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# Withdrawing from NAFTA

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# Withdrawing from NAFTA

ALISON PECK\*

*Since the 2016 campaign, Donald Trump has threatened to withdraw from NAFTA. Can he? The question is complex. For one thing, NAFTA is not a treaty negotiated under the Treaty Clause of the Constitution, but rather a congressional–executive agreement, a creature of dubious constitutionality and ill-defined withdrawal and termination parameters. This Article reviews the scope of those restrictions and concludes that unilateral presidential withdrawal from NAFTA, although not without support, is ultimately unlawful. On one hand, unilateral presidential withdrawal would be valid as a matter of international law, and the NAFTA Implementation Act appears to be designed to terminate in the event of a lawful U.S. withdrawal from NAFTA. However, the President probably lacks statutory or constitutional authority to withdraw from NAFTA, and litigants might overcome political question hurdles by arguing that the NAFTA Implementation Act should not terminate where the President’s action exceeds the scope of his authority. Finally, because the Legislative Branch possesses constitutional authority over foreign commerce, Congress would also have several political remedies if it wishes to foreclose unilateral executive withdrawal from NAFTA or other congressional–executive agreements.*

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#### INTRODUCTION

Since his 2016 presidential campaign, Donald Trump has threatened to withdraw from the North American Free Trade Agreement (the Agreement), or NAFTA.<sup>1</sup> Can he? Whether the President can unilaterally withdraw from a congressional–executive trade agreement like NAFTA is predicated on five distinct questions. First, can a notice from the President, acting alone, effect U.S. withdrawal as a matter of international law? Second, do the statutes that created the “fast track” procedure for making trade agreements like NAFTA afford the President such authority? Third, if such authority is not expressly granted by statute, would unilateral withdrawal by the President be constitutionally valid? Fourth, would U.S. withdrawal from the Agreement disable the statute that implemented the underlying trade obligations into U.S. law—in this case, the NAFTA

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1. See, e.g., Jethro Mullen, *Trump: We’ll Probably End Up Killing NAFTA ‘at Some Point,’* CNN (Aug. 23, 2017, 3:47 PM), <http://money.cnn.com/2017/08/22/investing/trump-nafta-termination/index.html> [<https://perma.cc/6EZU-HBQN>] (“Personally, I don’t think we can make a deal because we have been so badly taken advantage of,” Trump said during a rally in Arizona on Tuesday night. “I think we’ll end up probably terminating NAFTA at some point.”); Vicki Needham, *Trump Again Threatens Termination of NAFTA in Meeting with Trudeau*, HILL (Oct. 11, 2017, 4:43 PM), <http://thehill.com/policy/finance/355002-trump-again-threatens-termination-of-nafta-in-meeting-with-trudeau> [<https://perma.cc/9QW9-NYSY>]; Vicki Needham, *Trump Says He Will Renegotiate or Withdraw from NAFTA*, HILL (June 28, 2016, 2:53 PM), <http://thehill.com/policy/finance/285189-trump-says-he-will-renegotiate-or-withdraw-from-nafta-without-changes> [<https://perma.cc/82N9-JX7J>].

Implementation Act?<sup>2</sup> And finally, even if the President lacks such authority, is there anything anyone can do to stop him?

These questions are interrelated, and this Article endeavors to answer them all. As described in Part I, the answer to the first question—can the President give notice of withdrawal under international law?—is a simple “yes.” But functional withdrawal and termination of statutory commitments depend on the second and third questions: whether the President has the power to unilaterally withdraw the United States from NAFTA under the statutes that outline the congressional–executive agreement process or, independently, under the Constitution. Parts II and III take up the statutory and constitutional analysis required by these questions, respectively, and conclude that he does not.

That conclusion invites an exploration of remedies. As discussed in Part IV, the NAFTA Implementation Act appears to be designed to self-destruct upon *lawful* U.S. withdrawal—but termination might not occur if presidential withdrawal exceeds the scope of his constitutional and statutory authority. This argument may be a more potent way to oppose unilateral presidential action than a direct constitutional challenge—Part V concludes that private litigants face significant, though perhaps not insurmountable, justiciability hurdles in a constitutional challenge. Congress also has several available mechanisms to challenge unilateral presidential withdrawal, but the political will to exercise them may falter.

At the outset, let us recall one critical fact that will guide this analysis: *NAFTA is not a treaty*. Treaty formation is expressly governed by the Treaty Clause of Article II of the Constitution, which provides that the President may make an agreement with the advice and consent of the Senate, ratified by a two-thirds majority of that body.<sup>3</sup> Although the Constitution’s silence on the process for withdrawing from treaties has caused its own complications,<sup>4</sup> at least it may be argued that Article II provides the starting point for answering those questions.<sup>5</sup> But the Constitution does not expressly contemplate congressional–executive agreements at all. Congressional–executive agreements arose during the twentieth century—it is not clear when or how.<sup>6</sup> In the trade context, the practice was articulated and regulated by the Trade Act of 1974, which created a procedure for entry into international trade agreements that differed in important respects from treaty

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2. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-82, 107 Stat. 2057 (1993) (codified as amended in scattered sections of 19 U.S.C.) [hereinafter NAFTA Implementation Act].

3. U.S. CONST. art. II, § 2, cl. 2.

4. See *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (declining to consider the constitutionality of unilateral presidential termination of the Sino–American Mutual Defense Treaty).

5. Scholarly debate over the power to terminate treaties has proceeded from that point. See, e.g., Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 779 (2014); Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247, 249, 252 (2013).

6. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995), for an overview of the emergence of congressional–executive agreements and the historical debate over their constitutionality.

formation under Article II.<sup>7</sup> Although federal courts have declined to decide whether congressional–executive agreements are constitutional,<sup>8</sup> the practice has continued as an exercise between Congress and the President for decades at least, and now appears to be an accepted fact of constitutional life.

Scholars have long debated the constitutionality of entering into congressional–executive agreements,<sup>9</sup> but little scholarly attention has been paid to the proper constitutional procedure for withdrawing from them.<sup>10</sup> And the statutes that set up the process for congressional–executive agreements contain detailed instructions for how the President and Congress must exercise their constitutional authority in entering into those agreements, but lack instruction about what each Branch may or must do to effect withdrawal or termination. If the statutes are unclear about who may effect withdrawal, is the Executive empowered to fill the gaps? Is there a boundary between executive authority over foreign affairs and legislative authority to regulate foreign commerce that should be preserved when the United States withdraws from trade agreements?

The President’s power to unilaterally withdraw from congressional–executive agreements has important implications for the renegotiation of NAFTA, as well as other trade agreements in an era of growing protectionism. President Trump’s

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7. See *infra* Section II.A.

8. See *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001) (declining on political question grounds to decide constitutionality of entry into NAFTA).

9. E.g., Ackerman & Golove, *supra* note 6; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 3 (2011) (“Ever since their accelerated use began, congressional–executive agreements have encountered serious challenges to their legitimacy.”); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

10. A few have made forays into the arena. See, e.g., Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1336 (2008) (“[T]he President is on the whole likely to find it more difficult to withdraw unilaterally from a congressional–executive agreement than an Article II treaty.”); Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1115 (1990) (arguing that termination of congressional–executive agreements requires participation of Congress). The question has begun to generate more attention recently in light of the Trump Administration’s stated policies. See, e.g., BRANDON J. MURRILL, CONG. RESEARCH SERV., R44630, U.S. WITHDRAWAL FROM FREE TRADE AGREEMENTS: FREQUENTLY ASKED LEGAL QUESTIONS 8–10 (2016) (suggesting that the President may have constitutional authority to terminate free trade agreements unilaterally); Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty 1* (Oct. 20, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015981](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015981) [<https://perma.cc/64BP-35F7>] (arguing that the President lacks constitutional authority to withdraw from NAFTA unilaterally); Zeeshan Aleem, *We Asked 6 Experts if Congress Could Stop Trump from Eliminating NAFTA*, VOX (Oct. 26, 2017, 1:40 PM), <https://www.vox.com/policy-and-politics/2017/10/26/16505508/nafta-congress-block-trump-withdraw-trade-power> [<https://perma.cc/PK33-NYEM>] (presenting a range of expert opinions about the scope of presidential termination authority); Julian Ku & John Yoo, *Opinion, Trump Might Be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html> [<https://perma.cc/P9KC-6B9X>] (arguing that domestic implementation of legal obligations under NAFTA would survive presidential withdrawal from agreement).

threat of withdrawal has been used as a bargaining tool in NAFTA negotiations,<sup>11</sup> and international perception of the legality of unilateral executive action will bear on the weight of that threat in these and any future trade agreement negotiations. If congressional approval is required, that threat is less forceful. The present Republican-controlled Senate may be torn between following their party's President and pleasing their Republican constituencies, which have traditionally supported free trade. And politics of congressional approval are made even more complicated with the Democrats' win of the House in 2018.<sup>12</sup> Although the party has traditionally opposed free trade agreements, Democrats in Congress have no fondness for the current President, either. Serious scholarly (and legislative) attention to the question of legal authority to withdraw from congressional-executive agreements is now imperative and overdue.

#### I. CAN THE PRESIDENT EFFECT WITHDRAWAL AS A MATTER OF INTERNATIONAL LAW?

The first of our five questions is also the easiest. From an international law perspective, effecting withdrawal from NAFTA is (not to be too technical) no big deal. Article 2205 of the Agreement says, in its entirety, "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties."<sup>13</sup> One party sends notice to the other two that it intends to withdraw, and six months later, it's done.

Under international law, Mexico and Canada are entitled—or perhaps obligated—to treat notice by the head of state as authoritative. The Restatement (Third) of Foreign Relations Law of the United States provides that "[a] state is not required to accord formal recognition to the government of another state, but is required to treat as the government of another state a regime that is in effective control of that state."<sup>14</sup> That's getting out of NAFTA, free.

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11. Joshua Partlow, *Mexico Shrugs Off Trump Threats to Scrap NAFTA*, WASH. POST (Aug. 23, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/08/23/mexico-shrugs-off-trump-threats-to-scrap-nafta/?utm\\_term=.c9819378bb09](https://www.washingtonpost.com/news/worldviews/wp/2017/08/23/mexico-shrugs-off-trump-threats-to-scrap-nafta/?utm_term=.c9819378bb09) [<https://perma.cc/2JE2-MT75>]; Ira Shapiro, *NAFTA Withdrawal Looks Likely as Trump Moves Forward with Agenda*, HILL (Nov. 16, 2017, 12:00 PM), <http://thehill.com/opinion/international/360682-nafta-withdrawal-looks-more-likely-as-trump-moves-his-own-agenda> [<https://perma.cc/T2L7-Y7L7>]; Josh Wingrove et al., *Trump's 'Poison Pill' NAFTA Proposals Threaten to Derail Talks*, BLOOMBERG (Oct. 11, 2017, 1:04 PM), <https://www.bloomberg.com/news/articles/2017-10-11/u-s-partners-ponder-life-after-nafta-as-talks-hail-chapter-deal> [<https://perma.cc/4VW2-TF37>].

12. See, e.g., Clare Foran & Daniella Diaz, *Democrats Win Control of the House in 2018 Midterms*, CNN Projects, CNN (Nov. 7, 2018, 2:43 PM) <https://www.cnn.com/2018/11/06/politics/house-control-midterm-election/index.html> [<https://perma.cc/7DEJ-AX4B>].

13. North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

14. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203(1) (AM. LAW INST. 1986); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (stating that in foreign relations, "the President alone has the power to speak or listen as a representative of the nation").

## II. DO THE TRADE STATUTES GIVE THE PRESIDENT UNILATERAL WITHDRAWAL POWER?

The question of which Branch possesses the power to withdraw from congressional–executive agreements has significance for both NAFTA renegotiations and future U.S. trade relations. It is curious, then, that so little attention has been paid to the question by either scholars or Congress when it crafted the statutes that set out congressional–executive agreement procedures governing trade deals. Those statutes include those that established the congressional–executive agreement or “fast track” procedures,<sup>15</sup> the Trade Act of 1974,<sup>16</sup> and the Omnibus Trade and Competitiveness Act of 1988.<sup>17</sup> They also include statutes that extended the President’s fast track authority, most recently the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

This Part examines a number of trade statutes to see how Congress understood the scope of its own power and the Executive’s power to withdraw from trade agreements, and what, if any, termination or withdrawal powers it delegated to the Executive. After some historical background in section II.A., section II.B. searches the Trade Act of 1974 for clues about withdrawal and termination authority. Section II.C does the same for the next significant update of fast track authority, the Omnibus Trade and Competitiveness Act of 1988. Section II.D. looks at Congress’s most recent legislation extending fast track authority.

### A. WHY THE NEED FOR THE TRADE ACT OF 1974?

The Trade Act of 1974 sets up the fast track framework under which congressional–executive agreements like NAFTA were negotiated. Unlike treaties, the congressional–executive agreements authorized by the Trade Act are not submitted by the President for ratification by two-thirds of the Senate. Instead, the Trade Act authorizes the President, for a specific number of years, to negotiate trade agreements consistent with priorities identified by Congress in the authorizing act.<sup>18</sup> The Trade Act requires that the President obtain advice on negotiations

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15. See generally, e.g., DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 102 (2d ed. 2013) (discussing “Fast Track Procedure” in trade agreements); Lael Brainard & Hal Shapiro, *Fast Track Trade Promotion Authority*, 91 BROOKINGS INST. 1 (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/pb91.pdf> (same); Jagdish Bhagwati, *Fast Track to Nowhere*, *ECONOMIST* (Oct. 16, 1997), <http://www.economist.com/node/102730> [<https://perma.cc/BXK3-8MDD>] (same).

16. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101–2487 (2012)).

17. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. §§ 2901–3111 (2012)).

18. 19 U.S.C. §§ 2111, 2114. The President’s authority has been extended several times since 1974. See e.g., Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144; Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 93-99, 99 Stat. 405 (1985); Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933; Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320.



from a variety of parties<sup>19</sup> and brief designated members of Congress during the negotiation process.<sup>20</sup> Once an agreement has concluded, the President must submit the agreement and an implementing bill to Congress.<sup>21</sup> Congress must consider and vote on the bill within a specified period of time, with limited debate, and without amendment.<sup>22</sup>

This procedure was a change from how trade policy was historically made. As discussed more fully in section III.B., from the late eighteenth to the early twentieth centuries, U.S. trade policy was essentially synonymous with tariff policy: Congress set tariffs on imports as the nation's primary source of revenue or wielded tariffs to achieve access to desired markets, and that was pretty much it.<sup>23</sup> Trade policy, then, was essentially a congressional power.<sup>24</sup> In practice, however, the President's power to raise or lower tariffs as a carrot or stick to trade partners typically involved some degree of negotiation with the foreign governments.<sup>25</sup> By 1890, Congress began to give the President some limited power to alter congressionally mandated tariff levels by proclamation.<sup>26</sup> By 1934, President Roosevelt convinced Congress to grant the Executive broader authority to negotiate tariff levels with foreign nations through the Reciprocal Trade Agreement Act (RTAA).<sup>27</sup> That authority was used to enter into a number of bilateral trade agreements, as well as the 1947 multilateral General Agreement on Tariffs and Trade (GATT).<sup>28</sup>

By 1973, however, the tariff-making authority bestowed on the President by the RTAA was insufficient for modern trade agreements. By the Tokyo Round of trade negotiations under GATT, the focus of the parties had shifted from lowering tariffs to eliminating nontariff barriers, such as quotas, product specifications, labeling requirements, and discriminatory administrative burdens.<sup>29</sup> To give the President the authority to negotiate elimination of non-tariff barriers, something more than traditional "tariff proclamation" authority was needed.<sup>30</sup>

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19. 19 U.S.C. §§ 2151–2155.

20. *Id.* § 2211(b).

21. *Id.* § 2191(c)(1).

22. *Id.* § 2191(d)–(g).

23. See Douglas A. Irwin, *Revenue or Reciprocity? Founding Feuds over Early U.S. Trade Policy*, in *FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790s*, at 89–90 (Douglas A. Irwin & Richard Sylla eds., 2010).

24. See *id.* at 89; see also *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994) ("That the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation's ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others."); *infra* Section III.B.

25. See *infra* notes 143–50 and accompanying text.

26. For a discussion of the history of reciprocity provisions in the tariff acts, see *infra* Section III.B.

27. See Reciprocal Trade Agreements Act, Pub. L. No. 73-316, 48 Stat. 943 (1934); see *infra* notes 180–97 and accompanying text.

28. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

29. See *The Impact of Trade Agreements: Effect of the Tokyo Round, U.S.–Israel FTA, U.S.–Canada FTA, NAFTA, and the Uruguay Round on the U.S. Economy 18–22*, Inv. No. TA-2111-1, USITC Pub. 3621 (Aug. 2003) (Final).

30. *Id.* at 14 & n.4.

Congress immediately recognized a constitutional dilemma. As described in a retrospective report of the International Trade Commission, Congress was faced with the task of expanding the President's authority in a way sufficiently broad to negotiate non-tariff barriers, but which did not "abrogate Congress's constitutional powers over international trade or ignore those barriers' impact on the people of the United States."<sup>31</sup>

Congress fashioned a solution in the Trade Act of 1974.<sup>32</sup> Under that statute, Congress authorized the President, for a specific period of time, to negotiate trade agreements extending beyond tariff proclamations to include non-tariff barriers and other issues, such as subsidies. To ensure that the negotiations expressed the will of the people of the United States, the President was obligated to consult with a number of specific congressional committees,<sup>33</sup> as well as other executive agencies and public and private bodies, during the negotiation process.<sup>34</sup> To provide assurances to foreign governments that costly negotiating efforts would not be thwarted by a recalcitrant Congress, the Trade Act of 1974 provided that agreements would be subject to approval by Congress without amendment.<sup>35</sup> This was not the treaty process that frustrated the world and embarrassed the President when the Senate refused to ratify the Treaty of Versailles;<sup>36</sup> trade agreements would be approved, not by a two-thirds majority of the Senate, but by a simple majority of both houses after limited debate.<sup>37</sup>

The committee reports and remarks from the floor during Congress's consideration of the Trade Act of 1974 reveal that Congress viewed the trade agreement power to be its own, and that the expansion of executive power to make trade deals was an express—and limited—delegation of legislative power to the President. For example, in the report of the House Committee on Ways and Means transmitting the bill to the full House for consideration, the committee described the bill as expanding presidential authority over non-tariff trade barriers, unfair trade practices, trade with state trading countries like the Soviet Union, and trade preferences for developing countries.<sup>38</sup> In light of this expansion, the committee immediately addressed separation-of-powers questions. Its solution was an express delegation of congressional authority to the President, with Congress still holding the reins:

[I]t is important to stress that the achievement of these objectives entails a substantial delegation of congressional authority. Accordingly, the bill makes certain procedural reforms, both in terms of the development of an appropriate

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31. *Id.* at 14 & n.6 (citing S. REP. NO. 93-1298, at 75–76 (1974)).

32. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2101–2487 (2012)).

33. *Id.* § 2211.

34. *Id.* §§ 2151–2155.

35. *Id.* § 2191(f)(1), (g)(1).

36. See Hathaway, *supra* note 10, at 1299.

37. See 19 U.S.C. § 2191.

38. See H.R. REP. NO. 93-571, at 1–5 (1973).

oversight role for the Congress and in terms of providing a focal point in the executive branch for carrying out the trade policies jointly agreed upon by the Congress and the President.<sup>39</sup>

In the floor debates, individual members of Congress also emphasized that the President's new authority came from a delegation of legislative power, and that the bill was crafted to ensure constitutional congressional oversight of the use of that power. Representative Ullman, speaking in favor of the bill, assured the members that the bill did not give unfettered power to the President: "In this bill the trade agreement authority is delegated to the President under stricter statutory guidelines and more specific limitations than ever before."<sup>40</sup> He emphasized the bill's "[g]uidelines, limitations, requirements of investigations and public hearings, consultations, disapproval procedures" in support of his argument that "the delegation of authority in this bill is not an unlimited grant."<sup>41</sup> In this way, Representative Ullman said, the bill "preserves the constitutional power of the Congress, and it gives the executive branch strong backing in the forthcoming negotiations" in the Tokyo Round of the GATT.<sup>42</sup>

Reflecting the Cold War environment of the era, the Jackson-Vanik Amendment to the Trade Act of 1974 allowed the President by proclamation to either extend or withdraw nondiscriminatory treatment to the products of Soviet Bloc countries.<sup>43</sup> Testimony from the floor supports the notion that Congress saw the power given to the President under the Jackson-Vanik Amendment as a delegation of congressional authority over foreign commerce. Senator Roth testified that he had an amendment to the amendment drafted that would have allowed Congress, as well as the President, to withdraw or suspend nondiscriminatory treatment to the products of Soviet bloc countries.<sup>44</sup> In describing his amendment, Senator Roth said, "This new congressional authority is in accord with the constitutional provision giving Congress the power to regulate commerce with foreign nations."<sup>45</sup> Ultimately, he decided not to offer the amendment, fearing that it would be "too rigorous" and "might jeopardize the assurances that have already been given."<sup>46</sup> Senator Roth's withdrawal apparently did not reflect any misgivings about the source of the constitutional authority because he urged that the amendment "should be kept in mind in case Congress wishes to adopt it later."<sup>47</sup>

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39. *Id.* at 3–4.

40. 119 CONG. REC. 40,500, 40,501–02 (1973).

41. *Id.* at 40,502.

42. *Id.*

43. 19 U.S.C. §§ 2431, 2434(a), (c) (2012). For discussion of the Jackson-Vanik Amendments as a reflection of U.S. policy toward Soviet Bloc countries, see generally Robert H. Bradner, *The Jackson-Vanik Amendment to the Trade Act of 1974: Soviet Progress on Emigration Reform is Insufficient to Merit a Waiver*, 4 GEO. IMMIGR. L.J. 639 (1990); Michael S. McMahon, *The Jackson-Vanik Amendment to the Trade Act of 1974: An Assessment After Five Years*, 18 COLUM. J. TRANSNAT'L L. 525 (1979).

44. 120 CONG. REC. 39,801 (1974).

45. *Id.* at 33,424.

46. *Id.* at 39,801.

47. *Id.*

## B. WITHDRAWAL AND TERMINATION AUTHORITY IN THE TRADE ACT OF 1974

This was the historical and constitutional context in which the Trade Act of 1974 was passed. What attention did Congress devote to the question of withdrawal and termination? The Trade Act contains one provision devoted to “Termination and Withdrawal Authority.”<sup>48</sup> Section 125 of the Act contains six subsections, each a sentence or two long, and touches on a variety of issues related to withdrawal or termination: withdrawal periods, presidential proclamations, unfair trade remedies, effect of withdrawal on tariffs, and transparency.<sup>49</sup> What section 125 does not expressly deal with is *who* may withdraw from trade agreements. The answer to that question can only be determined by reading between the lines. Though some aspects of section 125 might superficially be construed as supporting unilateral presidential authority to withdraw, the better reading of the statute is that Congress did not intend to delegate such broad authority to the President. In the context of the trade concerns of 1974, the statutory delegation to the President seems designed to meet more narrowly tailored goals and to allow Congress to retain all of its residual authority over the regulation of foreign commerce.

## 1. Who May Withdraw?

Where the Act provides for withdrawal and termination of trade agreements, it does not specify who has the power to take such actions. Section 125(a) of the statute, which provides for termination of or withdrawal from trade deals entered into under the Act, is written in the passive voice—no subject, no actor. Section 125(a) provides:

Every trade agreement entered into under this chapter shall be subject to termination, in whole or in part, or withdrawal, upon due notice, at the end of a period specified in the agreement. Such period shall be not more than 3 years from the date on which the agreement becomes effective. If the agreement is not terminated or withdrawn from at the end of the period so specified, it shall be subject to termination or withdrawal thereafter upon not more than 6 months’ notice.<sup>50</sup>

The first sentence of section 125(a) says that any trade deal entered into under the Act shall be “subject to” termination or withdrawal, but is silent on whose action such withdrawal or termination would be “subject to.” The last sentence says that an agreement may be “subject to” withdrawal or termination upon six months’ notice if it is “not terminated or withdrawn from” during the specified period.<sup>51</sup>

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48. 19 U.S.C. § 2135.

49. *Id.*

50. *Id.* § 2135(a).

51. *Id.*

Did Congress intend the President to effectuate U.S. withdrawal? Such authority is far from obvious in the statutory scheme because section 125(c) sets out a distinction between actions of “the United States” and actions of “the President:”

Whenever *the United States*, acting in pursuance of any of its rights or obligations under any trade agreement . . . withdraws, suspends, or modifies any obligation with respect to the trade of any foreign country or instrumentality thereof, *the President* is authorized to proclaim increased duties or other import restrictions, to the extent, at such times, and for such periods as he deems necessary or appropriate, in order to exercise the rights or fulfill the obligations of the United States.<sup>52</sup>

The statute is ambiguous as to how—by what Branches, in what roles—“the United States” is expected to exercise its withdrawal authority. The distinction between action by the United States and action by the President suggests that Congress contemplated action of “the United States” to mean something other than unilateral presidential power.

Nor does section 125(e), the other subsection that expressly discusses the event of termination or withdrawal, assign that power to any actor. That subsection sets up a default rule that U.S. tariff levels, for one year, “shall not be affected by any termination, in whole or in part, of such agreement or by the withdrawal of the United States from such agreement.”<sup>53</sup> In the next sentence, Congress expressly authorizes certain presidential powers over tariffs in the event of withdrawal, but those powers do not include a general power to withdraw from or terminate an agreement.<sup>54</sup> Indeed, the Trade Act prescribes numerous express presidential powers, but never expressly authorizes the President to withdraw from trade agreements.<sup>55</sup> This omission of any such express authority when the Act discusses withdrawal and termination from trade agreements is conspicuous.

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52. *Id.* § 2135(c) (emphasis added).

53. *Id.* § 2135(e).

54. Section 125(e), codified at *id.*, *permits* the President to override the default rule and return tariffs to their pre-agreement levels for one year; it *requires* the President to submit recommendations as to the appropriate rate of duty within sixty days of termination or withdrawal. *Id.* This requirement to submit recommendations seems to be independent of whether the President proclaims a return to pre-agreement tariff levels: he is required to deliver his recommendation about appropriate rates of duty as to articles for which the President has ordered rates to be returned to pre-agreement levels and also as to articles for which rates remain unaltered by the President. *See id.* This does not seem to allow the President the broad leeway “to decide how much to involve Congress in setting new commercial terms for trade with Mexico and Canada” that Gary Clyde Hufbauer ascribes. *See* Gary Clyde Hufbauer, *Can Trump Terminate NAFTA?*, PETERSON INST. FOR INT’L ECON. (Oct. 10, 2017, 1:00 PM), <https://piie.com/blogs/trade-investment-policy-watch/can-trump-terminate-nafta> [<https://perma.cc/7BTC-HL7B>].

55. *See* 19 U.S.C. § 2135(b) (permitting the President to terminate proclamations made under the Act); *id.* § 2132(a)–(c) (permitting the President to proclaim temporary import surcharges and limitations on imports); *id.* § 2115 (permitting the President the discretion to determine whether bilateral agreements would better benefit the economic interests of the United States).

## 2. Presidential Proclamations Versus Withdrawing from Trade Agreements

Section 125(b) provides the President the authority to “at any time terminate, in whole or in part, any proclamation made under this chapter.”<sup>56</sup> Although this authority is broad, the history of trade negotiation suggests that this is not a general power to withdraw from trade agreements as a whole.

Historically, the President’s power to make proclamations under tariff acts referred to his power to raise or lower duties within certain limits and under certain conditions, against the backdrop of a detailed tariff law passed by Congress.<sup>57</sup> In debates on the Trade Act of 1974, members of Congress described section 125(b) as an uncontroversial continuation of authority that had been delegated to the President under all trade legislation since the RTAA.<sup>58</sup> Although it gave the President an unprecedented number of tools to negotiate reciprocal duties and concessions, it did not alter the primary constitutional allocation of tariff-making that had existed since the Founding: Congress set duties and imposts through tariff laws, and the President was authorized only to raise or lower tariffs (and sometimes other import restrictions) to obtain trade concessions or to punish discrimination against U.S. products.<sup>59</sup>

By 1974, the Trade Act was designed to accomplish something different. Acknowledging that the old congressional tariff laws were a thing of the past in trade negotiations, it gave the President a priori power to negotiate trade deals that dealt primarily with regulatory burdens to trade rather than with tariffs, subject to consultation, advice, review, and approval by Congress.<sup>60</sup>

This distinction between “trade agreements” and “proclamations” is reflected in the structure of the 1974 Act. Section 101(a), which sets out the basic authority for entering into trade agreements, divides the President’s authority between two tools: (1) entering into trade agreements *and* (2) proclaiming tariff modifications. Section 101(a) provides:

Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes of this chapter will be promoted thereby, the President—

- (1) . . . may enter into trade agreements with foreign countries or instrumentalities thereof, and

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56. *Id.* § 2135(b).

57. *See infra* Section III.B.

58. *See* 119 CONG. REC. 40,507 (statement of Rep. Ullman) (“This authority has existed in all prior acts since 1934.”).

59. *See infra* Section III.B.

60. *See supra* notes 18–47 and accompanying text.

- (2) may proclaim such modification or continuance of any existing duty . . . as he determines to be required or appropriate to carry out any such trade agreement.<sup>61</sup>

This distinction between “trade agreements” and the proclamations “required or appropriate to carry [them] out” carries throughout other sections of Title I of the Trade Act.<sup>62</sup> Terminating a proclamation—as provided in section 125(b)—is not the same as terminating or withdrawing from a trade agreement.

Two other subsections authorize the President to raise duties in the exercise of U.S. renegotiation rights under its trade agreements (section 125(c))<sup>63</sup> or in retaliation for suspension of trade concessions by another country without adequate compensation (section 125(d)).<sup>64</sup> These mechanisms—essentially early dispute resolution remedies and renegotiation mechanisms under the pre-World Trade Organization (WTO) GATT—do not appear to represent a wholesale power to withdraw from trade agreements.

### 3. Transparency and Public Participation Requirements

A dark-of-night withdrawal from NAFTA by the President would also violate section 125(f), which requires public participation in any presidential decision taken under section 125. Section 125(f) provides: “[b]efore taking any action pursuant to subsection (b), (c), or (d) of this section, the President shall provide for a public hearing during the course of which interested persons shall be given a reasonable opportunity to be present, to produce evidence, and to be heard,” except where urgent action is needed.<sup>65</sup> Even in cases requiring expediency, the statute requires a prompt hearing.<sup>66</sup> Although “interested persons” is not defined in the statute, it is possible that members of Congress could claim the right to appear and be heard.

At minimum, any presidential action—even a proclamation to raise or lower duties, which the President has been authorized to do since 1934—must be done according to specific procedures under section 125(f). Because Congress required public participation and transparency before the President may take even familiar

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61. 19 U.S.C. § 2111(a).

62. *See id.* § 2133(a) (dividing President’s authority to compensate trade partners for U.S. trade actions between entering trade agreements and proclaiming modification or continuance of duties); *id.* § 2134 (dividing President’s authority for two-year period following expiration of statutory period between entering trade agreements and proclaiming modification or continuance of duties).

63. *Id.* § 2135(c); *see* S. REP. No. 93-1298, at 91 (1974) (negotiations and suspensions contemplated in section 125(c) “now occur mainly where the GATT rules allow a country the right to withdraw or suspend tariff concessions owed to other contracting parties to the Agreement”); *see also* S. COMM. ON FINANCE, 93RD CONG., SUMMARY AND ANALYSIS OF H.R. 10710—THE TRADE REFORM ACT OF 1973, 21 (Comm. Print 1974) (analyzing identical language in earlier version of bill and concluding that “[t]he withdrawal authority provided under paragraph (c) is intended to give the United States leverage to persuade contracting parties to the GATT to modify or eliminate practices which the United States felt violated our rights under this agreement”).

64. 19 U.S.C. § 2135(d).

65. *Id.* § 2135(f).

66. *Id.*

actions, it seems unlikely that Congress intended, without explicit authorization or discussion, to give the President plenary authority to withdraw the United States from trade agreements without consultation.

C. UPDATING PRESIDENTIAL TRADE AUTHORITY: THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988

The Trade Act of 1974 gave the President the necessary authority to negotiate for the United States in the Tokyo Round of the GATT in 1979, which focused more on non-tariff barriers to trade than on the more traditional subjects of tariffs and quantitative import restrictions. In the 1980s, as the United States accumulated unprecedented trade deficits, Congress responded with the Omnibus Trade and Competitiveness Act of 1988 (1988 Act).<sup>67</sup> The 1988 Act, according to one commentator, “tinkered at the margins rather than making fundamental changes.”<sup>68</sup>

The liberal trade policy that had been gaining ascendancy since 1934, with the President at the forefront of negotiations, was maintained in the 1988 Act. The Senate Report on the bill noted that, “[f]or more than 50 years, the President’s authority to negotiate trade agreements has been recognized as the cornerstone of an effective trade policy.”<sup>69</sup> The Senate claimed an agnostic view of the President’s constitutional authority: the Senate Finance Committee justified its decision to renew and revitalize the President’s negotiating authority on the grounds that, “without some Congressional authority to negotiate, the President will be unable to negotiate successfully on trade, whatever his Constitutional prerogatives.”<sup>70</sup> This is because other countries know that trade acts must be implemented by Congress: “[t]he President will be a more effective negotiator to the extent he can assure foreign governments that he is implementing a Congressional directive, since the Congress is more likely to approve action in accordance with what it has directed than action it had no part in formulating.”<sup>71</sup>

In substance, however, the 1988 Act reveals a Congress that viewed itself as holding the power to grant, condition, or deny presidential negotiation authority—a position inconsistent with a model of unilateral presidential authority over trade agreements as part of his foreign affairs power. Although it renewed the President’s fast track trade authority, the Senate Report noted that Congress was “concerned” that observance of the terms of the 1974 Act had “deteriorated badly”—concerns that Congress intended to address “firmly” in the new law.<sup>72</sup> The Report introduced two new mechanisms, both of which are exercises of congressional control over presidential negotiating authority. First, the bill contained “provisions designed to assure that consultative mechanisms—

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67. See I.M. Destler, *U.S. Trade Policy-Making in the Eighties*, in *POLITICS AND ECONOMICS IN THE EIGHTIES* 251, 270–73 (Alberto Alesina & Geoffrey Carliner eds., 1991).

68. *Id.* at 252.

69. S. COMM. ON FINANCE, OMNIBUS TRADE ACT OF 1987, S. REP. NO. 100-71, at 5 (1st Sess. 1987).

70. *Id.*

71. *Id.*

72. *Id.*



especially close consultation with the Congress—are given new life.”<sup>73</sup> If Congress is not satisfied with the Administration’s consultation process, it has the authority under the 1988 Act to “revoke the negotiating authority using streamlined legislative procedures.”<sup>74</sup> Second, the Senate Committee “provided a variety of powers intended to give the President leverage in . . . negotiations, including the power to switch [from multilateral] to bilateral negotiations”<sup>75</sup>—a power that would not have to be “provided” by Congress if Congress believed it were inherent in the President’s foreign affairs powers.

This presumption of legislative control is reflected in the 1988 Act’s termination provision, section 1105. Section 1105(a) incorporates the termination-and-withdrawal provision of the 1974 Act by declaring that an agreement entered into under the 1988 Act shall be treated as if it were entered into under the 1974 Act.<sup>76</sup> Section 1105(b) also contains a new termination provision that reflected the driving concern of the era, negative trade balance with “major industrial countries,” which includes Canada, the European Communities (EC), EC member states, Japan, or any other country designated by the President.<sup>77</sup> Under that provision, the President is authorized to determine whether any of the major industrial countries has denied U.S. commerce “substantially equivalent competitive opportunities” by denying concessions owed under trade agreements entered into under the Act.<sup>78</sup>

The remedy, however, is not left to the discretion of the President. If the President finds such a denial of “[r]eciprocal [n]ondiscriminatory [t]reatment,” the Act requires the President to recommend that *Congress* take action to terminate.<sup>79</sup> The terminating actions that the President is to recommend to Congress here are sweeping, effectively ending a U.S. trade agreement with the country in question: Section 1105(b)(2)(A) is a presidential recommendation that Congress pass legislation terminating or denying benefits of trade concessions entered into under the Act.<sup>80</sup> Under the Act, such legislation may include agreements about duties and other import restrictions as well as agreements about non-tariff barriers to trade.<sup>81</sup> Section 1105(b)(2)(B) is a presidential recommendation that Congress

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73. *Id.* at 6.

74. *Id.*; see also 19 U.S.C. § 2903(c)(1)(E) (2012) (providing that fast track procedures shall not apply if both chambers agree that the “President has failed or refused to consult with Congress on trade negotiations and trade agreements”); *id.* § 2903(c)(2) (providing that fast track procedures shall apply where president has failed to consult with and provide sixty-days notice to the Senate Finance Committee and the House Ways and Means Committee or those Committees disapprove of negotiations within sixty days).

75. S. REP. NO. 100-71, at 6 (1987).

76. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1105(a) 102 Stat. 1107, 1132–33 (codified as amended at 19 U.S.C. § 2904(a) (2012)).

77. 19 U.S.C. § 2904(b)(3).

78. *Id.* § 2904(b)(1).

79. *Id.* § 2904(b)(2).

80. *Id.* § 2904(b)(2)(A).

81. *Id.* § 2904(a) (authorizing President to negotiate trade agreements regarding tariff barriers and to proclaim modification or continuance of duties or excise treatments); *id.* § 2904(b) (authorizing President to enter into agreements regarding non-tariff barriers).

pass “legislation providing that any law necessary to carry out any trade agreement under [the 1988 Act] not apply to such country.”<sup>82</sup> This is to be regular legislation; the Act contains no provisions providing special procedures for consideration or passage of such legislation recommended by the President.

In this special case of discriminatory treatment by its trading partners in the 1980s, Congress provided for a bilateral termination process: the President would make findings of imbalance in “competitive opportunities” and recommend termination to Congress, but Congress would retain the power (which it must have believed it possessed in the first place) to terminate both trade concessions and implementing legislation through ordinary legislation.<sup>83</sup>

#### D. CONGRESSIONAL CONTROL IN THE BIPARTISAN CONGRESSIONAL TRADE PRIORITIES AND ACCOUNTABILITY ACT OF 2015

Similarly, the 2015 iteration of fast track authority under which the NAFTA renegotiations are proceeding is silent about withdrawal and termination authority, and thus provides no direct guidance on the question.<sup>84</sup> The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 does, however, support the general principle of congressional control and oversight over trade agreements. Similar to the 1988 Act, the 2015 Act provides that the fast track implementing procedures in Congress will not apply where the President has not complied with detailed notification and consultation provisions to Congress and other parties as described in the Act.<sup>85</sup> Section 104 of the Act outlines five pages of requirements for “Congressional Oversight, Consultations, and Access to Information.”<sup>86</sup> Section 105 contains another eight pages of notice, consultation, and reporting requirements to Congress as a whole and to specific congressional committees before, during, and after negotiations.<sup>87</sup>

### III. DOES THE PRESIDENT HAVE CONSTITUTIONAL AUTHORITY TO WITHDRAW FROM TRADE AGREEMENTS?

So far, the answers to our first two questions tell us that (1) the President has the power to deliver a notice of withdrawal that Mexico and Canada would likely recognize, but (2) Congress did not make any clear delegation of authority to the President to withdraw from trade agreements formed under the fast track procedure. That brings us to our third question: even lacking clear congressional authorization, does the President nevertheless have the inherent constitutional

82. *Id.* § 2904(b)(2)(B).

83. *Id.* § 2904(b).

84. *See generally* Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, tit. I, 129 Stat. 320 (codified as amended at 19 U.S.C. §§ 4201–4210 (Supp. IV 2016)) (passed as part of the Defending Public Safety Employees’ Retirement Act). The issue is of only prospective interest, because termination of the existing NAFTA would be governed by the 1974 and 1988 Acts under which it was negotiated and implemented.

85. 19 U.S.C. § 4205(b)(1).

86. *Id.* § 4203. The number of pages refers to pagination in the public law within section 104 of the Omnibus Trade and Competitiveness Act of 1988.

87. *Id.* § 4204.

authority to legally effect withdrawal of the country from international agreements?

This question requires inquiry into the intersection between two separate sources of constitutional authority. Under Article I, Section 8, Clause 3, Congress has the power “to regulate Commerce with foreign Nations.”<sup>88</sup> At the same time, Article II gives the President several express powers relating to foreign affairs.<sup>89</sup> To understand the relative constitutional powers of these two Branches over trade agreements, this Part considers the law describing those Article I and Article II powers and the history of U.S. withdrawal from trade agreements. From the law, we can glean the outlines of the constitutional division of power between the Legislative and Executive Branches. From the history, we can gain an empirical understanding of how Congress and the President have traditionally understood that division, based on what they have actually done.

#### A. DEFINING THE BOUNDARIES OF THE FOREIGN AFFAIRS AND FOREIGN COMMERCE POWERS

Traditionally, and particularly in the middle of the twentieth century, the Supreme Court interpreted the President’s authority over foreign affairs expansively, in sweeping rhetoric that was invoked by the Executive to justify nearly unfettered control over any decisions touching on foreign policy. In more recent cases, however, the Court has curtailed the President’s foreign affairs authority, demonstrating a more careful balancing of the foreign affairs power of the President and the foreign commerce power of Congress.<sup>90</sup> These more recent cases help to demonstrate the limits of the Executive’s broad, but not plenary, authority over matters that touch on foreign affairs.

##### 1. The Limits of the “Sole Organ” Doctrine

The Court’s most sweeping statement about the breadth of the Executive’s foreign affairs power was in *United States v. Curtiss–Wright Export Corp.* There, the Court famously proclaimed that “[i]n this vast external realm, with its

88. U.S. CONST. art. I, § 8, cl. 3.

89. The Supreme Court has found the President’s authority as the sole “voice” of the United States to be located in the Commander-in-Chief powers in *id.* art. II, § 2; the Treaty Clause in *id.* art. II, § 2, cl. 2; and the ambassador powers in *id.* art. II, § 3. *See, e.g.*, *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) (“In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.”); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (finding that “the Executive had authority to speak as the sole organ of [the federal] government” when recognizing and settling U.S. nationals’ claims against the Soviet government); *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President alone has the power to speak or listen as a representative of the nation.”). *But see, e.g.*, Sarah H. Cleveland, Crosby and the “One-Voice” Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 979 (2001) (“[A]lthough the ‘one-voice’ doctrine has lengthy roots in the case law, the Constitution ensures that the national government will speak at least as a trio in the foreign relations area.”); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 955 (2014) (arguing that the one-voice doctrine “partially captures constitutional principles” but is to a greater extent “inconsistent with constitutional text, structure, and history”).

90. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”<sup>91</sup> Indeed, the Court continued, “[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”<sup>92</sup> This is the source of the “sole organ” rhetoric, so often quoted by government attorneys that it has become cliché.<sup>93</sup> The Court derived its “sole organ” language from Representative John Marshall’s speech before Congress in 1800.<sup>94</sup> Marshall may have drawn his opinion from international law of the time, which required that nations have a single “representative authority” to act as its representative with other nations.<sup>95</sup>

The Court has supplied a generous amount of rhetoric to support claims by the Executive of near-omnipotence over anything related to foreign affairs. The Court has cited the President’s “vast share of responsibility for the conduct of our foreign relations,”<sup>96</sup> his “lead role . . . in foreign policy,”<sup>97</sup> the “powers conferred by the Constitution on him as Commander-in-Chief and as the Nation’s organ in foreign affairs”<sup>98</sup> and even his “authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress.”<sup>99</sup>

However, most of the often-cited cases for the “sole organ” or “one voice” doctrine did not involve conflicts between the political Branches at all. In *Curtiss–Wright*, the respondent challenged an indictment issued pursuant to a presidential proclamation against arms sales to Bolivia.<sup>100</sup> There was no dispute that the President’s proclamation was expressly authorized by a Joint Resolution from Congress; respondents’ challenge was based on the nondelegation doctrine that prohibits Congress from delegating the lawmaking power to any other Branch.<sup>101</sup> Numerous other cases focused on the power of the President—representative of the *federal* government—to preempt *state* action.<sup>102</sup>

91. 299 U.S. at 319.

92. *Id.*

93. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 94 (1990) (“Among government attorneys, Justice Sutherland’s lavish description of the president’s powers is so often quoted that it has come to be known as the “‘*Curtiss–Wright*, so I’m right” cite’ . . .”).

94. *Curtiss–Wright*, 299 U.S. at 319 (quoting 6 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall)).

95. See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1012–13, 1013 & n.61 (2013) (citing QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 15 (1922)).

96. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

97. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion).

98. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948).

99. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003).

100. *Curtiss–Wright*, 299 U.S. at 311–13.

101. *Id.* at 314–15; see also *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 73, 75 (1993) (holding Tennessee shipping container tax not preempted by federal shipping taxation scheme nor opposed by Executive Branch as in prior cases); *Chi. & S. Air Lines, Inc.*, 333 U.S. at 109–10 (refusing to review denial of certificate for public air transport route granted by the President pursuant to federal statutory scheme).

102. See, e.g., *Garamendi*, 539 U.S. at 401, 419–20 (finding California’s Holocaust Victim Insurance Relief Act preempted as an impermissible interference with the President’s conduct of foreign affairs);

Yet where the President's foreign affairs power brushes up against the foreign commerce power, the Court has made clear that its "one voice" rhetoric should not be taken as bestowing power *carte blanche* to the Executive in all matters involving foreign affairs. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, for example, the Court expressly rejected the Executive's argument that the President "has 'exclusive authority to conduct diplomatic relations,' along with 'the bulk of foreign-affairs powers.'"<sup>103</sup> Instead, the Court emphasized that Congress, as the law-making branch, also retained a role in foreign affairs:

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation's foreign policy.<sup>104</sup>

Although the Court ultimately decided that the President has exclusive authority to recognize a foreign government, that conclusion was only made after detailed analyses of both caselaw and historical practice.<sup>105</sup>

Not all cases involving inter-branch conflicts over foreign policy have come out in the President's favor. In *Medellin v. Texas*, the Court held that the President could not unilaterally implement a decision by the International Court of Justice that the United States had violated the Vienna Convention, a non-self-executing treaty.<sup>106</sup> The Court rejected the President's argument that he was "uniquely qualifie[d]" to make the "sensitive foreign policy decisions" involved in complying expeditiously with the ICJ decision.<sup>107</sup> Instead, the Court held that "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."<sup>108</sup> The Court found that role to emanate from the Treaty Clause, which gives shared responsibility over treaties to the President and the Senate.<sup>109</sup> Moreover, the Court reasoned that Congress's share in this authority was constitutionally unremarkable: "It should not be surprising that our Constitution does not contemplate vesting such power in the Executive alone. As Madison explained in *The Federalist No.*

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*Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375, 380–86 (2000) (finding Massachusetts law prohibiting trade with Burma preempted by federal statutory scheme affording discretion to President to make policy); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285–86 (1976) (neutral ad valorem state taxes not within Import–Export Clause prohibition on tariffs by states); *Brown v. Maryland*, 25 U.S. 419, 424–25 (1827) (interpreting Import–Export and Foreign Commerce Clauses to prohibit discriminatory taxation by states after importation of taxed items).

103. 135 S. Ct. 2076, 2089 (2015) (quoting the Secretary of State's brief).

104. *Id.* at 2090 (citations omitted).

105. *See id.* at 2083–94.

106. 552 U.S. 491, 497–99 (2008).

107. *Id.* at 523–24 (quoting the government's brief).

108. *Id.* at 525–26.

109. *See id.* at 526.

47, under our constitutional system of checks and balances, ‘[t]he magistrate in whom the whole executive power resides cannot of himself make a law.’”<sup>110</sup>

Maintaining a role for Congress in the withdrawal from congressional–executive trade agreements should be similarly unsurprising, because trade deals historically were as much a function of Congress’s Foreign Commerce Clause authority as of the President’s foreign affairs authority. In *Barclays Bank PLC v. Franchise Tax Board*, the Court recognized that “[t]he Constitution expressly grants Congress, not the President, the power to ‘regulate Commerce with foreign Nations.’”<sup>111</sup> The Court relied on this principle to disregard as irrelevant the Executive’s disapproval of California’s method of taxing multinational corporations, despite the potential foreign policy implications of that practice.<sup>112</sup> Congress’s apathy to an executive policy preference, the Court concluded, was not evidence that California’s tax interfered with the nation’s ability to speak with one voice, but was “rather evidence that the preeminent speaker decided to yield the floor to others.”<sup>113</sup>

The Court has recognized that Congress’s power over foreign commerce is broader than its power over interstate commerce. In *Japan Line, Ltd. v. County of Los Angeles*, the Supreme Court set aside a California tax on cargo containers that were based, registered, and subject to tax in Japan as a violation of Congress’s power to regulate commerce with foreign nations.<sup>114</sup> The Court determined that although the Domestic Commerce Clause and the Foreign Commerce Clause were stated in parallel phrases in Article I, “there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”<sup>115</sup> The Court also found support in the Import–Export Clause,<sup>116</sup> which provides that “[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws.”<sup>117</sup> The Court drew from its earlier precedent interpreting the Import–Export Clause in the context of a tax on domestic commerce.<sup>118</sup> In *Michelin Tire Corp. v. Wages*, the Court held that the Import–Export Clause did not prohibit a state ad valorem property tax that was applied in a non-discriminatory fashion to both goods upon import and imported goods that

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110. *Id.* at 527–28 (quoting THE FEDERALIST NO. 47, at 326 (James Madison) (J. Cooke ed., 1961)).

111. 512 U.S. 298, 329 (1994) (quoting U.S. CONST. art. I, § 8, cl. 3); *see also* *Intel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring) (“[The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.”).

112. *See Barclays Bank*, at 328–30.

113. *Id.* at 329.

114. 441 U.S. 434, 451–52 (1979).

115. *Id.* at 448.

116. *Id.* at 449 n.14.

117. U.S. CONST. art. I, § 10, cl. 2.

118. *See Japan Line*, 441 U.S. at 449 n.14 (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285–86 (1976)).

are no longer in import transit.<sup>119</sup> Relying on this precedent the Court in *Japan Line* extended the “one voice” reasoning to support broad congressional authority over foreign commerce, stating that “[t]he need for federal uniformity is no less paramount in ascertaining the negative implications of Congress’ power to ‘regulate Commerce with foreign Nations’ under the Commerce Clause.”<sup>120</sup>

## 2. Applying the *Youngstown* Framework

Apart from these broad statements of the scope foreign affairs and foreign commerce authority, Justice Jackson’s concurring opinion in *Youngstown* offers a test to delineate the President’s foreign affairs power from Congress’s power to regulate foreign commerce.<sup>121</sup> Under the tripartite *Youngstown* framework, the President’s authority is greatest when he acts pursuant to express or implied congressional authorization, “for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>122</sup> Where Congress has been silent on the matter, presidential action occurs in a “zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>123</sup> In these situations, outcomes are likely to be more pragmatic, turning on the “imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>124</sup> Finally, when the President’s actions are “incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>125</sup> *Youngstown*’s three categories are treated below in reverse order of potential applicability to presidential withdrawal from NAFTA.

### *a. First Youngstown Category: Acting According to the Express or Implied Will of Congress*

There is room for debate as to how a court would apply this framework to unilateral presidential withdrawal from NAFTA. The first category is probably the easiest to eliminate: for all of the reasons discussed in Parts II and IV of this Article, the President lacks a strong argument that the fast track statutory framework or the NAFTA Implementation Act give him express or implied authority to withdraw from NAFTA without congressional consent.

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119. 423 U.S. at 285–86.

120. 441 U.S. at 449 n.14 (quoting U.S. CONST. art. I, § 8, cl. 3).

121. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson J., concurring). Justice Jackson’s concurrence was explicitly adopted by the Court in *Dames & Moore v. Regan*, 453 U.S. 654, 661–62 (1981). The Court has continued to apply this analytical framework in subsequent cases. E.g., *Medellin v. Texas*, 552 U.S. 491, 524–25 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006).

122. 343 U.S. at 635 (Jackson, J., concurring).

123. *Id.* at 637.

124. *Id.*

125. *Id.*

*b. Third Youngstown Category: Presidential Measure Incompatible with Congressional Will*

It is possible that a court would view unilateral presidential withdrawal as falling within Justice Jackson's third category—a measure “incompatible with the expressed or implied will of Congress.”<sup>126</sup> Although Congress has not expressly spoken on the question of presidential withdrawal, the statutory regime may be read fairly to imply a dual-branch mechanism for withdrawal or termination.<sup>127</sup> First, the Trade Act of 1974 and the Omnibus Act of 1988 carefully prescribe the cooperative authority of both Branches when entering into trade agreements, implying the contemplation of a cooperative exit strategy as well.<sup>128</sup> Second, the legislative histories of both fast track statutes illustrate that members of Congress viewed the constitutional authority for trade agreements to be a fundamentally legislative power and consciously withheld any authority not expressly granted to the President.<sup>129</sup> And finally, as discussed more fully in Part IV, the NAFTA Implementation Act incorporates a Statement of Administration Action, in which the President makes representations—in the only circumstances where withdrawal is expressly discussed—to withdraw from NAFTA only after “thorough consultation” with Congress.<sup>130</sup>

Moreover, the history of presidential use and expansion of trade agreement authority demonstrates that presidents, as well as Congress, have always viewed the trade agreement authority as a legislative power and, consequently, have petitioned Congress to expand the executive role when additional authority was sought.<sup>131</sup> This view of the relative constitutional powers of each Branch is supported by the writings of international law experts from the early days of the expansion of presidential trade authority. Writing in 1922, Quincy Wright identified the President's authority to make trade agreements as a function of his role as head of the Executive with the power to execute the nation's laws.<sup>132</sup> Wright stated that the President, “[i]n this capacity, . . . may only make international agreements, under authority expressly delegated to him by Congress, or the treaty power, or agreements of a nature which he can carry out within the scope of existing legislation.”<sup>133</sup>

Moreover, the Executive cannot fall back on his independent constitutional powers where his action would contradict the express or implied will of

126. *Id.*

127. *See supra* Part II.

128. *See supra* notes 48–83 and accompanying text.

129. *See supra* notes 38–47, 72–75 and accompanying text.

130. *See* EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATION ACTION, H.R. DOC. NO. 103-159, at 7 (1993) (approved by Congress in NAFTA Implementation Act, Pub. L. No. 103-82, § 101(a)(2), 107 Stat. 2057, 2061(codified at 19 U.S.C. § 3311(a)(2) (2012)) (providing that the Administration after consultation with Congress would cease to apply NAFTA to Canada or Mexico if either country withdrew from the labor or environmental side agreements).

131. *See infra* Section III.B.

132. WRIGHT, *supra* note 95, at 235–36.

133. *Id.* at 236.



Congress. In *Hamdan v. Rumsfeld*, the Court quickly dismissed the argument that the President might rely on his independent powers as Commander-in-Chief to ignore limitations placed by Congress on the establishment of procedures for military commissions.<sup>134</sup>

*c. Second Youngstown Category: Presidential Action and Congressional Silence*

Finally, a court may view the statutory framework as merely silent on the question of withdrawal power, in which case Justice Jackson's second category would come into play. In this category, the President's foreign affairs power might be seen as competing with Congress's power to regulate foreign commerce. In recent cases, the Court has narrowed, and possibly eliminated, presidential authority in Justice Jackson's zone of twilight.<sup>135</sup> In *Medellin v. Texas*, the President argued that his memorandum requiring state courts to comply with a decision of the International Court of Justice was justified under the President's independent foreign affairs powers, though Congress had not spoken on the question at issue.<sup>136</sup> Applying Jackson's *Youngstown* framework, the Court first noted that only Congress, not the President, had the authority to implement non-self-executing treaties.<sup>137</sup> Next, the Court rejected the argument that the President might rely on his foreign affairs powers.<sup>138</sup> The Court reasoned that the Administration's reliance on the jurisprudence on presidential settlement of international claims was mistaken because, in that context, there was "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."<sup>139</sup> By way of illustration, the Court quoted language from *American Insurance Ass'n v. Garamendi*, approving a practice of executive

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134. 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."). This rule is limited to cases in which Congress has its own source of constitutional authority over the matter at issue and the President's authority is not exclusive. *Cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (invalidating as violating the Executive's exclusive power to recognize foreign governments a federal statute requiring the Department of State to list "Israel" on passports as the birth place of citizens born in Jerusalem).

135. Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 679–91 (2009).

136. 552 U.S. 491, 523–24, 530–32 (2008).

137. *Id.* at 525–29. The Court reasoned that the Treaty Clause divides the treaty power between the President, who makes treaties, and the Senate, which ratifies them. *See id.* at 526. If the President wishes a treaty to be self-executing, he must make that plain in the language of the document. *Id.* If he fails to do that, only Congress has the power to implement the treaty pursuant to its general lawmaking powers under Article I, Section 7. *Id.* at 526–27.

138. *Id.* at 530–32.

139. *Id.* at 531 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). Although the Court attributed the quote to *Dames & Moore*, in which the Court adopted the rhetoric in its holding, the language is from Justice Frankfurter's concurrence in *Youngstown*. *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

claims settlement “[g]iven the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history.”<sup>140</sup>

This is problematic for President Trump if he wishes to unilaterally terminate NAFTA under his independent foreign affairs powers without congressional authorization. Far from having a two-hundred-year pedigree, unilateral presidential withdrawal from congressional–executive trade agreements is unprecedented.<sup>141</sup> Even the more limited reciprocity agreements of an earlier era, which were not congressional–executive agreements like NAFTA, were terminated by *Congress* in subsequent tariff acts, not the President (except where termination was accomplished under the RTAA by a simple withdrawal of a presidential proclamation adjusting tariffs).<sup>142</sup>

B. A BRIEF HISTORY OF TRADE DEALING (AND THAT AWKWARD BUSINESS OF WITHDRAWAL)

In the pre-GATT era, Congress set trade policy through a tariff act once or twice every decade. Indeed, “the tariff” was the stuff that could make or break careers among congressmen. Writing in 1940, Arthur Feiler repeated a story about a senior member of Congress advising a rookie on how to succeed on the Hill: “His whole wisdom was concentrated in the simple sentence: ‘Study the customs tariff law, young man; that is the essence of politics.’”<sup>143</sup>

Arthur Feiler’s story pointed to the primacy of special interest groups and regional constituencies over national unity.<sup>144</sup> Trade policy was the province of Congress, and one of its most important. This section offers a brief overview of that history, with special attention to actions of Congress and the President

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140. *Medellin*, 552 U.S. at 531 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003)). This narrowing or closing of Justice Jackson’s zone of twilight by the Court in *Medellin* is consistent with the Court’s deployment of the nondelegation doctrine. Although no modern statutes have been struck down on nondelegation grounds, where Congress has not defined the Executive’s role in a traditionally legislative arena, the Court will rely on the nondelegation doctrine to read statutes narrowly to deny executive power to act. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Indus. Union Dep’t, AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336 (1974); *Kent v. Dulles*, 357 U.S. 116 (1958); *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (explaining the Court enforces its “nondelegation doctrine by narrowly construing administrative statutes”). *But see* David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 2 (2002) (“Judicial reliance upon the nondelegation doctrine as a source of constitutional authority to revise regulatory statutes could aggrandize the judiciary at the expense of the more democratic branches of government, and could significantly affect public law.”).

Although not entirely congruent, the nondelegation doctrine and the second *Youngstown* category address a similar situation: when the Executive acts on what is understood to be a legislative power with little or no guidance from Congress. Both the use of the nondelegation doctrine as a narrowing principle of statutory construction, and the closing off of the second *Youngstown* category in *Medellin*, may be understood as judicial mechanisms to limit executive encroachments on legislative powers.

141. *See infra* Section III.B.

142. *See infra* Section IV.B.

143. Arthur Feiler, *The Trade Agreements Act*, 9 AM. SCHOLAR 133, 133 (1940).

144. *Id.*

concerning withdrawal from trade agreements. The actions demonstrate that both Branches considered withdrawal from trade deals to be a legislative prerogative.

Prior to 1890, many trade agreements were made by treaty—negotiated by the President and submitted to the Senate for ratification.<sup>145</sup> Although these agreements were rarely ratified,<sup>146</sup> the procedure under which they were negotiated was expressly provided for in the Treaty Clause. Beginning in 1890, however, Congress included provisions in its tariff acts that gave the President authority, either expressly or by operation, to adjust certain tariffs through negotiations with trade partners to obtain better treatment for U.S. exports.<sup>147</sup> Some statutes specifically allowed the President to enter into commercial treaties for tariff breaks. For example, the Dingley Tariff of 1897 authorized the President to make treaties lasting up to five years that would lower duties by up to twenty percent, or completely eliminate tariffs on any products that the United States did not produce in quantity, such as products of tropical agriculture.<sup>148</sup> Other statutes provided for mechanisms that effectively triggered negotiations. The McKinley Act of 1890, for example, provided for duty-free imports of sugar, molasses, coffee, tea, and raw hides, but allowed the President to impose specified duties on those products from any country that imposed “reciprocally unequal and unreasonable” duties on U.S. products—in light of the duty-free treatment afforded by Congress.<sup>149</sup> The Payne–Aldrich Act of 1909 proposed a schedule of maximum tariffs and authorized the President to lower duties up to twenty-five percent for products of countries that did not “unduly discriminate” against U.S. products.<sup>150</sup> In 1922, the Fordney–McCumber Act included a “flexibility” provision that allowed the President to raise or lower tariffs by up to fifty percent if the U.S. Tariff Commission found it necessary to equalize the costs of production between domestic and foreign products.<sup>151</sup> That Act also included a provision that gave the President absolute discretion to impose penalties on countries that

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145. See U.S. TARIFF COMM'N, RECIPROCITY AND COMMERCIAL TREATIES 9, 21 (1919).

146. See *id.*; see also DOUGLAS A. IRWIN, CLASHING OVER COMMERCE 309 tbl.6.4 (2017) (compiling reciprocity treaties and agreements).

147. *E.g.*, McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612 [hereinafter McKinley Act]; Dingley Tariff of 1897, ch. 11, §§ 3, 4, 30 Stat. 151, 203–05 [hereinafter Dingley Act]; Payne–Aldrich Tariff Act of 1909, ch. 6, §§ 2, 4, 36 Stat. 11, 82–83 [hereinafter Payne–Aldrich Act]; Underwood Tariff Act of 1913, ch. 16, § 4, 38 Stat. 114, 192; Fordney–McCumber Act of 1922, ch. 356, §§ 315, 317, 42 Stat. 858, 941–46 [hereinafter Fordney–McCumber Act]; Smoot–Hawley Tariff Act of 1930, ch. 497, §§ 336, 338 [hereinafter Smoot–Hawley Act], 46 Stat. 590, 701–06; Reciprocal Trade Agreements Act of 1934, ch. 474, § 350(a), 48 Stat. 943, 943–44.

148. Dingley Act, §§ 3–4, 30 Stat. at 203–05.

149. McKinley Act, § 3, 26 Stat. at 612; see also Dingley Act § 3, 30 Stat. at 203–04 (authorizing the President to impose duties on the goods of states that impose any kind of duty on U.S. exports); Smoot–Hawley Act, §§ 336, 338, 46 Stat. at 701–06.

150. See Payne–Aldrich Act, § 2, 36 Stat. at 82–83 (setting minimum–maximum tariff schedule). This provision differed from the McKinley and Dingley Acts’ reciprocity provisions by making presidential proclamations operate as a carrot instead of a stick to secure lower tariffs on U.S. products abroad.

151. Fordney–McCumber Act of 1922, § 315, 42 Stat. at 941–43.

discriminated against U.S. exports.<sup>152</sup> The effect of these provisions was to induce foreign sovereigns, worried about potential tariff hikes, to negotiate and strike deals with the United States to avoid being punished.<sup>153</sup>

These “reciprocity” and “flexibility” provisions began when, in 1890, some political interests in the United States started to call for a retreat from the nineteenth-century policy of protectionism.<sup>154</sup> In his annual address just before the 1888 presidential campaign, incumbent President Grover Cleveland stimulated the “Great Debate” by calling for an end to protectionist tariffs.<sup>155</sup> Although Cleveland lost that election to protectionist Republicans,<sup>156</sup> the new Secretary of State, James G. Blaine, convinced President Benjamin Harrison that the protectionist McKinley Tariff should include a reciprocity provision.<sup>157</sup> The United States faced stiff competition from European producers in Latin American trade markets, and Blaine saw the reciprocity power as a means to secure better treatment of U.S. products in Latin America.<sup>158</sup>

Although different Congresses were responding to different political and economic pressures between 1890 and 1930, provisions authorizing the President to raise or lower tariffs from the levels set by Congress appeared in nearly every tariff act during that time.<sup>159</sup> Presidents had negotiated agreements under these provisions to obtain reciprocal benefits and avoid penalties.<sup>160</sup> This presented an obvious question when Congress removed the previous presidential authority: what was to become of the agreements entered into by the president pursuant to that old authority?

### 1. Executive Insistence on Limited Executive Power

This question vexed Congress when it passed the Wilson–Gorman Tariff Act in 1894, which repealed the reciprocity provisions in section 3 of the McKinley

152. *Id.* § 317, 42 Stat. at 944–45.

153. *See, e.g.*, Letter from James G. Blaine, Sec’y of State, Dep’t of State, to Senhor Mendonça (Nov. 3, 1890), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 43, 43–44 (1891) (“I should be glad if you could advise me of the changes which Brazil would be willing to make in her system of tariff duties, in response to the changes proposed in the tariff of the United States which are favorable to your country.”).

154. *See* DAVID A. LAKE, POWER, PROTECTION, AND FREE TRADE 99–100 (1988) (summarizing the early stages of this debate).

155. *See* IRWIN, *supra* note 146, at 258–60.

156. *Id.* at 261–63.

157. *See* DAVID HEALY, JAMES G. BLAINE AND LATIN AMERICA 164–65 (2001) (“President Harrison . . . at first gave Blaine’s reciprocity program only limited support. . . . Before long, however, Blaine’s persuasion and the demands of western farmers moved the president firmly into the reciprocity camp.”).

158. IRWIN, *supra* note 146, at 304.

159. *See supra* note 147. The principal exception was the Wilson–Gorman Tariff Act of 1894, ch. 349, § 71, 28 Stat. 509, 569 [hereinafter Wilson–Gorman Act], which eliminated the reciprocity provision of the McKinley Act without adding any new authority for the President to adjust tariffs.

160. *See Extension of Reciprocal Trade Agreements Act: Hearings on H.R. 1211 Before the S. Comm. on Fin.*, 81st Cong. 1095–1121 (1949) (reprinting exchanges of diplomatic notes for twelve reciprocity agreements negotiated under McKinley Act between 1844 and 1934); U.S. TARIFF COMM’N, *supra* note 145, at 26–32 (describing reciprocity agreements entered into under statutory authority from 1890 to 1919).

Act.<sup>161</sup> Reciprocity had become unpopular among Democrats, now in the majority of each chamber, who were unexcited by the souring of diplomatic relations with many U.S. trade partners as a result of section 3's retaliatory effects.<sup>162</sup> The House Committee on Ways and Means (the Committee) initially expressed the view that the new tariff bill intended "to repeal *in toto* section 3 of the tariff act."<sup>163</sup> The Committee expressed both constitutional and diplomatic objections to the old section 3, noting that it did not "believe that Congress can rightly vest in the President of the United States any authority or power to impose or release taxes on our people by proclamation or otherwise, or to suspend or dispense with the operation of a law of Congress."<sup>164</sup> The Committee's constitutional objection is surprising in light of the Supreme Court's decision the previous year, in *Marshall Field & Co. v. Clark*, rejecting the argument that Section 3 was an impermissible delegation of the legislative power to the President.<sup>165</sup> The House did not go so far as to say, however, that repeal of section 3 of the McKinley Act would abrogate the existing agreements negotiated under its authority. In fact, the Chairman of the Committee stated on the House floor that repeal of section 3 would merely remove the President's discretion to issue future proclamations of retaliation—and thus remove trade partners' incentives to negotiate future deals—rather than repudiate any existing agreements.<sup>166</sup> Although the Committee felt that repealing the McKinley Act itself removed the President's prospective retaliation authority, it took a belt-and-suspenders approach, passing an amendment introduced by the Chairman that specifically provided for the repeal of section 3.<sup>167</sup>

However, if passed, the practical effect of the House amendment would have been to end the existing agreements. Once the President lacked authority to proclaim unjust and unreasonable discrimination and trigger higher duties, the

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161. Wilson-Gorman Act, §71, 28 Stat. at 569. The following discussion of the McKinley Act repeal is guided by a 1996 report by the U.S. Tariff Commission. See U.S. TARIFF COMM'N, *supra* note 145, at 157-63. That report canvassed reciprocity's ups and downs in advocating for a policy of "equality of treatment" among trade partners. *Id.* at 9-15.

162. See H.R. REP. NO. 53-234, at 11 (1893) (stating that presidential proclamations under section 3 of McKinley Act "have naturally led to ill-feeling in the countries thus discriminated against, and to diplomatic correspondence, in which it has been claimed with apparent justice that such discriminations were in violation of our solemn treaty obligations").

163. *Id.*

164. *Id.* at 12; see also 26 CONG. REC. 1420 (1894) (statement of Rep. Wilson) ("We are repealing what we never believed was constitutional—the authority given to the President of the United States . . ."); *id.* (statement of Rep. Simpson) ("Preventing one-man power and restoring it to the people.").

165. 143 U.S. 649, 680-90 (1892).

166. See 26 CONG. REC. 1420 (1894). For example, when directly questioned, Chairman Wilson denied that the amendment would or should destroy the existing agreements: "Mr. SPRINGER. I understand that the gentleman from West Virginia contends that [the amendment] will destroy these agreements, because he is of the opinion that they ought not to have been made. Mr. WILSON of West Virginia. The gentleman is mistaken." *Id.*

167. See *id.* at 1425. The amendment was received with some sarcasm by Representative Dingley, the Maine Republican whose name would be on the 1897 bill reintroducing reciprocity. See *id.* at 1417 (statement of Rep. Dingley) ("The effect of this amendment is not only to destroy reciprocity, but to emphasize the fact of its destruction.").

incentive of the country's trade partners to offer preferential entry to U.S. products would disappear, providing those partners with no reason to honor existing reciprocity agreements.<sup>168</sup> The United States would be left with a list of duty-free products and no strategy for getting anything in return.

The Senate was not so quick to accept either the loss of previously secured concessions, or the prospect of getting more. Although the Senate bill also repealed section 3 of the McKinley Act, it sought to maintain the existing reciprocity agreements by expressly providing that “nothing herein contained shall be held to abrogate, or in any way affect such reciprocal commercial arrangements as have been heretofore made . . . except where such arrangements are inconsistent with the provisions of this act.”<sup>169</sup> To keep from giving away too much to its trade partners now that retaliation–reciprocity authority was repealed, the Senate bill placed duties on raw sugar and new, higher duties on refined sugar.<sup>170</sup> The Senate amendment survived reconciliation as section 71 of the Wilson–Gorman Tariff Act.<sup>171</sup>

But the reciprocity agreements failed anyway, because the Executive Branch insisted it no longer had the power to honor them. Before the passage of the Wilson–Gorman Tariff Act of 1894, the Brazilian representative complained to Secretary of State Gresham that the proposed sugar duties were inconsistent with the two countries' reciprocity agreement.<sup>172</sup> Gresham responded that the entire agreement—not just the provisions relating to duty-free sugar—was abrogated by Congress's action in passing the new tariff law, telling the Brazilian minister,

I think it clear that the reciprocity arrangement between Brazil and the United States was terminated by the going into force of our existing tariff law, and I do not think the Executive Departments can act upon any other theory.

This is the view of the Secretary of the Treasury.<sup>173</sup>

## 2. Congress Exercises Its Termination Power

Reciprocity returned in the Dingley Act. Section 3 of the Dingley Act, which originated in the House, authorized the President to suspend duties on certain articles (primarily from France) based on entry into a reciprocal treaty, and to impose penalties on tropical products on the duty-free list if the exporting countries did not grant reciprocal concessions to U.S. products.<sup>174</sup>

168. *See id.* at 1421 (statement of Rep. Dingley) (after repeal of section 3 “those trade agreements will at once fall”).

169. *Id.* at 7110 (restating Senate bill).

170. *See LAKE, supra* note 154, at 114–15.

171. 26 CONG. REC. 8473, 8486 (1894).

172. *See* Letter from W.Q. Gresham, Sec'y of State, Dep't of State, to Senhor Mendonça (Aug. 29, 1894), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, *supra* note 153, at 77.

173. *Id.*

174. Dingley Act, ch. 11, § 3, 30 Stat. 151, 203–04 (1897). The Dingley Act also included a provision drafted by the Senate that authorized the President to enter into agreements for up to five

By 1909, however, reciprocity had become politically unpopular,<sup>175</sup> and the Payne–Aldrich Act once again moved away from reciprocity agreements.<sup>176</sup> The Senate bill, with an amendment by Senator Aldrich, provided for maximum–minimum tariff schedules instead of reciprocity with certain maximum duties to be applied, but where the President proclaimed that a country did not discriminate against U.S. products, an alternative, minimum tariff set out in the statute would be charged instead.<sup>177</sup>

Most important for present purposes, the Payne–Aldrich Act expressly abrogated all agreements entered into under the reciprocity provisions of the Dingley Act. In section 4, Congress authorized and required the President to give notice to all trade-partner countries under the terms of the agreements, or months’ notice if the agreement had no termination clause:

That the President shall have power and it shall be his duty to give notice, within ten days after the passage of this Act, to all foreign countries with which commercial agreements in conformity with the authority granted by section three of [the Dingley Act] . . . have been or shall have been entered into, of the intention of the United States to terminate such agreement . . . .<sup>178</sup>

This provision signaled Congress’s view that it had the competence to terminate the agreements as a function of its tariff-making power, and it could do so without regard to any specific conditions of discrimination or reciprocity found by the President. In section 4 of the Payne–Aldrich Act, “the intention of the United States” to terminate trade agreements was synonymous with the intention of Congress. The President was not consulted, but ordered to execute that will.

During this period of reciprocity and flexibility provisions, scholars apparently agreed with Secretary Gresham that Congress possessed the power to abrogate the agreements made by the President.<sup>179</sup> In 1922, Quincy Wright wrote that agreements made by the President as head of the Executive Branch pursuant to legislative authorization “appear to be dependent for their effectiveness upon the authorizing legislation, and are terminable, both nationally and internationally, at the discretion of Congress.”<sup>180</sup> Wright was apparently including the reciprocity agreements in this category, given that he illustrated his point by quoting

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years, lowering most duties twenty percent and eliminating duties on products not produced by the United States. *Id.* § 4. This latter provision, although signaling the Senate’s wishes, did not give the president power he did not already possess under the Treaty Clause because these “commercial treaties” were subject to “the advice and consent of the Senate.” *Id.*

175. See LAKE, *supra* note 154, at 131.

176. See U.S. TARIFF COMM’N, *supra* note 145, at 265 (citing continued discrimination against U.S. products in Europe, Senate’s refusal to ratify Dingley Act reciprocity treaties, lack of public attention to agreements with France, and domestic producers’ desire for protection).

177. Payne–Aldrich Act, ch. 6, § 2, 36 Stat. 11, 82 (1909).

178. *Id.* § 4, 36 Stat. at 83.

179. See WRIGHT, *supra* note 95, at 235–36.

180. *Id.*

Secretary Gresham's letter to Mr. Mendonça of Brazil regarding abrogation of the McKinley Act agreements.<sup>181</sup>

### 3. New Deal Reciprocity: Expansion and Limits of Presidential Power

In 1934, President Roosevelt sought to free himself from the strictures of the most infamous tariff act in U.S. history, the Smoot–Hawley Act of 1930.<sup>182</sup> Roosevelt's Secretary of State, Cordell Hull, believed that reciprocal trade agreements would precipitate peaceful relations between countries—sort of a 1930s take on Thomas Friedman's "golden arches theory of conflict prevention."<sup>183</sup> Hull essentially made it his mission to obtain reciprocity authority for the President.<sup>184</sup>

There appeared to be no question in Roosevelt's or Hull's mind that such authority must come from Congress. During the campaign, Hull had proposed a direct ten-percent reduction in tariffs in the next tariff bill, but the politics of the Great Depression left that proposal dead on arrival.<sup>185</sup> Instead, the Roosevelt Administration proposed the Reciprocal Trade Agreements Act (RTAA). Crafted as a three-page amendment to the Smoot–Hawley Act, the RTAA allowed the President to reduce tariffs by up to fifty percent in connection with a reciprocal trade deal from a negotiating partner.<sup>186</sup> These tariffs would not require any form of congressional approval, but the President's negotiating authority would expire three years after enactment.<sup>187</sup>

Neither Roosevelt nor Hull attempted to exercise any form of negotiating authority before receiving authorization from Congress. In June 1933, Hull

181. *Id.*

182. For a discussion of the passage of this "protectionist measure opposed by all right-thinking people," see *The Battle of Smoot-Hawley*, *ECONOMIST* (Dec. 18, 2008), <http://www.economist.com/node/12798595> [<https://perma.cc/G7HP-X4A3>]. Lake persuasively demonstrates that the Smoot–Hawley Act was not as protectionist as is commonly thought: although the average rate of duty under the Smoot–Hawley Act, 55.3%, is the highest in U.S. history, the Act also contained the second-largest number of items on the free list, 65.5%. See LAKE, *supra* note 154, at 194–95. Because of the expanded free list, the average duty imposed by the Smoot–Hawley Act was only 19%. By comparison, other average rates of duty under tariff acts of the reciprocity era were: 23.7% (McKinley Act); 20.5% (Wilson–Gorman Act); 26.2% (Dingley Act); 20.0% (Payne–Aldrich Act); 8.8% (Underwood Act); and 38.2% (Fordney–McCumber Act). See *id.* at 101, 106, 125, 133, 154–55, 167.

183. Friedman, also an advocate of trade as a strategy for achieving peace, posited that no two countries with McDonald's had ever gone to war. See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 195–218 (1999); Thomas L. Friedman, *Foreign Affairs Big Mac I*, *N.Y. TIMES* (Dec. 8, 1996), <http://www.nytimes.com/1996/12/08/opinion/foreign-affairs-big-mac-i.html> [<https://nyti.ms/2kvU6p2>]. For a similar perspective, see 1 *THE MEMOIRS OF CORDELL HULL: IN TWO VOLUMES* 84 (1948) [hereinafter HULL], stating that "if we could increase commercial exchanges among nations over lowered trade and tariff barriers and remove unnatural obstructions to trade, we would go a long way toward eliminating war itself."

184. See HULL, *supra* note 183, at 354; see also DEAN ACHESON, *PRESENT AT THE CREATION* 9–10 (1969).

185. See IRWIN, *supra* note 146, at 423 ("[A] unilateral tariff reduction was politically impossible in the midst of the Depression with the unemployment rate so high.").

186. Reciprocal Trade Agreements Act of 1934, ch. 474, § 350(a)(2), 48 Stat. 943, 943.

187. *Id.* § 2(c), 48 Stat. at 944. The President's negotiating authority was renewed in 1937, 1940, and 1943. See IRWIN, *supra* note 146, at 443–54.



traveled to the World Economic Conference in London, eager to begin negotiations with other countries.<sup>188</sup> While he was there, Roosevelt sent word to Hull that he was not yet prepared to request reciprocal negotiating authority from Congress.<sup>189</sup> Instead, Roosevelt suggested that Hull only begin negotiations of commercial treaties because no congressional authorization was needed merely to negotiate.<sup>190</sup> Roosevelt did not view the Executive Branch to have plenary authority over such agreements but was merely following the Treaty Clause process.<sup>191</sup> As Roosevelt told Hull, “All such agreements [negotiated by Hull in London], both general and bilateral, would be submitted for approval as soon as Congress reassembles.”<sup>192</sup> Hull viewed the delay as a devastating blow to his agenda.<sup>193</sup>

As eventually passed, the RTAA empowered the President to make tariff adjustments through simple proclamations, and thus withdrawal of lower tariffs could be accomplished simply by withdrawing the proclamation.<sup>194</sup> The withdrawal of reciprocity to Czechoslovakia after German occupation is instructive. President Roosevelt had entered into a trade agreement with the country on March 7, 1938, with an addendum on April 15, 1938.<sup>195</sup> The agreement was made effective in U.S. law by proclamations under the RTAA dated March 15 and April 15, of 1938.<sup>196</sup> The following year, after German occupation of Bohemia, Moravia, and Slovakia, Roosevelt issued a proclamation terminating the tariff preferences extended to Czechoslovakia—not by terminating the agreements of March 7 and April 15, but by terminating the proclamations that notified the agreement and addendum to the United States on March 15 and April 15.<sup>197</sup>

The RTAA was a significant expansion of presidential authority compared with the old tariff acts. Roosevelt advocated in his request to Congress that the economic situation demanded decisive executive action on trade and reassurance to Congress that the new executive authority would be “within carefully guarded limits.”<sup>198</sup> As Ackerman and Golove have noted, however,

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188. HULL, *supra* note 183, at 248–51.

189. See Letter from Hull, Sec’y of State, Dep’t of State, to Gilbert, Consul at Geneva (Sept. 29, 1933), in 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1933, GENERAL 776, 777 (1950).

190. See HULL, *supra* note 183, at 251.

191. *Id.* at 251–52.

192. *Id.*

193. *Id.*

194. Reciprocal Trade Agreements Act of 1934, ch. 474, § 350(a)(2), 48 Stat. 943, 943. In most cases, the reciprocity agreements entered into under the RTAA before 1940 were withdrawn or suspended by agreement whenever the trading partner entered into the GATT. See U.S. TARIFF COMM’N, TRADE AGREEMENTS MANUAL 5–7 (3d ed. 1959).

195. See Proclamation No. 2326, 4 Fed. Reg. 1367 (Mar. 30, 1939).

196. See *id.*

197. See *id.*

198. 78 CONG. REC. 3579 (1934).

no one contended that RTAA agreements were congressional–executive agreements.<sup>199</sup> In the RTAA and in all earlier examples of reciprocity and flexibility provisions, a few factors remained constant: Congress started the bidding by passing tariff legislation that set rates for all items of commerce; Congress set and frequently altered the boundaries of presidential authority to make changes to those tariffs; and Congress could undo any executive-made deals by repealing the underlying tariff act. Although the RTAA expanded presidential authority significantly, that new authority was still limited to lowering tariffs by proclamation and removing those advantages by withdrawing the proclamation. Any such tariff breaks had to be within a percentage reduction and time period limited by Congress.

For present purposes, the most important aspect of the RTAA is this: however expansive the President’s new authority, it was Congress—not the President—that did the expanding. When Roosevelt sought to respond to trade conditions with greater nimbleness, he did not purport to possess that authority; he went to Congress and asked for it. If even the most ambitious re-interpreter of presidential authority ever to occupy the White House believed that Congress possesses the constitutional authority over entering trade deals, it would be difficult to argue today that the President possesses independent constitutional authority to withdraw from them. History suggests that the better answer is that the President has only as much withdrawal power as Congress has afforded him.

#### IV. WOULD PRESIDENTIAL WITHDRAWAL FROM NAFTA TERMINATE U.S. OBLIGATIONS?

To briefly recap: although the President could deliver notice of withdrawal that Canada and Mexico would likely recognize under international law, the weight of authority suggests that the President does not have the statutory or independent constitutional power to do so. Even if he could legally effect withdrawal, that would raise another legal question: would withdrawal from NAFTA necessarily terminate the statute through which NAFTA obligations were implemented into U.S. law? After all, that statute—the NAFTA Implementation Act—was passed by Congress. Would the statute continue in force unless repealed by Congress? If so, then withdrawing from NAFTA does not really end NAFTA (the trade preferences, as enacted into U.S. law). Or does the statute terminate by its terms once the U.S. withdraws from the international agreement that prompted it? If so, then withdrawing from NAFTA really does put an end to NAFTA (the trade preferences).

Several commentators have suggested that the NAFTA Implementation Act would survive a U.S. notice of withdrawal from NAFTA and that the obligations would continue in domestic law, even if the United States technically withdrew

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199. See Ackerman & Golove, *supra* note 6, at 860 (“If NAFTA had been negotiated in 1937, Roosevelt would have submitted it as a treaty to the Senate without recognizing that he had a choice in the matter.”).

from the Agreement.<sup>200</sup> However, a careful reading of the text and accompanying documents of the NAFTA Implementation Act and a comparison with other trade agreements suggests that Congress likely intended the trade obligations of NAFTA to cease being operative in domestic law if the United States withdraws from the Agreement. But this also means that termination of the statute might be dependent upon what it means for “the United States” to withdraw from the Agreement, and who may do the withdrawing. This question would involve a court making the same analysis of the statutory and constitutional scope of the President’s authority to withdraw from fast track trade agreements, as discussed in Part III, and would present some (though not all) of the justiciability concerns discussed in Part V. To see how the termination issue may encompass the constitutionality and justiciability questions, this Part analyzes the termination provisions of the NAFTA Implementation Act and their implications for unilateral presidential withdrawal.

A. THE “TERMINATOR” CLAUSE: CEASING TO BE A NAFTA COUNTRY

In section 109(b), the NAFTA Implementation Act provides for situations in which the Act will cease to have effect.<sup>201</sup> It is a terminator provision inserted by Congress under which the Act self-destructs if certain conditions occur. Unfortunately, however, the provision is hardly a model of clarity. Section 109 (b) says:

(b) TERMINATION OF NAFTA STATUS. – During any period in which a country ceases to be a NAFTA country, [the implementing provisions of the Act] shall cease to have effect with respect to such country.<sup>202</sup>

Fair enough. But when does a country “cease[] to be a NAFTA country”? Does that only refer to withdrawal by Mexico or Canada, or could it include a case where the United States withdraws? “NAFTA country” is defined as:

(A) Canada for such time as the Agreement is in force with respect to, and the United States applies the Agreement to, Canada; and

(B) Mexico for such time as the Agreement is in force with respect to, and the United States applies the Agreement to, Mexico.<sup>203</sup>

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200. See, e.g., Aleem, *supra* note 10, at 4 (presenting argument by Todd Tucker that Trump’s withdrawal would create “a Zombie NAFTA, where America’s formal participation is dead, but our domestic law would still treat Canadian and Mexican products as if it weren’t”); Ku & Yoo, *supra* note 10 (arguing that Trump cannot unilaterally terminate U.S. participation in NAFTA because implementing statute “can be reversed only by another, repealing statute enacted by the House and the Senate and then signed by the president”).

201. NAFTA Implementation Act § 109(b), 19 U.S.C. § 2112 (2012).

202. 19 U.S.C. § 2112.

203. *Id.* § 3301(4)(A)–(B).

Thus, it seems clear (and logical) that Canada or Mexico would “cease[] to be a NAFTA country” if it withdrew from the Agreement. But how are we to understand this second condition, that a country is only a NAFTA country as long as “the United States applies the Agreement to” them?

The only authoritative sources of legislative history are the House and Senate Reports, and those Reports are cursory in their discussion of section 109(b). The House Report essentially repeats the language of the statute.<sup>204</sup> The Senate Report is not much more extensive, but it does paraphrase, which may shed light on the Senate’s understanding of the provision. The Senate Report says that the implementing provisions of the act “shall cease to have effect with respect to a country during any period in which *that country* ceases to be a party to the NAFTA.”<sup>205</sup> This seems to contemplate only cases where Canada or Mexico withdraws, not where the United States withdraws.

But in that case, what does the statute mean when it says that the Act terminates unless the Agreement is in force with respect to, *and the United States applies the agreement to*, Canada or Mexico? According to the canon against surplusage, the second clause must have a meaning that is distinct from the first.<sup>206</sup> The Senate Report’s description seems to make it redundant, if the Act’s provisions terminate only when the *other* party pulls out.

The floor debates are neither authoritative as a source of statutory interpretation<sup>207</sup> nor extensive, because NAFTA was passed under procedures designed precisely to curtail congressional debate on trade agreements.<sup>208</sup> Thus, the legislative history seems to deepen rather than resolve the confusion.

B. “CEAS[ING] TO APPLY THE AGREEMENT” IN THE STATEMENT OF ADMINISTRATIVE ACTION

Although section 109(b) is murky about what it means to “cease[] to apply the agreement,” there is another provision that sheds light on it. In section 101(a)(2)

204. EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. REP. NO. 103-361, at 25 (1993) (“[The implementing provisions of the act] shall cease to have effect with respect to a country during any period in which that country ceases to be a NAFTA country.”).

205. SEN. REP. NO. 103-89, at 12 (1993) (emphasis added).

206. For recent applications of the canon against surplusage, see *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 420–22 (2014); *Clark v. Rameker*, 573 U.S. 122, 132–33 (2014).

207. The Supreme Court has stated, “[i]f legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 580 (1995). The Committee Reports on the bill and statements by legislators offer the most authoritative evidence of congressional intent when these statements are consistent with the statutory text or other pieces of legislative history. *Brock v. Pierce Cty.*, 476 U.S. 253, 263 (1986); *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); see also *Coors Brewing Co. v. Mendez-Torres*, 787 F. Supp. 2d 149, 170 (D.P.R. 2011) (“The words of a legislative body itself, written or spoken contemporaneously with the passage of a statute, are usually the most authoritative guide to legislative purpose.” (quoting *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 33 (1st Cir. 2007))).

208. See, e.g., Trade Act of 1974, 19 U.S.C. §§ 2191(b)(3), (c)–(d), (f)–(g), 2192(d)–(f) (2012). Following its submission by the President, the bill implementing a trade agreement must be approved by both houses of Congress by a simple majority and without debate. *Id.*

of the Act, Congress approved “the statement of administrative action proposed to implement [NAFTA].”<sup>209</sup> The NAFTA statement of administrative action (SAA) was prepared in accordance with the Omnibus Trade and Competitiveness Act of 1988 and describes significant administrative actions proposed to implement the agreement.<sup>210</sup>

In the SAA, one issue discussed was the relationship between the NAFTA basic agreement, negotiated by President George H.W. Bush, and the side agreements on labor and environment, negotiated by President Bill Clinton.<sup>211</sup> The issue arose because Title I of the NAFTA Implementation Act required Mexico and Canada to pass the side agreements for Congress to approve the basic agreement.<sup>212</sup> But what if Mexico or Canada withdrew from the side agreements? Would the United States continue to adhere to the basic agreement without guaranteed protections for labor and the environment?

The SAA proposed a resolution to this potential dilemma: “The Administration, after thorough consultation with the Congress, would provide notice of withdrawal under the NAFTA, *and cease to apply that Agreement*, to Mexico or Canada if either country withdraws from a supplemental agreement.”<sup>213</sup> Here, Congress and the Administration contemplate a test case where the United States would pull out of NAFTA with respect to one or both other parties if those parties withdrew from the side agreements. The language the Administration used, and Congress adopted in section 101(a)(2), echoes the language used in sections 2 and 109(b): if Mexico or Canada were to withdraw from the side agreements, the United States would “cease to apply” NAFTA to that country.<sup>214</sup> And the definitions tell us a country is only a “NAFTA country” as long as “the United States applies the Agreement to” that country.<sup>215</sup> Section 109(b) thus closes the loop: once a country “cease[s] to be a NAFTA country,” the NAFTA Implementation Act’s implementing provisions terminate with respect to that country.<sup>216</sup>

Thus, under the SAA, the United States could provide a notice of withdrawal to Canada or Mexico if that country withdrew from the side agreements, and the implementing provisions of the NAFTA Implementation Act would terminate

209. NAFTA Implementation Act § 101(a)(2), 19 U.S.C. § 3311(a)(2) (2012).

210. EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, at 1 (1993). Section 1103 of the Omnibus Act says that a trade agreement entered into under that Act will enter into force only after the President transmits to both chambers of Congress the text of the agreement, along with a draft implementing bill and “a statement of any administrative action proposed to implement the trade agreement,” 19 U.S.C. § 2903(a)(1)(B)(ii) (2012), and “an explanation as to how the implementing bill and proposed administrative action will change or affect existing law,” *id.* § 2903(a)(2)(A).

211. North American Agreement on Environmental Cooperation, U.S.–Can.–Mex., Sep. 14, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994); North American Agreement on Labor Cooperation, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 1499 (1993).

212. NAFTA Implementation Act § 101(b)(2), 19 U.S.C. § 3311(b)(2).

213. H.R. DOC. NO. 103-159, at 456 (emphasis added).

214. Compare H.R. DOC. NO. 103-159, at 456, *and* NAFTA Implementation Act § 3311(a)(2), *with id.* § 3301(4)(A)–(B), *and* § 2122(b).

215. NAFTA Implementation Act § 311(a)(2).

216. *Id.* § 2122.

with respect to that country. It seems apparent, the same result would follow under sections 2 and 109(b) if the United States gave Canada, Mexico, or both notice of withdrawal for any other reason.

### C. COMPARISON WITH OTHER IMPLEMENTATION ACTS

This reading of the NAFTA Implementation Act's termination provision makes sense when laid side by side with the termination clauses in other multilateral and bilateral agreements. Since the implementation of NAFTA, the United States has entered into a dozen other such agreements, each with provisions expressing conditions of termination.<sup>217</sup> For example, the United States–Colombia Trade Promotion Agreement says, “(c) TERMINATION OF THE AGREEMENT. – On the date on which the Agreement terminates, this Act . . . and the amendments made by this Act . . . shall cease to have effect.”<sup>218</sup> That provision is clearer, but also an easier case than NAFTA. As a bilateral agreement, the U.S.–Colombia agreement would terminate if either party withdrew. The termination provisions of other bilateral trade agreement implementing acts are similarly straightforward.<sup>219</sup>

Because NAFTA involves three parties, one of whom might withdraw without affecting the intentions of the other two, drafting a termination provision would naturally be more complicated. A more relevant comparator, then, might be the statute implementing another multilateral trade agreement, like the Dominican Republic–Central America–United States Free Trade Agreement Implementation Act.<sup>220</sup> The underlying agreement, better known as CAFTA or CAFTA–DR, is a trade deal between the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. As with NAFTA, one of the parties could withdraw, and the Agreement would remain in force for the parties remaining in the Agreement

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217. See *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements> [<https://perma.cc/YT3X-D8W3>] (last visited Feb. 1, 2018). The United States has free trade agreements in force with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. *Id.*

218. United States–Columbia Trade Promotion Agreement, Pub. L. No. 112-42, § 107(c), 125 Stat. 462, 466 (2011) (codified at 19 U.S.C. § 3805 (2012)).

219. See, e.g., Australia–United States Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 106(c), 118 Stat. 919, 923 (2004) (codified at 19 U.S.C. § 3805 note and scattered sections of 19 U.S.C.) (“On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective.”); Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53 § 107(d), 119 Stat. 462, 466 (2005) (codified at 19 U.S.C. § 4001 note) (“On the date on which the Agreement ceases to be in force with respect to the United States, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect.”). It may be noted, however, that the Australia–United States Free Trade Agreement allows for the accession of other parties. See Free Trade Agreement, U.S.–Austl., art. 23.1, May 18, 2004, Hein’s No. KAV 6422.

220. See Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, § 3, 119 Stat. 462, 463 (2005) (codified at 19 U.S.C. § 4002).

The statute that implemented CAFTA–DR is clearer about the effects of termination than is the NAFTA Implementation Act. The implementation act for CAFTA–DR reads:

- (c) TERMINATION OF CAFTA–DR STATUS.—During any period in which a country ceases to be a CAFTA-DR country, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect with respect to that country.
- (d) TERMINATION OF THE AGREEMENT.—On the date on which the Agreement ceases to be in force with respect to the United States, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect.<sup>221</sup>

A “CAFTA–DR country” is defined for each country in the following manner: “[T]he term ‘CAFTA–DR country’ means – Costa Rica, for such time as the Agreement is in force between the United States and Costa Rica.”<sup>222</sup> This termination provision seems more straightforward than the comparable NAFTA provision. The implementation act for CAFTA–DR does not refer to the United States “appl[ying] the agreement to” any country.<sup>223</sup> As long as the Agreement is in force between the United States and a particular country, that country is a CAFTA–DR country. If the Agreement ceases to be in force between the United States and that country, the Implementation Act terminates with respect to that country (and that country only). But if the Agreement “*ceases to be in force with respect to the United States,*” then the Implementation Act terminates completely (apart from the termination provision itself).

Section 109, the termination provision of the NAFTA Implementation Act, does not expressly say what happens when the Agreement ceases to be in force with respect to the United States—in other words, when the United States withdraws. But reading the SAA (as adopted by Congress in section 101(a)(2)) together with the definitions in section 2 and the termination provision of section 109(b) produces the same result as in the implementation act for CAFTA–DR: the United States ceases to apply the Agreement to another country when the United States withdraws from the Agreement, and the Act terminates. Though the drafting may have become more artful in the decade between implementation of NAFTA and CAFTA–DR, a close reading suggests the intended effect was the same.

In contrast, the implementing act for the WTO Agreements expressly states that Congress’s approval of the deal will terminate only by a joint resolution to

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221. 19 U.S.C. § 4001 note.

222. *Id.* § 4002(2)(A).

223. Compare Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, 119 Stat. 462, with NAFTA Implementation Act § 2, 19 U.S.C. § 3301 (2012).

that effect.<sup>224</sup> Section 125 of the Uruguay Round Agreements Act (URAA), which implemented the WTO Agreements into U.S. law, provides that “[t]he approval of Congress . . . of the WTO Agreement shall cease to be effective *if, and only if*, a joint resolution . . . is enacted into law” in the manner prescribed in the following section.<sup>225</sup> The URAA is specific about the procedure and language that must be used to withdraw congressional approval: Congress must adopt and transmit the joint resolution within ninety days after receiving the President’s five-year report. If the President vetoes the joint resolution, both chambers must vote to override the veto within either the ninety-day period from the report or within fifteen days of receiving the President’s veto.<sup>226</sup> The joint resolution must state, after the resolving clause, “[t]hat the Congress withdraws its approval, provided under section 101(a) of the Uruguay Round Agreements Act, of the WTO Agreement as defined in section 2(9) of that Act.”<sup>227</sup>

Thus, the URAA provides a counterexample: instead of terminating by its terms upon United States withdrawal from the underlying agreement, the URAA requires a specific joint resolution to terminate the implementing provisions in domestic law. Although the President could deliver a notice of intent to withdraw to the other Member States in the WTO, the domestic implementation of those trade obligations would continue in force as long as congressional approval under Section 101(a) of the URAA remains in force. Section 125(b) makes clear that this approval can be withdrawn only by Congress. The role of the President is limited to making a report to Congress every five years of the costs and benefits of participation and value of continued participation.<sup>228</sup>

The legislative history is equally clear that Congress intended to exercise affirmative control over the removal of domestic obligations arising from the WTO Agreements. The House Report of section 125 reads,

The purpose of this provision is to provide an opportunity for Congress to evaluate the transition of the GATT to the WTO and to assess periodically whether continued membership in this organization is in the best interest of the United States. It is the desire of the Committee not to leave this decision totally in the hands of the Executive Branch but to be active in determining whether the WTO is an effective organization for achieving common trade goals and principles and for settling trade disputes among sovereign nations.<sup>229</sup>

Section 109 of the NAFTA Implementation Act does not precisely track the “terminator” language of the implementation act for CAFTA–DR or similar

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224. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 125(b), 108 Stat. 4809, 4833 (1994) (codified at 19 U.S.C. § 3535(b) (2012)).

225. 19 U.S.C. § 3535(b)(1) (emphasis added). Section 125 refers to section 101(a) of the Act, in which Congress gave its approval to “the trade agreements . . . resulting from the Uruguay Round of multilateral trade negotiations” under the GATT. *Id.* § 3511(a).

226. *Id.* § 3535(b)(2).

227. *Id.* § 3535(c)(1).

228. See *id.* § 3535(a).

229. H.R. REP. NO. 103-826, pt. 1, at 34 (1994).



implementing provisions for other bilateral trade agreements, but neither does it exclusively reserve the termination decision for an affirmative act of Congress as the URAA does. Because the URAA was enacted only one year later than the NAFTA Implementation Act, the dissimilarity between the two termination provisions supports the notion that Congress did not intend to require some affirmative termination mechanism for the NAFTA Implementation Act, but intended the implementing provisions of that Act to terminate automatically if the United States withdrew from the Agreement. Because the NAFTA Implementation Act termination provisions are more like the termination provisions in the implementation act for CAFTA–DR than in the URAA, Congress likely intended the NAFTA Implementation Act to terminate automatically if the United States gives notice of withdrawal from the Agreement. No additional action or repeal by Congress appears to be required.

D. “AFTER THOROUGH CONSULTATION WITH CONGRESS”: LIMITS ON WITHDRAWAL POWER IN THE STATEMENT OF ADMINISTRATIVE ACTION

Even if the implementing provisions of the statute were designed to terminate without congressional repeal, if the United States were to withdraw from NAFTA, the ultimate question remains: what constitutes a valid withdrawal for purposes of the NAFTA Implementation Act? In other words, does the United States “cease[] to apply the Agreement to”<sup>230</sup> Mexico and Canada whenever the President delivers notice of withdrawal, even if such action is beyond the scope of the President’s authority? Or does the statute contemplate automatic termination only upon withdrawal by some other procedure, if required by the fast track statutes or the Constitution?

The SAA suggests that something more than unilateral presidential withdrawal might be required to trigger the termination provision of the NAFTA Implementation Act. Recall that one of the issues addressed in the SAA was how the United States would respond if Mexico or Canada withdrew from the labor or environmental side agreements.<sup>231</sup> Recall also the Administration’s response to this dilemma in the SAA: “The Administration, after thorough consultation with the Congress, would provide notice of withdrawal under the NAFTA, and cease to apply that Agreement, to Mexico or Canada if either country withdraws from a supplemental agreement.”<sup>232</sup>

Section IV.B focused on the second part of this sentence, that the United States would “cease to apply [NAFTA], to Mexico or Canada” in that eventuality.<sup>233</sup> But the first part of the sentence, that “[t]he Administration, after thorough consultation with the Congress, would provide notice of withdrawal under the NAFTA,” is also remarkable. At least in the enumerated circumstances, United

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230. EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, at 456 (1993).

231. See *supra* notes 209–12 and accompanying text.

232. H.R. DOC. NO. 103-159, at 456 (emphasis added).

233. See *supra* Section IV.B.

States withdrawal is to be accomplished by the President “after thorough consultation with the Congress.”<sup>234</sup> Because the SAA was incorporated into domestic law as part of the NAFTA Implementation Act,<sup>235</sup> it appears that the President proposed, and Congress agreed, that the President would withdraw from NAFTA only “after thorough consultation with Congress” if Mexico or Canada withdrew from the labor or environmental side agreements.<sup>236</sup>

This provision, on its face, applies only in the instance that the United States seeks to withdraw from NAFTA because Mexico or Canada withdraws from the side agreements. It is not clear whether the commitment to a “thorough consultation with the Congress” applies in all circumstances of U.S. withdrawal.<sup>237</sup> The SAA does suggest, however, that withdrawal was not viewed as a unilateral prerogative of the President. At least in those circumstances where withdrawal was specifically contemplated, the President and Congress both believed that Congress was to play a role.

If a court were to reach this argument, its implications would be far-reaching. Statutory interpretation of the phrase “ceases to apply the Agreement to” Mexico or Canada would involve analysis of the entire fast track statutory scheme and the constitutional architecture surrounding congressional–executive trade agreement—the same analysis performed in Parts II and III of this Article. However, because the result of this inquiry would only affect the operation of a domestic statute, a court may be less likely to consider the political question doctrine to be a barrier to adjudication in this context than in a direct constitutional challenge to unilateral presidential withdrawal from NAFTA.<sup>238</sup> Thus, urging a court to consider the legality of unilateral presidential withdrawal for the purposes of the NAFTA Implementation Act termination provisions might provide a nimble strategy to avoid some of the justiciability issues presented by a direct challenge, as discussed in Part V.

#### V. IS THERE A REMEDY FOR EXECUTIVE OVERREACH?

If unilateral presidential action withdrawing the United States from NAFTA would be a statutory and constitutional overreach, what can be done about it? Because the issue arises only in the event that Congress opposes the President’s action, the question raises immediate red flags of justiciability, including standing and political question concerns. There is no precedent directly on point, but there are strong arguments based on Supreme Court and other federal court precedents that might persuade a court to treat a challenge to Executive withdrawal from

234. H.R. Doc. No. 103-159, at 456.

235. See NAFTA Implementation Act § 101(a)(2), 19 U.S.C. § 3311(a)(2) (2012).

236. H.R. Doc. No. 103-159, at 456.

237. *Id.*

238. A lawsuit challenging the operation of a statute that creates only domestic obligations may cause less risk of “embarrassment” within the realm of foreign relations than a challenge to the President’s power to withdraw. See *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962); *infra* notes 306–08 and accompanying text.

NAFTA differently from actions that challenged entry into NAFTA<sup>239</sup> or presidential withdrawal from treaties.<sup>240</sup> Moreover, a court may be more inclined to reach the merits because the substantive issues could be resolved using conventional principles of statutory construction and familiar exercises in constitutional interpretation, avoiding the need for sweeping judicial pronouncements about any lacunae in the Constitution.<sup>241</sup>

A. CONGRESSIONAL ACTION: RESOLUTION, LEGISLATION, OR OTHER POLITICAL PRESSURE

Some commentators have speculated that courts will refuse to hear a challenge to NAFTA withdrawal.<sup>242</sup> An obvious hurdle appears in *Goldwater v. Carter*, a case in which the Supreme Court, in a widely followed plurality opinion, articulated a strict political question doctrine limiting justiciability of claims between Branches.<sup>243</sup> But the first place to look for a remedy to unilateral presidential withdrawal may be to the “preeminent speaker”<sup>244</sup> on regulation of foreign commerce: Congress.

Political questions, after all, are not necessarily questions without a remedy—they are merely questions without a *judicial* remedy. Congress has a variety of tools at its disposal if it believes that unilateral presidential withdrawal violates the statutory framework and its foreign commerce powers.

1. “Sense of” Resolutions

First (and easiest), the House, Senate, or Congress could express its opinion on the matter through a “sense of” resolution.<sup>245</sup> “Sense of” resolutions take the form of a simple resolution (“Sense of the House” or “Sense of the Senate”) or a

239. See e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001) (declining to reach the merits of a challenge to the enactment of NAFTA because “the question of just what constitutes a ‘treaty’ requiring Senate ratification presents a nonjusticiable political question”).

240. See e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (plurality opinion) (finding that a challenge by members of Congress to the President’s termination of a treaty with Taiwan was a nonjusticiable political question “because it involve[d] the authority of the President in the conduct of [the] country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President”); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (holding that plaintiff members of Congress challenging the President’s withdrawal from the 1972 Anti-Ballistic Missile Treaty lacked standing under *Raines v. Byrd* because they alleged only an institutional injury to Congress, and that the challenge raised a nonjusticiable political question under *Goldwater v. Carter*).

241. Cf. *Nixon v. United States*, 506 U.S. 224, 230 (1993) (finding lack of judicially manageable standards to decide whether Senate’s constitutional mandate to “try” impeachment cases required the whole Senate to hear witness testimony).

242. See e.g., Hufbauer, *supra* note 54.

243. See *Goldwater*, 444 U.S. at 1002–06.

244. See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994).

245. See generally CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-825, “SENSE OF” RESOLUTIONS AND PROVISIONS (2016) (report was originally written by Paul S. Rundquist in 1999). “Sense of Congress” resolutions are used to express “fact, principles, opinions, and purposes of the two houses.” THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 114-192, at 205 (2017).

concurrent resolution (“Sense of Congress”).<sup>246</sup> Because “sense of” resolutions are not presented to the President, they do not have the force of law.<sup>247</sup> “Sense of” resolutions are used for a variety of political purposes, most importantly in this context to communicate congressional will or to communicate the body’s intentions to foreign governments.<sup>248</sup> Congress may also include “sense of” provisions in legislation, subject to germaneness limitations.<sup>249</sup>

“Sense of” resolutions are often used to express the opinion of Congress about foreign affairs.<sup>250</sup> In 2004, Congress expressed its disapproval of President Bush’s decision to mobilize 20,000 troops to Iraq.<sup>251</sup> The Senate also introduced a simple resolution with respect to President Carter’s withdrawal from the Sino–American Mutual Defense Treaty with Taiwan, but the resolution was never passed.<sup>252</sup>

## 2. Joint Resolutions

Another tool available to Congress is the joint resolution. Although the procedure for consideration and passage of a joint resolution is the same as that for a bill, the House Rules and Manual states that joint resolutions are used for “the incidental, unusual, or inferior purposes of legislating.”<sup>253</sup> One of those purposes is “notice to a foreign government of the abrogation of a treaty,”<sup>254</sup> or “[a] resolution alleging an unconstitutional abrogation of a treaty by the President, and calling on the President to seek the approval of Congress before such abrogation.”<sup>255</sup>

Of course, congressional–executive agreements are not formed in the same way as treaties and therefore may not be subject to the same congressional rules for withdrawal or termination. However, if congressional sentiment about unilateral presidential withdrawal is strong enough, Congress may choose to use the same procedure to express its disapproval of unilateral presidential withdrawal and clarify its intentions under the fast track statutory regime.

246. See DAVIS, *supra* note 245, at 1; see also *Bills and Resolutions*, U.S. SENATE, <https://www.senate.gov/legislative/bills.htm> [<https://perma.cc/8JWB-RC3B>] (last visited Jan. 26, 2018).

247. DAVIS, *supra* note 245, at 1.

248. *Id.* at 2.

249. *Id.*; see also RICHARD S. BETH, CONG. RESEARCH SERV., 98-706, *BILLS AND RESOLUTIONS: EXAMPLES OF HOW EACH IS USED* 2–3 (2010).

250. DAVIS, *supra* note 245, at 2.

251. H.R. Con. Res. 63, 110th Cong. (2007). Though styled as a concurrent resolution, the House-initiated measure failed to pass in the Senate. See Shailagh Murray, *Iraq Vote in Senate Blocked by GOP*, WASH. POST (Feb. 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021700247.html> [<https://perma.cc/K42M-C4ET>].

252. S. Res. 15, 96th Cong. (1979); see also *Goldwater v. Carter*, 481 F. Supp. 949, 953–54 nn.11 & 13 (D.D.C.), *rev’d*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

253. WICKHAM, *supra* note 245, at 206.

254. See also *id.* at 317 (“Notice to a foreign government of the abrogation of a treaty is authorized by a joint resolution.”).

255. *Id.* at 317. The relevant section of House Rules and Manual, which annotates Jefferson’s Manual, begins with the note 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.” *Id.* The Supreme Court, of course, declined in *Goldwater* to decide whether this position is correct. See 444 U.S. at 997–98.

Notably, common justiciability concerns do not apply here—Congress is free to express its intention before notice has been delivered, or after it has taken effect. Although joint resolutions are subject to presidential veto, it would be politically awkward for the President to veto the resolution and would likely only place greater political pressure on him if he did so.

Because a joint resolution has the effect of legislation, it would require a heavier political lift than a simple or concurrent “Sense of” resolution. Because of its limited scope, however, the joint resolution would be easier than the most aggressive option available to Congress: trade legislation that clarifies the locus of withdrawal authority from congressional–executive trade agreements.

### 3. Amendment to Fast Track Framework Statutes

Although politically thorny, legislation that amends the Trade Act of 1974, the Omnibus Trade and Competitiveness Act of 1988, or both would be the most precise means of clarifying congressional intentions in this area.<sup>256</sup> A legislative amendment to the fast track statutory regime would finish the job that Congress left undone in 1974 and 1988: conditioning the presidential power to enter into *and* withdraw from trade agreements upon Congressional consultation.

The Omnibus Trade and Competitiveness Act of 1988 offers obvious precedent for the 115th or 116th Congress to clarify its will and emphasize the need for inter-branch consultations in withdrawal from trade agreements.<sup>257</sup> In that statute, Congress underscored the importance of presidential consultation with Congress in entering trade agreements, which had fallen off since 1974.<sup>258</sup> Congress might protect its trade authority through legislation of limited scope that merely clarifies the consultation and approval procedure it expects the President to undertake before delivering notice of withdrawal from an agreement entered into under the authority of the 1974 and 1988 Acts.

Passage of legislation, a joint resolution, or even a “Sense of” resolution might be ambitious to hope for from a Congress that is better known for its failure to act.<sup>259</sup> Smaller voting blocs, however, might be able to exert significant political pressure on the President to begin consultations before delivering notice of withdrawal. Because Congress might effectively curtail unilateral presidential action through threats of withholding votes on key legislation or on appropriations for programs that are pivotal to the President’s agenda, even a relatively small number of unified members of Congress could pose a credible threat. Although this result may smack of countermajoritarianism, it is part and parcel of politics in a

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256. See *supra* Part II.

257. See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2901–3111 (2012); see also *supra* Section II.C.

258. See S. REP. NO. 100-71, at 5–6 (1987).

259. See generally Shi-Ling Hsu, *Introduction: Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. L. 1, 1 (2014) (noting Congress’ failure to pass meaningful environmental legislation in twenty years); Evan Zoldan, *Congressional Dysfunction, Public Opinion, and the Battle Over the Keystone XL Pipeline*, 47 LOY. U. CHI. L.J. 617, 617–18 (2015) (stating that President Obama’s 2015 veto of the Keystone XL Approval Act reflects a general lack of congressional deliberation).

multibranch government and a multidistrict legislature. Moreover, these small voting blocs could do no more than push the President to consult with Congress before delivering notice. If the President judged that NAFTA withdrawal mattered more to him politically than the votes that the objecting members threatened to withhold, he would still be free to deliver notice of withdrawal—and face the lawsuits that would inevitably ensue.

#### B. STANDING: PRIVATE PARTIES VERSUS MEMBERS OF CONGRESS

Strategy over litigation to block unilateral presidential withdrawal from NAFTA is already being developed.<sup>260</sup> Because the matter involves a claim of aggrandizement of presidential power at the expense of Congress,<sup>261</sup> the instinctive reaction might be for members of Congress to bring suit, but that approach is likely foreclosed by the Supreme Court's decision in *Raines v. Byrd*.<sup>262</sup> In *Raines*, members of Congress sought to challenge the constitutionality of the Line Item Veto Act.<sup>263</sup> The Court held that the plaintiff members of Congress alleged no personal stake that was particularized to them, but merely an “institutional injury” that was “wholly abstract and widely dispersed” and “contrary to historical experience.”<sup>264</sup>

That is not to say that legislators may never have standing; the Court in *Raines* distinguished its holding from *Coleman v. Miller*.<sup>265</sup> In *Coleman*, members of the Kansas state legislature sought to challenge the legality of a tie-breaking vote cast by the Lieutenant Governor in favor of adding the “Child Labor Amendment” to the Federal Constitution.<sup>266</sup> The Court held that the legislators had standing.<sup>267</sup> It reasoned that the legislators' claims were sufficiently concrete and particularized for Article III standing purposes because their votes against the amendment were “overridden” and “virtually held for naught” by the Lieutenant Governor's allegedly unlawful action.<sup>268</sup>

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260. See David Lawder, *Any Trump NAFTA Withdrawal Faces Stiff Court Challenge: Legal Experts*, REUTERS, (Nov. 21, 2017, 4:20 PM), <https://www.reuters.com/article/us-trade-nafta-trump-options/any-trump-nafta-withdrawal-faces-stiff-court-challenge-legal-experts-idUSKBN1DL2PK> [<https://perma.cc/F2LY-8C9B>]; William Mauldin, *Lawyers Begin Sketching Legal Strategy to Challenge Possible NAFTA Withdrawal*, WALL ST. J. (Oct. 20, 2017, 5:30 AM), <https://www.wsj.com/articles/lawyers-begin-sketching-legal-strategy-to-challenge-possible-nafta-withdrawal-1508491805> [<https://perma.cc/5FLE-LX28>].

261. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

262. 521 U.S. 811, 820–29 (1997).

263. The plaintiffs were four Senators and two Congressmen of the 104th Congress who voted “nay” on the Line Item Veto Act, which authorized the President to “cancel” certain spending and taxing measures after he had signed them into law. *Id.* at 814–15. See generally Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200.

264. *Raines*, 521 U.S. at 829.

265. *Id.* at 821–26 (distinguishing *Coleman v. Miller*, 307 U.S. 433 (1939)).

266. *Coleman*, 307 U.S. at 435–36.

267. *Id.* at 438, 446.

268. *Id.* at 438; see also *Raines*, 521 U.S. at 823 (providing that, in *Coleman*, legislators' votes were “completely nullified” by Lieutenant Governor's allegedly unlawful action).

The injury to members of Congress in the NAFTA case would be much more akin to *Raines* than to *Coleman*, however. Members would be arguing not that their votes would have decided the law but for the President's unlawful action, but merely that the President's conduct aggrandized the power of the Executive Branch at the expense of Congress, causing a "widely dispersed" injury of an institutional rather than individualized nature.

Moreover, at least one lower court has followed *Raines* to deny legislator standing in circumstances that more closely resemble the NAFTA controversy than either *Raines* or *Coleman*. In *Kucinich v. Bush*, the U.S. District Court for the District of Columbia held that members of Congress lacked standing to challenge President Bush's decision to withdraw from the Anti-Ballistic Missile Treaty without the approval of Congress.<sup>269</sup> The plaintiffs characterized their injury as being "deprived of their constitutional right and duty to participate in treaty termination," which the court dismissed as "the same *institutional* injury as in *Raines*."<sup>270</sup>

Regardless, the NAFTA controversy offers the possibility of private plaintiffs and more traditional economic injuries that will likely be recognized as concrete and particularized. By ending a trade deal, a unilateral decision by the President to withdraw from NAFTA would occasion the loss of access to Canadian and Mexican markets, on which thousands of U.S. persons and businesses rely on in daily transactions. For this reason, courts have recognized standing for private parties in previous cases challenging trade-related decisions by the President. In *Made in the USA Foundation v. United States*, the U.S. Court of Appeals for the Eleventh Circuit found that unions and a nonprofit group promoting American-made products had standing to challenge the constitutionality of the procedure used to enter into NAFTA.<sup>271</sup>

Another case, involving trade sanctions against Nicaragua in the 1980s, gives slightly more pause, but still likely supports standing for a number of private persons and businesses to challenge any NAFTA withdrawal. In *Beacon Products Corp. v. Reagan*, the District Court for the District of Massachusetts confirmed that plaintiffs who had contracts for sales to or from Nicaragua had standing to challenge the President's imposition of trade sanctions on the Republic of Nicaragua.<sup>272</sup> The court contrasted the plaintiffs' standing to challenge the embargo with their likely lack of standing to challenge the President's unilateral withdrawal from the Treaty of Friendship, Commerce, and Navigation (FCN Treaty), an issue the court did not reach.<sup>273</sup> The court's view that plaintiffs likely

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269. 236 F. Supp. 2d 1, 8 (D.D.C. 2002).

270. *Id.* at 6.

271. 242 F.3d 1300, 1307 (11th Cir. 2001) ("[T]he appellants have amassed considerable evidence . . . from which we may infer that U.S. reimposition of tariff and non-tariff barriers to trade is by itself likely to result in somewhat reduced competition from foreign imports, thereby generating more demand for domestic production . . . in the industries represented by the appellant labor organizations.")

272. 633 F. Supp. 1191, 1195 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

273. *Beacon Prods. Corp.*, 633 F. Supp. at 1199 n.13 ("In light of this holding, the court does not reach the issue of plaintiffs' standing.")

lacked standing to make the latter claim was based on the plaintiffs' failure to allege any deprivation of contract rights flowing directly from the treaty termination; plaintiffs had only alleged that the treaty termination would increase their business risk in Nicaragua.<sup>274</sup> In contrast, plaintiffs challenging the President's unilateral withdrawal from NAFTA could point to specific tariff increases or other trade barriers to export of their own products, or increases in costs of Canadian and Mexican products they plan to import, as a direct result of U.S. withdrawal from NAFTA.

#### C. POLITICAL QUESTION: A MATTER OF TIMING

Some cases questioning presidential authority touching on foreign affairs have been dismissed on political question grounds,<sup>275</sup> but not always.<sup>276</sup> Justice Rehnquist's plurality opinion in *Goldwater v. Carter* seems to reject any question that "involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."<sup>277</sup> But in *Baker v. Carr*, the Court emphasized that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>278</sup> Rather, the Court will consider in each case "the history of its management by the political branches, . . . its susceptibility to judicial handling in the light of its nature and posture in the specific case, and . . . the possible consequences of judicial action."<sup>279</sup> Nor does an inter-branch conflict necessarily render a case nonjusticiable, as a number of well-known Supreme Court cases illustrate (albeit most often outside the foreign relations context).<sup>280</sup>

274. *Id.*

275. *E.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (plurality opinion) (finding congressional opposition to presidential treaty withdrawal to be nonjusticiable political question); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Luther v. Borden*, 48 U.S. (7 How.) 1, 1 (1849); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32–33 (1827).

276. *See, e.g.*, *Zivotofsky v. Clinton (Zivotofsky I)*, 566 U.S. 189, 201 (2012) (finding justiciable controversy as to whether Congress could mandate that Secretary of State list "Israel" as place of birth on passport of U.S. citizen born in Jerusalem); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (finding justiciable dispute over Secretary of Commerce's decision regarding Secretary of Commerce's enforcement of statute enacting international whaling quotas even though it would affect "the conduct of the Nation's foreign relations"); *The Three Friends*, 166 U.S. 1, 49 (1897); *Soc'y for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823).

277. 444 U.S. at 1002 (Rehnquist, J., concurring).

278. 369 U.S. 186, 211 (1962).

279. *Id.* at 211–12.

280. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417, 448–49 (1998) (holding that Line Item Veto Act violated the Presentment Clause); *Loving v. United States*, 517 U.S. 748, 773–74 (1996) (holding that presidential prescription of aggravating factors indicating death penalty in court-martial did not infringe Article III); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 892 (1991) (holding that law allowing Chief Judge of federal Tax Court to appoint special trial judge to hear case and recommend opinion to Chief Judge did not violate Appointments Clause); *United States v. Munoz-Flores*, 495 U.S. 385, 401 (1990) (holding that law mandating special assessments for federal misdemeanors was not a "[b]ill for raising Revenue" that must originate in the House of Representatives); *Morrison v. Olson*, 487 U.S. 654, 677, 684 (1988) (holding that Independent Counsel Act did not violate Appointments Clause or infringe on Article III powers of federal courts); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding



The Court in *Baker* outlined six factors for determining whether courts should leave a matter to the political Branches: whether there is (1) a “textually demonstrable constitutional commitment” of the issue to a political Branch; (2) a “lack of judicially discoverable and manageable standards” to resolve the controversy; (3) no possibility of deciding the case without “an initial policy determination of a kind clearly for nonjudicial discretion”; (4) an unavoidable “lack of respect for the coordinate branches of government”; (5) an “unusual need for unquestioning adherence” to an earlier decision of the government; or (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>281</sup>

The first three of these concerns are easily set aside in the NAFTA situation. First, far from a “textually demonstrable constitutional commitment” of the withdrawal decision to the President, the Constitution commits at least as much authority over trade matters to Congress under the Foreign Commerce Clause.<sup>282</sup> Second, a decision by the Court would involve fairly conventional exercises in construing statutes (the NAFTA Implementation Act, the fast track statutes, and other trade agreement acts) and constitutional provisions (the Foreign Commerce Clause and the presidential foreign affairs power).<sup>283</sup> And third, these decisions require strictly legal—not policy—determinations, which courts are well equipped to make.

The Court’s 2012 decision in *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*) demonstrates that the Court does not view the political question doctrine as a talismanic bar to justiciability of all questions touching foreign affairs—including those involving competing policies of the political Branches.<sup>284</sup> In *Zivotofsky I*, a U.S. citizen born in Jerusalem to American parents sought to have “Jerusalem, Israel” listed on his passport as his place of birth.<sup>285</sup> By statute, Congress had ordered the Secretary of State to list “Israel” as the place of birth at the request of the citizen or the citizen’s legal guardian.<sup>286</sup> The State Department’s Foreign Affairs Manual, however, expressly prohibited passport officials from

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that Immigration and Nationality Act violated constitutional bicameralism and presentment requirements); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that the President did not have constitutional authority to issue order to Secretary of Commerce to seize nation’s steel mills in contravention of procedures for emergency seizures of property established by Congress). One notable exception that did implicate foreign relations is *Zivotofsky I*, 566 U.S. at 201 (holding that political question doctrine did not bar challenge to Secretary of State’s refusal to list “Israel” as place of birth on passport of citizen born to American parents in Jerusalem in compliance with Foreign Relations Authorization Act).

281. 369 U.S. at 217.

282. See U.S. CONST. art. 1 § 8, cl. 3.

283. See *Zivotofsky I*, 566 U.S. at 201.

284. See *id.*

285. *Id.* at 192–93.

286. *Id.* at 191 (citing the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350, 1365 (2002)).

writing “Israel” or “Jordan” on the passports of citizens born in Jerusalem.<sup>287</sup> The case involved highly sensitive foreign policy issues and turned on resolution of whether the President’s recognition power trumped Congress’s power over immigration and nationality matters.<sup>288</sup> Neither of these concerns presented an obstacle. The Court noted that “[t]he federal 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.”<sup>289</sup> Interpretation of the underlying statutory and constitutional arguments is “a familiar judicial exercise.”<sup>290</sup> The Court’s refusal in *Zivotofsky I* to adopt an absolute bar to hearing all questions of a political nature supports the notion that a challenge to presidential withdrawal from NAFTA is not foreclosed by the political questions doctrine.

But the fourth, fifth, and sixth *Baker* factors—which Justice Sotomayor characterized as prudential in her concurrence in *Zivotofsky I*<sup>291</sup>—give more pause. Under those factors, courts may choose, for reasons of judicial efficiency, to hear cases that (4) would occasion a lack of respect for the other Branches; (5) demand an “unusual need for unquestioning adherence” to an earlier decision of the government; or (6) might result in “embarrassment” arising from different Branches of government speaking on the same question.<sup>292</sup>

Justice Sotomayor’s opinion emphasized that only the “rare case” will be non-justiciable because of one of the three prudential factors outlined in *Baker*.<sup>293</sup> Many potential objections that arise from earlier cases are easily overcome in this context: for example, courts will not infer illicit motives by any Branch, but none are implied here.<sup>294</sup> Courts will not second-guess decisions taken in exigent circumstances, but no urgent national security or foreign policy decisions are likely to precipitate NAFTA withdrawal.<sup>295</sup> Nor will courts fill lacunae in constitutional

287. *Id.* at 192 (citing 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 1383 Ex. 1383.1, 1383.5-5 to .5-6 (1987)).

288. *See id.* at 199.

289. *Id.* at 196.

290. *Id.*; *see also id.* at 201 (“Resolution of Zivotofsky’s claim demands 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. This is what courts do.”).

291. *Id.* at 204.

292. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

293. *Zivotofsky I*, 566 U.S. at 207; *see also id.* at 205–06 (stating that “[r]are occasions” presenting an “unusual case” may be nonjusticiable under the final three factors and abstention accommodates separation of powers concerns in “unusual cases”).

294. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649, 672–73 (1892) (declining to entertain possibility that presiding officers, clerks, and committees on enrolled bills of both Houses of Congress might conspire to enter bill not duly passed by Congress).

295. *Cf. Luther v. Borden*, 48 U.S. 1, 1 (1849) (declining on political question grounds to consider legality of state recognition of charter government of Rhode Island during Dorr Rebellion); *Martin v. Mott*, 25 U.S. 19, 32–33 (1827) (declining on political question grounds to consider legality of President’s order to call out militia of State of New York during War of 1812).

provisions, but because congressional–executive agreements are not creatures of the Constitution, the only lacunae here are statutory.<sup>296</sup>

The simple fact that NAFTA is an international agreement does not necessarily make presidential withdrawal a political question either. In *Baker*, the Court noted that “a court will not ordinarily inquire whether a treaty has been terminated.”<sup>297</sup> But the Court also noted that a court may nevertheless make such a determination “if there has been no conclusive ‘governmental action’” pursuant to it.<sup>298</sup> In *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, the Court considered and rejected an argument that the War of 1812 operated to terminate the Treaty of Peace of 1783 between the United States and Great Britain.<sup>299</sup> The Court’s decision to reach the question was ambitious, because it did set aside “conclusive government action”: the State of Vermont in 1794 had reclaimed and redistributed land previously granted by the colonial government to a corporate citizen of Great Britain.<sup>300</sup> Vermont pointed to the War of 1812 as a defense to the claim that its land policy violated the 1783 treaty, and the Supreme Court rejected that claim.<sup>301</sup> If treaty termination will sometimes be a justiciable issue, prudential factors would seem to weigh in favor of construing presidential withdrawal from a congressional–executive agreement, because the President’s powers in that context derive mostly from statute and are cabined by the congressional power over foreign commerce.

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296. Cf. *Nixon v. United States*, 506 U.S. 224, 230 (1993) (declining on political question grounds to decide whether Senate procedures were consistent with constitutional mandate to “try” impeachment cases). In the NAFTA context, the primary lacuna is that left by the vagueness of the withdrawal and termination provisions of the Fast Track statutes and the NAFTA Implementation Act. Underlying constitutional questions—the scope and relationship between the congressional foreign commerce clause and the presidential foreign affairs power—raise conventional separation-of-powers considerations that the Court has frequently decided. See, e.g., *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 478–81 (2010); *Morrison v. Olson*, 487 U.S. 654, 657–58 (1988); *Bowsher v. Synar*, 478 U.S. 714, 715–16 (1986); *INS v. Chadha*, 462 U.S. 919, 921–22 (1983); *Buckley v. Valeo*, 424 U.S. 1, 120–37 (1976); *Myers v. United States*, 272 U.S. 106, 293–95 (1926).

297. See *Baker*, 369 U.S. at 212; see e.g., *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (plurality opinion) (declining to consider whether President was constitutionally empowered to unilaterally terminate defense treaty with Taiwan pursuant to recognition of government of People’s Republic of China); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) (declining to consider whether the incorporation of Prussia into the German Empire terminated the 1852 treaty between the United States and Prussia); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1195 (D. Mass. 1986) (declining to decide whether President was constitutionally empowered to unilaterally terminate Treaty of Friendship, Commerce and Navigation with Nicaragua), *aff’d on other grounds*, 814 F.2d 1 (1st Cir. 1987). Cf. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796) (opinion of Iredell, J.) (“[B]y the law of nations, we have no authority . . . to consider or declare [the 1783 Treaty of Peace] broken; but our judgment must be grounded on the solemn declaration of Congress alone, (to whom, I conceive, the authority is entrusted) given for the very purpose of vacating the treaty on the principles I have stated.”).

298. *Baker*, 369 U.S. at 212.

299. 21 U.S. 464 (1823).

300. *Id.* at 466.

301. *Id.* at 493–94. The Court’s statement in *Baker* is perhaps technically correct because Vermont argued that its law was actually based on the (incorrect) view that foreign corporate citizens were not entitled to hold land in the state; treaty termination was argued more as a defense to the petitioner’s argument that the Treaty invalidated the State’s action. *Id.* at 493.

Nevertheless, courts will refuse to consider cases that might cause an “embarrassment” to foreign relations owing to “multifarious pronouncements” from different Branches.<sup>302</sup> It is unclear when courts would view this “embarrassment” concern to arise. Significantly, a notice of withdrawal under NAFTA Article 2205 does not take effect until six months after delivery.<sup>303</sup> Courts might view a lawsuit as justiciable after the notice has been given, but before it has taken effect.<sup>304</sup> However, the Court in *Baker* worried not just about legalistically final actions, but also about “embarrassment” and “multifarious pronouncements” from different Branches.<sup>305</sup> Once the President has sent notice of U.S. withdrawal, courts may view this as a “pronouncement” to Mexico and Canada of U. S. intent to withdraw and may hesitate to differ.<sup>306</sup>

But the *Baker* concern about differing statements from different Branches can be overstated. It is worth noting that the Framers effectively built a form of international “embarrassment” into the Constitution by dividing the treaty power between the President and the Senate.<sup>307</sup> Of course, that embarrassment has been a source of deep concern for U.S. leaders and scholars, at least since the Senate’s rejection of the Treaty of Versailles, and may be partly responsible for the rise of the congressional–executive agreement.<sup>308</sup> Still, the Treaty Clause illustrates that “multifarious pronouncements” were contemplated and encouraged by the Framers as an aspect of separation of powers.

Courts could go either way on the political question issue, and timing will certainly be a factor. In *Goldwater*, Justice Powell’s concurring opinion explicitly refused to entertain the dispute between members of Congress and the President because the issue had not yet reached a “constitutional impasse.”<sup>309</sup> That case reached the Court after the Senate had introduced a resolution declaring that Senate approval is necessary for treaty termination, but before it had voted.<sup>310</sup> It was also unclear whether the resolution would be retroactive.<sup>311</sup> Justice Powell found this lack of “official action” by the Senate to be dispositive.<sup>312</sup>

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302. *Id.* at 217.

303. North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

304. Other scholars have made this point and still arrived at pessimistic conclusions about justiciability. See Hufbauer, *supra* note 54.

305. 369 U.S. at 217.

306. See *supra* Part I.

307. See U.S. CONST. art. II, § 2, cl. 2. As of August 28, 2018, there were forty two treaties pending before the Senate, including treaties submitted as long ago as 1949, 1982, and 1966. See *Treaties Pending in the Senate (updated Aug. 28, 2018)*, U.S. DEP’T OF STATE, <https://www.state.gov/s/treaty/pending/> [<https://perma.cc/F2WV-NK9B>] (last updated Aug. 28, 2018).

308. See Ackerman & Golove, *supra* note 6, at 837–40.

309. *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring).

310. See *id.* at 998.

311. See *id.*

312. See *id.*

The NAFTA situation is different. In the NAFTA case, the plaintiffs would claim that the President is violating his statutory authority under the Trade Act of 1974 by withdrawing from NAFTA without consulting Congress. This claim would not be dependent on any resolution by the House or Senate, because the plaintiffs would claim that the President's action violates the will *already* expressed by Congress in the fast track statutes. And because the ideal plaintiffs would be private parties rather than members of Congress, there would be no concern that only a few members were prematurely expressing the will of the body.<sup>313</sup> Timing may remain an insurmountable hurdle, however, if courts would not consider the action ripe until the President actually delivers the notice of withdrawal without consulting Congress—at which point the prospect of “embarrassment” becomes real, even if the withdrawal does not take effect for another six months.<sup>314</sup>

D. BACK-DOOR CHALLENGE TO THE PRESIDENT'S AUTHORITY THROUGH LITIGATION UNDER THE NAFTA IMPLEMENTATION ACT

Another avenue of challenge remains available to plaintiffs aggrieved by unilateral presidential withdrawal: as discussed in Part IV, plaintiffs challenging the continuation of the domestic obligations under the NAFTA Implementation Act may be able to argue that the statute does not terminate until “the United States” ceases to apply the agreement to Mexico or Canada—and that the President may not unilaterally act for “the United States” for the reasons discussed in Parts II and III. This argument invites the same statutory and constitutional analysis as a direct challenge to the President's withdrawal power, but may more easily overcome political question hurdles because the remedies would be drastically different. In a direct challenge to the President's withdrawal power, the remedy for finding that the President exceeded the scope of his powers would be to invalidate the President's notice of withdrawal to Canada and Mexico. Even if decided before the effective date of that notice of withdrawal, the consequences would necessarily affect the relationship of the U.S. government with Mexico and Canada, perhaps causing the type of “embarrassment” that the Court feared in *Baker*.

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313. *Cf. id.* at 997–98.

314. In this era of presidential tweets, one might argue that near-contemporaneous statements on Twitter by President Trump—that he intends to withdraw from NAFTA imminently—might cause the action to become ripe. Because this would (slightly) precede the notice of withdrawal, the action might ripen before any real international “embarrassment” can occur. Courts have taken notice of presidential tweets as statements of executive policy in other contexts. *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 4, 267 (4th Cir.) *vacating as moot* 138 S. Ct. 377 (2017) (mem.) (recognizing President's tweets about travel ban as official statements of federal policy); *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir.), *vacating as moot*, 138 S. Ct. 377 (2017) (mem.) (same); *Doe v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017) *rev'd sub nom. Doe v. Shanahan*, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019) (recognizing President's tweet as announcement of federal policy prohibiting transgender individuals from serving in military). But a statement of policy is not the same as an executive action, and the latter would be needed to create a ripe controversy for court review. It is unlikely that even the most affirmative Twitter statement of presidential intention to withdraw would be viewed by a court as equivalent to withdrawal, creating a ripe controversy.

However, in a lawsuit construing the scope of the NAFTA Implementation Act's termination clause, the remedy for a finding of presidential overreach would simply be that the termination clause is not triggered. The effect of this would be that the United States may withdraw from NAFTA based on the President's notice of withdrawal for purposes of international law, but the trade obligations implemented into domestic law would continue in force. This result would not change the fact of U.S. withdrawal from NAFTA, but it would provide some relief to parties who stand to be injured by the loss of trade within North America because zero tariffs and other trade concessions would continue in force as a matter of domestic law. It would also complicate the political case for withdrawal from NAFTA because the President would not be free to implement tariffs on Mexican and Canadian imports. Finally, it would likely galvanize Congress—in dialogue with the President—to amend the trade statutes to delineate the respective Branches' powers to withdraw. This political resolution would be consistent with the concerns of the political question doctrine by pushing the ultimate decision to the political Branches.

#### CONCLUSION

President Trump is free to deliver notice of withdrawal from NAFTA. But the better reading of both the statutory regime and the Constitution suggests that the President does not have the independent constitutional authority to withdraw from trade agreements and that Congress did not give such authority to him. And although the NAFTA Implementation Act appears designed to terminate automatically upon U.S. withdrawal from the Agreement, it is unclear—and subject to challenge by private litigants—whether unilateral presidential withdrawal would constitute withdrawal by “the United States” if such action exceeds the President's statutory and constitutional authority.

If Congress agrees with this view and wishes to protect its constitutional authority to regulate foreign commerce, it has several options at its disposal to negate unilateral presidential withdrawal. If Congress fails to act, private litigants could try to overcome prudential doctrines such as standing, ripeness, and political question considerations to have the President's action declared unconstitutional by the courts. It may be easier, however, for litigants to contest the automatic termination of the NAFTA Implementation Act on the grounds that unilateral presidential action is not withdrawal by “the United States.” If a court agrees, the domestic trade obligations would continue in force despite withdrawal from the Agreement and might prompt Congress to clarify the scope of the President's withdrawal powers.

Settling these questions has implications for NAFTA and beyond. Most immediately, if serious challenge to unilateral presidential withdrawal can be mounted or even articulated, the President will be less able to use the threat of withdrawal as a bullwhip to exact concessions from NAFTA partners. In the bigger picture, the current prospect of unilateral presidential withdrawal from trade agreements may cause anxiety among potential trade partners that any agreements will be

built on the shifting sands of the latest presidential election. Ruling out such a unilateral prerogative may encourage the formation of future trade agreements, including the bilateral agreements the Trump Administration itself purports to favor.<sup>315</sup>

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315. See, e.g., Don Lee, *Trump Wants to Cut Bilateral Trade Deals, But What if Nobody Comes to the Table?*, L.A. TIMES (May 26, 2017, 1:40 PM), <http://www.latimes.com/business/la-fi-trump-trade-strategy-20170526-story.html> [<https://perma.cc/U2DN-BQ55>].