

CONGRESS MUST APPROVE A WITHDRAWAL FROM NAFTA

By John B. McNeece III

Abstract: *Some have argued that the President can terminate NAFTA without the assent of Congress. A lawsuit challenging President Trump's withdrawal from NAFTA without congressional approval would be heavily contested. Nevertheless, such a lawsuit would be well-founded in U.S. laws and the Constitution. By unilaterally withdrawing from NAFTA without congressional approval, the President would be infringing on Congress' constitutional powers and overturning legislation passed pursuant to those powers. Furthermore, the "political question" doctrine should not bar the U.S. federal courts from hearing and deciding such a lawsuit.*

In a thoughtful essay entitled "[Can Trump Terminate NAFTA?](#)" Gary Clyde Hufbauer of the Peterson Institute for International Economics asks, "Can the president withdraw the United States from the agreement, and rewrite U.S. commercial relations with Mexico and Canada, without the assent of Congress and the courts?" His answer: "Very likely yes." This commentary respectfully disagrees with Mr. Hufbauer's position and contends that Congress must approve a withdrawal from NAFTA.

Mr. Hufbauer argues that "[w]hile the Constitution is silent on the power to terminate treaties, historical practice has conferred this power on the president alone." A broader analysis of the allocation of power between the President and Congress under the Constitution and U.S. laws shows that the President could not withdraw from a trade agreement such as NAFTA without the approval of Congress.

Mr. Hufbauer also suggests that the courts would not accept a challenge to President Trump's unilateral withdrawal from NAFTA because the case would turn on a "political question," i.e. an issue to be resolved between Congress and the President rather than the courts. Yet if President Trump withdraws from NAFTA without approval from Congress, there is a strong argument under a decision by the U.S. Supreme Court that the U.S. federal courts would hear and decide a lawsuit challenging his authority to do so.

The Scope of Presidential Powers

Under the U.S. Constitutional system, the President does not have unlimited powers. In the U.S. Supreme Court case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that the President's powers must derive "either from an act of Congress or from the Constitution itself." NAFTA was approved by an act of Congress, the North American Free Trade Agreement Implementation Act. Since NAFTA was approved by act of Congress, it should be overturned only by act of Congress, unless the President has the power to withdraw either by grant of authority from Congress or from the Constitution itself. This commentary argues that the President does not have authority to unilaterally withdraw from NAFTA either by grant of authority from Congress or by way of "inherent" powers under the Constitution. Accordingly, the President can withdraw from NAFTA only with the approval of Congress.

Presidential Powers Granted by Congress

NAFTA provides at Article 2205 that "[a] Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties." However, neither NAFTA itself nor the legislation approving NAFTA grants authority to the President to exercise these rights of withdrawal on behalf of the United States. The Trade Act of 1974, one of the legal foundations for the NAFTA Implementation Act, does include general provisions on "termination and withdrawal authority" with respect to trade agreements. But once again, those provisions, set forth at Section 125 of the Trade Act of 1974, do not give the President the power unilaterally to withdraw from or terminate NAFTA.

Section 125(a) provides broadly that "[e]very trade agreement entered into under this Act shall be subject to termination, in whole or in part, or withdrawal, upon due notice, at the end of a period specified in the agreement," subject to further provisions on what that period should be. But this language says nothing on whether the President or Congress itself has the power to withdraw or terminate. Further, the remaining provisions of Section 125 give the President limited powers of termination or withdrawal only in two specific circumstances.

- First, under Section 125(b), the President can terminate proclamations that he (or she) made under the 1974 act. But proclamations pertain to the setting of duties or imposition of import restrictions, not approval or adoption of trade agreements.
- Second, under Section 125(d), where a foreign country withdraws from or breaches a trade agreement without adequate compensation to the U.S., the President is granted the power “in pursuance of rights granted to the United States under any trade agreement” to either take away “substantially equivalent trade agreement obligations of benefit to such foreign country” or else proclaim “such increased duties or other import restrictions as are appropriate to effect adequate compensation from such foreign country.” But this grant of power to the President is predicated on the foreign country first taking action to deprive the United States of agreed-upon trade benefits.

The cited provisions grant no explicit general powers to the President to withdraw from or terminate trade agreements. Nor do they implicitly grant powers of withdrawal or termination to the President. To the contrary, in the Trade Act of 1974 Congress clearly understood how to grant powers to the President to act “in pursuance of rights granted to the United States under any trade agreement” in order to terminate treaty benefits. It did so where a foreign country withdraws from or breaches a trade agreement with the U.S. without adequate compensation. But it gave no general power for the President unilaterally to withdraw from or terminate trade agreements pursuant to rights granted to the United States under any such agreement. This strongly indicates that Congress did not intend to grant to the President such broader power.

“Inherent” President Powers under the Constitution

Apart from any powers that might be delegated by Congress, does the President have independent or “inherent” power to terminate or withdraw from NAFTA pursuant to his separate constitutional role as chief executive? The historical record does show the President has unilaterally withdrawn from or otherwise terminated numerous treaties or other international agreements,

particularly since the beginning of the twentieth century.¹ In this regard, the U.S. State Department argued in 1939 that “the power to denounce [withdraw from] a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign state,” and that the President has “full control over the foreign relations of the nation, except as specifically limited by the Constitution.” On a related point, the U.S. Supreme Court has held that the President “has a unique role in communicating with foreign governments,” *Zivotofsky v. Kerry*, 576 U.S. ___ (June 8, 2015), which suggests that where the “United States” has a right of withdrawal or termination, the President can communicate the exercise of that right. Yet all of these points in favor of the inherent power of the President to withdraw from NAFTA have significant limitations.

The historical argument assumes that the President’s withdrawal power is inherent in his constitutional role as chief executive with “full control over the foreign relations of the nation, except as specifically limited by the Constitution.” Yet the constitutional powers of the President cannot override the constitutional powers of Congress. Congress has specific powers under Article I of the Constitution “to regulate Commerce with foreign Nations” and to lay and collect “duties” and “imposts.” Congressional approval of a trade agreement such as NAFTA by means of legislation signed by the President presents the quintessential case of Congress acting to regulate Commerce with foreign Nations and to lay duties and imposts. By unilaterally withdrawing from NAFTA without authorization from Congress, the President would be infringing on Congress’ constitutional powers and overturning legislation passed pursuant to those powers.

Second, notwithstanding the historical argument, there are now special statutory rules for the approval and administration of trade agreements, i.e. the Trade Act of 1974. Section 125 of that act, pertaining to withdrawal from or termination of trade agreements, does not grant explicit or implicit authority to the President unilaterally to terminate trade agreements such as NAFTA. Further, according to a concurring opinion in *Youngstown Sheet &*

¹The historical record is much more ambiguous when the focus is on termination of international commercial agreements. See Joel P. Trachtman, “Power to Terminate U.S. Trade Agreements: the Presidential Dormant Commerce Clause versus an Historical Gloss Half Empty,” https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015981.

Tube Co., “[w]hen 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.” Here, where Congress has constitutional powers “to regulate Commerce with foreign Nations” and to lay and collect “duties” and “imposts,” and has adopted legislation to approve NAFTA, the President does not have residual inherent power to withdraw from or otherwise terminate NAFTA.

Third, even if the President “has a unique role in communicating with foreign governments,” and has the right to give a notice of withdrawal with respect to NAFTA, that does not equate to the substantive right to withdraw. Under NAFTA Section 2205, a “Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties.” There must be the passage of six months after notice of withdrawal, and then a Party may withdraw. The permissive word “may” breaks the link between the giving of notice and an automatic withdrawal following the passage of time following notice. Accordingly, the question of who has the powers to withdraw or otherwise terminate remains open, notwithstanding the President’s power to give a notice of withdrawal.

The Political Question Doctrine

Apart from the substantive question of allocation of powers, there will also be a major controversy on whether such a case is suitable for resolution by the courts in light of the political question doctrine. But this hurdle too can be overcome.

The Supreme Court case of *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), holds that where challenged executive action in foreign affairs is contrary to a statute, pertaining to matters where Congress has explicit congressional powers, the political question doctrine does not bar judicial resolution of the dispute. This is because the “Judiciary has a responsibility to decide cases properly before it even those it would gladly avoid,” and resolution of such case is within the scope of judicial competence since the courts are well-equipped to interpret statutes and evaluate their constitutionality. The court will also be more inclined to decide a matter in controversy “where the question is whether Congress or the Executive is aggrandizing its power at the

expense of another branch." Regarding a purported withdrawal from NAFTA, the controversy would be within the scope of judicial competence because there is a statutory framework for withdrawal from or termination of trade agreements, including NAFTA; the courts are experienced in interpreting the applicable statutes; and the area in question is not committed solely to the President, but involves matters where Congress has explicit constitutional powers and the President would be encroaching upon those powers. *Zivotofsky v. Clinton* provides a sound basis for overcoming the political question doctrine in such case.

Mr. Hufbauer cites the case of *Goldwater v. Carter*, 444 U.S. 996 (1979) to argue that the political question doctrine would foreclose a legal challenge if President Trump unilaterally withdraws from NAFTA. *Goldwater v. Carter* dealt with President Jimmy Carter's unilateral termination of the Mutual Defense Treaty between the United States and the Republic of China (Taiwan), carried out in connection with President Carter's determination to recognize the People's Republic of China and terminate diplomatic relations with Taiwan. The Supreme Court determined that the plaintiffs' case challenging President Carter's termination without Senate or Congressional approval should be dismissed. Four Justices of the Supreme Court, a plurality, stated that "the basic question presented by the petitioners in this case is 'political,' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." But *Goldwater v Carter* is not on point.

The NAFTA case would involve foreign commerce and laying of duties, where Congress has explicit constitutional powers, rather than defense and recognition of nations, the matters at issue in *Goldwater v. Carter*, which are understood to be within the purview of the President. NAFTA is a congressional-executive agreement, approved by legislation, while the U.S.-Taiwan Mutual Defense Treaty was a treaty made by the President with the advice and consent of the Senate. This argues for legislative approval to withdraw from NAFTA, unless the President has independent authority to withdraw from or otherwise terminate that agreement, which will be a contested point. Most importantly, the case of *Zivotofsky v. Clinton*, decided after *Goldwater v Carter*, specifically deals with the case where executive

action is contrary to applicable legislation. That was not the situation where President Carter terminated the Mutual Defense Treaty with Taiwan.

A lawsuit challenging President Trump's unilateral termination of NAFTA would certainly be heavily contested. Nevertheless, such a lawsuit would be well-founded in U.S. laws and the Constitution. Further, the political question doctrine, properly interpreted under applicable case law, should not foreclose the judiciary from hearing and deciding such suit.

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