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Legal Sidebar

The North Atlantic Treaty: U.S. Legal Obligations and Congressional Authorities

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On July 21, 1949, the Senate passed a resolution giving its advice and consent to the ratification of the North Atlantic Treaty, the multilateral collective security agreement that established the North Atlantic Treaty Organization (NATO). On July 25, 1949, the United States officially joined the treaty, becoming one of NATO's 12 founding members. Since that time, the Senate has approved every request to increase the membership of NATO—enlarging the alliance to 32 members. Congress has also enacted numerous statutes implementing U.S. obligations under the North Atlantic Treaty and conducted oversight as to the executive branch's participation in the alliance. Among the many statutes related to NATO is Section 1250A of the National Defense Authorization Act for Fiscal Year 2024 (2024 NDAA), which prohibits the President from withdrawing the United States from the North Atlantic Treaty without the approval of the Senate or statutory authorization—the first (and thus far the only) statute prohibiting unilateral presidential withdrawal from a treaty.

This Legal Sidebar briefly (1) explicates the key legal obligations of the United States and other parties under the North Atlantic Treaty, (2) examines Congress's authorities for implementing those obligations, (3) analyzes the constitutional issues that may arise if a President were to withdraw from the treaty in violation of Section 1250A, and (4) discusses various topics of consideration for the 119th Congress.

Key North Atlantic Treaty Obligations

Under Article 5 of the North Atlantic Treaty, parties agree that "an armed attack against one or more of them … shall be considered an attack against them all." Under the Charter of the United Nations (U.N. Charter) and customary international law, an armed attack permits a country to potentially use force in its defense—one of the exceptions to the prohibition of the use of force against another state set forth in the U.N. Charter. In the event of such an attack, Article 5 obligates each party to exercise this right of self-defense by taking "such action *as it deems necessary*, including the use of armed force, to restore and maintain the security of the" territory protected by the treaty (emphasis added). Article 3 of the treaty contains complementary obligations for NATO members to carry out these mutual defense obligations if necessary by "maintain[ing] and develop[ing] their individual and collective capacity to resist armed attack."

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During the negotiations on the text of the North Atlantic Treaty, the U.S. Department of State consulted closely with the Senate Foreign Relations Committee (SFRC), and several of its members advocated for the broad phrasing of these two articles to provide the United States with discretion in determining how to meet its obligations. Such discretion was necessary, according to the Senators, to ensure that Congress had a role in deciding what action the United States would take in response to an armed attack—which Article 5 makes clear can, but need not, involve the use of armed force—as well as how to "maintain and develop" the alliance's defensive abilities as required by Article 3. Along these same lines, the current language of Article 11, which provides that the North Atlantic Treaty's obligations are to be "carried out by the Parties in accordance with their respective constitutional processes," was changed from the original proposal in response to several SFRC members' suggestions.

Since the United States entered the treaty in 1949, Congress has played an essential role in interpreting U.S. treaty obligations and determining what legislation should be enacted to carry out those obligations. Congress has also continued to enact legislation that shapes and oversees the executive branch's participation in NATO.

Select Legislation Implementing the North Atlantic Treaty

The Supreme Court has recognized that Congress has the power under the Necessary and Proper Clause of Article I to pass legislation implementing U.S. treaties. Congress has exercised this authority in enacting many statutes related to NATO over the 75 years that the North Atlantic Treaty has been in effect. These laws provide various requirements, authorizations, and restrictions, as well as executive branch oversight mechanisms.

Congress has, for example, required the President to appoint a permanent representative to NATO with the advice and consent of the Senate and provided for the appointment of Members of Congress to represent the United States at meetings of the North Atlantic Treaty Parliamentary Assembly for discussions with other NATO members' parliamentary groups about "common problems in the interests of the maintenance of peace and security." Congress has also provided the President with various authorizations to assist certain countries in support of their efforts to become NATO members.

Many NATO-related statutes involve Congress's other constitutional powers. For example, Congress's spending power underlies provisions authorizing U.S. contributions to NATO and to the NATO Parliamentary Assembly. Similarly, Congress's power to regulate foreign commerce provides authority for statutes creating expedited notification requirements for arms sales to NATO members and modifying other controls on security-related exports to those countries. Additionally, provisions structuring U.S. armed forces for NATO training and operations and authorizing the Department of Defense to undertake cooperative military activities with NATO members may be understood as supported by Congress's war-related powers. Congress has exercised its plenary power over immigration to provide special categories of visa for NATO civilian employees.

Congress has also established mechanisms for overseeing the executive branch's participation in NATO in the form of reporting and notification requirements for various NATO activities. In 2024, Congress asserted additional authority regarding the North Atlantic Treaty—specifically, authority related to withdrawal therefrom.

Section 1250A's Prohibition of Unilateral Presidential Withdrawal from the North Atlantic Treaty

In Section 1250A of the 2024 NDAA (found at 22 U.S.C. § 1928f), Congress prohibited the President from "suspend[ing], terminat[ing], denounc[ing] or withdraw[ing] from the North Atlantic Treaty … except by and with the advice and consent of the Senate, provided that two-thirds of the Senators present concur, or pursuant to an Act of Congress." Congress further prohibited the use of any funds to "support, directly or indirectly, any decision to" withdraw from the North Atlantic Treaty without Senate advice and consent or statutory authorization. Although Congress has to some extent regulated the President's withdrawal from a treaty in the past, Section 1250A is the first statute in which Congress has prohibited unilateral presidential withdrawal from a treaty.

Treaty Withdrawal Jurisprudence and Legal Opinions

The executive branch has often claimed that the President has independent authority to withdraw the United States from treaties absent congressional restriction. The Carter Administration took this position, for example, in defending the President's withdrawal from the United States' 1954 mutual defense treaty with Taiwan in *Goldwater v. Carter*, a case brought by individual Members of Congress arguing that the President's unilateral withdrawal was unconstitutional. Ultimately, the Supreme Court declined to weigh in on the dispute, with a plurality of the Justices concurring in the judgment to dismiss the complaint, concluding that the case presented a political question that was properly addressed by the political branches rather than the judiciary—a determination that is not uncommon in cases involving separation-of-powers disputes in areas of foreign policy.

Before Section 1250A was enacted, the Department of Justice's Office of Legal Counsel (OLC) published an opinion in 2020, taking the view, for the first time, that the President not only has the power to withdraw from treaties absent congressional restriction but that treaty withdrawal is an *exclusive* presidential power that Congress is constitutionally prohibited from constraining. The OLC opinion determined that a provision in the 2020 NDAA, which required the Secretary to provide Congress at least 120 days' notice before officially notifying parties to the Treaty on Open Skies that the United States intended to exercise its right to withdraw, "unconstitutionally interferes with the President's exclusive authority to executive execute treaties and to conduct diplomacy, a necessary incident of which is the authority to execute a treaty's termination's right." OLC opinions are binding on executive branch agencies. Unless the opinion is rescinded, it is generally more likely that future Administrations will follow this advice.

The only Supreme Court case involving a challenge to unilateral treaty withdrawal is the 1979 *Goldwater* case, which the Court dismissed without addressing the merits. That case did not, however, involve a statute, such as Section 1250A, that expressly prohibits the President from withdrawing absent congressional authorization. More recent Supreme Court caselaw suggests that a court may be more willing to conclude that a foreign policy case involving a challenge to a President's violation of a statute should be resolved by the judiciary rather than left to the political branches because of an existing statute.

In addition, although there is no Supreme Court precedent directly addressing congressional and presidential powers related to treaty withdrawal, there is precedent that a court would likely find relevant in a case concerning the constitutionality of Section 1250A. In particular, a court's analysis in such a case may likely begin with the framework that the Supreme Court has recognized as appropriate for determining the scope of presidential powers relative to those of Congress: Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*. Under the *Youngstown* framework, courts assess presidential claims of authority based on what Congress has—or has not—said about the matter. In

Youngstown, Justice Jackson observed: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."

Potential Application of *Youngstown* to Section 1250A

In a case challenging a President's violation of Section 1250A, a court may likely determine that the *Youngstown* framework places presidential power "at its lowest ebb." In this circumstance, when a President's action is contrary "to the expressed … will of Congress," the Supreme Court has held that the President's action will be upheld only if it is supported by constitutional power that is exclusive to the presidency and, thus, that Congress is prohibited from infringing upon.

In light of that seemingly heightened constitutional standard, a court may find a President's claim of exclusive constitutional power to withdraw from a treaty to be unpersuasive given that the Constitution is silent about treaty withdrawal powers and that Article II makes treaty *entry* a power shared between the President and the Senate. On the other hand, the Supreme Court has concluded that the President's power to "make treaties" reflects the President's unique function of serving as the nation's "one voice" in matters of foreign affairs. Based on such reasoning, the Court has held that the President has exclusive authority to recognize foreign governments—a power that, like treaty withdrawal, is not expressly addressed in the Constitution's text—and struck down a statute that it determined to impermissibly infringe on that power.

In addition to the Constitution's text and any relevant Supreme Court precedent, a court may consider the historical practice of the first two branches in separation-of-powers cases in determining where the constitutional lines between the branches lie. During the 19th century, the legislative and executive branches often treated the treaty withdrawal power as a shared one. In the 20th century, the executive branch increasingly asserted independent authority to withdraw from treaties. The executive branch first asserted a claim of *exclusive* presidential authority in the 2020 OLC opinion described above.

Ultimately, it is uncertain how a court would rule on the constitutional distribution of treaty withdrawal power based on its analysis of the Constitution's text and structure, relevant Supreme Court precedent, and historical interbranch practice.

Congressional Considerations

Since the United States entered the North Atlantic Treaty in 1949, Congress has played a key role in determining whether and how the international law embodied in the treaty interacts with U.S. domestic law. Below are some considerations that may arise in the 119th Congress as it continues to impact the future of the alliance:

- The President may ask for Senate approval of future enlargements of NATO membership. Such enlargements are effected pursuant to Article 10 of the North Atlantic Treaty through protocols of accession. At the U.S. domestic level, the President would negotiate any protocols before submitting them to the Senate. Given that any such accessions would expand the territory protected by the treaty and thereby impact Article 5 and other treaty obligations, the Senate may consider what, if any, information it might ask of the executive branch to inform its decisionmaking. In addition to determining whether to provide advice and consent, the Senate may also consider whether to include any conditions in a resolution authorizing the President to ratify any accession protocol, as it has several times in the past.
- The distribution of some foreign policy powers is uncertain as a result of the absence of controlling judicial precedent, including that related to treaty withdrawal. Regardless of whether a court eventually hears a case involving issues of the treaty withdrawal or other

foreign policy powers, interbranch practice matters. On the one hand, if a court does not intervene, the President and Congress are the principal governmental interpreters of constitutional meaning. On the other hand, should a court weigh in, it would likely consider interbranch practices in determining constitutional meaning that is binding on both of the political branches. Accordingly, Congress may consider what, if any, additional action to take related to Section 1250A or any other NATO-related statute.

- Initially, if a President were to withdraw the United States from the North Atlantic Treaty in violation of Section 1250A, all NATO-related legislation would remain in effect, and it would be up to Congress to determine whether any statutes should be repealed or amended. Because many NATO-related provisions are not dependent on whether the United States is a party to the treaty, Congress may be able to achieve some NATO-related policy objectives through new legislation. For example, in response to President Carter's withdrawal from the United States' mutual defense agreement with Taiwan in 1979, Congress enacted the Taiwan Relations Act, which provides that "the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability."
- Additionally, courts often decline to weigh in on the merits of cases involving the separation of foreign policy powers, as the Supreme Court did in *Goldwater*. Although a recent Supreme Court case suggests that the political question doctrine may be less of a barrier in a case involving a challenge to a President's violation of a statute, the doctrine of standing limits who can bring a case to those who, among other things, have suffered an injury unique to them as a result of the alleged unlawful conduct. This requirement may be challenging in foreign policy cases, as any harms incurred are often understood as more public than private in nature.

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