

U.S. Withdrawal From the World Health Organization: Unconstitutional and Unhealthy

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SUMMARY. On May 29, 2020, during the same week that U.S. deaths from COVID-19 topped 100,000, President Trump announced that the United States would end relations with the World Health Organization (WHO). In the beginning of July, the administration formally notified the United Nations of the decision to withdraw. Withdrawing the United States from the WHO would threaten both national and global health interests. The loss of U.S. funding would derail WHO's ability to detect and respond to emergencies like COVID-19, and could reverse hard-won progress in combatting infectious and non-communicable diseases, and addressing the social determinants of health globally. The United States also would cede its position as a global health leader, curtailing its ability to engage in global health diplomacy. Yet President Trump's apparent attempt to unilaterally withdraw the United States from the WHO raises major constitutional implications, and Congress must not let the move go unchallenged. As the United States entered the WHO through a joint congressional resolution, the same process should be required to exit the WHO. That joint resolution also imposes withdrawal requirements of one year's notice and full payment of dues for that year. These two conditions indicate Congress' intent to maintain a role in any decision to vacate the WHO. Congress must now step into that role and prevent the president from ending WHO membership and funding.

Introduction

President Trump's announcement that the United States would immediately terminate relations with and stop funding the World Health Organization (WHO), even as the agency leads the global response to a massive and still growing pandemic, is not only a shocking abrogation of U.S. global health leadership, already diminished by a meager response to COVID-19 globally. It is also an unconstitutional assertion of presidential power.

The United States has been a member of the WHO since its founding in 1948, and had championed its establishment to help countries address threats including malaria, tuberculosis, venereal disease, children's and women's health, nutrition, and environmental sanitation. Since then, U.S. presidential administrations have consistently supported the WHO. U.S. voluntary and mandatory funding contributions have established the United States as a leading ally to WHO in addressing threats like HIV, Ebola, and polio.

Yet now, for the first time in more than 70 years and in the midst of a devastating pandemic, the U.S. role as a WHO member and global health leader are at stake. Congress must not acquiesce to an

action that would not only be a major blow to global health, but also to the balance of power and the credibility of U.S. commitments enshrined in treaties, legally binding agreements between nations. By terminating obligations to the WHO, the United States would also be sidestepping its commitments to global health security.

The Health Consequences of a U.S. Withdrawal From WHO

Exiting from the WHO places U.S. health and national security interests at risk. COVID-19 has proven how the zoonotic leap of a single virus anywhere in the world can result in health and economic catastrophe in the United States. Once outside the WHO, the United States would no longer be a part of the WHO's global system for sharing critical outbreak and vaccine data, potentially slowing the United States' ability to recover from COVID-19, and to react to future pandemics.

The rest of the world would be at heightened risk, too. As the United States is a major funder this year of WHO's health emergency response capacities, resources for testing and contact tracing, building health workforces, and developing vaccines would be lost with U.S. withdrawal (WHO, 2020). Second or third waves of

COVID-19 cases could repeatedly overwhelm health care systems and result in far more lives lost. Beyond COVID-19, the WHO would have reduced capacity to detect and control future outbreaks without U.S. support, marking a new era of pandemic risk.

A number of other WHO programs would suffer enormously under U.S. withdrawal, especially as many global health resources have been redirected to fight COVID-19. Historically, the United States has served as a global health leader and the largest WHO donor (providing about 15% of its budget, or \$450 million annually) (WHO, 2020). The United States has helped fund such initiatives as polio eradication, child nutrition, vaccines, HIV/AIDS, malaria, and tuberculosis. Pulling funding could reverse hard-won progress. For example, efforts to eradicate polio over the last two decades have reduced global cases by 99.9%, but loss of U.S. funding could potentially allow annual global polio cases to jump from a few hundred to 200,000 within a decade.

Though the United States may attempt to remain a global health leader by rerouting funding directly to countries, or through global public-private partnerships, it will have far less impact without WHO expertise and global reach. Even the President's Emergency Plan for AIDS Relief, the U.S.'s signature achievement in responding to HIV/AIDS, has relied on WHO to deliver health messages, ensure quality medications, and set health workforce standards. As U.S. global health funding and leadership falters, the United States will lose capacity to engage in global health diplomacy.

WHO is working worldwide to achieve its triple billion goal: to ensure that a billion more people have universal health coverage, that a billion more people are protected from health emergencies, and that a billion more people enjoy better health and well-being. The COVID-19 pandemic is a major obstacle toward achieving these goals, and the world's most vulnerable populations have faced the biggest threats of the pandemic. Refugees and migrants, as well as impoverished persons living in crowded, unsanitary conditions, often lack access to health care and other resources that WHO is working to ensure. COVID-19 exemplifies why more resilient health systems are so badly needed, and should stimulate countries' future investments in global health. Yet at this moment when global solidarity is necessary to overcome the common enemy of COVID-19, the loss of U.S. funding and support for WHO places the world at far greater risk.

Presidential Authority to Withdraw From WHO

The debate about the president's authority to withdraw from treaties stems from the U.S. Constitution's silence on the matter, stipulating that two-thirds of Senators must agree to ratify a treaty, but stating nothing on withdrawal. Over the years, even how a treaty is defined and adopted has shifted away from the Constitution's apparent hard-and-fast rule, with many international agreements adopted through other procedures. The WHO Constitution was adopted through a joint congressional resolution, akin to regular legislation. Critically, foreign relations is an area where, even apart from their joint role in treaty-making, Congress and the president both have constitutional powers, including the former's power to declare war, regulate the armed forces, and regulate commerce among nations, and the latter's role as commander-in-chief and authority to appoint and receive ambassadors.

A common misperception is that the president has the authority to unilaterally withdraw from treaties, due to a history of such actions going unchallenged by Congress over the past century, and the 1979 Supreme Court case, *Goldwater v. Carter* (Bradley et al., 2017; *Goldwater v. Carter*, 1979). In that case, the Court, in a result agreed to by six justices, required the lower court to dismiss a challenge to President Carter's unilateral decision to terminate a mutual defense treaty with Taiwan. Four of the justices would have dismissed the case as a non-justiciable political question. In his concurrence, Justice Powell agreed with the result, but expressly rejected the notion that the Court had no role: "the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another" (*Goldwater v. Carter*, 1979).

Meanwhile, not a single justice stated that the Constitution gives the president a general power to unilaterally withdraw from treaties. The plurality opinion of four justices expressly recognized that different procedures could be appropriate for different treaties. Two dissenters would have heard the case. And in a separate dissent, Justice Brennan, would have upheld the president's power to terminate the treaty based on the narrow grounds that President Carter's decision to terminate the treaty was directly linked to the "President's well-established authority to recognize, and withdraw recognition from, foreign governments" (*Goldwater v. Carter*, 1979). Yet even if the president has the established authority to unilaterally withdraw recognition from a foreign government, this is not equivalent to withdrawing from a multilateral treaty with 194 parties on an international organization devoted to global health.

As a matter of constitutional design, it is highly questionable whether the president may unilaterally withdraw from a treaty that the United States enters into with congressional action. The best understanding of treaty withdrawal under the U.S. Constitution is a "mirror principle," that the same process for entering the treaty is necessary for withdrawing from it (Koh, 2018). And President Harry Truman did not enter the United States into WHO by his action alone. Rather, the United States joined only after a joint congressional resolution, signed into law by President Truman in 1948, that approved U.S. entrance into WHO — a congressional-executive agreement. Accordingly, under this principle, only another resolution from both houses of Congress, signed by the President, could withdraw the United States from WHO.

Even without adopting the mirror principle, the specifics of the 1948 joint resolution militate against unilateral withdrawal. Since WHO's Constitution is silent on whether or how member states could withdraw from the organization, the joint resolution specified that the United States could withdraw from WHO, but only under two conditions (Constitution of the World Health Organization, 1948). First, the United States would have to provide WHO one year's notice, and second, the United States would have to meet its financial obligations for WHO's current fiscal year.

The one-year notice condition also indicates that in this domain of shared and contested authority, foreign relations, withdrawing from WHO is not the type of action that is filled by the president's

role as the nation's chief diplomat, which may require — as the circuit court recognized in *Goldwater v. Carter* — “immediate action” (*Goldwater v. Carter*, 1979). Congress constrained the president such that the United States cannot immediately withdraw from WHO. Immediate action, in this case, is not an option.

The requirement on meeting U.S. financial obligations for WHO's current fiscal year is one that necessitates congressional action, with Congress's sole power to authorize and appropriate funding. Congress, therefore, clearly intended to retain its role in any decision to withdraw from WHO. And as Supreme Court Justice Robert Jackson explained in his classic concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb” (*Youngstown Sheet & Tube Co. v. Sawyer*, 1952). Here, the president would be acting against the implied will of Congress.

Notably, this was not the case with respect to the treaty at issue in *Goldwater v. Carter*. When the Senate approved that treaty, it extensively debated — and ultimately did not vote on — a resolution to require the Senate to approve treaty termination (Hurd, 2018). Unlike Congress's approval of U.S. entrance into the WHO, then, the Senate in that case was on record of at least implicitly acceding unilateral termination authority to the president.

President Trump has himself, without challenge from Congress (thus far), withdrawn or begun the process of withdrawing from two arms control treaties, the Intermediate Nuclear Forces (INF) Treaty, and the Open Skies Treaty. In approving the INF Treaty, the Senate was silent on the withdrawal process (Pompeo, 2019). However, in the 2019 National Defense Authorization Act, Congress stated that the United States was “legally entitled to suspend the operation of the INF Treaty,” on the belief that Russia had materially breached the treaty, prospectively endorsing administration action to step back from the treaty's operation. This express statement on suspension but not withdrawal could be read that Congress supported suspension but opposed withdrawal. However, Congress neither challenged the president legislatively or in court.

Anticipating the possibility of the president seeking to withdraw from the Open Skies Treaty, Congress set procedural requirements in recent defense legislation for the Secretaries of Defense and State to notify Congress of its intent to withdraw before notifying other treaty parties (United States Participation in Open Skies Treaty, 2019). The administration failed to comply with these requirements. Still, unlike for exiting the WHO treaty, Congress did not suggest a role for itself in approving the withdrawal itself; it merely required prior notification, and the Senate had been silent on its role in withdrawal when ratifying the treaty (U.S. Dept. of Defense, 2020).

The most significant court case since *Goldwater v. Carter* on presidential unilateral treaty withdrawal authority was a DC District Court case, *Kucinich v. Bush*, where 32 members of Congress challenged President George W. Bush's unilateral authority to withdraw from the Anti-Ballistic Missile (ABM) Treaty with Russia (*Kucinich v. Bush*, 2002). The court dismissed the case, holding that individual members of Congress lacked standing to bring the case,

and that the termination question was a political one, and thus nonjusticiable. The judge found the political question reasoning particularly apt because of the nature of the treaty at hand — national defense, representing a potentially key difference with WHO withdrawal. Also, the members of Congress had waited until two days before the withdrawal from the ABM Treaty took effect; Russia may have acted based on this intent in the meantime.

There has been one other key legal development. In the 2012 case *Zivotofsky v. Clinton*, the Supreme Court significantly narrowed the political question doctrine with a two-part test: “[1] where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it.’” (*Zivotofsky v. Clinton*, 2012). Neither condition would be met in the case of WHO withdrawal. The U.S. Constitution does not clearly commit withdrawing from treaties to any branch of government; it is silent on the matter. And there is no special discovery required — this is a straightforward question of constitutional interpretation — or obstacles to the Court's established standards. Accordingly, with the political question not applying, courts should be receptive to a congressional challenge of the president's action.

From all of this, we can also conclude that as a legal matter, the Court has never supported the unilateral prerogative of the president to withdraw from treaties as a general matter. The constitutional authority may be very different for a treaty that touches on a well-recognized presidential power — like recognizing foreign governments — than a multilateral global health treaty. Perhaps most significantly, the conditions that Congress placed on the WHO withdrawal process — implicating its own core power of the purse — point to the unconstitutionality, in this case, of a unilateral presidential withdrawal.

The two conditions that Congress included have two other major implications. First and most significantly, the one-year notice period means that Joe Biden may well be president before the withdrawal could take effect. If Congress and the courts have not already blocked President Trump's move, Biden could, and undoubtedly would withdraw the notice of withdrawal.

And second, even apart from his lack of authority to act unilaterally, the president could not simultaneously withdraw the United States from WHO while withholding any further funding. The United States pays WHO an annual mandatory contribution of about \$120 million per year. Congress has appropriated the money fiscal year 2020, and about half has already been paid. The full amount must be paid as a condition of withdrawal. So must the 15% of the U.S. mandatory balance for fiscal year 2019 still outstanding, and any further money the U.S. government owes WHO, which may be more still. Indeed, the joint resolution refers to the organization's fiscal year, and WHO fiscal years are calendar years, not the U.S. cycle of October to September. The United States would, therefore, have a further balance for 2020, as well as all of 2021, the year that withdrawal would take effect.

Further, when Congress appropriates funds for a given purpose, the president does not have the power to use those funds for another purpose, or forgo using the funds at all. Such actions are

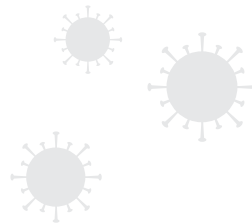
specifically prohibited under the Impoundment Control Act of 1974, and would require express congressional approval.

WHO needs to be strengthened to improve global health security and carry out its broad mandate to advance the right of everyone to the highest attainable standard of health. Congress should not let this administration's decision, undermining both global health and its own authority, go unchallenged. 🦠

Recommendations for Action

Federal recommendations:

- Congress should immediately hold hearings on the legal authority and potential impacts of the president's decision to withdraw from WHO.
- Congress should pass a joint resolution that 1) formally disapproves of President Trump withdrawing from WHO, establishing the clear conflict with the executive that would provide the grounding for a legal challenge, 2) requires continued participation in WHO, and 3) affirms its interpretation of the 1948 joint resolution: that WHO withdrawal would require joint executive and congressional action.
- If the president vetoes the resolution, Congress could override the veto. Alternatively, Congress could pass a concurrent resolution, which does not require presidential signature, though lacks force of law. Either action would bolster Congress's position that a unilateral withdraw violates separation of powers principles.
- Congress should continue funding WHO.
- In appropriating mandatory contributions for 2020 and 2021, Congress should clarify that the funds are being appropriated with intent for the U.S. to remain in the WHO, and not to meet a precondition of withdrawal. This would preclude the possibility of the Trump administration asserting that Congress acquiesced to WHO withdrawal by failing to wield its funding power to block withdrawal by preventing the funding precondition from being met.
- Congress should appropriate voluntary contributions to WHO. As long as Congress does not provide the administration flexibility in how the funds are to be used, the president would have no legal choice under the Impoundment Act but to proceed with providing WHO these funds.
- Congress should pass a resolution to authorize litigation against the president to block withdrawal.



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