

EXITING CONGRESSIONAL-EXECUTIVE AGREEMENTS

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ABSTRACT

Commentators have argued that, even if the president has the unilateral authority to terminate Article II treaties concluded with the Senate's advice and consent, the president lacks the unilateral authority to terminate "congressional-executive agreements" concluded with majority congressional approval, such as the North American Free Trade Agreement (NAFTA). This Article challenges that claim. If one accepts a presidential authority to terminate Article II treaties, this Article contends, there is no persuasive reason to conclude differently with respect to congressional-executive agreements. Congressional-executive agreements have become largely interchangeable with Article II treaties as a matter of domestic law and practice. For example, either instrument can be used to address matters relating to international commerce and trade. Moreover, while presidents cannot unilaterally terminate statutes, congressional-executive agreements are not mere statutes. They are, like Article II treaties, binding international instruments that can be concluded by the United States only through presidential action. These agreements also typically contain withdrawal clauses similar to those contained in Article II treaties, which presidents have long invoked unilaterally, and Congress has never indicated that presidents have less withdrawal authority for such agreements. Indeed, in its trade legislation, Congress appears to have accepted that presidents may invoke such clauses unilaterally.

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INTRODUCTION

The election of Donald Trump to the presidency brought renewed attention to the scope of the president’s authority to terminate the United States’ international agreements. During his campaign, Trump suggested that he might terminate various agreements, and after taking office he announced his intent to withdraw the United States from the Paris agreement on climate change.¹ He has also threatened to terminate various trade agreements, including NAFTA.²

The text of the Constitution does not specifically address this question of presidential authority. Article II states that, in order to make a treaty, the president must obtain the advice and consent of two-thirds of the Senate,³ but it does not specify how such Article II treaties are to be unmade. Moreover, it says nothing at all about either the making or unmaking of “executive agreements,” even though such agreements now constitute the vast majority of the United States’

1. See Lisa Friedman, *U.S. to Join Climate Talks Despite Planned Withdrawal from Paris Accord*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/climate/us-to-join-climate-talks-despite-planned-withdrawal-from-paris-accord.html> [https://perma.cc/7KW2-CYUQ]; Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [https://perma.cc/96HQ-N65K].

2. See Ana Swanson, *Trump’s Tough Talk on Nafta Raises Prospects of Pact’s Demise*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/business/economy/nafta-trump.html> [https://perma.cc/U9FK-CDUW].

3. See U.S. CONST. art. II, § 2.

international agreements.⁴

In part because of longstanding historical practice, many commentators have concluded that the president can act unilaterally for the United States in terminating Article II treaties, at least when international law permits termination.⁵ Some commentators who accept this proposition nevertheless contend that the president lacks unilateral authority to terminate congressional-executive agreements—that is, international agreements concluded by presidents with majority congressional authorization or approval, like NAFTA.⁶ This Article challenges that claim. If one accepts presidential authority to terminate Article II treaties, this Article contends, there is no persuasive reason to conclude differently with respect to congressional-executive agreements.

Part I explains why presidential authority to terminate Article II treaties is generally accepted, and it briefly describes the phenomenon of executive agreements. Part II contests the claim that congressional-executive agreements differ from Article II treaties with respect to presidential termination authority. Part III discusses other potential constraints on presidential withdrawal from treaties and congressional-executive agreements. Part IV concludes.

I. PRESIDENTIAL AUTHORITY TO TERMINATE ARTICLE II TREATIES

The U.S. Constitution describes how the United States can make treaties, but it does not describe how it can terminate or withdraw from them.⁷ Despite the lack of clear textual guidance, the generally

4. See *infra* Part II.

5. See *infra* Part I.

6. See, e.g., John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 815 (2001); Julian Ku & John Yoo, *Trump Might Be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html> [<https://perma.cc/C4GN-S565>]; Joel P. Trachtman, *Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty* (Oct. 16, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015981 [<https://perma.cc/HE5B-VNPO>]. Trachtman's claim is similar to, but potentially narrower than, Yoo's and Ku's. He only contends that presidents cannot terminate *commerce-related* congressional-executive agreements, and he takes no definitive position on the termination of other types of congressional-executive agreements.

7. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 211 (2d ed. 1996) (“[T]he Constitution tells us only who can make treaties for the United States; it does not say who can unmake them.”).

prevailing view is that the president can act unilaterally for the United States in terminating treaties, at least when international law allows withdrawal and Congress has not prohibited it. This view is reflected in both the *Restatement (Third) of the Foreign Relations Law of the United States* and in the new *Restatement (Fourth)*.⁸

This Part describes why this has become the prevailing view. It begins by briefly recounting the history of treaty terminations by the United States. Next, it discusses the principal arguments in support of unilateral presidential termination power. Finally, it describes the phenomenon of executive agreements.

Before turning to these points, it is useful to have in mind some of the international law rules governing treaty termination. These rules are themselves set out in a treaty—the Vienna Convention on the Law of Treaties.⁹ Although the United States has not ratified the Vienna Convention, the executive branch accepts that many provisions of the Convention, including its termination provisions, reflect binding customary international law.¹⁰ The International Court of Justice in The Hague has also specifically observed that the Vienna Convention provisions concerning termination “in many respects” reflect customary international law.¹¹

Under international law as reflected in the Vienna Convention, nations can suspend, terminate, or withdraw from treaties under various circumstances. Perhaps most obviously, they can enter into an agreement with the other parties to the treaty to suspend or terminate the treaty.¹² In addition, many modern treaties contain clauses that allow parties to withdraw without obtaining the agreement of other parties, although such clauses often require a certain amount of notice

8. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (AM. LAW INST. 1986) [hereinafter RESTATEMENT (THIRD)]; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 113(1) (AM. LAW. INST., Tentative Draft No. 2, 2017) [hereinafter RESTATEMENT (FOURTH) Draft 2]. I served as a Reporter for the *Restatement (Fourth)*. The views expressed in this Article are my own and do not necessarily reflect the position of the *Restatement (Fourth)*.

9. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

10. See RESTATEMENT (THIRD), *supra* note 8, pt. 3, intro. note (documenting executive branch statements); RESTATEMENT (FOURTH) Draft 2, *supra* note 8, § 113 reporters’ note 1 (same). Customary international law is the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD), *supra* note 8, § 102(2).

11. See *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 46 (Sept. 25).

12. See Vienna Convention, *supra* note 9, arts. 58, 59.

before the withdrawal will take effect. Unsurprisingly, international law allows such clauses.¹³ Even fundamental and wide-ranging treaties often allow for withdrawal, as illustrated by Great Britain’s decision to exit the European Union, or “Brexit.” International law further allows a party to withdraw in response to particular developments, such as a material breach of the treaty by another party, or a fundamental change in circumstances.¹⁴

Importantly, these international law standards all govern the behavior of nations and do not purport to determine which governmental actors within each nation can terminate an international agreement. Instead, that question is left for each nation to resolve under its domestic law.¹⁵

A. *A Brief Overview of U.S. Historical Practice*

Throughout its history, the United States has terminated treaties by a variety of procedures.¹⁶ The first time it did so was pursuant to a statute. In 1798, on the eve of war with France, Congress passed and President Adams signed legislation stating that the four treaties the United States had with France at that time “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”¹⁷ This appears to be the only instance in U.S. history in which Congress purported to directly effectuate a treaty termination. Importantly, this action was related to Congress’s authority to declare war, a power that would inherently have been linked to treaty termination at the Founding.¹⁸

13. *See id.* art. 54. In a recent book, Professor Koremenos estimates that approximately 70 percent of modern treaties contain withdrawal clauses. *See* BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* 140–44 (2016); *see also* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582 (2005) (“Treaty clauses that authorize exit are pervasive. They are found in a wide array of multilateral and bilateral agreements governing key transborder regulatory issues, including human rights, trade, environmental protection, arms control, and intellectual property.”).

14. *See* Vienna Convention, *supra* note 9, arts. 60 ¶ 1, 62 ¶ 1.

15. *See generally* Laurence R. Helfer, *Terminating Treaties*, in *THE OXFORD GUIDE TO TREATIES* (Duncan B. Hollis ed., 2012) (describing the international law rules governing treaty termination and explaining that they are distinct from the domestic rules governing such termination).

16. *See generally* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014) [hereinafter Bradley, *Treaty Termination*] (providing a history of American treaty termination).

17. Act of July 7, 1798, ch. 67, 1 Stat. 578.

18. *See, e.g.*, EMERICH DE Vattel, *THE LAW OF NATIONS*, bk. 3, ch. X, § 175 (J. Chitty ed., 1854) (“The conventions, the treaties made with a nation, are broken or annulled by a war arising

During the nineteenth century, the United States did not exit from many treaties, but when it did so, presidents usually acted with some sort of legislative authorization or approval.¹⁹ Congress sometimes authorized presidents to terminate treaties in their discretion;²⁰ at other times, Congress directed the president to terminate.²¹ On rare occasions, the Senate alone authorized presidential termination.²² When Congress attempted to compel termination of select articles within treaties, however, presidents sometimes resisted on the ground that such action was not permissible under the treaties.²³

On other occasions in the nineteenth and early twentieth centuries, such as in the Lincoln and Taft administrations, presidents unilaterally terminated treaties and received approval after the fact from either Congress or the Senate.²⁴ In another somewhat unilateral action, President Grant informed Congress in 1876 that he would

between the contracting parties”); *see also* RESTATEMENT (THIRD), *supra* note 8, § 339 cmt. a (“Congress, as distinct from the Senate alone, might perhaps claim a voice in the termination of a treaty where termination might create serious danger of war, in view of the authority of Congress to decide for war or peace under Article I, Section 8, of the Constitution.”); Daniel J. Hessel, Note, *Founding-Era Jus Ad Bellum and the Domestic Law of Treaty Withdrawal*, 125 YALE L.J. 2394, 2399 (2016) (arguing that “at the Founding, treaty withdrawal provided a just cause of war under the law of nations” and that, “because the Constitution assigns Congress the power to declare war, . . . the original understanding of the Constitution contemplated a congressional treaty withdrawal power”).

19. *See* Bradley, *Treaty Termination*, *supra* note 16, at 788–96; *see also* HENKIN, *supra* note 7, at 211 (“At various times, the power to terminate treaties has been claimed for the President, for the President-and-Senate, for President-and-Congress, for Congress.”).

20. *See, e.g.*, Joint Resolution of Apr. 27, 1846, 9 Stat. 109, 109–10 (authorizing President Polk “at his discretion” to terminate a treaty with Great Britain relating to the two countries’ joint occupation of the Oregon Territory).

21. *See, e.g.*, Joint Resolution of Mar. 3, 1883, 22 Stat. 441 (directing President Arthur to terminate various articles in an 1871 treaty with Great Britain, which Arthur then acted to terminate).

22. *See, e.g.*, Franklin Pierce, Third Annual Message (Dec. 31, 1855), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2860, 2867 (James D. Richardson ed., 1897) (explaining that President Pierce was terminating a treaty with Denmark “[i]n pursuance of the authority conferred by a resolution of the Senate”).

23. *See, e.g.*, Rutherford B. Hayes, Veto of the Chinese Immigration Bill, H.R. Exec. Doc. No. 45-102, at 5 (3d Sess. 1879) (disputing that Congress can direct the abrogation of only parts of a treaty, while accepting that Congress can direct the termination of the entire treaty); Press Release, U.S. Dep’t of State 2–3 (Sept. 6, 1920) (on file with *Duke Law Journal*) (declining to follow a congressional directive to terminate treaty obligations relating to customs duties because the treaties in question did not allow for such partial termination).

24. *See, e.g.*, Joint Resolution of Dec. 21, 1911, 37 Stat. 627 (stating that President Taft’s notice of termination of a treaty with Russia was “adopted and ratified”); Joint Resolution of Feb. 9, 1865, 13 Stat. 568 (“adopt[ing] and ratif[ying]” President Lincoln’s termination of a treaty with Great Britain).

suspend U.S. compliance with an extradition treaty with Great Britain because of that nation's noncompliance, while noting that "[i]t is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States."²⁵ The first entirely unilateral presidential treaty termination may have been President McKinley's 1899 termination of certain clauses in a commercial treaty with Switzerland.²⁶

During the twentieth century, and especially during and after the administration of President Franklin Roosevelt, unilateral presidential termination became the norm.²⁷ Most of these presidential treaty terminations have been uncontroversial. An important exception is President Carter's 1978 announcement that he was withdrawing the United States from a mutual defense treaty with Taiwan, as part of his recognition of the mainland Chinese government. The Taiwan defense treaty, which the United States approved in 1954 with senatorial advice and consent, provided that either party could withdraw after a year's notice. In *Goldwater v. Carter*,²⁸ some members of Congress brought a lawsuit challenging Carter's authority to terminate the treaty. Although the D.C. Circuit upheld Carter's action, the Supreme Court vacated the decision and ordered dismissal because it concluded that the case was not justiciable.²⁹ Thus, while the courts declined to stop Carter's treaty termination, *Goldwater* provided no definitive judicial resolution of the legality of unilateral presidential termination.

The practice of unilateral presidential treaty termination has continued. Since *Goldwater*, presidents have unilaterally terminated dozens of treaties and, as before *Goldwater*, most of these terminations

25. Letter from Ulysses S. Grant to the Senate and House of Representatives (June 20, 1876), in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4324, 4327 (James D. Richardson ed., 1897).

26. See Letter from John Hay, U.S. Sec'y of State, to Ambassador Leishman (Mar. 8, 1899), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 733, 753-54 (1901). The termination need not be viewed as purely unilateral in that McKinley was responding to a conflict between the treaty and a federal statute. See Bradley, *Treaty Termination*, *supra* note 16, at 799.

27. See Bradley, *Treaty Termination*, *supra* note 16, at 801-16.

28. *Goldwater v. Carter*, 444 U.S. 996 (1979).

29. A plurality of four justices reasoned that that the case presented a political question. See *id.* at 1002 (Rehnquist, J., concurring in the judgment). Providing a fifth vote for dismissal, Justice Powell reasoned that the dispute was not sufficiently ripe because "Congress has taken no official action," and "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." *Id.* at 997-98 (Powell, J., concurring).

have not generated controversy.³⁰ One post-*Goldwater* termination that did generate controversy was President George W. Bush's 2002 announcement that he was withdrawing the United States from the Anti-Ballistic Missile Treaty with Russia, pursuant to a withdrawal clause. Thirty-two members of the House of Representatives challenged the withdrawal, but the case was dismissed based on lack of standing and the political question doctrine.³¹ Since that litigation, presidents have unilaterally terminated a number of additional treaties, without constitutional controversy.³²

B. Arguments in Favor of Presidential Termination Authority

As a logical matter, the process constitutionally specified for making treaties could reasonably be thought to be the default process for unmaking them. If so, treaty termination would require the advice and consent of two-thirds of the Senate. As the D.C. Circuit explained in *Goldwater*, however, the constitutional analysis is more complicated than that, for several reasons.³³

First, when resolving separation of powers issues, courts often give significant weight to longstanding governmental practice.³⁴ As discussed in Section A, since the early twentieth century, the vast majority of U.S. treaty terminations have been accomplished by unilateral presidential action. These terminations have encompassed a broad range of treaties, from defense, to tax, to commerce. Moreover,

30. See Bradley, *Treaty Termination*, *supra* note 16, at 814–15.

31. See *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002); see also *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986) (relying on the political question doctrine in dismissing a challenge to President Reagan's termination of a treaty of "Friendship, Commerce, and Navigation" with Nicaragua).

32. The Bush administration unilaterally terminated a protocol to a multilateral consular convention in 2005 and a tax treaty with Sweden in 2007. See Bradley, *Treaty Termination*, *supra* note 16, at 815. In 2016, the Obama administration unilaterally initiated withdrawal from a multilateral fisheries treaty, but rescinded the notice of withdrawal after the treaty was renegotiated. See U.S. DEP'T. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2016, at 149–50 (CarrieLyn D. Guymon ed., 2016), <https://www.state.gov/documents/organization/272128.pdf> [<https://perma.cc/3XN5-9TMB>]; Press Release, U.S. Dep't. of State, Conclusion of the South Pacific Tuna Treaty Amendment Negotiations (Dec. 3, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/264807.htm> [<https://perma.cc/K6DY-AZRW>].

33. See generally *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979) (explaining the rationales underlying the D.C. Circuit's decision).

34. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (discussing the role of historical practice in constitutional interpretation relating to the separation of powers).

with a couple of exceptions—most notably President Carter’s termination of the Taiwan treaty at issue in *Goldwater*—these presidential terminations have not generated controversy in Congress, let alone any effort by Congress to restrict presidential termination. Meanwhile, the Senate knows that presidents claim authority to invoke withdrawal clauses unilaterally, and yet it routinely consents to treaties containing such clauses without ever attempting to restrict presidential action under them.

Second, there are structural reasons to question whether the constitutional process for initiating governmental action must always be followed for terminating governmental action. To be sure, this regime applies to federal statutes. To terminate a federal statute, governmental actors must follow the same process specified in the Constitution for making a statute.³⁵ But treaties are constitutionally different from statutes in a number of respects. Perhaps most significantly for present purposes, the United States can never conclude a treaty without presidential agreement. Whereas Congress can enact statutes over a presidential veto, it is well accepted that Congress cannot cause the United States to join a treaty unless the president agrees.³⁶ Given that a treaty cannot be made without presidential approval, arguably no treaty can stay in place without presidential approval. Moreover, even though the president needs senatorial consent to appoint federal officials, it is well accepted that presidents can generally terminate such appointments unilaterally—again confirming that initiation and termination can have different processes.³⁷

Third, certain well-accepted presidential powers in the diplomacy and foreign relations areas inherently seem to carry with them some treaty termination authority.³⁸ For example, the Supreme Court has

35. See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *INS v. Chadha*, 462 U.S. 919, 954 (1983).

36. See, e.g., *Zivotofsky*, 135 S. Ct. at 2086 (noting that “the Senate may not conclude or ratify a treaty without Presidential action”); HENKIN, *supra* note 7, at 37 (“The President need not make a treaty, even if the Senate, or Congress, demands it.”); Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 *YALE L.J.* 140, 209 (2009) (“[E]ven if Congress fully supports an international agreement, that agreement cannot be made unless and until the President communicates the country’s assent. Congress cannot force an unwilling President to consent to an agreement.”).

37. As the D.C. Circuit noted in *Goldwater*, “[e]xpansion of the language of the Constitution by sequential linguistic projection is a tricky business at best.” 617 F.2d at 704.

38. Some commentators also maintain that the first sentence of Article II of the Constitution—that “[t]he executive Power shall be vested in a President”—implicitly conveys

made clear that the president can determine which governments and states the United States will recognize as legitimate, and indeed that Congress cannot restrict this power.³⁹ But the power to de-recognize can sometimes amount to a power to suspend or terminate a treaty obligation with a particular state; for example, when there has been a change in the nature of the state entity, and thus a change in the nature of the treaty obligation.⁴⁰ In addition, as discussed below, presidents can conclude executive agreements relating to matters within their independent constitutional authority, and the exercise of that noncontroversial power could in some instances suspend or terminate earlier treaty commitments, including most obviously by unilaterally making an agreement with the treaty partner to do so.

Fourth, there are originalist and functionalist reasons to resist the conclusion that the process for making treaties must necessarily be followed for their unmaking. The Founders created a cumbersome process for making treaties—perhaps too cumbersome—in part because they were worried about excessive foreign entanglements. This concern does not necessarily imply that they sought to make it equally cumbersome to get out of such entanglements. Indeed, U.S. interests might be best served by having unilateral presidential termination authority. For example, one accepted ground for terminating a treaty is a material breach by the other treaty party. The president may be in the best position to identify and react to such breaches, both in terms of threatening a responsive U.S. action and acting quickly if such a response becomes necessary. This leverage would be substantially weaker if presidents needed legislative consent.⁴¹

Finally, as a practical matter, treaty terminations become effective on the international plane with or without domestic legal symmetry between making and unmaking treaties. Under the Vienna Convention, the head of state is presumed to be a sufficient national

certain powers to the president, including potentially the power to terminate treaties. *See, e.g.,* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *YALE L.J.* 231 (2001). For skepticism about this interpretation of the clause, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *MICH. L. REV.* 545 (2004).

39. *See Zivotofsky*, 135 S. Ct. at 2094 (“[T]he power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone.”).

40. *See* SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 425–39 (2d ed. 1916).

41. *Cf. Goldwater*, 617 F.2d at 706 (“In many of these situations the President must take immediate action.”).

representative for purposes of treaty termination and withdrawal.⁴² Because the president is the head of state for the United States, a unilateral presidential notice of withdrawal will be effective under international law, especially given the lack of any manifest U.S. constitutional prohibition of such presidential action.⁴³ This practical point may cause courts to be especially reluctant to second-guess presidential terminations.⁴⁴

In sum, it is generally accepted—although not entirely settled—that the president has the unilateral authority to act for the United States in withdrawing the country from a treaty. This authority stems in part from the president’s power over diplomacy and role as head of state, as well as from longstanding historical practice.

C. Executive Agreements

The above Section focused on Article II treaties; that is, treaties made by presidents with the advice and consent of two-thirds of the Senate. Starting early in U.S. history, presidents have concluded some executive agreements without the senatorial advice and consent process specified in Article II. For example, for many years presidents concluded postal agreements with other nations based on congressional authorization conferred by a 1792 statute.⁴⁵ To take another early example, during the War of 1812, President Madison concluded an agreement with Great Britain concerning the treatment of prisoners of war without legislative authorization or approval.⁴⁶

Today, there are several accepted categories of executive agreements: congressional-executive agreements, based on ex ante authorization or ex post approval by a majority of Congress; treaty-

42. See Vienna Convention, *supra* note 9, art. 67.

43. When a nation enters *into* a treaty in a manner inconsistent with its fundamental law, the nation is allowed to challenge the validity of the treaty if the inconsistency would have been “manifest” to the other treaty parties. See *id.* art. 46. There is no equivalent rule in the Vienna Convention for the unmaking of treaties. Even if there were, any U.S. law requiring legislative approval would not be manifest at this point.

44. Cf. M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RES. SERV., THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 26 (2017) (“As a practical matter, it appears that the President has the ability to terminate U.S. international commitments under international agreements, including trade agreements, in accordance with the agreements’ terms and the rules for withdrawal from treaties in the Vienna Convention on the Law of Treaties.”).

45. See Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.

46. See Cartel for the Exchange of Prisoners of War, Gr. Brit.-U.S., May 12, 1813, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 557 (Hunter Miller ed., 1931).

based executive agreements, made by presidents pursuant to authority delegated in a Senate-approved Article II treaty; and sole executive agreements, made by the president without congressional involvement, based on the president's independent constitutional authority.⁴⁷ Since the 1930s, executive agreements, especially congressional-executive agreements, have come to represent the vast majority of international agreements made by the United States. Indeed, they now represent well over 90 percent of all of the United States' international agreements.⁴⁸

Most congressional-executive agreements have been *ex ante*—Congress has merely delegated to presidents the authority to conclude agreements about a certain subject, and presidents have done so without returning to Congress for approval, sometimes long after the statute is enacted.⁴⁹ Many military assistance agreements are concluded based on such *ex ante* authorization.⁵⁰ Modern free trade agreements, however, have typically been concluded *ex post*—Congress has voted whether to approve them after they have been negotiated. This was true of the NAFTA agreement. Because the Constitution does not specifically mention the various forms of executive agreements, it of course does not describe how the United States can exit from them. It is generally assumed that presidents can unilaterally exit from sole executive agreements.⁵¹ It also stands to reason that presidents can modify treaty-based executive agreements: if the president can choose the method of carrying out treaty authority in the first instance, the president should be able to change that method within the scope of that authority.

What about congressional-executive agreements? These

47. See CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 77 (Comm. Print 2001) [hereinafter CRS Study]; RESTATEMENT (THIRD), *supra* note 8, § 303.

48. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1212–13 (2018) (documenting how executive agreements now represent approximately 94 percent of international agreements made by the United States).

49. See Hathaway, *supra* note 36, at 145.

50. See *id.* at 157.

51. See, e.g., STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44761. WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 6 (2017) (“Based on past practices, it appears to be generally accepted that, when the President has independent authority to enter into an executive agreement, the President may also independently terminate the agreement without congressional or senatorial approval.”).

agreements are fully “treaties” as a matter of international law.⁵² They also frequently contain withdrawal clauses just like those found in many modern Article II treaties. Presidential use of congressional-executive agreements in lieu of Article II treaties is generally assumed to be constitutionally permissible. It is not clear whether they are *fully* interchangeable with Article II treaties under U.S. domestic law. A number of commentators, and the *Restatement (Third) of Foreign Relations Law*, argue that they are,⁵³ while others suggest modest limits based, for example, on historical practice.⁵⁴ But everyone seems to agree that Article II treaties and congressional-executive agreements are roughly equivalent in legal status to federal statutes, and thus are subject to the later-in-time rule; that is, if a treaty or congressional-executive agreement conflicts with a federal statute, whichever came about later in time controls.⁵⁵

II. PRESIDENTIAL TERMINATION OF CONGRESSIONAL-EXECUTIVE AGREEMENTS

Some commentators who accept unilateral presidential power to terminate Article II treaties contend that this power does not extend to congressional-executive agreements. They make three principal arguments: first, that congressional-executive agreements—especially in the area of international trade—are based on “exclusive” congressional powers, which means that Congress must be involved in their termination;⁵⁶ second, that terminating a congressional-executive

52. Under international law, a treaty includes any “international agreement concluded between States in written form and governed by international law.” Vienna Convention, *supra* note 9, art. 2(1)(a).

53. See, e.g., RESTATEMENT (THIRD), *supra* note 8, § 303 cmt. e; HENKIN, *supra* note 7, at 217; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 806 (1995) (naming scholars who have argued in favor of full interchangeability); cf. Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1270 (2008) (concluding that congressional-executive agreements are almost always interchangeable with Article II treaties).

54. See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 993–1003 (2001); John C. Yoo, *supra* note 6, at 852.

55. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 109 (AM. LAW INST., Tentative Draft No. 1, 2016) [hereinafter RESTATEMENT (FOURTH) Draft 1].

56. See Ku & Yoo, *supra* note 6 (“[T]rade deals are different, because under the Constitution’s Commerce Clause, only Congress may alter our tariff, tax and customs laws.”); Trachtman, *supra* note 6 (manuscript at 10) (“If the President is not to directly and importantly ‘regulate’ commerce, in usurpation of Congress’ exclusive power, then the presidential power to send the notice of termination cannot be exercised independently of congressional

agreement is tantamount to terminating a statute, which the president cannot do unilaterally;⁵⁷ and, third, that unlike the termination of Article II treaties, there is little historical practice supporting unilateral presidential termination of congressional-executive agreements.

Before evaluating these commentators' arguments, it is worth noting that the overall claim they are making is counterintuitive. Consider NAFTA, for example. Although it is a congressional-executive agreement, it is fully a "treaty" on the international plane. Moreover, almost everyone assumes that NAFTA could have been concluded as an Article II treaty.⁵⁸ Article 2205 of NAFTA permits a party to withdraw from the agreement "six months after it provides written notice of withdrawal to the other Parties."⁵⁹ If NAFTA had been concluded as an Article II treaty, the commentators I am disagreeing with would apparently accept that the president could invoke the withdrawal clause unilaterally. They contend, however, that because NAFTA was concluded with majority congressional approval, the president lacks unilateral termination authority. This argument is puzzling, because one might assume that, if anything, presidential termination authority should be lower for Article II treaties than for congressional-executive agreements. Article II treaties are the most formal means of concluding international agreements and involve what is in practice the most difficult procedure, and there has been controversy over unilateral presidential authority to terminate them. But, as the Congressional Research Service noted in its comprehensive 2001 study of treaties, presidential authority to terminate non-Article

authorization."); see also Tim Meyer, *Trump's Threat to Withdraw from NAFTA May Hit a Hurdle: The US Constitution*, CONVERSATION (Aug. 15, 2017), <http://theconversation.com/trumps-threat-to-withdraw-from-nafta-may-hit-a-hurdle-the-us-constitution-81444>

[<https://perma.cc/4RTE-3VHT>] ("The Constitution plainly assigns power over the policy areas covered by trade agreements—foreign trade and tariffs (taxes levied on imported goods)—to Congress, not the president.").

57. See Trachtman, *supra* note 6 (manuscript at 10–11) ("[B]y independently terminating a trade agreement, the President would be independently repealing, if not a statute per se, a treaty transposed into domestic law by statute. Thus, if the President acts independently to terminate a trade agreement, his action might be understood as partially repealing a statute."); Yoo, *supra* note 6, at 815 ("This . . . would provide the President with the heretofore unknown power of executive termination of statutes.").

58. Indeed, some commentators and litigants argued that it *had* to be concluded that way, although the argument did not prevail in court. See *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1313–17 (N.D. Ala. 1999), *aff'd on other grounds*, 242 F.3d 1300 (11th Cir. 2001).

59. North American Free Trade Agreement art.2205, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 (1993).

II agreements “has not been seriously challenged.”⁶⁰

A. “*Exclusive*” Congressional Authority?

The first argument for distinguishing between congressional-executive agreements and Article II treaties with respect to presidential termination authority is that congressional-executive agreements, at least in subject areas like trade, are based on “exclusive” congressional authority.⁶¹ In particular, the argument has been made that only Congress can regulate commerce, and when Congress does so in a congressional-executive agreement, the president lacks authority to terminate what Congress has done.

For a number of reasons, this is not a strong argument. It is true that Congress has extensive authority to regulate commerce, and it has invoked its foreign commerce authority to justify the constitutionality of some congressional-executive agreements.⁶² But the suggestion that the commerce authority is exclusive in a way that would distinguish congressional-executive agreements from Article II treaties is unpersuasive.

As an initial matter, characterizing the commerce power as exclusive is odd, in that the domestic aspects of this power are not even exclusive from a *federalism* standpoint because states have concurrent authority to regulate commerce.⁶³ Of course, the claim here is that the commerce power is exclusive from a horizontal, separation of powers standpoint. But that is not true either. There may be some powers that only Congress can exercise at the horizontal level, and thus that cannot be exercised, for example, by the Senate and president when making treaties. The most likely example is the power to appropriate money from the Treasury. Article I, Section 9 of the Constitution directs that “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,”⁶⁴ and it has long been assumed that this

60. CRS Study, *supra* note 47, at 199.

61. See *infra* text accompanying note 56.

62. See, e.g., *Made in the USA*, 56 F. Supp. 2d at 1317 (endorsing the argument that “the Commerce Clause, coupled with the Necessary and Proper Clause and the President’s foreign relations powers, provides sufficient authority for the completion of NAFTA”).

63. See, e.g., *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (“Where the [state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

64. U.S. CONST. art. I, § 9, cl. 7.

means that only Congress can make appropriations.⁶⁵ It is possible, although less certain, that the power to impose taxes and tariffs is also an exclusive power given the mandate in Article I, Section 7 that “[a]ll Bills for raising Revenue shall originate in the House of Representatives”⁶⁶ Even for such exclusive congressional powers, it has long been settled that treaties can address these matters as long as the treaties are non-self-executing and thus require implementing legislation in order to have domestic effect.⁶⁷

Importantly, however, the commerce power has never been considered one of these exclusive powers. As a result, there is no question that the Senate and president can make treaties regulating commerce, and that these treaties can be self-executing.⁶⁸ Indeed, not only have Article II treaties regulating international commerce been common, they were the only way in which the United States concluded commercial agreements until the late nineteenth century. And presidents have acted unilaterally in terminating commerce-related Article II treaties. To take just a couple of examples, President Franklin Roosevelt terminated a commercial treaty with Italy in 1936, and President Reagan terminated a “friendship, commerce, and navigation” treaty with Nicaragua in 1985.

The D.C. Circuit usefully explained the relationship between Congress’s powers and the Article II treaty power in *Edwards v. Carter*.⁶⁹ The issue in that case was whether the president could convey the Panama Canal Zone back to Panama by means of a treaty instead of a statute. Those challenging President Carter’s action contended

65. See, e.g., *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (“[T]he expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable.”); *Turner v. Am. Baptist Missionary Union*, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) (“[M]oney cannot be appropriated by the treaty-making power.”).

66. U.S. CONST. art. I, § 7, cl. 1.

67. See RESTATEMENT (FOURTH) Draft 2, *supra* note 8, § 110, reporters’ note 11.

68. See, e.g., HENKIN, *supra* note 7, at 195 (“Treaties have dealt with many matters that were also subject to legislation, e.g., tariffs and other regulations of commerce with foreign nations”). Professor John Yoo’s argument against a presidential power to terminate congressional-executive agreements connects to his narrow originalist conception of the Article II treaty power, pursuant to which treaties could never be self-executing for matters falling within Congress’s Article I powers. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999). This conception is at odds with the understandings and practices that have prevailed since the Founding. See Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2191 (1999) (noting that Yoo’s argument “has been decisively rejected by history and tradition”).

69. *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978).

that the assignment of power to Congress in Article IV, Section 3 of the Constitution to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” was “exclusive” and thus could not be exercised by the president and Senate. The D.C. Circuit disagreed:

The grant of authority to Congress under the property clause states that “The Congress shall have Power . . . ,” not that only the Congress shall have power, or that the Congress shall have exclusive power. In this respect the property clause is parallel to Article I, § 8, which also states that “The Congress shall have Power” Many of the powers thereafter enumerated in § 8 involve matters that were at the time the Constitution was adopted, and that are at the present time, also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. 1, § 8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce.⁷⁰

As the court noted, no one thought to contend that the commerce power was exclusive.

To be sure, there is one sense in which the commerce power is exclusive at the horizontal level, but it is only in the same sense in which most of Congress’s powers are exclusive—the president lacks the unilateral authority to regulate the subject.⁷¹ The president cannot unilaterally regulate commerce, just as the president cannot unilaterally regulate intellectual property, or the environment, or civil rights. This is not because there is anything special about the commerce power; rather, it is simply because the president lacks legislative authority.⁷²

The only relevant implication of this exclusivity for the present discussion is that presidents presumably cannot conclude sole executive agreements regulating commerce—or intellectual property, the environment, civil rights, and many other matters. Rather, it is generally thought that presidents can conclude sole executive agreements only if the agreements relate to their independent Article

70. *Id.* at 1057–58.

71. *See, e.g.,* *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994) (“The Constitution expressly grants Congress, not the President, the power to ‘regulate Commerce with foreign Nations.’” (quoting U.S. CONST., art. I, § 8, cl. 3)).

72. *See, e.g.,* *Medellin v. Texas*, 552 U.S. 491, 526–27 (2008) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952))).

II powers, such as the commander-in-chief power or the recognition power, as informed by longstanding practice. But this limitation on the president's sole executive agreement authority does not yield any particular reason to question presidential authority to terminate congressional-executive agreements, including trade agreements. Just as presidents lack unilateral authority to regulate commerce and other subjects through sole executive agreements, they also lack the unilateral authority to conclude Article II treaties. And yet most commentators assume that they can terminate such treaties. In other words, a lack of unilateral presidential authority to conclude such agreements is not thought to imply a lack of unilateral presidential authority to terminate them.⁷³

It is true that congressional-executive agreements inherently have something that Article II treaties do not—an enactment passed by a majority of *both* houses of Congress. As a result, unlike treaties, these agreements can be self-executing even with respect to issues falling within Congress's exclusive authority, such as appropriations. But there is no inherent logical connection between the president's authority to terminate an agreement and an agreement's need for legislation to carry out its terms. If one accepts that presidents may terminate both self-executing and non-self-executing Article II treaties, the mere fact that congressional-executive agreements might have more ability to be self-executing in certain circumstances does not explain why termination authority should be any different.

B. Are Congressional-Executive Agreements the Same as Statutes?

Another argument made against a unilateral presidential power to terminate congressional-executive agreements is that, unlike Article II treaties, congressional-executive agreements are statutes, and, as the Supreme Court has held, the president cannot constitutionally terminate statutes.⁷⁴ In fact, however, even though congressional-executive agreements are connected to statutes, they are not statutes.

Congressional-executive agreements, like Article II treaties, bind the United States to international commitments. In doing so, congressional-executive agreements accomplish something that

73. Given the breadth of Congress's foreign commerce power, it would also likely be difficult in practice to draw a line between commerce-related congressional-executive agreements and other congressional-executive agreements.

74. See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

Congress alone lacks the power to accomplish.⁷⁵ These agreements therefore reflect a *combination* of congressional and presidential authority.⁷⁶ Congress's role in congressional-executive agreements resembles the Senate's role in Article II treaties: its approval may be needed, but it lacks the unilateral authority to conclude, or even to compel the president to conclude, an international agreement. As a result, the proposition that "presidents cannot terminate statutes" does not translate into "presidents cannot terminate congressional-executive agreements."

Some commentators have suggested that, when concluding congressional-executive agreements, the president merely exercises authority delegated from Congress, and that as a result the president lacks termination authority unless such authority has also been delegated. Putting aside the fact that the conclusion does not follow from the premise,⁷⁷ the premise is incorrect. A president concluding an agreement does not merely exercise delegated congressional authority. Congress has no authority to make binding international agreements in the first place and thus cannot delegate that authority to the president. Instead, Congress adds its commerce authority to the president's agreement-making authority. This is an important addition, because without it the president could only conclude agreements under his own constitutional authority, which, as discussed above, would not include the ability to regulate commerce. But the same is true with respect to Article II treaties regulating commerce—the president

75. Professor Laurence Tribe worries that the constitutional reasoning supporting such agreements might allow Congress to conclude international agreements even over a presidential veto, which he noted would constitute a "radical change . . . [in] the foreign policy architecture of our constitutional system." Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1255 (1995). But proponents of congressional-executive agreements have not made such a claim. See, e.g., David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1893–94 (1998) (accepting that "Congress may approve agreements but for historical reasons it is enjoined from acting independently in the realm of foreign negotiations" while noting that this proposition is consistent with constitutional arguments supporting congressional-executive agreements).

76. See Hathaway, *supra* note 53, at 1336 ("The President, on the other hand, manages the negotiations of the agreement with the foreign government and registers the formal assent of the United States to the agreement (based on the authority or assent offered by Congress), thereby binding the country as a matter of international law.").

77. See Michael Ramsey, *Could President Trump Unilaterally Withdraw the U.S. from its International Agreements?*, ORIGINALISM BLOG (Sept. 9, 2016), <http://originalismblog.typepad.com/the-originalism-blog/2016/09/julian-ku-on-president-trump-withdrawing-from-international-agreementsmichael-ramsey.html> [<https://perma.cc/BGA8-GYJ3>] ("[T]he fact that the trade agreements are negotiated under a congressional delegation of authority does not imply any limitation on the President. All trade authority delegated to the President is discretionary.").

cannot conclude those on his own constitutional authority either—and thus this observation does not provide a reason to conclude that the president has less termination authority for congressional-executive agreements than for Article II treaties.

It might seem like a harder case in the event of an ex post congressional-executive agreement, like NAFTA, where Congress enacts legislation approving an agreement after it has been negotiated. Is the president in effect terminating *that* legislation by withdrawing the United States from NAFTA? Not more so, I would suggest, than terminating a Senate resolution of advice and consent for an Article II treaty, which similarly gives consent to an already-negotiated agreement—a practice, again, generally assumed to be constitutional.⁷⁸ Of course, there may well be *other* aspects of implementing legislation for an ex post congressional-executive agreement that the president cannot terminate. But note that this would be true as well for legislation implementing an Article II treaty. In both situations, it may be that the president can terminate the agreement but is stuck with the implementing legislation unless and until Congress repeals it.⁷⁹ That is an important point, but it does not itself disallow a presidential termination authority.

In the trade area, Congress has actually addressed the continuing effect of its implementing legislation in the event of a termination of the underlying agreement, and it has done so in a way that seems to accept a presidential termination authority. The United States is a party to fourteen free trade agreements, covering twenty countries. For most of them, the implementing legislation provides (as it does, for example, for the trade agreement between the United States and South Korea) that “[o]n the date on which the Agreement ceases to be in

78. See David Golove & Marty Lederman, *Do Congressional-Executive Agreements Establish More Reliable Commitments than Treaties?*, OPINIO JURIS (Mar. 21, 2008), <http://opiniojuris.org/2008/03/21/do-congressional-executive-agreements-establish-more-reliable-commitments-than-treaties/> [<https://perma.cc/TE4V-43QR>] (“[E]ven legislation *implementing* a pact will ordinarily be dependent on the ongoing validity of the agreement under international law.” (emphasis in original)).

79. See Hathaway, *supra* note 53, at 1334 (“Even though the President may be able to ‘unmake’ the international commitment created by a congressional-executive agreement as a matter of international law, the President *cannot* unmake the legislation on which the agreement rests.”). This is actually more complicated than Professor Hathaway suggests. For example, if Congress intends its implementing legislation to last only as long as the United States remains a party to an agreement, then the legislation may terminate of its own force after presidential withdrawal from the agreement. See Golove & Lederman, *supra* note 78.

force,” the legislation “shall cease to be effective.”⁸⁰ Certain other agreements, including NAFTA, are governed by a more general provision in the Trade Act of 1974, which provides that, in the event of a termination of the agreement, U.S. duties and other import restrictions “shall not be affected . . . and shall remain in effect after the date of such termination or withdrawal for 1 year, unless the President by proclamation provides that such rates shall be restored to the level at which they would be but for the agreement.”⁸¹

This legislation appears to assume that these agreements may be terminated without congressional approval. If such approval were required, Congress could simply address the continuing effect of its implementing legislation and any presidential proclamations enacted thereunder at that time rather than needing to address it in advance. Notably, in referring generally to termination of these agreements, Congress never says that a U.S. action to terminate the agreement would require congressional approval. Instead, Congress merely insists that there be U.S. withdrawal rights, and it addresses what happens to its implementing legislation in the event of withdrawal. This silence is especially notable given that these agreements all contain withdrawal clauses invocable at will by either party, and presidents have long asserted the authority to invoke similar clauses in Article II treaties. Various forms of this trade legislation date back at least to the Trade Act of 1930, and yet in the succeeding eighty-eight years Congress has never sought to limit presidential termination in this legislation.

Some commentators have suggested that, by tying the continuing effect of implementing legislation to presidential termination, Congress is acting unconstitutionally.⁸² Specifically, the argument is that, under the Supreme Court’s analysis in *Clinton v. City of New York*,⁸³ Congress cannot delegate to the president the authority to “cancel statutes.” In *Clinton*, the Court held unconstitutional the Line Item Veto Act, which allowed the president to cancel certain provisions in appropriations statutes after they were enacted.⁸⁴

Clinton is distinguishable, however, on at least four grounds. First, and most importantly, the Court emphasized that the Line Item Veto Act improperly allowed presidential cancellation of appropriations

80. 19 U.S.C. § 3805 note (2012) (Administration of Dispute Settlement Proceedings).

81. *Id.* § 2135(e).

82. See Trachtman, *supra* note 6 (manuscript at 19–22); see also Meyer, *supra* note 56.

83. *Clinton v. City of New York*, 524 U.S. 417 (1998).

84. See *id.* at 448–49.

measures based on conditions that existed *when Congress enacted* the measures.⁸⁵ This is not true, however, if a statute's continuing effect turns on whether the United States remains a party to an agreement *in the future*. When the president takes action in the future that relates to a condition set forth by Congress in legislation, the president does not cancel the legislation; rather, the president gives full effect to the legislation containing the condition.⁸⁶

Second and relatedly, the Line Item Veto Act allowed the president to take action in conflict with congressional policy as reflected in an appropriations statute. As the Court noted, "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment."⁸⁷ The trade statutes discussed above, however, do not have this effect. Indeed, Congress's policy is presumably to ensure that preferential trade measures apply only while the United States remains a party to a reciprocally binding agreement. Therefore, it would accord with congressional policy if trade preferences were ended when the United States withdraws from an agreement.

Third, the Court in *Clinton* specifically noted that it was dealing with a domestic statute and that there is more leeway with respect to delegation in the area of foreign affairs, most notably trade and commerce.⁸⁸ Fourth, the Line Item Veto Act in *Clinton* was novel. By

85. *See id.* at 443 (emphasizing that "the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes").

86. *See* BRANDON J. MURRILL, CONG. RES. SERV., R44630, U.S. WITHDRAWAL FROM FREE TRADE AGREEMENTS: FREQUENTLY ASKED LEGAL QUESTIONS 15 (2016) ("[T]he President's authority to exercise the power depends on a condition that did not exist when Congress passed the [free trade agreement] implementing law."). This is even easier to see for an *ex ante* congressional-executive agreement. Imagine that Congress merely stated in a statute that "we hereby consent in advance to the president concluding an agreement on subject X." If the president proceeds to conclude an agreement on that subject, and then later terminates that agreement, he has done nothing to cancel the statute.

87. *Clinton*, 524 U.S. at 444.

88. *See id.* at 445. It is not uncommon for statutes, especially in the foreign affairs area—sanctions laws, for instance—to set default legal mandates conditioned on presidential action or inaction. These arrangements have not been thought to be unconstitutional. For an example, see 22 U.S.C. § 9411(a)(1) (2012) ("The President may waive . . . a requirement . . . to impose or maintain sanctions with respect to a person, . . . after the President determines and reports to the appropriate congressional committees that it is vital to the national security interests of the United States to waive such sanctions."). *See also* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1548 (2004) ("Given the relative breadth of national authority over foreign affairs, it is probable that limits on congressional power

contrast, as noted below, many presidents have terminated trade agreements—often, but not always with the consent of the trading partner. These presidents and Congress have all assumed that these terminations ended the mandated trade preferences in the implementing legislation. It is unlikely that this practice, accepted by both political branches and both major political parties over the course of many administrations and congresses, would now be found to violate the separation of powers.⁸⁹

To be sure, the Supreme Court has not always deferred to longstanding separation of powers arrangements. Most notably, it declined to do so in *INS v. Chadha*,⁹⁰ in which it held that a “legislative veto” provision was unconstitutional despite decades of practice in which Congress had enacted such provisions. But that decision, too, is distinguishable. There, the legislative veto provision reserved power to Congress that the Court thought conflicted with clear constitutional text. By contrast, the trade statutes discussed above potentially delegate authority to the president rather than Congress, and it is difficult to see how that conflicts with clear constitutional text. It is also worth noting that in *Chadha* the Court observed that Congress’s inclusion of legislative veto provisions was not a settled practice in light of the fact that numerous presidents had questioned their constitutionality.⁹¹ There is no comparable level of ongoing contestation regarding the president’s authority to terminate international agreements.

C. *What About (Lack of) Historical Practice?*

Another potential reason to distinguish between presidential

established in the domestic sphere—like nondelegation—do not apply with precisely the same force to treaties and congressional-executive agreements.”).

89. *Cf. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (“Over the last 100 years, there has been scarcely any debate over the President’s power to recognize foreign states.”); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2564 (2014) (“[T]hree-quarters of a century of settled practice is long enough to entitle a practice to ‘great weight in a proper interpretation’ of the constitutional provision.” (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936) (“A legislative practice such as we have here . . . goes a long way in the direction of proving . . . unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.”).

90. *INS v. Chadha*, 462 U.S. 919 (1983).

91. *See id.* at 942 n.13 (“11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.”).

authority to terminate Article II treaties and presidential authority to terminate congressional-executive agreements concerns historical practice. The president's authority to terminate Article II treaties stems in part from longstanding historical practice, also known as "historical gloss,"⁹² and it may appear that such gloss does not exist with respect to the termination of congressional-executive agreements.⁹³ The United States has not terminated many congressional-executive agreements, so if one looks just at that subset of international agreements, the practice will not seem very extensive.

A threshold problem with this historical practice argument is that it is not clear why the practice of terminating congressional-executive agreements should be considered separately from the practice of terminating other types of agreements, such as Article II treaties and sole executive agreements. As demonstrated above, arguments about a purportedly exclusive commerce clause and the disallowance of presidential termination of statutes fail to justify a distinctive treatment for each practice. Without a good reason for subdividing them, the mere fact that terminations of congressional-executive agreements have been infrequent compared to Article II treaties has little analytical significance.

In any event, existing practice is consistent with presidential authority to terminate congressional-executive agreements. A number of the Article II treaties terminated throughout history have concerned trade or commerce. Indeed, as noted above, what may have been the very first unilateral presidential termination concerned a trade treaty.⁹⁴ So there *is* practice with respect to terminating agreements relating to those subject areas, without any specific authorization from the legislative branch. In addition, 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.⁹⁵ More recently, in 2012 President Barack Obama

92. See generally Bradley & Morrison, *supra* note 34 (discussing the nature and role of historical gloss).

93. See Trachtman, *supra* note 6 (manuscript at 11–17).

94. See *supra* text accompanying note 26. For additional examples, see Bradley, *Treaty Termination*, *supra* note 16, at 807, 809, 814.

95. President Johnson did so in 1969 with respect to a trade agreement with Switzerland; President Kennedy did so in 1961 with respect to a trade agreement with Honduras; President Eisenhower did so in 1955 with respect to a trade agreement with Guatemala; and President Truman did so in both 1951 with respect to a trade agreement with Costa Rica, and in 1950 with respect to trade agreements with Finland, Haiti, Nicaragua, and Sweden.

terminated a congressional-executive agreement relating to screwworm eradication by entering into an agreement with Mexico.⁹⁶ In some instances, congressional-executive trade agreements have been terminated even without the consent of the trading partner.⁹⁷

In addition, the United States has joined a number of international organizations through ex post congressional-executive agreements, and presidents have sometimes unilaterally withdrawn from the agreements. For example, the United States joined the International Labour Organization in 1934 through a congressional-executive agreement. In 1975, the Ford administration unilaterally withdrew the United States from the Organization, and in 1980 the Carter administration unilaterally had the United States rejoin.⁹⁸ Similarly, the United States became a member of the United Nations Educational, Scientific and Cultural Organization (UNESCO) through a congressional-executive agreement, and the Reagan administration unilaterally withdrew the United States in 1983. After the Bush administration rejoined in 2003, the Trump administration once again announced a withdrawal.⁹⁹

Finally, Congress has not indicated that it views congressional-executive agreements as special for purposes of presidential termination authority. Congress has consented to withdrawal clauses

96. *See* Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the Termination of the 1972 Agreement Between the Government of the United States of America and the Government of the United Mexican States to Eradicate Screwworms, Mex.-U.S., Sept. 24–25, 2012, T.I.A.S. No. 12-925.1.

97. For example, in 1955 President Eisenhower terminated a trade agreement with Ecuador and did not claim to have obtained Ecuador's consent. *See* Proclamation No. 3111 (Aug. 27, 1955), <http://www.presidency.ucsb.edu/ws/?pid=107254> [<https://perma.cc/F4KZ-65P6>]. In 1982 President Reagan terminated a trade agreement with Argentina because of a material breach. *See* Proclamation No. 4993 (Oct. 29, 1982), <http://www.presidency.ucsb.edu/ws/?pid=41938> [<https://perma.cc/P9QN-UNRS>].

98. *See* 22 U.S.C. § 271 (2012) (authorizing U.S. membership in the International Labor Organization and acceptance of the ILO Constitution and subsequent amendments); U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, at 70–73 (Eleanor C. McDowell ed., 1976) (withdrawing from ILO); U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, at 76–78 (Marian Nash Leich ed., 1986) (rejoining ILO).

99. 22 U.S.C. § 287m (authorizing U.S. membership in and acceptance in UNESCO in accordance with its constitution); U.S. DEP'T OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 405–09 (Marian Nash (Leich) ed., 1993) (withdrawing from UNESCO); U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2003, at 421–23 (Sally J. Cummins & David P. Stewart eds., 2004) (rejoining UNESCO); Press Release, U.S. Dep't State, The United States Withdraws from UNESCO (Oct. 12, 2017), <https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm> [<https://perma.cc/6WFE-NQ5N>].

in these agreements without ever indicating that that presidents must return to Congress to invoke the clauses, despite a long history of presidents unilaterally invoking similar clauses in Article II treaties. Moreover, as discussed above, the legislation that Congress has enacted relating to congressional-executive agreements in the trade area appears to assume that presidents might terminate such agreements unilaterally. There are also examples of this sort of legislation outside the trade area.¹⁰⁰ In the few modern instances in which Congress as a body has addressed the termination of treaties and congressional-executive agreements, it has been to encourage presidents to terminate particular agreements, not to limit their authority to do so.

III. OTHER LIMITATIONS ON PRESIDENTIAL TERMINATION

As discussed above, if one accepts a presidential power to terminate Article II treaties, there is little reason to conclude that this power does not also apply to congressional-executive agreements. Even so, there are other potential constraints on withdrawal from international agreements.¹⁰¹ As an initial matter, presidents may find that international agreements are “sticky” for a variety of reasons. These reasons include the continuing effect of implementing legislation and administrative regulations, as well as domestic and international expectation interests that are generated from the agreement.

International law also constrains presidential withdrawal from international agreements. The analysis above assumed that a president would withdraw the United States from an agreement based on accepted international law grounds, such as by invoking a withdrawal clause in a treaty and giving the requisite notice. If the United States does not comply with international law in attempting to withdraw from a treaty, then the treaty is still binding as a matter of international law. As a result, whether a president’s notice of treaty termination is effective in ending corresponding U.S. obligations is ultimately determined by international law, not U.S. law.¹⁰²

100. See, e.g., 18 U.S.C. § 3181(a) (2012) (“The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.”).

101. See, e.g., Jean Galbraith, *The President’s Power to Withdraw the United States from International Agreements at Present and in the Future*, 111 AJIL UNBOUND 445, 445–49 (2018); Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 355–66 (2017).

102. See RESTATEMENT (FOURTH) Draft 2, *supra* note 8, § 113(2).

Importantly, if the president cannot release the United States from the international law obligations in an agreement, the president may have no incentive to break international law rules for withdrawal. To take a recent example, President Trump announced shortly after taking office that the United States would withdraw from the Paris climate change agreement. But he has apparently accepted that this cannot be effectuated for some time, because the agreement specifies that a party may not initiate withdrawal until three years after the agreement has entered into force for that party and that such withdrawal would then become effective one year after that.

To be sure, a president might want to terminate the domestic effects of a treaty even without the ability to terminate the international law effects. There are strong reasons to conclude, however, that presidents lack such domestic termination authority. Most notably, the Constitution makes treaties part of the supreme law of the land, and it states that presidents are to take care that the “Laws” are faithfully executed.¹⁰³ If this reference in the Take Care Clause encompasses treaties, as seems likely,¹⁰⁴ a president cannot declare that a treaty no longer has domestic effect and proceed to disregard it.¹⁰⁵ Such action would involve violating the law, not executing the law.¹⁰⁶

Presidential authority in this regard is different from congressional authority. Congress can clearly end the domestic effect of a treaty even while the United States remains a party to it. That is, Congress can place the United States in breach of treaties, pursuant to the later-in-time doctrine mentioned at Part I. Under that doctrine, a federal statute enacted after a treaty controls as a matter of domestic law if the statute conflicts with the treaty.¹⁰⁷ But this is because, in the U.S.

103. See U.S. CONST. art. II, § 3.

104. See, e.g., Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1231–32 (2005).

105. Non-self-executing treaties may complicate this conclusion. The Supreme Court has explained that a non-self-executing treaty “does not by itself give rise to domestically enforceable federal law.” *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008). There is some uncertainty about whether such treaties qualify as domestic law for purposes of the Take Care Clause. See Ramsey, *supra* note 104, at 1232–33.

106. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 103–04 (2004) (“[A] presidential decision to breach a treaty, in contravention of international law, may violate the President’s duty under the Take Care Clause.” (quoting U.S. CONST. art. II, § 3)).

107. See RESTATEMENT (FOURTH) DRAFT 1, *supra* note 55, § 109(2). If possible, however, courts construe statutes to avoid violation of a treaty. See *id.* § 109(1); see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

domestic legal system, both treaties and federal statutes are types of law—and, as the domestic lawmaker for the United States, Congress can alter the controlling law.¹⁰⁸ By contrast, the president is not a domestic lawmaker.¹⁰⁹

Nevertheless, the Bush administration's Office of Legal Counsel (OLC) suggested in a 2002 memorandum that a president could suspend the effect of a treaty even when suspension was not permissible under international law.¹¹⁰ The memorandum claimed that “[t]he President’s power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so.”¹¹¹ Shortly after President Obama took office, however, his OLC disavowed this and another similar memorandum from the Bush administration.¹¹² The Obama OLC noted that it had “found the two opinions’ treatment of this history to be unpersuasive, their analysis equating treaty termination with treaty suspension to be doubtful, and their consideration of the Take Care Clause to be insufficient.”¹¹³

In addition to these constraints, Congress can probably limit presidential termination authority if it wishes. For a congressional-executive agreement, such a limitation could be included in the

108. *See, e.g.*, Chinese Exclusion Case, 130 U.S. 581, 600 (1889) (“If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress.”); Head Money Cases, 112 U.S. 580, 599 (1884) (“The Constitution gives [a treaty] no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date.”).

109. *See Medellin*, 552 U.S. at 526–27 (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952))).

110. *See* Memorandum from John C. Yoo, Deputy Assistant Attorney 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, Authority of the President to Suspend Certain Provisions of the ABM Treaty (Nov. 15, 2001), <http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf> [<https://perma.cc/2Y4Y-FWCH>].

111. *Id.* at 12.

112. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., for the Files, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 8–9 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf> [<https://perma.cc/9SEJ-JF9T>] (indicating that the two memoranda should not be relied upon “to the extent they suggest[] that the President has unlimited authority to suspend a treaty beyond the circumstances traditionally recognized”).

113. *Id.* at 9. The Obama OLC also observed, however, that a 2007 memorandum it was not disavowing asserted that presidents have traditionally exercised unilateral power to suspend treaties “where suspension was authorized by the terms of the treaty or under recognized principles of international law.” *Id.*

legislation authorizing or approving the agreement. For Article II treaties, the Senate could include it in its resolution of advice and consent. Such limitations could require legislative assent to termination, or something less than that, such as advance notice to Congress.¹¹⁴ Under Justice Jackson's canonical framework in *Youngstown Sheet & Tube Co. v. Sawyer* for analyzing presidential power, these limitations would be binding on the president unless they invaded an exclusive presidential power.¹¹⁵

Absent any constitutional text specifically addressing termination authority, and given Congress's involvement in most nineteenth-century treaty terminations, it is difficult to conclude that treaty termination authority is an exclusive presidential power.¹¹⁶ Indeed, even in the twentieth century, Congress sometimes involved itself in treaty terminations. In 1986, for example, Congress enacted legislation over President Reagan's veto, directing the secretary of state to terminate two agreements with South Africa—an Article II tax treaty and a congressional-executive agreement relating to air services—and the secretary of state did so.¹¹⁷ Another post-World War II example of congressional involvement in the termination of international agreements was in the Trade Agreements Extension Act of 1951. There, Congress directed the president “[a]s soon as practicable” to “take such action as is necessary to suspend, withdraw or prevent the application of” concessions “contained in any trade agreement entered into under authority of section 350 of the Tariff Act of 1930” relating

114. A presidential administration could attempt to limit the treaty withdrawals of future administrations by, for example, requiring certain internal executive branch processes prior to such action. See Galbraith, *supra* note 101, at 449.

115. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed 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. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”); *cf.* *Hamdan v. Rumsfeld*, 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.”).

116. See CRS Study, *supra* note 47, at 199 (“[T]he assertion of an exclusive Presidential power in the context of a treaty is controversial and flies in the face of a substantial number of precedents in which the Senate or Congress have been participants.”). There might be narrow instances in which a congressional restriction on the termination of a treaty would improperly interfere with an exclusive presidential power, such as the president's power over recognizing foreign governments and territories.

117. See Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, 1100, 1104.

to imports from the Soviet Union and Soviet bloc countries.¹¹⁸ President Truman relied on the Act in terminating a number of congressional-executive trade agreements.¹¹⁹ If termination is, as it appears to be, a concurrent rather than exclusive power, Congress can regulate it.¹²⁰

CONCLUSION

This Article assumes for the sake of argument that presidents can legally withdraw the United States from Article II treaties. Substantial arguments support that assumption, but the Supreme Court has not dispositively resolved the issue. If that assumption falters, so too does the proposition that presidents can withdraw the United States from congressional-executive agreements. But if presidents do have the legal authority to withdraw from Article II treaties, it is not clear why that authority would not extend to congressional-executive agreements.

This Article focuses exclusively on the proper legal analysis of unilateral presidential termination authority rather than on the underlying policy issues associated with the exercise of such authority. The Article does not endorse presidential withdrawal from any particular international agreements. Nor does it suggest that unfettered presidential withdrawal authority is always desirable. It might be better for the stability of U.S. foreign relations if presidential withdrawal authority were subject to greater constraints, at least for certain types of agreements. Any such constraints, however, likely will

118. Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, § 5, 65 Stat. 72, 73.

119. See OFFICE OF THE HISTORIAN, U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1951, EUROPE: POLITICAL AND ECONOMIC DEVELOPMENTS, VOLUME IV, PART 2, <https://history.state.gov/historicaldocuments/frus1951v04p2/d169> [<https://perma.cc/2JCX-RMPV>].

120. See RESTATEMENT (THIRD), *supra* note 8, § 339 n.3 (“[A]s a condition applicable to the treaty before it and having a plausible relation to its adoption, such a condition [on termination] would presumably be valid . . . , and if the President proceeded to make the treaty he would be bound by the condition.”); CRS Study, *supra* note 47, at 208 (“To the extent that the agreement in question is authorized by statute or treaty, its mode of termination likely could be regulated by appropriate language in the authorizing statute or treaty.”); see also, e.g., Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247, 279–86 (2013) (arguing that “for cause” limitations imposed by the Senate on the President’s treaty-termination power would be constitutional). Professor Hathaway argues that, as a matter of constitutional interpretation, “the case for congressional control over withdrawal from congressional-executive agreements is much stronger than the case for congressional control over withdrawal from treaties.” Hathaway, *supra* note 53, at 1323. I doubt this, but I nevertheless agree that Congress could regulate termination of such agreements.

need to come from either the Senate, when approving Article II treaties, or from the full Congress.