

## SYMPOSIUM ON TREATY EXIT AT THE INTERFACE OF DOMESTIC AND INTERNATIONAL LAW

### TREATY EXIT IN THE UNITED STATES: INSIGHTS FROM THE UNITED KINGDOM OR SOUTH AFRICA?

*Curtis A. Bradley\* and Laurence R. Helfer†*

Courts in the United Kingdom and South Africa have recently issued important rulings that have constrained the executive's authority to withdraw from treaties in those countries. This essay considers whether these rulings might offer insights for treaty exit issues in the United States. We first provide an overview of U.S. law and practice regarding the termination of international agreements. We next summarize the U.K. and South African decisions, which required parliamentary approval for pulling out of treaties establishing the European Union and the International Criminal Court (ICC), respectively. Finally, we consider the relevance of these rulings for treaty withdrawals in the United States. We conclude that they are unlikely to offer much guidance, both because of differences in the three countries' constitutions and because the reasoning of the U.K. and South African courts do not engage with the central arguments made in the United States concerning the President's unilateral authority to withdraw from treaties.

#### *U.S. Practice and the Goldwater Decision*

The U.S. Constitution describes how the United States can make treaties, but it does not describe how it can unmake them. Article II gives the President the power to make treaties with the advice and consent of two-thirds of the Senate. Presidents have also long concluded other types of "executive agreements," either with the ex ante or ex post approval of a majority of Congress rather than two-thirds of the Senate ("congressional-executive agreements"); by the President alone, based on a delegation of authority in an earlier Article II treaty ("executive agreements pursuant to treaty"); or by the President alone based on his independent constitutional authority ("sole executive agreements"). Because these other international agreements are not mentioned in the Constitution, nothing in the Constitution describes how the United States can exit from them, although it is generally assumed that presidents can unilaterally withdraw from sole executive agreements.

During the nineteenth century, presidents usually acted with some sort of legislative approval when exiting treaties. [The practice changed](#) during the early twentieth century, as presidents began regularly terminating treaties on their own authority.<sup>1</sup> Most of these terminations have been uncontroversial. The most well-known exception is President Carter's 1978 withdrawal from a bilateral mutual defense treaty with Taiwan. The treaty, which had been

\* *William Van Alstyne Professor, Duke Law School.*

† *Harry R. Chadwick, Sr. Professor, Duke Law School.*

<sup>1</sup> See Curtis A. Bradley, [Treaty Termination and Historical Gloss](#), 92 TEX. L. REV. 773, 788–96, 801–10 (2014).

approved by the United States in 1954 with senatorial advice and consent, contained a withdrawal clause providing that either party could leave after giving one year's notice.

After Carter announced his decision to invoke the withdrawal clause, several members of Congress, in *Goldwater v. Carter*, challenged his constitutional authority to unilaterally withdraw the United States from the treaty. The District Court agreed, but the [Court of Appeals](#) reversed, offering three principal reasons for upholding a presidential withdrawal power.<sup>2</sup>

The Court first explained that even though the Constitution requires senatorial consent for the making of treaties, this does not necessarily imply that unmaking international agreements must follow the same process. For example, the Constitution requires senatorial approval for officers appointed by the President, but the President may generally terminate such officers' appointments without senatorial approval. "Expansion of the language of the Constitution by sequential linguistic projection," the Court observed, "is a tricky business at best."<sup>3</sup>

Next, the Court emphasized that "the President is the constitutional representative of the United States with respect to external affairs" and that no treaty can be made by the United States without the President's approval.<sup>4</sup> "Thus," noted the Court, "in contrast to the lawmaking power, the constitutional initiative in the treaty-making field is in the President, not Congress."<sup>5</sup> The Court further pointed out that, "of all the historical precedents brought to our attention, in no situation has a treaty been continued in force over the opposition of the President."<sup>6</sup>

Finally, the Court noted that it was "of central significance" that Carter had acted pursuant to the treaty's withdrawal clause. The Court explained that "the President's authority . . . is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of notice of termination."<sup>7</sup>

In reviewing this decision, a majority of the [U.S. Supreme Court](#) concluded that the case was nonjusticiable.<sup>8</sup> Four of the nine Justices reasoned that the dispute presented a political question, and another Justice concluded that the case was not institutionally ripe for a decision.<sup>9</sup>

Presidents have unilaterally denounced or terminated dozens of treaties since *Goldwater*. One post-*Goldwater* termination that generated controversy was President George W. Bush's 2002 withdrawal from the Anti-Ballistic Missile Treaty with Russia. A group of House members challenged the withdrawal, but the [case was dismissed](#) for lack of standing and on political question grounds.<sup>10</sup> In light of this historical practice, both the [Restatement \(Third\) of the Foreign Relations Law of the United States](#) and the Tentative Draft of the new [Restatement \(Fourth\)](#) conclude that the President has the constitutional authority to unilaterally withdraw the United States from a treaty, at least when international law allows for withdrawal.<sup>11</sup>

<sup>2</sup> See [Goldwater v. Carter](#), 617 F.2d 697 (D.C. Cir. 1979).

<sup>3</sup> [Id.](#) at 704.

<sup>4</sup> [Id.](#) at 705.

<sup>5</sup> [Id.](#)

<sup>6</sup> [Id.](#) at 706.

<sup>7</sup> [Id.](#) at 708.

<sup>8</sup> [Goldwater v. Carter](#), 444 U.S. 996 (1979).

<sup>9</sup> [Id.](#) at 1002 (Rehnquist, J., concurring); [id.](#) at 998 (Powell, J., concurring).

<sup>10</sup> See [Kucinich v. Bush](#), 236 F. Supp. 2d 1 (D.D.C. 2002).

<sup>11</sup> See [RESTATEMENT \(THIRD\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES](#) § 339 (AM. LAW INST. 1987); [RESTATEMENT \(FOURTH\) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES](#) § 113(1) (AM. LAW INST., Tentative Draft No. 2, 2017). Curtis Bradley was a Reporter for the *Restatement (Fourth)*. The views expressed in this essay are his own.

Nevertheless, it cannot be said that the domestic authority over U.S. treaty terminations is entirely settled. The Supreme Court has not definitively resolved the issue, and it may be less inclined today to dismiss cases based on the political question doctrine than it was at the time of *Goldwater*. While the Court might give significant weight to historical practice, it would not necessarily view such practice as dispositive. The reasoning of other national courts that have addressed the constitutionality of treaty exits might thus be instructive if and when the Court addresses these issues.

### *The U.K. Supreme Court*

In June 2016, U.K. voters narrowly approved a referendum calling for the country's withdrawal from the European Union. The government's plans to exit pursuant to the withdrawal clause in Article 50 of the Treaty on European Union were quickly challenged on constitutional grounds, which were eventually considered by the U.K. Supreme Court.

In the United Kingdom, the prerogative powers of the executive branch include the authority to both make and withdraw from treaties. Treaties operate as domestic law in the United Kingdom, however, only when implemented by statute, and only Parliament can make, repeal, or modify statutory law. Shortly before the United Kingdom ratified the accession treaty to join what is now the European Union, Parliament enacted the European Communities Act 1972. The key issue before the U.K. Supreme Court was the relationship between this implementing statute and the executive's authority to withdraw from treaties unilaterally.

In *R (Miller) v. Secretary of State for Exiting the European Union*,<sup>12</sup> the Court held that the executive could withdraw from the European Union only with the prior approval of Parliament. In reaching this result, the Court emphasized the constitutional character of the 1972 Act, explaining that the Act not only gives domestic effect to EU treaty provisions, but also "authorises 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."<sup>13</sup> The Court also emphasized that EU treaties are "a source of domestic legal rights many of which are inextricably linked with domestic law from other sources."<sup>14</sup> In light of these features, leaving the European Union would result in "a fundamental change in the constitutional arrangements of the United Kingdom."<sup>15</sup> The Court concluded that such a major change "must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation."<sup>16</sup>

The Court accepted that Parliament, when adopting the 1972 Act, could have provided that the constitutional changes and legal rights created by the statute would continue only so long as the executive maintained the U.K.'s membership in the European Union, but it found no indication that this is what Parliament intended.<sup>17</sup> Following *Miller*, Parliament passed a statute giving the executive authority to initiate the EU withdrawal process, which occurred in March 2017.

<sup>12</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5.

<sup>13</sup> *Id.* at para. 60.

<sup>14</sup> *Id.* at para. 86.

<sup>15</sup> *Id.* at para. 78.

<sup>16</sup> *Id.* at para. 82.

<sup>17</sup> *Id.* at para. 77. For additional discussion of *Miller*, see Alison L. Young, *Brexit, Miller, and the Regulation of Treaty Withdrawal: One Step Forward, Two Steps Back?*, 111 AJIL UNBOUND 434 (2017).

*The South African High Court*

In *Democratic Alliance v. Minister of International Relations and Cooperation*,<sup>18</sup> the High Court of South Africa upheld a constitutional challenge to the executive's decision to withdraw from the Rome Statute, the treaty establishing the ICC. The decision was triggered by fallout from Sudanese President Omar al-Bashir's visit to South Africa in 2015, when the executive declined to arrest him, despite an obligation to do so under the Rome Statute because he is under indictment by the ICC. The executive cited the conflict between this obligation and the customary international law of head-of-state immunity as a justification for withdrawal.

The [South African constitution](#) describes how the country enters into treaties and incorporates them into domestic law, but it is silent on treaty exit. According to the first clause of Section 231, "[t]he negotiating and signing of all international agreements is the responsibility of the national executive."<sup>19</sup> However, Section 231(2) provides that treaties signed by the executive do not bind South Africa on the international plane until "after [they have] been approved by resolution in both the National Assembly and the National Council of Provinces."<sup>20</sup> For approved treaties to have domestic effect, they must, in addition, be "enacted into law by national legislation," except for "self-executing provision[s]" that are not inconsistent with the Constitution or an act of Parliament.<sup>21</sup>

Given the Constitution's silence on treaty exit, the High Court was faced with choosing the proper analogy to the treaty-making activities described in Section 231. The executive argued that a notice of withdrawal is akin to the conclusion and signature of an international agreement.<sup>22</sup> The judges, however, held that notice of withdrawal is the equivalent of ratification, an act that requires prior parliamentary approval.

The Court offered three justifications for this analogy. First, it underscored the different effects of signing a treaty and filing a notice of withdrawal. "The former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations, albeit on a deferred basis in the present case."<sup>23</sup> Second, the Court emphasized that, because the constitution ascribes to Parliament the power to "determine[] whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement."<sup>24</sup> Third, the Court suggested that treaty exit is an inherently legislative function, such that if the Constitution had conferred this power on the executive it would have been "a clear breach of separation of powers and the rule of law."<sup>25</sup>

For these reasons, the High Court held that the notice of withdrawal was unconstitutional and invalid. The Court ordered the executive to revoke the notice of withdrawal, which it did in March 2017. South Africa will thus continue as a member of the ICC unless Parliament approves the country's exit from the Rome Statute.

<sup>18</sup> *Democratic Alliance v. Minister of International Relations and Cooperation*, 2017 (3) SA 212 (GP).

<sup>19</sup> S. AFR. CONST., 1996, § 231(1).

<sup>20</sup> *Id.* at § 231(2). There is an exception for treaties "of a technical, administrative or executive nature" and agreements that do "not require either ratification or accession," which become binding when they are entered into by the executive and do not require legislative assent. *Id.* at § 231(3). The Rome Statute does not fall within this exception. See *Democratic Alliance*, *supra* note 18, at para. 35.

<sup>21</sup> S. AFR. CONST., § 231(4).

<sup>22</sup> *Democratic Alliance*, *supra* note 18, at para. 39.

<sup>23</sup> *Id.* at para. 47.

<sup>24</sup> *Id.* at para. 51.

<sup>25</sup> *Id.* at para. 56. For additional discussion of *Democratic Alliance*, see Hannah Woolaver, *Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court*, 111 AJIL UNBOUND 450 (2017).

*Considering the U.S. Approach in Comparative Perspective*

What insights might the decisions of the U.K. and South African courts offer for debates in the United States over whether the President has unilateral treaty withdrawal authority? One limitation on applying the reasoning of these decisions to the United States is that there are important constitutional differences among the three countries. To be sure, all three countries share an important feature—their constitutions are silent on how and by whom the state terminates or withdraws from treaties. But the United Kingdom has an unwritten constitution, the United States has an old written constitution, and South Africa has a relatively recent written constitution that contains considerable detail about treaty-making. This means, for example, that historical practice is likely to play a more significant role in constitutional interpretation in the United Kingdom and United States than in South Africa.

In addition, the constitutions differ in how they address the making of international agreements. Of the three jurisdictions, the United Kingdom gives the executive branch the most freedom to make treaties—Parliament must be notified of such international agreements, but its [consent is not required](#)<sup>26</sup>—while South Africa mandates legislative approval for most important treaties.<sup>27</sup> The United States lies somewhere between these two poles. Presidents must obtain the advice and consent of the Senate for Article II treaties, but they also enter into sole executive agreements, including some on important topics, and they conclude many other international agreements based on ex ante delegations from Congress rather than ex post approval.

The potential relevance of the *Miller* decision to the United States is also limited by the unique nature of the treaty exit it considered. The U.K. Supreme Court gave substantial weight to the constitutional character of the EU treaty regime as implemented by Parliament. This includes an expansive delegation of authority to EU institutions (such as the European Court of Justice) and the ongoing incorporation of EU laws (including binding regional legislation) into the U.K. legal system. The United States has not joined an international organization or multilateral agreement that involves anything close to such a constitutional reordering.

In contrast to *Miller*, the analysis in *Democratic Alliance* was not limited to treaties involving broad delegations of authority. But its relevance to debates within the United States over whether the President has unilateral treaty withdrawal authority is diminished by the fact that the Court did not address the arguments that have typically been made in support of such authority, such as those considered by the Court of Appeals in *Goldwater*.

First, as a matter of constitutional interpretation, the fact that the executive is constitutionally obligated to obtain legislative approval to conclude an agreement does not necessarily imply that such approval is constitutionally required for termination. Even if, as the High Court reasoned, withdrawal is more like ratification than signature, it does not necessarily follow that exit requires the same constitutional approval process.

Second, it can be argued that when Parliament approves a treaty containing an express withdrawal clause (such as the Rome Statute) without indicating that legislative approval is required before the executive can quit the treaty, it is implicitly acquiescing in the possibility that the executive may later invoke the clause as part of its conduct of foreign relations. This too was central to the reasoning in *Goldwater*.

Third, the High Court's assertion that exiting a treaty is inherently a legislative act overlooks many functional reasons supporting executive denunciations of at least some international agreements. The executive is often better placed to determine whether exit is factually or legally justified, it can act with dispatch in response to rapidly evolving events, and it can consider the risks and benefits of withdrawal in light of other foreign relations concerns. A legislative preapproval requirement would potentially undermine these functional advantages.

Finally, the High Court lumps together treaties that have domestic legal effect—either directly or as a result of implementing legislation—with those that do not. For agreements in the former category, the decision to exit may

<sup>26</sup> See Arabella Lang, [Parliament's Role in Ratifying Treaties](#) 3, 20 (House of Commons Library Briefing Paper No. 5855, Feb. 17, 2017).

<sup>27</sup> Compare [S. AFR. CONST.](#), § 231(2) with § 231(3).

affect legal rights and obligations and upset reasonable reliance interests in much the same way as would the repeal or modification of a domestic statute. For such withdrawals, there may be stronger reasons to require legislative approval, as the U.K. Supreme Court in *Miller* explained. For externally-focused international agreements, however, the arguments for such a legislative role are considerably weaker.

For these reasons, while it might in principle be instructive to look abroad when considering the domestic authority to exit from treaties in the United States, the recent decisions from the United Kingdom and South Africa—while important and interesting—are unlikely to advance this analysis very much.