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Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty

JOEL P. TRACHTMAN*

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation's foreign policy.¹

I. Introduction: Withdrawal and Termination of Trade Agreements under U.S. Foreign Relations Law

It is remarkable how uncertain the allocation of power within the U.S. constitutional and statutory system is to withdraw the U.S. from its international trade treaties or to terminate international trade treaties to which the U.S. is party. While this issue has been controversial in other contexts, the allocation of authority to terminate trade agreements (as opposed to other important treaties) was not a significant political issue in the modern era until the 2016 election of President Trump, because before Trump, Presidents supported trade agreements more enthusiastically than Congress, and so were not expected to withdraw from or terminate trade treaties in conflict with Congress' will.

On the other hand, it is well accepted that the U.S. President may *make* trade treaties under the Treaty Clause, with the advice and consent of two-thirds of the Senate.² Although it is not free from contention, it is generally accepted³ that the U.S. President may also make what, in the international sphere, are trade treaties, pursuant to statutory authorization from Congress,

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1. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015) (citations omitted).

2. U.S. CONST. art. II, § 2, cl. 2.

3. Alan S. Lederman, *11th Circuit Declines to Rewrite 20th Century World History*, 75-DEC FLA. B.J. 30, 31 (2001).

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as “congressional-executive agreements.”⁴ Indeed, the latter is the typical way in which international trade treaties are currently entered into by the U.S., utilizing the system formerly known as “fast track” and currently known as “trade promotion authority,” to streamline the ordinary legislative process to seek simple majorities in both houses of Congress.⁵

While the Constitution explicitly allocates power to make Treaty Clause treaties,⁶ and is now understood to allocate power to make congressional-executive agreements pursuant to *ex ante* or *ex post* statutory authorization, it does not explicitly allocate the power of withdrawal from treaties, or termination of treaties.⁷

This article will examine the possibilities for constitutional interpretation, the historical practice of the President and Congress in this area, and the scope of statutory authorization for termination, in order to evaluate the current scope of Presidential authority to terminate U.S. commercial treaties. One question this article does not need to address is the permission to terminate U.S. trade treaties under international law. All modern U.S. trade treaties, pursuant to statutory requirements, contain withdrawal provisions, allowing member states to withdraw, generally upon six months’ notice.⁸

Justice Jackson in *Youngstown* observed that “Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”⁹ Circumstances vary first by the extent of commitment of power to the President relative to the commitment of power to Congress, and they also vary by statutory grant or other congressional acceptance. Given that it is well-understood that the Commerce Clause allocates the power over commerce to Congress, and implicitly derogates power over commerce away from the President, the area of commerce may be distinct from other areas of treaty practice.¹⁰

Thus, as Lawrence Tribe and other scholars have suggested, the mode of treaty termination should vary by the circumstances.¹¹ If so, the President’s

4. By “treaty,” this article generally refers to both such congressional-executive agreements, which of course are “treaties” under international law, as well as to Treaty Clause treaties, adopted on the advice and consent of two-thirds of the Senate, unless explicitly stated otherwise. Within the field of commerce, the analysis of the President’s independent power to terminate a Treaty Clause treaty is likely to be the same as the analysis of the President’s independent power to terminate a congressional-executive agreement.

5. Edward T. Hayes, *International Law*, 61 LA. B.J. 447, 448 (2014).

6. U.S. CONST. art. II, § 2, cl. 2.

7. Withdrawal by the U.S. and termination at the instance of the U.S. are treated the same for purposes of the President’s power to carry out termination or withdrawal independently, and so, hereinafter, each will be generally and collectively referred to as “termination.”

8. 19 U.S.C. § 2135 (1994).

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

10. *Dennis v. Higgins*, 498 U.S. 439, 447 (1991).

11. Lawrence Tribe, *A Constitutional Red Herring: Goldwater v. Carter*, THE NEW REPUBLIC 16 (Mar. 17, 1979) (“[T]he very fact that the Constitution does not prescribe a mode of treaty

power to terminate must be at its lowest ebb in the area of commerce. As Tribe suggests, “[W]hen the termination of a commercial treaty is at issue, the case for mandatory congressional involvement is stronger than when the fate of a defense pact is involved.”¹²

Termination of a trade agreement is comparable to termination of an entire area of statutory action. Thus, allocation of the power to terminate trade agreements to the President, acting alone, would be inconsistent with the substance of the Constitution’s allocation to Congress of control over both international *and domestic* commerce under the Commerce Clause of the Constitution.¹³ Assuming that globalization increases, and that trade agreements grow in importance to U.S. public policy, the issue of termination of trade agreements will grow in importance. The increasing move toward international treaties that play a regulatory role, in which regulatory authority over product standards, environmental protection, investment regulation, or services regulation are governed, suggests that a unilateral Presidential power to terminate these regimes will upset the balance of powers between the executive and legislative branches that exists today, and that was envisaged by the framers of the Constitution.¹⁴

II. Constitutional Context: The Presidential Dormant Commerce Clause

The Commerce Clause of the Constitution allocates power over commerce to Congress.¹⁵ The “dormant” Commerce Clause, by negative inference, is understood to allocate authority away from the fifty states of the

termination suggests that the framers did not think any one mode appropriate in all cases, and therefore left the matter to be resolved in light of the particular circumstances of each situation. The subject of a particular treaty, for example, could be a relevant factor. When a treaty creates private rights, it closely resembles the sort of law that cannot be repealed except by Congress. Thus, when the termination of a commercial treaty is at issue, the case for mandatory congressional involvement is stronger than when the fate of a defense pact is involved.”); *see also* S.Res.15, 96th Cong. (1979); *see also* Anna Mamalakis Pappas, *The Constitutional Allocation of Competence in the Termination of Treaties*, 13 N.Y.U. J. INT’L L. & POL. 473, 521 (1981); *see also* Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1091 (1990) (“Where article II of the Constitution empowers the executive to govern exclusively over a particular topic, the President may unilaterally make, reinterpret, and terminate executive agreements without any senatorial consent. Conversely, where article I gives the Congress authority over a particular topic, or where articles I and II distribute authority over that topic to both the Congress and the executive, the President must establish either a treaty with the Senate’s consent or at least an executive agreement with congressional authorization. In such cases, the President may neither unilaterally reinterpret nor terminate that treaty or executive agreement.”).

12. Tribe, *supra* note 11, at 16.

13. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 961 (2010).

14. *See* Robert F. Housman, *International Environmental Law and Industrial Ecology*, in NATIONAL ACADEMY OF ENGINEERING, *THE GREENING OF INDUSTRIAL ECOSYSTEMS* 108, 109 (National Academies Press, 1994).

15. Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1130 (2012).

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U.S.¹⁶ Although less commonly invoked, there is another negative inference, which might be termed a “presidential dormant Commerce Clause.” The presidential dormant Commerce Clause denies the President power over interstate and international commerce.¹⁷

The Supreme Court had occasion to review the allocation of power over international commerce between Congress and the President in 1994 in *Barclays Bank PLC v. Franchise Tax Board of California*.¹⁸ In that case, in support of its argument that the California tax at issue impermissibly interfered with the ability of the Federal government to speak with one voice, one of the taxpayers referred to a series of executive branch actions, which it argued amounted to a clear federal directive proscribing the method of taxation at issue.¹⁹ The Court responded that the relevant issues are not within the executive’s constitutional powers.²⁰ Citing the Commerce Clause, Justice Ginsburg, speaking for the Court, stated that “the Constitution expressly grants Congress, not the President, the power to ‘regulate Commerce with foreign Nations.’”²¹

If the President lacks power to regulate international commerce, then he lacks the independent power either to remove barriers to trade or to re-impose barriers to trade, without congressional authorization.²²

In its 2003 decision upholding executive power in foreign relations in *American Insurance Association v. Garamendi*, the Supreme Court stated, “While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in

16. Patricia Weisselberg, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions from Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F.L. REV. 185, 207 (2007).

17. Of course, neither congressional-executive agreements nor Treaty Clause treaties may come into force without presidential participation, while ordinary legislation can come into force without presidential participation if Congress overrides a veto. See Anthony M. Bottenfield, *Congressional Creativity: The Post-Chadha Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 PENN ST. L. REV. 1125, 1131 (2008).

18. *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994).

19. *Id.* at 298–99.

20. *Id.* at 299.

21. *Id.* at 329. The opinion was approving of a concurring opinion of Justice Scalia in *Itel Containers v. Huddleston*, citing, “[The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.” *Id.* (quoting *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring in part and concurring in judgment). See also *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 85 (1993) (“The constitutional power over foreign affairs is shared by Congress and the President, . . . but the power to regulate commerce with foreign nations is textually delegated to Congress alone . . . ‘It is well established that Congress may authorize States to engage in regulation that the Commerce Clause would otherwise forbid,’ . . . but the President may not authorize such regulation by the filing of an *amicus* brief.”) (citations omitted).

22. The issue of authorization is addressed below.

foreign affairs the President has a degree of independent authority to act.”²³ By distinguishing foreign commerce powers from other “foreign affairs,” this suggests that the President lacks independent authority to act in connection with commerce.

As recently as 2015, the Supreme Court in *Zivotofsky II* recognized the indispensable role of Congress in regulating commerce: “It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may ‘regulate Commerce with foreign Nations,’”²⁴

The point that the President has no independent power in the field of commerce has been made clear in the trade subfield. In the case of *United States v. Guy W. Capps, Inc.*, the Court of Appeals for the Fourth Circuit found that the President had no regulatory power to re-impose barriers to trade:

. . . [W]hile the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate inter-state and foreign commerce is not among the powers incident to the Presidential office but is expressly vested by the Constitution in the Congress.²⁵

That court further held that “imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone.” This position was repeated in *U.S. v. Yoshida International, Inc.*: “It is nonetheless clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.”²⁶

III. Constitutional Context: Vesting Clause, “Sole Organ” Thesis, and Appointments Clause Analogy

Of course, the President has a broad executive function, and has many explicit and implicit powers, including, as relevant, the explicit power to make Treaty Clause treaties with the advice and consent of the Senate, the implicit power to make international sole executive agreements within his areas of independent power, the implicit power to sign or not sign congressional-executive agreements where he lacks independent power, and the power to refuse to sign legislation passed by Congress.

23. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003).

24. *See Zivotofsky*, 135 S. Ct. at 2087.

25. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953), *aff’d*, 348 U.S. 296 (1955). It might be argued that despite this sweeping language, the *Capps* decision stands for the more modest holding that the President lacks power only where Congress has occupied the relevant field.

26. *U. S. v. Yoshida Intern., Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975).

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A common epithet, with a heritage that includes Alexander Hamilton, John Marshall, and the Supreme Court in *U.S. v. Curtiss-Wright*, is that the President is the “sole organ” of the United States in international relations.²⁷ But despite occasional executive branch claims to the contrary, it is clear that the President is not the “sole decider” in international relations, at least outside areas exclusively committed to executive power.

The President’s basic authority to conduct the Nation’s diplomatic relations derives from his specific constitutional authorities to “make Treaties,” to “appoint Ambassadors . . . and Consuls” (subject to Senate advice and consent),²⁸ and to “receive Ambassadors and other public Ministers.”²⁹ It also flows more generally from the President’s status as Chief Executive,³⁰ and from the requirement in Article II, Section 3 of the Constitution that the President “shall take Care that the Laws be faithfully executed.”³¹

The view, expressed by the Secretary of State in the *Zivotofsky* litigation, that the President has “exclusive authority to conduct diplomatic relations,” along with “the bulk of foreign-affairs powers,” was rejected by the Supreme Court.³² The Court explicitly “declined to acknowledge” what it called the “unbounded power” included in the “sole organ” formulation of *Curtiss-Wright*.³³ As Oona Hathaway has written,

To say that the President is the “sole organ” of the federal government in international relations does not mean that the President has exclusive authority over the nation’s foreign affairs. It means something quite a bit more limited: the President is empowered to act as the formal legal representative of the United States. . . .³⁴

In the light of the *Zivotofsky II* Court’s rejection of the expansive view of executive foreign relations power, it is important to note that both Professor

27. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (referring to “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”); *see also History of Congress*, 10 ANNALS OF CONGRESS 613 (1800) (describing a statement by John Marshall, made when serving as a Representative in Congress, that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”); *see also*, Alexander Hamilton, *Pacificus No. VII* [July 27, 1793], NATIONAL ARCHIVES, last modified June 13, 2018, <http://founders.archives.gov/documents/Hamilton/01-15-02-0111> (Original source: 15 THE PAPERS OF ALEXANDER HAMILTON 130–135 (Harold C. Syrett et al. eds., 1969) (describing the Executive Branch as the “constitutional organ of intercourse between the [U.S. and] foreign Nations”).

28. U.S. CONST. art. II, § 2, cl. 2.

29. *Id.* art. II, § 3.

30. *Id.* art. II, § 1, cl. 1.

31. *Id.*

32. *Zivotofsky*, 135 S. Ct. at 2089.

33. *Id.* at 2088.

34. Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236, 1330, n.278 (2008).

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Henkin³⁵ and the American Law Institute in its *Restatement (Third) of Foreign Relations Law* based their broad views of the President's power to terminate treaties on the "sole organ" perspective expressed in *Curtiss-Wright*.³⁶

Therefore, the Vesting Clause and "sole organ" principle cannot support a plenary power over treaty termination that would allow the President to terminate a treaty in a context where Congress otherwise holds exclusive power.

One of the arguments for independent presidential authority to terminate treaties is the textual analogy with the Appointments Clause, which parallels the Treaty Clause in allowing the President to make appointments "by and with the advice and consent of the Senate."³⁷ This textual analogy is inapposite because of the substantive difference between terminating a commercial treaty, on the one hand, and removing high-level executive officers, on the other hand. While the latter interferes with no other congressional power, and is firmly within the management of the executive branch, the former could frustrate congressional management of a substantive responsibility accorded exclusively to Congress.

One response might be that commercial agreements may, of course, be made under the Treaty Clause, with only the permission of the Senate, rather than the Congress as a whole.³⁸ Therefore, this argument goes, the authors of the Constitution accepted that despite the Commerce Clause, Congress, as a whole, would not be involved in the *making* of even commercial treaties. This might support an argument that Congress as a whole need not be involved in the termination of commercial treaties. But the fact that the Treaty Clause constitutes a specific and limited exception from exclusive congressional power over commerce is not a basis for argument that the exclusive character of congressional control of commerce is completely eviscerated, and therefore allows Presidential termination of commercial agreements.

35. However, the authors of the Restatement (Third) accepted that congressional powers might result in modification of the presidential power to terminate. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 339 cmt. a (1987) ("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."). Louis Henkin took a similar view. See Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFFAIRS 292 (1987).

36. RESTATEMENT (THIRD), *supra* note 35 at § 339 n.1. Section 113 of the Restatement (Fourth) of Foreign Relations Law (2017), is consistent in substance with § 339 of the Restatement Third.

37. For an illuminating discussion, see Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 269-75 (2013); see also RESTATEMENT OF THE LAW FOURTH THE FOREIGN RELATIONS LAW OF THE UNITED STATES TREATIES, TENTATIVE DRAFT NO. 2 § 113 cmt. d (2017).

38. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001).

IV. Constitutional Context: Concurrent or Co-Dependent Powers

The above analysis suggests that the President simply lacks power to terminate trade agreements. But it is clear that Congress does not have the executive authority required to execute a treaty termination on its own, and that therefore the power to complete a treaty termination in the commerce field is characterized as concurrent authority.

This type of situation has been analyzed since 1952 in accordance with the second category of Justice Jackson's "tripartite framework" advanced in *Youngstown Sheet & Tube Co. v. Sawyer*.³⁹ Within the second category, that of concurrent authority, "congressional inertia, indifference or quiescence may" allow the exercise of executive power.⁴⁰ Termination of commercial treaties cannot be justified in Justice Jackson's third category of exclusive and conclusive presidential power, because the President's termination power *vis-à-vis* treaties is arguably not exclusive, nor does it seem conclusive.⁴¹ Treaty termination may be either an area of exclusive congressional authority or an area of concurrent authority.⁴²

But the type of concurrent authority in our context involves the intersection between Congress' commerce power, on the one hand, and the President's executive power, presumably pursuant to the Vesting Clause, to execute the decision of the United States to terminate. These powers are somewhat concurrent, but in the commercial context, under the Commerce Clause, the lion's share of the substantive regulatory authority is assigned to Congress.⁴³ If Congress' commerce power is truly exclusive, then the only role of the President is to sign or not sign legislation, or to sign or not sign congressional-executive agreements. In this model, the power is not truly concurrent, but only two separate exclusive powers that might both be necessary for action: co-dependent powers. Indeed, it is arguable that, while presidential action is necessary to terminate commercial treaties, it is not sufficient to do so.

In the commerce context, under this model, the only role of the President is to send the notice of termination once Congress decides to terminate a commercial agreement.⁴⁴ He can presumably refuse to act, but he cannot act independently. He is the "sole organ" in the administrative sense, but has no power over the substantive decision.

39. See *Youngstown*, 343 U.S. at 634–38 (Jackson, J., concurring).

40. *Id.* at 637.

41. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEXAS L. REV. 773, 824 (2014).

42. See David A. Schnitzer, *Into Justice Jackson's Twilight: A Constitutional and Historical Analysis of Treaty Termination*, 101 GEO. L.J. 243, 277 (2012).

43. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

44. Bradley, *supra* note 41, at 790.

In *Zivotofsky II*,⁴⁵ the Supreme Court seemed to understand some of Congress' legislative powers as co-dependent in relation to the President's exclusive recognition power. The Court found that in an area of exclusive *Presidential* authority, *Congress* could not constitutionally "aggrandize its power at the expense of another branch" by using its legislative power to control the President's exercise of his exclusive power.⁴⁶ Analogously, it might be argued that the President's termination of a commercial treaty, using his foreign affairs "sole organ" power, would be an unconstitutional self-aggrandizement, and an incursion on Congress' exclusive Commerce Clause domain.

Thus, given that it is well-understood that the Commerce Clause allocates the power over commerce to Congress, and implicitly derogates power over commerce from the President, the field of commerce may be distinct from other areas of treaty practice. 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.

It is important also to note that all modern U.S. trade agreements have been incorporated by statute in U.S. law.⁴⁷ While this has often been misperceived, it is beyond doubt that the implementing legislation for each of these trade agreements indicates that the trade agreements themselves will be available as a basis for suit in U.S. courts, while limiting standing to bring claims thereunder to the federal government.⁴⁸ Thus, each of these trade agreements is (commercial) law of the land in the United States. Therefore, by 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. As the Court stated in *Zivotofsky II*, "[T]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."⁴⁹ As discussed in more detail below, this type of partial repeal might raise the same concerns regarding the integrity of the legislative process as caused the Supreme Court to strike down the line item veto in *Clinton v. City of New York*.⁵⁰

V. Practice: Is the Historical "Gloss" Half Full, or Half Empty?

As Justice Frankfurter suggested in his concurring opinion in *Youngstown*,

45. *Zivotofsky*, 135 S. Ct. at 2079.

46. See *id.* at 2080 (quoting *Freytag v. Commissioner*, 501 U. S. 868, 878 (1991)).

47. See, e.g., Uruguay Round Agreements Act, Pub. L. No. 103-465, December 8, 1994, 108 Stat. 4809.

48. *Id.* at § 102(b)(2)(A).

49. *Zivotofsky*, 135 S. Ct. at 2079.

50. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

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a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by [§] 1 of Art. II.⁵¹

In the *Youngstown* case, Frankfurter found that the three relevant prior instances of executive action were insufficient in "number, scope, duration or contemporaneous legal justification" to establish a determinative historical gloss.⁵²

It is important to note that Frankfurter prefaced those statements with the following caveat: "Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."⁵³ In our context, we have no specific textual guidance in the Constitution. Instead, we have a conflict between the Commerce Clause, which has been interpreted by negative inference to disempower the President, and the President's Vesting Clause powers, which have been interpreted to include executive functions that encompass signing treaties (but not ratifying them outside his inherent powers) and sending notices of termination of treaties.

Our core question is whether the President may determine to terminate and send notices of termination without Congressional authorization: We know that he cannot accept congressional-executive agreements for the United States without such authorization, and we know that the Treaty Clause requires Senate advice and consent for the international agreements approved thereunder. But the Constitution is silent on termination.⁵⁴

As Frankfurter suggests, historical gloss is an interpretative tool.⁵⁵ Other interpretative tools, including text and context, may overshadow historical gloss. Thus, it is possible to find that the existing allocation of powers, the structure of the legislative process, and the specification of the executive powers, leaves little latitude for the interpretative influence of historical gloss. As explained above, the settled understanding of the presidential dormant Commerce Clause leaves little interpretative space for a unilateral presidential power to terminate Commerce Clause-based treaties. Yet executive branch lawyers, and courts, may differ on the interpretative power or determinacy of these other tools, and may find it useful to refer to historical gloss: to the practice of the President and Congress.

But, as discussed below, historical gloss provides little support for a unilateral presidential power to terminate Commerce Clause-based treaties.

51. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring).

52. *Id.* at 613.

53. *Id.* at 610.

54. Alan C. Swan, *The Constitutional Power to Terminate Treaties: Who, When, and Why*, 6 YALE STUDIES IN WORLD PUBLIC ORDER 179 (1980).

55. *Youngstown*, 343 U.S. at 610.

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If anything, the historical gloss suggests the opposite.⁵⁶ The group of commercial treaties examined herein shows that, whether a Treaty Clause treaty or a congressional-executive agreement, the President does not generally claim the authority independently to terminate these agreements. Nor has Congress as a whole, or the Senate for Treaty Clause treaties, acquiesced in independent presidential termination. Furthermore, as a practical matter, the U.S. practice is to enter into trade agreements as congressional-executive agreements, rather than as Treaty Clause treaties. Finally, there is uniform evidence from relevant implementing legislation that Congress, delegating other authority to the President to operate trade agreements, and aware of the question of termination authority, clearly determined not to accord termination authority to the President. This is the opposite of acquiescence: It is denial.

It is important to state at the outset of our review of practice in this field that from the founding of the United States until the late 19th or early 20th century, the President did not generally exercise independent power to terminate treaties.⁵⁷ As Curtis Bradley states, “If the Article II Vesting Clause conveyed to presidents the unilateral authority to terminate treaties, it is surprising that no one (with the possible exception of Alexander Hamilton) seemed to be aware of it for a hundred years.”⁵⁸ So, if historical gloss were valued as simply an indicator of the founders’ understanding of the Constitution, it would not support an independent presidential power to terminate treaties. But the Supreme Court has recently stated that “this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”⁵⁹

In his 2014 study of general treaty practice (as opposed to the subset of commercial treaties), Bradley finds that by 1798, it was clear that *Congress* held the power to terminate, and that Congress authorized or directed termination in a number of instances.⁶⁰ Furthermore, he observes that “no President actually terminated a treaty unilaterally during the twentieth century until 1927.”⁶¹ He finds uncertainty in the period from the beginning of the 20th Century until 1978, but subsequent to 1978, he observes a historical gloss in general treaty practice supporting independent executive power to terminate.⁶²

56. Of course, it is also true as a matter of constitutional law that the federal government’s power to enter into commercial treaties under the Treaty Clause is independent of the Commerce Clause power. This point is irrelevant to modern trade agreements that do not rely on the Treaty Clause. Moreover, the Treaty Clause provides a special normative power that is explicitly limited to the making of treaties. It does not confer termination power, and none of the arguments of implicit presidential unilateral termination power rely on the Treaty Clause.

57. See Bradley, *supra* note 41 at 805, 807.

58. *Id.* at 801.

59. *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

60. Bradley, *supra* note 41, at 789-790.

61. *Id.* at 805.

62. *Id.* at 807, 811.

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But recall the above-referenced statements by Tribe and other scholars that the mode of treaty termination should be understood to vary by the circumstances.⁶³ Recall also that the Restatement Third has accepted that varying circumstances may be treated differently.⁶⁴ Thus, it seems appropriate to conduct separate historical gloss analyses for different areas of treaty practice.

While it is arguable that recent historical gloss supports an inherent presidential power to terminate treaties generally, when the practice in connection with commercial treaties is examined, it is not possible to find “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”⁶⁵ Recall also that historical gloss is merely an interpretative tool. “‘Past practice does not, by itself, create power.’”⁶⁶ Even if gloss supports a presidential power to terminate, the presidential dormant Commerce Clause stands in opposition to a presidential power to terminate Commerce Clause-based treaties.

In order to describe the historical gloss relating to treaties in the area of Congress’ Commerce Clause power, I sought to identify a group of these treaties that have been terminated. I used the HeinOnline U.S. Treaties and Agreements Library (the Treaty Library).⁶⁷ Within the Treaty Library, I identified those treaties that (i) have a termination date, and (ii) are categorized under the Treaties in Force (TIF) subject “Trade and Commerce.”⁶⁸ This search in the Treaty Library was an effort to identify treaties that fall under the Commerce Clause of the U.S. Constitution and have been terminated. The search identified 112 treaties.

This method has several important limitations. First, there are some treaties that have been terminated but that are not denoted by a termination date in the database, so this group of treaties is not comprehensive. Second, the “Trade and Commerce” category is not necessarily congruent with congressional Commerce Clause power. Third, the most recent treaty included in this group was entered into in 1984. Fourth, and perhaps as a result of these limits, reviews of the secondary literature show that there exist several commercial agreements, discussed below, that are not included

63. See Tribe, *supra* note 11; see also Bradley, *supra* note 41, n.285 (“Because the precise contours of constitutional custom are contestable, it is still possible to argue as a descriptive matter that certain types of treaties are not subject to unilateral presidential termination. It might be argued, for example, that in light of Congress’s power to declare war, a president may not unilaterally terminate a peace treaty.”).

64. RESTATEMENT (THIRD), *supra* note 35 § 339, cmt. a.

65. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring).

66. *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

67. This online library includes treaties both in force and not in force. U.S. Treaties and Agreements Library, HEINONLINE, http://heinonline.org/HOL/Index?collection=US_treaties&set_as_cursor=clear.

68. Treaties in Force is an annual publication prepared by the Department of State which lists treaties and other international agreements in force at the time of publication. One of the treaty categories used by the Department of State in this publication is “Trade and Commerce.”

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in the results of this search, but that have been terminated without congressional participation. But while this method is not comprehensive, and while it depends on what appears to be a somewhat arbitrary and unreliable TIF system of categorization, it seems like a reasonable sampling.⁶⁹

The next step was to identify Congressional action in connection with the termination of these 112 treaties. I did so by examining the Congressional Record for statements or action relating to these treaties. I also examined relevant Presidential statements.⁷⁰ The following table shows an analysis of the circumstances of termination of these 112 agreements.

69. I directed my research assistant to run a series of additional searches in the Treaty Library to ensure that this search was sufficiently comprehensive. For example, he searched for treaties with a termination date and containing the term “Trade,” “Commerce,” or “Commercial.” This search contained 346 results. He read the summaries of the additional treaties—additional to the 112 contained in our first search—to make a judgement on whether or not these treaties fell under the Commerce Clause. While a very few of these treaties arguably fall within the Commerce Clause, I decided to exclude this broader group from further analysis.

70. To identify the manner by which each of the 112 treaties was terminated I directed my research assistant to take three steps. First, he consulted the treaty summary created by the curators at HeinOnline, and all the corresponding documents in the Treaty Library that relate to the treaty. Second, he used the ProQuest Congressional & Executive Branch Documents database to search for Congressional action on each of the treaties. He started by searching for the country and treaty name one year before and after the termination date. He also did other searches to locate documents pertaining to a treaty: for example, searching for just the country name, or the country name and the word “treaty” or the word “termination.” Finally, he used the ProQuest Congressional & Executive Branch Documents database to search for Presidential statements on the termination of each treaty. One productive method that he used was to search for the country name, the term “trade,” and the year in which the treaty was terminated. He then filtered the results to include only documents categorized by ProQuest as “Presidential Proclamations.” If he was unable to find a Presidential statement regarding termination for a particular treaty, he tried up to three different searches using variations of the year of termination, the term “presidential statement,” the term “presidential message,” the country name, and the name of the treaty.

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Number of Treaties	Type of Action
18	Expired
6	Terminated by other party
3	Annexation of treaty partner (Hawaii, Lagos)
3	Treaty partner joined GATT
27	Replaced by treaty or executive agreement approved by Senate or Congress
1	Replaced by statute
15	Terminated under §350 Tariff Act of 1930
19	Terminated under §350 Tariff Act of 1930 and replaced
2	Terminated under Trade Agreements Extension Act of 1951
4	Terminated under §620(a) of the Foreign Assistance Act of 1961
9	Terminated pursuant to Payne-Aldrich Tariff Act of 1909
1	Executive action referring to inconsistency with statute
1	No congressional action
2	No information

We can ignore the treaties that expired by their terms or were terminated by action of the other parties. We can ignore the two treaties that were terminated pursuant to annexation of Hawaii by the U.S., and probably the one that was terminated pursuant to annexation of Lagos by the U.K.

That leaves eighty-two agreements where a U.S. government action is worth analyzing. For the twenty-seven explicitly replaced by statute or other agreements—pursuant to either Senate or Congressional participation, it is fair to say that these were not assertions of sole presidential authority. Of the remaining fifty-five agreements, forty-nine were terminated pursuant to statute, although in several of those, the President proclaimed that the termination was pursuant to his constitutional power *and* the relevant statute, leaving some uncertainty as to the scope of independent presidential power. But importantly, the President did not claim that his constitutional power alone was sufficient authority for termination.

It is important to note that the authority under section 350 of the Tariff Act of 1930, which is referenced in relation to thirty-four of the eighty-two agreements terminated by U.S. government action, is explicitly only authority to terminate proclamations under trade agreements, not the trade agreements themselves.⁷¹ It might be that the reference to section 350 of the Tariff Act of 1930 was intended in some of these cases to justify termination of the agreement, eliding the distinction between the implementing proclamation and the agreement itself, or inferring a power to terminate the treaty from a power to terminate the related proclamation. This possibility may suggest an interpretative strategy with respect to *statutory* authorization,

71. Tariff (Smoot-Hawley Tariff) Act of 1930 § 350, 46 Stat. 590 (1930) (current version at 19 U.S.C. §§ 1351-1354 (2012)).

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as discussed below: that the prevalent authorization of the President to proclaim tariffs pursuant to treaty commitments and termination of treaty commitments somehow includes power to terminate the treaties themselves. But this would be a strange counter textual inference.

Thus, only a very small number—one to four, depending on how you categorize them—of these eighty-two agreements was terminated without some basis in Congressional action. It is possible to read these statistics as suggesting that the President indeed has independent authority to terminate U.S. treaties, but that the independent authority is only rarely exercised.⁷² But the more appealing reading is that the President has much more often recognized the need for Congressional or Senate participation in termination.

So, it is difficult to argue that, within this category of treaties, there is an historical gloss supporting independent presidential authority. Practice in this area certainly lacks the “number, scope, duration or contemporaneous legal justification”⁷³ necessary to meet Frankfurter’s test for empowering historical gloss.

But as noted above, this group of treaties represents a limited sample, and one that ended with treaties entered in 1984. Therefore, I have also reviewed some of the treaties identified by Professor Bradley in his 2014 article to evaluate whether these, when added to the sample evaluated above, suggest sufficient practice to influence interpretation of the Constitution to the effect that the President has the independent authority to terminate trade treaties. These treaties identified by Professor Bradley did not appear within the TIF “trade and commerce” category, but appeared in categories such as “amity,” “industrial property,” “fishing,” and “general relations.”

In 1936, the executive terminated a commercial treaty with Italy, with the State Department arguing that, while the constitutional allocation of authority to terminate treaties was “in a somewhat confused state,” termination was justified partially on the basis of a potential conflict between the treaty and a subsequent statute.⁷⁴ In 1941, in connection with the Second World War, the U.S. “suspended” the International Load Lines Convention, the Attorney General stated that Senate action was not required because the U.S. was not formally withdrawing.⁷⁵ And in 1939, the Roosevelt administration terminated a commercial treaty with Japan, based on resolutions in both houses of Congress.⁷⁶ But in 1944, the executive

72. *Goldwater v. Carter*, 617 F.2d 697, 708 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

73. *Youngstown*, 343 U.S. at 613.

74. Bradley, *supra* note 41, at 807 (citing Memorandum from R. Walton Moore, Acting U.S. Sec’y of State, to President Roosevelt (Nov. 9, 1936)); *see also* 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1936, EUROPE, 356–59 (1954) (related State Department correspondence).

75. Int’l Load Line Convention, 40 Op. Att’y Gen. 119, 123 (1941); Bradley, *supra* note 41, at 808–09.

76. Bradley, *supra* note 41, at 807.

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unilaterally terminated a protocol to a trademark registration treaty.⁷⁷ So, the pre-1950 record is decidedly mixed, with only the last example supporting unilateral presidential termination.

As noted above, during the 1950s and later, there were executive actions to terminate commercial treaties where full formal Congressional approval was not sought.⁷⁸ But in the 1962 termination of a commercial relations treaty with Cuba, (a) the U.S. had legislated a formal embargo on Cuba, and (b) this action may be distinguished by the fact that it implicates the President's non-commercial foreign affairs power.⁷⁹ Similarly, the Reagan Administration's 1985 notice of termination of a Treaty of Friendship, Commerce and Navigation with Nicaragua may be viewed as implicating the President's foreign affairs power.⁸⁰ As also noted above, the Truman administration action to terminate commercial treaties with the Soviet Union and certain Eastern European states was based on statutory authority.⁸¹ As Bradley notes, Ford administration withdrawal of the U.S. from several fishing treaties was pursuant to the 1976 Fishery and Conservation and Management Act.⁸² So, this post-1950 record is also rather mixed.

It is fair to say that there are instances in which Presidents have unilaterally terminated treaties. But it is also fair to say that, once we recognize that different Constitutional contexts implicate different levels of relative Presidential power, we see few if any instances in which a President terminates a significant commercial agreement unless his act implicates an independent presidential power. We do see many instances in which Presidents have purported to act pursuant to statutory authority. Thus, the historical gloss supporting independent Presidential authority to terminate commercial treaties for commercial reasons seems significantly less than half empty.

VI. Statutory Provisions

As suggested above, if we accept that Congress holds exclusive power over international commerce, with the result that the President lacks inherent authority unilaterally to terminate commercial treaties, then the President may only do so pursuant to Congressional authorization. In this section, I review the statutory authority relevant to the WTO, as well as each of the U.S.'s current preferential trade agreements.

None of the implementing statutes for U.S. trade agreements explicitly authorize the President to terminate those treaties. The implementing statutes provide other explicit authorization to the President to take specific

77. *Treaty Information*, 11 DEP'T ST. BULL. 442, 442 (1944); Bradley, *supra* note 41, at 809.

78. Bradley, *supra* note 41, at 809-10.

79. *See id.* at 810.

80. *See Economic Sanctions Against Nicaragua*, 85 DEP'T ST. BULL. 74, 74-75 (1985).

81. Bradley, *supra* note 41, at 810.

82. *Id.*

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actions, such as proclaiming tariffs consistent with the trade agreement, or even consistent with the termination of the trade agreement.⁸³ This leads to an *expressio unius* argument that Congress did not intend to delegate termination power, and it undermines arguments of implicit delegation of termination power.

The implicit delegation argument is that the inclusion of a termination provision in the treaty itself is evidence of an implicit intent to delegate termination power to the President. This inference was argued by the Court of Appeals in *Goldwater v. Carter*, suggesting that a termination clause in the treaty that did not specify that the President is delegated authority to invoke it amounts to Senate authorization of invocation: “The President’s authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year’s notice, and the President’s action is the giving of notice of termination.”⁸⁴ But this argument proves too much, because trade agreements also often provide for their amendment, and no one believes that they therefore implicitly delegate power to amend to the President. It should also be noted that this argument is more attractive outside a field of exclusive Congressional power.

In *Dames & Moore*, the Supreme Court followed an approach that is the opposite of an *expressio unius* interpretative canon: inferring unspecified authority from broad specified authority.⁸⁵ It stated that:

Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take, or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially . . . in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive. (*Citation omitted*). On the contrary, the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility,” (*citation omitted*). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.⁸⁶

Obviously, the choice of statutory interpretation approach would be for a court to make, and the choice may be made arbitrarily, or with a certain policy goal in mind.⁸⁷ But given historical uncertainty regarding the

83. *E.g.* United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 313, 118 Stat. 919, 943 (2004).

84. *Goldwater*, 617 F.2d at 708.

85. *See Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981).

86. *Id.* at 678–79 (first quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981), and then quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

87. *See Karl N. Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

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executive's power independently to terminate treaties in general and commercial treaties in particular, and given (as detailed below) congressional silence in the face of frequent opportunities for greater specificity both in the treaties themselves and in implementing legislation, the more prudent approach would seem to be to decline to draw inferences of executive authorization from the inclusion in treaties of termination clauses. In any event, in our context, the facts do not seem consistent with an assertion that Congress has enacted "legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion," so it is not clear that the predicate for the *Dames & Moore* court's inference is satisfied.⁸⁸ Indeed, as detailed below, termination was addressed in much of the relevant implementing legislation, and the failure to provide explicit authority to the President is starkly inconsistent with a legislative intent to accord the President broad discretion that would include termination.

At the time of this writing, the U.S. was party to the WTO Agreement, plus fourteen preferential trade agreements with twenty countries. All of these trade agreements were entered into as congressional-executive agreements pursuant to votes of both houses of Congress under "fast track" authority (now called trade promotion authority). Each of them was approved through implementing legislation that also made several changes in U.S. law. Importantly, each of them has domestic effect as law through implementing legislation that recognized that the treaty itself is applicable as law in U.S. courts, although only in suits by the United States as plaintiff.⁸⁹ Each of them contains provisions permitting each party to withdraw or terminate upon six months' notice.

One of the most important statutory provisions for our study is section 125 of the Trade Act of 1974.⁹⁰ It states, "The President may at any time terminate, in whole or in part, *any proclamation* made under this Act (emphasis added)."⁹¹ Section 125(a) requires that every trade agreement be subject to termination on not more than six months' notice.⁹² Then in section 125(b), instead of providing that the President may terminate U.S. participation in such trade agreements, the statute states merely that the President may terminate any proclamation made under the statute.⁹³ This juxtaposition seems to clearly evince an intent not to authorize independent Presidential termination.

This inference is also supported by section 125(c), which states, as relevant, "[W]henver the United States . . . withdraws . . . any obligation with respect to the trade of any foreign country . . . , the President is

88. *Dames & Moore*, 453 U.S. at 678.

89. See, e.g. Uruguay Round Agreements Act, Pub. L. 103-465, § 102(b)(2), 108 Stat. 4809, 4815-4816 (1994).

90. Trade Act of 1974, Pub. L. 93-618, § 125, 88 Stat. 1978, 1991 (1974).

91. *Id.* § 125(b).

92. *Id.* § 125(a).

93. *Id.* § 125(b).

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authorized to proclaim increased duties. . . .”⁹⁴ Here, the United States’ action to withdraw obligations is separated from the President’s action proclaiming duties.

Section 101 of the Trade Act of 1974 also clearly establishes a separation between (i) entry into an agreement, and (ii) proclamation.⁹⁵ If this separation between agreements and proclamations is carried forward to section 125, then the President is only authorized to make proclamations to carry out the trade agreement but is not authorized to terminate the trade agreement. Thus, Congress did not by this statute authorize the President to terminate the trade agreements entered under the Trade Act of 1974. Moreover, by an *a contrario* interpretation, it could be argued that this structure stands as evidence of a Congressional intent to deny the President the power to terminate these trade agreements.

Section 125 of the Uruguay Round Agreements Act (URAA) provides that “[t]he approval of the Congress, provided under section 101(a), of the WTO Agreement shall cease to be effective if, and only if, a joint resolution described in sub-section (c) is enacted into law.”⁹⁶ By this provision, Congress seemed to reserve its right subsequently to disapprove the WTO Agreement, presumably with the result that the U.S. would no longer consider itself bound thereby. While it does not necessarily mean that the President lacks independent termination authority, the “if, and only if” language suggests an intent that this be an exclusive method of U.S. termination. Supporting the latter inference is section 122, which requires the President to consult with Congress prior to participating in making certain important decisions under the WTO Agreement, but does not require consultation on any Presidential act to terminate U.S. participation.⁹⁷ This would be a strange omission if the President were intended to have independent power to terminate U.S. participation.

Interestingly, section 107 of the NAFTA Implementation Act of 1993 amended the act that originally implemented the partial predecessor Canada-U.S. Free Trade Agreement (CUSFTA) to provide that when the CUSFTA terminates, its implementing statute would also terminate.⁹⁸ This is interesting because Congress recognized the problem that an implementing statute might survive termination of the relevant international agreement and determined to ensure that both would terminate at the same time.

On the one hand, this suggests that Congress saw the problem, and determined not to remedy it in the NAFTA Implementation Act: the NAFTA Implementation Act will not automatically terminate upon termination of NAFTA. On the other hand, it suggests that Congress was

94. *Id.* § 125(c).

95. See Trade Act of 1974, Pub. L. 93-618, § 101, 88 Stat. 1978, 1982 (1974).

96. Uruguay Round Agreements Act, Pub. L. 103-465, § 125, 108 Stat. 4809, 4833 (1994).

97. See §122, 108 Stat. at 4829-4830.

98. North American Free Trade Agreement (NAFTA) Act, Pub. L. 103-183, § 107, 107 Stat. 2057, 2065 (1993).

aware of, and accepted, the possibility that the CUSFTA might be terminated without legislative action which could have also repealed the CUSFTA implementing statute. This is important, because it could be a basis for an inference of Congressional acceptance of executive power to terminate: if treaty termination could only take place with Congressional approval, there would be no need to provide for automatic termination of the implementing statute upon treaty termination. But there are circumstances in which it would be appropriate to terminate implementing legislation where neither Congress nor the President approved termination of the agreement: where the other country terminates the agreement. Therefore, an exclusive Congressional power to terminate treaties would not be inconsistent with the *effet utile* of these automatic statute termination provisions.

Importantly also, the implementing statutes for the U.S. trade agreements with Australia, Colombia, Korea, Peru, and Panama provide that when those agreements terminate, the statute would also terminate.⁹⁹ This is subject to the same interpretative choice mentioned above: *expressio unius* refusal to make inferences where the author has addressed certain relevant categories, versus inference of unspecified authority from broad specified authority.

The interpretative choice denying presidential authority to terminate the treaty may be required to preserve the constitutionality of these statutes. Congress cannot delegate its repeal control over statutes. As the Supreme Court stated in 1983 in *Chadha*, "repeal of statutes, no less than enactment, must conform with Art. I."¹⁰⁰ To put a fine point on it, if the trade agreement implementing legislation provides for termination of the legislation upon termination of the underlying treaty, and if the President has independent authority to terminate the treaty, the implementing legislation would be an unconstitutional delegation of repeal power.

In *Clinton v. City of New York*, the Supreme Court rejected statutory delegation of a line item veto to the President, as violating the presentment and bicameralism requirements of the Constitution:

Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.¹⁰¹

99. See, e.g., United States-Australia Free Trade Agreement Implementation Act §106(c): "On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective." United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 106(c), 118 Stat. 919, 923 (2004).

100. *INS v. Chadha*, 462 U. S. 919, 954 (1983).

101. *Clinton*, 245 U.S. at 439.

It is worth noting that one of the arguments to which the Court responded in *Clinton v. City of New York* was that the delegation of the line item veto was similar to the delegation of power to suspend the exemption from import duties upheld in *Field v. Clark*.¹⁰² The power reviewed in *Field v. Clark* is a conditional delegated tariff-setting power under the Tariff Act of 1890, similar to the proclamation power delegated to the President under current legislation, allowing the President to proclaim tariffs to carry out trade agreements, or to respond to certain conditions. In *Field v. Clark*, the conditional and limited nature of the delegation was important to its constitutionality. In *Clinton v. City of New York*, the Court quoted extensively from *Field v. Clark*:

Nothing involving the expediency or the just operation of such legislation was left to the determination of the President [W]hen he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress.¹⁰³

Thus, the fact that in some of these statutes termination of the relevant trade agreement automatically results in termination of the implementing legislation suggests that Congress did not intend to delegate to the President power to terminate the trade agreement. If it did, the delegation would be unconstitutional because it would amount to delegation of power to terminate the legislation, and unguided delegation at that.

While the *Clinton v. City of New York* court recognized, following *Field v. Clark*, that greater delegation by Congress to the President in foreign affairs than in the domestic context may be appropriate, it still limited the scope of delegation, requiring that Congress determine the policy reasons for action:

More important [than the foreign affairs distinction], when enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President.¹⁰⁴

This holding suggests that the provisions of those implementing statutes, such as the implementing act for the Korea-U.S. Free Trade Agreement, that purport to terminate the implementing statute upon termination of the agreement, would be unconstitutional if the President alone had the power

102. *Id.* at 442–45 (discussing *Field v. Clark*, 143 U.S. 649 (1892)).

103. *Id.* at 442–443 (quoting *Field*, 143 U.S. at 693).

104. *Id.* at 445.

to terminate the agreement without any Congressional direction regarding conditions for termination. Interestingly, then, implementing statutes that provide for termination of the statute upon termination of the agreement are even more difficult to interpret as implicitly authorizing Presidential power to terminate than implementing statutes, like the URAA and NAFTA acts, that do not.

But more broadly, these limits on delegation of statutory repeal authority are motivated by the same separation of power concerns that would motivate a limit on an inherent or statutory authorization of the President to terminate a trade agreement that had legislative-type effects and/or that had legal effect within the U.S. domestic legal system.

VII. Justiciability: Standing; Jurisdiction; Political Question

There are no leading case precedents on the substantive issue of the executive's independent power to terminate treaties generally, or trade treaties in particular. One reason for the lack of precedent is that federal courts have avoided deciding cases on this topic, finding the relevant dispute non-justiciable. But since the 2012 decision in *Zivotofsky v. Clinton*, there is a clearer path toward justiciability of a case in this field.¹⁰⁵

In the leading case of *Goldwater v. Carter*,¹⁰⁶ the Supreme Court did not decide the issue of the executive's power independently to terminate the U.S.-Taiwan mutual defense treaty. In that case, Justice Rehnquist, writing for a plurality of four justices, stated that "in light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties (citation omitted), the instant case in my view also "must surely be controlled by political standards."¹⁰⁷

Rehnquist distinguished *Youngstown*, which had reached the merits, on the basis that (i) *Youngstown* involved a private plaintiff, rather than a dispute between coequal branches with resources not available to private plaintiffs to protect their interests, and (ii) "moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is entirely external to the United States, and [falls] within the category of foreign affairs."¹⁰⁸ In a trade case, it is likely that an injured exporter or importer would bring a private case.¹⁰⁹ Moreover, the effect of termination of a trade agreement would fall importantly within the United States.

105. See *Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

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

107. *Id.* at 1003 (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)). Note the recognition of different procedures for different treaties.

108. *Id.* at 1004-05.

109. Note that in *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987), a private plaintiff was found insufficient to overcome political question-based dismissal.

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So, the distinguishing factors that resulted in non-justiciability on political question grounds would not apply in the context of the termination of a trade treaty. Furthermore, while different termination procedures would be appropriate for different treaties, it may be possible to separate particular categories of treaties, such as commercial treaties, and evaluate the constitutional disposition of the power to terminate.

In his dissent in *Goldwater*, Justice Brennan anticipated some of the views more recently adopted by the Court in *Zivotofsky v. Clinton*:

In stating that this case presents a nonjusticiable “political question,” Mr. Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been “constitutional[ly] commit[t]ed.” (Citation omitted). But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power.¹¹⁰

In *Zivotofsky v. Clinton* (*Zivotofsky I*), Justice Roberts, writing for the Court, found the issue of Congressional power under the Constitution to legislate regarding an issue of recognition of foreign country territory to be a justiciable issue, and not a political question, to determine constitutionality of a statute.¹¹¹ He recalled that a controversy “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’”¹¹² Furthermore, “[t]he Judicial Branch appropriately exercises that authority [to determine constitutionality of a statute in that case], including in a case such as this, where the question is whether Congress or the Executive is ‘aggrandizing its power at the expense of another branch.’”¹¹³

Roberts found the dispute in *Zivotofsky I* to be firmly within the judicial competence, and not committed to other branches. “To resolve his claim, the Judiciary must decide if *Zivotofsky*’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.”¹¹⁴

In the context at hand, there is no “textually demonstrable constitutional commitment of the issue to a coordinate political department.” Nor is there a lack of judicially discoverable and manageable standards: it is a purely legal

110. *Goldwater*, 444 U.S. at 1006-1007 (Brennan, J., dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 211-213, 217 (1962)). Brennan would have decided in favor of presidential power on the basis of the constitutional commitment of the exclusive recognition power to the president.

111. See *Zivotofsky*, 566 U.S. at 189.

112. *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

113. *Id.* at 197 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

114. *Id.* at 196.

exercise involving no judgments outside the legal domain. And it is a question of whether the Executive is “aggrandizing its power at the expense of another branch.”

Indeed, the determination of statutory authorization to the President to terminate a treaty is also a “familiar judicial exercise,” at three levels. First, the determination of the relationship between Congress’ exclusive commerce power and the President’s Vesting Clause power is a standard question of constitutional interpretation. Second, if the President lacks inherent independent authority to terminate, then he needs statutory authorization. This is a standard question of interpretation of statutes. Third, if a court found that Congress has delegated authority to terminate to the President, then the question of the constitutionality of delegation, as in *Clinton v. City of New York*, is similarly familiar, and capable of judicial determination.

VIII. Conclusion

The question of presidential authority independently to terminate trade treaties should be seen within the broader context of the Constitution, and also within the context of globalization. Under the Constitution, the allocation of power over commerce makes it difficult to argue that these commercial policy decisions require congressional approval to be made, but not congressional approval to be un-made.

With treaties playing a growing, and already large role in the management of domestic commerce and the domestic economy, it would be strange to allow a President, operating alone, to engage in the direct regulation—or re-regulation—of commerce, discarding broad swaths of commercial law, by terminating trade agreements.