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Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement

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Summary

The legal procedure through which the United States withdraws from treaties and other international agreements has been the subject of long-standing debate between the legislative and executive branches. Recently, questions concerning the role of Congress in the withdrawal process have arisen in response to statements made by President Donald J. Trump that he may consider withdrawing the United States from certain high-profile international commitments. This report outlines the legal framework for withdrawal from international agreements under domestic and international law, and it examines legal issues related to the potential termination of two agreements that may be of significance to the 115th Congress: the Paris Agreement on climate change and the Joint Comprehensive Plan of Action (JCPOA) related to Iran's nuclear program.

Although the Constitution sets forth a definite procedure whereby the Executive has the power to make treaties with the advice and consent of the Senate, it is silent as to how treaties may be terminated. Moreover, not all agreements between the United States and foreign states are made through Senate-approved, ratified treaties. The President also enters into executive agreements, which do not receive the Senate's advice and consent, and "political commitments," which are not binding under domestic or international law. The legal procedure for withdrawal often depends on the type of agreement at issue, and the process may be further complicated when Congress has enacted legislation implementing the agreement into domestic law.

Historical practice suggests that, because the Obama Administration considered the Paris Agreement to be an executive agreement that did not require the Senate's advice and consent, a future Executive may unilaterally withdraw from it without seeking approval from the legislative branch. By its terms, however, the Paris Agreement does not allow parties to submit a notice of withdrawal until November 2019. Should a future Executive seek a more expedient method of exit, withdrawal from the 1992 United Nations Framework Convention on Climate Change (UNFCCC)—the parent treaty to the Paris Agreement—would also terminate the United States' participation in the subsidiary Paris Agreement. Because the UNFCCC received the Senate's advice and consent in 1992, an effort by the Executive to terminate that treaty unilaterally could invoke the historical and largely unresolved debate over the role of Congress in treaty termination.

The Obama Administration treated the JCPOA as a political commitment that is not legally binding. To the extent this understanding is correct, there is no legal prohibition on the President from withdrawing from the plan of action. It is worth noting that the JCPOA was "endorsed" by U.N. Security Council Resolution 2231, and there is disagreement among observers as to whether this resolution may have converted at least some of the voluntary commitments in the JCPOA into obligations that are binding under international law. Both the JCPOA and Resolution 2231 contain what has been called a "snapback" mechanism that may allow the United States to cause the Security Council to reinstate its prior sanctions that had been imposed on Iran.

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Introduction

Renewed attention to the role of Congress in the termination of treaties and other international agreements has arisen following statements by President Donald Trump that he may consider withdrawing the United States from certain high-profile agreements.¹ This report examines the legal framework for withdrawal from international agreements, and it provides a specific focus on two agreements that may be of interest to the 115th Congress: the Paris Agreement on climate change² and the Joint Comprehensive Plan of Action (JCPOA) related to Iran’s nuclear program.³

Although the Constitution sets forth a definite procedure whereby the President has the power to make treaties with the advice and consent of the Senate,⁴ it is silent as to how treaties may be terminated. Moreover, not all agreements between the United States and foreign nations are made through Senate-approved, ratified treaties. The President commonly enters into binding executive agreements, which do not receive the Senate’s advice and consent, and “political commitments,” which are not legally binding, but may carry significant political weight.⁵ Executive agreements and political commitments are not mentioned in the Constitution, and the legal procedure for withdrawal may differ depending on the precise nature of the agreement.

Treaties and other international agreements also operate in dual international and domestic contexts.⁶ In the international context, international agreements constitute binding compacts between nations, and they create rights and obligations that sovereign states owe to one another under international law.⁷ In this regard, international law creates a distinct set of rules governing the way in which sovereign states enter into—and withdraw from—international agreements.⁸

¹ See, e.g., Donald J. Trump Remarks at American Israel Public Affairs Committee (Mar. 21, 2016), *available at* <https://www.donaldjtrump.com/media/donald-j-trump-remarks-at-aipac> (statement of then-candidate Donald Trump) (“My number one priority is to dismantle the ... [nuclear] deal with Iran.”); Donald J. Trump, An America First Energy Plan (May 26, 2016), <https://www.donaldjtrump.com/press-releases/an-america-first-energy-plan> (statement of then-candidate Donald Trump) (“We’re going to cancel the Paris Climate Agreement and stop all payments of U.S. tax dollars to U.N. global warming programs.”).

² Conference of Parties No. 21, United Nations Framework Convention on Climate Change, Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016), annex 1, *available at* <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [hereinafter, “Paris Agreement”].

³ Joint Comprehensive Plan of Action, July 14, 2015, *available at* <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> [hereinafter, “JCPOA”].

⁴ U.S. CONST., art. II, §2, cl. 2 (“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....”).

⁵ See *infra* § Forms of International Agreements and Commitments.

⁶ See, e.g., *Medellin v. Texas*, 552 U.S. 491, 504-06 (2008) (discussing the distinction between the binding effect of treaties under international law versus domestic law); PETER MALANCZUK, ALKHURT’S MODERN INTRODUCTION TO INTERNATIONAL LAW 64-71 (7th ed. 1997) (analyzing the interplay between international law and domestic or “municipal” legal systems).

⁷ See *Medellin*, 552 U.S. at 505 (“A treaty is, of course, ‘primarily a compact between independent nations.’”) (quoting *Head Money Case*, 112 U.S. 580, 598 (1884)); JEFFREY L. DUNOFF, ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED-APPROACH 37-38 (4th ed. 2015) (“States must enter into treaties ... to obtain legally binding commitments from other states....”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, §301(1) [hereinafter, “RESTATEMENT”] (defining “international agreement” as any agreement between two or more states or international organizations that is “intended to be legally binding and is governed by international law”). The Restatement is not binding law, but is considered by many to be persuasive authority. See WINER ET AL., INTERNATIONAL LAW LEGAL RESEARCH 242-43 (2013).

⁸ See Vienna Convention on the Law of Treaties, arts. 7-17, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter “Vienna Convention”] (defining the rules under international law in which a state may consent to be bound by a treaty). The United States has not ratified the Vienna Convention, but it is considered in many respects to reflect (continued...)

Those procedures are intended to apply to all nations, but they may not account for the distinct constitutional and statutory requirements of the domestic law of the United States.⁹ Consequently, the legal regime governing withdrawal under domestic law may differ in meaningful ways from the procedure for withdrawal under international law. And the domestic withdrawal process may be further complicated if Congress has enacted legislation implementing an international agreement into the domestic law of the United States.¹⁰

In sum, the legal procedure for termination of or withdrawal from¹¹ treaties and other international agreements depends on three main features: (1) the type of agreement at issue; (2) whether withdrawal is analyzed under international law or domestic law; and (3) whether Congress has enacted implementing legislation. These procedures and considerations are explored below and applied to the Paris Agreement and the JCPOA.

Forms of International Agreements and Commitments

For purposes of U.S. law and practice, agreements between the United States and foreign nations may take the form of treaties, executive agreements, or nonlegal agreements, which involve the making of so-called “political commitments.”¹² Under the domestic law of the United States,¹³ a

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customary international law. *See* U.S. Dep’t of State, Vienna Convention on the Law of Treaties, <http://www.state.gov/s/l/treaty/faqs/70139.htm>. *See also* *De Los Santos Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008) (“Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it ‘as an authoritative guide to the customary international law of treaties,’ insofar as it reflects actual state practices.”) (quoting *Avero Belg. Ins. v. Am. Airlines, Inc.*, 423 F.3d 73, 80 n.8 (2d Cir. 2005)); *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423 (2d Cir. 2001) (“[W]e rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties....”) (internal citations omitted). *But see* RESTATEMENT, *supra* note 5, §208 reporters’ n. 4 (“[T]he [Vienna] Convention has not been ratified by the United States and, while purporting to be a codification of preexisting customary law, it is not in all respects in accord with the understanding and the practice of the United States and of some other states.”).

⁹ *See* CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S.Rept. 192-206 (2001) [hereinafter “TREATIES AND OTHER INTERNATIONAL AGREEMENTS”] (surveying the principles related to withdrawal from international agreements under international law and the domestic law of the United States); Int’l Law Comm’n, Draft Articles on the Law of Treaties with Commentaries, 1966, arts. 2 cmt. (9) & 11 cmt. (1), in II YEARBOOK OF THE INT’L L. COMM’N, 1966, at 187, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf [hereinafter, “Commentary on the Law of Treaties”] (discussing differences between international and domestic law of treaty ratification and noting that “the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.”). For a brief discussion on the history and development of the Commentary on the Law of Treaties, see MALANCZUK, *supra* note 6, at 130.

¹⁰ *See infra* § The Effect of Implementing Legislation.

¹¹ This report addresses both *withdrawal from* and *termination of* international agreements. Withdrawal generally occurs in the context of a multilateral agreement in which one party may withdraw from the agreement, but the agreement remains in place for the remaining parties. Termination generally occurs in the context of a bilateral agreement in which the withdrawal of a single party effectively terminates the agreement. For purposes of this report, the underlying legal framework is generally the same for both events, and the terms may be used interchangeably.

¹² For further detail of various types of international commitments and their relationship with U.S. law, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia.

¹³ The term “treaty” has a broader meaning under international law than under domestic law. Under international law, “treaty” refers to any binding international agreement. Vienna Convention, art. 1(a). Under domestic law, “treaty” signifies only those binding international agreements that have received the advice and consent of the Senate. *See* RESTATEMENT, *supra* note 5, §303(1).

treaty is an agreement between the United States and another state that does not enter into force until it receives the advice and consent of a two-thirds majority of the Senate and is subsequently ratified by the President.¹⁴ The great majority of international agreements that the United States enters into, however, fall into the distinct and much larger category of executive agreements.¹⁵ Although they are intended to be binding, executive agreements do not receive the advice and consent of the Senate, but rather are entered into by the President based upon a source of authority other than the Treaty Clause in Article II, Section 2 of the Constitution.¹⁶ In the case of *congressional-executive agreements*, the domestic authority is derived from an existing or subsequently enacted statute.¹⁷ The President also enters into *executive agreements made pursuant to a treaty* based upon authority created in prior Senate-approved, ratified treaties.¹⁸ In other cases, the President enters into *sole executive agreements* based upon a claim of independent presidential power in the Constitution.¹⁹

In addition to treaties and executive agreements, the United States makes nonlegal agreements that often involve the making of so-called *political commitments*.²⁰ While political commitments are not intended to be binding under domestic or international law,²¹ they may nonetheless carry moral and political weight and other significant incentives for compliance.²²

¹⁴ See RESTATEMENT, *supra* note 5, §303(1).

¹⁵ Although not mentioned expressly in the Constitution, the executive branch has entered into executive agreements on a variety of subjects without the advice and consent of the Senate since the early years of the Republic. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (discussing “executive agreements to settle claims of American nationals against foreign governments” dating back to “as early as 1799”); L. HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 219 (2d ed. 1996) (“Presidents ... have made many thousands of [executive] agreements, differing in formality and importance, on matters running the gamut of U.S. foreign relations.”). Over the history of the Republic, it appears that well over 90% of international legal agreements concluded by the United States have taken a form other than a treaty. See CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, *supra* note 12, at 4-5.

¹⁶ U.S. CONST., art. II, §2, cl. 2 (“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....”).

¹⁷ See, e.g., Foreign Assistance Act of 1961, P.L. 87-195 (codified as amended, 22 U.S.C. §2151 *et seq.*) (authorizing the President to furnish assistance to foreign nations “on such terms and conditions as he may determine, to any friendly country....”). In some cases, the President enters into congressional-executive agreements based on existing statutes that do not contain an explicit legislative authorization to allow an international agreement, but in which the authorization is implied. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 78-86 (discussing examples congressional-executive agreements).

¹⁸ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 86.

¹⁹ Examples of sole executive agreements include the Litvinov Assignment, under which the Soviet Union purported to assign to the United States claims to American assets in Russia that had previously been nationalized by the Soviet Union, and the 1973 Vietnam Peace Agreement ending the United States’ participation in the war in Vietnam. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 88.

²⁰ See *id.* at 58-64 (discussing various types of nonlegal agreements and their status under domestic and international law). See generally Duncan B. Hollis and Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507 (2009) (discussing the origins and constitutional implications of the practice of making political commitments).

²¹ See Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT’L L.J. 1, 11 (2016) (“[P]olitical commitments carry no international law obligation[.]”).

²² See RESTATEMENT, *supra* note 5, §301 reporters n. 2 (“[T]he political inducements to comply with such [nonbinding] agreements may be strong and the consequences of noncompliance serious.”).

Key Terminology

International Agreement: A blanket term used to refer to any agreement between the United States and a foreign state that is legally binding under international law.²³

Treaty: An international agreement that receives the advice and consent of the Senate and is ratified by the President.²⁴

Executive Agreement: An international agreement that is binding, but which the President enters into without receiving the advice and consent of the Senate.²⁵

Congressional-Executive Agreement: An executive agreement for which domestic legal authority derives from a preexisting or subsequently enacted statute.²⁶

Executive Agreement Made Pursuant to a Treaty: An executive agreement based on the President's authority in a treaty that was previously approved by the Senate.²⁷

Sole Executive Agreement: An executive agreement based on the President's constitutional powers.²⁸

Nonlegal Agreements and Political Commitments: An agreement or a provision in an agreement between the United States and a foreign entity that is not intended to be binding under international law, but may carry nonlegal incentives for compliance.²⁹

Withdrawal Under International Law

Under international law, a nation may withdraw from any binding international agreement either in conformity with the provisions of the agreement—if the agreement permits withdrawal—or with the consent of all parties.³⁰ Most modern international agreements contain provisions allowing and specifying the conditions of withdrawal, and many require a period of advance notice before withdrawal becomes effective.³¹ Even when an agreement does not contain an express withdrawal clause, international law still permits withdrawal if the parties intended to allow a right of withdrawal or if there is an implied right to do so in the text of the agreement.³² In those cases, under the Vienna Convention on the Law of Treaties (Vienna Convention),³³ the withdrawing party must give 12 months' notice of its intent to depart from the agreement.³⁴ In

²³ RESTATEMENT, *supra* note 5, §301(1).

²⁴ For more on variations of the definition of the term “treaty,” see *supra* note 13.

²⁵ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 76.

²⁶ See *supra* note 17.

²⁷ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 86; see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, *supra* note 12, at 5.

²⁸ See *supra* note 19.

²⁹ See *supra* notes 20-22.

³⁰ Vienna Convention, art. 54; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 192. Some rules of international law known as *jus cogens* are recognized by the international community as peremptory, permitting no derogation. RESTATEMENT, *supra* note 5, §102 cmt. k. These rules generally prevail regardless of the content or status of international agreements, *id.*, and thus would not be affected by withdrawal.

³¹ See, e.g., Paris Agreement, art. 28; United Nations Framework Convention on Climate Change, art. 25, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force 21 March 1994) [hereinafter “UNFCCC”]. See also Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1597-98 (2005) (analyzing denunciation and withdrawal clauses in existing treaties).

³² TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 192.

³³ Although the United States has not ratified the Vienna Convention, it has been described as the “most widely recognized international law source on current treaty law practice.” See *id.* at 63. As described in note 8, *supra*, the Vienna Convention is also understood to reflect customary international law in certain respects.

³⁴ Vienna Convention, art. 56.

addition, certain superseding events, such as a material breach by one party or a fundamental change in circumstances, may give rise to a right to withdraw.³⁵

Under the Vienna Convention, treaties and other binding international agreements may be terminated through

[a]ny act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty ... through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.³⁶

Under this rule, a notice of withdrawal issued by the President (i.e., the “Head of State” for the United States) would effectively withdraw the United States from the international agreement as a matter of international law, providing such notice complied with applicable treaty withdrawal provisions.³⁷ In this regard, the withdrawal process under international law may not account for the unique constitutional and separation of powers principles related to withdrawal under U.S. domestic law, discussed below.³⁸

Political commitments are not legally binding between nations, and thus a party can withdraw at any time without violating international law³⁹ regardless of whether the commitment contains a withdrawal clause.⁴⁰ Although such withdrawal may not constitute a legal infraction, the withdrawing party still may face the possibility of political consequences and responsive actions from its international counterparts.⁴¹

Withdrawal Under Domestic Law

Under domestic law, it is generally accepted among scholars that the Executive, by virtue of its role as the “sole organ” of the government charged with making official communications with foreign states, is responsible for communicating the United States’ intention to withdraw from international agreements and political commitments.⁴² The degree to which the Constitution

³⁵ See *id.*, arts. 60-64; MALANCZUK, *supra* note 6, at 142-46 (outlining the events which may give rise to a right to terminate a treaty under international law).

³⁶ Vienna Convention, art. 67.

³⁷ See *id.*

³⁸ See *infra* § Withdrawal Under Domestic Law.

³⁹ TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 59 (stating that a “‘political’ undertaking is not governed by international law and there are no applicable rules pertaining to compliance, modification, or withdrawal[.]” and therefore a party may “extricate[] itself from its ‘political’ undertaking ... without legal penalty[.]”) (quoting DEP’T OF STATE, ARTICLE-BY-ARTICLE ANALYSIS OF START DOCUMENTS 352 (1991), reprinted in S. Treaty Doc. No. 20, 102d Cong., 1086 (1991)); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 300 (1977) (“[A] nonbinding agreement, however seriously taken by the parties, does not engage their legal responsibility.”). *But see* Nuclear Test Case (N.Z. v. Fr.), 174 I.C.J. 457 (Dec. 20) (holding that a series of unilateral declarations by France concerning its intention to refrain from certain nuclear tests in the South Pacific were legally binding).

⁴⁰ Political commitments may have, but often lack, express withdrawal provisions. See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 791 (2010) (discussing exit provisions in certain political commitments).

⁴¹ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 59.

⁴² See *id.* at 199 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); WESTEL WOODBURY WILLOUGHBY, 1 CONSTITUTIONAL LAW OF THE UNITED STATES 587 (1929)) (stating that it is a “noncontroversial observation that, “as the official spokesperson with other governments, the President is the person who communicates the notice of impending termination” of international agreements); HENKIN, *supra* note 17, at 42 (“That the President is (continued...)”).

requires Congress or the Senate to participate in the decision to withdraw, however, has been the source of historical debate and differs significantly depending on the type of agreement or commitment.

Withdrawal from Executive Agreements and Political Commitments Under Domestic Law

In the case of executive agreements, the President's authority to terminate such agreements unilaterally "has not been seriously questioned in the past."⁴³ Based on past practices, it appears to be generally accepted that, when the President has independent authority to enter into an executive agreement, the President may also independently terminate the agreement without congressional or senatorial approval.⁴⁴ Thus, observers appear to agree that, when the Constitution affords the President authority to enter into sole executive agreements, the President may also unilaterally terminate those agreements.⁴⁵ This same principle may also apply to political commitments: to the extent the President has the authority to make nonbinding commitments without the assent of the Senate or Congress,⁴⁶ the President may also unilaterally withdraw from those commitments.⁴⁷

For congressional-executive agreements and executive agreements made pursuant to treaties, the mode of termination may be dictated by the underlying treaty or statute on which the agreement is based.⁴⁸ For example, in the case of executive agreements made pursuant to a treaty, the Senate

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the sole organ of official communication by and to the United States has not been questioned and is not a source of significant controversy."); Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 243 (2001) ("Even the most committed advocate of congressional primacy usually admits that the President is "sole organ of official communication in foreign affairs."); Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 782 n.39 (2014) (citing historical sources of the "sole organ" role of the Executive from the founding era through the U.S. Supreme Court decision in *Curtiss-Wright*). For the Supreme Court's latest description of the President's role in communicating with foreign governments and the contours of presidential power in the field of foreign affairs in general, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("The President does have a unique role in communicating with foreign governments.... But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.").

⁴³ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 208.

⁴⁴ See *id.* at 172; RESTATEMENT, *supra* note 5, §339 reporter's note 2.

⁴⁵ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 173-74 (stating that the conclusion that the President has the authority to terminate executive agreements unilaterally "seems invariably true in the case of executive agreements concluded by virtue of exclusive Presidential authority"); RESTATEMENT, *supra* note 5, §339 reporter's note 2 ("No one has questioned the President's authority to terminate sole executive agreements.").

⁴⁶ For a discussion of competing positions related to the Executive's constitutional authority to enter into political commitments, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, *supra* note 12, at 9-12.

⁴⁷ See, e.g., Ryan Harrington, *A Remedy for Congressional Exclusion from Contemporary International Agreement Making*, 118 W. VA. L. REV. 1211, 1226 (2016) ("A political commitment also provides the executive branch with the ability to terminate the agreement unilaterally or to deviate from it without consequences."); Julian Ku, *President Rubio/Walker/Trump/Whoever Can Indeed Terminate the Iran Deal on "Day One,"* OPINIO JURIS (Sep. 10, 2015), <http://opiniojuris.org/2015/09/10/president-rubiowalkertrumpwhoever-can-indeed-terminate-the-iran-deal-on-day-one/> (arguing that, because the JCPOA is a nonbinding political commitment, the President can unilaterally terminate the arrangement).

⁴⁸ See RESTATEMENT, *supra* note 5, §339 cmt. a; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 174, 208; Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 926 (1986). See also Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Law Making in the United States*, 117 YALE L.J. 1236, 1362 n. 268 (2008) ("The President may withdraw from ... a congressional-executive agreement unilaterally (continued...)

may condition its consent to the underlying treaty on a requirement that the President not enter into or terminate executive agreements under the authority of the treaty without senatorial or congressional approval.⁴⁹ In the case of congressional-executive agreements, Congress may dictate how termination occurs or how it affects U.S. domestic law.⁵⁰ At least one court has held that, to the extent Congress has enumerated constitutional powers to legislate on an issue, it may also enact legislation directing the executive branch to terminate an executive agreement that implicates its enumerated powers.⁵¹ In most cases, however, the President has unilaterally terminated executive agreements, and the Executive's authority has not been questioned by Members of Congress or in judicial challenges, at least in circumstances where such termination is not in contravention of a legislative act.⁵²

Withdrawal from Treaties Under Domestic Law

Unlike the process of terminating executive agreements, which has not generated significant opposition from Congress, the constitutional requirements for the termination of Senate-approved, ratified treaties have been the subject of occasional debate between the legislative and executive branches. The Constitution sets forth a definite procedure for the President to make treaties with the advice and consent of the Senate,⁵³ but it does not describe how they should be terminated.⁵⁴

Some commentators and executive branch attorneys have argued that the President possesses broad powers to withdraw unilaterally from treaties based on Supreme Court case law describing the President as the “sole organ” of the nation in matters related to foreign affairs⁵⁵ and pursuant

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unless Congress has expressly limited the President's power to withdraw through ... authorizing legislation[.]”.

⁴⁹ See RESTATEMENT, *supra* note 5, §339 cmt. a.

⁵⁰ For example, Section 125 of the Free Trade Act of 1974 applies to a number of international trade agreements and states: “Duties or other import restrictions required or appropriate to carry out any trade agreement entered into pursuant to this chapter ... shall not be affected by any termination, in whole or in part, of such agreement or by the withdrawal of the United States from such agreement and shall remain in effect after the date of such termination or withdrawal for 1 year, unless” certain exceptions apply. 19 U.S.C. §2135(e). For answers to frequently asked questions on withdrawal from the North American Free Trade Agreement and other international trade agreements, see CRS Report R44630, *U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions*, by Brandon J. Murrill.

⁵¹ In the Comprehensive Anti-Apartheid Act of 1986 (Anti-Apartheid Act), which was passed over President Reagan's veto, Congress directed the Secretary of State to terminate an air services agreement with South Africa. P.L. 99-440, §306(b)(1), 313, 100 Stat. 1086, 1100 (“The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between their Respective Territories...”). In a subsequent legal challenge, the U.S. Court of Appeals for the D.C. Circuit held that Congress had the power to enact this provision by virtue of its constitutional powers to “regulate Commerce with foreign Nations” and to “make all Laws [that] shall be necessary and proper for carrying into Execution [such] Powers.” See *South African Airways v. Dole*, 817 F.2d 118, 126 (1987) (quoting U.S. CONST., art. I, §8), *cert denied*, 484 U.S. 896 (1987).

⁵² TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 173-74 & 208.

⁵³ See U.S. CONST., art. II, §2, cl. 2.

⁵⁴ Scholars have also noted that the Framers never directly addressed the power to terminate treaties in the Federalist Papers, the Constitutional Convention, or the state ratifying conventions. See, e.g. James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 CONN. J. INT'L L. 123, 132 (1999).

⁵⁵ See, e.g., RESTATEMENT, *supra* note 5, §339 cmt. a (stating that the President has the authority to terminate treaties pursuant to the presidential powers related to foreign affairs as described in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); John C. Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2242 (1999) (“[W]ith treaty formation, the President retains (continued...)”).

to the “executive Power” conveyed to the President in Article II, Section 1 of the Constitution.⁵⁶ Other proponents of executive authority have likened the power to withdraw from treaties to the President’s power to remove executive officers.⁵⁷ Although appointment of certain executive officers requires senatorial advice and consent, courts have held that the President has some unilateral authority to remove those officers.⁵⁸ In the same vein, some argue that the President may unilaterally terminate treaties even though those treaties were formed with the consent of the Senate.⁵⁹ Since the turn of the 20th century, officials in the executive branch have adopted variations of these arguments and consistently taken the position that domestic law permits the President to terminate or withdraw from treaties without receiving express approval from the legislative branch,⁶⁰ and some in the executive branch have described treaty termination as a plenary power of the President that is not shared with the legislative branch.⁶¹

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this authority “due to his preeminent position in foreign affairs and his structural superiority in managing international relations.”); Bradley, *supra* note 42, at 782 (discussing the application of the President’s role as the “sole organ” of communications to the concept of treaty termination); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat’l Sec. Council, Authority of the President to Suspend Certain Provisions of the ABM Treaty 7 (Nov. 15, 2001) [hereinafter “Yoo & Delahunty Memorandum”], available at <http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf> (“The President’s power to terminate treaties must reside in the President as a necessary corollary to the exercise of the President’s other plenary foreign affairs powers.”). The Office of Legal Counsel (OLC) in the Department of Justice later disavowed unrelated portions of the Yoo & Delahunty Memorandum, but it continued to maintain that the President may unilaterally suspend a treaty where suspension is permitted “by the terms of the treaty or under recognized principles of international law.” See Memorandum of Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 8-9 (Jan. 15, 2009), available at <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf>.

⁵⁶ See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 158 (2007) (“[I]n eighteenth-century terms ‘executive’ power included general power over treaties—including, of course, the decision whether or not to withdraw.”); Bradley, *supra* note 42, at 780 (analyzing the so-called “Vesting Clause Thesis” and its application to treaty withdrawal); Yoo & Delahunty Memorandum, *supra* note 56, at 3-13 (stating that the “treaty power is fundamentally executive in nature”).

⁵⁷ See, e.g., DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 94 (1986); Yoo & Delahunty Memorandum, *supra* note 56, at 6; Bradley, *supra* note 42, at 781-82.

⁵⁸ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary.”).

⁵⁹ See sources cited *supra* note 57.

⁶⁰ See Memorandum from James Brown Scott, Solicitor, U.S. Dep’t of State 1-2 (June 12, 1909) (on file with author) (“A third method of terminating a treaty is by notice given by the President upon his own initiative without a resolution of the Senate or the joint resolution of the Congress”); Memorandum from R. Walton Moore, Acting U.S. Sec’y of State, to President Roosevelt 5 (Nov. 9, 1936) (on file with author) (“I have no doubt that you may authorize the giving of notice to Italy of the intention to terminate the treaty of 1871 without seeking the advice and consent of the Senate or the approval of Congress to such action.”); Memorandum from William Whittington, Termination of Treaties: International Rules and Internal United States Procedure 5 (Feb. 10, 1958) (on file with author) (“While the practice has varied in the past, it is now generally considered that, as to a self-executing treaty ... it is proper for the Executive acting alone to take the action necessary to terminate or denounce the treaty.”); Memorandum from Herbert J. Hansell, Legal Adviser, U.S. Dep’t of State, to Cyrus R. Vance, U.S. Sec’y of State, President’s Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty (Dec. 15, 1978) [hereinafter, “Hansell Memorandum”], reprinted in S. Comm. on Foreign Relations, 95th Cong., Termination of Treaties: The Constitutional Allocation of Power 395 (Comm. Print 1978) (“This memorandum confirms my advice to you that the President has the authority under the Constitution to decide whether the United States shall give the notice of termination ... without Congressional or Senate action.”); Yoo & Delahunty Memorandum, *supra* note 56, at 3-13 (concluding that the Constitution vests the President with authority to terminate or suspend treaties unilaterally).

⁶¹ See, e.g., Yoo & Delahunty Memorandum, *supra* note 56, at 7; *Treaty Termination: Hearings Before the S. Comm. on* (continued...)

Not all courts and commentators, however, agree that the President possesses this power, or at least contend that the power is shared between the political branches and that the President cannot terminate a treaty in contravention of the will of Congress or the Senate.⁶² Some have argued that the termination of treaties is analogous to the termination of federal statutes.⁶³ Because domestic statutes may be terminated only through the same process in which they were enacted⁶⁴—i.e., through a majority vote in both houses and with the signature of the President or veto override—these commentators contend that treaties must be terminated through a procedure that is symmetrical to their making and that includes, at a minimum, the Senate’s consent.⁶⁵ Proponents of congressional or senatorial participation further assert the Founders could not have intended the President to be the “sole organ” in the broader context of treaty powers because the Treaty Clause expressly provides a role for the Senate in the formation of treaties.⁶⁶

Historical Domestic Practices Related to Treaty Termination and Withdrawal

While proponents on both sides of the debate over the Executive’s power of unilateral treaty termination cite historical practices in favor of their respective branches,⁶⁷ past practices related to treaty termination vary considerably.⁶⁸ These historical practices can generally be organized into five categories:⁶⁹

1. executive withdrawal or termination pursuant to prior authorization or direction from Congress;⁷⁰

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Foreign Relations, 96th Cong. 50 (1979) (testimony of State Dep’t Legal Adviser Herbert Hansell); *id.* at 220 (letter from Larry A. Hammond, Deputy Assistant Attorney General to Senator Frank Church, Chairman of the Senate Foreign Relations Committee).

⁶² See, e.g., Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198 (1979); David “Dj” Wolff, *Reasserting its Constitutional Role: Congress’ Power to Independently Terminate a Treaty*, 46 U.S.F. L. Rev. 953 (2012); Michael J. Glennon, *The Constitutional Power of the United States to Condition its Consent to Treaties*, 67 CHI.-KENT. L. REV. 533, 554-66 (1991); ADLER, *supra* note 54, at 98-110. The courts’ differing interpretations of the power of treaty termination is discussed below. See *infra* § Domestic Legal Challenges to Unilateral Treaty Termination by the Executive .

⁶³ See, e.g., Goldwater, *supra* note 62, at 199-200; Bradley, *supra* note 42, at 781.

⁶⁴ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (“There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”); *INS v. Chadha*, 462 U.S. 919, 954 (1983) (“[R]epeal of statutes, no less than enactment, must conform with Art. I.”).

⁶⁵ See, e.g., Wolff, *supra* note 62, at 966. Stefan A. Riesenfeld, *Tribute: The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 87 CALIF. L. REV. 786, 802 (1999).

⁶⁶ See, e.g., ADLER, *supra* note 54, at 93. For more arguments regarding the role of the legislative branch in treaty termination, see the sources cited *supra* note 62.

⁶⁷ Compare, e.g., Hansell Memorandum, *supra* note 60 (discussing “previous Presidential treaty terminations undertaken without action by Congress” in support of the conclusion that “[w]hile treaty termination may be and sometimes has been, undertaken by the President following Congressional or Senate action, such action is not legally necessary”); with Goldwater, *supra* note 62, at 198 (“[T]he weight of historical evidence proves that treaties are normally only terminated with legislative approval.”).

⁶⁸ See, e.g., ADLER, *supra* note 54, at 190 (“There has been no predominant method of termination, or even a discernible trend. Indeed, the record is checkered.”); 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 330 (1943) (“The question as to the authority of the Executive to terminate treaties independently of the Congress or of the Senate is in a somewhat confused state.... No settled rule or procedure has been followed.”).

⁶⁹ For more detailed investigation of historical practices, see Bradley, *supra* note 42, at 788-816 and TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 202-208.

⁷⁰ See, e.g., Comprehensive Anti-Apartheid Act of 1986, See P.L. 99-440, §313, 100 Stat. 1086, 1104 (mandating that “[t]he Secretary of State shall terminate immediately” a tax treaty and protocol with South Africa); Joint Resolution (continued...)

2. executive withdrawal or termination pursuant to prior authorization or direction from the Senate;⁷¹
3. executive withdrawal or termination without prior authorization, but with subsequent approval by Congress;⁷²
4. executive withdrawal or termination without prior authorization, but with subsequent approval by the Senate;⁷³ and
5. unilateral executive withdrawal or termination without authorization or direction by Congress or the Senate.⁷⁴

Although historical accounts vary,⁷⁵ most observers are in general agreement that the practice of unilateral withdrawal or termination by the President without authorization or direction by the legislative branch (category 5) increased markedly during the 20th century.⁷⁶ In most cases, this unilateral presidential action has not generated significant opposition in either chamber of Congress, but there have been occasions in which Members filed suit in an effort to block the President from terminating a treaty without first receiving congressional or senatorial approval.

Domestic Legal Challenges to Unilateral Treaty Termination by the Executive

Goldwater v. Carter

The most prominent attempt by Members of Congress to prevent the President from terminating a treaty through litigation occurred during the 1970s as the United States began to pursue closer

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Concerning the Oregon Territory, 9 Stat. 109 (1846) (providing that the President “is hereby authorized, at his discretion, to give to the government of Great Britain the notice required by” a convention allowing for joint occupancy of parts of the Oregon Territory). Although the Anti-Apartheid Act was enacted over his veto, *see supra* note 47, President Reagan terminated the treaty at issue. *See* Bradley, *supra* note 42, at 814-15 n. 244 (discussing history of the Anti-Apartheid Act). Likewise, after Congress enacted the Joint Resolution Concerning the Oregon Territory (Oregon Territory Treaty) in 1846, the Secretary of State informed the U.S. Ambassador to Great Britain that “Congress have spoken their will upon the subject, in their joint resolution; and to this it is his (the President’s) and your duty to conform.” S. Doc. No. 29-489, at 15 (1846). The Oregon Territory Treaty was ultimately renegotiated. *See* Bradley, *supra* note 42, at 790.

⁷¹ In 1855, the Senate authorized President Franklin Pierce to terminate a Friendship, Commerce, and Navigation Treaty with Denmark, and the President subsequently relied on the Senate’s action in carrying out the termination. Franklin Pierce, Third Annual Message (Dec. 31, 1855), *available at* <http://millercenter.org/president/pierce/speeches/speech-3730> (“In pursuance of the authority conferred by a resolution of the Senate of the United States passed on the 3d of March last, notice was given to Denmark” that the United States would “terminate the [treaty] at the expiration of one year from the date of notice for that purpose.”).

⁷² *See, e.g.*, Joint Resolution to Terminate the Treaty of 1817 Regulating the Naval Force on the Lakes, 13 Stat. 568 (1865) (“Be it resolved ... That the notice given by the President of the United States to [the] government of Great Britain and Ireland to terminate the treaty ... is hereby adopted and ratified as if the same had been authorized by Congress.”).

⁷³ *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 9, at 205-06.

⁷⁴ *See, e.g.*, Telegram from the U.S. Department of State to the Embassy of the Republic of China (Dec. 23, 1978), *text available at* <https://history.state.gov/historicaldocuments/frus1977-80v13/d180> [hereinafter, Taiwan Treaty Termination Telegram] (providing notice of termination of the Mutual Defense Treaty with the government of Taiwan).

⁷⁵ *See, e.g.*, Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 733-40 (2016) (challenging the conclusions of recent studies related to past practices in treaty termination).

⁷⁶ *See, e.g.*, Bradley, *supra* note 42, at 801-20; HENKIN, *supra* note 15, at 213-14; Adler Jean Galbraith, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. 121, 121-26 (2014).

relations with the government of the People's Republic of China (PRC).⁷⁷ Anticipating that, as part of its efforts to normalize relations with the PRC, the executive branch might terminate a 1954 mutual defense treaty with the government of Taiwan,⁷⁸ Congress enacted (and President Carter signed) the International Security Assistance Act, which, among other things, expressed “the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.”⁷⁹ When the Carter Administration announced that the United States would provide the required notice to terminate the treaty without having first obtained the consent of Congress,⁸⁰ a group of 16 Members of the House of Representatives and nine Senators, led by Senator Barry Goldwater, filed suit seeking to block the President's action on the ground that the Executive lacks the constitutional authority for unilateral treaty termination.⁸¹

In the early stages of the litigation, the district court agreed with the Members and entered an order enjoining the State Department from “taking any action to implement the President's notice of termination unless and until that notice is so approved [by the Senate or Congress].”⁸² The district court reasoned as follows:

[T]reaty termination generally is a shared power, which cannot be exercised by the President acting alone. Neither the executive nor legislative branch has exclusive power to terminate treaties. At least under the circumstances of this case involving a significant mutual defense treaty ... any decision of the United States to terminate that treaty must be made with the advice and consent of the Senate or the approval of both houses of Congress.⁸³

Notably, the district court relied, in part, on historical practice, and stated that, although no definitive procedure exists, “the predominate United States' practice in terminating treaties ... has involved mutual action by the executive and legislative branches.”⁸⁴

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, disagreed both with the district court's interpretation of past practice and the ultimate decision on the constitutionality of President Carter's action.⁸⁵ In addition to relying on case law emphasizing the President's role as the “sole organ” in foreign relations,⁸⁶ the D.C. Circuit reasoned that past practices were varied, and that there was no instance in which a treaty continued in force over the

⁷⁷ For additional background on *Goldwater v. Carter*, see ADLER, *supra* note 54, at 248-306 and VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* 1-52 (1991).

⁷⁸ Mutual Defense Treaty Between the United States of America and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433 [hereinafter, “Taiwan Mutual Defense Treaty”].

⁷⁹ International Security Assistance Act of 1978, P.L. 95-384, §26(b), 92 Stat. 730, 746.

⁸⁰ See Taiwan Treaty Termination Telegram, *supra* note 74; President Jimmy Carter, Address to the Nation: Diplomatic Relations Between the United States and the People's Republic of China (Dec. 15, 1978), available at <http://www.presidency.ucsb.edu/ws/?pid=30308>.

⁸¹ In addition, three days of hearings were held in the Senate Foreign Relations Committee on a resolution expressing the sense of the Senate that “approval of the U.S. Senate is required to terminate any mutual defense treaty between the United States and another nation.” S.Res. 15, 96th Cong. (1979); Treaty Termination: Hearings Before the S. Comm. on Foreign Relations, 96th Cong. (1979). The resolution never passed.

⁸² *Goldwater v. Carter*, 481 F. Supp. 949, 964 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), *vacated and remanded with instructions to dismiss*, *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality op.).

⁸³ *Goldwater*, 481 F. Supp. at 964.

⁸⁴ *Id.* at 960.

⁸⁵ See *Goldwater v. Carter*, 617 F.2d 697, 699 (D.C. Cir. 1979) (en banc) (per curiam).

⁸⁶ *Id.* at 707 (discussing and quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

opposition of the President.⁸⁷ Of “central significance” to the appellate court’s decision was the fact that the Mutual Defense Treaty of 1954 contained a termination clause.⁸⁸ Because there was “[n]o specific restriction or condition” on withdrawal specified in the termination clause, and because the Constitution does not expressly forbid the Executive from terminating treaties, the D.C. Circuit reasoned that the termination power, for that particular treaty, “devolves upon the President[.]”⁸⁹

In an expedited decision issued two weeks later, the Supreme Court vacated the appellate court’s decision and remanded with instructions to dismiss the complaint, but it did so without reaching the merits of the constitutional question and with no majority opinion.⁹⁰ Writing for a four-Justice plurality, Justice Rehnquist concluded that the case should be dismissed because it presented a nonjusticiable political question⁹¹—meaning that the dispute was more properly resolved in the politically accountable legislative and executive branches than in the court system.⁹² One member of the Court, Justice Powell, also voted for dismissal, but did so based on the ground that the case was not ripe for judicial review until the Senate passed a resolution disapproving of the President’s termination.⁹³ Only one Justice reached a decision on the constitutionality of President Carter’s action: Justice Brennan would have affirmed the D.C. Circuit, but his opinion was premised on the conclusion that termination of the Mutual Defense Treaty implicated the Executive’s power to recognize the PRC as the official government of China,⁹⁴ and not because the President possesses a general, constitutional power over treaty termination.⁹⁵ Accordingly, it is not clear that Justice Brennan’s reasoning would apply to all treaties, particularly those that do not address matters where the President does not have preeminent constitutional authority.

District Court Dismissals Following Goldwater

In the years after the litigation over the Mutual Defense Treaty with Taiwan, the Executive continued the practice of unilateral treaty termination in many,⁹⁶ but not all,⁹⁷ cases. In 1986, a

⁸⁷ *Id.* at 706-07. Judge MacKinnon issued a lengthy dissent which focused on past termination practices and concluded that “congressional participation in termination has been the overwhelming historical practice.” *Id.* at 723 (MacKinnon, J., dissenting).

⁸⁸ *See id.* at 709.

⁸⁹ *Id.* at 708.

⁹⁰ *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality op.).

⁹¹ *Id.* at 1002 (Rehnquist, J. concurring) (opinion joined by Justices Stewart and Stevens and Chief Justice Burger).

⁹² For further analysis of the political question doctrine, see CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole.

⁹³ *See Goldwater*, 444 U.S. at 998 (Powell, J.) (“If the Congress chooses not to confront the President, it is not our task to do so.”). Justice Marshall also concurred in the result without a written opinion.

⁹⁴ For the Court’s most recent holding on the President’s power to recognize foreign governments, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

⁹⁵ *See Goldwater*, 444 U.S. at 1006-07 (Brennan, J., dissenting) (“Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China.”). Justices Blackmun and White also dissented, but on the grounds that they felt the case should have been set for oral argument and to allow time for “plenary consideration” of the issues. *Id.* at 1006 (Blackmun & White, JJ., dissenting in part).

⁹⁶ *See* OFFICE OF LEGAL ADVISER, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 202-06 (Sally J. Cummins & David P. Stewart eds., 2002) (identifying 23 treaties terminated by the President between 1980 and 2002); Bradley, *supra* note 42, at 815 (identifying unilateral treaty terminations since the State Department’s compilation in 2002).

⁹⁷ For example, the Comprehensive Anti-Apartheid Act of 1986, which was enacted over President’s Reagan’s veto, directed the President to terminate a tax treaty and an air service treaty with South Africa. *See* P.L. 99-440, §§306, 313, (continued...)

group of private plaintiffs filed suit seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua,⁹⁸ but the district court dismissed the suit as a nonjusticiable political question following the reasoning of the four-Justice plurality in *Goldwater*.⁹⁹

Six years later, Members of Congress again instituted litigation in opposition to the President's unilateral termination, this time in response to George W. Bush's 2001 announcement that he was terminating the Anti-Ballistic Missile (ABM) Treaty with Russia.¹⁰⁰ Thirty-two Members of the House of Representatives challenged the constitutionality of that termination in *Kucinich v. Bush*,¹⁰¹ but the district court dismissed the suit on jurisdictional grounds without reaching the merits for two reasons.¹⁰² First, the court held that the Member-Plaintiffs failed to meet the standards for Members of Congress to have standing to assert claims for institutional injuries to the legislative branch¹⁰³ as set by the Supreme Court in *Raines v. Byrd*.¹⁰⁴ Second, the district court held that the interbranch dispute over the proper procedure for treaty termination was a nonjusticiable political question better resolved in the political branches.¹⁰⁵ The district court did not opine on the underlying constitutional question, and no appeal was filed.

Limits on Applicability of Past Cases in Separation of Powers Disputes

In addition to courts' reluctance to reach the merits of separation of powers disputes over treaty termination, past cases have not addressed a circumstance in which the Executive's decision to terminate a treaty was in direct opposition to the stated will of the Senate or Congress. While the International Security Assistance Act, passed in 1978, expressed the sense of the Congress that there should be *consultation* between the Congress and the executive branch related to termination of the Mutual Defense Treaty with Taiwan, it did not direct the President to obtain the Senate's *consent* before terminating the treaty.¹⁰⁶ The following year, the Senate introduced a resolution expressing the "sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation."¹⁰⁷ But that resolution was never passed,¹⁰⁸ and it does not appear that Congress has enacted a

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100 Stat. 1086, 1100, 1104.

(1986)

⁹⁸ Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024.

⁹⁹ See *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1198-99 (D. Mass. 1986) ("[A] challenge to the President's power vis-a-vis treaty termination raise[s] a nonjusticiable political question"), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

¹⁰⁰ President George W. Bush, Remarks on National Missile Defense (Dec. 13, 2001), <https://2001-2009.state.gov/t/ac/rls/rm/2001/6847.htm>.

¹⁰¹ 236 F. Supp. 2d 1 (D.D.C. 2002).

¹⁰² See *Kucinich*, 236 F. Supp. 2d at 18.

¹⁰³ See *id.* at 9-12. For more background on standing requirements in lawsuits by Members of Congress, see CRS Legal Sidebar WSLG783, *Legislator Lawsuits: Checking Executive Action Through the Courts*, by Todd Garvey and Alissa M. Dolan.

¹⁰⁴ 521 U.S. 811 (1997).

¹⁰⁵ See *Kucinich*, 236 F. Supp. 2d at 12-18.

¹⁰⁶ International Security Assistance Act of 1978, P.L. 95-384, §26(b), 92 Stat. 730, 746 (emphasis added).

¹⁰⁷ S.Res. 15, 96th Cong. (1979).

¹⁰⁸ For further background on this resolution, *Goldwater v. Carter*, 481 F. Supp. 949, 954 (1979).

provision purporting to block the President from terminating a treaty or expressing the sense of the Senate or Congress that unilateral termination by the President is wrongful unless approved by Congress.

If such an act or resolution were passed and the Executive still terminated without approval from the legislative branch, the legal paradigm governing the separation of powers analysis might shift. When faced with certain separation of powers conflicts, the Supreme Court has frequently adopted the reasoning of Justice Jackson's well-known concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰⁹ which stated that the President's constitutional powers often "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."¹¹⁰ Justice Jackson's opinion sets forth a tripartite framework for evaluating the constitutional powers of the President. The President's authority is (1) at a maximum when acting pursuant to authorization by Congress; (2) in a "zone of twilight" when Congress and the President "may have concurrent authority, or in which its distribution is uncertain," and Congress has not spoken on an issue; and (3) at its "lowest ebb" when taking measures incompatible with the will of Congress.¹¹¹

Because Congress, in *Goldwater* and the district court cases discussed above, had not passed legislation disapproving the President's terminations, presidential authority in those cases likely fell into the "zone of twilight." But a future resolution or legislation disapproving of unilateral treaty termination could place the President's authority at the "lowest ebb." In that scenario, the President only may act in contravention of the will of Congress in matters involving exclusive presidential prerogatives that are "at once so conclusive and preclusive" that they "disabl[e] the Congress from acting upon the subject."¹¹² Members of the executive branch have contended that treaty termination is one such plenary power that is exclusively reserved to the President,¹¹³ but a counterargument could be made that the legislative branch plays at least a shared role in the termination process, especially in matters that implicate Congress' enumerated powers.¹¹⁴

The Effect of Implementing Legislation

The legal framework for withdrawal from an international agreement may also depend on whether Congress has enacted legislation implementing its provisions into the domestic law of the United States. Some provisions of international agreements are considered self-executing, meaning they have the force of domestic law without the need for subsequent congressional action.¹¹⁵ But for non-self-executing provisions or agreements,¹¹⁶ implementing legislation from

¹⁰⁹ 343 U.S. 579 (1952).

¹¹⁰ *Id.* at 635 (Jackson, J., concurring).

¹¹¹ *Id.* at 635-38.

¹¹² *Id.* at 637-40 (Jackson, J., concurring). *Accord* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015).

¹¹³ See sources cited, *supra* note 61.

¹¹⁴ *Cf.* *South African Airways v. Dole*, 817 F.2d 118, 126 (1987) (quoting U.S. CONST., art. I, §8), *cert denied*, 484 U.S. 896 (1987) (holding that Congress had the power to enact legislation mandating the Secretary of State terminate an executive agreement related to airline services with South Africa pursuant to Congress's constitutional authority to "regulate Commerce with foreign Nations" and to "make all Laws shall be necessary and proper for carrying into Execution [such] Powers.").

¹¹⁵ See, e.g., *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); *Cook v. United States*, 288 U.S. 102, 119 (1933) ("For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.").

¹¹⁶ For analysis of the differences between self-executing versus non-self-executing agreements, see CRS Report (continued...)

Congress may be required to provide U.S. agencies with legal authority to carry out functions contemplated by the agreement or to make them enforceable by private parties.¹¹⁷ Certain political commitments have also been incorporated into domestic law through implementing legislation.¹¹⁸

Under Supreme Court precedent, the repealing of statutes must conform with the same bicameral process set forth in Article I that is used to enact new legislation.¹¹⁹ Accordingly, when Congress has passed legislation implementing an international agreement into domestic law, the President would appear to lack the authority to terminate the domestic effect of that legislation without going through the full legislative process for repeal.¹²⁰ Even when the President may have the power under international law to withdraw the United States from an international agreement and suspend its obligations to its counterparts,¹²¹ that withdrawal likely would not, on its own accord, repeal the domestic effect of implementing legislation.¹²²

In some cases, implementing legislation may dictate the extent to which termination of an underlying international agreement affects domestic law.¹²³ Analysis of the terms of the implementing statutes may be necessary, therefore, to understand the precise legal effect that termination of an international agreement has on U.S. law.

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RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, *supra* note 12, at 12-14.

¹¹⁷ See *Medellin*, 552 U.S. at 505 (“In sum, while treaties may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”) (internal citations and quotations omitted); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject.”). See generally RESTATEMENT, *supra* note 5, §111(4)(a) & cmt. h.

¹¹⁸ See, e.g., Clean Diamond Trade Act, 19 U.S.C. §§3901-3913 (implementing a multilateral nonbinding commitment to adopt the “Kimberley Process” designed to decrease the trade in conflict diamonds).

¹¹⁹ See sources cited, *supra* note 64.

¹²⁰ See Hathaway, *supra* note 49, at 1362 n. 268 (“To the extent the legislation creates domestic law that operates even in the absence of an international agreement, that law will survive withdrawal from the international agreement by the President.”); Julian Ku & John Yoo, *The Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties*, 90 NOTRE DAME L. REV. 1607, 1628 (2015) (“A President’s termination of a treaty will dissolve the formal legal obligation, but the policy of the United States will still continue because he cannot repeal the implementing legislation.”); John Setear, *The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5, S15 n.20 (2002) (“If only legislation can repeal legislation, then the formal status of implementing legislation does not change merely because the president takes some action, namely, terminating the treaty that the legislation implements.”)

¹²¹ See *supra* § Withdrawal Under International Law.

¹²² See sources cited *supra* note 120; Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1005 (2001) (“[T]he president could unilaterally terminate the treaty, but not the implementing legislation[.]”); Kristen E. Eichensehr, 53 VA. J. INT’L L. 247, 308 n. 245 (2013) (“If ... the treaty was ... incorporated into U.S. law with implementing legislation, then the President’s termination ends only U.S. obligations to treaty partners; it does not alter the implementing legislation, which was adopted as a statute under domestic law.”).

¹²³ E.g., U.S.-Australia Free Trade Agreement Implementation Act §106(c) (“On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective.”).

Withdrawal from the Paris Agreement

Some media outlets have reported¹²⁴ that President Donald Trump may be considering options to withdraw the United States from the Paris Agreement—a multilateral, international agreement intended to reduce the effects of climate change by maintaining global temperatures “well below 2°C above pre-industrial levels[.]”¹²⁵ President Obama signed an instrument of acceptance of the Paris Agreement on August 29, 2016, which was deposited with U.N. Secretary General Ban-Ki Moon on September 3, 2016.¹²⁶ The Agreement entered into force on November 4, 2016, and has been ratified or accepted by 121 parties, including the United States and the European Union, as of January 1, 2017.¹²⁷

The Paris Agreement is a subsidiary to the 1992 United Nations Framework Convention on Climate Change (UNFCCC), a broader, framework treaty entered into during the George H. W. Bush Administration.¹²⁸ Unlike the UNFCCC, which received the Senate’s advice and consent in 1992,¹²⁹ the Paris Agreement was not submitted to the Senate for approval. Instead, the Obama Administration took the position that the Paris Agreement is an executive agreement,¹³⁰ but it did not publicly articulate the precise sources of executive authority on which the President relied.¹³¹ Possible sources of authority include the UNFCCC,¹³² existing statutes such as the Clean Air Act

¹²⁴ See, e.g., Trump Looking for Fast Ways to Quit Global Climate Deal: Source, REUTERS (Nov. 14, 2016), <http://www.reuters.com/article/us-usa-election-climatechange-accord-idUSKBN1370JX>; Trump Seeking Quickest Way to Quit Paris Climate Agreement, Says Report, GUARDIAN (Nov. 13, 2016), <https://www.theguardian.com/us-news/2016/nov/13/trump-looking-at-quickest-way-to-quit-paris-climate-agreement-says-report>.

¹²⁵ Paris Agreement, *supra* note 2, art. 1(a). For further analysis of the Paris Agreement, see CRS Report R44609, *Climate Change: Frequently Asked Questions about the 2015 Paris Agreement*, by Jane A. Leggett and Richard K. Lattanzio.

¹²⁶ See Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE BLOG (Sep. 3, 2016), <https://www.whitehouse.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>.

¹²⁷ *Paris Agreement – Status of Ratification*, UNFCCC (last visited Jan. 1, 2017), http://unfccc.int/paris_agreement/items/9485.php.

¹²⁸ See *supra* note 31.

¹²⁹ See 138 CONG. REC. S17150 (daily ed. Oct. 7, 1992).

¹³⁰ See Press Briefing by White House Press Secretary Josh Earnest, Deputy Nat’l Security Advisor for Strategic Communications, Ben Rhodes, Senior Advisor, Brian Deese and Deputy Nat’l Security Advisor Int’l Economic, Wally Adeyemo (Aug. 29, 2016) [hereinafter, “Press Briefing”], <https://www.whitehouse.gov/the-press-office/2016/08/29/press-briefing-press-secretary-josh-earnest-deputy-nsa-strategic> (statement of Brian Deese) (“[T]he Paris agreement is an executive agreement. And so the President will use his authority that has been used in dozens of executive agreements in the past to join and ... put our country as a party to the Paris agreement.”). Senior State Department Official on the Paris Agreement Signing Ceremony (Apr. 20, 2016), <http://www.state.gov/r/pa/prs/ps/2016/04/256415.htm> (statement of unnamed “Senior State Department Official”) (“With respect to the Paris agreement, we have our own procedures, we have a standard State Department exercise that we are currently going through for authorizing an executive agreement, which this is[.]”).

¹³¹ Whether the Paris Agreement should have been treated as a treaty which required the advice and consent of the Senate has been the subject of disagreement among observers. Compare e.g., STEVEN GROVES, *THE PARIS AGREEMENT IS A TREATY AND SHOULD BE SUBMITTED TO THE SENATE*, BACKGROUND NO. 3103 (Heritage Foundation, Mar. 15, 2016), available at <http://thf-reports.s3.amazonaws.com/2016/BG3103.pdf> (arguing that the Paris Agreement requires the Senate’s advice and consent) with David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515 (2015) (asserting that neither Senate advice and consent nor new congressional legislation are necessarily conditions precedent to the United States becoming a party to an international agreement related to emissions reduction and climate change).

¹³² See Written Testimony of Andrew M. Gross, *Pitfalls of Unilateral Negotiations at the Paris Climate Change Conference*, Hearing before the H. Comm. on Science, Space & Technology, 104th Cong. (2015), available at (continued...)

and Energy Policy Act,¹³³ the President's sole constitutional powers,¹³⁴ or a combination of these authorities.¹³⁵ Regardless, there does not appear to be an underlying restriction on unilateral Presidential withdrawal (i.e., a treaty reservation,¹³⁶ statutory restriction, or other form of limitation) in any of the potential sources of executive authority. Consequently, the Paris Agreement would likely fall into the category of executive agreements that the Executive has traditionally terminated without seeking consent from the Senate or Congress.¹³⁷

Timeline and Procedure for Withdrawal from the Paris Agreement

Article 28 of the Paris Agreement allows any party to withdraw voluntarily by providing written notice to the U.N. depository, and that withdrawal becomes effective one year after notice is received.¹³⁸ Article 28's right to withdraw, however, is not available until three years after the Paris Agreement became effective.¹³⁹ Because the agreement entered into force in November 2016,¹⁴⁰ the right of withdrawal would not be available until November 2019.

Article 28 also provides that any party that withdraws from the UNFCCC shall be considered to have also withdrawn from the Paris Agreement. The UNFCCC has nearly identical withdrawal

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<https://www.cato.org/publications/testimony/pitfalls-unilateral-negotiations-paris-climate-change-conference> (concluding that certain procedural and reporting requirements of the Paris Agreement could be viewed as implementing the UNFCCC).

¹³³ See UNITED STATES, U.S. COVER NOTE, INDC AND ACCOMPANYING INFORMATION (2015) available at <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> [hereinafter, "U.S. INDC"] (citing the Clean Air Act, 42 U.S.C. §7401 *et seq.*, the Energy Policy Act, 42 U.S.C. §13201 *et seq.*, and the Energy Independence and Security Act, 42 U.S.C. §17001 *et seq.*, as existing statutes through which the United States will implement the Paris Agreement). The statutes that the Obama Administration identified as allowing the United States to implement the Paris Agreement do not expressly authorize the President to enter into agreements with foreign nations. However, the executive branch has stated in the past that existing domestic laws which allow executive agreements to be implemented without subsequent action by Congress may bolster the Executive's authority to enter into the agreement. See Letter from Harold Koh to Sen. Ron Wyden (Mar. 6, 2016), in DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 2012, at 95 (CarrieLyn D. Guymon, ed. 2012) (asserting that the Obama Administration is "currently in a position to accept the [Anti-Counterfeiting Trade Agreement] for the United States[.]" in part, based on "existing U.S. intellectual property law for implementation of the [Agreement], including the Copyright Act of 1976, the Lanham Act" and other statutes); see also Daniel Bodansky & Peter Spiro, *Executive Agreements*+, 49 VANDERBILT J. TRANSAT'L L. 885, 909-16 (2016) (discussing the executive branch's reliance on existing domestic statutes as a basis of authority to enter into certain executive agreements).

¹³⁴ ELIZA NORTHPROP & CHAD SMITH, DOMESTIC PROCESSES FOR JOINING THE PARIS AGREEMENT, TECHNICAL NOTE 4 (2015), available at http://www.wri.org/sites/default/files/Domestic_Processes_for_Joining_the_Paris_Agreement.pdf (stating that the U.S. joined the Paris Agreement as a sole-executive agreement).

¹³⁵ See David A. Wirth, *Is the Paris Agreement on Climate Change a Legitimate Exercise of the Executive Agreement Power?* LAWFARE (Aug. 29, 2016), <https://www.lawfareblog.com/paris-agreement-climate-change-legitimate-exercise-executive-agreement-power> (citing multiple sources of executive authority for the Paris Agreement); Borandsky & Spiro, *supra* note 133, at 886 (stating that that Paris Agreement would "fall somewhere in between" a sole executive agreement and a congressional-executive agreement).

¹³⁶ For more on reservations, understandings, and declarations issued by the Senate in the course of providing its advice and consent to a treaty, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, *supra* note 12, at 3.

¹³⁷ See *supra* § Withdrawal from Executive Agreements and Political Commitments Under Domestic Law.

¹³⁸ Paris Agreement, art. 28.

¹³⁹ *Id.*

¹⁴⁰ See *Paris Agreement – Status of Ratification*, UNFCCC (last visited Dec. 7, 2016), http://unfccc.int/paris_agreement/items/9485.php.

requirements to the Paris Agreement,¹⁴¹ but because the UNFCCC entered into force in 1994,¹⁴² the three-year withdrawal prohibition expired in 1997. Thus, the option of withdrawing from the Paris Agreement via withdrawal from the UNFCCC may be an available option to the executive branch. If the Executive sought to pursue such a course of action and effectuate such a withdrawal, it would need to provide written notice to the U.N. pursuant to the terms of the UNFCCC.¹⁴³ Withdrawal from both the UNFCCC and the Paris Agreement would become effective one year later.¹⁴⁴

The fact that the UNFCCC was approved by the Senate, however, makes the domestic withdrawal procedure for that treaty less straightforward, and an effort by the President to withdraw unilaterally from that treaty might invoke the long-standing debate over the proper role of the legislative branch in treaty termination.¹⁴⁵ Given the diverse nature of past practice and the unsettled state of the law relating to the legislative branch's role in this process, it is unclear whether the Executive would be required to receive congressional or senatorial approval should it decide to withdraw from the UNFCCC.

It is also unclear whether the courts would resolve a dispute between the legislative and executive branches over termination of the UNFCCC should a disagreement arise. While past efforts to challenge the President's assertion of unilateral withdrawal authority in *Goldwater* and *Kucinich* proved unsuccessful, those cases addressed the President's termination of treaties that implicated the President's power to recognize foreign governments.¹⁴⁶ In the case of the UNFCCC, it is possible that a court could reason that environmental treaties related to climate change implicate core congressional interests, such as Congress' enumerated powers over interstate and foreign commerce in Article I, Section 8, clause 3,¹⁴⁷ and therefore Congress may be given a role in reviewing the propriety of withdrawing from the treaty. On the other hand, in light of the *Goldwater* Court's decision not to reach the merits of the constitutional challenge¹⁴⁸ and lower courts' subsequent dismissals of similar cases on jurisdictional grounds,¹⁴⁹ it appears unlikely that the judicial branch would resolve this constitutional debate.

¹⁴¹ Compare *id.* with UNFCCC, art. 25.

¹⁴² *United Nations Framework Convention on Climate Change, Status of Ratification of the Convention* (last visited Dec. 8, 2016), http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php.

¹⁴³ See UNFCCC, art. 25(1) ("At any time after three years from the date on which the Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depository.").

¹⁴⁴ *Id.*, art. 25(2); Paris Agreement, art. 28.

¹⁴⁵ See *supra* § Withdrawal from Treaties Under Domestic Law.

¹⁴⁶ See *Goldwater v. Carter*, 444 U.S. 996, 1006-07 (1979) (Brennan, J., dissenting) (discussing the implications of the "Executive[s] recognition of the Peking Government" on the termination of the Mutual Defense Treaty with Taiwan). The ABM Treaty at issue in *Kucinich* implicated issues related to the dissolution of the Soviet Union and the fact that, what was formerly a bilateral treaty, now involved four "successor" states: Belarus, Kazakhstan, Russia, and the Ukraine. See Yoo & Delahunty Memorandum, *supra* note 56, at 2.

¹⁴⁷ U.S. CONST., art. I, §8, cl. 3 ("The Congress shall have the power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]").

¹⁴⁸ *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality op.).

¹⁴⁹ See *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987); *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).

Non-implementation as an Alternative to Withdrawal from the Paris Agreement

The Paris Agreement contains a number of provisions that appear to create binding obligations under international law, including requirements that the parties “*shall* prepare, communicate and maintain ... nationally determined contributions [NDC]” to the “global response to climate change” in the form of domestic plans for reducing greenhouse gas emissions and otherwise attempting to address the effects of climate change.¹⁵⁰ But other provisions contain aspirational language and appear to take the form of nonbinding political commitments.¹⁵¹ Most notably, Article 4.4 states that “[d]eveloped country parties *should* continue taking the lead by undertaking economy-wide absolute emission reduction targets.”¹⁵² This variation in language has been interpreted to mean that, while the Paris Agreement creates a legal obligation for states to communicate an NDC, it does not create a binding duty to carry out domestic implementing activities or to satisfy the emission reduction targets that may be stated in the NDC.¹⁵³ Because the emissions targets themselves are not binding under this interpretation, it may be possible to repeal or revise the domestic regulations that the Obama Administration sought to utilize to meet its emission reduction targets in the United States’ NDC without withdrawing from or violating a legal obligation in the Paris Agreement.¹⁵⁴

Withdrawal from the Joint Comprehensive Plan of Action

Prompted by statements by President Donald J. Trump during the 2016 presidential race,¹⁵⁵ some media outlets have reported that the President may seek to withdraw the United States from the Joint Comprehensive Plan of Action (JCPOA) related to Iran’s nuclear program.¹⁵⁶ On July 14,

¹⁵⁰ See Paris Agreement arts. 3, 4.1. For discussion of which provisions may be binding and new obligations for the United States, see CRS Report R44609, *Climate Change: Frequently Asked Questions about the 2015 Paris Agreement*, *supra* note 125.

¹⁵¹ *E.g.*, *id.* arts. 4.19 (“All parties *strive* to formulate and communicate long-term low greenhouse gas emission development strategies”); 5.2 (“Parties *are encouraged* to take action to implement and support ... the existing framework ... already agreed under the [UNFCCC]”); 7.7 (“Parties *should* strengthen their cooperation on enhancing action on adaptation, taking into account the Cancun Adaptation Framework”) (emphasis added in all).

¹⁵² *Id.* art. 4.4 (emphasis added). For other examples of international agreements that contain both binding obligations and political commitments, see Hollis & Newcomer, *supra* note 30, at 536-37.

¹⁵³ See, Letter from Julia Frifield, Assistant Secretary, Legislative Affairs, U.S. Dep’t of State, to The Honorable Bob Corker, Chairman, Senate Committee on Foreign Relations (Oct. 19, 2015), *available at* <http://www.state.gov/r/pa/prs/ps/2016/04/256415.htm> (“[W]e are not seeking an agreement in which Parties take on legally binding emissions targets.”); COP21 Press Availability with Special Envoy Todd Stern (Dec. 7, 2015), <http://www.state.gov/s/climate/releases/2015/250425.htm> (U.S. Special Envoy for Climate Change, Todd Stern, stating that the Paris Agreement creates an emission reduction target that is not legally binding, but that the reporting and “accountability system that circles around the target” is legally binding).

¹⁵⁴ The domestic laws and regulations that the Obama Administration intended to utilize to meet its emissions reduction targets are identified in the United States’ Intended Nationally Determined Contributions (INDC). See U.S. INDC, *supra* note 133. For primers on the process for repealing existing rules and regulations, see CRS Legal Sidebar WSLG888, *How to Repeal a Rule*, by Jared P. Cole, and CRS Legal Sidebar WSLG1697, *With the Stroke of a Pen: What Executive Branch Actions Can President-elect Trump “Undo” on Day One?*, by Todd Garvey.

¹⁵⁵ See, *e.g.*, Donald J. Trump Remarks at AIPAC (Mar. 21, 2016), *available at* <https://www.donaldjtrump.com/media/donald-j-trump-remarks-at-aipac> (statement of President Donald J. Trump).

¹⁵⁶ See, *e.g.* Yeganeh Torbati, *Trump Election Puts Iran Nuclear Deal on Shaky Ground*, REUTERS (Nov. 9, 2016), (continued...)

2015, Iran and six nations (the United States, the United Kingdom, France, Russia, China, and Germany—collectively known as the P5+1)¹⁵⁷ finalized a “plan of action” placing limitations on the development of Iran’s nuclear program.¹⁵⁸ The JCPOA identifies a series of “voluntary measures” in which the P5+1 provides relief from sanctions imposed on Iran through U.S. law, EU law, and U.N. Security Council resolutions in exchange for Iranian implementation of certain nuclear-related measures.¹⁵⁹ The JCPOA was not signed by any party, and it does not contain any provisions for ratification or entry into force, but the bulk of the sanctions at issue were lifted on January 16, 2016, the date referred to as “Implementation Day.”¹⁶⁰

Legal Considerations Related to Withdrawal from the JCPOA

As an unsigned document that purports to rely on “voluntary measures” rather than binding obligations, the executive branch has treated the JCPOA as a political commitment.¹⁶¹ Many commentators agree with this assessment,¹⁶² but there is some debate over the classification of the plan of action,¹⁶³ and its legal status may have been affected by a subsequent U.N. Security

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<http://www.reuters.com/article/us-usa-election-trump-iran-idUSKBN13427E>; Carol Morello, *Iran Nuclear Deal Could Collapse Under Trump*, WASH. POST. (Nov. 9, 2016), https://www.washingtonpost.com/world/national-security/iran-nuclear-deal-could-collapse-under-trump/2016/11/09/f2d2bd02-a68c-11e6-ba59-a7d93165c6d4_story.html?utm_term=.382d020085d7.

¹⁵⁷ The term P5+1 refers to the five permanent members of the U.N. Security Council—the United States, the United Kingdom, France, Russia, and China—plus Germany.

¹⁵⁸ For a comprehensive review of the JCPOA, see CRS Report R43333, *Iran Nuclear Agreement*, by Kenneth Katzman and Paul K. Kerr, and for further information related to the sanctions imposed on Iran, see CRS Report RS20871, *Iran Sanctions*, by Kenneth Katzman.

¹⁵⁹ See JCPOA at 6.

¹⁶⁰ See Executive Order 13716 of January 16, 2016, Revocation of Executive Orders 13574, 13590, 13622, and 13645 With Respect to Iran, Amendment of Executive Order 13628 With Respect to Iran, and Provision of Implementation Authorities for Aspects of Certain Statutory Sanctions Outside the Scope of U.S. Commitments Under the Joint Comprehensive Plan of Action of July 14, 2015, 81 FED. REG. 3693 (Jan. 21, 2016); Dep’t of the Treasury & Dep’t of State, Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day, at 34-37 (Jan. 16, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf [hereinafter “Treasury Guidance”].

¹⁶¹ See OFFICE OF LEGAL ADVISER, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2015, at 123 (Sally J. Cummins & David P. Stewart eds., 2002) (describing the JCPOA as a “non-binding political arrangement[.]”); Letter from Julia Frifield, Assistant Sec., Legislative Affairs, U.S. Dep’t of State, to The Honorable Mike Pompeo, House of Representatives (Nov. 19, 2015), available at http://pompeo.house.gov/uploadedfiles/151124_-_reply_from_state_regarding_jcpoa.pdf (“The [JCPOA] is not a treaty or an executive agreement, and it is not a signed document. The JCPOA reflects political commitments....”).

¹⁶² See, e.g., DANIEL H. JOYNER, IRAN’S NUCLEAR PROGRAM AND INTERNATIONAL LAW: FROM CONFRONTATION TO ACCORD 228 (2016) (“[T]he JCPOA is not a treaty, i.e. it is not a legally binding agreement among states. It is, rather, an agreement among states constituting political commitments only.”); Jack Goldsmith, *Why Congress is Effectively Powerless to Stop the Iran Deal (and Why the Answer is Not the Iran Review Act)*, LAWFARE (July 20, 2015), <https://www.lawfareblog.com/why-congress-effectively-powerless-stop-iran-deal-and-why-answer-not-iran-review-act> (asserting that Congress lacked the power to block the JCPOA, in part, because the plan of action was a nonbinding political commitment); Dan Joyner, *Guest Post: The Joint Comprehensive Plan of Action Regarding Iran’s Nuclear Program*, OPINIO JURIS (July 15, 2015) (“The JCPOA is simply a diplomatic agreement, consisting of political and not legal commitments.”).

¹⁶³ See Bruce Ackerman & David Golove, *Can the Next President Repudiate Obama’s Iran Agreement?*, THE ATLANTIC (Sep. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/09/can-the-next-president-repudiate-obamas-iran-agreement/404587/> (asserting the JCPOA received congressional approval, and is more properly understood as a congressional-executive agreement); Michael Ramsey, *Is the Iran Deal Unconstitutional?*, ORIGINALISM BLOG (July 15, 2015), <http://originalismblog.typepad.com/the-originalism-blog/2015/07/is-the-iran-deal-> (continued...)

Council resolution (discussed below). To the extent the JCPOA is correctly understood as a nonbinding political commitment, international law would not prohibit President Trump from withdrawing from the plan of action and reinstating certain sanctions that had been previously imposed under U.S. law,¹⁶⁴ but there may be political consequences for this course of action. It is also unlikely that the President would require congressional or senatorial approval for withdrawal in light of the Obama Administration's treatment of the JCPOA as a nonbinding commitment.¹⁶⁵

The JCPOA states that the United States will, among other things, withdraw certain "secondary sanctions" imposed under U.S. law that are related to foreign entities and countries that conduct specified transactions with Iran.¹⁶⁶ "Secondary" sanctions are distinguished from "primary" sanctions in that primary sanctions prohibit economic activity with Iran involving U.S. persons or goods, and secondary sanctions seek to discourage non-U.S. parties from doing business with Iran.¹⁶⁷ On Implementation Day, President Obama issued an executive order revoking all or portions of five prior executive orders that imposed secondary sanctions on Iran.¹⁶⁸ These executive orders generally may be revoked or modified at the will of the President,¹⁶⁹ and therefore nothing in domestic law would prevent the President from reinstating these sanctions through his own executive order, provided he complies with the requirements of the underlying statutes that authorize the President to sanction Iran via executive order.¹⁷⁰

Other secondary sanctions addressed in the JCPOA were imposed on Iran by statute rather than through executive order.¹⁷¹ These statutes gave the President or a delegate in the executive branch authority to waive sanctions under certain conditions, and the waiver remains effective for a period ranging from 120 days to one year, depending on the statute.¹⁷² The Obama Administration

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unconstitutionalmichael-ramsey.html (arguing that the JCPOA should be treated as a treaty that requires the advice and consent of the Senate).

¹⁶⁴ See sources cited *supra* note 39.

¹⁶⁵ See *supra* § Withdrawal from Executive Agreements and Political Commitments Under Domestic Law.

¹⁶⁶ JCPOA arts. 21-25.

¹⁶⁷ See JCPOA, Ann. II, art. B, n. 6. See also Sahand Moarefy, *Partially Unwinding Sanctions: The Problematic Construct of Sanctions Relief in the JCPOA*, at §C.2, HARV. L. SCH. NAT'L SECURITY J., July 15, 2016, <http://harvardnsj.org/2016/07/partially-unwinding-sanctions-the-problematic-construct-of-sanctions-relief-in-the-jcpoa/>. For detail on the sanctions lifted by the United States and sanctions relief in the JCPOA in general, see CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, by Dianne E. Rennack.

¹⁶⁸ See Executive Order 13716 of January 16, 2016, *supra* note 160.

¹⁶⁹ See CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, *supra* note 167 at 7 (discussing the authority of the Executive to renew, alter, and revoke executive orders he issues pursuant to the National Emergencies Act and International Emergency Economic Powers Act). See generally CRS Report RS20846, *Executive Orders: Issuance, Modification, and Revocation*, by Vivian S. Chu and Todd Garvey, at 7 (discussing the general power of the President to revoke or modify executive orders).

¹⁷⁰ The Executive's authority to issue executive order based sanctions on Iran was premised on the National Emergencies Act, 50 U.S.C. 1601, *et seq.*, the International Emergency Economic Powers Act, 50 U.S.C. §1701 *et seq.*, the Iran Sanctions Act of 1996, P.L. 104-172, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. §8501 *et seq.*, the Iran Freedom and Counter-Proliferation Act of 2012, 22 U.S.C. 8801 *et seq.*, and the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §8701 *et seq.* For details on the requirements that the Executive must meet in order to impose sanctions under these statutes, see CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, *supra* note 167, at Table 2.

¹⁷¹ For a summary of the statutory sanctions lifted, see CRS Report R43333, *Iran Nuclear Agreement*, *supra* note 158, at 19-22, and for a broader report on the legislative bases for sanctions imposed on Iran and the nature of the authority to waive them, see CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, *supra* note 167.

¹⁷² See 22 U.S.C. §8803(i) (authorizing waiver of sanctions under the Iran Freedom and Counter-Proliferation Act for (continued...))

first exercised this waiver authority on Implementation Day,¹⁷³ and it issued its most recent notice of waivers on December 15, 2016.¹⁷⁴ When those waivers expire, the Trump Administration could choose not to renew them, thereby reinstating sanctions imposed on Iran by statute. Whether the Trump Administration could unilaterally rescind the Obama Administration’s waivers before their expiration is not clear as the governing statutes do not address whether the Executive may revoke waivers that have already been issued.¹⁷⁵

U.N. Security Council Resolution 2231

In addition to U.S. withdrawal of secondary sanctions, the JCPOA calls for the “comprehensive lifting of all U.N. Security Council sanctions ... related to Iran’s nuclear programme,”¹⁷⁶ and it specifies a set of resolutions to be terminated through a future act of the Security Council.¹⁷⁷ On July 20, 2015, the Security Council unanimously voted to approve Resolution 2231, which, as of Implementation Day, terminated the prior sanctions-imposing Security Council resolutions subject to certain terms in Resolution 2231 and the JCPOA.¹⁷⁸ Resolution 2231 references and annexes the JCPOA, and it states that the Security Council “[w]elcom[es] diplomatic efforts by [the P5+1] and Iran to reach a comprehensive, long-term and proper solution to the Iranian nuclear issue, culminating in the [JCPOA].”¹⁷⁹ Although the text of the JCPOA appears to rely on “voluntary measures,”¹⁸⁰ some observers have stated that Resolution 2231 may have converted some voluntary political commitments in the JCPOA into legal obligations that are binding under U.N. Charter.¹⁸¹

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up to 180 days if the President determines such a waiver is “vital to the national security of the United States” and submits a report providing a justification for the waiver to the “appropriate congressional committees”); 22 U.S.C. §8513a(d)(5) (authorizing the waiver of sanctions under the National Defense Authorization Act for FY2012 if the President determines that the waiver is “in the national security interest of the United States”); 22 U.S.C. §8851(b) (authorizing the waiver of sanctions under the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 if the President determines that the waiver “is in the national interest of the United States”); P.L. 112-158, §205, 126 Stat. 1214, 1226 (authorizing waiver of sanctions under the Iran Threat Reduction and Syria Human Rights Act of 2012 for a period of not more than one year when the President deems it “essential to the national security interests of the United States”). For summary of all legislation authorizing sanctions made inapplicable under the JCPOA, see CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, *supra* note 167, at Table 3.

¹⁷³ See Treasury Guidance, *supra* note 160, at 34-37.

¹⁷⁴ See Press Statement, John Kerry, U.S. Secretary of State, Statement by Secretary Kerry on Renewing Waivers Related to Extension of the Iran Sanctions Act (Dec. 15, 2016), <http://www.state.gov/secretary/remarks/2016/12/265652.htm>.

¹⁷⁵ See sources cited *supra* note 172.

¹⁷⁶ S.C. 2231, ¶ v (July 20, 2015).

¹⁷⁷ Article 18 of the JCPOA calls for the termination of U.N. Security Council Resolutions 1696, 1737, 1747, 1803, 1835, 1929, and 2224.

¹⁷⁸ S.C. 2231, ¶ 7.

¹⁷⁹ *Id.* at 1.

¹⁸⁰ JCPOA at 6.

¹⁸¹ See Colum Lynch & John Hudson, *Obama Turns to U.N. to Outmaneuver Congress*, FOREIGN POLICY (July 15, 2015), <http://foreignpolicy.com/2015/07/15/obama-turns-to-u-n-to-outmaneuver-congress-iran-nuclear-deal/>; CRS Report R43333, *Iran Nuclear Agreement*, *supra* note 158, at 25 (quoting an email to CRS from a European Union official as stating that “the commitments under the JCPOA have been given legally binding effect through UNSC Resolution 2231 (2015).”).

Whether a U.N. Security Council resolution imposes legal obligations on U.N. Member States depends on the nature of the provisions in the resolution.¹⁸² As a matter of international law, many observers¹⁸³ agree that “decisions” of the Security Council are generally binding pursuant to Article 25 of the U.N. Charter,¹⁸⁴ but the Security Council’s “recommendations,” in most cases, lack binding force.¹⁸⁵ Whether a provision is understood as a nonbinding “recommendation” or a binding “decision” frequently depends on the precise language in the resolution.¹⁸⁶ Commentators have noted that the Security Council’s use of certain affirmative language, such as “shall” as opposed to “should,” or “demand” as opposed to “recommend,” may indicate that a resolution is intended to establish legally binding duties upon U.N. Member States.¹⁸⁷

Resolution 2231 appears to contain a combination of nonbinding recommendations and binding decisions.¹⁸⁸ It seems clear that the Security Council intended the provisions that lifted its prior sanctions to be binding as these paragraphs begin with the statement that the Security Council “*Decides*, acting under Article 41 of the Charter of the United Nations” that its prior resolutions are terminated subject to certain conditions.¹⁸⁹ Article 41 authorizes the Security Council to “decide” what measures “not involving the use of armed force are to be employed to give effect to its decisions,”¹⁹⁰ and it is understood to allow the Security Council to issue resolutions that are binding on U.N. Member States.¹⁹¹

¹⁸² The U.N. Charter does not use the term “resolutions” and instead states, “[t]he Members of the United Nations agree to accept and carry out the *decisions* of the Security Council in accordance with the present Charter.” U.N. CHARTER, art 25 (emphasis added).

¹⁸³ See, e.g., Marko Divac Öberg, *Agora: The ICJ’s Kosovo Advisory Opinion: The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion*, 105 AM. J. INTL. L. 81, 82 (2011); John Quigley, *Who Admits New Members to the United Nations (Think Twice Before You Answer)*, 44 GEO. WASH. INT’L L. REV. 179, 222 (2012).

¹⁸⁴ Article 25 states: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” U.N. CHARTER, art 25.

¹⁸⁵ See, e.g., Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v U.K.), Preliminary Objection, 1998 I.C.J. 9, ¶44 (Feb. 27) (“As to Security Council resolution 731 (1992) ... it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect...”).

¹⁸⁶ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶114 (June 21) (“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.”); Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 880 (2005) (stating that the exact terminology of a Security Council resolution may be relevant in interpreting whether the resolution is binding); Kwadwo Appiagyei-Atua, *United Nations Security Council Resolution 1325 on Women, Peace, and Security – Is it Binding?*, 18 HUM. RTS. BR. 2, 3 (2011) (“[T]he meaning of a decision or a recommendation can change depending on context. Therefore, a rigid application of these distinctions leads to confusion[.]”).

¹⁸⁷ See Öberg, *supra* note 186, at 880 (explaining that certain terms, such as “*shall* as opposed to *should*, [or] *recommend* as opposed to *demand*,” may indicate whether a Security Council resolution is binding) (emphasis in original); Appiagyei-Atua, *supra* note 186, at 4 (“Weak language can indicate the non-binding nature of the resolution and strong language can indicate binding intent. Words such as ‘decide,’ ‘declare,’ and ‘call upon’ are examples of strong language, while ‘urge,’ ‘recommend,’ and ‘encourage’ are weak.”).

¹⁸⁸ Compare S.C. 2231, ¶ 10 (“*Encourag[ing]*” Iran and the P5+1 “to resolve any issues arising with respect to implementation of the JCPOA commitments through the procedures specified in the JCPOA”); ¶ 17 (“*Request[ing]*” U.N. member to take certain action); ¶ 26 (“*Urg[ing]*” all states to cooperate with the Security Council “in its exercise of the tasks related to this resolution”) (emphasis in original in all) *with id.* ¶¶ 7-9, 11, 12, 15, 16, 21-23, 25, 27 (prefacing provisions with the verb “*Decides*”) (emphasis in original).

¹⁸⁹ *Id.* ¶¶ 7, 21, 22, 22.

¹⁹⁰ See U.N. CHARTER, art 41.

¹⁹¹ E.g. Frederic L. Kirgis, Jr., *The United Nations at Fifty: the Security Council’s First Fifty Years*, 80 AM. J. INT’L L. (continued...)

Whether Resolution 2231 creates an obligation under international law for the United States to continue to withhold its domestic secondary sanctions or to comply with the JCPOA more broadly is a more complex question. Paragraph 2 of Resolution 2231 states that the Security Council

Calls upon all Members States ... to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA[.]¹⁹²

While this provision arguably seeks general compliance with the JCPOA, the phrase “calls upon” is understood by some commentators as a hortatory, nonbinding expression in Security Council parlance.¹⁹³ Others have interpreted the phrase to create an obligation under international law to comply,¹⁹⁴ and a third group falls in between, describing the phrase as purposefully ambiguous.¹⁹⁵ Historically, U.N. Member States have ascribed varying levels of significance to the phrase “calls upon” in Security Council resolutions.¹⁹⁶ As a consequence, there is likely no definitive answer as to whether Resolution 2231 creates a binding international legal obligation for the United States to “support the implementation of the JCPOA” or whether the JCPOA remains a nonbinding political commitment that the United States may withdraw from without violating international law.

As a matter of domestic law, U.N. Security Council Resolutions are frequently seen to be non-self-executing, and therefore their legal effect is dependent on their relationship with existing authorizing or implementing legislation.¹⁹⁷ In certain cases, existing statutory enactments may

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506 (1995); Richard W. Edwards, Jr., *Extraterritorial Application of the U.S. Iranian Assets Control Regulations*, 75 AM. J. INT'L L. 870, 898 (1981).

¹⁹² S.C. 2231, ¶ 2. Resolution 2231 also states that Iran and the P5+1 “commit to implement the JCPOA in good faith[.]” *id.* ¶ viii, and that the “United States will make best efforts in good faith to sustain this JCPOA and to prevent interference with the realisation of the full benefit by Iran of the sanctions lifting....” *Id.* ¶ 26.

¹⁹³ See John B. Bellinger, *The New UNSCR on Iran: Does it Bind the United States (and Future Presidents)?*, LAWFARE (July 18, 2015), <https://www.lawfareblog.com/new-unscr-iran-does-it-bind-united-states-and-future-presidents> (“[Resolution 2231] has the effect of urging the US to carry out its commitments in the JCPOA, including the lifting of sanctions, but it does not require the US to do so as a matter of international law.”). See also Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?*, 21 INT'L & COMP. L.Q. 270, 282 (1972) (former President of the International Court of Justice explaining that the phrase “calls upon” in U.N. Security Council parlance is not intended to be the equivalent of a binding decision); Thilo Marauhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – The Case of Syria*, 43 CA. W. INT'L L.J. 401, 419 (2013) (noting that the phrase “calls upon” is “remarkably softer language” than a binding decision).

¹⁹⁴ See James D. Fry, *Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and their Legal Implications*, 29 MICH. J. INT'L L. 197, 229-33, 272-74 (2008) (discussing competing interpretations of the phrase by commentators and Member States of the U.N.).

¹⁹⁵ See, e.g., Louis Henkin, *Congress, the President and the United Nations*, 3 PACE Y.B. INT'L L. 1, 14 n.47 (1991).

¹⁹⁶ See Fry, *supra* note 194, at 262-63 (describing the differing interpretations of the phrase “calls upon” in U.N. Security Council Resolution 1172 by China, Costa Rica, and other members of the U.N.).

¹⁹⁷ See *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (reasoning that a specific Security Council resolution was not self-executing because it did not “by [its] terms” confer rights upon individuals); *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325, 342 (S.D.N.Y. 2013) (concluding that certain Security Council resolutions were not self-executing because, among other reasons, there was nothing in the text of the resolutions to suggest they were intended to be self-executing). Cf. *Medellin v. Texas*, 552 U.S. 491, 508 (2008) (interpreting Article 94 of the U.N. Charter, under which each U.N. Member “undertakes to comply” with decisions of the International Court of Justice (ICJ), as not transforming judgments of the ICJ into law which is automatically judicially enforceable by the domestic courts of U.N. Members, but instead establishing a commitment on the political branches of U.N. Members to take future action (continued...))

authorize the Executive to implement the provisions of a resolution through economic and communication-related sanctions.¹⁹⁸ But, to the extent Resolution 2331 is not self-executing, domestic law would not, on its own accord, mandate that the President comply with the terms of the resolution.¹⁹⁹

The “Snapback” Mechanism

While it seems clear Resolution 2231 has the legal effect of lifting the sanctions imposed on Iran through prior Security Council resolutions, Resolution 2231 also contains a mechanism that may reinstate—or “snapback”—those sanctions under certain conditions.²⁰⁰ If a party to the JCPOA notifies the Security Council of an issue it believes “constitutes significant non-performance of commitments under the JCPOA,” the Security Council must vote on a draft resolution addressing whether it should continue to withhold the sanctions imposed on Iran through its earlier resolutions.²⁰¹ Unless the Security Council votes to continue to lift those sanctions within 30 days of receiving a complaint of nonperformance, the prior Security Council resolutions “shall apply in the same manner as they applied before the adoption of” Resolution 2231.²⁰² The “snapback” mechanism thus places the onus on the Security Council to vote affirmatively to continue to lift its sanctions by stating that those sanctions will be implemented automatically unless the Security Council votes otherwise.²⁰³ As a permanent member of the Security Council,²⁰⁴ the United States would possess the power to veto any such vote²⁰⁵ and effectively force the reinstatement of the Security Council’s sanctions on Iran. Stated another way, the United States may possess a unilateral ability to “snapback” the Security Council’s sanctions regime even without the agreement of the other members of the P5+1 by (1) notifying the Security Council of an issue of significant nonperformance and (2) vetoing the subsequent resolution to continue to withhold sanctions on Iran.

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to comply with an ICJ decision).

¹⁹⁸ See 22 U.S.C. §287c(a) (“[W]henver the United States is called upon by the Security Council to apply measures which said Council has decided ... are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or ... means of communication between any foreign country ... and the United States or ... involving any property subject to the jurisdiction of the United States.”).

¹⁹⁹ Cf. *Medellin*, 552 U.S. at 505-06 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)) (“Only “[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.”).

²⁰⁰ JCPOA, arts. 36, 37; S.C. 2231, ¶¶ 11-12. The “snapback” provision would reinstate all but one of the prior Security Council Resolutions (or the relevant portions thereof) that were lifted by Resolution 2231. See S.C. 2231 ¶¶ 7(a), 12. The resolution that would not be reinstated, Resolution 2224, related to the use of a “panel of experts” designed to assist the Security Council in matters related to Iranian nuclear development. See S.C. 2224 (2015).

²⁰¹ S.C. 2231, ¶ 11.

²⁰² *Id.*

²⁰³ *Id.* ¶¶ 11, 12.

²⁰⁴ See U.N. CHARTER, art 23.

²⁰⁵ Decisions of the Security Council require the concurring vote of all permanent members except in the case of purely procedural matters. See U.N. CHARTER, art 27.

European Union Sanctions

In addition to the secondary sanctions created under U.S. law and sanctions imposed through U.N. Security Council resolutions, the JCPOA calls for the phased withdrawal of certain sanctions imposed under EU law.²⁰⁶ These EU sanctions were lifted on Implementation Day,²⁰⁷ and it has been reported that EU businesses have begun to enter the Iranian market.²⁰⁸ The “snapback” mechanism would not, on its own accord, require the reimposition of EU sanctions. Thus, even if the United States were to withdraw from the JCPOA, reinstate its domestic sanctions, and utilize the “snapback” to reestablish U.N. Security Council sanctions, Iran may not be subject to EU sanctions that were in place before the JCPOA was established.

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²⁰⁶ JCPOA arts. 19, 20, 24.

²⁰⁷ See CRS Report R43333, *Iran Nuclear Agreement*, supra note 158, at 19.

²⁰⁸ Golnar Motevalli, Hashem Kalantari & Javier Blas, *Total, China Join Iran’s First Gas Deal Since Sanctions Eased*, BLOOMBERG (Nov. 8, 2016), <https://www.bloomberg.com/news/articles/2016-11-08/total-china-share-iran-s-first-gas-deal-since-sanctions-eased> (discussing a \$4.8 billion natural gas development project between Iran, China National Petroleum Corp., and Paris-based Total SA).