

The North American Free Trade Agreement was a hot topic of the 2016 presidential election. NAFTA received an unprecedented amount of attention by both candidates. On the campaign trail, [Donald Trump](#) vowed to “rip up” NAFTA, although his team has since clarified that he is “looking to right-size it and make it fairer.”

Politics aside, it is worth asking: Can President Trump terminate or renegotiate NAFTA?



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NAFTA was established in 1994 with the goal of reducing trading costs by abolishing tariffs and other trade barriers, increasing business investment and helping North American countries become more competitive in the global marketplace. Since its implementation, trade between the U.S., Mexico and Canada has quadrupled, surpassing \$1 trillion (U.S.) in 2015. NAFTA also confers immigration benefits to business visitors and temporary workers across borders.

NAFTA Article 2205 states: “A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties.” NAFTA’s language is equally clear regarding revisions to NAFTA at Article 2202: “The Parties may agree on any modification of or addition to this Agreement.”

The mechanics of termination or negotiation

So we know that a party can withdraw from NAFTA with six months’ notice, and the parties may agree to make changes or additions to NAFTA. But how does this unfold on a political level? Who has the right to make these decisions?

Contrary to popular belief, NAFTA is not a treaty. It is a “congressional executive agreement.” CEAs are created by statute following majority approval in the Senate and House of Representatives. The Constitution is silent regarding who has the power to

terminate a CEA, and neither the NAFTA text nor the ensuing NAFTA Implementation Act of 1993 establish a procedure for withdrawal. The U.S. has not withdrawn from a trade agreement since 1866 so there is little precedent.

There are two schools of thought regarding a president's power vis-à-vis NAFTA. The first ideological camp (Group A) insists that only Congress may alter our tariff, tax and customs law pursuant to the Commerce Clause. Under this framework, Congress authorizes a president to reach a trade agreement with foreign nations, and once the deal is struck, the president sends the deal back to Congress for enactment into law. Since Congress enacts trade agreements as statutes, Group A advocates that NAFTA's implementing statute can only be reversed by another statute to repeal the underlying law.

It follows that this repealing statute must be passed by both houses of Congress and signed into law by the president. Thus, if Trump unilaterally withdrew from NAFTA as prescribed by Article 2205, NAFTA's implementation statutes would remain in effect until repealed by Congress. If he only wished to renegotiate NAFTA, Group A maintains that Congress would still have to approve the trade deal.

In this scenario, it is highly unlikely that Trump could successfully persuade Congress to withdraw from NAFTA. Canada and Mexico remain this country's top trading partners. It would be difficult for the president to convince Congress to dismantle these relationships.
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The second ideological camp (Group B) argues that the president could unilaterally withdraw or renegotiate NAFTA on several grounds. First, he could extend a wide interpretation of a president's constitutional powers over foreign affairs to CEAs. Second, Trump could invoke multiple statutes passed by Congress over the past century that specifically authorize him to impose tariffs or quotas on imports and regulate foreign commerce in other ways. Lastly, Group B advocates that the president's unilateral withdrawal from NAFTA would render its underlying implementation statutes obsolete.

In the second scenario, the president would likely endure strong court challenges from adversely affected U.S. businesses or states asserting that he exercised constitutional powers and statutes beyond the intent of the Constitution and Congress. In addition, Congress would likely generate bills that amend or rescind the implementation or trade statutes upon which Trump would have relied to conduct the underlying withdrawal or renegotiation. Keep in mind that either attempt to prevent the president's actions from materializing would be lengthy at best, temporarily providing the president with an upper hand.

Our predictions

Each day there are roughly 1 million cross-border visits between NAFTA countries and \$2 million worth of trade per minute. Commercial transactions between U.S. and Canada alone are valued at \$1.6 billion per day. Canada and Mexico remain our first and third-largest trading partners, respectively, and it is unlikely that the Executive Branch would

allow the president to compromise trading relations with these countries by completely withdrawing from NAFTA.

As U.S. immigration lawyers who sit at the U.S.-Canada border, our greatest concern regards the continued ability of our Canadian and Mexican clients to obtain U.S. work authorization as provided by NAFTA. Fortunately, Trump's main criticisms with NAFTA regard policies surrounding the movement of goods rather than the movement of people. We are confident that NAFTA's procedures for the temporary entry of business visitors and workers across national borders will remain intact.

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