

OLC: Congressional Notice Period Prior to Withdrawing from Treaty Unconstitutional

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On May 22, 2020, Secretary of State Mike Pompeo [announced](#) the United States' intent to withdraw from the multilateral [Treaty on Open Skies](#) (Open Skies Treaty), an arms control treaty permitting parties to fly over each other's territories for security surveillance purposes, to the treaty's parties. But a [provision](#) of the [National Defense Authorization Act for FY2020](#) (FY2020 NDAA) required the Secretary to provide Congress at least 120-day notice before officially notifying parties to the treaty that the United States intended to exercise its right to withdraw under Article XV of the treaty. The Trump Administration disregarded the 120-day FY2020 NDAA notification requirement, however, based on [advice](#) from the Office of Legal Counsel (OLC) at the Department of Justice (DOJ) that the FY2020 NDAA provision unconstitutionally intruded into presidential prerogatives to execute treaties and conduct diplomacy. Withdrawal from the Open Skies Treaty became [final](#) on November 22, 2020. OLC released its full [opinion](#) on the provision in December 2020. This Legal Sidebar discusses the NDAA provision, summarizes the OLC opinion, and suggests issues for Congress to consider. For more information on the Open Skies Treaty, see CRS Insight IN10502, *The Open Skies Treaty: Background and Issues*, by Amy F. Woolf.

Section 1234(a) of the FY2020 NDAA

Section 1234(a) of the FY2020 NDAA ([22 U.S.C. § 2593a note](#)) provides that

(a) Notification Required.—Not later than 120 days before the provision of notice of intent to withdraw the United States from the Open Skies Treaty to either treaty depository pursuant to Article XV of the Treaty, the Secretary of Defense and the Secretary of State shall jointly submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives], the Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate a notification that—

- (1) such withdrawal is in the best interests of the United States national security; and
- (2) the other state parties to the Treaty have been consulted with respect to such withdrawal.

The provision resulted from a [compromise](#) between the House and Senate. The House version would have [prohibited](#) the Department of Defense from obligating or expending FY2020 NDAA funds to take any

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action to suspend, terminate, or withdraw the United States from the Open Skies Treaty, absent certain circumstances. The Senate provision would have [modified](#) certain reporting requirements. DOJ [advised](#) that the House provision would be unconstitutional because the authority to terminate treaties, in its view, is an exclusive prerogative of the President. The above provision mandating 120-day prior notice to Congress emerged from conference.

Upon signing the FY2020 NDAA into law, President Trump issued a [signing statement](#) objecting to section 1234(a), among other provisions, because they “purport to dictate the position of the United States in external military and foreign affairs.” With respect to the provision at issue, he [wrote](#) it

purports to require congressional notification before providing Russia with a notice of intent to withdraw from the Open Skies Treaty. I reiterate the longstanding understanding of the executive branch that these types of provisions encompass only actions for which such advance certification or notification is feasible and consistent with the President’s exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.

Pursuant to section 1234(a), the Trump Administration [notified](#) the appropriate congressional committees that withdrawal from the Open Skies Treaty is in the U.S. national security interest and that the State Department had consulted with other parties, but it did not provide Congress 120-day notice prior to officially notifying other parties to the treaty of its intent to withdraw. [Some Members](#) of Congress [objected](#) to the Trump Administration’s non-compliance with the notice requirement, which allowed it to exit the agreement prior to the next presidential inauguration and without permitting Congress to take any action on the withdrawal.

OLC Opinion

OLC’s opinion on section 1234(a) of the FY2020 NDAA expands on its 2018 [opinion](#) that congressional approval was not required for the President to withdraw from the [North American Free Trade Agreement \(NAFTA\)](#) in accordance with its terms (NAFTA opinion). In its NAFTA opinion, OLC analyzed whether further legislative action would be necessary for the President to execute the withdrawal provision in a [congressional-executive agreement, such as NAFTA](#), that Congress had approved under the [Trade Act of 1974](#), which [provides](#) that qualifying trade agreements must have termination and withdrawal provisions. OLC [concluded](#) that

Where an international agreement contains defined procedures for termination or withdrawal and Congress approves the agreement without limiting those procedures, the President may invoke the right of the United States to terminate or withdraw under those procedures without the need for additional congressional authorization.

That authority, [according to OLC](#), flows from the President’s [constitutional responsibility](#) to “take Care that the Laws be faithfully executed,” as well as his “[role](#) as ‘the sole organ of the nation in its external relations, and its sole representative with foreign nations.’” OLC asserted that “when the President invokes a termination provision in a congressional-executive agreement, he is implementing the laws that Congress has enacted and exercising his own foreign-affairs powers.”

In its NAFTA opinion, OLC cited an opinion of the Court of Appeals for the D.C. Circuit (D.C. Circuit) in [Goldwater v. Carter](#), a 1979 case in which Members of Congress challenged President Carter’s termination of the Mutual Defense Treaty with the Republic of China (Taiwan) after the U.S. recognized the People’s Republic of China. The D.C. Circuit [ruled](#) “that two-thirds Senate consent or majority consent in both houses is not necessary to terminate [the Mutual Defense Treaty] in the circumstances” of the particular case. [Crucial](#) among such circumstances were the President ceasing to recognize Taiwan and the Senate having provided advice and consent to the Mutual Defense Treaty, including its termination clause. The D.C. Circuit [emphasized](#) that its intent was not to minimize legislative prerogatives in foreign affairs:

While under the termination clause of this and similar treaties the power of the President to terminate may appear theoretically absolute, to think that this is so would be to ignore all historical practices in treaty termination and past and current reciprocal relationships between the Chief Executive and Congress. The wide variety of roles played by the Executive and the Congress (or the Senate alone) in the past termination of treaties teaches us nothing conclusive as to constitutional theory, but it instructs us as to what may fairly be contemplated as to the President's future exercise of the treaty termination power. Treaty termination is a political act, but political acts are not customarily taken without political support. Even if formal advice and consent is not constitutionally required as a prerequisite to termination, it might be sought. If the Congress is completely ignored, it has its arsenal of weapons, as previous Chief Executives have on occasion been sharply reminded.

The Supreme Court [vacated](#) the D.C. Circuit's opinion and remanded the case to the district court with instructions to dismiss the complaint, without issuing an opinion. Then-Justice Rehnquist, whose concurrence attracted four votes, viewed the issue as a non-justiciable [political question](#).

The OLC FY2020 NDAA opinion relies on its NAFTA opinion and the *Goldwater* decision by the D.C. Circuit. OLC also places great [weight](#) on the Supreme Court's 2015 *Zivotofsky v. Kerry* opinion, in which the Court [held](#) that the President alone has the constitutional authority to recognize foreign states. Consequently, the Court invalidated a [law](#) requiring the Secretary of State, upon request, to list Israel as the place of birth on the passports of U.S. citizens born in Jerusalem, finding that the law unconstitutionally forced the President to contradict an earlier statement regarding recognition of sovereignty over Jerusalem. "If Congress could command the President to state a recognition position inconsistent with his own," the Court [wrote](#), "Congress could override the President's recognition determination." The majority, however, appeared to [cabin](#) its opinion to the facts before it, and [rejected](#) the government's position that Court precedent demonstrated that "the President has 'exclusive authority to conduct diplomatic relations,' along with 'the bulk of foreign-affairs powers.'"

OLC [asserts](#) in its FY2020 NDAA opinion that, "[a]lthough Congress may legislate on topics that affect foreign affairs, Congress's authority does not extend to regulating the President's decision to exercise a right of the United States to withdraw from a treaty." OLC [explains](#) that, in addition to vesting the President with the "[executive Power](#)" of the United States, the Constitution also confers express foreign affairs powers, including the "power to direct the military as '[Commander in Chief](#)'; to '[make](#)' treaties, after receiving the advice and consent of the Senate; to [appoint](#) 'Ambassadors,' 'public Ministers and Consuls'; and to [receive](#) 'Ambassadors and other Public Ministers.'" These powers combined, [according](#) to OLC, "grant the President the authority and discretion to implement a treaty by notifying foreign powers of the United States' exercise of its right to withdraw from the treaty." OLC [asserts](#) that the Constitution "does not provide Congress with any parallel responsibility."

In OLC's [view](#), historical precedent supports the President's exclusive role in terminating treaties. While identifying instances of congressional involvement in the termination of treaties, OLC [concludes](#) that "the modern practice stands decidedly to the contrary, and even those earlier examples do not support the conclusion that Congress may require the United States to remain in a treaty longer than the President deems in the national interest." OLC [identifies](#) two modern instances where the Senate or Congress made efforts to regulate termination of international agreements, but Congress appears to have acquiesced to executive branch push-back on constitutional grounds (though other factors were also at play). Separately, with respect to the 1986 passage of the Comprehensive Anti-Apartheid Act over President Reagan's veto, which required the Secretary of State to terminate an air services agreement with South Africa, OLC [notes](#) executive branch objection on constitutional grounds. (The Secretary ultimately [complied with the statute](#)).

As to earlier incidents demonstrating congressional participation, OLC [finds](#) "the most salient lesson arises from what the history does not contain" that is, "[a]lthough Presidents from time to time have acted consistently with congressional requests to terminate treaties, we are not aware of any instance in which a treaty has been allowed to endure based upon congressional action contrary to the President's wishes."

And, it **remarked** “[t]he fact that Presidents in some instances acted consistently with congressional directives does not establish that the directives themselves were constitutionally permissible.” OLC **believes** instead that “[t]he few examples where the President complied with the directives may further indicate nothing more than that the President agreed with those measures as a matter of policy” and can apparently be dismissed as far as constitutional precedent is concerned. **Likewise**, “episodes . . . where Presidents accepted or invited congressional involvement in treaty termination. . . do not support an affirmative power of Congress to regulate the President’s action over his objection.” While it may be argued instead that precedent seems to cut both ways, OLC’s approach seems to find some support in *Zivotofsky*.

Issues for Congress

OLC opinions **are binding** for the executive branch. Consequently, unless the OLC NDAA opinion is rescinded, it seems likely that the executive branch will resist any future efforts by Congress to delay or otherwise affect the possible U.S. termination of an international agreement. The Supreme Court **frequently** applies the *Youngstown* formula, whereby a presidential action contrary to congressional enactment survives judicial inquiry only if Congress is constitutionally disabled from acting on the matter because the President has exclusive and preclusive authority under the Constitution. It may be noteworthy that no court has gone so far as to find that Congress is constitutionally disabled from acting with respect to the termination or implementation of treaties on the international plane or that the President holds exclusive and preclusive power over the same. (OLC appears to **concede** that Congress often enacts implementing legislation for international agreements and can also effectively abrogate a treaty by enacting inconsistent legislation, but suggests the effects of such actions are limited to the domestic realm, at least unless there is some **relation** to the “regulation of war, foreign commerce, immigration, or any other power of Congress”). Some commentators **argue** that these are shared powers.

While it seems well established that the President has the sole power to *conduct* international diplomacy, it is not clear that Congress may never influence the content or timing of diplomatic communications. Even if *Zivotofsky* extends beyond matters involving the recognition power, it is not clear that delaying a diplomatic communication is tantamount to directing the executive branch to contradict itself in conducting diplomacy. Consequently, Congress may choose to legislate with respect to the potential termination of a treaty and, if such legislation is crafted in such a way as to be enforceable, await a potential judicial determination regarding its constitutional powers. Congress may also choose to accord legitimacy to the OLC views on executive foreign affairs power and avoid future efforts to regulate the termination of a treaty.

Author Information

Jennifer K. Elsea
Legislative Attorney

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