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The Trump Approach to Trade Negotiations: Risks in Presenting a Renegotiated NAFTA to a Skeptical Congress

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On August 31, 2018, President Donald Trump formally advised Congress that he planned to “enter into a trade agreement with Mexico—and Canada if it is willing, in a timely manner.”¹ The deal is tentative and incomplete in that a full text will not be completed until the end of September and most of the details are not available to Congress or the public. The president also threatened to terminate NAFTA if Congress fails to accept a bilateral agreement with Mexico (in lieu of a trilateral one with Canada as well).²

The significant possibility that an agreement will not be reached with Canada, and that the Trump administration will proceed with a bilateral free trade agreement (FTA) with Mexico, has caused great consternation in Congress, particularly among members whose states are major traders with Canada. Canada remains the United States’ largest export destination, with annual exports valued at nearly \$300 billion. The U.S.–Canada trade balance is virtually in equilibrium if extensive bilateral services trade is included. Negotiations between Canada and the United States resumed September 5, and the effective deadline for completing the text of a new agreement and releasing it to Congress is September 30. Thus, time remains to secure Canada’s participation in a tripartite agreement. However, disagreements over a

trade dispute settlement mechanism, import restrictions on dairy products (milk proteins), biologic drug protection, continued “national security” tariffs, and cultural industries, all of which are highly sensitive within Canada, threaten to prevent Canadian accession, particularly under conditions where the president is taking a hard line against any U.S. concessions.

If before September 30 negotiations with Canada are successful, the president’s legal authority to sign the agreement before December 1—when Mexico’s new president takes office—is clear. However, if Canada does not agree to become a part of the agreement, the situation raises a series of complex political and legal challenges for both the Trump administration and Congress, the results of which are currently unpredictable. These include: 1) whether the president has been authorized by Congress to conclude a bilateral agreement with Mexico, without including Canada; 2) whether the president possesses the legal authority to terminate NAFTA without congressional consent; and 3) if a bilateral free trade agreement is signed by the presidents of the U.S. and Mexico, without Canada, whether the votes exist for approval by the Congress, presumably sometime in 2019. Each issue is examined below.



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1. NOTICE TO CONGRESS ON AUGUST 31, 2018

Under the 2015 Trade Promotion Authority (TPA) legislation,³ the administration in May 2017 sought authorization to negotiate and conclude a “modernized” NAFTA with both Canada and Mexico. Neither the request nor the congressional acquiescence that followed makes any mention of concluding a trade agreement with Mexico alone; several members of the Senate, including Patrick Toomey (R–Pennsylvania) and John Cornyn (R–Texas), have sharply questioned both the wisdom of excluding Canada and the president’s authority to do so under the 2017 TPA notification. However, the legality of signing a bilateral rather than a trilateral agreement is unclear, and it may be argued that the 2017 notice and authorization subsumed a bilateral trade agreement. What is evident is that only Congress has the effective authority to object, given that no private right of action exists under the TPA.

Thus, any action by members of Congress to reassert Congress’ constitutional authority under the commerce clause of the U.S. Constitution (see 3, below) would effectively be a political decision to oppose the president on a key issue of his agenda. Given the president’s current viselike grip on the Republican Party, such opposition to many observers seems unlikely in the current political climate.

2. PRESIDENTIAL TERMINATION OF NAFTA

NAFTA provides that “A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the other Parties.”⁴ There is little doubt that as a matter of international law, such notice would be considered effective for the United States.⁵ However, as with most international agreements, NAFTA does not address the domestic, legal, and constitutional procedures that may be required for the United States to

withdraw from the accord as a matter of domestic law, including the requirements of the U.S. Constitution.

This is a complex and uncertain legal area. A president has terminated an Article I–II treaty without seeking congressional or Senate approval in a few instances. For example, in 1979, President Jimmy Carter terminated the U.S. defense treaty with Taiwan as a precondition to establishing formal diplomatic relations with the People’s Republic of China. At the time, the Senate approved a “sense of the Senate” resolution contending that prior consultation was required, but no final vote occurred.⁶ The litigation that followed was inconclusive. No similar precedent exists for withdrawal by the president from an FTA approved under the TPA.

Presidents have typically relied extensively on their Article II powers in foreign relations, as broadly supported by *United States v. Curtiss Wright*,⁷ decided at a time (1936) when presidential powers were probably at their all-time zenith. As recently as 2017, a Congressional Research Service analysis reached the somewhat ambiguous conclusion that:

[T]he weight of judicial and scholarly opinion suggests that the President possesses the exclusive constitutional authority to communicate with foreign powers, and such authority might provide the President with a constitutional basis for withdrawing from at least some types of international agreements. The agreement’s subject matter, however, might be relevant to a legal analysis ... Even in the event that the President could properly withdraw from an FTA unilaterally, the President cannot make laws, and thus repeal of federal statutory provisions implementing U.S. FTA obligations [such as elimination of tariffs] requires congressional action.⁸

Much of the complexity arises from the constitutional separation of powers, particularly in cases involving trade and commerce. The executive powers of the president under Article II of the U.S. Constitution have been interpreted

as providing the president with a “vast share of responsibility” for the conduct of foreign relations,⁹ including the treaty power and acting as commander in chief. Simultaneously, Article I, Section 8 of the Constitution provides Congress with the authority to (1) “lay and collect taxes, duties, imposts, and excises,” (2) “regulate commerce with foreign nations, among the several states and with the Indian Tribes,” and (3) “make all laws which shall be necessary and proper” to carry out these specific powers. It is difficult to argue that the termination of a free trade agreement does not fall within both (1) and (2) above.

The NAFTA Implementation Act of 1993, in contrast to several later FTA implementing laws, does not incorporate “clear language on repeal of provisions implementing the agreement. However, it does contain language that could potentially be construed as repealing some provisions ... at the time the United States determines not to apply the agreement with respect to a NAFTA partner country as a result of U.S. withdrawal from the agreement.”¹⁰ The lack of explicit language notwithstanding, any effort by the Trump administration to withdraw from NAFTA and increase tariffs to most favored nation (MFN) levels or higher would likely generate a firestorm among some members of Congress as well as thousands of affected stakeholders, but might well fall short of effective legislative action.

3. CONGRESSIONAL APPROVAL OF A BILATERAL TRADE AGREEMENT WITH MEXICO

If Congress cannot or likely will not block a revised NAFTA that excludes Canada under the TPA authorization or prevent the termination of the existing agreement under the NAFTA Implementation Act, what other option is available to assert Congress’ constitutional prerogative? Even if the existing NAFTA is terminated—or in what could be a long and contentious legal process, the president attempts to terminate NAFTA—a revised trade agreement with Mexico requires congressional approval through majority votes in both House and Senate.

It is conceivable that when the president sends the agreement to Congress with the text, its draft implementing legislation, and a “Statement of Administrative Action” outlining the provisions—all required by the TPA—presumably sometime in mid-2019, a majority in both houses could support the agreement even without Canada. Regardless of whether the Democratic Party regains control of the House of Representatives, the approval process for trade agreements has never been the province of one party—even if traditionally more Republican members have supported trade agreements than Democrats, and approval of a modernized NAFTA would likely require the concurrence of some Democrats in both the House and Senate.

A revised NAFTA could attract more Democrats than has historically been the case. New automotive rules of origin that are expected to create American jobs in the auto and auto parts industries due to requirements that (a) 75% of the value of a compliant vehicle be of North American origin (or of just Mexican and U.S. origin if Canada does not sign on) and (b) 40–45% of the vehicle be produced in facilities in which workers are paid at least \$16 per hour (e.g., not in Mexico). The sketchy available information on the negotiations with Mexico also suggests that the new provisions protecting labor, particularly independent unions, in Mexico have been strengthened. Thus, some Democratic members who have steadfastly opposed NAFTA in the past may be encouraged by their labor supporters to support the new agreement.

Conversely, many members—particularly Republican members of Congress who would traditionally be expected to support a revised trade agreement—may balk or even oppose the president’s will if Canada is excluded, given the extensive bilateral trade with Canada from their states, the presence of thousands of American company affiliates in Canada, and the critical importance of Canadian manufacturers in supply chains for U.S. manufactured goods, particularly autos and auto parts. Such opposition would likely be driven by groups such as the U.S. Chamber of Commerce and the National Association of Manufacturers, which have strongly opposed an agreement excluding Canada,

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and auto industry groups such as the Alliance of Auto Manufacturers (representing most manufacturers selling autos in the United States), along with major auto producers that make vehicles in both the United States and Canada, including General Motors, Fiat-Chrysler, Ford, and Honda.

CONCLUSIONS

In its primacy over trade matters under the Constitution, Congress has broad authority over new and existing trade agreements, and could—if it had the political will to do so and the necessary votes to block the signature of a “modernized” NAFTA that excludes Canada—seek to assure that the duty-free trade within North America provided under the NAFTA Implementation Act continues despite an attempted unilateral termination by the executive branch, or simply decline to approve a revised agreement when it is submitted to Congress under TPA procedures. Whether the current Congress (or the one taking office in January 2019) would have the political will to do any of these things remains to be seen. Of course, if the United States and Canada agree on terms for Canada’s participation in a modernized NAFTA (whatever the name), a result that seems reasonably possible in September, the issues raised in parts 1 and 2 of this brief would be academic, although even a trilateral trade agreement is by no means assured of approval by Congress.

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4. See NAFTA, art. 2205, <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement>.

5. See Vienna Convention on the Law of Treaties, art. 70, May 23, 1969, 1155 U.N.T.S. 331.

6. See CRS Annotated Constitution: Interpretation and Termination of Treaties as International Compacts, Cornell University Legal Information Institute, https://www.law.cornell.edu/anncon/html/art2frag19_user.html.

7. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

8. Brandon Murrill, *U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions*, Congressional Research Service ii, Sept. 7, 2017; NAFTA Implementation Act (1993), §109(b).

9. See *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 414 (2003).

10. Murrill, 2017, 3.

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ENDNOTES

1. White House, Office of the Press Secretary, Text of a letter from the president to the speaker of the House and president of the Senate, Aug. 31, 2018.

2. Javier E. David and Jacob Pramuk, “Trump Takes a New Short at Canada, Threatens to End NAFTA if Congress Intervenes,” *CNBC Politics*, Sept. 1, 2018.

3. See Section 105(a)(1)(A), Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (“Trade Promotion Authority”).

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