

Intelligence MEMOS



As NAFTA renegotiations proceed, the C.D. Howe Institute Intelligence Memos will be looking at what to expect and provide analysis on the latest developments. This post is part of that series.

From: Jon Johnson
To: Senate Majority Leader Mitch McConnell and House Leader Paul Ryan
Date: November 16, 2017
Re: **STAND UP TO TRUMP ON TRADE**

“Inside US Trade” reported last week that you as GOP leaders have told business groups you won’t stand up to President Trump on trade. The powers expressly granted to Congress by the Commerce Clause over duties and commerce with foreign nations will be severely compromised if you and your colleagues do not block an attempt by President Trump to unilaterally withdraw the US from NAFTA. The practical consequences for both of you could be severe.

As you are aware, trade agreements like NAFTA are “congressional-executive agreements” in US law because they fall within the joint authority of Congress and the president. While the executive power of the president is required for a trade agreement to be executed on behalf of the US, the subject matter of a trade agreement falls squarely within the powers expressly granted to Congress under the Commerce Clause. A US withdrawal from NAFTA would profoundly affect US commerce with two foreign nations, namely Canada and Mexico. If both Congress and the president must participate for the US to enter into a trade agreement, it follows that unless Congress expressly provides otherwise, the president cannot withdraw the US from a trade agreement unless Congress concurs. Congress has not explicitly delegated power to the president to withdraw from NAFTA or from any other trade agreement.

An attempt by the president to unilaterally withdraw the US from NAFTA will result in a constitutional challenge that could be brought by any number of interested parties. US courts have recognized that the Commerce Clause limits the executive power of the president. However, none of these cases has involved withdrawal from a trade agreement. Agricultural groups, an important Republican constituency, have made it clear that they expect you to intervene if the president attempts to unilaterally withdraw from NAFTA. Congress must take a leading role in defending its powers rather than passively standing by and relying on other interested parties.

Legalities aside, there are important practical considerations that you should consider. The mere issuance of notice of intent to withdraw would have an immediate negative impact on important sectors of the US economy. Farmers relying on the Mexican market would be in doubt as to what crops to plant because of the prospect of high Mexican tariffs if the US withdraws. US auto producers would have to revisit their supply chains. The resulting uncertainty for many US industries could result in layoffs and both short- and long-term unemployment.

Members of both the House and the Senate will have many unhappy constituents. You as the GOP leadership will be blamed if you are seen to be missing in action at what could be a critical challenge to the powers of Congress. You must be proactive in asserting the powers of Congress over trade. This could begin by insisting that the administration remove the poison pills (sunset clause, punitive auto rules of origin, evisceration of dispute resolution, regressive demands respecting government procurement) from the negotiating table so that the NAFTA negotiations have a chance of succeeding.

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