Exiting Congressional-Executive Agreements

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Some 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 paper challenges that claim. If one accepts a presidential authority to terminate Article II treaties, this paper contends, there is no compelling 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, and, thus, for example, either instrument can be used to address matters relating to international commerce and trade. Moreover, while presidents do not have the authority to 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 the ones contained in Article II treaties that presidents have long claimed the authority to invoke unilaterally, and Congress has never indicated that it views presidents as having less withdrawal authority for such agreements. Indeed, in its trade legislation, Congress appears to have accepted that presidents may invoke such clauses unilaterally.

INTRODUCTION

The election of Donald Trump to the presidency brought renewed attention to the question whether presidents have the unilateral authority to terminate the United States’ international agreements. During the presidential campaign, Trump suggested that he might terminate various agreements, and after taking office he announced his intent to withdraw the United from the Paris agreement on climate change.¹ He has also threatened to terminate various trade agreements, including the North American Free Trade Agreement (NAFTA).²

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² See Ana Swanson, Trump’s Tough Talk on Nafta Raises Prospects of Pact’s Demise, N.Y.
The text of the Constitution does not specifically address this question of presidential authority. It states in Article II that, in order to make a treaty, the President must obtain the advice and consent of two-thirds of the Senate, 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 today constitute the vast majority of international agreements entered into by the United States.

In part because of longstanding historical practice, many commentators have concluded that the President has the authority to act unilaterally on behalf of the United States in terminating Article II treaties. Some commentators who accept this proposition nevertheless contend that the President lacks the unilateral authority to terminate “congressional-executive agreements”—that is, international agreements concluded by presidents with majority congressional authorization or approval, like NAFTA. This essay challenges that claim. If one accepts a presidential authority to terminate Article II treaties, this essay argues, there is no compelling reason to conclude differently with respect to congressional-executive agreements.

Part I explains why it is generally accepted today that Presidents have the authority to terminate Article II treaties, and it briefly describes the phenomenon of “executive agreements.” Part II contests the claim that congressional-executive agreements are distinguishable 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.

Before proceeding, 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. Although the United States has not ratified the Vienna Convention, it accepts that at least much of the Convention reflects binding


3 See U.S. CONST. art. II, § 2.
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); Joel P. Trachtman, Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause versus an Historical Gloss Half Empty (draft dated Oct. 16, 2017). Trachtman’s claim is potentially narrower than Yoo’s and Ku’s, in that he only contends that presidents are disallowed from terminating commerce-related congressional-executive agreements and takes no definitive position on the termination of other types of congressional-executive agreements. But his arguments are similar.
customary international law, and it appears to have accepted that this is true of the Convention’s termination provisions. 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.

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. In addition, many modern treaties contain withdrawal clauses that allow parties to withdraw without obtaining the agreement of other parties, often subject to giving a certain amount of notice before the withdrawal will take effect, and international law unsurprisingly allows the use of such clauses. International law further recognizes various developments that can give a party a right to terminate its treaty obligations, such as a material breach of the treaty by another party or a fundamental change in circumstances.

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

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. Despite the lack of clear

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8 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. 3, intro. note (1987) (documenting Executive Branch statements). 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. Id., § 102(2).


11 See Vienna Convention, supra note 7, arts. 58, 59.

12 See id., art. 54. In a recent book, Professor Koremenos estimated that approximately seventy-percent of modern treaties contain withdrawal clauses. See BARBARA KORENENOS, 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.”).

13 See Vienna Convention, supra note 7, arts. 60, para. 1, 62, para. 1.


15 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.”).
textual guidance, the generally prevailing view today is that the President has the authority to act unilaterally on behalf of the United States in terminating treaties, at least when international law allows for withdrawal and Congress has not prohibited such action. This view is reflected in both the Restatement (Third) of the Foreign Relations Law of the United States and in the new Restatement (Fourth).\textsuperscript{16} 

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

A. A Brief Overview of Historical Practice

Throughout its history, the United States has terminated treaties by means of a variety of procedures.\textsuperscript{17} 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 that the United States had at that time with France “shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.”\textsuperscript{18} This appears to be the only instance in U.S. history in which Congress purported to effectuate directly a treaty termination. Importantly, this action was related to Congress’s authority to declare war, a power that would inherently have been linked at the Founding to treaty termination.\textsuperscript{19} 

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.\textsuperscript{20} Congress sometimes authorized presidents to terminate treaties without

\textsuperscript{16} See Restatement (Third), supra note 8, § 339; Restatement (Fourth), Tentative Draft No. 2, supra note 9, § 113(1). I served as a Reporter for the Restatement (Fourth). The views expressed in this essay are my own and do not necessarily reflect the position of the Restatement (Fourth).

\textsuperscript{17} See generally Curtis A. Bradley, Treaty Termination and Historical Gloss, 92 Tex. L. Rev. 773 (2014).

\textsuperscript{18} Act of July 7, 1798, ch. 67, 1 Stat. 578.

\textsuperscript{19} See, e.g., Emerich de Vattel, The Law of Nations, bk. 3, ch. X, § 175 (J. Chitty ed., 1854) (1758) (“The conventions, the treaties made with a nation, are broken or annulled by a war arising between the contracting parties either because those compacts are grounded on a tacit supposition of the continuance of peace, or because each of the parties, being authorized to deprive his enemy of what belongs to him, takes from him those rights which he had conferred on him by treaty.”). See also Restatement (Third), supra note 8, § 339 reporters’ note 1 (“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”).

\textsuperscript{20} See Bradley, supra note 17, at 788-96; see also Henkin, supra note 15, 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.”).
requiring them to do so.\textsuperscript{21} At other times, Congress directed the President to do so.\textsuperscript{22} Presidents sometimes resisted efforts by Congress to compel them to terminate select articles in treaties when such action was not permissible under the treaties.\textsuperscript{23} On rare occasions, the Senate alone authorized presidential termination.\textsuperscript{24}

On other occasions, presidents acted unilaterally to terminate a treaty and received approval after the fact from either Congress or the Senate.\textsuperscript{25} In another somewhat unilateral action, President Grant in 1876 informed Congress that he would suspend U.S. compliance with an extradition treaty with Great Britain because of that nation’s noncompliance, unless Congress directed him to continue to comply, 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.”\textsuperscript{26} The first treaty termination carried out entirely unilaterally by the President may have been President McKinley’s 1899 termination of certain clauses in a commercial treaty with Switzerland.\textsuperscript{27}

During the twentieth century, and especially during and after the administration of President Franklin Roosevelt, unilateral presidential termination became the norm.\textsuperscript{28} Most of these presidential treaty terminations have been uncontroversial. An important exception is President Carter’s announcement in 1978 that he was withdrawing the United States from a mutual defense treaty with Taiwan, as part of his recognition of the

\textsuperscript{21} See, e.g., Joint Resolution of Apr. 27, 1846, 9 Stat. 109, 109-110 (authorizing President Polk “at his discretion” to terminate a treaty with Great Britain relating to the two countries’ joint occupation of the Oregon Territory).

\textsuperscript{22} 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).

\textsuperscript{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) (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).

\textsuperscript{24} See, e.g., Franklin Pierce, Third Annual Message (Dec. 31, 1855), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2860, 2867 (James D. Richardson ed., 1897) (explanation from President Pierce that he was terminating a treaty with Denmark “[i]n pursuance of the authority conferred by a resolution of the Senate”).

\textsuperscript{25} See, e.g., Joint Resolution of Feb. 9, 1865, 13 Stat. 568 (“adopt[ing] and ratifying!” President Lincoln’s termination of a treaty with Great Britain); Joint Resolution of Dec. 21, 1911, 37 Stat. 627 (1911) (stating that President Taft’s notice of termination of a treaty with Russia was “adopted and ratified”).

\textsuperscript{26} Letter from Ulysses S. Grant to the Senate and House of Representatives (June 20, 1876), in 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4324, 4327 (James D. Richardson ed., 1897).

\textsuperscript{27} 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, supra note 17, at 799.

\textsuperscript{28} See Bradley, supra note 17, at 801-16.
mainland Chinese government. The Taiwan defense treaty, which had been approved by the United States in 1954 with senatorial advice and consent, provided that either party could withdraw after a year’s notice. Some members of Congress brought a lawsuit challenging Carter’s authority to terminate the treaty, in *Goldwater v. Carter*. Although the D.C. Circuit upheld Carter’s action, the Supreme Court vacated the decision and ordered the case dismissed, concluding that the case was not justiciable.29 Thus, while the courts declined to stop Carter’s treaty termination, there was no definitive resolution of its legality in the litigation.

The practice of unilateral presidential treaty termination has continued since *Goldwater*. Since the decision, presidents have acted unilaterally in terminating dozens of treaties, and most of these terminations have not generated controversy.30 The one post-*Goldwater* termination that did generate controversy was President George W. Bush’s announcement in 2002 that he was withdrawing the United States from the Anti-Ballistic Missile Treaty with Russia, pursuant to a withdrawal clause in the treaty. Thirty-two members of the House of Representatives challenged the withdrawal, but the case was dismissed based on lack of standing and under the political question doctrine.31 In the years since that litigation, presidents have unilaterally terminated a number of additional treaties, without constitutional controversy.32

**B. Arguments in Favor of Presidential Termination Authority**

It can be argued that, as a logical matter, the process specified for making treaties should be the default process for unmaking them. There are a number of reasons, however, why the issue is more complicated than that, some of which were outlined by the D.C. Circuit in holding in favor of President Carter in *Goldwater*.33

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29 *Goldwater v. Carter*, 444 U.S. 996 (1979). 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 996, 998 (Powell, J., concurring).

30 *See Bradley*, supra note 17, at 814-15.


33 *See 617 F.2d 697 (D.C. Cir. 1979), vacated on other grounds, 444 U.S. 996 (1979).*
First, when resolving separation of powers issues, courts often give significant weight to longstanding governmental practice. 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, 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 routinely has consented to treaties containing withdrawal clauses, knowing that presidents maintain that they have the authority to invoke these clauses, without ever attempting to restrict presidential action under them.

Second, there are structural reasons to question the argument that the constitutional process for governmental action on the initiation end must always be followed for governmental action on the termination end. To be sure, this is the regime that applies to federal statutes: to terminate a federal statute, the process specified in the Constitution for making a statute must be followed. But treaties are constitutionally different from statutes in a number of respects. Perhaps most significantly for present purposes, they can never be concluded by the United States without presidential agreement. Whereas Congress can enact statutes over a presidential veto, it is well accepted that it cannot cause the United States to join a treaty unless the president agrees. Given that no agreement can be established without the presidential approval, it is arguable that no agreement should be kept in place without the presidential approval. Moreover, we know that at least one presidential power that is subject to senatorial consent on the initiation end—the appointment of federal officials (including diplomats)—is not subject to senatorial consent on the termination end, since it is well accepted that presidents have broad authority to terminate such appointments unilaterally.

Third, while there is debate about the precise bounds of presidential authority over diplomacy and the conduct of foreign relations (and the relevance of the Article II

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36 See, e.g., HENKIN, supra note 15, at 37 (“The President need not make a treaty, even if the Senate, or Congress, demands it.”); Oona A. Hathaway, Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States, 117 YALE L.J. 1236, 1329 (2008) (“As the sole actor charged with representing the United States on the international stage, the President retains the power to negotiate (or not) the terms of the agreement with the foreign party and to formally communicate (or not) the consent of the United States.”); Zivotofsky, 135 S. Ct. at 2086 (noting that “the Senate may not conclude or ratify a treaty without Presidential action”).

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.
“vesting clause” to such analysis\textsuperscript{38}, certain well-accepted presidential powers in this area inherently seem to carry with them some treaty termination authority. For example, the Supreme Court has made clear that the President has the power to determine for the United States which governments and states are recognized as legitimate, and indeed that Congress cannot even restrict this power.\textsuperscript{39} But the power to de-recognize can in some instances 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).\textsuperscript{40} In addition, it is accepted that presidents have some power to conclude sole executive agreements relating to matters within their independent constitutional authority, and again the exercise of that power could in some instances suspend or terminate earlier treaty commitments (including most obviously by making a sole executive agreement with the treaty partner to do so).

Fourth, there are originalist and functionalist reasons for resisting 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. Relatedly, U.S. interests might be best served by having some 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—all terms of threatening a responsive U.S. action and acting quickly if such action becomes necessary. This leverage might be substantially weakened if presidents had to obtain legislative consent.\textsuperscript{41}

Finally, there is a practical point to consider relating to how treaty terminations work on the international plane. Because the President is the head of state, a unilateral presidential notice of withdrawal will be treated as effective under international law, especially given the lack of any manifest U.S. constitutional disallowance of such presidential action.\textsuperscript{42} This practical point may, among other things, cause courts to be especially reluctant to second-guess presidential terminations.\textsuperscript{43}

\textsuperscript{38} Some commentators maintain that the first sentence of Article II of the Constitution—the “vesting clause”—implicitly conveys certain powers to the President, including potentially the power to terminate treaties. See Saikrishna B. Prakash & Michael D. Ramsey, \textit{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, \textit{Executive Power Essentialism and Foreign Affairs}, 102 MICH. L. REV. 545 (2004).

\textsuperscript{39} See \textit{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.”).

\textsuperscript{40} See \textit{Samuel B. Crandall, Treaties, Their Making and Enforcement} § 179, at 425-39 (2d ed. 1916).

\textsuperscript{41} Cf. \textit{Goldwater v. Carter}, 617 F.2d 697, 706 (D.C. Cir. 1979) (“In many of these situations the President must take immediate action.”), vacated on other grounds, 444 U.S. 996 (1979).

\textsuperscript{42} Under the Vienna Convention, the head of state is presumed to be a sufficient representative of a nation for purposes of treaty termination and withdrawal. See Vienna Convention, supra note 7, art. 67. When a nation \textit{enters into} a treaty in a manner inconsistent with its fundamental law of a nation, the nation
In sum, it is generally accepted—although not entirely settled—that the President has the unilateral authority to act on behalf of the United States in withdrawing the country from a treaty. This authority appears to stem 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 discussion was 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 going through 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. To take another early example, during the War of 1812, President James Madison concluded an agreement with Great Britain concerning the treatment of prisoners of war without seeking legislative authorization or approval.

Today, there are several accepted categories of “executive agreements”: congressional-executive agreements, which are based on ex ante authorization or ex post approval of a majority of Congress; executive agreements made by presidents pursuant to authority delegated in an Article II treaty; and sole executive agreements made by presidents without congressional involvement, based on the presidents’ independent constitutional authority. 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% of all the United States’ international agreements.

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, but even if there were, any U.S. law requirement of legislative approval would not be manifest at this point.


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


46 See Restatement (Third), supra note 8, § 303; Cong. Res. Serv., 106th Cong., Treaties and Other International Agreements: The Role of the United States Senate 77 (Comm. Print 2001) [hereinafter “CRS Study”].

Most congressional-executive agreements have been *ex ante* agreements: Congress has merely delegated authority to the President to conclude agreements relating to a subject area, and presidents have done so (sometimes long after the statute is enacted), without returning to Congress for approval of the agreement. Modern free trade agreements, however, have typically been concluded as *ex post* agreements: Congress has voted whether to approve them after they have been negotiated. This was true, for example, of the NAFTA agreement. Because the various forms of executive agreements are not specifically mentioned in the Constitution, there is of course nothing in the Constitution describing how the United States can exit from them, although it is generally assumed that Presidents can unilaterally exit from sole executive agreements.

Congressional-executive agreements are fully “treaties” as a matter of international law. They also frequently contain withdrawal clauses just like the ones 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. The main debate has been over whether they are *fully* interchangeable under U.S domestic law with Article II treaties. A number of commenters, and the *Restatement (Third) of Foreign Relations Law*, have argued in favor of full interchangeability, while other commentators have suggested some modest limits (based, for example, on historical practice). But everyone seems to agree that Article II treaties and congressional-executive agreements are roughly equivalent in status to federal statutes—and, thus, for example, are both subject to the later-in-time rule whereby when there is a conflict between an agreement and a federal statute the later in time controls.

**II. PRESIDENTIAL TERMINATION OF CONGRESSIONAL-EXECUTIVE AGREEMENTS**

Some commentators who accept a presidential power to terminate Article II treaties contend that this power does not extend to congressional-executive agreements. These commentators make three principal arguments: First, they argue that congressional-executive agreements—especially in the area of international trade—are

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49 See, e.g., Stephen P. Mulligan, Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement 7 (Cong. Res. Serv., Feb. 9, 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.”), at https://fas.org/sgp/crs/row/R44761.pdf.

50 Under international law, a treaty includes any “international agreement concluded between States in written form and governed by international law.” Vienna Convention, supra note 7, art. 1(a).


based on exclusive congressional powers, which they contend, means that Congress must be involved in their termination.\textsuperscript{53} Second, they argue that terminating a congressional-executive agreement is tantamount to terminating a statute, something that the President is normally not allowed to do unilaterally.\textsuperscript{54} Third, they argue that, unlike for the termination of Article II treaties, there is little historical practice in support of unilateral presidential termination of congressional-executive agreements.

Before examining these arguments specifically, it is worth noting that the general thrust of the arguments is counter-intuitive. Consider NAFTA, which has been a central focus of the most recent commentary. NAFTA is fully a “treaty” on the international plane, subject to the usual international law rules for termination. Moreover, almost everyone assumes that President Clinton could have concluded it as an Article II treaty. Indeed, challengers argued in court that it \textit{had} to be concluded that way, although the argument did not prevail.\textsuperscript{55} Article 2205 of NAFTA provides that a party may withdraw from the agreement “six months after it has provided written notice of withdrawal to the other parties.” If Clinton had concluded NAFTA as an Article II treaty, the commentators I am disagreeing with would apparently accept that the President would have had the unilateral authority to invoke the withdrawal clause. They merely contend that, because NAFTA was concluded with majority congressional approval, the President lacks termination authority. At least at first glance, this argument is puzzling. As the Congressional Research Service noted in its comprehensive 2001 study of treaties, while there has been controversy at times over a presidential authority to terminate Article II treaties—because they are the most formal means of concluding international agreements and involve what is in practice the most difficult procedure—a presidential authority to terminate non-Article II agreements “has not been seriously challenged.”\textsuperscript{56}

\textbf{A. “Exclusive” Congressional Authority?}

Some commentators argue that, even though the President may have the authority to withdraw the United States from Article II treaties, he cannot withdraw the United States from congressional-executive agreements like NAFTA because such agreements are based on “exclusive” congressional authority. For example, it is claimed that only Congress can regulate commerce, and that when Congress does so in a congressional-

\textsuperscript{53} \textit{See} Trachtman, \textit{supra} note 6, 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 authorization.”); Yoo & Ku, \textit{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.”).

\textsuperscript{54} \textit{See} Trachtman, \textit{supra} note 6, 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 a statute. Thus, if the President acts independently to terminate a trade agreement, his action might be understood as partially repealing a statute.”); Yoo, \textit{supra} note 6, at 815 (“This . . . would provide the President with the heretofore unknown power of executive termination of statutes.”).

\textsuperscript{55} \textit{See} Made in the USA Foundation v. United States, 56 F. Supp. 2d 1226 (N.D. Ala. 1999), aff’d on other grounds, 242 F.3d 1300 (11th Cir. 2001).

\textsuperscript{56} CRS Study, \textit{supra} note 46, at 199.
executive agreement, this means that the president lacks the authority to terminate what Congress has done.

There are many problems with this argument. As an initial matter, identifying the commerce power as “exclusive” is odd, in that at least the domestic aspects of this power (unlike some other federal government powers) are not even exclusive from a federalism standpoint. That is, states are allowed some concurrent authority to regulate commerce.\(^{57}\)

Of course, what the commentators are claiming is that the commerce power is exclusive from a horizontal, separation of powers standpoint. But even this is not true. There may be some powers that can be exercised only by Congress at the horizontal level and thus that cannot be exercised 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,” and it has long been assumed that this means that only Congress can make appropriations.\(^{58}\) 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 “all Bills for raising Revenue shall originate in the House of Representatives.” Even for such exclusive congressional powers, however, it has long been settled that treaties can still regulate the matter—for example, that they can call for the expenditure of money—as long as they are non-self-executing and thus require implementing legislation in order to have domestic effect.

Importantly, the commerce power has never been thought to be one of these exclusive powers. There is therefore no question that the Senate and President can make treaties regulating commerce, and that these treaties can be self-executing.\(^{59}\) 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

\(^{57}\) 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.”).


\(^{59}\) See, e.g., HENKIN, supra note 15, 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 . . . .”). John Yoo’s argument against a presidential power to terminate congressional-executive agreements is connected to his narrow originalist conception of the Article II treaty power, pursuant to which treaties could never be self-executing with respect to any 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 Vazquez, Laughing at Treaties, 99 COLUM. L. REV. 2154, 2191 (1999) (noting that Yoo’s argument “has been decisively rejected by history and tradition”).
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. The issue there was whether the President could convey the Panama Canal Zone back to Panama by means of a treaty instead of a statute. Those challenging Carter’s action contended 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, observing that:

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.

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 that most of Congress’s powers are exclusive, which is that the President lacks the unilateral power to regulate the subject. The President cannot by himself regulate commerce, just as he cannot by himself regulate intellectual property, or the environment, or civil rights. This is not because there is anything special about the commerce power in this regard; rather, it is simply because the President ordinarily lacks legislative authority.

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 the President can conclude sole executive agreements only if the agreements relate to their independent Article II powers (such as the Commander in Chief power or the recognition power).

60 580 F.2d 1055 (D.C. Cir. 1978).

61 See, e.g., Medellín v. Texas, 552 U.S. 491, 526-27 (2008) (“‘the 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)).
This “exclusivity” conclusion does not yield any particular reason to question the authority of presidents to terminate congressional-executive agreements, including trade agreements. Just as presidents lack the unilateral authority to regulate commerce and other subjects, 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 at the creation end is not thought to imply a lack of unilateral presidential authority at the termination end.62

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, these agreements can be self-executing even with respect to issues falling within Congress’s exclusive authority (such as appropriations). But there is no logical connection between this point and the claim that the President lacks termination authority over congressional-executive agreements. Those who make this claim concede that presidents may terminate both self-executing and non-self-executing Article II treaties, so the fact that congressional-executive agreements might have more ability to be self-executing in certain circumstances should not affect termination authority.

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

Another, somewhat related argument that is made by these commentators to challenge a presidential authority to terminate congressional-executive agreements is that, unlike Article II treaties, congressional-executive agreements are statutes, and the President is not constitutionally allowed to terminate statutes. It is true that the Supreme Court has held that presidents lack the authority to terminate statutes.63 But the problem with this argument is that congressional-executive agreements are not in fact statutes, even though they are connected to statutes.

Congressional-executive agreements are, like Article II treaties, binding international agreements. That is, as discussed above, congressional-executive agreements accomplish something that Congress alone lacks the power to accomplish—they bind the United States to international obligations.64 They therefore reflect a

62 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.


64 In raising constitutional concerns about the phenomenon of congressional-executive agreements, Professor Tribe worried that the constitutional reasoning being advanced in support of 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) (“Congress may approve agreements but for historical reasons it is enjoined from acting independently in the realm of foreign negotiations. Where is the inconsistency?”).
A related argument made by commentators is that, when concluding congressional-executive agreements, the President is merely exercising authority delegated to him from Congress, which, it is argued, implicitly disallows him from exercising a unilateral termination authority. Putting aside the fact that the conclusion does not even follow from the premise, the premise is incorrect: the President in concluding an agreement is not merely exercising authority delegated from Congress. Congress has no authority to make binding international agreements and thus cannot be delegating that authority to the President. Instead, it is adding its commerce authority to the President’s agreement-making authority. This is an important addition, because without it the President would only be able to conclude agreements under his own constitutional authority, which, as discussed above, would not include the ability to regulate commerce. But it is not the case that the President is merely exercising authority obtained from Congress.

It might seem like a harder case in the event of an ex post congressional-executive agreement, like NAFTA, where Congress has enacted legislation approving of an agreement after it has been negotiated. Is the president terminating that legislation if he withdraws 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. But, again, it is assumed by these commentators that this is constitutionally allowed. 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

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65 See Hathaway, supra note 36, at 1336 (“Congress approves the legislation necessary to authorize (in the case of ex ante agreements) or to approve (in the case of ex post agreements) the agreement. 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. Neither can craft an agreement without the other.”).

66 See Michael Ramsey, Could President Trump Unilaterally Withdraw the U.S. from its International Agreements?, THE ORIGINALISM BLOG (Sept. 9, 2016), at http://originalismblog.typepad.com/the-originalism-blog/2016/09/julian-ku-on-president-trump-withdrawing-from-international-agreementsmichael-ramsey.html (“[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.”).

67 See also David Golove & Marty Lederman, Do Congressional-Executive Agreements Establish More Reliable Commitments than Treaties?, OPINIO JURIS (Mar. 21, 2008), at http://opiniojuris.org/2008/03/21/do-congressional-executive-agreements-establish-more-reliable-commitments-than-treaties/ (“[E]ven legislation implementing a pact will ordinarily be dependent on the ongoing validity of the agreement under international law.”).
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. 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 14 free trade agreements, covering 20 countries. For most of them (such as, for example, the U.S.-Korea free trade agreement), the implementing legislation provides that “[o]n the date on which the Agreement ceases to be in force,” the legislation “shall cease to be effective.” 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.”

This legislation appears to assume that these agreements may be terminated without congressional approval, because if such approval were required Congress could simply address the continuing effect of its implementing legislation (and presidential proclamations enacted thereunder) at that time rather than needing to address it in advance. Moreover, in referring generally to termination of these agreements, it is noteworthy that Congress never says that a U.S. action to terminate the agreement would require congressional approval. Instead, Congress simply 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 (a) these agreements all contain withdrawal clauses invocable at will by either party, and (b) 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 87 years Congress has never sought to limit presidential termination in this legislation.

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68 See Hathaway, supra note 36, 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.”). The issue is actually more complicated than is suggested by this quotation from Professor Hathaway. For example, if Congress intends for 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 a presidential withdrawal from the agreement. See David Golove & Marty Lederman, Do Congressional-Executive Agreements Establish More Reliable Commitments than Treaties?, OPINIO JURIS (Mar. 21, 2008), at http://opiniojuris.org/2008/03/21/do-congressional-executive-agreements-establish-more-reliable-commitments-than-treaties/ (“[E]ven legislation implementing a pact will ordinarily be dependent on the ongoing validity of the agreement under international law.”).


70 19 U.S.C. § 2135(e).
At this point, the commentators I am disagreeing with fall back on the argument that, if Congress is in fact tying the continuing effect of its implementing legislation to presidential action in terminating the agreement, it is acting unconstitutionally.71 Their argument is that, under the Supreme Court’s analysis in Clinton v. City of New York,72 Congress is not allowed to delegate to the President the authority to “cancel statutes.” In that case, the Court held unconstitutional the Line Item Veto Act, which allowed the President to cancel certain provisions in appropriations statutes after they were enacted.73

Clinton is distinguishable, however, on several grounds. First, and most importantly, the Court there emphasized that the Line Item Veto Act was improperly allowing presidential cancellation of appropriations measures based on conditions that existed when the measures were enacted.74 This is not true, however, of having a statute’s continuing effect turn 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 is not cancelling the legislation; the legislation containing the condition is given full effect.75

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 there 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.”76 The trade statutes discussed above, however, do not have this effect. Indeed, Congress’s policy is presumably to ensure that preferential trade measures are applied only while the United States remains a party to a reciprocally-binding agreement, so having the trade preferences end when the United States withdraws from an agreement would accords with congressional policy.


73 See id. at 449.

74 See 524 U.S. 417, 443 (1998) (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”).

75 See Brandon J. Murrill, U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions 15 (Cong. Res. Serv., Sept. 7, 2016) (“the 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.

76 524 U.S. at 444.
Third, the Court in *Clinton* specifically noted that it was dealing with a domestic statute and that more leeway with respect to delegation is allowed in the area of foreign affairs, including most notably with respect to trade and commerce. Finally, the Line Item Veto Act in *Clinton* was novel. By contrast, as noted below, many presidents have terminated trade agreements, often but not always with the consent of the trading partner, and 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 of the 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.

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*, 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, and it is difficult to see how they conflict with clear constitutional text. It is also worth noting that in *Chadha* the Court observed that the practice of enacting legislative veto provisions was not a settled practice in light of the fact that numerous presidents had questioned their constitutionality.

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77 See 524 U.S. at 445. It is not uncommon for statutes, especially in the foreign affairs area (sanctions laws, for instances), to set default legal mandates conditioned on presidential action or inaction, and these arrangements have not been thought to be unconstitutional. For a recent example, see 22 U.S.C. § 9411(a)(1) (“The President may waive, on a case-by-case basis and for a period of not more than 180 days, a requirement . . . to impose or maintain sanctions with respect to a person, and may waive the continued imposition of such sanctions, not less than 30 days 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 established in the domestic sphere—like nondelegation—do not apply with precisely the same force to treaties and congressional-executive agreements.”).

78 Cf. *Zivotofsky*, 135 S. Ct. at 2094 (“Over the last 100 years, there has been scarcely any debate over the President’s power to recognize foreign states.”); *Noel Canning*, 134 S. Ct. at 2564 (“[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, 328 (1936) (“A legislative practice such as we have here, evidenced not by only occasional instances but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of 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.”).


80 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.”).
C. What About (Lack of) Historical Practice?

A final argument made by these commentators is that a lot of the justification for concluding that the President can terminate Article II treaties is longstanding historical practice, also known as “historical gloss,” and that such gloss does not exist with respect to the termination of congressional-executive agreements. This is true in a sense. The United States has not terminated many congressional-executive agreements, so if one just looks at that subset of international agreements, there is not a lot of practice.

However, the practice that does exist for is consistent with a presidential termination authority with respect to congressional-executive agreements. As an initial matter, it is worth keeping in mind that a number of the Article II treaties that have been 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.

In addition, in the 1950s and 1960s, there were a number of instances in which presidents have terminated ex ante congressional-executive agreements relating to trade by obtaining the consent of the trading partner (but not Congress) to do so. More recently, in 2012 President Obama terminated a congressional-executive agreement with Mexico relating to screwworm eradication by entering into an agreement with Mexico. In at least some instances, terminations of congressional-executive trade agreements have been accomplished even without the consent of the trading partner.

In addition, the United States has joined a number of international organizations through congressional-executive agreements, and presidents have sometimes acted unilaterally to withdraw the United States from these organizations. For example, the United States joined the International Labour Organization through a congressional-executive agreement, and in 1975 the Ford administration unilaterally withdrew the

81 See generally Bradley & Morrison, supra note 34.
82 See Trachtman, supra note 6, at [11-17].
83 See supra text accompanying note 27. For additional examples, see Bradley, supra note 17, at 807, 809, 814.
84 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.
86 For example, in 1955 President Eisenhower terminated a trade agreement with Ecuador and did not claim to have obtained Ecuador’s consent, see Proclamation 3111 (Aug. 27, 1955), at http://www.presidency.ucsb.edu/ws/?pid=107254; and in 1982 President Reagan terminated a trade agreement with Argentina because of a material breach, see Proclamation 4993 (Oct. 29, 1982), at http://www.presidency.ucsb.edu/ws/?pid=41938.
United States from the Organization (and then the Carter administration subsequently acted unilaterally in having the United States rejoin in 1980). 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 acted unilaterally in withdrawing the United States in 1983, and then, after the Bush administration acted to have the United States rejoin in 2003, the Trump administration once again unilaterally withdrew the United States.

More importantly, those arguing that the historical practice for terminating congressional-executive agreements needs to be considered separately from the practice of terminating other types of agreements (such as Article II treaties and sole executive agreements) have not offered a persuasive reason for sub-dividing the practice in this way. As discussed above, the arguments based on the “exclusive” commerce clause and statutes-versus-treaties are not persuasive. Without a good reason for sub-division of the practice, the observation that there is relatively little practice of terminating congressional-executive agreements does little analytical work. It is like arguing that presidents cannot terminate treaties on Tuesdays because there are not many examples of Tuesday terminations.

It is worth emphasizing that Congress has not itself indicated that it views congressional-executive agreements as special with respect to the issue of presidential termination authority. Congress has consented to withdrawal clauses in these agreements without ever indicating that it thought that presidents had to 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. In the few instances in which Congress as a body has addressed the termination of treaties and congressional-executive agreements in the modern era, it has been to encourage presidents to terminate particular agreements, not to limit their authority to do so.

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87 See 22 USC § 271 and accompanying notes (authorizing U.S. membership in the International Labor Organization and acceptance of the ILO Constitution and subsequent amendments); U.S. Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, at 70-73 (withdrawing from ILO); U.S. Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, at 76-78 (rejoining ILO).

88 22 USC § 287m (authorizing U.S. membership in and acceptance in UNESCO in accordance with its constitution); U.S. Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-88, at 405-09 (withdrawing from UNESCO); U.S. Department of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2003, at 421-23 (rejoining UNESCO); State Department Press Statement, The United States Withdraws from UNESCO (Oct. 12, 2017), at https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm.

89 See, e.g., 18 U.S.C. § 3181(a) (“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.”).
III. OTHER LIMITATIONS ON PRESIDENTIAL TERMINATION

As discussed above, if you accept a presidential power to terminate Article II treaties, there is no compelling reason to conclude that this power does not also apply to congressional-executive agreements. Even so, it is important to keep in mind that there are other potential constraints on withdrawal from international agreements. As an initial matter, presidents may find that international agreements are “sticky” for a variety of reasons. These reasons include the continuing effect of some implementing legislation and administrative regulations enacted thereunder, as well as domestic and international expectation interests that get generated as a result of the agreement. This point about stickiness is of course not limited to congressional-executive agreements.

Another potential constraint on presidential withdrawal from international agreements comes from international law. The analysis above assumed that a president would be withdrawing the United States from an agreement based on one of the accepted international law grounds for doing so, such as by invoking a withdrawal clause in a treaty and giving the requisite notice. If the United States does not act in accordance with international law in attempting to withdraw the country from a treaty, then by definition the treaty will still be binding on the country as a matter of international law. As a result, whether a President’s notice of treaty termination is effective in ending U.S. obligations under the treaty is ultimately determined by international law, not U.S. law.90

Importantly, if the President cannot release the United States from the international law obligations in an agreement, the President may have no incentive to act outside of the international law rules for withdrawal. To take a recent example, even though President Trump announced shortly after taking office that the United States would withdraw from the Paris climate change agreement, he has apparently accepted that this cannot be effectuated until near the end of his presidency, because the agreement specifies that a party may not initiate withdrawal until three years after the agreement has entered into force for them and that such withdrawal will then become effective only one year after that.

To be sure, there might be situations in which a president might want to terminate the domestic effects of a treaty even if he or she cannot terminate the international law effects. There are strong reasons to conclude, however, that presidents lack such 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.91 If this reference in the Take Care Clause encompasses treaties, as seems likely,92 a

90 See RESTATEMENT (FOURTH), Tentative Draft No. 2, supra note 9, § 113(2).
91 See U.S. CONST. art. II, § 3.
president cannot declare a treaty as no longer having domestic effect and proceed to disregard it. Such action would involve violating the law, not executing the law.

Presidential authority in this regard is different from congressional authority. It is settled that Congress can 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 what is called the “later in time” doctrine. Under that doctrine, courts will apply a federal statute that is enacted after the U.S. acceptance of a treaty even if the statute conflicts with the treaty. But the reason for that result is that, in the U.S. 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. By contrast, the President is not lawmaker in this sense.

To be sure, 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. 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.” Shortly after

93 A potential complication with this conclusion concerns “non-self-executing” treaties. The Supreme Court has explained that a non-self-executing treaty is one that “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 92, at 1232-33.

94 See Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?, 90 CORNELL L. REV. 97, 103-04 (204) (“A presidential decision to terminate a treaty in compliance with international law is generally considered consistent with the President's constitutional duty to ‘take care that the laws be faithfully executed.’ In contrast, a presidential decision to breach a treaty, in contravention of international law, may violate the President's duty under the Take Care Clause.”).

95 See RESTATEMENT FOURTH, Tentative Draft No. 1, supra note 9, § 109(2). Where possible, however, courts will attempt to construe statutes to avoid a 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 . . . .”).

96 See, e.g., 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.”); 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. In either case, the last expression of the sovereign will must control.”).

97 See 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)).


99 Id. at 12.
President Obama took office, however, OLC disavowed this and another similar memorandum from the Bush administration. 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.”

In addition to these constraints, Congress can probably limit presidential termination authority if it wishes to do so. For a congressional-executive agreement, such a limitation could be included in the legislation authorizing or approving the agreement. For Article II treaties, it could be included by the Senate in its resolution of advice and consent. Under Justice Jackson’s canonical framework in Youngstown for analyzing presidential power, such limitations would be binding on the President unless they invaded an exclusive presidential power.

Given the lack of any constitutional text specifically addressing termination authority, and the involvement of Congress in most treaty terminations in the nineteenth century, it is difficult to conclude that treaty termination authority is an exclusive presidential power, at least as a general matter. Indeed, even in the twentieth century, Congress sometimes has 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. Another post-World War II example of congressional involvement in the

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100 See Memorandum of Steven G. Bradbury, Principal Deputy Assistant Att’y 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), at https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf (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”).

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

102 See Youngstown, 343 U.S. at 637-38 (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. Our 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.”).

103 See CRS Study, supra note 46, at 199 (“The 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.

termination of international agreements was in the Trade Agreements Extension Act of 1951, in which 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 . . . to imports from the Union of Soviet Socialist Republics and to imports from any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement.” President Truman relied on the Act in terminating various congressional-executive trade agreements with the Soviet Union and Soviet bloc countries. If termination is, as it appears to be, a concurrent rather than exclusive power, it can be regulated by Congress.

IV. CONCLUSION

This essay largely assumes for the sake of argument that presidents have the legal authority to withdraw the United States from Article II treaties. While the essay suggests that there are substantial arguments in support of that assumption, the issue has not been dispositively resolved by the Supreme Court. If one questions that assumption, one could of course also question the proposition that presidents can withdraw the United States from congressional-executive agreements. It is also worth emphasizing that the focus of this essay is on the proper legal analysis rather than on underlying policy issues. It may be that, as a normative matter, there should be greater restraints on presidential authority to terminate international agreements, or at least certain types of agreements. Any such restraints, however, likely will need to come from either the Senate, when approving Article II treaties, or from the full Congress.

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105 Pub. L. No. 82-50, § 5.
107 See RESTATEMENT (THIRD), supra note 8, § 339 reporters’ note 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 46, 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 36, at 1323. I am doubtful of this claim, but I nevertheless agree with her that Congress could regulate termination of such agreements.