Sec’y, U.S. Dep’t of Def., May 22, 2020, [https://democrats-armedservices.house.gov/\\_cache/files/a/2/a2186721-db29-4324-acb4-8cf6784dc985/85E3C84EC3080246B5541FF09F1CED30.20200522-hasc-ost-letter-secesper.pdf](https://democrats-armedservices.house.gov/_cache/files/a/2/a2186721-db29-4324-acb4-8cf6784dc985/85E3C84EC3080246B5541FF09F1CED30.20200522-hasc-ost-letter-secesper.pdf); Ranking Member Menendez Statement on Trump Administration’s Withdrawal from the Open Skies Treaty (May 20, 2020), [https://www.foreign.senate.gov/press/dem/release/ranking-member-menendez\\_statement-on-trump-administrations-withdrawal-from-the-open-skies-treaty](https://www.foreign.senate.gov/press/dem/release/ranking-member-menendez_statement-on-trump-administrations-withdrawal-from-the-open-skies-treaty).

<sup>80</sup> *See* H. Amdt. 846 to H.R. 6395, 116th Cong. (2020) (proposed provision expressing the sense of Congress that the withdrawal from the Open Skies Treaty did not comply with statutory requirements); *see also* Helsinki Commission Chairman Amends NDAA to Reflect Support for Open Skies Treaty (July 22, 2020), <https://www.csce.gov/articles/helsinki-commission-chairman-amends-ndaa-reflect-support-open-skies-treaty/>. The United States’ withdrawal remains effective. *See* Government of Canada (treaty depositary), Treaty List, Treaty on Open Skies, Helsinki, 24 March 1992, <https://www.treaty-accord.gc.ca/details.aspx?lang=eng&id=102747&t=639062448990851409> (last visited Feb. 9, 2026) (indicating the United States withdrawal was effective on November 22, 2020). In the year after the U.S. withdrawal, legislation was introduced “call[ing] on the administration to consider continued participation in the Treaty on Open Skies.” H. Res. 54, 117th Cong. (2021).

## Congressional Rejection of Exclusive Presidential Withdrawal Power in Section 1250A of the 2024 NDAA

In what might be understood as a rejection of the executive branch’s position that the President possesses exclusive power over treaty withdrawal, in 2023, Congress enacted what appears to be the first statute prohibiting the President from unilaterally withdrawing from a treaty (specifically, the North Atlantic Treaty).<sup>81</sup> Section 1250A of the 2024 NDAA provides that the President “shall not suspend, terminate, denounce, or withdraw the United States from the North Atlantic Treaty” without the advice and consent of the Senate, with two-thirds of Senators present concurring, or pursuant to an act of Congress.<sup>82</sup> Additionally, the statute prohibits use of appropriated funds to withdraw from the North Atlantic Treaty without the advice and consent of the Senate, with two-thirds of Senators present concurring or pursuant to an act of Congress.<sup>83</sup> Section 1250A also requires the President to consult with the House and Senate foreign affairs committees “in relation to any initiative” to withdraw the United States from the North Atlantic Treaty, and to notify those committees “of any deliberation or decision” to withdraw from the North Atlantic Treaty “as soon as possible but in no event later than 180 days prior to taking such action.”<sup>84</sup> To date, the 2020 OLC opinion has not been withdrawn, suggesting that the executive branch may maintain that the President has exclusive treaty withdrawal power, including power to unilaterally withdraw from the North Atlantic Treaty.<sup>85</sup>

### Changing Practice in Treaty Withdrawal Paradigms

The United States’ treaty withdrawal practice can be summarized in several key events and stages.

**Congressional Termination (1798).** The United States’ first treaty withdrawal after the Constitution’s adoption took place pursuant to legislation stating that four treaties “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”<sup>86</sup>

**Shared Withdrawal Power (19th century).** Treaty withdrawal was treated as a shared power between the legislative and executive branches, and both branches authorized or approved withdrawal.<sup>87</sup>

**Shift to Unilateral Presidential Power (20th century to present).** Unilateral withdrawal by the executive branch becomes the predominant practice.<sup>88</sup>

<sup>81</sup> 22 U.S.C. § 1928f(a); *see also* Kaine & Rubio Applaud Adoption of Their Amendment to the NDAA to Prevent Any U.S. President from Leaving NATO (July 13, 2023), <https://www.kaine.senate.gov/press-releases/kaine-and-rubio-applaud-adoption-of-their-amendment-to-the-ndaa-to-prevent-any-us-president-from-leaving-nato> (quoting Sen. Rubio as stating that the amendment “ensure[s] that current and future U.S. Presidents cannot leave NATO without rigorous debate and consideration by the U.S. Congress with the input of the American people”); Final Package Includes McClellan Amendments (Dec. 14, 2023), <https://mcclellan.house.gov/media/press-releases/mcclellan-helps-pass-ndaa-fully-fund-military> (describing provision as an endeavor to “prevent any U.S. President from unilaterally withdrawing from NATO without congressional approval”).

<sup>82</sup> 22 U.S.C. § 1928f(a).

<sup>83</sup> *Id.* § 1928f(b).

<sup>84</sup> *Id.* § 1928f(c).

<sup>85</sup> *See supra* note 77 and accompanying text. Although in a statement issued in conjunction with signing the 2024 NDAA, President Biden noted constitutional objections to a number of sections in the statute, such as restrictions on the transfer of Guantánamo Bay detainees and requirements to submit reports that could reveal classified information, he did not mention Section 1250A. *See* Presidential Statement on Signing the NDAA for Fiscal Year 2024, 2023 DAILY COMP. PRES. DOC. 1145 (Dec. 22, 2023).

<sup>86</sup> *See supra* notes 26–29 and accompanying text.

<sup>87</sup> *See supra* notes 30–35 and accompanying text.

<sup>88</sup> *See supra* notes 36–49 and accompanying text.

**Claim of Presidential Exclusivity (2020).** In an OLC opinion, the executive branch claimed exclusive constitutional authority to withdraw from treaties and asserted that Congress cannot limit or condition this power in legislation.<sup>89</sup>

**Congressional Rejection of Presidential Exclusivity (2023).** In Section 1250A of the 2024 NDAA, Congress provided that the President cannot withdraw from the North Atlantic Treaty without congressional or Senatorial consent.<sup>90</sup>

## Justiciability Issues in Enforcing Section 1250A

Before addressing the constitutional analysis that a court would likely apply in a case involving a challenge to a President’s withdrawal from the North Atlantic Treaty, there is the initial question of whether a court would intervene in the first place or instead deem the issue improper for judicial resolution based on one or more justiciability doctrines. Many cases involving issues of foreign affairs face significant justiciability hurdles that often have led courts to decline to weigh in on the merits. Two of the principal justiciability doctrines that have resulted in dismissal of cases involving foreign affairs, including challenges to a President’s unilateral withdrawal from treaties, are the political question and standing doctrines.<sup>91</sup> Both doctrines are based on the separation of powers between federal courts and the political branches; the Supreme Court has developed the law governing each based on its interpretation of the scope of judicial power granted in Article III of the Constitution.<sup>92</sup> If a President sought to withdraw from the North Atlantic Treaty, but did not obtain approval through the advice and consent of the Senate or an act of Congress, it is possible that the executive branch would invoke the political question and standing doctrines as bases to dismiss any lawsuits seeking to enforce Section 1250A.

### Political Question Doctrine

The Supreme Court developed the political question doctrine based on its determination that Article III grants the judicial branch the power to decide “cases” and “controversies,”<sup>93</sup> and this power precludes courts from deciding so-called “political questions”—a term that the Court uses to refer to questions that are reserved to the political branches.<sup>94</sup> In the 1962 case *Baker v. Carr*,<sup>95</sup>

<sup>89</sup> See *supra* “The Executive Branch’s 2020 Claim to Exclusive Treaty Withdrawal Power.”

<sup>90</sup> See *supra* “Congressional Rejection of Exclusive Presidential Withdrawal Power in Section 1250A of the 2024 NDAA.”

<sup>91</sup> See *infra* notes 97 & 116.

<sup>92</sup> See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”); see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (“[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the ‘case or controversy’ requirement of Art. III, embodies both the standing and political question doctrines.”).

<sup>93</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>94</sup> See, e.g., *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968) (explaining that “the words ‘cases’ and ‘controversies’ . . . define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government” and are “give[n] expression” in justiciability doctrines such as the political question doctrine); *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers. . . . Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”).

<sup>95</sup> 369 U.S. 186 (1962).

the Supreme Court articulated a factor-based analysis for courts to use in determining whether a case presents a political question.

### **The *Baker v. Carr* Factors**

Under *Baker v. Carr*, political questions might involve the following features:

- an issue with “a textually demonstrable constitutional commitment” to the political branches;
- the absence of “judicially discoverable and manageable standards for resolving” the case;
- a need to make policy determinations that are not fit for judicial discretion;
- potential expression of lack of respect for the political branches;
- an unusual need for adherence to a political decision that has already been made; and
- potential embarrassment from inconsistent pronouncements from different branches of government.<sup>96</sup>

Although courts have frequently dismissed cases involving foreign policy issues on the ground that they present a political question, courts generally state that they arrive at those conclusions based on the *Baker* analysis rather than based on the mere fact that the case involves foreign policy.<sup>97</sup> As the Supreme Court stated in *Baker*, the political question doctrine “is one of ‘political questions,’ not one of ‘political cases’”;<sup>98</sup> thus, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>99</sup>

In the most prominent treaty-withdrawal case to date and the only one that has reached the Supreme Court—*Goldwater v. Carter*<sup>100</sup>—a plurality of the Justices concluded that dismissal was appropriate based on the political question doctrine.<sup>101</sup> That case arose during the 1970s when the executive branch was pursuing closer relations with the government of the People’s Republic of China (PRC).<sup>102</sup> Anticipating that, as part of its efforts to normalize relations with the PRC, the executive branch might terminate the 1954 Mutual Defense Treaty with the government of Taiwan,<sup>103</sup> Congress enacted the International Security Assistance Act, which, among other things, expressed “the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.”<sup>104</sup> When the Carter Administration announced that the United States would provide notice to Taiwan of its intent to terminate the treaty without

<sup>96</sup> *Id.* at 217.

<sup>97</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002–03 (1979) (plurality opinion) (concluding that a challenge to the President’s authority to unilaterally withdraw from the United States’ mutual defense treaty with Taiwan presented a nonjusticiable political question); *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (affirming dismissal on political question grounds of suit brought by Members of Congress challenging President Reagan’s deployment of U.S. troops to Nicaragua without providing a notification to Congress pursuant to the War Powers Resolution); *Smith v. Obama*, 217 F. Supp. 3d 283, 288, 297, 302–04 (D.D.C. Cir. 2016) (dismissing on both political question and standing grounds a case challenging the constitutionality of President Obama’s military campaign against the Islamic State of Iraq and the Levant (ISIL), *vacated sub nom.* *Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018)); *Ange v. Bush*, 752 F. Supp. 509, 510 (D.D.C. 1990) (dismissing challenge to President George H.W. Bush’s authority to deploy servicemembers to the Persian Gulf during the First Gulf War as a nonjusticiable political question).

<sup>98</sup> *Baker*, 369 U.S. at 217.

<sup>99</sup> *Id.* at 211.

<sup>100</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>101</sup> See *id.* at 1002–06 (plurality opinion).

<sup>102</sup> For additional background on *Goldwater v. Carter*, see ADLER, *supra* note 25, at 248–306 and VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* 1–52 (1991).

<sup>103</sup> Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433 [hereinafter *Taiwan Mutual Defense Treaty*].

<sup>104</sup> International Security Assistance Act of 1978, Pub. L. No. 95-384, § 26(b), 92 Stat. 730, 746.

having first obtained congressional consent,<sup>105</sup> some Members of Congress filed a lawsuit seeking to block the President’s action on the ground that the President lacked the constitutional authority to unilaterally terminate the treaty.<sup>106</sup>

The U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia both held that the suit was justiciable, but they came to opposite conclusions on the merits. While the district court determined that the treaty power was a shared one and thus the President’s unilateral withdrawal was unconstitutional,<sup>107</sup> the appellate court reversed based on its holding that the President’s unilateral withdrawal from the particular treaty at issue was constitutional based on the circumstances involved in the case.<sup>108</sup> The Supreme Court granted the Members of Congress’s petition for a writ of certiorari, but did not reach the merits of the constitutional question.<sup>109</sup> Instead, in a divided opinion, the Court vacated the appellate court’s decision and remanded the case to the district court with instructions to dismiss the complaint.<sup>110</sup>

Writing for a four-Justice plurality, Justice Rehnquist concluded that the case should be dismissed because the constitutional question over treaty withdrawal was a nonjusticiable political question.<sup>111</sup> In reaching this conclusion, the plurality relied primarily on the second *Baker* factor—a lack of judicially discoverable and manageable standards for resolving” the case.<sup>112</sup> The plurality reasoned that, because the Constitution did not expressly address treaty withdrawal and because “different termination procedures may be appropriate for different treaties,” the issue presented by the case was governed by “political” rather than judicial standards.<sup>113</sup> Justice Powell concurred in the judgment for dismissal, but on the ground that the case was not ripe for judicial review as Congress had not taken any “formal action” disputing the President’s authority to

<sup>105</sup> See Backchannel Message From Secretary of State Vance and the President’s Assistant for National Security Affairs (Brzezinski) to the Ambassador to the Republic of China (Unger), para. 5 (Dec. 15, 1978), in U.S. DEP’T OF STATE OFFICE OF THE HISTORIAN, XIII FOR. RELATIONS OF THE UNITED STATES, 1977-1980, CHINA, <https://history.state.gov/historicaldocuments/frus1977-80v13/d171/>.

<sup>106</sup> In addition, three days of hearings were held in the Senate Foreign Relations Committee on a resolution expressing the sense of the Senate that “approval of the U.S. Senate is required to terminate any mutual defense treaty between the United States and another nation.” S. Res. 15, 96th Cong. (1979); *Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. (1979). The resolution never passed.

<sup>107</sup> *Goldwater v. Carter*, 481 F. Supp. 949, 965 (D.D.C. 1979), *rev’d*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), *vacated and remanded with instructions to dismiss*, *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion).

<sup>108</sup> See 617 F.2d 697, 707–09 (D.C. Cir. 1979) (en banc) (basing its conclusion that the President had unilateral authority to withdraw from the Mutual Defense Treaty on the “material and unique elements” involved, including that the withdrawal was part of the President’s exercise of the power of recognition of the PRC as the government of China and that the treaty had a termination clause “without conditions and without designation as to who shall act to terminate it”). The court further explained that “we have no occasion to decide whether [the existence of a termination clause] would be determinative in a case lacking other factors identified above, e.g., under a notice of withdrawal from the NATO treaty unaccompanied by derecognition of the other signatories.” *Id.* at 708. The court also specified that “[t]he question of whether the Senate may be able to reserve to itself in particular treaties, at the time of their original submission, a specific role in their termination is not presented by the record in this appeal and we decide nothing with respect to it.” *Id.* at 709.

<sup>109</sup> *Goldwater*, 444 U.S. at 996.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1003–05.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1003. According to the plurality, its determination that the case was not one for judicial resolution was reinforced by the fact that it “involves foreign relations” and “as far as we can tell, “is ‘entirely external to the United States.’” *Id.* at 1004–05 (quoting *United States v. Curtiss Wright Export Corp.* 299 U.S. 304, 315 (1936)).

terminate the treaty.<sup>114</sup> According to Justice Powell, if Congress had done so, “it would be the duty of this Court to resolve the issue.”<sup>115</sup>

Since the *Goldwater* decision, Justice Rehnquist’s plurality opinion has proven influential among some lower federal courts, which have cited the decision in dismissing challenges to Presidents’ unilateral withdrawals from treaties on political question grounds.<sup>116</sup> While courts—and perhaps ultimately the Supreme Court—might find the *Goldwater* plurality’s reasoning to be persuasive in a case challenging a President’s unilateral withdrawal from the North Atlantic Treaty in violation of Section 1250A, there is a potentially legally significant distinction between *Goldwater* and a case involving a violation of Section 1250A; namely in *Goldwater*, there was no statute prohibiting the President’s unilateral withdrawal from the U.S.-Taiwan Mutual Defense Treaty. In providing the fifth vote for dismissal, Justice Powell maintained that the case would have been appropriate for judicial resolution had there been such a statute prohibiting unilateral withdrawal.<sup>117</sup>

The Supreme Court’s more recent political question jurisprudence might also influence whether a court addressing a Section 1250A case would reach the same result as the *Goldwater* plurality. In particular, a 2012 decision addressing whether a case involving separation of foreign policy powers presented a political question suggests that a statutory prohibition of the challenged presidential action might make a difference in a reviewing court’s application of the *Baker* factors. That case—*Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*<sup>118</sup>—involved a challenge to the State Department’s refusal to comply with a statute requiring the Department to record in a passport the birthplace of U.S. citizens born in Jerusalem as “Israel” if requested by the citizen or the citizen’s guardian.<sup>119</sup> According to the State Department, its long-standing policy of recording the birthplace as “Jerusalem” on passports reflected the executive branch’s decision to leave the question of the sovereign status of Jerusalem as a matter to be resolved in diplomatic negotiations.<sup>120</sup> The government argued that this policy was based on the President’s exclusive power to recognize foreign states and that the statutory requirement impermissibly infringed on that power.<sup>121</sup>

<sup>114</sup> *Id.* at 1001 (Powell, J., concurring); *see also id.* at 998 (“It cannot be said that either the Senate or the House has rejected the President’s claim. If the Congress chooses not to confront the President, it is not our task to do so.”). Justice Marshall also concurred in the result without a written opinion. *See id.* at 996. In a dissenting opinion, Justice Brennan argued that the political question doctrine did not apply because the question before the Court was “whether a particular branch has been constitutionally designated as the repository of political decisionmaking power,” which “falls within the competence of the courts.” *Id.* at 1007 (Brennan, J., dissenting). He further argued that the President’s unilateral withdrawal should be upheld because it “was a necessary incident to” the President’s exercise of the power of recognition of foreign states, which, Brennan explained, “the Constitution commits to the President alone.” *Id.*

<sup>115</sup> *Id.* at 1002.

<sup>116</sup> *See, e.g.,* Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (dismissing on both political question and standing grounds a challenge brought by thirty-one Members of Congress to President George W. Bush’s termination of the Anti-Ballistic Missile Treaty with Russia); Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986), *aff’d on other grounds*, 814 F.2d 1 (1st Cir. 1987) (dismissing a group of private plaintiffs’ suit seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua based on the political question doctrine).

<sup>117</sup> *See supra* note 114; *see also Goldwater*, 444 U.S. at 996 (Powell, J., concurring) (“[A] dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. . . . [and] the political branches reach[ed] a constitutional impasse.”).

<sup>118</sup> 566 U.S. 189 (2012).

<sup>119</sup> *Id.* at 191–93 (citing the Foreign Relations Authorization Act, Fiscal Year 2003 § 214, 116 Stat. 1350 (2002)).

<sup>120</sup> *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 6–7 [hereinafter *Zivotofsky III*].

<sup>121</sup> *See Zivotofsky I*, 566 U.S. at 198–99. The Supreme Court’s subsequent decision on the merits of the case—*Zivotofsky II*—is discussed *infra* section “*Zivotofsky ex rel. Zivotofsky v. Kerry*.”

The U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) agreed with the executive branch that the case presented a political question requiring dismissal,<sup>122</sup> but the Supreme Court reversed in an eight-Justice majority opinion that focused on the first two *Baker* factors.<sup>123</sup> In concluding that the first factor—a textually demonstrable constitutional commitment of the issue to a coordinate political department—did not apply, the majority reasoned that the case required a determination of whether a statute was constitutional, which “is a decision for the courts.”<sup>124</sup> According to the majority:

[F]ederal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.<sup>125</sup>

The majority also found that the fact the case presented the question of the constitutionality of a statute was relevant in concluding that the second *Baker* factor—a lack of judicially discoverable and manageable standards for resolving the issue presented by the case—did not apply. Specifically, the Court observed that the issue of whether the passport statute impermissibly infringed on the President’s constitutional powers required “careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers,” which “is what courts do.”<sup>126</sup>

*Zivotofsky I* arguably supports a claim that a challenge to any alleged violation of Section 1250A does not present a political question. As to the first factor, an alleged violation of Section 1250A would involve a President’s refusal to comply with a statutory directive, and thus “the only real question for the courts [would be] whether the statute is constitutional”—a question that the *Zivotofsky I* Court emphasized was constitutionally committed to the courts rather than to the political branches.<sup>127</sup> Similarities with *Zivotofsky I* also suggest that the second *Baker* factor may not be implicated in a challenge to a possible Section 1250A violation, as the question of whether the President has exclusive constitutional authority to withdraw from treaties, including the North Atlantic Treaty, would require courts to analyze constitutional text, structure, and history—which the *Zivotofsky I* Court emphasized are quintessential judicial standards.<sup>128</sup>

<sup>122</sup> *Id.* at 193–94.

<sup>123</sup> *See id.* at 195 (stating that the political question doctrine applies “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it’” (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993))).

<sup>124</sup> *Id.* at 196–97; *see also id.* at 196 (“At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’” (quoting 5 U.S. (1 Cranch) 137, 177 (1803))).

<sup>125</sup> *Id.* at 196. This reasoning is arguably supported by the Court’s conclusion that the political question doctrine did not apply in *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986), a case challenging the executive branch’s decision related to a treaty regulating whaling, *see* 478 U.S. at 224–29. According to the Court, that case did not present a political question even though it involved foreign policy because the case “present[ed] a purely legal question of statutory interpretation.” 478 U.S. at 230. In *Zivotofsky I*, Justice Breyer wrote the sole dissent, in which he highlighted the Court’s precedent expressing reluctance to weigh in on matters related to foreign affairs powers on the ground that they were often appropriately addressed by the political branches alone. *See* 478 U.S. at 213–15 (Breyer, J., dissenting).

<sup>126</sup> *Zivotofsky I*, 566 U.S. at 201.

<sup>127</sup> *Id.* at 196.

<sup>128</sup> *See supra* note 126 and accompanying text; *see also* *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing “lack of judicially discoverable and manageable standards for resolving” a question as among the factors relevant to the (continued...))

On the other hand, the executive branch may cite Justice Rehnquist’s plurality opinion in *Goldwater* to argue that a dismissal is appropriate on the ground that such a challenge presents a political question. According to the *Goldwater* plurality opinion, a treaty-withdrawal case “must surely be controlled by political standards” given “the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties.”<sup>129</sup> The *Goldwater* plurality stated that this conclusion is further supported by the fact that the case “involve[d] foreign relations.”<sup>130</sup> Although *Zivotofsky I* arguably rendered this latter point less relevant,<sup>131</sup> the *Goldwater* plurality also emphasized that the type of foreign policy issue at stake in the case was “a treaty commitment to use military force in the defense of a foreign government if attacked”<sup>132</sup>—a consideration that would also be implicated in a case involving presidential withdrawal from the North Atlantic Treaty in contravention of Section 1250A.

Although, as discussed, the majority’s reasoning in *Zivotofsky I* may provide support for the claim that the *political question doctrine* does not bar judicial review of a challenge to Section 1250A, litigants may face hurdles under another justiciability doctrine that the executive branch may invoke in seeking to get a challenge to an alleged violation of Section 1250A dismissed—namely, standing.

## Standing

The next justiciability doctrine that could affect whether a court resolved the merits of a Section 1250A case is standing. Like the political question doctrine, the Supreme Court developed the standing doctrine based on the Court’s interpretation of the limits of the federal judiciary’s authority under Article III of the U.S. Constitution to decide “cases” and “controversies.”<sup>133</sup> While the political question doctrine focuses on whether the *questions* presented by the case are appropriate for judicial resolution, the standing doctrine focuses on whether the *plaintiff* is the right litigant to bring the case.<sup>134</sup>

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determination of whether a case presents a nonjusticiable political question). Although the *Zivotofsky I* majority discussed only the first two factors, it did not state that courts should no longer consider the others. Additionally, Justice Sotomayor wrote a concurring opinion suggesting that the majority should have engaged in a more thorough analysis and discussing the relevance of all six *Baker* factors. See *Zivotofsky I*, 566 U.S. at 203–07 (Sotomayor, J., concurring). She also wrote to emphasize that, while she agreed with the majority’s conclusion that *Zivotofsky*’s case did not present a political question, she did not believe the majority’s opinion should be read as holding that no case involving an issue of a statute’s constitutionality or requiring a court to resort to text, history, and structure for its resolution could present a political question. See *id.* at 208–10.

<sup>129</sup> *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

<sup>130</sup> *Id.*

<sup>131</sup> The Court’s *Zivotofsky I* decision sparked debate among commentators about whether it portended a greater willingness on the part of the Court to decide foreign policy cases. Compare, e.g., Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1925–27 (2015) (arguing that *Zivotofsky I* “is of far-reaching significance” because it “reduced the justiciability barriers to hearing [foreign affairs] cases and in doing so . . . rejected arguments that foreign relations cases need exceptional treatment”), with Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from Exceptionalism*, 128 HARV. L. REV. 294, 301 (2015) (“*Zivotofsky* . . . presented a relatively unusual situation in which the executive branch was asserting authority to disregard a clear statutory provision, something not presented in earlier, “exceptionalist” foreign relations law decisions in which the Court had invoked justiciability limitations, such as *Goldwater v. Carter*.”).

<sup>132</sup> *Goldwater*, 444 U.S. at 1004.

<sup>133</sup> See *supra* notes 93–94 and accompanying text.

<sup>134</sup> See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

To establish standing, the Court has set forth three primary requirements that litigants must meet.<sup>135</sup> These three requirements are designed to ensure that plaintiffs have a “‘personal stake in the outcome’ in order to ‘assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution’” of the case.<sup>136</sup>

### Requirements to Establish Standing

To establish standing, litigants must show

- they have suffered or will imminently suffer a concrete and particularized injury;
- the injury is traceable to the allegedly unlawful actions of the defendant; and
- the injury is redressable by a favorable judicial decision.<sup>137</sup>

Applying the Supreme Court’s standing jurisprudence, litigants challenging an alleged violation of Section 1250A would have to demonstrate that they suffered an injury of the sort required by the Supreme Court’s standing doctrine as a result of a President’s unilateral withdrawal from the North Atlantic Treaty. The Court requires that plaintiffs establish that they suffered or will imminently suffer a “‘particularized’” injury—that is, one that affects [them] in a personal and individual way<sup>138</sup>—rather than a “‘generalized grievance’” common across the public at large.<sup>139</sup> The Court has emphasized that it is not sufficient for plaintiffs to assert “‘only the generalized interest of all citizens in constitutional governance’” or in “‘hav[ing] the Government act in accordance with law.’”<sup>140</sup> Although an injury may sometimes be “‘widely shared,’”<sup>141</sup> to have standing, litigants must allege that they personally suffered or will imminently suffer an injury sufficiently “‘discrete’” and “‘concrete’” to be distinctive to them.<sup>142</sup>

The nature of the standing analysis in a Section 1250A case may, to some extent, depend on whether the plaintiff was a Member of Congress or a private individual.

## Congressional Standing

Although cases involving congressional plaintiffs make up a relatively small portion of the Supreme Court’s standing cases, the Court has developed several principles specific to congressional standing.<sup>143</sup> In the 1997 case *Raines v. Byrd*, the Court clarified that it distinguishes between cases in which individual legislators have suffered an injury unique to them—such as being deprived of salary as a result of being unlawfully prevented from taking their congressional

<sup>135</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>136</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>137</sup> See *Lujan*, 504 U.S. at 560–61.

<sup>138</sup> *Id.* at 560 n.1.

<sup>139</sup> *Id.* at 575.

<sup>140</sup> *Id.* at 575 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)); see also *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997) (“[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”).

<sup>141</sup> See *FEC v. Akins*, 524 U.S. 11, 23 (1998).

<sup>142</sup> *Lujan*, 504 U.S. at 572–73; see also *Akins*, 524 U.S. at 24–25 (holding that, where an injury “is sufficiently concrete and specific . . . the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts”).

<sup>143</sup> See *Raines*, 521 U.S. at 820–29 (discussing the Court’s precedent regarding standing doctrine as it applies to lawsuits brought by Congress); see also Cong. Rsch. Serv., *Federal and State Legislators and Standing*, Constitution Annotated, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-7/ALDE\\_00013009/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-7/ALDE_00013009/) (last visited Feb. 9, 2026).

seats<sup>144</sup>—and cases in which Members of Congress allege an “institutional injury”—that is, an injury to the governance body of which they are a part, such as the voting power of a chamber or of Congress as a whole.<sup>145</sup> As discussed, Members of Congress have brought challenges to Presidents’ unilateral withdrawal from treaties in the past.<sup>146</sup> In those cases in which courts addressed standing, they generally viewed the alleged injury—treaty termination without congressional approval—as an institutional one.<sup>147</sup>

The Supreme Court has indicated that an allegation of an institutional injury may establish standing in fewer circumstances than an allegation of a personal injury by a Member of Congress.<sup>148</sup> Because institutional injuries are typically shared by all members of a legislative body equally, they are often more appropriately remedied through political action rather than adjudication, the Court has reasoned.<sup>149</sup> The Court has stated, however, that where a group of legislators can establish that their votes were effectively “nullified,” they may be able to establish an institutional injury sufficient for purposes of standing.<sup>150</sup> In such circumstances, the Court has explained, the institutional injury is to the legislators’ “plain, direct and adequate interest in maintaining the effectiveness of their votes.”<sup>151</sup>

While the Court has seemingly indicated that the cases in which legislators will be able to establish an institutional injury for purposes of standing by showing “complete[] nullif[ication]” of their votes may be relatively rare,<sup>152</sup> the Court has also suggested that this showing might be made more easily if the congressional plaintiffs are “authorized to represent their respective Houses of Congress”<sup>153</sup> or Congress as a whole.<sup>154</sup> When the body suffering the alleged injury has

<sup>144</sup> See *Raines*, 521 U.S. at 820–21 (“[W]e [have] held that a Member of Congress’ constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy.” (citing *Powell v. McCormack*, 395 U.S. 486, 512–14 (1969))).

<sup>145</sup> See *id.* at 821 (contrasting cases in which congressional plaintiffs had “been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies” and “deprived of something to which they *personally* are entitled—such as their seats after their constituents had elected *them*, with cases in which Members alleged “a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally”).

<sup>146</sup> See *supra* notes 102–108 and accompanying text; *supra* note 116.

<sup>147</sup> See, e.g., *Kucinich v. Bush*, 236 F. Supp. 2d 1, 6 (D.D.C. 2002) (concluding that the Member plaintiffs alleged an institutional injury “to the constitutional role and power of the Legislative Branch—here, in the treaty termination process”); cf. also *Goldwater v. Carter*, 617 F.2d 697, 702–03 (D.C. Cir. 1979) (en banc), *vacated on other grounds and remanded with instructions to dismiss*, *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion) (stating that each of the Senators challenging the President’s unilateral withdrawal from the United States’ Mutual Defense Treaty with Taiwan had asserted an injury to their asserted authority “to be able to block the termination of this treaty by voting, in conjunction with one-third of his colleagues, against it”).

<sup>148</sup> See *Raines*, 521 U.S. at 823–29.

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* at 821–25.

<sup>151</sup> *Id.* at 821–22 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

<sup>152</sup> In the 1997 case *Raines v. Byrd*, the Court stated that the “one case” in which it found vote nullification sufficient to establish standing—which was decided in 1939—“stands (*at most* . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Id.* at 821–24 (citing *Coleman*, 307 U.S. at 438, 431, & 446) (emphasis added). The *Raines* Court further pointed out that it was not required to decide whether its standing analysis in the 1939 case, which addressed nullification of the votes of *state* legislators, would be applicable in a case brought by Members of Congress. See *id.* at 824 n.8.

<sup>153</sup> *Id.* at 829 (“We attach some importance to the fact that [they] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.”).

<sup>154</sup> Cf. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 802–03 (2015) (in holding that the (continued...))

authorized the suit, the Court has reasoned, the institutional plaintiff may be able to establish standing by showing that the challenged action would nullify a vote by the entire legislative body.<sup>155</sup> Accordingly, as Section 1250A prohibits the President from withdrawing from the North Atlantic Treaty without approval by two-thirds of the Senate or an act of Congress, if Congress or one of its chambers authorized suit to be brought on its behalf, a court may conclude that an injury had been alleged sufficient to establish standing because the alleged unlawful action nullified the chamber’s or Congress’s vote on whether the United States should withdraw from the treaty.

An early version of 1250A that passed in the Senate would have created a process to authorize suit to be brought on behalf of the Senate or House of Representatives to enforce the law’s congressional approval requirements,<sup>156</sup> but final Section 1250A language agreed to in conference did not contain this provision.<sup>157</sup> While the Supreme Court has not expressly held that authorization is necessary, the Court’s standing jurisprudence suggests that such authorization increases the likelihood of establishing congressional standing in cases, such as a challenge by a congressional plaintiff to a Section 1250A violation, that courts may view as alleging an institutional injury.

## Standing Under Other NATO-Related Statutes

Outside the context of congressional standing, if a private plaintiff were to challenge unilateral withdrawal from the North Atlantic Treaty, legislation other than Section 1250A might affect a court’s standing analysis. Numerous laws reference or relate to NATO, the North Atlantic Treaty, or subsidiary international agreements concluded under the NATO rubric,<sup>158</sup> and these laws could be relevant to the standing analysis in a private plaintiff’s case.

### NATO-Related Legislation

NATO-related legislation enacted in domestic law includes the following:

- appropriations for U.S. contributions to NATO’s common budget;<sup>159</sup>

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Arizona Legislature had standing to sue, explaining that the body “is an institutional plaintiff asserting an institutional injury, and it commenced the action after authorizing votes in both of its chambers”).

<sup>155</sup> *Id.* at 804 (quoting *Raines*, 521 U.S. at 823–24).

<sup>156</sup> Although the text was later removed, the version of Section 1250A that passed in the Senate contained a section providing the following:

By adoption of a resolution of the Senate or the House of Representatives, respectively, the Senate Legal Counsel or the General Counsel to the House of Representatives may be authorized to initiate, or intervene in, in the name of the Senate or the House of Representatives, as the case may be, independently, or jointly, any judicial proceedings in any Federal court of competent jurisdiction in order to oppose any action to suspend, terminate, denounce, or withdraw the United States from the North Atlantic Treaty in a manner inconsistent with this subtitle.

S. 2226, 118th Cong. § 1399DD(a) (2023).

<sup>157</sup> The House bill did not contain a parallel provision regarding withdrawal from the North Atlantic Treaty, and according to the Conference Report, the House “recede[d] with an amendment to remove the authorization of legal counsel to represent Congress.” H.R. REP. NO. 118-301, at 1227 (2023) (Conf. Rep.).

<sup>158</sup> *See, e.g.*, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67; Colonel Brian H. Brady, *The North Atlantic Treaty Organization Legal Advisor: A Primer*, ARMY LAW., Oct. 2013, at 7-11 (examining international agreements concluded under the North Atlantic Treaty).

<sup>159</sup> 22 U.S.C. § 1928(a).

- requirement to appoint a U.S. permanent representative to NATO;<sup>160</sup>
- policy statements, congressional findings, and “sense of” provisions expressing Congress’s support for NATO;<sup>161</sup>
- modified export control requirements for NATO member nations;<sup>162</sup>
- simplified federal acquisition authorities concerning NATO member nations and NATO subsidiary organizations;<sup>163</sup>
- provisions to facilitate and support enlargement of NATO membership;<sup>164</sup>
- congressional reporting requirements related to NATO activities;<sup>165</sup> and
- immigration authorities providing for several categories of NATO visas.<sup>166</sup>

Unilateral presidential withdrawal from NATO would not automatically repeal NATO-related legislation because the Supreme Court has recognized that the repealing of statutes generally must conform to the same bicameral process used to enact new legislation.<sup>167</sup> At the same time, private individuals or entities might argue that U.S. withdrawal interfered with NATO-related rights and opportunities reflected in statute.<sup>168</sup> For example, withdrawal from NATO could leave

<sup>160</sup> *Id.* § 1928(b).

<sup>161</sup> *See, e.g.*, 22 U.S.C. § 8902(14); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1233(a)(5), 131 Stat. 886 (2017); Countering America’s Adversaries through Sanctions Act, Pub. L. No. 115-44, § 292(b)(3), 131 Stat. 886 (2017). There are also several single-chamber resolutions containing similar provisions. *See, e.g.*, H.R. Res. 256, 115th Cong. (2018) (enacted) (“[T]he House of Representatives . . . affirms the United States enduring commitment to and friendship with its NATO allies[.]”); H.R. Res. 397, 115th Cong. (2017) (enacted) (“[T]he House of Representatives . . . solemnly reaffirms the commitment of the United States to the North Atlantic Treaty Organization’s principle of collective defense as enumerated in Article 5 of the North Atlantic Treaty[.]”).

<sup>162</sup> 22 U.S.C. §§ 2796–2796d (permitting the Secretary of Defense to loan or lease defense-related equipment to NATO member nations for cooperative research and development purposes, subject to certain conditions and approvals); 22 U.S.C. § 2753(d)(2)(B) (providing a shortened, 15-day congressional notification period for certain arms sales to NATO or NATO member countries); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 1000(a)(7), 113 Stat. 1501 (1999) (enacting into law a resolution stating that the Secretary of State “shall establish a regulatory regime for the licensing for export of commercial satellites, satellite technologies, their components, and systems which shall include expedited approval, as appropriate, of the licensing for export by United States companies . . . to NATO allies).

<sup>163</sup> *See* North Atlantic Treaty Organization Mutual Support Act of 1979, Pub. L. No. 96-323, 94 Stat. 1016 (1980) (codified as amended at 10 U.S.C. §§ 2341-2350).

<sup>164</sup> *See, e.g.*, NATO Participation Act of 1994, Pub. L. No. 103-447, 108 Stat. 4691, tit. II; NATO Enlargement Facilitation Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009 (1996); European Security Act of 1998, Pub. L. No. 105-277, §§ 2701-2705, 112 Stat. 2681; Gerald B. Soloman Freedom Consolidation Act of 2002, Pub. L. No. 107-187, § 4, 116 Stat. 590; NATO Freedom Consolidation Act of 2007, Pub. L. No. 110-17, § 4, 121 Stat. 73.

<sup>165</sup> *See, e.g.*, Fiscal Year 2001 National Defense Authorization Act, Pub. L. No. 106-398, § 1221, 114 Stat. 1654 (2000) (requiring reporting when NATO undertakes a military operation); National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 230, 125 Stat. 1632 (requiring a report on contributions of NATO member nations to missile defense in Europe); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1231, 117 Stat. 1392 (2003) (requiring an annual report on the NATO member nations’ commitment to improving capabilities in specific areas).

<sup>166</sup> Immigration regulations allow for several types of “NATO visas” available to NATO representatives and their international staff and families. *See* 22 C.F.R. § 41.25 (2024). The seven categories of NATO visas are set forth in 22 C.F.R. § 41.12 (2024).

<sup>167</sup> *See* *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *INS v. Chadha*, 462 U.S. 919, 954 (1983).

<sup>168</sup> *Cf., e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (“The existence of a statutory right . . . is certainly relevant to the Judiciary’s power to decide [a plaintiff’s] claim.”); *FEC v. Akins*, 524 U.S. 11, 21 (1988) (concluding that plaintiffs suffered an injury in fact by being denied the ability to access information that a statute required to be made public); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“The actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . . .’”) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). For more expansive discussion of the relationship between statutory (continued...)

uncertain the status of federal acquisition and export control authorities that simplify certain commercial transactions involving NATO countries.<sup>169</sup> NATO withdrawal might also call into question the status and future availability of NATO visas for NATO officials, staff, and immediate family members.<sup>170</sup> In seeking to establish standing, litigants might contend that withdrawal from the North Atlantic Treaty undermined their statutory rights or expectations of rights under a particular NATO-related statute, which led to a concrete and particularized injury.<sup>171</sup> The Supreme Court has recognized that “[t]he actual or threatened injury required [to establish standing] may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”<sup>172</sup>

## Constitutional Analysis of Section 1250A

As discussed, the Supreme Court has never heard a treaty withdrawal case on its merits, and no court has addressed the constitutionality of a statute restricting the President’s ability to withdraw from a treaty. The analytical approaches that the Court has taken in separation of powers cases involving other issues may inform any case involving a statute that the executive branch claims impermissibly infringes on the President’s constitutional authority.

### The Supreme Court’s *Youngstown* Framework for Separation of Powers Cases

The Supreme Court has developed approaches to decide separation of powers issues in other cases that courts might draw upon in assessing any potential challenges to a President’s withdrawal from a treaty in alleged violation of a statutory prohibition such as that in Section 1250A. A court’s evaluation of such a challenge would likely begin with the framework that the Supreme Court has recognized as appropriate for determining the scope of presidential powers relative to those of Congress, including in cases involving foreign policy issues: Justice Robert Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>173</sup> Under the *Youngstown* framework, courts assess presidential claims of authority based on what Congress has—or has not—said about the matter. As Justice Jackson observed: “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>174</sup> Justice Jackson accordingly formulated a tripartite framework for analyzing the scope of presidential power.

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violations and standing, see Cong. Rsch. Serv., *Particularized Injury*, Constitution Annotated, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-3/ALDE\\_00012998/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-3/ALDE_00012998/) (last visited Feb. 9, 2026).

<sup>169</sup> See *supra* notes 162–163 and accompanying text.

<sup>170</sup> See *supra* note 166.

<sup>171</sup> *Cf.*, e.g., *Clinton v. City of New York*, 524 U.S. 417, 429–33 (1998) (holding that plaintiffs with an economic interest in the continued application of federal statutes had standing to challenge the constitutionality of process for nullifying those statutes); *Northeast Florida Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 668 (1993) (unconstitutional denial of ability to bid on government contract held to create standing).

<sup>172</sup> *Warth*, 422 U.S. at 500; see also *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) (reasoning that “a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute,” and holding that Zivotofsky had alleged an injury sufficient for standing purposes because “his allegation that Congress conferred on him an individual right to have ‘Israel’ listed as his place of birth on his passport and on his Consular Birth Report is at the least a colorable reading of the statute”).

<sup>173</sup> 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>174</sup> *Id.* at 635.

### The Tripartite Framework in Justice Jackson’s *Youngstown* Concurrence

**Presidential Maximum.** Where Congress has expressly or implicitly authorized the President’s action, presidential power is at its “maximum” and “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>175</sup>

**Zone of Twilight.** Cases in which Congress has neither authorized nor prohibited executive branch action lie in an inscrutable “zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain,” and “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>176</sup>

**Lowest Ebb.** Where Congress has expressly or impliedly prohibited executive action, presidential power “is at its lowest ebb,” as it is an assertion of executive authority “at once so conclusive and preclusive [that it] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”<sup>177</sup>

In the 1981 case *Dames & Moore v. Regan*,<sup>178</sup> the Supreme Court elaborated on the *Youngstown* framework by observing that “it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”<sup>179</sup> Additionally, in analyzing where the constitutional lines between the legislative and executive branches lie, the Court often “put[s] significant weight upon historical practice,”<sup>180</sup> which the Court has stated may “be treated as a gloss” on the Constitution’s provisions.<sup>181</sup> The *Youngstown* framework’s focus on congressional actions coupled with the constitutional significance that the Court often accords to historical practice of the political branches means that the Court’s analysis of the distribution of powers to a considerable extent depends on the ways in which it interprets any relevant statutes and the interactions of Congress and the President over time.<sup>182</sup>

The Supreme Court has applied the *Youngstown* framework in other opinions that a court might find relevant in evaluating a presidential claim of power to withdraw from the North Atlantic Treaty in violation of Section 1250A, including the two discussed in the following sections.

### *Zivotofsky ex rel. Zivotofsky v. Kerry*

In a significant 2015 foreign policy case—*Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*)<sup>183</sup>—a majority of the Supreme Court applied the *Youngstown* framework to uphold, for what appears to be the first time, a presidential action that the Court determined fell into category

<sup>175</sup> *Id.* at 637.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 637–38.

<sup>178</sup> 453 U.S. 654.

<sup>179</sup> *Id.* at 669. The Court further observed that “Justice Jackson himself recognized that his three categories represented ‘a somewhat over-simplified grouping.’” *Id.* (quoting *Youngstown*, 343 U.S. at 635).

<sup>180</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry* 576 U.S. 1, 23 (2015) (quoting *NLRB v. Noel Canning* 573 U.S. 513, 524 (2014)).

<sup>181</sup> *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)); see also *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”).

<sup>182</sup> For further discussion of how congressional actions and inactions factor into the Supreme Court’s analytical approaches to questions regarding the scope of the President’s foreign policy authority under Article II of the Constitution, see CRS Report R48524, *Congress and the Scope of the President’s Article II Foreign Policy Authorities*, by Karen Sokol (2025).

<sup>183</sup> 576 U.S. 1 (2015).

three.<sup>184</sup> In this case, the Court held that the President has an “exclusive” and “conclusive” power<sup>185</sup> that “disabl[es] the Congress from acting upon the subject”—specifically, the recognition of foreign states.<sup>186</sup> As the Court explained, “[r]ecognition is a ‘formal acknowledgement’ that a particular ‘entity possesses the qualifications for statehood’ or ‘that a particular regime is the effective government of a state.’”<sup>187</sup>

As discussed, the Court earlier held in *Zivotofsky I* that the case was justiciable because no political question was presented by the plaintiff’s challenge to the State Department’s refusal to comply with the statute requiring the State Department to record in a passport or a consular report of birth abroad the birthplace of U.S. citizens born in Jerusalem as “Israel.”<sup>188</sup> On remand, the D.C. Circuit held that the statute was unconstitutional.<sup>189</sup> After holding that the President had exclusive power to recognize foreign states,<sup>190</sup> the court determined that the statutory requirement impermissibly infringed on that power because it “force[d] the State Department to deviate from its decades-long position of neutrality on what nation or government, if any, is sovereign over Jerusalem.”<sup>191</sup>

The Supreme Court granted review for a second time in the litigation<sup>192</sup> and upheld the D.C. Circuit’s decision.<sup>193</sup> The Court began its analysis by observing that “[i]n considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from *Youngstown*.”<sup>194</sup> Because the President’s action at issue—“refusal to implement” the passport statute—“falls into Justice Jackson’s third category,” the Court stated, the President’s claim of authority “must be ‘scrutinized with caution,’ and he may rely solely on powers the Constitution grants to him alone.”<sup>195</sup> Acknowledging that the text of the Constitution does not expressly reference the recognition power,<sup>196</sup> the Court nevertheless concluded that the Constitution implicitly grants the President such power based on the President’s other express Article II powers and the Constitution’s structure.<sup>197</sup>

<sup>184</sup> *See id.* at 31–32; *cf. id.* at 61 (Roberts, C.J., dissenting) (“Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”). In *Youngstown*, the Supreme Court struck down President Truman’s order seizing many of the nation’s steel mills—which he justified based on the need to ensure the availability of sufficient materiel for fighting the Korean War—on the ground that the President did not have either congressional or constitutional authority to take such action. *See Youngstown*, 343 U.S. at 585–89; *see also id.* at 640 (Jackson, J., concurring) (“[T]he current seizure [can] be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject.”).

<sup>185</sup> *Zivotofsky II*, 576 U.S. at 10.

<sup>186</sup> *Id.* at 29–30 (alteration in original) (quoting *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)).

<sup>187</sup> *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (AM. L. INST. 1987)).

<sup>188</sup> *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201–02 (2012); *see also supra* notes 118–126 and accompanying text.

<sup>189</sup> *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 214 (D.C. Cir. 2014).

<sup>190</sup> *Id.* at 220.

<sup>191</sup> *Id.*

<sup>192</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 572 U.S. 1059 (2014).

<sup>193</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 32 (2015).

<sup>194</sup> *Id.* at 10.

<sup>195</sup> *Id.* (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)).

<sup>196</sup> *See id.* at 11 (“Despite the importance of the recognition power in foreign relations, the Constitution does not use the term “recognition,” either in Article II or elsewhere.”).

<sup>197</sup> *See id.* at 11–14.

According to the Court, the inference of a presidential power of recognition is supported by the President's Article II powers to "receive Ambassadors and other public Ministers,"<sup>198</sup> to "make Treaties, provided two thirds of the Senators present concur,"<sup>199</sup> and to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors" and "other public Ministers and Consuls."<sup>200</sup> As a matter of constitutional structure, the Court reasoned, the President has the sole power to receive ambassadors and other public ministers and to "negotiate treaties," while "Congress . . . has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation."<sup>201</sup> The Court thus concluded that the Constitution's "text and structure grant the President the power to recognize foreign nations and governments"; however, the Court also observed these textual and structural factors did not alone answer the question of "whether that power is exclusive."<sup>202</sup>

In addressing exclusivity, the Court looked to functional considerations (e.g., the necessity that the United States "speak with one voice"),<sup>203</sup> judicial precedent,<sup>204</sup> and the historical practice of the political branches.<sup>205</sup> These methods of constitutional interpretation led the Court to hold that the President not only has the power of recognition, but that that power resides *solely* in the presidency.<sup>206</sup> Further, because the Court determined that the passport statute required the Secretary of State to "directly contradict[]" the President's recognition decision,<sup>207</sup> the Court held

<sup>198</sup> U.S. CONST. art. II, § 3.

<sup>199</sup> *Id.* art. II, § 2, cl. 2.

<sup>200</sup> *Id.*

<sup>201</sup> *Zivotofsky II*, 576 U.S. at 13–14.

<sup>202</sup> *Id.* at 14.

<sup>203</sup> *See id.* at 14–15 ("Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.").

<sup>204</sup> *See id.* at 14–15. The Court explained that "[n]o single precedent resolves the question whether the President has exclusive recognition authority":

In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States—not between the President and Congress.

*Id.* at 17. Although no case had directly addressed whether the recognition power was exclusive to the Presidency, the Court concluded that several cases in which the Court discussed the recognition power "illustrate [that] the Court has long considered recognition to be the exclusive prerogative of the Executive."

*Id.* at 19.

<sup>205</sup> *See id.* at 23–28 ("The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.").

<sup>206</sup> *See id.* at 28. Justice Scalia, joined by Chief Justice Roberts and Justice Alito, questioned this holding, arguing that, while "I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive." *Id.* at 70 (Scalia, J., dissenting).

<sup>207</sup> The Court determined without much elaboration that the decision not to recognize any state's sovereignty over Jerusalem is part of the President's exclusive recognition power and that the State Department's recording of a U.S. citizen born in Jerusalem as "Israel" would contradict that decision. *See id.* at 5 (stating that the Court had two questions before it: "whether the President has the exclusive power to grant formal recognition to a foreign sovereign," and, "if he has that power, . . . whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition"). Chief Justice Roberts and Justices Alito and Scalia disagreed with those conclusions. *See id.* at 64, 66 (Roberts, C.J., dissenting) ("[T]he statute at issue *does not implicate recognition* . . . . Whatever recognition power the President may have, exclusive or otherwise, is not implicated by [the passport statute.]"); *id.* at 76–77 (Scalia, J., dissenting) (criticizing the majority for "conclud[ing] that, in addition to the (continued...)

that the statute must be struck down because Congress had thereby “improper[ly]” “aggrandiz[ed] its power at the expense of another branch.”<sup>208</sup>

Emphasizing that its decision did “not question the substantial powers of Congress over foreign affairs in general or passports in particular,”<sup>209</sup> the Court suggested that its holding was a narrow one that left ample room for Congress to “express its disagreement with the President[’s] recognition decision in myriad ways,” such as by “enact[ing] an embargo, declin[ing] to confirm an ambassador, or even declar[ing] war.”<sup>210</sup> The Court further emphasized that its exclusivity analysis was confined to the President’s recognition power and did not subsume the executive branch’s broader claim that that power derives from the President’s “exclusive authority to conduct diplomatic relations” and possession of the “bulk of foreign-affairs powers.”<sup>211</sup>

### *Trump v. United States*

The Supreme Court’s decision concerning presidential immunity from criminal prosecution in *Trump v. United States* might also be relevant in a separation of powers case concerning Section 1250A. The Supreme Court in *Trump* relied on *Youngstown* to provide an extensive discussion of exclusive and preclusive presidential powers.<sup>212</sup> The Court explained that separation of powers principles prohibit legislation—criminal or otherwise—that restricts Presidents’ exercise of their “conclusive and exclusive powers”<sup>213</sup> (which the Court also referred to as the President’s “core constitutional powers”<sup>214</sup>). These conclusive and exclusive powers, the *Trump* Court held, include some actions not specifically mentioned in the Constitution’s text, such as removing executive officers whom the same President appointed, recognizing foreign states,<sup>215</sup> and discussing potential investigations and prosecutions with the Department of Justice.<sup>216</sup>

The following section analyzes how a court might apply the foregoing Supreme Court precedent to a presidential claim of exclusive power to withdraw from the North Atlantic Treaty in contravention of Section 1250A.

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exclusive power to make the ‘formal recognition determination,’ the President holds an ancillary exclusive power ‘to control . . . formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds’” (quoting *id.* at 31)).

<sup>208</sup> *Id.* at 30–32 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

<sup>209</sup> *Id.* at 32.

<sup>210</sup> *Id.* at 30.

<sup>211</sup> *Id.* at 20 (quoting Brief for the Respondent at 16–18, *Zivotofsky II*, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 4726506, at \*16–18).

<sup>212</sup> *Trump v. United States*, 603 U.S. 593, 606–10 (2024). For additional background on the decision, see CRS Legal Sidebar LSB11194, *Presidential Immunity from Criminal Prosecution in Trump v. United States*, by Todd Garvey (2024).

<sup>213</sup> *Trump*, 603 U.S. at 608–10. The Court largely derived its holding that Presidents are “absolutely immune from criminal prosecution for conduct within [their] exclusive sphere of constitutional authority,” *id.* at 609, from *Youngstown*’s category-three principle that “Congress cannot act on, and courts cannot examine, the President’s actions on subjects within his ‘conclusive and preclusive’ constitutional authority.” *Id.*

<sup>214</sup> *Id.* at 606.

<sup>215</sup> *See id.* at 607, 609 (citing *Zivotofsky II*, 576 U.S. at 32).

<sup>216</sup> *See id.* at 703–06.

## Possible Application of Supreme Court Jurisprudence to Section 1250A

A court might frame its analysis in a case challenging a President’s violation of Section 1250A using the *Youngstown* framework, as the Supreme Court framed its analysis of the separation of powers issue in *Zivotofsky II*. Under that framework, if a court determines that the presidential action contravenes an express congressional prohibition and falls into category three, the action may be upheld only if the court determines that the Constitution grants the President exclusive power such that Congress is prohibited “from taking action upon the subject.”<sup>217</sup> The Supreme Court has emphasized that presidential action contrary to the expressed will of Congress must be “scrutinized with caution,” as it is in such situations that the President’s power is at its “lowest ebb.”<sup>218</sup> In assessing a President’s claim of exclusive authority to withdraw from treaties under that seemingly heightened level of scrutiny, a court would likely consider constitutional text and structure, relevant judicial precedent, and the historical practice of the political branches.

### Constitutional Text and Structure

As the Constitution is silent with respect to the treaty withdrawal power, both parties to a case challenging a Section 1250A violation would likely cite other constitutional provisions as well as constitutional structure in support of their positions on treaty withdrawal authority. Those challenging a violation might emphasize that, although the Constitution does not explicitly reference treaty withdrawal, it does specify a process for the branches to exercise shared powers to enter into treaties: The President “make[s]” treaties, but the United States may become a party to a treaty<sup>219</sup> only if the Senate provides its advice and consent and two-thirds of the Senators concur.<sup>220</sup> Given that treaty entry and withdrawal both affect the content of U.S. international legal obligations as well as of federal law that may trump U.S. state laws under the Supremacy Clause,<sup>221</sup> one might reason that the distribution of entry and withdrawal powers should be symmetrical and subject to the same checks and balances.

Challengers might further contrast treaty withdrawal with the recognition power, which appears to be the only foreign policy authority to date that the Supreme Court has found to be exclusive and beyond congressional regulation.<sup>222</sup> In contrast to U.S. participation in treaties, the

<sup>217</sup> 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

<sup>218</sup> *Zivotofsky II*, 576 U.S. at 10 (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)). In contrast, a presidential action taken pursuant to congressional authorization is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>219</sup> In this context, “treaty” means a treaty as defined in the U.S. legal system—that is, an “Article II” treaty—and not as defined in the international legal system. See *supra* “Background and Legal Framework.”

<sup>220</sup> See U.S. CONST. art. II, § 2, cl. 2 (granting the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

<sup>221</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 (2003) (“Generally . . . valid executive agreements are fit to preempt state law, just as treaties are.”); Cong. Rsch. Serv., *Overview of Supremacy Clause*, Constitution Annotated, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE\\_00001283/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-9-1/ALDE_00001283/) (last visited Feb. 15, 2026).

<sup>222</sup> Cf. *Trump v. United States*, 603 U.S. 593, 608–09 (2024) (explaining that the President’s powers the Court has found to be exclusive include the powers to pardon for federal offenses, to remove “executive officers of the United States whom he has appointed,” and “to control recognition determinations’ of foreign countries” (quoting *Myers v. United States*, 272 U.S. 52, 106 (1926) and *Zivotofsky II*, 576 U.S. at 32)).

Constitution does not speak directly to U.S. recognition of foreign states. Some could argue that this difference suggests that the Supreme Court’s reasoning in *Zivotofsky II* for acknowledging the President’s exclusive recognition power does not apply to the treaty withdrawal context. Given that claims of exclusive presidential authority must be “scrutinized with caution,”<sup>223</sup> it might be contended that the existence of a congressional role in treaty entry weighs against an interpretation of the Constitution that excludes Congress from participation in treaty withdrawal.

The executive branch, for its part, might contend that the Constitution’s silence on treaty withdrawal is not determinative because the Supreme Court has been willing to recognize other exclusive presidential powers that are not expressly granted in the Constitution.<sup>224</sup> These exclusive presidential powers include not only the recognition power, but also the power to remove executive officers whose appointment, like treaty entry, requires Senate approval.<sup>225</sup> The executive branch might further argue, as it has in the past in support of the President’s unilateral authority in foreign affairs, that the President has inherent Article II power based on the “combined force” of several Article II provisions,<sup>226</sup> including the vesting of “[t]he executive power” in the President,<sup>227</sup> the Take Care Clause,<sup>228</sup> the Commander in Chief Clause,<sup>229</sup> the Reception Clause,<sup>230</sup> and the Treaty Clause.<sup>231</sup> The OLC invoked that line of reasoning in its 2020 opinion in support of its argument that the President has exclusive authority to withdraw from treaties: “Taken together, these provisions [of Article II] grant the President the authority and discretion to implement a treaty by notifying foreign powers of the United States’ exercise of its right to withdraw from the treaty.”<sup>232</sup>

## Judicial Precedent

As discussed, there is no directly controlling precedent regarding the distribution of treaty-withdrawal authority.<sup>233</sup> Both sides to a case regarding a Section 1250A violation may emphasize aspects of potentially relevant cases that could support their respective position and distinguish those aspects that might be understood as unfavorable to them.

<sup>223</sup> See *supra* note 218 and accompanying text.

<sup>224</sup> See *supra* notes 55–56 and accompanying text.

<sup>225</sup> See *supra* notes 55–56 and accompanying text.

<sup>226</sup> Brief for Petitioner at 6–15, 92, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 745) (arguing that “Presidential power to act on a particular occasion may derive from . . . the combined force of . . . several provisions of Article II”); see also *Youngstown*, 343 U.S. at 587 (“[The government does] not claim[] that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that ‘the executive Power shall be vested in a President . . .’; that ‘he shall take Care that the Laws be faithfully executed’; and that he ‘shall be Commander in Chief of the Army and Navy of the United States.’”).

<sup>227</sup> U.S. CONST. art. II, § 1 (“the executive power shall be vested in a President of the United States of America.”).

<sup>228</sup> U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed.”).

<sup>229</sup> *Id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”).

<sup>230</sup> *Id.* art. II, § 3 (“[The President] shall receive Ambassadors and other public Ministers.”).

<sup>231</sup> *Id.* 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.”).

<sup>232</sup> Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. 184, 193–95 (2020).

<sup>233</sup> See *supra* “Political Question Doctrine”; “The Supreme Court’s *Youngstown* Framework for Separation of Powers Cases.”

Those challenging a Section 1250A violation might highlight the Supreme Court’s broad statements about foreign affairs authorities, which arguably support the idea that most foreign powers are shared because the Constitution assigns those authorities to the national government as a whole.<sup>234</sup> Challengers also might emphasize that many Supreme Court precedents that could be understood as characterizing presidential foreign affairs powers as broad did not involve questions of exclusive authority, but rather questions of whether the President could act in the absence of express congressional authorization.<sup>235</sup> Additionally, challengers might maintain that if, as the executive branch maintains, treaty withdrawal is an instance of executing treaties as the “law of the land,”<sup>236</sup> Section 1250A must also be understood as the law of the land pursuant to Congress’s treaty-implementing power, which has long been recognized by the Supreme Court.<sup>237</sup>

Challengers may also point out that, even when the Supreme Court determined that the President has exclusive authority to recognize foreign states in *Zivotofsky II*, the Court emphasized the narrowness of this power<sup>238</sup> and cautioned that “it is essential the congressional role in foreign affairs be understood and respected.”<sup>239</sup> In addition, challengers might emphasize that the

<sup>234</sup> See, e.g., *Crosby v. Nat’l For. Trade Council*, 530 U.S. 363, 381 (2000) (“Congress’s express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government, in harmony with the President’s own constitutional powers.” (internal citations omitted)); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.”); cf. also *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 19 (2025) (“[W]hen the Executive and Congress have spoken with one voice in th[e foreign affairs] sphere, their coordinate action is ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952))).

<sup>235</sup> Compare, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“Although the source of the President’s power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations’” (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J. concurring))), *with id.* at 427 (“There is . . . no need to consider the possible significance . . . of tension between an Act of Congress and Presidential foreign policy.”); cf. also, e.g., *The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 668 (1862) (5–4 decision) (in upholding President Lincoln’s blockade of southern ports without specific congressional authorization, relying on the President’s Article II duty “to take care that the laws be faithfully executed” and power as “Commander in Chief” as well as on various statutes authorizing the President “to called [sic] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States”).

Additionally, in holding that the President has independent authority inherent in Article II to settle foreign claims in the absence of explicit congressional authorization, the Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), emphasized “the narrowness” of [its] decision,” highlighting that it had determined that historical practice indicated that Congress had “acquiesced” in such authority. *Id.* at 688; see also *Learning Resources, Inc. v. Trump*, No. 24–1287, slip op. at 20, 607 U.S. \_\_\_, 2026 WL 477534, \*13 (2026), [https://www.supremecourt.gov/opinions/25pdf/24-1287\\_4gcj.pdf](https://www.supremecourt.gov/opinions/25pdf/24-1287_4gcj.pdf) (characterizing *Dames & Moore* as “exceedingly narrow”).

<sup>236</sup> See *Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty*, 44 Op. O.L.C. at 191, 196, 200 (stating that “[a]s the Chief Executive, the President bears the constitutional responsibility to execute the law and treaties of the United States,” and reasoning that treaty withdrawal pursuant to a treaty’s terms is an instance of treaty execution pursuant to this authority); see also *supra* note 232 and accompanying text.

<sup>237</sup> See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that “if the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government”); *Neely v. Henkel*, 108 U.S. 109, 121 (1901) (recognizing the Congress’s “power to enact legislation as is appropriate to give efficacy” to U.S. treaty obligations).

<sup>238</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 30 (2015) (“Here, the subject [of the President’s exclusive authority] is quite narrow: The Executive’s exclusive power extends no further than his formal recognition determination.”); see also *id.* at 28 (in examining historical practice of the branches, stating that, “in the narrow context of recognition,” Congress “on balance has acknowledged the importance of speaking ‘with one voice’” (quoting *Crosby*, 530 U.S. at 381)).

<sup>239</sup> *Id.* at 20–21.

*Zivotofsky II* Court dismissed as dicta earlier, expansive language about presidential foreign policy power in *United States v. Curtiss-Wright Export Corp.*,<sup>240</sup> a New Deal-era case that the executive branch relied on in support of broad claims of exclusive authority “to conduct diplomatic relations” and “the bulk of foreign affairs powers.”<sup>241</sup> “[D]eclin[ing] to acknowledge this unbounded power,” the Court explained that “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”<sup>242</sup>

The executive branch might respond by contending that the functional considerations recognized by the Supreme Court—such as the institutional capacity of the President to speak with “one voice” on behalf of the nation in international affairs<sup>243</sup>—have particular salience in the context of treaty withdrawal. In its 2020 opinion claiming that the President has exclusive treaty-withdrawal authority, the OLC cited the Court’s reasoning in *Zivotofsky II* based on such functional considerations in arguing that the case “reinforces the [OLC’s] conclusion that the President’s authority to exercise the United States’ right to withdraw from a treaty is exclusive.”<sup>244</sup> According to the OLC, “[n]o less than the power to recognize foreign sovereigns, the decision to withdraw from a treaty ‘is a topic on which the Nation must speak with one voice.’”<sup>245</sup>

The executive branch might also argue that Congress’s authority to implement treaties does not include restricting the President’s authority to withdraw from them. In its 2020 opinion, the OLC argued that the statutory notification and waiting period restrictions on the President’s withdrawal from the Open Skies Treaty are “not an exercise of Congress’s authority to adopt laws to implement treaties as part of our domestic law.”<sup>246</sup> According to the OLC, “[t]he power of Congress to implement a treaty does not itself imply a power to direct the President to engage in diplomacy or control the manner by which the President executes the rights of the United States under treaties.”<sup>247</sup>

Given the arguably inconclusive nature of constitutional text, structure, and jurisprudence regarding treaty-withdrawal authority—and particularly whether any of that authority is exclusive—courts might look to historical practice for “gloss” on constitutional meaning as they have done in other separation of powers cases.<sup>248</sup> The parties accordingly would likely also advance arguments based on historical practice in support of their positions.

<sup>240</sup> See *id.* at 20–21 (“Th[e] description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination.” (citing *United States v. Curtiss Wright Export Corp.* 299 U.S. 304 (1936))).

<sup>241</sup> See *id.* at 19–21 (“In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States v. Curtiss-Wright Export Corp.*, which described the President as ‘the sole organ of the federal government in the field of international relations.’” (quoting *Curtiss Wright*, 299 U.S. at 320)). The Court explained: “This description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination.” *Id.* at 21.

<sup>242</sup> *Id.* at 21.

<sup>243</sup> *Zivotofsky II*, 576 U.S. at 14, 28, 29; *Crosby*, 530 U.S. at 382; cf. also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (explaining that the President has “unique responsibility” for “foreign and military affairs”).

<sup>244</sup> Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C. 184, 197 (2020).

<sup>245</sup> *Id.* at 198 (quoting *Zivotofsky II*, 576 U.S. at 14).

<sup>246</sup> *Id.* at 198–99.

<sup>247</sup> *Id.* at 199.

<sup>248</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)); see also *NLRB v. Noel Canning* 573 U.S. 513, 524 (2014) (“We [have] confirmed that ‘[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.” (quoting (continued...)))

## Historical Practice

Those challenging a Section 1250A violation might maintain that the pre-20th century practice of regular congressional involvement in treaty withdrawal discussed above<sup>249</sup> demonstrates that the President and Congress adopted the constitutional interpretation that treaty withdrawal is, like treaty entry, a shared power. In light of that past practice, they might further argue that the more recent trend of unilateral presidential withdrawal at most demonstrates that Congress may at times have accepted the President has *independent* authority—that is, in the absence of congressional restriction—to withdraw from treaties, but not an acceptance that the power is *exclusive*.<sup>250</sup> After all, challengers might point out, it does not appear that the executive branch took the position that the treaty-withdrawal power was exclusive to the President until 2020, and Congress responded with the enactment of Section 1250A soon after the executive branch announced that view.

Additionally, challengers might argue that the relevant historical practice extends to other types of congressional actions affecting U.S. participation in treaties, such as treaty-implementing legislation and notification and reporting requirements.<sup>251</sup> Looking to a broader set of practices, one might argue that statutes such as the law requiring that the President provide Congress with a notice period before withdrawing from the Open Skies Treaty<sup>252</sup> evince a congressional understanding that treaty-withdrawal authority is shared. Other potentially relevant examples include statutory restrictions on the President’s ability to unilaterally modify treaties<sup>253</sup> or to alter U.S. international legal obligations unless through a Senate-approved treaty.<sup>254</sup>

The executive branch, by contrast, might maintain that *Zivotofsky II* calls for a more focused set of historical examples, and that the relevant practice is limited to assertions of authority that relate to treaty withdrawal directly. The executive branch might argue that the Supreme Court’s approach in *Zivotofsky II* to interpreting past practice sets a high bar for Congress to evince an understanding that a given power is not exclusive to the presidency. Although the Court cited historical instances in which the President consulted with Congress about recognition decisions and Congress enacted appropriations and other legislation related to those decisions, the

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The Pocket Veto Case, 279 U.S. 655, 689 (1929)); *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”); *supra* “The Supreme Court’s *Youngstown* Framework for Separation of Powers Cases.”

<sup>249</sup> See *supra* “Historical Practice.”

<sup>250</sup> For further discussion of the distinction between the President’s exclusive and independent authorities under Article II of the Constitution, see CRS Report R48524, *Congress and the Scope of the President’s Article II Foreign Policy Authorities*, by Karen Sokol (2025).

<sup>251</sup> For background on congressional implementation statutes and notification and reporting requirements, see CRS Legal Sidebar LSB11049, *International Agreements (Part II): Examining Tools for Congressional Influence Over International Instruments*, by Steve P. Mulligan.

<sup>252</sup> See *supra* note 73 and accompanying text.

<sup>253</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1035(3), 130 Stat. 2000, 2391 (2016) (prohibiting the use of funds “to implement a material modification to the Treaty Between the United States of America and Cuba signed at Washington, D.C. on May 29, 1934 that constructively closes United States Naval Station, Guantanamo Bay”).

<sup>254</sup> See, e.g., Consolidated Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-113, § 705(b), 113 Stat. 1501, 1501A-461 (1999) (prohibiting the United States from “becom[ing] a party to the International Criminal Court except pursuant to a [Senate-approved] treaty”) (codified at 22 U.S.C. § 7401(b)); Arms Control and Disarmament Act, Pub. L. No. 87-297, § 33, 75 Stat. 631, 634 (1961) (codified as amended at 22 U.S.C. § 2753(b)) (prohibiting actions “that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause 2 of the Constitution or unless authorized by the enactment of further affirmative legislation”).

*Zivotofsky II* Court did not interpret those examples as indicating an understanding that recognition is a shared power.<sup>255</sup> Instead, the Court found that the examples demonstrated “no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.”<sup>256</sup> The Court arguably suggested that only congressional action directly contrary to the President’s exercise of a power will suffice as historical evidence of congressional assertion of that power. As the Court observed: “[T]he most striking thing about the history of recognition is what is absent from it: a situation like this one, where Congress has enacted a statute contrary to the President’s formal and considered statement concerning recognition.”<sup>257</sup>

Furthermore, the executive branch might contend that the *Zivotofsky II* Court’s approach to the political branches’ historical practices was heavily informed by functional considerations—most prominently the ability of the President to “speak . . . with one voice” on behalf of the nation in the international arena.<sup>258</sup> According to the Court, the President is “better positioned to take the decisive, unequivocal action necessary to recognize other states at international law,”<sup>259</sup> which Congress “on balance has acknowledged the importance of.”<sup>260</sup> The executive branch might argue that the same clarity and decisiveness is necessary in the United States’ treaty relations, and therefore functional considerations favor unliteral presidential decisionmaking over treaty withdrawal.

In sum, existing Supreme Court precedent may not provide a clear answer on the question that would be presented by a President’s claim of exclusive authority to withdraw from the North Atlantic Treaty in contravention of Section 1250A. Rather, if a court agreed to hear a case on the merits, both sides would likely present arguments based on constitutional text and structure, relevant judicial precedent, and historical practice of the political branches in support of their respective positions.

## Considerations for Congress

As the foregoing discussion makes clear, the question of whether the President possesses authority to withdraw from the North Atlantic Treaty without congressional or senatorial approval implicates a long-standing and still-unresolved debate over the Constitution’s allocation of the power to withdraw from treaties. If a court were to conclude that Section 1250A places a President’s unilateral withdrawal from the North Atlantic Treaty in *Youngstown*’s category three, to defend such a violation, the executive branch would have to establish that the President has exclusive authority to withdraw from treaties,<sup>261</sup> an argument that the executive branch advanced in a 2020 OLC opinion.<sup>262</sup> The Supreme Court was willing to find exclusive presidential powers

<sup>255</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23–28 (2015).

<sup>256</sup> *Id.* at 23.

<sup>257</sup> *Id.* at 24 (quoting *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 725 F.3d 197, 221 (D.C. Cir. 2013) (Tatel, J., concurring)).

<sup>258</sup> *Id.* at 14 (quoting *Am. Ins. Ass’n. v. Garamendi*, 539 U.S. 396, 424 (2003)).

<sup>259</sup> *Id.* at 15.

<sup>260</sup> *Id.* at 28. In his dissent, Justice Scalia argued that the majority’s analysis of the constitutional text and interbranch practices analysis was principally driven by functional considerations that improperly minimized congressional actions, stating, “In the end, the Court’s decision does not rest on text or history or precedent. It instead comes down to ‘functional considerations’—principally the Court’s perception that the Nation ‘must speak with one voice’ about the status of Jerusalem.” *Id.* at 80 (Scalia, J., dissenting) (quoting *Garamendi*, 539 U.S. at 424).

<sup>261</sup> See *supra* “The Supreme Court’s *Youngstown* Framework for Separation of Powers Cases.”

<sup>262</sup> See *supra* “The Executive Branch’s 2020 Claim to Exclusive Treaty Withdrawal Power.”

in both *Zivotofsky II* and *Trump*,<sup>263</sup> but it remains uncertain how a court would rule if it were to agree to hear a case challenging a Section 1250A violation given the absence of controlling Supreme Court precedent on the treaty-withdrawal power.<sup>264</sup>

Absent judicial enforcement, Congress may consider responding to what it believes to be a violation of Section 1250A by using its institutional tools to influence the executive branch, which include impeachment, oversight, exercising the power of the purse to eliminate executive branch funding, and withholding approval for nominations.<sup>265</sup>

Additionally, if a President were to withdraw the United States from the North Atlantic Treaty, all existing NATO-related legislation would appear to remain in effect, and it would be up to Congress to determine whether any statutes should be repealed or amended. Because many NATO-related provisions are not dependent on whether the United States is a party to the treaty,<sup>266</sup> Congress may be able to achieve some NATO-related policy objectives through new legislation. For example, in response to President Carter’s withdrawal from the United States’ mutual defense agreement with Taiwan in 1979,<sup>267</sup> Congress enacted the Taiwan Relations Act,<sup>268</sup> which provides that “the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”<sup>269</sup>

Congress may also consider that, in addition to statutory prohibitions of unilateral presidential treaty withdrawal such as in Section 1250A, other congressional actions that might be understood by courts or the political branches as assertions of congressional treaty withdrawal authority include, for example, placing restrictions on the President’s authority to withdraw from treaties in the Senate’s resolutions providing advice and consent to the President’s ratification of those treaties<sup>270</sup> or in authorizing legislation.<sup>271</sup>

Congress may also consider the potentially complex state of affairs if a court were to enforce Section 1250A and enjoin a President from unilaterally withdrawing from the North Atlantic Treaty. Even with an injunction in place, other questions may arise over whether the President

<sup>263</sup> See *supra* “*Zivotofsky ex rel. Zivotofsky v. Kerry*” & “*Trump v. United States*.”

<sup>264</sup> See *supra* “Justiciability Issues in Enforcing Section 1250A “Constitutional Analysis of Section 1250A.”

<sup>265</sup> For deeper analysis of Congress’s institutional tools to influence the executive branch, see CRS Report R45442, *Congress’s Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Sean Stiff.

<sup>266</sup> See *supra* notes 158–166 and accompanying text (providing examples of NATO-related legislation supported by Congress’s appropriation, foreign commerce, and immigration authorities). For further discussion of such legislation, see CRS Legal Sidebar LSB11256, *The North Atlantic Treaty: U.S. Legal Obligations and Congressional Authorities*, by Karen Sokol (2025).

<sup>267</sup> The litigation challenging the President’s unilateral withdrawal is discussed *supra* “Political Question Doctrine.”

<sup>268</sup> Pub. L. No. 96-8, 93 Stat. 14 (1979).

<sup>269</sup> *Id.* at 15, § 3(a).

<sup>270</sup> In concluding that President Carter’s unilateral withdrawal from the United States’ mutual defense treaty with Taiwan was constitutional in the *Goldwater* case, the D.C. Circuit emphasized that the case did not involve any such restriction in the Senate’s resolution of advice and consent. See *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir. 1979) (en banc) (per curiam), *vacated and remanded with instructions to dismiss*, *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion) (“The question of whether the Senate may be able to reserve to itself in particular treaties, at the time of their original submission, a specific role in their termination is not presented by the record in this appeal and we decide nothing with respect to it.”).

<sup>271</sup> *Cf.*, e.g., 22 U.S.C. §§ 290, 290c (authorizing the President to join the World Health Organization (which is effected through ratification of the Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185), and conditioning the right of the United States to withdraw from the treaty on the provision of one year’s notice and the meeting of “the financial obligations of the United States to the Organization . . . in full for the Organization’s current fiscal year”).

could be compelled to honor the United States’ treaty commitments, such as the mutual defense obligations under Article 5 of the North Atlantic Treaty.<sup>272</sup> Initially, any attempt to mount a judicial challenge to an alleged failure to meet U.S. NATO obligations would likely face justiciability hurdles such as the political question and standing doctrines discussed above.<sup>273</sup> Additionally, the executive branch might maintain that any judicial action could not interfere with the President’s “exclusive sphere of constitutional authority,”<sup>274</sup> which the executive branch might claim includes presidential powers like the Commander-in-Chief authority.<sup>275</sup>

Finally, regardless of the outcome of any case in which a court may agree to hear a challenge to a Section 1250A violation, there may remain ways the legislative and executive branches could affect the United States’ policy regarding NATO through the use of their respective constitutional authorities. Such authorities may include Congress’s powers related to foreign commerce, use of the armed forces, and spending, and the President’s powers as Commander in Chief and to receive ambassadors and other foreign government officials.<sup>276</sup>

Congress may find it useful to consider the legal contexts outlined in this report and the issues that could arise as it continues to exercise its legislative and oversight powers with regard to the North Atlantic Treaty, as well as other treaties to which the United States is a party.

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<sup>272</sup> North Atlantic Treaty, *supra* note 6, art 5 (“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”). For background on the complexities of Article 5, see CRS Legal Sidebar LSB11256, *supra* note 266, at 1–2.

<sup>273</sup> See *supra* “Justiciability Issues in Enforcing Section 1250A.”

<sup>274</sup> *Trump v. United States*, 603 U.S. 593, 609 (2024).

<sup>275</sup> Although the Supreme Court has referenced the President’s role as Commander in Chief in discussing foreign affairs authorities generally, the Court generally has not specified the contours of that authority. See, e.g., *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) (“The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs.”). In a 19th century case, Chief Justice Salmon Chase posited in a concurring opinion joined by three other Justices that the President has some independent—and possibly exclusive—power to direct military campaigns:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.*

*Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1867) (Chase, C.J., concurring) (emphasis added).

<sup>276</sup> *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 16 (2015) (“Although the President alone effects the formal act of recognition, Congress’ powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President’s recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.”).

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