The President's Authority to Withdraw the United States from the North American Free Trade Agreement (NAFTA) Without Further Congressional Action

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SUMMARY

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The President's Authority to Withdraw the United States from the North American Free Trade Agreement (NAFTA) Without Further Congressional Action

NAFTA is an international trade agreement among the United States, Canada, and Mexico that became effective on January 1, 1994. The agreement includes market-opening provisions that remove tariff and non-tariff barriers to trade, as well as other rules affecting trade in areas such as agriculture, customs procedures, foreign investment, government procurement, intellectual property protection, and trade in services. Congress approved and implemented NAFTA in domestic law in the NAFTA Implementation Act (Pub. L. No. 103-182, 107 Stat. 2057). On May 18, 2017, U.S. Trade Representative Ambassador Robert Lighthizer notified Congress that the Administration intended to renegotiate NAFTA. More than a year later, following the conclusion of the negotiations, President Trump signed a proposed replacement for NAFTA, the United States-Mexico-Canada Free Trade Agreement (USMCA), along with his counterparts from Canada and Mexico. President Trump has at times suggested that he will withdraw the United States from NAFTA unilaterally if Congress does not approve the USMCA.

This report examines the President's authority to terminate the United States' international obligations under NAFTA without further action from Congress. It also examines whether the NAFTA Implementation Act, the primary federal statute that implements the agreement in domestic law, would remain in effect if the President successfully terminated U.S. obligations under the agreement. In analyzing these issues, the report focuses on three related questions: (1) whether, under international law, the President may terminate U.S. international obligations under NAFTA without congressional approval; (2) whether, under domestic law, the President, relying on constitutional or statutory authority, may terminate U.S. international obligations under NAFTA unilaterally; and (3) whether the NAFTA Implementation Act would remain in effect if the President successfully terminated U.S. international obligations under the agreement.

With regard to the first question, under *international* law, the President appears to be able to terminate the United States' international obligations under NAFTA without congressional approval by delivering six months' notice of withdrawal to Canada and Mexico, provided such notice later becomes effective (e.g., assuming that a court does not enjoin the Executive from issuing the notice or declare such issuance unlawful).

The answer to the second question is less clear, however, and would require a reviewing court to confront several complicated issues of first impression, including the scope of the President's *constitutional* authority and *statutory* authority to terminate an international agreement. Justiciability questions may prevent a court from definitively answering the constitutional questions, leaving the resolution of the President's constitutional authority to the political process. With regard to the statutory question, while legal commentators have raised various arguments with respect to the President's domestic legal authority to terminate U.S. NAFTA international obligations unilaterally, it does not appear that any statute *expressly* affords the President with the authority to terminate NAFTA on his own. It is unclear whether Congress's enactment of an extensive legal framework providing for legislative consideration, approval, and implementation of trade agreements indicates that Congress did not intend to authorize the President implicitly to withdraw from NAFTA without further congressional action. Nonetheless, as explained below, provisions of federal law such as Sections 125 and 301 of the Trade Act of 1974 may provide the Executive with broad authority to suspend individual trade concessions granted to NAFTA countries and thereby establish barriers to trade with Canada and Mexico. At the same time, the Executive's use of such authority would, however, likely be subject to review on various grounds by domestic or international tribunals.

Finally, whether the NAFTA Implementation Act would remain in effect after termination of U.S. obligations under NAFTA would be informed by Supreme Court precedent generally requiring the repeal of statutes to conform to the same bicameral process set forth in Article I of the Constitution that is used to enact new legislation. Accordingly, as an initial matter, it would appear that the President lacks authority to terminate the domestic effect of the NAFTA Implementation Act without going through the full legislative process for repeal. Thus, the Act appears to remain in effect unless Congress has, consistent with the Constitution, delegated to the President authority to terminate its provisions or made such provisions "self-terminating."

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This report examines the President's authority to terminate the United States' international obligations under the North American Free Trade Agreement (NAFTA) without further action from Congress.[1] It also examines whether the NAFTA Implementation Act,[2] the primary federal statute that implements the agreement in domestic law, would remain in effect if the President successfully terminated U.S. obligations under the agreement. In analyzing these issues, the report focuses on three related questions: (1) whether, under international law, the President may terminate U.S. international obligations under NAFTA without congressional approval; (2) whether, under domestic law, the President, relying on constitutional or statutory authority, may terminate U.S. international obligations under NAFTA unilaterally; and (3) whether the NAFTA Implementation Act would remain in effect if the President successfully terminated U.S. international obligations under the agreement.

Brief Background on NAFTA

NAFTA is an international trade agreement among the United States, Canada, and Mexico that became effective on January 1, 1994.[3] The agreement includes market-opening provisions that remove tariff and non-tariff barriers to trade, as well as other rules affecting trade in areas such as agriculture, customs procedures, foreign investment, government procurement, intellectual property protection, and trade in services.[4] The United States approved NAFTA as a congressional-executive agreement by a majority vote of each house of Congress, rather than as a treaty ratified by the President after Senate approval by a two-thirds majority vote.[5] It was not a self-executing agreement; rather, implementing legislation was required to provide domestic legal authorities with the power to enforce and comply with the agreement's provisions.[6] Congress approved and implemented NAFTA in domestic law in the NAFTA Implementation Act.[7]

Although many U.S. obligations under NAFTA were already implemented in domestic law prior to Congress's enactment of the NAFTA Implementation Act,[8] Congress delegated rulemaking authority to the President and various federal agencies in the Act so that they could further implement NAFTA in domestic law by promulgating executive orders, proclamations, or

[1] This report does not address the President's authority to amend or modify NAFTA. For an explanation of how the NAFTA Implementation Act implements the NAFTA agreement, *see* North American Free Trade Agreement Statement of Administrative Action, H.R. DOC. NO. 103-159, at 454-681 (1993).

[2] Pub. L. No. 103-182, 107 Stat. 2057 (codified at 19 U.S.C. ch. 21) [hereinafter NAFTA Implementation Act].

[3] *See* North American Free Trade Agreement, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement (last visited March 4, 2019) (providing the text of NAFTA). *See also* CRS In Focus IF10047, *North American Free Trade Agreement (NAFTA)*, by M. Angeles Villarreal (providing background on NAFTA).

[4] *See, e.g.*, NAFTA chs. 5, 7, 10–12, 14, 17, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993).

[5] NAFTA Implementation Act § 101, 107 Stat. 2057, 2061–62. A congressional-executive agreement is "an executive agreement for which domestic legal authority derives from a preexisting or subsequently enacted statute." *See* CRS Report R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, by Stephen P. Mulligan, at 4. This report does not analyze the constitutionality of approving free trade agreements as congressional-executive agreements instead of treaties. *See generally* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995).

[6] *See* CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan, at 15–17 (discussing the difference between self-executing and non-self-executing agreements).

[7] NAFTA Implementation Act § 101, 107 Stat. 2057, 2061–62.

[8] *See* NAFTA Statement of Administrative Action, H.R. DOC. NO. 159, 103d Cong. at 450 (1993) ("In many cases, U.S. laws and regulations are already in conformity with the obligations imposed by the Agreement.").

regulations.[9] The NAFTA implementing legislation contemplates certain limited changes to certain provisions of NAFTA (e.g., certain rules of origin) in accordance with NAFTA's rules for minor amendments to the text of the agreement[10] and limited congressional delegations of authority to the President to implement such changes in U.S. law.[11]

On May 18, 2017, U.S. Trade Representative (USTR) Ambassador Robert Lighthizer notified Congress that the Administration intended to renegotiate NAFTA.[12] More than a year later, following the conclusion of the negotiations, President Trump signed a proposed replacement for NAFTA, the United States-Mexico-Canada Free Trade Agreement (USMCA), along with his counterparts from Canada and Mexico.[13] The new agreement addressed a variety of issues, including changes to rules of origin for automotive trade; intellectual property rights protections; digital trade; limitations on the scope of investor-state dispute settlement (ISDS) provisions; and certain provisions on agricultural trade.[14] President Trump has at times suggested that he will withdraw the United States from NAFTA unilaterally if Congress does not approve the USMCA.[15]

The President's Unilateral Termination of U.S. NAFTA Obligations Analyzed Under International Law

International law does not itself prohibit the President from unilaterally terminating the United States' obligations under NAFTA. NAFTA is a legally binding agreement under international law. In other words, NAFTA is a "treaty" under international law, a term that has a more expansive meaning than the same term when used in U.S. domestic practice.[16] In this regard, it is important

[9] *See, e.g.*, NAFTA Implementation Act § 104, 107 Stat. 2057, 2064 ("After the date of the enactment of this Act—(1) the President may proclaim such actions; and (2) other appropriate officers of the United States Government may issue such regulations; as may be necessary to ensure that any provision of this Act, or amendment made by this Act, that takes effect on the date the Agreement enters into force is appropriately implemented on such date . . . ").

[10] *See, e.g.*, NAFTA Annex 300-B, § 7, ¶ 2, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993) (addressing modifications of NAFTA rules of origin concerning textile or apparel goods).

[11] *See, e.g.*, NAFTA Implementation Act § 202(q), 107 Stat. 2057, 2086 (codified at 19 U.S.C. § 3332(q)) (authorizing limited changes to NAFTA's rules of origin, subject to congressional consultation and layover procedures).

[12] *USTR Announces First Round of NAFTA Negotiations*, USTR (July 19, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-announces-first-round-nafta.

[13] Peter Baker, *Trump Signs New Trade Deal With Canada and Mexico After Bitter Negotiations*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/2018/11/30/world/americas/trump-trudeau-canada-mexico.html.

[14] *United States-Mexico-Canada Trade Agreement*, USTR (Nov. 30, 2018), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement. *See also* CRS Report R44981, *NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)*, by M. Angeles Villarreal and Ian F. Fergusson (discussing the NAFTA renegotiation process).

[15] Sabrina Rodriguez, *Pelosi Casts Doubt on Passage of Trump's New NAFTA Without Changes*, POLITICO (Dec. 6, 2018), https://www.politico.com/story/2018/12/06/pelosi-casts-doubt-on-trumps-usmca-passage-without-changes-1014361.

[16] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [hereinafter "Vienna Convention"], art. 2 (May 23, 1969), https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf ("'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."); *id.* art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). In U.S. domestic practice, the term typically refers only to those international legal agreements that are submitted to the Senate

to distinguish "treaty" in the context of international law, in which "treaty" and "international agreement" are synonymous terms for all binding agreements, and "treaty" in the context of domestic American law, in which "treaty" may more narrowly refer to a particular subcategory of binding international agreements that receive the Senate's advice and consent.[17]

Part V of the Vienna Convention on the Law of Treaties (Vienna Convention), which the United States has not ratified but considers to reflect, in many aspects, customary international law,[18] provides rules for withdrawal of a party from a binding international agreement. Article 54 of the Vienna Convention provides that "termination of a treaty or the withdrawal of a party may take place . . . in conformity with the provisions of the treaty . . . ."[19] Article 2205 of NAFTA, which Congress approved in the NAFTA Implementation Act, provides that 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." NAFTA does not address whether, in the context of the United States's withdrawal from the agreement, the term "Party" includes both the President and Congress acting together to accomplish withdrawal. In addition, neither the other provisions of the agreement, the context in which they appear, nor the subsequent practice of the NAFTA parties sheds light on the issue.

In the absence of language to the contrary in NAFTA Article 2205, the Vienna Convention applies. Article 67 of the Vienna Convention provides that:

> Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty . . . shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers [i.e., a document showing that the representative has authority to terminate the agreement on behalf of the state].[20]

for advice and consent to ratification. *See also*, *e.g.*, Medellin v. Texas, 552 U.S. 491, 504–06 (2008) (discussing the distinction between the binding effect of treaties under international law versus domestic law).

[17] The term "treaty" is not always interpreted under U.S. law to refer only to those agreements described in Article II, § 2 of the Constitution. *See* Weinberger v. Rossi, 456 U.S. 25, 31–32 (1982) (interpreting a statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (construing the term "treaty," as used in a statute conferring appellate jurisdiction, to also refer to executive agreements).

[18] *See Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, https://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Jan. 28, 2019). U.S. courts also rely upon the Vienna Convention. *E.g.*, De Los Santos Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices." (quoting Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 & n.8 (2d Cir. 2005))); Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 433 (2d Cir. 2001) ("[W]e rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties. Because the United States recognizes the Vienna Convention as a codification of customary international law . . . [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice.") (citations and internal quotation marks omitted).

[19] Vienna Convention, *supra* note16, at art. 54. This report does not examine alternative bases for terminating a treaty under international law outside of termination in accordance with the terms of the treaty, such as a material breach by a party or a fundamental change in circumstances. *See id.* at arts. 60–64.

[20] *Id.* at art. 67. Article 2 of the Convention defines "full powers" as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty." Vienna Convention art. 2.

It thus appears that if the President (i.e., the "head of state" for the United States) communicated a notice of withdrawal from NAFTA to Canada and Mexico, and such notice became effective at least six months later,[21] it would terminate the United States' obligations under the agreement as a matter of international law.[22] The withdrawal process under international law, however, may not account for the unique statutory, constitutional, and separation-of-powers principles related to withdrawal under U.S. domestic law, as discussed below.[23]

The President's Unilateral Termination of U.S. NAFTA Obligations Analyzed Under Domestic Law

If the President sought to terminate U.S. international obligations under NAFTA, an injured business or other party with standing to bring a lawsuit might seek an injunction from a U.S. federal court directing the executive branch to refrain from issuing a notice terminating U.S. obligations under NAFTA or a declaration from the court that such issuance is unlawful.[24] It is difficult to predict how a court might resolve such a challenge, as U.S. courts have uniformly avoided answering whether the U.S. Constitution authorizes the President to terminate an international pact without express congressional approval.[25] Instead, courts have left the executive

[21] The Vienna Convention would not appear to prohibit the President from issuing a single instrument communicating notice to Canada and Mexico of the impending termination of NAFTA and simultaneously making that notice effective at a future date. In fact, other Presidents have delivered such a "two-for-one" notice of termination of U.S. obligations under other international agreements. For example, when President George W. Bush issued a 2001 notice to Russia of the United States' withdrawal from the 1972 Anti-Ballistic Missile Treaty between the two countries, the notice stated that "in the exercise of the right to withdraw from the Treaty provided in Article XV, paragraph 2, the United States hereby gives notice of its withdrawal from the Treaty. In accordance with the terms of the Treaty, withdrawal will be effective six months from the date of this notice." *Text of Diplomatic Notes to Russia, Belarus, Kazakhstan, and Ukraine*, ARMS CONTROL ASS'N (Dec. 13, 2001), https://www.armscontrol.org/act/2002_01-02/docjanfeb02. Six months later, the President issued a statement noting that the withdrawal had become effective. *U.S. Withdraws From ABM Treaty; Global Response Muted*, ARMS CONTROL ASS'N (July 1, 2002), https://www.armscontrol.org/act/2002_07-08/abmjul_aug02 ("Six months ago, I announced that the United States was withdrawing from the 1972 Anti-Ballistic Missile (ABM) Treaty, and today that withdrawal formally takes effect.").

[22] Article 68 of the Vienna Convention provides that an instrument of termination "may be revoked at any time before it takes effect." Vienna Convention, *supra* note 16, at art. 68. Thus, it appears that an instrument terminating U.S. international obligations under NAFTA may be revoked by the President at any time before its effective date. Unless the United States and other parties to NAFTA otherwise agreed—or NAFTA otherwise provides—U.S. withdrawal from NAFTA in accordance with its provisions would appear to release the United States from its international obligations under the agreement from the date that withdrawal became effective. *See* Vienna Convention, *supra* note 16, at art. 70. However, U.S. withdrawal would not "affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." *Id.*

[23] *See infra* "The President's Unilateral Termination of U.S. NAFTA Obligations Analyzed Under Domestic Law."

[24] This report does not analyze whether a court may direct injunctive relief at the President. *See generally* Mississippi v. Johnson, 71 U.S. (Wall.) 475, 499 (1866) (indicating that a court may direct the President to perform a "ministerial" act but not "executive and political" acts).

[25] Federal courts have declined to review the Executive's termination of treaties addressing both commercial and defense matters. *See generally* Goldwater v. Carter, 444 U.S. 996, 996–1006 (1979) (vacating the judgment of the United States Court of Appeals for the District of Columbia Circuit and remanding to the United States District Court for the District of Columbia for dismissal on jurisdictional grounds a case brought by certain Members of Congress challenging President Carter's withdrawal of the United States from a defense treaty with Taiwan without the consent of Congress). In *Goldwater*, none of the Court's opinions garnered a majority of votes. *Id.* Four Justices agreed that the case presented a nonjusticiable political question; one Justice concluded that the Court should dismiss the case because it was not ripe for review; and one Justice concurred in the judgment without further elaboration. *Id. See also* Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (D.D.C. 2002) (dismissing a legal challenge brought by thirty-two Members of the House of Representatives to President George W. Bush's unilateral termination of the 1972 Anti-Ballistic Missile

and legislative branches to resolve disagreements over the termination power through the political process.[26] While no court has considered a case involving a trade agreement approved as a congressional-executive agreement under Trade Promotion Authority (TPA) procedures, there is a significant possibility that a court would dismiss such a case for lack of jurisdiction.

Congress could signal that it disputes the Executive's termination of U.S. NAFTA obligations to a court by enacting a law or resolution with a veto-proof majority opposing or purporting to block such action.[27] If Congress passed such an act or resolution and the Executive still terminated NAFTA in direct derogation of that act or resolution, the legal paradigm governing the separation-of-powers analysis might shift. To resolve certain separation-of-powers conflicts, the Supreme Court typically applies the approach set forth in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[28] which states that the President's constitutional powers often "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."[29] Justice Jackson's opinion sets forth a tripartite framework for evaluating the constitutional powers of the President. The President's authority is (1) at a maximum when acting pursuant to authorization by Congress; (2) in a "zone of twilight" when Congress and the President "may have concurrent authority, or in which its distribution is uncertain," and Congress has not spoken on an issue; and (3) at its "lowest ebb" when taking measures incompatible with the will of Congress.[30]

Although Congress has not enacted a law or resolution prohibiting the President from terminating NAFTA unilaterally, such action could place the President's authority at the "lowest ebb." In that scenario, the President may act in contravention of the will of Congress only in matters involving exclusive presidential prerogatives that are "at once so conclusive and preclusive" that they "disabl[e] the Congress from acting upon the subject."[31] Members of the executive branch have suggested that treaty termination is part of the President's plenary powers,[32] but one could

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Treaty with Russia because the case presented a nonjusticiable political question and plaintiffs lacked standing as legislators to sue for institutional injuries to the legislative branch); Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986) (dismissing on political question grounds a legal challenge brought by private plaintiffs to President Reagan's unilateral termination of a Treaty of Friendship, Commerce, and Navigation with Nicaragua), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987). *See also generally* CRS Report R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, by Stephen P. Mulligan, at 12–15 (discussing these cases further).

[26] *See supra* note 25.

[27] *See* Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (concluding that a dispute between Congress and the President over the power to withdraw from a treaty is not ripe for judicial review "unless and until each branch has taken action asserting its constitutional authority").

[28] 343 U.S. 579 (1952). *See also* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (concurring opinion)] . . .").

[29] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

[30] *Id.* at 635–38.

[31] *Id.* at 637–40. *Accord Zivotofsky*, 135 S. Ct. at 2095.

[32] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat'l Sec. Council, Regarding Authority of the President to Suspend Certain Provisions of the ABM Treaty 7 (Nov. 15, 2001), http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf ("The President's power to terminate treaties must reside in the President as a necessary corollary to the exercise of the President's other plenary foreign affairs powers."). The Office of Legal Counsel (OLC) in the Department of Justice later disavowed unrelated portions of the Yoo & Delahunty Memorandum, but it continues to maintain that the President may unilaterally suspend a treaty where suspension is permitted "by the terms of the treaty or under recognized principles of international law." *See* Memorandum of Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Regarding Status of Certain OLC

plausibly advance the counterargument that the legislative branch plays a shared role in the termination process, especially in matters that implicate Congress's enumerated powers, such as international trade.[33]

Assuming that a federal court found a case challenging the President's termination of NAFTA to be justiciable, it would likely evaluate the President's authority to take such action. Because Congress has not enacted a resolution or legislation disapproving of unilateral NAFTA termination, in order to terminate NAFTA without further congressional action, either (1) the President must possess plenary constitutional authority to terminate U.S. international obligations under NAFTA, or (2) Congress must have authorized the President to take such action through legislation.[34]

Does the President Have Plenary Constitutional Authority to Terminate U.S. International Obligations Under NAFTA?

Although the Constitution establishes a procedure whereby the Executive has the power to make treaties with the advice and consent of the Senate,[35] it is silent as to how the United States may withdraw from treaties or congressional-executive agreements. Scholars have also noted that the Framers of the Constitution never directly addressed the power to terminate treaties (or congressional-executive agreements) in the *Federalist Papers*, the Constitutional Convention debates, or the debates of the state ratifying conventions.[36] In the absence of guidance from the text or original meaning of the Constitution, a court considering whether the President has the constitutional authority to terminate U.S. international obligations under NAFTA without congressional approval would likely turn to other methods of constitutional interpretation. As discussed below, applying relevant methods of interpretation does not provide a clear answer as to whether the President possesses plenary constitutional authority to terminate U.S. obligations under NAFTA.[37]

Structuralism

One method of constitutional interpretation, known as structuralism, draws inferences from the design of the Constitution, including the relationships among the three branches of the federal government (commonly called separation of powers).[38] In this vein, Article I, Section 8 of the Constitution specifically gives Congress the authority to impose duties on imports of products

Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 8–9 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf.

[33] Joel P. Trachtman, *Trump Can't Withdraw from NAFTA Without a 'Yes' from Congress*, THE HILL (Aug. 16, 2017), https://tinyurl.com/y9byuyed ("If the president, acting alone, were to terminate U.S. participation in NAFTA, he would be imposing regulation on commerce, without congressional participation. This would be an unconstitutional usurpation of the powers granted to Congress.").

[34] *Youngstown Sheet & Tube Co.*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

[35] Article II of the Constitution authorizes the President to make treaties "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2.

[36] *See, e.g.*, James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 CONN. J. INT'L L. 123, 132 (1999).

[37] *See also* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill (discussing methods of constitutional interpretation).

[38] *See id.*

from other countries and to "regulate Commerce with foreign Nations."[39] By contrast, although the President may possess constitutional authority to negotiate trade agreements and communicate a notice of withdrawal from an agreement to trading partners, Article II gives the President no specific power over international commerce or trade.[40] The manner in which the Constitution apportions power over international commerce, granting such power specifically to Congress, suggests that the President may simply lack authority to terminate U.S. international obligations under NAFTA, which addresses commercial matters, without further congressional action.[41]

The Supreme Court, however, has interpreted Article II of the Constitution as granting the President the "vast share of responsibility" for conducting foreign relations.[42] This authority includes, but also extends beyond, specific Article II powers to appoint ambassadors with advice and consent of the Senate; submit treaties to the Senate; ratify treaties; and act as the Commander in Chief of the armed forces.[43] Courts and scholars generally accept that such authority includes the exclusive authority to negotiate treaties and international agreements[44] and make official communications with foreign states.[45] Because terminating the United States' NAFTA obligations

[39] U.S. CONST. art. I, § 8.

[40] *See* U.S. CONST. art. II.

[41] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) ("The President does have a unique role in communicating with foreign governments. . . . But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch that makes the law."). Because NAFTA regulates foreign commerce, Congress could also potentially enact legislation that would largely ensure that the United States adheres to, for example, tariff rates established under NAFTA. *Cf. id.* at 2085 ("If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.").

[42] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (citations and internal quotation marks omitted).

[43] U.S. CONST. art. II, § 1 (executive power), § 2 (commander in chief power, treaty power), § 3 (receiving ambassadors).

[44] *Zivotofsky*, 135 S. Ct. at 2086 ("The President has the sole power to negotiate treaties . . . .") (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.")). In *Zivotofsky*, the Court determined that the President had the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not require the President to issue a formal statement contradicting the President's policy on recognition. *Id*. at 2096.

In addition, Justice Thomas argued in *Zivotofsky* that the Vesting Clause of Article II vests the President with the residual foreign affairs powers of the federal government not allocated expressly to Congress, the Executive, or both in the Constitution. The Vesting Clause of Article II provides that the "executive power" shall be vested in the President. U.S. CONST. art. II, § 1, cl. 1; *Zivotofsky*, 135 S. Ct. at 2098 (Thomas, J., concurring in the judgment in the part and dissenting in part) ("By omitting the words 'herein granted' in Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the 'executive Power' of the Federal Government.").

[45] *E.g.*, *id.* at 2090 ("The President does have a unique role in communicating with foreign governments. . . ."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). *See also* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 782 n.39 (2014) [hereinafter Bradley, *Treaty Termination*] (citing historical sources of the Executive's role as the "sole organ" from the founding era through the U.S. Supreme Court decision in *Curtiss-Wright*); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1330 n.278 (2008) ("[T]he President is empowered to act as the formal legal representative of the United States and is therefore uniquely empowered to speak with foreign entities on behalf of the United States. This does not mean that Congress has little or no role in foreign affairs, but simply that this power to represent the nation is granted exclusively to the President."); Saikrishna B. Prakash & Michael D. Ramsay, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 243 (2001) ("Even the most committed advocate of congressional primacy usually admits that the President is the 'sole organ of official communication' in foreign affairs."); L. HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 42 (2d ed. 1996) ("That the President is the sole organ of official communication by and to the United States has not been questioned and has not been a source of

implicates foreign relations and, more specifically, communication of a notice of withdrawal to foreign sovereigns (i.e., Canada and Mexico), one could argue that the design of the Constitution provides the President with independent power to terminate NAFTA unilaterally.[46] Nonetheless, the President's preeminent role in *communicating* with foreign powers does not necessarily imply that he has authority to *terminate* a trade agreement without congressional consent.[47]

Historical Practice

Long-established historical practices of the political branches may also be relevant to whether the President can terminate NAFTA unilaterally.[48] In some cases, the United States has withdrawn from international legal agreements pursuant to the joint action of the political branches.[49] However, beginning at the turn of the 20th century, the President has sometimes withdrawn unilaterally from an international agreement without the consent of Congress.[50] Thus, general

significant controversy."); WESTEL WOODBURY WILLOUGHBY, 1 THE CONSTITUTIONAL LAW OF THE UNITED STATES 587 (1929) (stating that it is a "noncontroversial observation" that, "as the official spokesperson with other governments, the President is the person who communicates the notice of impending termination" of international agreements).

[46] *See* sources cited *supra* note 45.

[47] *See Zivotofsky*, 135 S. Ct. at 2087 ("It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may 'regulate Commerce with foreign Nations . . . .'"). *See also, e.g.*, Bradley, *Treaty Termination, supra* note 45, at 782 (arguing that the President's preeminent role in communicating with foreign powers does "not necessarily establish . . . that the President has unilateral authority to terminate a treaty. After all, it is understood that no treaty can be ratified except through presidential action, and yet the President is required to obtain the advice and consent of two-thirds of the Senate before engaging in such ratification.").

[48] *See* Murrill, *supra* note 37, at 22–24 (discussing the use of historical practices to interpret the Constitution).

[49] In 1855, the Senate authorized President Franklin Pierce to terminate a Friendship, Commerce, and Navigation Treaty with Denmark, and the President subsequently relied on the Senate's action in carrying out the termination. Pres. Franklin Pierce, Third Annual Message (Dec. 31, 1855), http://millercenter.org/president/pierce/speeches/speech-3730 ("In pursuance of the authority conferred by a resolution of the Senate of the United States passed on the 3d of March last, notice was given to Denmark" that the United States would "terminate the [treaty] at the expiration of one year from the date of notice for that purpose."). *See also, e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 306(b)(1), 313, 100 Stat. 1086, 1100 (1986) ("The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between their Respective Territories . . . ."); Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, § 5, 65 Stat. 72, 73 (1951) (directing the President to "take such action as is necessary to suspend, withdraw or prevent the application of" trade concessions contained in prior trade agreements regulating imports from the Soviet Union and "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."). In both cases, the President complied with the congressional direction and provided the notice of termination. *See also* SEN. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 201–02 (Comm. Print 2001), https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf (prepared by the Congressional Research Service).

[50] In 1899, the McKinley Administration terminated certain articles in a commercial treaty with Switzerland. *See* Letter from John Hay, U.S. Sec'y of State, to Ambassador Leishman (March 8, 1899), *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 753–754 (1901). Then, in 1927, the Coolidge Administration withdrew the United States from a convention to prevent smuggling with Mexico. *See* Letter from Frank B. Kellogg, U.S. Sec'y of State, to Ambassador Sheffield (March 21, 1927), *in* 3 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1927, at 230–231 (1942). The Eisenhower Administration terminated a trade agreement with Ecuador that had been authorized by statute without seeking congressional approval. *See* Proclamation No. 3111, 20 Fed. Reg. 6485 (Sept. 2, 1955). However, this agreement was unlike modern FTAs, which are negotiated and considered under Trade Promotion Authority (TPA) procedures and subsequently implemented in a federal statute. *See also* OFFICE OF LEGAL ADVISER, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002 202–06 (Sally J. Cummins & David P. Stewart eds., 2002) (identifying several treaties terminated by the President between 1980 and 2002); Bradley, *Treaty Termination, supra* note 45, at 807–15 (identifying unilateral treaty terminations since the State Department's

historical practice involving the termination of international agreements has been inconsistent, and therefore it may not be particularly helpful in resolving questions about the President's power to terminate trade agreements unilaterally.[51]

Defining the relevant historical practice more narrowly provides little guidance, as well. Historical experience with the suspension of modern free trade agreements (FTAs)—those subsequently approved and implemented in domestic law as congressional-executive agreements by a majority vote in both houses of Congress under Trade Promotion Authority (TPA) procedures—is limited.[52] In fact, no U.S. FTA approved as a congressional-executive agreement under these procedures has been terminated. In the single instance involving suspension rather than termination of an FTA,[53] Congress amended the act implementing the U.S.-Canada Free Trade Agreement preceding NAFTA to suspend certain provisions in the act while allowing others to continue to operate.[54] Although this historical practice concerns *suspension* of an FTA rather than *termination,* a court could interpret it to suggest that Congress may have a role in *terminating* U.S. international obligations under NAFTA. However, because it is a single instance and involves suspension rather than termination of an agreement, a court could also find it to provide little guidance on the President's authority in this context.[55]

Pragmatism

The practical consequences of a court concluding that the President possesses the power to terminate a trade agreement unilaterally may also be relevant. Generally, a pragmatic approach to constitutional interpretation weighs the future costs and benefits of an interpretation to society or the political branches, selecting the interpretation that may lead to the perceived best outcome.[56] However, it is difficult to predict which set of pragmatic arguments a court would find most persuasive. On the one hand, one could argue that the President should possess an exclusive power of unilateral termination because: (1) the nation must have a "single policy" regarding which international trade agreements remain in effect, and (2) additional pronouncements from Congress on the issue could result in confusion for the United States and its trading partners.[57] One might also arguably justify a unilateral termination power on the grounds that the United

compilation in 2002).

[51] NLRB v. Canning, 573 U.S. 513, 533 (2014) (indicating that consistency in historical practice is important when interpreting the Constitution using this method).

[52] Professor Curtis Bradley notes that "in the 1950s and 1960s, presidents terminated multiple ex ante congressional-executive agreements relating to trade by obtaining the consent of the trading partner, but not Congress." Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1638 (2018) [hereinafter Bradley, *Exiting Agreements*]. Although this historical practice may have some relevance, these agreements were not subsequently approved and implemented in domestic law pursuant to the modern fast-track procedures set forth in the Trade Act of 1974.

[53] The United States and Canada agreed to suspend operation of the U.S.-Canada FTA when NAFTA entered into force on January 1, 1994. *See* NAFTA Implementation Act, Pub. L. No. 103-182, § 107, 107 Stat. 2057, 2065–66 (amending 19 U.S.C. § 2112 note); *Canada*, USTR, https://ustr.gov/sites/default/files/Canada_0.pdf (last visited March 4, 2019).

[54] *See* NAFTA Implementation Act § 107, 107 Stat. 2057, 2065–66.

[55] *NLRB*, 573 U.S. at 533.

[56] *See* Murrill, *supra* note 37, at 12–15 (discussing the use of pragmatic considerations to elaborate on the Constitution's meaning).

[57] *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (discussing the President's unilateral power to recognize foreign sovereigns); *see also, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414, 424, 429 (2003) (striking down a California law that "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments" to resolve claims against foreign companies) (citations and internal quotation marks omitted).

States needs a means to make decisive, quick, and clear decisions on withdrawal from NAFTA or other FTAs,[58] particularly when another party has breached the agreement,[59] and that it would make it easier for the President to threaten NAFTA partners with U.S. withdrawal from the agreement as a means of leverage to obtain concessions from them during renegotiation of the agreement.[60] On the other hand, one could instead argue that a unilateral termination power would improperly allow a single actor (i.e., the President) to eliminate an international commercial agreement.[61] In addition, the President's use of such a power could be viewed to undermine the United States' ability to make convincing international commitments in the realm of trade as well as other areas.[62]

Has Congress Granted the President Authority to Terminate U.S. NAFTA Obligations?

Notwithstanding whether the President has plenary constitutional authority to terminate NAFTA, the President could terminate NAFTA without first seeking congressional approval if Congress has already given the Executive such authorization either expressly or by implication.[63]

It is unclear whether a court would find that Congress has implicitly approved of unilateral presidential termination of NAFTA obligations.[64] Congress has enacted a detailed statutory framework for the negotiation, legislative consideration, and implementation of free trade agreements under Trade Promotion Authority (TPA) procedures.[65] During the past few decades, Congress and the President have used this legal framework to conclude and implement 14 free trade agreements with 20 countries, including NAFTA.[66] Given this extensive framework for legislative approval and implementation of trade agreements, a court might find it unlikely that Congress implicitly authorized the President to withdraw from NAFTA without further

[58] *Zivotofsky*, 135 S. Ct. at 2086, 2090.

[59] Bradley, *Exiting Agreements*, *supra* note 52, at 1624 (stating that "U.S. interests might be best served by having unilateral presidential termination authority" in the event that a treaty partner materially breaches an international agreement).

[60] *Cf.* Bradley, *Treaty Termination*, *supra* note 45, at 823.

[61] Joel P. Trachtman, *Trump Can't Withdraw from NAFTA Without a 'Yes' from Congress*, THE HILL (Aug. 16, 2017), https://tinyurl.com/y9byuyed ("If the president, acting alone, were to terminate U.S. participation in NAFTA, he would be imposing regulation on commerce, without congressional participation. This would be an unconstitutional usurpation of the powers granted to Congress.").

[62] *See* Hathaway, *supra* note 45, at 1316.

[63] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

[64] *Id.* at 635–38 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . . [C]ongressional inertia, indifference or quiescence may . . . invite, measures on independent Presidential responsibility.").

[65] During several periods from 1974 onward, Congress has agreed to make legislation submitted by the President implementing a trade agreement eligible for consideration under expedited legislative procedures if the President adheres to certain trade agreement negotiating objectives defined in statute, and meets other statutory requirements for informing and consulting with Congress. *See, e.g.*, Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 103, 129 Stat. 319, 333-37 (June 29, 2015) (codified at 19 U.S.C. § 4202). *See also* CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Ian F. Fergusson (discussing the expedited consideration of trade agreement implementing legislation).

[66] *See Free Trade Agreements*, USTR, https://ustr.gov/trade-agreements/free-trade-agreements (last visited Jan. 28, 2019) (listing the countries with which the USTR has an FTA that has entered into force).

congressional action.[67] On the other hand, the fact that Congress enacted a comprehensive statutory framework for *entering into* trade agreements, but not *withdrawing from* them, may indicate that Congress was not as concerned with the President's termination of U.S. obligations under the agreements.[68]

Nonetheless, some commentators have argued that Congress has *specifically* authorized the President to terminate U.S. international obligations under NAFTA.[69] In particular, these commentators have pointed to Sections 125 and 301 of the Trade Act of 1974, an act that, among other things, sets up the procedure for Congress's consideration of trade agreement implementing legislation, as potentially providing such authority.[70] The following subsections of this report therefore analyze whether Sections 125 and 301 grant the President this termination authority.

Section 125 of the Trade Act of 1974

Some commentators have argued that Section 125(a) of the Trade Act of 1974 authorizes the President to terminate U.S. NAFTA commitments.[71] Congress specifically made this subsection applicable to NAFTA in the Omnibus Trade and Competitiveness Act of 1988, the Trade Promotion Authority (TPA) legislation for NAFTA.[72] Section 125(a), titled "Termination and Withdrawal Authority," which specifically addresses withdrawal from FTAs, provides the following:

> (a) Grant of authority for termination or withdrawal at end of period specified in agreement
>
> Every trade agreement entered into under [the Trade Act of 1974] 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

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[67] *Cf.* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 202 (1994) (holding that the extensive statutory-review scheme in the Federal Mine Safety and Health Amendments Act of 1977 precluded a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the Act).

[68] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–38 (Jackson, J., concurring) ("[C]ongressional inertia, indifference or quiescence may . . . invite, measures on independent Presidential responsibility.").

[69] *See, e.g.*, Gunjan Sharma, *Can Trump Withdraw From NAFTA Without Congress?*, Law360 (Sept. 5, 2017), https://www.law360.com/articles/960203 ("Some commentators appear to have argued that Section 125 of the Trade Act of 1974 permits the president to terminate NAFTA on his own prerogative."); Michael C. Dorf, *Trump Can Destroy NAFTA Alone But Cannot Replace It Without Congressional Help*, Verdict (Sept. 5, 2018), https://verdict.justia.com/2018/09/05/trump-can-destroy-nafta-alone-but-cannot-replace-it-without-congressional-help ("Accordingly, USTR Robert Lighthizer, who serves at the pleasure of the president, could, consistent with the NAFTA Implementation Act, effectively terminate the provisions of NAFTA with respect to Canada (or Mexico or both), even if Congress disapproves.").

[70] 19 U.S.C. §§ 2135, 2411.

[71] *See* Sharma, *supra* note 69.

[72] Section 1105 of the Act states the following:

> For purposes of applying sections [125, 126(a), and 127 of the Trade Act of 1974]—
>
> (1) any trade agreement entered into under [Section 1102 of the Trade Act of 1974, which authorized the President to negotiate NAFTA under TPA procedures] shall be treated as an agreement entered into under [Sections 101 or 102 of the Trade Act of 1974, as appropriate]; and
>
> (2) any proclamation or Executive order issued pursuant to a trade agreement entered into under [Section 1102 of the Trade Act of 1974, which authorized the President to negotiate NAFTA under TPA procedures] shall be treated as a proclamation or Executive order issued pursuant to a trade agreement entered into under [Section 102 of the Trade Act of 1974].

Pub. L. No. 100-418, § 1105, 102 Stat. 1107, 1132 –33 (Aug. 23, 1988) (codified at 19 U.S.C. § 2904).

> 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.[73]

If the President were to invoke Section 125(a) as authority for terminating U.S. international obligations under NAFTA, his actions might be challenged in federal court as exceeding the statutory authority delegated to him.[74] Because no court has yet interpreted Section 125(a), the scope of the President's power under this provision would be an issue of first impression. In deciding whether Section 125(a) authorizes the President to terminate U.S. obligations under NAFTA, the court might consider several principles of statutory interpretation.[75]

First, a court would likely consider the ordinary meaning of the text.[76] In this vein, the title of subsection (a) may provide some guidance. The title "Grant of authority for termination or withdrawal at end of period specified in agreement" may suggest that Congress's purpose in enacting Section 125(a) was to "grant" the President the authority to terminate the agreement in accordance with the withdrawal provision in NAFTA Article 2205 without the need for further legislation. However, the Supreme Court has stated that statutory headings and titles "are not meant to take the place of the detailed provisions of the text"[77] and that the title of an act "cannot enlarge or confer powers."[78] Although the title of subsection (a) may provide limited interpretive aid,[79] it does not specify which political actor has withdrawal authority. Thus, it is unlikely that a court would view it as conferring authority on the President to terminate U.S. obligations under NAFTA.

Turning to the text of Section 125(a), the provision states that agreements like NAFTA "shall be *subject to* termination."[80] The relevant dictionary definition of "subject" is "contingent on or under the influence of some later action."[81] To say that NAFTA is "subject to" termination means that it is capable of later being terminated but says nothing about which political actor(s) must terminate the agreement. This reading is supported by the canon of statutory construction[82] that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."[83] It seems unlikely that Congress would have "hidden" a delegation of authority to the President to terminate NAFTA in a

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[73] 19 U.S.C. § 2135.

[74] *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 576–80, 584 (1975) (declining to review the "essentially political questions" surrounding President Nixon's declaration of a national emergency under the Trading with the Enemy Act to impose a duty surcharge on imports but reviewing whether the President's actions were "within the power constitutionally delegated to him").

[75] *See generally* CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (discussing statutory interpretation).

[76] *See, e.g.*, Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 251 (2010) (noting that between January 31, 2006, and June 29, 2009, the majority of Supreme Court Justices "referenced text/plain meaning and Supreme Court precedent more frequently than any of the other interpretive tools").

[77] Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528 (1947).

[78] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 n.14 (1981) (quoting United States v. Or. & Cal. R.R. Co., 164 U.S. 526, 541 (1896); Cornell v. Coyne, 192 U.S. 418, 430 (1904)).

[79] *See* INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183, 189–90 (1991) (citing Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989); FTC v. Mandel Bros., Inc., 359 U.S. 385, 388–89 (1959)).

[80] 19 U.S.C. § 2135(a) (emphasis added).

[81] *Subject*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/subject (last visited Jan. 30, 2019).

[82] A canon of statutory construction is a presumption about how courts ordinarily read statutes.

[83] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

vaguely worded provision. Rather, the ordinary meaning of Section 125(a) appears to require only that the text of the NAFTA agreement contain a provision allowing for its termination.

Legislative history materials appear to confirm this reading of Section 125(a).[84] These materials suggest that Section 125(a)'s purpose was to ensure that trade agreements entered into by the President contained language providing for termination or withdrawal at the end of a certain time period. This reading is suggested by the House Committee on Ways and Means report on a predecessor to Section 125, Section 2(b) of the 1934 Reciprocal Trade Agreements Act.[85] Congress enacted that law to authorize the President to negotiate reciprocal agreements reducing barriers to international trade during the Great Depression in order to stimulate the domestic economy.[86] The House committee report stated:

> The final provision of the bill under consideration deals with the amount of time during which a foreign trade agreement with another country may run. The provision is that such agreement *must be terminable* at the end of not more than 3 years. If it is not terminated at that time it must thereafter be terminable at any time upon not more than 6 month[s'] notice.[87]

The committee reports thus suggest that Section 125(a)'s purpose was to ensure that the trade agreements that the President entered into would be *subject to termination* or *terminable*. Under this reading, Section 125(a) does not appear to delegate authority to the President to terminate those agreements unilaterally by delivering notice of withdrawal to trading partners.[88]

Section 301 of the Trade Act of 1974

One scholar has argued that Section 301 of the Trade Act of 1974 authorizes the President to terminate U.S. obligations under NAFTA.[89] Section 301 provides that the Office of the United States Trade Representative (USTR), a federal agency within the Executive Office of the President, must take certain specified trade actions "subject to the specific direction, if any, of the President regarding any such action" when it finds, after conducting an investigation and following other procedures, that:

> (A) the rights of the United States under any trade agreement are being denied; or (B) an act, policy, or practice of a foreign country—(i) violates, or is inconsistent with, the

[84] Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) ("Those of us [Justices] who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text.").

[85] Section 2(b) of the Reciprocal Trade Agreements Act of 1934 stated that "Every foreign trade agreement concluded pursuant to this Act shall be subject to termination, upon due notice to the foreign government concerned, at the end of not more than three years from the date on which the agreement comes into force, and, if not then terminated, shall be subject to termination thereafter upon not more than six months' notice." Pub. L. No. 73-316, § 2(b), 48 Stat. 943, 944 (June 12, 1934). Similar language also appeared in Section 255(a) of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 880.

[86] Reciprocal Trade Agreements Act of 1934 § 1, 48 Stat. 943, 943.

[87] H. REP. NO. 73-1000, at 18 (1934) (emphasis added). The purpose of the provision remained the same in the 1974 Act. S. REP. NO. 93-1298, at 91 (1974).

[88] *See* S. REP. NO. 93-1298, at 51 ("Trade agreements must include [a] provision permitting termination or withdrawal within 3 years, and thereafter upon 6 months' notice."). Nonetheless, other provisions in Section 125 of the Trade Act of 1974 would appear to provide the President with authority to establish barriers to trade with Canada and Mexico by withdrawing some trade concessions granted to products and services of those countries. *See infra* "Presidential Authority to Impose Barriers to Trade with NAFTA Parties Under Sections 125 and 301."

[89] Dorf, *supra* note 69. The NAFTA Implementation Act specifically provides that it shall not be construed to "limit any authority conferred under any law of the United States, including [Section 301 of the Trade Act of 1974] unless specifically provided for in this Act." 19 U.S.C. § 3312(a)(2)(B).

> provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce.[90]

Section 301 also provides the USTR with discretion to take "all appropriate and feasible" trade actions specifically authorized under subsection (c) when it finds that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and . . . action by the United States is appropriate."[91]

Section 301(c) provides a list of actions that the USTR may or must take in response to the unfair foreign trade practices. As relevant here, that list authorizes USTR to:

> (A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country [that is the subject of the Section 301 investigation];
>
> (B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate . . .[92]

Notably, the list of actions in Section 301(c) does not explicitly include authorization for the Executive to deliver a notice of withdrawal from a trade agreement to U.S. trading partners and thereby terminate U.S. obligations under the agreement.[93] Rather, as discussed further below, the legislative history of this provision, as recounted in committee reports, indicates that Congress merely intended the provision to provide the President broad authority to take action against unfair foreign trade practices by imposing various barriers to trade under domestic law, including by suspending or terminating individual trade concessions.[94] The text and legislative history do not appear to suggest that Section 301(c) more broadly authorizes the USTR to terminate a trade agreement. However, as discussed below, the Executive might exercise the authority in Section 301 to establish significant barriers to trade with Canada and Mexico.[95] Accordingly, if the USTR were to interpret Section 301(c) as authorizing it to terminate a trade agreement, it would appear that its actions would fall outside of the statutory authority delegated to the agency.

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[90] 19 U.S.C. § 2411(a). The provision states, "Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country."

[91] Id. § 2411(b). See also CRS Legal Sidebar LSB10108, *Tricks of the Trade: Section 301 Investigation of Chinese Intellectual Property Practices Concludes (Part I)*, by Brandon J. Murrill (discussing the executive branch's use of Section 301 against China and the general procedures that the USTR follows when conducting a Section 301 investigation).

[92] 19 U.S.C. § 2411(c).

[93] *See id.* A common canon of statutory construction holds that "when the items expressed are members of an 'associated group or series,' [it justifies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

[94] H. REP. NO. 93-571, at 10 (1973) ("Under section 301 the President may suspend or otherwise limit the benefits of trade agreements, or impose duties or other import restrictions on the products of countries that maintain unjustifiable or unreasonable restraints on the trade of the United States or that provide subsidies or equivalent incentives which have the effect of substantially reducing U.S. exports, or in the case of subsidies, reducing sales of U.S. products in the domestic market."); S. REP. NO. 93-1298, at 163–66 (1974) ("In addition, the Committee felt that there would be situations, such as in the case of unreasonable foreign import restrictions where the President ought to be able to act or threaten to act under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade.").

[95] *See infra* "Presidential Authority to Impose Barriers to Trade with NAFTA Parties Under Sections 125 and 301."

It should be noted that courts reviewing specific USTR actions under Section 301 have in the past accorded "substantial deference to decisions of the Trade Representative implicating the discretionary authority of the President in matters of foreign relations,"[96] including the USTR's selection of a remedy following a Section 301 investigation.[97] But the U.S. Court of Appeals for the Federal Circuit, which reviews the USTR's actions under Section 301, has held that, under the Administrative Procedure Act,[98] "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[99] Furthermore, a court may hold agency action unlawful when there has been "a clear misconstruction of the governing statute" or "action outside delegated authority."[100] Because the text and legislative history of Section 301 indicate that Congress merely intended the provision to furnish the Executive with broad authority to take action against unfair foreign trade practices by imposing various barriers to trade under domestic law,[101] it seems unlikely that a court would accord deference to a USTR interpretation that Section 301 authorizes the President to deliver notice of termination to Canada or Mexico.

Presidential Authority to Impose Barriers to Trade with NAFTA Parties Under Sections 125 and 301

Although neither Section 125 nor Section 301 of the Trade Act of 1974 appears to authorize the Executive to terminate U.S. international obligations under NAFTA, these statutory provisions appear to grant broad authority to the executive branch to impose barriers to trade on goods and services from Canada and Mexico under domestic law. For example, the text and legislative history of Section 125(b)–(f) suggest that Congress intended to provide the President with broad authority to terminate various presidential proclamations implementing a trade agreement in domestic law (e.g., proclamations implementing tariff reductions) and to impose trade barriers in order to, for example, respond to a breach of the agreement by another party.[102] And the text and

[96] Gilda Indus. v. United States, 622 F.3d 1358, 1363 (Fed. Cir. 2010) (involving a challenge to the United States' enforcement of trade rights through the imposition of retaliatory tariffs that the World Trade Organization authorized after formal dispute settlement).

[97] *See* Almond Bros. Lumber Co. v. United States, 721 F.3d 1320, 1326 (Fed. Cir. 2013) (noting that the Administrative Procedure Act "precludes review of agency action[s that are] committed to agency discretion by law," and thus the USTR's negotiation of certain bilateral agreements between the United States and Canada to resolve Section 301 and other trade investigations was unreviewable).

[98] 5 U.S.C. § 706.

[99] *Gilda Indus.*, 622 F.3d at 1363 (quoting Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 n.9 (1984)).

[100] *Gilda Indus.*, 622 F.3d at 1363.

[101] H. REP. NO. 93-571, at 10 (1973) ("Under section 301 the President may suspend or otherwise limit the benefits of trade agreements, or impose duties or other import restrictions on the products of countries that maintain unjustifiable or unreasonable restraints on the trade of the United States or that provide subsidies or equivalent incentives which have the effect of substantially reducing U.S. exports, or in the case of subsidies, reducing sales of U.S. products in the domestic market."); S. REP. NO. 93-1298, at 163–66 (1974) ("In addition, the Committee felt that there would be situations, such as in the case of unreasonable foreign import restrictions where the President ought to be able to act or threaten to act under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade.").

[102] Section 125(b) of the Trade Act of 1974 provides that the "President may at any time terminate, in whole or in part, any proclamation made under [the Trade Act of 1974]." 19 U.S.C. § 2135(b). The legislative history indicates that this provision was intended to authorize the President to terminate various proclamations made to implement a trade agreement, such as those pertaining to tariffs or rules of origin. *See* S. REP. NO. 93-1298, at 51 (1974) ("[The] President may at any time terminate tariff reductions proclaimed pursuant to [the] negotiated trade agreement."). Much of the remainder of Section 125 addresses the President's authority to withdraw individual trade concessions, for example, in response to another party's breach of the agreement. 19 U.S.C. § 2315(c)-(d); S. REP. NO. 93-1298, at 92 (1974) ("The

legislative history of Section 301, as recounted in committee reports, indicate that the provision was intended to provide the Executive with broad authority to effect the temporary suspension or withdrawal of individual trade concessions accorded by the United States to the goods and services of trading partners while a trade agreement remained in effect.[103]

Although such provisions appear to furnish the executive branch with broad authority to suspend or terminate individual trade concessions, the Executive's actions under these provisions could be subject to challenge before international and domestic tribunals. For example, the Executive's imposition of trade barriers pursuant to such authorities may place the United States in breach of its obligations under other international agreements, such as the World Trade Organization (WTO) agreements.[104] If a dispute proceeded to a WTO panel, and the panel rendered an adverse decision against the United States, the United States would be expected to remove the offending measure, generally within a reasonable period of time, or face the possibility of paying compensation to the complaining member or being subject to sanctions.[105] Such sanctions might include the complaining member imposing higher duties on imports of selected products from the United States.[106] However, a WTO Member could begin to impose its own duties on selected U.S. exports without awaiting the outcome of a dispute settlement proceeding.[107]

In addition, a *domestic* court might consider whether, in exercising authority under Section 125, the President acted within the scope of his delegated powers as defined by the terms of the statute,

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purpose of subsection (c) is to enable the President to exercise U.S. rights and obligations under the [General Agreement on Tariffs and Trade] and other international trade agreements, so as to protect U.S. trading interests. The subsection would authorize the President to give domestic legal effect to the withdrawal or suspension of trade agreement concessions to any foreign country in the exercise of our international rights and obligations. . . . The use of this authority would be limited to the exercise of U.S. rights and obligations under international trade agreements. . . . The Committee adopted a new provision (new section 125(d)) which would require the President to withdraw trade agreement concessions whenever a foreign country withdraws, suspends or modifies application of trade agreement obligations of benefit to the United States without granting adequate compensation."). Section 125(e) provides for the continuation of preferential tariff rates on imports of products from former FTA partner countries for a year from U.S. termination of, or withdrawal from, an FTA, "unless the President by proclamation provides that such rates shall be restored to the level at which they would be but for the agreement." 19 U.S.C. § 2135(e).

[103] *See* sources cited *supra* note 101.

[104] *See, e.g.*, General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (obligating each WTO Member to treat another WTO Member's goods no less favorably than a third WTO Member's goods (most-favored nation treatment); *id.* art. II (generally prohibiting WTO Members from imposing duties on imported goods in excess of upper limits to which they agreed in their Schedules of Concessions and Commitments).

[105] Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 21-22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. Members whose measures are deemed inconsistent with its WTO obligations and unjustified under one of the GATT exceptions are expected to implement the panel and/or Appellate Body's report. *Id.* art. 21.3. That is, the defending Member must withdraw, modify, or replace its inconsistent measures. *See id.* If a disagreement arises as to whether the defending Member has, in fact, implemented the report, a WTO panel may be convened to hear the dispute over compliance. *Id.* art. 21.5. The WTO Appellate Body hears appeals of these compliance panel reports. *Id.* art. 17.1.

[106] *See id.* art. 22.3. Ultimately, when a defending Member fails to implement a panel or Appellate Body report within the established compliance period, the prevailing Member may request that the defending Member negotiate a compensation agreement. *Id.* art. 22.2. If such negotiations are not requested or if an agreement is not reached, the prevailing Member may also request authorization to impose certain trade sanctions against the noncomplying Member. *Id.* art. 22.2–22.3. Specifically, the WTO may authorize the prevailing Member to suspend tariff concessions or other trade obligations that it otherwise owes the noncomplying Member under a WTO agreement. *Id.*

[107] *See* Charles Hutzler, *China Retaliates Against Trump Tariffs with Duties on American Meat and Fruit*, WALL STREET J. (Apr. 1, 2018), https://www.wsj.com/articles/china-retaliates-with-new-tariffs-on-u-s-meat-and-other-products-1522618533.

or whether the President's actions were proportional to the circumstances cited to justify them.[108] As a further example, a federal court could review USTR's Section 301 actions under the Administrative Procedure Act to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[109] A reviewing court might consider, for example, whether the USTR's Section 301 actions involved "a clear misconstruction of the governing statute," "a significant procedural violation," or "action outside delegated authority."[110]

Whether the NAFTA Implementation Act Would Remain in Effect After Termination of U.S. NAFTA Obligations

The NAFTA Implementation Act, the primary federal statute that implements NAFTA in domestic law, would likely remain in effect if the President successfully terminated the United States' international obligations under NAFTA unilaterally. Under Supreme Court precedent, the repealing of statutes generally must conform to the same bicameral and presentment process set

[108] *See* U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 404 (C.C.P.A. 1982) ("In sum, let the President's action be authorized, and let his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end."). A court might also examine whether the President's trade-related actions were proportional to the circumstances cited as requiring such actions. *See also* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 580, 584 (1975) (declining to review the "essentially political questions" surrounding President Nixon's declaration of a national emergency under the Trading with the Enemy Act to impose a duty surcharge on imports but reviewing whether the President's actions were "within the power constitutionally delegated to him").

[109] 5 U.S.C. § 706.

[110] Gilda Indus. v. United States, 622 F.3d 1358, 1363 (Fed. Cir. 2010). In addition, it is possible that these sections of the Trade Act of 1974 could be challenged in federal court as facially unconstitutional under the "non-delegation doctrine" because the provisions delegate too much of Congress's power over commerce to the President in violation of basic separation-of-powers principles. In fact, in June 2018, a steel industry trade association and other plaintiffs challenged the constitutionality of Section 232 of the Trade Expansion Act of 1962—a federal statute that appears to provide expansive authority to the Executive to impose barriers to trade with other countries based on an affirmative determination by the Department of Commerce that the product under investigation "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." Complaint at 1, Am. Inst. for Int'l Steel, Inc. v. United States, No. 18-00152 (Ct. Int'l Trade June 27, 2018). *See also* 19 U.S.C. § 1862. The President has cited this statute as authority to impose tariffs on U.S. imports of certain steel and aluminum products after following procedures established in the statute. Presidential Proclamation on Adjusting Imports of Steel into the United States (March 8, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/; Presidential Proclamation on Adjusting Imports of Aluminum into the United States (March 8, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/. The plaintiffs in the case have argued that "Congress created an unconstitutional regime in section 232, in which there are essentially no limits or guidelines on the trigger or the remedies available to the President, and no alternative protections to assure that the President stays within the law, instead of making the law himself." Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 3–4, Am. Inst. for Int'l Steel, Inc. v. United States, No. 18-00152 (July 19, 2018).

Although an analysis of the merits of the plaintiffs' claims is beyond the scope of this report, it is important to note that nondelegation challenges could be brought to other federal statutes delegating apparently expansive authority over commerce to the executive branch, such as Sections 125 and 301 of the Trade Act of 1974. However, the Supreme Court has not used the nondelegation doctrine to invalidate a delegation of authority to other branches of government since 1935. *See* Fed. Power Comm'n. v. New England Power Co., 415 U.S. 345, 352–53 (1974) (remarking that the nondelegation doctrine has "been virtually abandoned by the Court for all practical purposes"). Rather, it has held that delegations are permissible as long as Congress lays out an "intelligible principle" to govern and guide its delegate by setting out boundaries for the delegation. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

forth in Article I that is used to enact new legislation.[111] For example, in *Clinton v. City of New York*, the Supreme Court struck down the Line Item Veto Act (LIVA), a law that authorized the President, within five days of signing a bill into law, to make partial cancellation of certain tax and spending provisions in the law if the President determined certain criteria were met.[112] The Court held that the LIVA violated the bicameralism and presentment requirements of the Constitution because the President could effectively repeal acts of Congress without going through the regular legislative process involving House and Senate passage of legislation and presentment of it to the President for his signature or veto.[113] Nonetheless, the Court has recognized Congress's authority to enact contingent legislation that provides for the alteration of a law's effect based on a condition that arises after the law is enacted.[114]

It should be noted that Sections 109(b) and 415 of the NAFTA Implementation Act contain language that could be read to effect the repeal of certain provisions of the NAFTA Implementation Act under specific circumstances.

Specifically, section 109(b) states:

> (b) TERMINATION OF NAFTA STATUS—During any period in which a country ceases to be a NAFTA country, sections 101 through 106[115] shall cease to have effect with respect to such country.[116]

Section 415(a) provides similar language with respect to certain provisions addressing dispute settlement in antidumping and countervailing duty cases in Title IV of the NAFTA Implementation Act:

> (a) IN GENERAL—Except as provided in subsection (b)[, which contains transitional provisions], on the date on which a country ceases to be a NAFTA country, the provisions of this title (other than this section) and the amendments made by this title shall cease to have effect with respect to that country.[117]

The NAFTA Implementation Act defines "NAFTA country" as those countries (i.e., Canada and Mexico) (1) to which the agreement is in force and (2) to which the United States "applies the Agreement."[118]

The text and legislative history of Sections 109(b) and 415 of the NAFTA Implementation Act indicate that Congress intended these sections to trigger automatic termination of certain

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[111] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."); INS v. Chadha, 462 U.S. 919, 954 (1983) ("[R]epeal of statutes, no less than enactment, must conform with Art. I."). The Presentment Clause of the Constitution requires that legislation passed by Congress be presented to the President for his signature or veto before it can become law. "[E]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it." U.S. CONST. art. I, §7, cl. 2.

[112] Clinton v. City of New York, 524 U.S. 417, 436 (1998).

[113] *Id.* at 439.

[114] *Id.* at 446 n.40.

[115] Sections 101–106 of the NAFTA Implementation Act include Congress's approval of the agreement in domestic law; provisions addressing the relationship between the agreement and federal and state law; authorization for implementing regulations; authorization for the establishment of the United States section of the NAFTA Secretariat; and provisions on appointments to NAFTA Chapter 20 panel proceedings, among other things.

[116] NAFTA Implementation Act, § 109(b), 107 Stat. 2057, 2068.

[117] *Id.* § 415(a), 107 Stat. 2057, 2148.

[118] *Id.* § 2(4), 107 Stat. 2057, 2060–61.

provisions of the Act with respect to Canada or Mexico when *either country* withdrew from NAFTA but the United States remained a party.[119] However, it is unclear what language in either of these provisions would afford the President the authority to terminate the agreement without such conduct by Canada or Mexico. Moreover, interpreting Sections 109(b) and 415 to provide for the automatic termination of certain provisions in the NAFTA Implementation Act when the *President* unilaterally terminates U.S. NAFTA obligations under international law would appear to violate a key canon of statutory construction that holds that if one plausible reading of a statute would raise questions about the statute's constitutionality, a court should look for another, "fairly possible" reading that would avoid the constitutional issue.[120] Interpreting Sections 109(b) and 415 to authorize the President to terminate portions of the NAFTA Implementation Act by withdrawing the United States from NAFTA would raise the question of whether Congress's delegation of such authority to the President violates separation-of-powers principles by contravening the Presentment Clause of the Constitution, which, as noted above, requires that legislation be passed by Congress and presented to the President for his signature or veto in order to become law.[121] Accordingly, a more likely reading of Sections 109(b) and 415 would likely be that certain provisions of the NAFTA Implementation Act cease to have effect with respect to Canada or Mexico if either country withdraws from NAFTA but the United States remains a party. Therefore, absent further congressional action, the United States' withdrawal from NAFTA alone appears unlikely to trigger Sections 109(b) and 415 or render the NAFTA Implementation Act ineffective.

Notably, even if the NAFTA Implementation Act remains in effect, other provisions of federal law (e.g., Section 301 of the Trade Act of 1974) may grant the President or a federal agency authority to restrict trade with Canada or Mexico.[122] As noted, such actions would likely be subject to judicial review on various grounds.[123]

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[119] S. REP. NO. 103-189, at 12 (1993) ("Sections 101 through 106 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."); *id.* at 50 ("[Section 415(a)] provides that, on the date on which a country ceases to be a NAFTA country, the provisions of Title IV regarding the binational panel process and the amendments made by Title IV will cease to have effect with respect to that country."); H. REP. NO. 103-361, at 25 (1993) ("Sections 101 through 106 shall cease to have effect with respect to a country during any period in which that country ceases to be a NAFTA country."); *id.* at 87 ("Section 415 of H.R. 3450 addresses circumstances in which a country ceases to be a NAFTA country."). Neither Canada nor Mexico has, as a formal matter, withdrawn from NAFTA.

[120] Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

[121] *See supra* "Whether the NAFTA Implementation Act Would Remain in Effect After Termination of U.S. NAFTA Obligations" above.

[122] *See supra* "Presidential Authority to Impose Barriers to Trade with NAFTA Parties Under Sections 125 and 301."

[123] *See supra* note 122.

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