AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

*John Yoo and Robert J. Delahunty*, **Authority of the President to Suspend Certain Provisions of the ABM Treaty** (2001)[[1]](#footnote-1)

*The United States entered into the Anti-Ballistic Missile Treaty with the Soviet Union in 1972. It set limits on anti-ballistic missiles (ABM), but also included a provision that limited the deployment of any ABM defense. Republicans had chafed at this feature of the treaty since President Ronald Reagan proposed the Strategic Defense Initiative in 1983, which called for the development of technologies capable of defending the United States from an ABM strike. The status of the treaty was further complicated by the collapse of the Soviet Union in 1991. Over Republican opposition in the Senate, the Clinton administration moved in 1997 to explicitly extend the ABM treaty to the successor states of the former Soviet Union though an executive Memorandum of Understanding (MOU) with those states. There remained some uncertainty about the status of both the ABM treaty and the MOU since the Russian Federation’s ratification was contingent on American ratification of additional arms control treaties that were never submitted to the Senate.*

*In December 2001, President George W. Bush invoked the withdrawal clause of the ABM treaty and formally notified Russia that it would terminate the pact in six months. Before taking that step, the Bush administration had contemplated keeping the United States in the ABM treaty but suspending its specific provisions relating to missile defense. The Office of Legal Counsel in the Department of Justice produced a memorandum for the legal advisor to the National Security Council evaluating whether the president had the constitutional authority to suspend specific provisions of a treaty.*

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Presidential authority over treaties stems from the President's leading textual and structural position in foreign affairs generally, from the text and structure of Article II's vesting of all of the federal executive power in the President, and from the specific manner in which the Constitution allocates the treaty power. Construing the Constitution in this manner comports with the President's Article II responsibilities to conduct the foreign affairs of the nation, to act as its sole representative in international relations, and to exercise the powers of Chief Executive. Historical practice also plays an important role in resolving separation of powers questions relating to foreign affairs. Judicial decisions in the area are rare, while the need for discretion and speed of action favor deference to the arrangements of the political branches. The historical evidence supports the claim that the President has broad constitutional powers with respect to treaties, including the powers to terminate and suspend them. In light of considerations of all three kinds ~ textual, structural and historical ~ we conclude that the President has the constitutional authority to suspend a provision of the ABM Treaty.

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From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington Administration: "[t]he constitution has divided the powers of government into three branches [and] has declared that 'the executive powers shall be vested in the president,' submitting only special articles of it to a negative by the senate." Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly." . . .

In the relatively few occasions where it has addressed foreign affairs, the Supreme Court has lent its approval to the executive branch's consistent interpretation of the President's powers. Responsibility for the conduct of foreign affairs and for protecting the national security are, as the Supreme Court has observed, "'central' Presidential domains." *Harlow v. Fitzgerald* (1982). The President's constitutional primacy flows from both his unique position in the constitutional structure and from the specific grants of authority in Article II that make the President both the Chief Executive of the nation and the Commander in Chief. *Nixon v. Fitzgerald* (1982). Due to the President's constitutionally superior position, the Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive."' *Department of the Navy v. Egan* (1988). This foreign affairs power is exclusive: it is "the very delicate, plenary and exclusive power of the President as 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." *United States v. Curtiss-Wright Export Corp*. (1936).

In light of these basic principles, it should be understood that the treaty power is fundamentally executive in nature. Article II, § 1 of the Constitution provides that [t]he executive Power shall be vested in a President of the United States." By contrast. Article I's Vesting Clause gives Congress only the powers 'herein granted." This difference in language indicates that Congress's legislative powers are limited to the list enumerated in Article I, § 8, while the President's powers include inherent executive powers that are unenumerated in the Constitution. . . .

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This understanding of the constitutional text and structure has led to the recognition that the President enjoys powers, such as the removal of executive branch officials, that may be unenumerated but that are an essential part of the executive power. As true as this principle is in domestic affairs, it must especially be the case in regard to foreign affairs, and thus treaties. Treaties represent a central tool for the exercise of the President's plenary control over the conduct of foreign policy: in the course of protecting national security, recognizing foreign governments, or pursuing diplomatic objectives, for example, the President may need to decide whether to perform, withhold, or terminate the United States' treaty obligations. . . . Construing the Constitution to grant unenumerated treaty authority to another branch could prevent the President from exercising his core constitutional responsibilities in foreign affairs. Even in the cases in which the Supreme Court has limited executive authority, it has also emphasized that we should not construe legislative prerogatives to prevent the executive branch "from accomplishing its constitutionally assigned functions."

Thus, treaty-related powers not specifically detailed in Article II, § 2, such as the powers to terminate or suspend treaties unilaterally, must remain with the President. This has been the general approach in regard to other treaty powers not mentioned in the Constitution. Article II, for example, does not expressly grant the President the power to interpret treaties on behalf of the United States. Yet, when the question arose concerning the proper interpretation of the 1778 Treaty of Alliance with France, President Washington issued the 1793 Neutrality Proclamation construing the treaty not to require United States entry into the European wars on France's side. . . .

Other treaty powers similarly have been understood to rest within plenary presidential authority. Thus, it is the President alone who decides whether to negotiate an international agreement, and it is the President alone who controls the subject, course, and scope of negotiations. "In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's." . . . The President has the sole discretion whether to sign a treaty and whether to choose even to submit it for Senate consideration. . . .

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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. As noted before, the President is the sole organ of the nation in regard to foreign nations. A President, therefore, may need to terminate a treaty in order to implement his decision to recognize a foreign government. Or, for example, the President may wish to terminate a treaty in order to reflect the fact that the treaty has become obsolete, to sanction a treaty partner for violations, to protect the United States from commitments that would threaten its national security, to condemn human rights violations, or to negotiate a better agreement.

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The executive branch has long held the view that the President has the constitutional authority to terminate treaties unilaterally, and the legislative branch seems for the most part to have acquiesced in it. The Justice Department has consistently maintained that the President's constitutional authority over foreign affairs provides him with the power to unilaterally terminate treaties. . . .

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Against this background, it should be evident that the President must also have the power to *suspend* a treaty, whether in whole or in part. Suspension of a treaty is not nearly so drastic as termination; indeed, the power to suspend a treaty, in whole or in part, is implied from the power to terminate it. When a treaty is suspended, it remains formally in effect, and can be revived at a later time. Suspension consists merely in the withholding of performance of some or all of the obligations the suspending Party has under the treaty, and the non-assertion of some or all of its treaty rights. Termination, by contrast, extinguishes the United States rights and obligations under a treaty, at least as a matter of domestic law. The power to extinguish obligations subsumes the lesser power to withhold performance of them. . . .

Again, as with the termination power, the power to suspend a treaty, whether wholly or in part, must be available to the President if he is to be fully able to conduct the Nation's foreign policy successfully: the President, for example, must be able credibly to threaten to suspend performance of the United States' treaty obligations in order to sanction a treaty partner for the non-performance of *its* treaty obligations, or in order to deter partners to other treaties from breaching them. Similarly, the President must be able to suspend a particular treaty obligation when a radical change in circumstances would cause performance to be a grave threat to the national security. . . .

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The President's power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so. While the President will ordinarily take international law into account when deciding whether to suspend a treaty in whole or in part, his constitutional authority to suspend a treaty provision does not hinge on whether such suspension is or is not consistent with international law. If the exercise of the President's constitutional powers with respect to a treaty puts the United States in breach of treaty or other international law, the United States may have to face sanctions of some form from its aggrieved treaty partners. Whether the considerations in favor of suspending, breaching or terminating a treaty are sufficient to outweigh the countervailing risks of sanctions or liability for those actions is for the President, as the Nation's constitutional representative in its foreign affairs, to decide.

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The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled. (By "practice" we mean not only the acts and decisions of governmental decisionmakers, but also their considered statements and judgments about what they could do.) Both the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." . . . The role of practice is heightened in dealing with issues affecting foreign affairs and national security, where "the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions."

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It seems clear that the United States has terminated relatively few treaties. It appears that several different methods of termination have been used. One review has found that of these terminations, the President acted alone nine times, seven were by congressional directive, and two by Senate command. . . .

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Constitutional practice with respect to treaty suspension originates with the controversies surrounding President Washington's Neutrality Proclamation of 1793. That dispute centered on the effect of the French Revolution upon the 1778 Franco-American Treaty of Alliance. In those debates, which several important Founders entered, Alexander Hamilton argued that "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone."

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In 1939, President Franklin Roosevelt suspended the operation of the London Naval Treaty of 1936. "The war in Europe had caused several contracting parties to suspend the treaty, for the obvious reason that it was impossible to limit naval armaments. The notice of termination was therefore grounded on changed circumstances." On August 9, 1941, President Roosevelt unilaterally suspended, for the duration of the emergency created by the Second World War, the International Load Line Convention, a multilateral agreement that established comprehensive limits to which vessels could be loaded for international voyages. Acting Attorney General Biddle concluded that neither the approval of the Senate nor the Congress was required for treaty suspension. . . .

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On June 20, 1876, President Grant informed Congress that he was suspending the extradition clause of the 1842 "Webster-Ashburton Treaty" with Great Britain, Convention as to Boundaries, Suppression of Slave Trade and Extradition, Aug. 9, 1842. Grant advised Congress that the release of two fugitives whose extradition was sought by the United States amounted to the abrogation or annulment of the extradition clause, and that the executive branch in response would take no action to surrender fugitives sought by the British Government unless Congress signified that it do so. The clause remained suspended until it was reactivated by the British Government's resumed performance.

A recent and significant example of partial treaty suspension occurred during the presidency of Ronald Reagan. In 1986, the United States suspended the performance of its security obligations under the 1952 "ANZUS Pact," Security Treaty Between Australia, New Zealand and the United States, as to New Zealand but not as to Australia. President Reagan's decision came in response to New Zealand's refusal of visitation rights to the *U.S.S. Buchanan*, unless the Navy disclosed whether the vessel was nuclear-powered (which the Navy declined to do). The United States treated this as a material breach of New Zealand's obligations under the ANZUS Treaty and suspended performance of our security obligations towards New Zealand. The suspension was only a partial suspension, because the security aspects of the Treaty in regard to Australia, the third ANZUS Pact partner, were left unaffected. Again, the President acted without the consent of either the entire Congress or the Senate. Indeed, "no senator has questioned the legality of the executive's suspension of aspects of the ANZUS Treaty." . . .

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Critics might argue that the suspension of certain provisions of the ABM Treaty - especially if coupled with a corresponding, agreed-upon suspension of that provision by the Russian Federation - was effectively an amendment to the ABM Treaty, and hence that Senate advice and consent to such a measure was required. The Supreme Court held at an early date that "the obligations of [a] treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority." *The Amiable Isabella* (1821). That language certainly suggests that a treaty amendment must be submitted to the Senate. The State Department has also upon occasion taken the view that "a treaty to which the United States is a party cannot be modified except by an instrument brought into force through the treaty processes." . . .

We do not disagree that an Amendment to a Senate-approved treaty - in the sense explained below— must be submitted to the Senate, exactly as the underlying treaty was. But the partial suspension of a treaty is clearly distinct from an amendment to it, and the power of partial suspension, like that of complete suspension, rests with the President.

An "amendment" to a treaty, like an amendment to the Constitution or to an Act of Congress, is a change in the text of a legal document. Any such textual change must be carried out in accordance with prescribed procedures (often the same procedures for adopting the original text). But partial "suspension" of a treaty leaves the text of the treaty unaltered, and does not vary the legal rights or obligations created by the text as a matter of international law. The treaty provision still exists. Suspension merely signifies a party's expressed intention not to perform some or all of its obligations, or not to assert some or all of its rights, under the treaty, for a period or until some condition is met. The treaty is capable of being revived after having been suspended, and need not at that point be renegotiated by the President, resubmitted to the Senate, and proclaimed once more by the President. So, for example, a state of war may suspend but not terminate a treaty, and the return of peace may cause the treaty to revive.

Partial suspension by the President, like presidential treaty termination, in no way violates the Supremacy Clause. A critic might analogize suspension of a treaty provision to suspension of a statute, which generally is outside the powers of the executive due to the Take Care Clause. But, as we have argued above, treaties do not automatically receive the same treatment as a constitutional provision or an Act of Congress. Treaties, for example, do not generate private causes of action, but instead are often non-self-executing. Because of his enhanced constitutional position in foreign affairs, the President has greater authority over treaties. The President, for example, can wholly terminate a treaty, which he cannot do in regard to a statute. Therefore, presidential power to suspend a treaty provision does not undermine the Supremacy Clause.

Moreover, longstanding constitutional practice makes it clear that not every substantial modification of the United States' treaty rights and obligations counts as an "amendment" that has to be referred to the Senate for approval. "[T]he President can interpret the meaning of treaties by the mere exchange of diplomatic notes. . . . Moreover, there have been instances in which a President, 'acting through the Secretary of State, has tacitly acquiesced in action by foreign Governments which had the effect of modifying stipulations in our treaties.'" Were it to become effective, the 1997 MOU on succession to the ABM Treaty would surely represent a substantial modification of what had been merely a bilateral treaty. Indeed, one might see the multilateralization of what had previously been a bilateral agreement as a greater threat to the Senate's role in the treaty process than the suspension of a provision of the bilateral agreement. The 1997 MOU could have been entered into as a "sole" executive agreement based on the President's constitutional powers to apply and execute treaties and to recognize foreign governments. As a constitutional matter, the Clinton Administration could have refused to submit the MOU to the Senate because it was not a treaty amendment, although the MOU could have resulted in substantive changes in the United States' obligations under the ABM Treaty.

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Accordingly, we do not think that a partial suspension of the ABM Treaty should be considered a treaty "amendment" that is subject to Senate advice and consent.

1. Excerpt taken from John Yoo and Robert J. Delahunty, “Memorandum for John Bellinger, III: re, Authority of the President to Suspend Certain Provisions of the ABM Treaty” (November 15, 2001) [↑](#footnote-ref-1)