

TREATY EXIT

The text devotes substantial attention to the mechanisms for entering into international agreements. Recently, however, questions of treaty withdrawal and termination have gained increasing prominence. Since treaties create international legal obligations, international law determines when a state's treaty obligations terminate. International law does not, however, address how a state decides to withdraw from or terminate a treaty. In most states, questions of treaty withdrawal and termination, and in particular the allocation of decision-making authority between the Executive and Legislative branches, are a matter of constitutional law.

The United Kingdom

In a June 23, 2016 referendum, United Kingdom citizens voted to "leave" the European Union by 51.9% to 48.1%. The vote, however, was technically nonbinding, immediately raising questions as to whether, and how, the UK government would implement its results. Specifically, could the UK Government formally initiate Brexit, the withdraw from the treaties creating the EU, or was it necessary for Parliament to enact legislation?

In *R (Miller) v. Secretary of State for Exiting the European Union*, 2017 UKSC 5, the Government argued that the conduct of foreign relations, including entry into and withdrawal from treaties, fell within the "prerogative power," i.e., the power that the Government inherently possesses, and that an act of Parliament was not necessary. The UK Supreme Court disagreed. The Court's reasoning turned largely on the existence and impact of the European Communities Act, passed in 1972. This act gives domestic effect to EU treaty law, and "authorizes a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes." As a result, a withdrawal from the EU would cause "a fundamental change in the constitutional arrangements of the United Kingdom." The Court concluded that it could not "accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be affected in the only way that the UK constitution recognizes, namely by Parliamentary legislation."

On July 13, 2017, the ruling Conservative Party introduced the European Union (Withdrawal) Bill into Parliament. The bill would repeal the European Communities Act of 1972. The bill would also convert pre-existing EU law into UK law as it applies in the UK at the date of exit, which is called "retained EU law." Legal questions as to the meaning of retained EU law will be determined by UK courts in accordance with pre-exit case law of the Court of Justice of the European Union (CJEU). However, decisions of the CJEU issued after exit day will not be binding on UK courts.

South Africa

On July 17, 1998, South Africa signed the Rome Statute creating the International Criminal Court, and ratified this treaty on November 27, 2000. In 2002, South Africa passed an act implementing the provisions of the Rome Statute into domestic law.

On October 21, 2016, the South Africa's Minister of International Relations and Cooperation notified the UN Secretary General that South Africa was withdrawing from the Rome Statute. Article 127 of the Rome Statute provides that withdrawal will take effect one year after receipt of the notification.

South Africa's constitution addresses the process for entering into a treaty (see page 211 of the DRW text), but is silent regarding treaty withdrawal. An opposition political party and several non-governmental organizations challenged the Minister's action in South African courts. In *Democratic Alliance v. Minister of International Relations and Cooperation and Others* (83145/2016) 2017 (3) SA 212 (GP), the High Court of South Africa relied upon separation of powers arguments and held that "[i]f it is parliament which determines whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement." As a result, the Court found the notice of withdrawal to be unconstitutional and invalid, and ordered the government to revoke its notice of withdrawal.

More information regarding South Africa's efforts to withdraw from the ICC can be found in the Update to Chapter 9 found on the textbook website.

United States

The U.S. Constitution does not address questions of treaty withdrawal or termination, and courts have rarely addressed these questions. Hence, debates over these issues – and, specifically, over the allocation of decision-making authority between the President and the Congress – often rely heavily upon historical practice.

The first instance of treaty termination involving the United States concerned four treaties between the United States and France. In 1798, as war with France appeared increasingly imminent, Congress passed, and the President signed, legislation providing that the four treaties "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States." Thomas Jefferson's *Manual of Parliamentary Practice* (1801) stated 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. This accordingly was the process adopted in the case of France in 1798."

Although the 1798 statute appears to be the only instance when the full Congress adopted legislation purporting to terminate a treaty, in a number of instances through at least the late 19th Century, Congress authorized or directed presidents to terminate treaties. In the 1920s and 1930s, however, a practice of unilateral presidential terminations of treaties began to take root. A detailed account of this history can be found in Curtis Bradley, *Treaty Termination and Historical Gloss*, 92 *Tex. L. Rev.* 773 (2014).

The modern debate over treaty termination begins with President Carter's decision, in 1978, to terminate a mutual defense treaty between the United States and the Republic of China (Taiwan), taken in connection with his decision to recognize the People's Republic of China. Senator Barry Goldwater, joined by other senators and members of the House of Representatives, filed suit in federal court seeking an injunction preventing the President from unilaterally terminating the treaty without Senate or congressional consent. The case quickly reached the U.S. Supreme Court. Writing for a four Justice plurality, Justice Rehnquist found that the case presented a nonjusticiable political question "because it involves the authority of the President in the conduct of our country's foreign relations," and directed that the complaint be dismissed. *Goldwater v. Carter*, 444 U.S. 996 (1979). Justice Powell concurred in the result, although he rejected the argument that the case involved a political question. Rather, he reasoned that the case should be dismissed as not yet ripe for adjudication, as Congress had taken no official action in response to the President's termination of the treaty. Justice Marshall concurred in the result, without explaining his reasoning.

Three Justices dissented. Justice Brennan argued that the political question doctrine was inapplicable and that "[t]he issue of decision-making authority must be resolved as a matter of constitutional law, not political discretion." On the merits, he argued that the decision to terminate the treaty rested upon "the President's well-established authority to recognize" foreign governments. Since the President could recognize the People's Republic of China, he possessed legal authority to withdraw recognition from, and hence terminate the treaty with, Taiwan. Justices Blackmun and White dissented on procedural grounds and did not reach the merits.

In June 2002, President George W. Bush announced that he would terminate the Anti-Ballistic Missile (ABM) treaty with Russia, pursuant to the treaty's termination clause. Thereafter, members of the House of Representatives filed suit, arguing that the President cannot terminate a treaty without congressional consent. A U.S. District Court dismissed the action on the grounds that the House members lacked standing to sue, and that the case raised a non-justiciable political question. *Kucinich v. Bush*, 236 F.Supp. 2d 1 (D.D.C. 2002).

Questions regarding the power to withdraw from or terminate treaties have assumed new prominence since President Trump assumed office, in light of his threats to withdraw from NAFTA, the Iran Nuclear agreement, and other international agreements. To be sure, whether Congress or the Senate must

participate in a decision to withdraw may vary depending on the type of agreement at issue. In other words, just as Article II treaties, congressional-executive agreements, and sole executive agreements differ in how they are made, perhaps they likewise differ in how they are unmade.

There is general consensus that the President can unilaterally withdraw from sole executive agreements. For example, as a matter of domestic law, the Paris Climate Agreement was considered a sole executive agreement, as the agreement's obligations fell within the President's pre-existing authority (meaning that no legislative action was required). Hence, there was little debate over whether, as a legal matter, President Trump possessed authority unilaterally to withdraw the United States from this agreement. Likewise, it is uncontroversial that the President has unilateral authority to withdraw from instruments that constitute "political commitments," such as the Joint Comprehensive Plan of Action regarding Iran's nuclear programs.

For congressional-executive agreements, which are approved and implemented by majority vote of both houses of Congress, the question is more complex, and much may turn on the precise terms of the underlying treaty or statute upon which the treaty is based, and the treaty's subject matter. In the area of international trade, in particular, some argue that Congress's explicit constitutional authority to regulate commerce with foreign nations suggests that Congress must have a role in any decision by the United States to terminate or withdraw from a trade agreement. See Joel P. Trachtman, *Terminating Trade Agreements: the Presidential Dormant Commerce Clause Versus a Constitutional Gloss Half Empty*. More generally, even if the President possesses unilateral authority to withdraw from the international obligations created by a congressional-executive agreement, the President cannot unilaterally undo the legislation upon which the agreement rests.

Which branch has authority to decide whether the United States will withdraw from or terminate an Article II treaty is likewise uncertain. After the Senate gives its advice and consent to an Article II treaty, the President has discretion whether or not to "ratify" that treaty. Some claim that because the President has unilateral authority not to ratify a Senate-approved treaty, the President must possess a parallel authority to withdraw that ratification, even absent Senate consent. Others argue that since the consent of both the Senate and the President is necessary to enter into an Article II treaty, the consent of each is likewise necessary to withdraw from or terminate an Article II treaty.

As noted in the text, Congress can supersede the terms of Article II treaties and congressional-executive agreements as a matter of domestic law by enacting inconsistent later-in-time legislation. In these instances, the United States would still have international obligations under the treaty, unless and until the United States formally withdraws from the treaty.