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FR: Lori Wallach, Public Citizen's Global Trade Watch
DT: November 13, 2017
RE: **Presidential Authority to Terminate NAFTA Without Congressional Approval**

SUMMARY: A U.S. president has authority to notify other signatories that the United States is withdrawing from a trade agreement. Doing so, for instance by triggering the Article 2205 six-month notice to withdraw from the North American Free Trade Agreement (NAFTA), would end U.S. international law obligations under the pact. That alone would terminate some terms, such as U.S. consent to investor-state dispute settlement (ISDS), which are not covered in NAFTA's implementing legislation. However, withdrawing from NAFTA would also terminate Congress' approval of the pact and elements of its implementation. The NAFTA Implementation Act Article 109(b) cancels Congress' approval of NAFTA and terminates five key provisions implementing aspects of it with respect to any country that withdraws. A president also has authority to switch terms of trade with Mexico and Canada without further congressional action. The Trade Act of 1974 Section 125 automatically terminates trade agreement tariff concessions in one year, but also provides presidents proclamation authority to revert tariff rates to World Trade Organization (WTO) Most Favored Nation (MFN) levels immediately with respect to any trade partner and any agreement if the United States withdraws or the pact terminates. With respect to Canada, the president could choose to extend duty free treatment by reversing the suspension of the 1988 U.S.-Canada Free Trade Agreement (FTA). In sum, absent congressional action to alter the NAFTA implementing bill's automatic sunset terms and the two existing congressional delegations of tariff authority to the president, not only can a president end U.S. international law obligations under NAFTA, but doing so would cancel Congress' approval of the agreement and key elements of the implementing bill.

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Given low wages and lax environmental standards in Mexico draw firms to relocate production and jobs from the United States, the best outcome from the ongoing NAFTA renegotiations is a new agreement that raises standards. Indeed, raising wages in Mexico is essential to reversing American job outsourcing to its southern neighbor, where average manufacturing wages are now 9 percent lower in real terms than before NAFTA.[1] However, NAFTA additionally includes provisions that explicitly incentivize outsourcing. With more than 930,000 specific U.S. workers certified as losing their jobs to NAFTA under just one narrow government program[2] and every week NAFTA helping corporations outsource more middle class jobs, no NAFTA is better than more years of the current agreement. This memo explores a president's authority to withdraw from NAFTA, for instance if President Donald Trump is unable to successfully renegotiate NAFTA as promised.

Because no U.S. president has used the provision in U.S. trade pacts that provides for withdrawal after a six-month notice, President Donald Trump's threat to do so has led various commentators to opine about his authority to act without congressional authorization. The claim made by some NAFTA proponents that a president does not have such authority is premised on three major errors, all of which relate to the peculiarities of trade pacts and their implementation under U.S. law. NAFTA proponents

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[1] Organization for Economic Co-operation and Development, "OECD.Stat," accessed Jan. 31, 2017. Available at: https://stats.oecd.org/.
[2] See Trade Adjustment Assistance database at https://www.citizen.org/trade-adjustment-assistance-database .

with greater familiarity with the arcana of U.S. trade law, such as Gary Hufbauer of the Peterson Institute for International Economics, concede that the president does have such authority and doubt that withdrawal could be successfully contested in court.[3]

A President Has Authority to Notify Trade Partners of U.S. Withdrawal From a Trade Agreement, Terminating U.S. International Law Obligation Under the Agreement

The first common error is confusing the president's authority to withdraw the United States from being a signatory of NAFTA and the president's authority to cancel NAFTA's implementing bill. Some commentators have argued that the president cannot unilaterally withdraw from NAFTA because NAFTA was approved by Congress and the president cannot cancel NAFTA's implementing legislation. [4] It is true that a president cannot unilaterally terminate previously enacted legislation. However, that is a question of domestic law that Congress contemplated in NAFTA's implementing legislation, as described below.

The international law question is whether a president can notify Mexico and Canada that the United States is withdrawing as a signatory to NAFTA. NAFTA Article 2205 provides that a country may exit six months after providing written notice of intent to do so. It does not specify who must give that notice. However, under the Vienna Convention on the Law of Treaties Article 67 the *only* officials assumed to have the authority to provide notice of exiting an agreement are "the Head of State, Head of Government or Minister for Foreign Affairs." Indeed, if another official signs such a notice, a government can be called on to show the other signer has authority to terminate the agreement on behalf of the country.

The remaining question is whether *under U.S. law* the president has the authority to provide the notice to withdraw. As noted in a recent analysis of this question by the Congressional Research Service: "The Constitution does not specifically address withdrawal from treaties or congressional-executive agreements... However, the weight of judicial and scholarly opinion suggests that the President possesses the exclusive constitutional authority to communicate with foreign powers... Congress may thus find it difficult to prevent the President from terminating or withdrawing from an FTA."[5] Namely, a president's broad Article II authority to conduct U.S. foreign relations has been interpreted by the U.S. Supreme Court as providing a president with exclusive authority to negotiate international agreements and to communicate on behalf of the United States with other countries.[6] That Congress views this as the president's role is reinforced by the fact that U.S. trade agreement implementing legislation systematically includes provisions automatically withdrawing Congress' approval of trade agreements when a country withdraws or the pact is terminated. That is to say that in its trade agreement implementing legislation, Congress both presumes the president has the authority to withdraw and included provisions to automatically play out Congress' part of disengaging from an

[3] Gary Clyde Hufbauer, "Could a President Trump Shackle Imports?," Assessing Trade Agendas in the US Presidential Campaign, Peterson Institute of International Economics, Sept. 2016 at pgs. 7-8. Available at https://piie.com/system/files/documents/piieb16-6.pdf

[4] See e.g. Hofstra University Law School Professor Julian Ku and UC Berkeley law professor John Yoo Trump might be stuck with NAFTA, *Los Angeles Times*, Nov. 29, 2016. Available at http://www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html

[5] Congressional Research Service, "U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions" September 7, 2016. Available at https://www.everycrsreport.com/reports/R44630.html#ifn52

[6] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("The President has the sole power to negotiate treaties.... ") (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.")).

agreement. Indeed, trade pact implementing bills after NAFTA go one step further: They not only terminate Congress' approval of the agreement but also reverse changes to other U.S. statutes made in the implementing legislation. Notably, while these details are enumerated, neither trade pact implementing legislation nor Fast Track trade authority (or other trade laws) limit a president's authority to withdraw from a pact nor provide Congress a role in approving withdrawal.

In the past the legal questions about who can withdraw the United States from a trade agreement have focused on the other side of the question: If Congress voted to repeal a trade agreement's implementing legislation, and a president refused to transmit the notice of withdrawal, would the U.S. international law obligations remain intact? This question has been premised on the question of who but a president could withdraw the United States from such international legal obligations given Article II-1 of the U.S. Constitution vests "executive power" with the president, and the president, not the Congress, has the authority to represent the United States with respect to foreign sovereigns.

NAFTA proponents have suggested that notice to withdraw from NAFTA would face legal challenges. The first question is who is the injured party that would have standing to bring such a claim? Even assuming that hurdle could be overcome, the likely outcome would either be a court declining to adjudicate on the basis that this type of issue is a "political question" or a ruling in support of unilateral presidential termination, given past practice and precedent. Tuft's Professor of International Law (and NAFTA supporter) Joel Trachtman lays out the state of the law nicely:[7]

> "During the first century of the republic, it was understood that the President needed some form of Congressional or Senate authorization in order to terminate a treaty... However, the general practice during the past century seems to have been for presidents to act unilaterally to terminate treaties, including for example, in one 1936 instance, a commercial treaty between the U.S. and Italy. Arguments for sole presidential authority to terminate treaties were based on the 1936 Supreme Court case in United States v. Curtiss-Wright, which referred to the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." In the 1952 Steel Seizure Case, Youngstown Sheet and Tube v. Sawyer, Justice Jackson stated that "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility."
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> There is some evidence of this type of congressional inertia in connection with termination of treaties. In 1978, as part of the normalization of relations with the People's Republic of China, President Carter terminated a mutual defense treaty with Taiwan, without obtaining congressional or Senate approval. A group of Senators and Congressmen brought suit, but the Supreme Court dismissed that suit, with four justices holding that the issue constituted a non-justiciable "political question," and a fifth holding that the case was not yet ripe for adjudication. While this lawsuit itself is inconsistent with an argument of inertia, it seems to have set the stage for subsequent acquiescence.
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> Since 1978, presidents have terminated a number of treaties on their own authority, including commercial treaties such as the 1985 termination by President Reagan of the Treaty of Friendship,

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[7] Joel Trachtman, "US Presidential Power to Terminate Trade Agreements," International Law and Policy Blog, Dec. 15, 2016. Available at http://worldtradelaw.typepad.com/ielpblog/2016/12/us-presidential-power-to-terminate-trade-agreements.html

> Commerce, and Navigation with Nicaragua. By 1987, the prevailing view in the U.S. international law community, reflected in the American Law Institute's Restatement (Third) of Foreign Relations Law, was that the President has authority acting alone to terminate treaties, unless that power is restricted by statute.
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> The remaining question to address is whether this prevailing view, and the general acquiescence in presidential terminations of treaties, applies with respect to trade treaties like NAFTA and the WTO..."

After reviewing the relevant case law and arguments, and also assuming that the question would end up in court, Trachtman concludes:

> "Given this degree of uncertainty, and with precedents holding that this type of issue is a "political question" that is not amenable to adjudication, we can expect a court dealing with this issue to decline to adjudicate. Even if it determined to adjudicate, the chances are that it would find the practice and precedent sufficient support for a unilateral presidential termination."

What is not a contested question is the international law effect of a president withdrawing the United States as a signatory: Doing so would release the United States from its NAFTA international law obligations. But what would happen to the NAFTA implementing legislation that Congress enacted, Congress' approval of NAFTA and the changes to U.S. law made in the act?

NAFTA's Implementing Legislation Automatically Terminates Congress' NAFTA Approval and Various Provisions of the Act With Respect to a Country Withdrawing From NAFTA

The second incorrect claim is that a president's withdrawal from NAFTA would have no domestic legal effect because NAFTA was approved by an act of Congress and thus NAFTA would remain in effect until Congress acted to reverse that approval. This argument seems to be premised on a lack of familiarity with trade agreement implementing bills in general and assumptions about NAFTA's implementing legislation in specific, rather than a review of the relevant legislative text.

In general, U.S. trade agreement implementing legislation includes terms repealing congressional approval and other implementing provisions if a party withdraws from the agreement or the agreement is terminated.[8] Congress contemplated the prospect that countries could withdraw from NAFTA. Section 109(b) of the NAFTA implementing legislation automatically cancels Congress' approval of NAFTA and terminates five key provisions implementing aspects of the agreement with respect to any country that withdraws.[9] Future withdrawal from NAFTA of Mexico or Canada may have been the motivation for including this term, but the way it is written if the United States withdraws from NAFTA and no longer "applies the Agreement to" Canada and Mexico, both countries cease to be NAFTA countries, which is the condition upon which Congress' approval is automatically revoked. That is to say that if President Trump uses the NAFTA Article 2205 notice provisions to withdraw,

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[8] See e.g. United States-Korea Free Trade Agreement Implementation Act. P.L 112–41,§ 107(c): "TERMINATION OF THE AGREEMENT.—On the date on which the Agreement terminates, this Act (other than this subsection and title V) and the amendments made by this Act (other than the amendments made by title V) shall cease to have effect."

[9] North American Free Trade Agreement Implementation Act, P.L. 103-182, §109(b): "During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country." Id. at §2(4) "NAFTA COUNTRY.—Except as provided in section 202, the term "NAFTA country" means— (A) Canada for such time as the Agreement is in force with respect to, **and the United States applies the Agreement to, Canada**; and PUBLIC LAW 103-182—DEC. 8, 1993 107 STAT. 2061 (B) Mexico for such time as the Agreement is in force with respect to, **and the United States applies the Agreement to, Mexico**." (emphasis added)

Section 109(b) of the NAFTA implementing legislation would automatically terminate Congress' approval of NAFTA without requiring any further action by Congress. Another provision of the NAFTA implementing legislation explicitly terminates changes to U.S. anti-dumping and countervailing duty law.[10]

Were a president's withdrawal from a trade agreement to be challenged in court, provisions such as these in NAFTA's implementing legislation and in other pacts' implementing acts would provide support for the president's authority to act unilaterally. The strongest argument against such executive authority is that a trade pact is a unique context for which there are limits to presidents' otherwise broad treaty authority given that the Constitution provides Congress with exclusive authority over the terms of commerce with foreign nations. Yet, with these terms in the NAFTA Implementation Act and other trade pact implementing acts, Congress has effectively created a "living will" that carries out its role in the trade-agreement executive-legislative partnership. Namely, Congress has specified what is to become of the terms of international commerce that it has approved were a country to withdraw from the pact, while also not legislating a role for Congress in determining when the United States may provide notice of a decision to withdraw.

Given that some elements of the implementing bill would remain in effect, it is worth noting that the legislation does not directly alter many U.S. statutes. Rather, with respect to most NAFTA obligations, the bill authorizes the president to enact the agreement's terms via regulation. This includes some of NAFTA's main job-outsourcing incentives, which are not implemented via the NAFTA Implementation Act, but by regulation under authority delegated to the president in the implementing legislation. This includes NAFTA Chapter 11's foreign investor protections and investor-state dispute settlement which make it cheaper and less risky for U.S. firms to outsource investment and jobs to Mexico or Canada, and that also expose the U.S. Treasury to unlimited compensation demands from Mexican and Canadian corporations with investments here. Also implemented by regulation are NAFTA's obligation to give Mexican and Canadian goods and firms access to U.S. government procurement contracts on equal terms with U.S. goods and firms, which has resulted in presidents waiving Buy American and other domestic procurement preferences.[11] These NAFTA terms have been criticized for outsourcing U.S. tax dollars to purchase goods made in Canada and Mexico rather than reinvesting such funds to create jobs at home. The Trade Agreements Act provides the authority for the president to waive the Buy American statute and other rules giving domestic preferences for countries that have signed a trade agreement with the United States.[12] The law gives the president the authority to do so, but does not require a waiver. Another example is the NAFTA trucking rules that provide access to all U.S. roadways for Mexican-domiciled trucks – whose drivers from Mexico are paid a tiny fraction of what U.S. drivers receive and are not required to obtain U.S. commercial driving licenses (or meet health and other standards).

However, the remaining provisions of the Implementation Act require a careful legal scrub to identify language that would have real effect if left unchanged. Significant portions of the language would not have meaning absent the United States having international legal obligations under the pact. However, there are important exceptions to that rule, including statutory changes to the two U.S. laws setting the

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[10] Id. at §415: "Except as provided in subsection (b), on the date on which a country ceases to be a NAFTA country, the provisions of this title (other than this section) and the amendments made by this title shall cease to have effect with respect to that country." The construction of that provision suggests that withdrawal by Canada or Mexico was being contemplated. However, the plain meaning of the provision, with its reference to "a country" has the effect of terminating the listed provisions of the Implementation Act upon U.S. withdrawal as well.

[11] Waiver list can be found at 48 CFR 25.400.

[12] See 19 U.S.C. §2501, *et seq.* Authority for waivers at §2511.

standards for importation of meat and poultry. (The statutes were changed to allow importation of products deemed to meet other countries' standards if those standards provide "equivalent" levels of safety protection, while prior to NAFTA both statutes only permitted imports if the products explicitly met the actual U.S. standards for safety and inspection. Unfortunately, similar changes were included in the WTO Implementation Act.)

Congress Has Delegated Authority to the President to Unilaterally Alter Tariff Rates Upon Termination of a Trade Agreement or U.S. Withdrawal From a Trade Agreement

Finally, the third false claim – that a president cannot alter tariff cuts under NAFTA without congressional approval – is related to the second, but is narrower and based on a constitutional separation of powers argument apparently also made without reviewing the relevant legislation. A variant of this argument is that the United States would suffer the worst of all outcomes by being bound by statute to provide its trade partners the tariff cuts NAFTA provided, while no longer obtaining that treatment from them given the termination of U.S. international law obligations and rights under an agreement. It is correct that Article I-8 gives Congress exclusive authority over tariffs. But it is also true that starting in 1974, Congress expressly delegated to the president blanket authority to proclaim changes to tariffs if *any* U.S. trade agreement is terminated or the United States withdraws from *any* agreement.[13] This provision automatically reverts tariff levels back to the WTO MFN rate one year after an agreement is terminated or the U.S. withdraws. However, it also provides a president with delegated authority to proclaim such tariff changes immediately. Delegations of Fast Track authority since 1974 have explicitly applied this authority to agreements entered into under subsequent Fast Track grants.

Notably, in the NAFTA implementing legislation Congress explicitly delegated its tariff authority to the president, who was empowered to proclaim tariffs changes with respect to Mexico and Canada to implement NAFTA tariff rates.[14] The NAFTA implementing legislation *did not* include specific NAFTA tariff levels that Congress approved by passing that bill. Rather, the NAFTA tariff cuts were enacted by proclamation by the president and Congress also delegated authority via the 1974 Trade Act to revert tariff levels back to the WTO MFN level by proclamation if the U.S. withdraws.

Additionally, the president could opt to continue the duty free status provided to Canada under the 1988 U.S-Canada FTA, a pact that was suspected in Article 107 of the NAFTA's implementing legislation when NAFTA superseded most of its terms.

It is worth noting that were a president to bring tariffs levels to the WTO MFN levels, a significant number of goods imported from Mexico and Canada would remain duty free and as would a significant

[13] Sec. 125 of the Trade Act of 1974 (19 U.S.C. §2135(e)): "Duties or other import restrictions required or appropriate to carry out any trade agreement entered into pursuant to this chapter ... shall not be affected by any termination, in whole or in part, of such agreement or by the withdrawal of the United States from such agreement 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. Within 60 days after the date of any such termination or withdrawal, the President shall transmit to the Congress his recommendations as to the appropriate rates of duty for all articles which were affected by the termination or withdrawal or would have been so affected but for the preceding sentence."

[14] North American Free Trade Agreement Implementation Act, P.L. 103-182, §201(a): "Tariff Modifications Provided for in the Agreement.-- (1) Proclamation authority.--The President may proclaim-- (A) such modifications or continuation of any duty, (B) such continuation of duty-free or excise treatment, or (C) such additional duties, as the President determines to be necessary or appropriate to carry out or apply articles 302, 305, 307, 308, and 703 and Annexes 302.2, 307.1, 308.1, 308.2, 300-B, 703.2, and 703.3 of the Agreement."

share of U.S. exports to those countries. Forty-six percent of U.S. tariff lines, 50 percent of Mexican tariff lines and 76 percent of Canadian tariff lines are duty free under the WTO. The tariffs that would exist would be relatively low, and with respect to Mexico (as Canada was duty free under its U.S. FTA) would be drastically lower than those that were in place when NAFTA went into effect. That is the case because since NAFTA was enacted, the massive tariff cuts required by the WTO have gone fully into effect. As a result, the current average WTO MFN applied tariffs on a trade-weighted basis for the United States, Mexico and Canada are respectively 2.4, 4.5 and 3.1 percent. With respect to U.S. exports to Mexico, beef, pork and poultry and wheat would face significant tariffs while almost all U.S. corn exports to Mexico, by far the largest U.S. agricultural export, would be duty free. (Mexico went duty free for yellow corn for all WTO countries in 2008, thus 95 percent of U.S. corn exports to Mexico would be duty free without NAFTA.) A large share of U.S. soy exports would also be duty free under Mexico's WTO tariff rates. If the president did not reverse the suspension of the U.S.-Canada FTA, U.S. exports to Canada of beef, dairy, wheat and barley would face significant tariffs. Tariff rates on most manufactured goods are relatively low, although there are exception such as U.S. tariffs on pickup trucks and Canadian tariffs on some shoes and commercial water craft such as tug boats and dredgers.

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In conclusion, the rich irony of this situation bears mention. The proponents of providing presidents broad delegation of Congress' constitutional Article I-8 trade authority via "Fast Track" are now those arguing that a president does not have authority to terminate the very agreements that Fast Track enabled presidents to initiate, negotiate and sign without congressional approval. (Fast Track limits Congress' role to approving a final, signed trade agreement via a vote on implementing legislation that is not subject to amendment or extended debate.) Moreover, the interests that have argued for ever-expanding executive branch control over U.S. trade policy, to the detriment of Congress' constitutional trade authority, now find themselves in a situation where the only way to stop a president from withdrawing from NAFTA would be to muster congressional support to enact by a veto-proof majority new legislation to roll back the broad authorities for which they have advocated for the past forty-plus years.