

Can Trump Withdraw From NAFTA Without Congress?

By **Gunjan Sharma**

Law360, New York (September 5, 2017, 2:19 PM EDT) -- Aug, 20, 2017, marked the end of the first round of the renegotiation of the North American Free Trade Agreement between the United States, Canada and Mexico.[1] On Aug. 23, 2017, just three days later, President Donald Trump told a crowd at a political rally in Phoenix that "[p]ersonally, I don't think we can make a deal. I think we'll probably end up terminating NAFTA at some point." [2]



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The possibility that President Trump may seek to terminate NAFTA is not new. On April 26, 2017, unnamed White House officials suggested that a draft executive order existed that would (if signed by President Trump) declare the United States' intent to withdraw from NAFTA.[3] Six months after such an order is issued, these officials appeared to suggest, the United States could choose to withdraw from NAFTA.[4]

While that executive order has not (to date) been signed, the possibility of withdrawing from NAFTA seemed to be in line with the Trump administration's previous statements, and also some of the remarks Trump made as a candidate. For instance, in March 2017, the Trump administration submitted a 2017 trade policy agenda to Congress that, among other things, took care to explain how "[f]or years now, the United States has run deficits in goods with our trading partners in the North American Free Trade Agreement (NAFTA)" and that "[a]s long ago as 2008, both Barack Obama and Hillary Clinton called for the United States to renegotiate NAFTA — and to withdraw from NAFTA if such renegotiations were unsuccessful." [5] A draft memo authored by the president's transition team (i.e., before he took office) suggested that, if the United States could not renegotiate NAFTA within "Day 200" of the Trump administration, the president-elect (as Trump then was) might withdraw from the treaty and instead pursue bilateral trade agreements with Mexico and Canada.[6] Furthermore, the whitehouse.gov website continues to suggest that president intends to renegotiate the terms of NAFTA — or failing that, give notice of U.S. withdrawal from the treaty.[7]

Whether or not this happens, the mention of a possible executive order from the president does raise a complicated question of U.S. constitutional law: Can President Trump unilaterally, without congressional action or approval, withdraw from NAFTA? Some sources appear to think so.[8] Nevertheless, there is room for debate over the president's authority to withdraw from NAFTA without congressional action.[9]

Constitution Law and Historical Precedent Provide Limited Guidance on the Presidential Authority to Terminate a Treaty

Article 2205 provides that the United States may "withdraw from [NAFTA] six months after

it provides written notice of withdrawal to the other Parties." [10] While it is true that Article 2205 of NAFTA permits the United States to withdraw from NAFTA by providing six months' notice to Canada and Mexico, nothing in Article 2205 defines the internal processes that the branches of United States government must follow before the government can send formal notice of treaty termination. Those internal processes are, instead, defined by the U.S. Constitution and U.S. laws.

Unfortunately, at the time the U.S. Constitution was signed, the rules of treaty termination under international law were established by practice and commentary, and "clauses in treaties allowing for unilateral withdrawal ... were not common." [11] "Indeed, it appears the United States did not become a party to a treaty containing a unilateral withdrawal clause until 1822." [12] Perhaps as a result, although the U.S. Constitution takes care to establish that the president "by and with the Advice and Consent of the Senate" may "make Treaties," [13] the Constitution is silent as to who — the president or Congress — can terminate a treaty once it is made. [14]

Historical practice as a whole also does not clarify this question. From the country's founding until the late 19th century, it appears to have been largely assumed that either the Senate or the entire Congress was required to authorize, or at least ratify, the termination of a treaty, except perhaps in certain exceptional circumstances (such as when the treaty would have already been effectively terminated by operation of international law). [15] In the beginning of the 20th century, however, the tide shifted, and presidents began regularly exercising the power to terminate treaties unilaterally. [16]

Nor, notably, has the U.S. Supreme Court given any clarity on this issue. In 1978, President Carter unilaterally terminated the U.S.-Taiwan Mutual Defense Treaty, causing various members of Congress to file suit against his authority to do so in the U.S. District Court for the District of Columbia. The question of whether the president could unilaterally terminate the treaty divided the district court and then the circuit court, but the case was eventually dismissed by five members of the Supreme Court, without oral argument, as a nonjusticiable political controversy. [17] Justice William Rehnquist and three other members of the court found that "the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government" because the Constitution was silent on how to terminate a treaty. [18] Justice Lewis Powell concurred on the grounds that Congress as a whole had not yet passed a resolution calling for it to be granted the authority to participate in treaty termination. [19]

Commentators have reached different answers on whether the president can unilaterally terminate a treaty. Some have argued that, through his inherent executive authority and authority over foreign relations, the president retains the exclusive right to terminate treaties. [20] Others have found the opposite, i.e., that the power to terminate a treaty constitutionally rests with Congress, not the president. [21]

Thus, whether or not the president can unilaterally terminate a treaty such as NAFTA has not been settled by the courts. Put simply, "it remains the case that there has not been a final judicial determination of the constitutional parameters governing the termination of treaties." [22]

The Potential Statutory Bases for Termination Are Similarly Ambiguous

Complicating the issue further is that NAFTA is not a treaty ratified with the "advice and consent" of the Senate under Article II, § 2 of the U.S. Constitution, but is instead a "congressional-executive action" (CEA), or an international agreement negotiated with congressional authorization and implemented through a congressional statute.

Specifically, Congress authorized the president to negotiate NAFTA under the Omnibus

Trade and Competitiveness Act of 1988 and Trade Act of 1974, and thereafter both Houses of Congress accepted NAFTA by passing an implementation act that amended U.S. law to satisfy NAFTA's requirements.[23] There is potentially less authority governing the termination of such CEAs as NAFTA than there is authority concerning treaties passed under Article II, § 2 of the U.S. Constitution. As might be expected, some commentators argue that because Congress alone can overturn an implementation act, Congress alone has the power to terminate CEAs; other commentators argue that the president's unilateral power to terminate treaties (itself open to debate) permits him to terminate a CEA and automatically suspend an implementation act.[24]

To make matters more complicated, the NAFTA Implementation Act and the two statutes authorizing NAFTA's negotiation (the Omnibus Trade and Competitiveness Act of 1988 or the Trade Act of 1974) are ambiguous as to whether Congress has delegated the authority to terminate NAFTA to the president.

Some commentators appear to have argued that Section 125 of the Trade Act of 1974 permits the president to terminate NAFTA on his own prerogative.[25] On its face, the text of Section 125 lends some support (albeit implicit) for president authority to terminate or withdraw from NAFTA. Section 125(b) states that the "President may at any time terminate, in whole or in part, any proclamation made under this chapter,"[26] but, as the Congressional Research Service notes:

This provision arguably allows the President to terminate proclamations implementing FTA obligations (e.g., proclaimed modifications rules of origin [sic] that establish when an imported product is eligible for preferential tariff treatment) for a particular FTA. It is unclear whether it might also cover termination of executive orders, regulations, or policies implementing FTA obligations.[27]

In a similar vein: (1) Section 125(a) of the 1974 Trade Act lays out that trade agreements shall be subject to termination under their terms, but does not disclose who in the U.S. government may terminate the agreement; (2) Section 125(c) states that the President may "proclaim increased duties or other import restrictions" when the "United States" withdraws from or terminates a trade agreement, without disclosing who in the U.S. government should terminate the agreement; and (3) Section 125(d) permits the president to withdraw, suspend or modify trade agreement obligations when "any foreign country or instrumentality withdraws, suspends, or modifies the application of [the] trade agreement." These clauses do not definitively address whether the president, acting in a nonretaliatory fashion, may unilaterally withdraw or terminate a trade agreement such as NAFTA.[28]

It should be noted that Section 125(f) of the 1974 Trade Act requires the president to "provide for a public hearing" where interested parties may be heard before any of the actions under Sections 125(b), (c) or (d) are taken, "unless he determines that such prior hearings will be contrary to the national interest because of the need for expeditious action, in which case he shall provide for a public hearing promptly after such action." [29] Thus, if the president were to invoke Section 125 of the 1974 Trade Act as a basis for this authority to terminate NAFTA, as a matter of statute the executive branch would be required to hold public hearings on the question before rendering its decision (or demonstrate an urgent reason for failing to do so).

For its part, the Omnibus Trade and Competitiveness Act of 1988 refers to Section 125 of the Trade Act in Section 1105(a), but also, in Section 1105(b), appears to assume that Congress must terminate the concessions made under trade agreements if the President determines that another major industrial country has not complied with a trade agreement. [30]

The NAFTA Implementation Act, moreover, does not speak to how termination of that treaty occurs, but merely says that "[d]uring any period in which a country ceases to be a NAFTA

country, sections 101 through 106 [sections 3311 through 3316 of this title] shall cease to have effect with respect to such country." [31] Perhaps notably, Section 107 of the NAFTA Implementation Act by legislation terminated/suspended of the 1988 U.S.-Canada Free Trade Agreement whole NAFTA remains in force, suggesting that Congress' view, at least, was that it had to authorize the termination of that free trade agreement.

As such, some uncertainty concerning the president's authority to unilaterally terminate a treaty or CEA persists.

Concluding Remarks

As can be seen, then, no definitive judicial or statutory answer exists as to whether President Trump has the unilateral authority, without Congress, to terminate NAFTA. The Constitution itself provides no guidance on which branch of government may terminate a treaty, much less a congressional-executive action like NAFTA. While presidents have unilaterally terminated treaties in the recent decades, some may argue that this approach does not conform to the original practice of the founders and the practice of the U.S. government throughout the 19th century. Moreover, NAFTA's authorizing and implementing statutes are not clear on this question as well.

Thus, if renegotiations of NAFTA fail, it remains unclear whether President Trump can unilaterally terminate NAFTA through an executive order, without congressional authorization or ratification.

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[1] See David Lawder & Anthony Esposito, Initial NAFTA talks conclude amid signs schedule could slip, Reuters.com, Aug. 20, 2017, <https://www.reuters.com/article/us-trade-nafta-idUSKCN1B0002>.

[2] Steve Holland & Dave Graham, Trump warns may terminate NAFTA treaty, Reuters.com, Aug. 23, 2017, <https://www.reuters.com/article/us-usa-trump-nafta-idUSKCN1B30F2>.

[3] See Tara Palmeri, Adam Behsudi & Seung Min Kim, Republicans tell Trump to hold up on NAFTA withdrawal, Politico.com, Apr. 26, 2017, <http://www.politico.com/story/2017/04/26/white-house-nafta-withdraw-trump-237632>; Damian Paletta, Trump considers order that would start process of withdrawing from NAFTA, Wash. Post, Apr. 26, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/04/26/trump-close-to-notifying-canada-mexico-of-intent-to-withdraw-from-nafta/?utm_term=.9add6630d63f; Patrick Gillespie, Trump's NAFTA is already running out of time, CNNMoney.com, Apr. 26, 2017, <http://money.cnn.com/2017/04/26/news/economy/nafta-running-out-of-time/>.

[4] Tara Palmeri, White House readies order on withdrawing from NAFTA, Politico.eu, Apr. 26, 2017, <http://www.politico.eu/article/trump-trade-white-house-readies-order-on->

withdrawing-from-nafta/.

[5] Office of the United States Trade Representative, 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program, ch. I at 6, <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> ; see also Damian Paletta & Ana Swanson, Trump suggests ignoring World Trade Organization in major policy shift, Wash. Post, Mar. 1, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-may-ignore-wto-in-major-shift-of-u-s-trade-policy/?utm_term=.fccb20a0b1af; Eric Beech, Trump administration would ignore WTO rulings it sees as anti-U.S.: FT, Reuters.com, Feb. 28, 2017, <http://www.reuters.com/article/us-usa-trump-wto-idUSKBN16832U>.

[6] See Tal Kopan, Trump Transition memo: Trade reform begins Day 1, CNN.com, Nov. 16, 2016, <http://www.cnn.com/2016/11/15/politics/donald-trump-trade-memo-transition/>

[7] White House, Trade Deals that Work for All Americans, <https://www.whitehouse.gov/trade-deals-working-all-americans> (last visited Aug. 29, 2017) ("President Trump is committed to renegotiating NAFTA. If our partners refuse a renegotiation that gives American workers a fair deal, then the President will give notice of the United States' intent to withdraw from NAFTA.").

[8] See, e.g., Tami Luhby, Yes, 'President Trump' really could kill NAFTA – but it wouldn't be pretty, CNNMoney.com, Nov. 15, 2016, <http://money.cnn.com/2016/11/15/news/economy/trump-nafta/index.html>; Matthew Kronby & Milos Barutciski, Trump, Canada and the future of NAFTA, Globe & Mail, Jan. 18, 2017, <https://beta.theglobeandmail.com/report-on-business/trump-canada-and-the-future-of-nafta/article33664146/?ref=http://www.theglobeandmail.com&>.

[9] See Mark Gollom, What would it take for Donald Trump to rip up NAFTA?, CBC News, June 30, 2016, <http://www.cbc.ca/news/world/donald-trump-nafta-trade-1.3657673>.

[10] North American Free Trade Agreement ("NAFTA"), Can.-Mex.-U.S., art. 2205, Dec. 17, 1992, 32 I.L.M. 289 (1993).

[11] Curtis A. Bradley, Treaty Termination and Historical Gloss, 92 Tex. L. Rev. 773, 779 (2014).

[12] *Id.*

[13] U.S. Const. art. II, § 2.

[14] See *supra* note 12, at 774 ("The authority to terminate treaties is not addressed specifically in the constitutional text . . ."); see also John Yoo & Robert J. Delahunty, U.S. Dep't of Justice Office of Legal Counsel, Authority of the President to Suspend Certain Provisions of the ABM Treaty at 6 (Nov. 15, 2001) (power to terminate or suspend treaties is "not specifically detailed in Article II, § 2").

[15] See generally Bradley, *supra* note 12, at 774-801.

[16] See *id.* at 806-810.

[17] See *Goldwater v. Carter*, 444 U.S. 996 (1979).

[18] *Id.* at 1003.

[19] *Id.* at 998.

[20] See Yoo & Delahunty, *supra* note 15; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L. J.* 231 (2001).

[21] See Alan C. Swan, *The Constitutional Power to Terminate Treaties: Who, When and Why*, 6 *Yale J. Int'l L.* 159 (1980), <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1080&context=yjil>.

[22] David M. Ackerman, Congressional Research Service, *Withdrawal from the ABM Treaty: Legal Considerations* at CRS-6, Dec. 31, 2002, <http://research.policyarchive.org/3544.pdf>.

[23] Jane M. Smith, Daniel T. Shedd, & Brandon J. Murrill, Congressional Research Service, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties* at 1, Apr. 15, 2013, <https://www.fas.org/sgp/crs/misc/97-896.pdf>.

[24] See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *Yale L. J.* 1236, 1323-25 (May 2008).

[25] William Clinton et al., *Termination or Modification of US Trade Agreements*, White & Case, Jan. 13, 2017, <https://www.whitecase.com/publications/article/termination-or-modification-us-trade-agreements>.

[26] Trade Act of 1974 § 125(b), 19 U.S.C § 2135(b).

[27] Brandon J. Murrill, Congressional Research Service, *U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions* at 7, Sept. 7, 2016 (emphasis added), <https://fas.org/sgp/crs/misc/R44630.pdf>.

[28] 19 U.S.C. § 2135(c), (d).

[29] *Id.* § 2135(f).

[30] See Omnibus Trade and Competitiveness Act of 1988 § 1105(a), (b), Pub. L. No. 100-418, 102 Stat. 1107. Section 1105(b)(2) provides that "[i]f the President determines . . . that a major industrial country has not made concessions under trade agreements . . . the President shall . . . in order to restore equivalence of competitive opportunities, recommend to the Congress – (A) legislation providing for the termination or denial of the benefits of concessions of trade agreements." § 1105(b)(2), 102 Stat. 1107. Arguably, however, this clause may not apply to a terminated treaty, because any concessions under such a treaty would automatically cease to apply in the event of termination.

[31] NAFTA Implementation Act § 109(b), 19 U.S.C. § 3311 note (Termination of NAFTA Status).