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#### **KEY ACTIONS**

Pass a bill through both chambers that includes provisions stating that withdrawal from NATO would require a 2/3 majority vote in the Senate and that no funds can be used to withdraw from NATO without congressional approval.

Signal congressional support for NATO by passing a resolution highlighting the importance of a 21st-century NATO that furthers the alliance's three pillars of collective defense, crisis management, and cooperative security.

Determine whether the administration has developed a legal theory that the president may unilaterally withdraw from NATO and/or any other Article II treaty.

Call for testimony by the leadership of the Defense Department, Joint Chiefs, and other senior national security leaders to provide transparency for the public about the role that NATO provides in maintaining global security.

# **Congressional Support for NATO**

Rachel Rizzo and Carrie Cordero

In January, *The New York Times* reported that President Trump suggested to senior advisors several times over the course of the previous year that he might withdraw the United States from the North Atlantic Treaty Organization (NATO or the alliance).¹ Accordingly, the time is ripe for Congress to refresh its institutional understanding of the history of NATO, the contribution the alliance makes to global security, current challenges in modernizing the alliance, and the legal issues that would be involved in a potential effort by the president to withdraw. Congress is a key player in protecting the integrity of NATO, and it is vital that policymakers understand the tools at their disposal.

#### This brief addresses:

- » The role of NATO today;
- » Whether the executive can lawfully unilaterally withdraw the United States from NATO; and
- » Steps Congress can take to protect this long-standing alliance.

### IS NATO OBSOLETE OR IS THE ALLIANCE MODERNIZING?

Lord Hastings Ismay, the first secretary general of NATO, famously stated that NATO was created to keep "the Soviet Union out, the Americans in, and the Germans down" after the end of World War II.² The alliance soon evolved to represent a pillar of Western solidarity against Soviet encroachment until the end of the Cold War. But as NATO's 2010 *Strategic Concept* explains, throughout history and still today, "NATO's fundamental and enduring purpose is to safeguard the freedom and security of all its members by political and military means." Members of the alliance have struggled over the years to make sense of multidirectional shifts in the strategic landscape, but the overall utility of NATO membership seemed obvious, especially to the United States.

Today is a different story. It appears President Trump is the first American president to openly question the value of U.S. participation in the alliance. This is indicative of how the president views not only NATO, but rather treaties in general. From the Joint Comprehensive Plan of Action (JCPOA) with Iran to the Paris Climate Agreement, withdrawal from treaties and other international agreements has emerged as a substantial foreign policy tool of the Trump administration.<sup>4</sup> The president seems to view at least some of these international agreements as political decisions made by the former administration, and is thus especially critical of them.<sup>5</sup>

Yet, NATO remains a bedrock of the transatlantic relationship and is representative of deep ties between the United States and Europe. NATO offers a consortium of allies who

<sup>5.</sup> Lena Felton, "Read Trump's Speech Withdrawing from the Iran Deal," *The Atlantic*, May, 8, 2018, www.theatlantic.com/politics/archive/2018/05/full-transcript-iran-deal-trump/559892/.



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<sup>1.</sup> Julian E. Barnes and Helene Cooper, "Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia," *The New York Times*, January 14, 2019, www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html.

<sup>2.</sup> The North Atlantic Treaty Organization, NATO Declassified, www.nato.int/cps/us/natohq/declassified\_137930.htm.

<sup>3.</sup> The North Atlantic Treaty Organization, NATO Strategic Concept 2010, November 19, 2010, www.nato.int/cps/en/natohq/top-irs. 82705 htm.

<sup>4.</sup> Chimene Keitner, "What Are the Consequences of the Trump Administration's Recent Treaty Withdrawals?" Just Security, October 17, 2018, www.justsecurity.org/61101/consequences-trump-administrations-treaty-withdrawals/.



"NATO also provides a conduit through which the United States and Europe can work together in a larger framework on challenges that will shape the future of our societies."

have proven their willingness to fight alongside the United States.<sup>6</sup> In addition, NATO is a consensus organization: it provides legitimacy for foreign policy decisions made both within and beyond the boundaries of the United States and Europe.

NATO also provides a conduit through which the United States and Europe can work together in a larger framework on challenges that will shape the future of our societies. Populist parties are gaining traction within the borders of some of the United States' most important allies, such as Germany, France, and Italy. These emerging political movements pose a threat to transatlantic unity given that many are anti-NATO, Eurosceptic, and anti-U.S. In addition, U.S.-European partnership is needed to address hybrid threats like terrorism, disinformation campaigns, and malign cyber activities. Finally, global stability in the coming decades will largely be defined by the relationships between and among the United States, China, and Russia. A strong NATO is necessary to provide a foundation for the U.S.-European relationship, and it will need to adjust to the emerging competitive environment.

However, even supporters of NATO must be clear-eyed about its faults. Burden-sharing is still an issue; Europeans have been too dependent on the United States' security guarantees and have, as a result, spent less than they should on their own defense budgets. Although allies are finally turning this around, the process has been long. Additionally, NATO as an institution has struggled to define its modern-day purpose. Although it has shown an ability to adapt to reflect the current security environment, such as the recent decision at the 2018 NATO Summit to adjust and strengthen its command structure, these adaptations often happen too slowly. For example, NATO still has work to do to clarify information-sharing in support of cyber defense activities.

For NATO to remain relevant, allies will need to continue to work together to find common approaches to emerging 21st-century security challenges. Congress can play an important role in determining how the United States fits into this puzzle going forward.

## **CAN THE PRESIDENT UNILATERALLY WITHDRAW FROM NATO?**

While it is hard to determine the seriousness with which to take President Trump's threats to abandon the alliance, Congress must nevertheless understand the legal parameters of the executive power in this situation. According to the limited existing precedent and recent historical practice, prevailing legal opinion is that probably yes, the president could lawfully unilaterally withdraw from NATO if he wanted to without congressional approval. In fact,

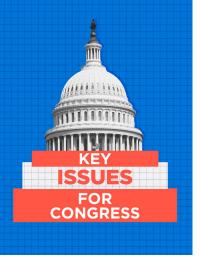
<sup>9.</sup> Curtis Bradley and Jack Goldsmith, "Constitutional Issues Relating to the NATO Support Act," Lawfare, January 28, 2019, www. lawfareblog.com/constitutional-issues-relating-nato-support-act (concluding that "Trump has the constitutional authority to withdraw from [NATO] in accordance with its terms and in the face of congressional silence ... [and that] his authority to do so would be much less certain if Congress were to bar such withdrawal."). But see, Harold Hongju Koh, "Presidential Power to Terminate International Agreements," The Yale Law Journal Forum, November 12, 2018, https://www.yalelawjournal.org/pdf/Koh\_r5kyrm5m.pdf (concluding that the prevailing view among legal experts that a president can terminate treaties is wrong, and that a comparable, or "mirror principle" of original legislative action, should apply).



<sup>6.</sup> Philip H. Gordon, "NATO and the War on Terrorism: A Changing Alliance" (Brookings Institution, June 1, 2002), https://www.brookings.edu/articles/nato-and-the-war-on-terrorism-a-changing-alliance/.

<sup>7.</sup> Defence Expenditures of NATO Countries 2010-2017, NATO, press release, March 15, 2018, www.nato.int/nato\_static\_fl2014/assets/pdf/pdf\_2018\_03/20180315\_180315-pr2018-16-en.pdf.

<sup>8.</sup> Christopher Porter and Klara Jordan, "Don't Let Cyber Attribution Debates Tear Apart the NATO Alliance," Lawfare, February 14, 2019, www.lawfareblog.com/dont-let-cyber-attribution-debates-tear-apart-nato-alliance.



"According to the limited existing precedent and recent historical practice, prevailing legal opinion is that probably yes, the president could lawfully unilaterally withdraw from NATO if he wanted to without congressional approval."

U.S. presidents have repeatedly withdrawn from treaties unilaterally. Although early U.S. government tradition contemplated a substantial role for Congress in terminating treaties, more recent 20th-century practice has repeatedly acknowledged executive's ability to withdraw unilaterally.

Article II, Section 2 of the Constitution provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." The text of the Constitution is silent, however, on presidential power to withdraw from treaties that have been subject to congressional action.

Treaty withdrawal clauses provide a process by which a country may withdraw.<sup>12</sup> NATO's founding document is no exception. The North Atlantic Treaty of 1949, which created NATO, contains a withdrawal clause in Article 13, providing,

After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.<sup>13</sup>

Most notably, the withdrawal provision states that the nation withdrawing must notify the United States. This indicates that we are experiencing a dilemma for which there is no historical precedent: at its creation the participating nations appear to have never expected a scenario could evolve where the United States would be the nation to withdraw.<sup>14</sup>

A president seeking to withdraw from NATO would likely point to two cases considered by the federal courts in the past 50 years. *Goldwater v. Carter* considered a challenge brought by members of Congress to President Jimmy Carter's decision to withdraw from the Sino-American Mutual Defense Treaty as part of the United States' recognition of the People's Republic of China. The Supreme Court declined to overturn the D.C. Circuit decision affirming the president's authority.<sup>15</sup> The decision also started an intense debate within Congress, which included three days of Senate Foreign Relations Committee hearings, and a resolution sponsored by Senator Harry Byrd Jr. that stated the Senate should be required to approve any withdrawal from a mutual defense treaty.<sup>16</sup> The Senate never voted on the resolution. In 2002, President George W. Bush announced his intention to withdraw the United States from the Anti-Ballistic Missile Treaty with Russia.<sup>17</sup> Yet again, members of Congress challenged Bush's action in *Kucinich v. Bush*.<sup>18</sup> The district court dismissed the case without reaching the merits.

<sup>18.</sup> Kucinich v. Bush, 236 F. Supp. 2d 1, 2 (D.D.C. 2002); Bradley, Treaty Termination, 787.



<sup>10.</sup> Bradley and Goldsmith, "Constitutional Issues Relating to the NATO Support Act."

<sup>11.</sup> Curtis A. Bradley, "Treaty Termination and Historical Gloss," *Texas Law Review 92*, (2014), 773-835 https://scholarship.law.duke.edu/faculty\_scholarship/3105.

<sup>12.</sup> Bradley, Treaty Termination, 778

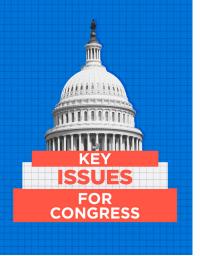
<sup>13.</sup> The North Atlantic Treaty Organization, *The North Atlantic Treaty*, April 4, 1949, www.nato.int/cps/ie/natohq/official\_texts\_17120.

<sup>14.</sup> Bradley and Goldsmith, "Constitutional Issues Relating to the NATO Support Act."

<sup>15.</sup> Goldwater v. Carter, 100 S. Ct. 533 (1979).

<sup>16.</sup> Bradley, Treaty Termination, 811-812.

<sup>17.</sup> Bradley, Treaty Termination, 784.



Both the Justice Department's Office of Legal Counsel and State Department's Legal Advisor have previously supported the executive branch position that a president may unilaterally withdraw from treaties, including Article II treaties.<sup>19</sup> There is, however, an alternative view that the modern historical precedent supporting this position is wrong and that a "mirror principle" should apply. In other words, the mechanism to exit the treaty should "mirror" the mechanism to enter the treaty.<sup>20</sup> There is a logical quality and a symmetry to this argument, although it has yet to be tested in court. This view rejects the prevailing analysis that historical practice following *Goldwater* is dispositive, in light of the lack of textual or binding precedent.<sup>21</sup> This view right-sizes the debate by acknowledging that the adherence to past practice is not the same as Supreme Court precedent on the specific issue.

If the current administration takes the legal position that a president has the authority to unilaterally withdraw from NATO (or any other treaty for that matter), the argument would be consistent with prior administrations of both parties. Substantively, the position that withdrawing from NATO is in U.S. national security interests is on the outskirts of a bipartisan national security consensus. As a legal matter, however, and in the absence of additional congressional action,<sup>22</sup> the administration would be comfortably in the mainstream of legal interpretation to date.

## **ROLE OF CONGRESS IN PROTECTING NATO**

Despite the prevailing legal analysis, Congress has an avenue available to it to protect U.S. participation in NATO and strengthen the relevance of the alliance itself. After President Trump's implied threat to leave NATO in July 2018 at the Brussels Summit, Congress sprang into action to reassure European allies of continued U.S. support.<sup>23</sup> On January 22, 2019, the House passed H.R. 676, the NATO Support Act, which reaffirmed Congress's commitment to NATO. The bill expresses a Sense of Congress that the president "shall not withdraw the United States from NATO," and includes a statement of policy that the United States will "remain a member of good standing in NATO. The bill further states that "no funds are authorized to be appropriated, obligated, or expended to take any action to withdraw the United States from the North Atlantic Treaty."

<sup>24.</sup> H.R. 676, 116th Congress, 1st Session (NATO Support Act), https://www.congress.gov/116/bills/hr676/BILLS-116hr676eh.pdf.



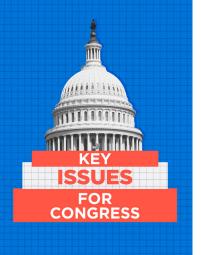
<sup>19.</sup> Bradley, Treaty Termination, 784.

<sup>20.</sup> Harold Hongju Koh, "Presidential Power to Terminate International Agreements," *The Yale Law Journal Forum* (November 12, 2018), 453–453, <a href="https://www.yalelawjournal.org/pdf/Koh\_r5kyrm5m.pdf">www.yalelawjournal.org/pdf/Koh\_r5kyrm5m.pdf</a> (articulating the mirror principle as "the commonsense notion that the degree of legislative participation necessary to exit an international agreement should mirror the degree of legislative participation required to enter it in the first place).

<sup>21.</sup> Koh, "Presidential Power," 43.

<sup>22.</sup> Bradley and Goldsmith, "Constitutional Issues Relating to the NATO Support Act."

<sup>23.</sup> Brian Naylor, *Trump's Harsh Words for NATO Meet with Pushback from Democrats and Republicans*, NPR, July 11, 2018, www.npr org/2018/07/11/628015546/trumps-harsh-words-for-nato-meet-with-pushback-from-republicans-and-democrats. In addition, congressional leadership issued a bipartisan invitation to the NATO Secretary General to speak to a joint session of Congress. Catie Edmondson, "Congressional Leaders Invite NATO Chief to Speak, in Jab at Trump," *The New York Times*, March 11, 2019, https://www.nytimes.com/2019/03/11/us/politics/congress-nato-trump.html.



"A potential legal challenge to a presidential unilateral withdrawal might be framed in as narrow a manner possible so as to not require a court to rule beyond the North Atlantic Treaty."

Meanwhile, the Senate introduced (but has not acted on) S.J. Resolution 4 which contains a more specific statement:

The President shall not suspend, terminate, or withdraw the United States from [NATO] 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."

The Senate bill also prohibited the use of funds for withdrawal purposes.

Neither bill seeks to solve the broader question of whether the executive needs congressional approval to withdraw from all Article II treaties. And if Congress seeks to protect NATO specifically, one approach would be to focus exclusively on NATO and not attempt to challenge the president's power regarding Article II treaties more broadly. As one observer writes, NATO "has never been a typical alliance." NATO has served in a unique role in maintaining post—World War II order by underpinning the U.S.-European relationship and helping preserve peace on the European continent. Accordingly, a potential legal challenge to a presidential unilateral withdrawal might be framed in as narrow a manner possible so as to not require a court to rule beyond the North Atlantic Treaty, specifically, given its foundational role in supporting post—World War II international security.

## **RECOMMENDATIONS**

As a matter of foreign policy, withdrawing from NATO would cause irreparable damage to the U.S. relationship with European allies and would have profound consequences for cooperation on military defense, counterterrorism, counterproliferation, and counterintelligence activities. While the current world order cannot be expected to remain static, the United States needs a modern NATO attuned to today's threats, not an abandonment of alliances built over decades. Congress's engagement on this issue, even in the absence of presidential action to withdraw, could also have the ancillary effect of bolstering public understanding of NATO's role and function.

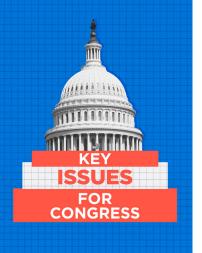
Congress can take proactive steps to express its consensus support for NATO and bolster its role as a matter of law in any potential presidential attempt to withdraw.<sup>26</sup> If the president were to unilaterally withdraw from NATO, prior action by Congress would be considered in subsequent litigation, assuming litigation would ensue. Steps that Congress could take include:

» Passing a bill through both chambers that includes a provision that withdrawal from NATO would require a 2/3 majority vote in the Senate, which would strengthen Congress's constitutional position. The bill should also include strong language regarding the power of the purse, saying no funds can be used to withdraw from NATO without congressional approval.

<sup>26.</sup> Bradley and Goldsmith, "Constitutional Issues Relating to the NATO Support Act."



<sup>25.</sup> Celeste Wallander, "NATO's Enemies Within: How Democratic Decline Could Destroy the Alliance," *Foreign Affairs* (July/August 2018), www.foreignaffairs.com/articles/2018-06-14/natos-enemies-within (From its inception in 1949, NATO has not only deterred and defended against external threats; it has also advanced the principles of liberal democratic governance).



- » Signaling its support for NATO and the United States' continued participation by passing a resolution highlighting the importance of a 21st-century NATO that furthers the alliance's three pillars of collective defense, crisis management, and cooperative security.
- » Determining whether the administration has developed a legal theory that the president may unilaterally withdraw from NATO and/or any other Article II treaty. This includes calling for testimony from the State Department legal advisor and the attorney general.
- » Conducting oversight by calling for leadership of the Defense Department, Joint Chiefs, and other senior national security leaders to provide transparency for the public about the critical role that NATO provides in maintaining global security and providing mutual protection against common enemies.

Congress will play an increasingly central role in defending the integrity of NATO and ensuring it stays relevant in the years to come. While the alliance may not be perfect, given today's tepid relationship between the United States and Europe, it is worth protecting.

