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 President Donald J. Trump's actions related to certain high-profile international commitments. This report outlines the legal framework for withdrawal from international agreements under domestic and international law, and it applies that framework to two pacts 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 nations take the form of Senate-approved, ratified treaties. The President also enters into executive agreements, which do not receive the Senate's advice and consent, and "political commitments" that 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 to give the international agreement domestic legal effect.

On June 1, 2017, President Trump announced that he intends to withdraw the United States from the Paris Agreement—a multilateral, international agreement intended to reduce the effects of climate change. 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, the President potentially may claim authority to withdraw without seeking approval from the legislative branch. By its terms, however, the Paris Agreement does not allow parties to complete the withdrawal process until November 2020, and Trump Administration officials have stated that the Administration intends to follow the multiyear withdrawal procedure. Consequently, absent additional action by the Trump Administration, the United States will remain a party to the Paris Agreement until November 2020, albeit one that has announced its intent to withdraw once it is eligible to do so.

The Trump Administration has not withdrawn the United States from the JCPOA, but the President has stated he intends do so unless the plan of action is renegotiated. When the Obama Administration concluded the JCPOA, it treated the plan of action as a non-binding political commitment. To the extent this understanding is correct, President Trump's ability to withdraw from the JCPOA would not be restricted by international or domestic law. However, some observers have suggested that U.N. Security Council Resolution 2231 subsequently converted at least some provisions in the JCPOA into obligations that are binding under international law. As a result, withdrawal from the JCPOA could implicate a complex debate over the plan of action's status in international law.

As a matter of domestic law, the President and Congress have authority to reassert sanctions lifted pursuant to U.S. pledges made in the JCPOA if they deem the reinstitution of such sanctions to be appropriate, even if such action resulted in a violation of international law. Several possible domestic legal avenues exist to re-impose sanctions, some of which would involve joint action by the President and the legislative branch, and others that would involve decisions made by the President alone.

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Introduction

Renewed attention to the role of Congress in the termination of treaties and other international agreements has arisen in response to President Donald J. Trump's actions related to certain high-profile international commitments. This report examines the legal framework for withdrawal from international agreements, and it focuses specifically on two pacts[1] that may be of interest to the 115th Congress: the Paris Agreement on climate change[2] 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 pacts between the United States and foreign nations take the form of 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 pact.

Treaties and other international pacts also operate in dual international and domestic contexts.[6] In the international context, many international agreements that are binding in nature constitute compacts between nations,[7] and they often create rights and obligations that sovereign states owe to one another under international law.[8] 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.[9] Those procedures are intended to apply to all nations, but they may not account for

[1] As used in this report, the term "pact" is a generic term intended to encompass non-binding commitments between nations and legally binding international agreements.

[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, http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf [hereinafter Paris Agreement].

[3] Joint Comprehensive Plan of Action, July 14, 2015, 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, AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 64-71 (7th ed. 1997) (analyzing the interplay between international law and domestic or "municipal" legal systems).

[7] As discussed more detail below, *infra*, the term "international agreement" as used in this report refers only to those agreements between nations that are binding under international law. *See infra* § Forms of International Agreements and Commitments.

[8] *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 THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 301(1) (1987) [hereinafter THIRD 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).

[9] *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...)

the distinct constitutional and statutory requirements of the domestic law of the United States.[10] 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 pact into the domestic law of the United States.[11]

In sum, the legal procedure for termination of or withdrawal from treaties and other international pacts depends on three main features: (1) the type of pact at issue; (2) whether withdrawal is analyzed under international law or domestic law; and (3) whether Congress has enacted implementing legislation. [12] 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, pacts 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."[13] Under the domestic law of the United States,[14] a

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customary international law. *See* U.S. Dep't of State, *Vienna Convention on the Law of Treaties* (last visited May 1, 2018), 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* THIRD RESTATEMENT, *supra* note 8, § 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.").

[10] *See* Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, S.Rept. 106-71 (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 187-88, 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.

[11] *See infra* § "The Effect of Implementing Legislation."

[12] 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. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS, § 155 cmt. c (1965). For purposes of this report, the underlying legal framework is generally the same for both events, and the terms may be used interchangeably.

[13] 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 (name redacted) .

[14] 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* THIRD RESTATEMENT, *supra* note 8, § 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.[15] The great majority of international agreements that the United States enters into, however, fall into the distinct and much larger category of executive agreements.[16] 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.[17] In the case of *congressional-executive agreements*, the domestic authority is derived from an existing or subsequently enacted statute.[18] The President also enters into *executive agreements made pursuant to a treaty* based upon authority created in prior Senate-approved, ratified treaties.[19] In other cases, the President enters into *sole executive agreements* based upon a claim of independent presidential power in the Constitution.[20]

In addition to treaties and executive agreements, the United States makes nonlegal pacts that often involve the making of so-called *political commitments*.[21] While political commitments are not intended to be binding under domestic or international law,[22] they may nonetheless carry moral and political weight and other significant incentives for compliance.[23]

[15] *See* THIRD RESTATEMENT, *supra* note 8, § 303(1).

[16] 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*, by (name redacted) , *supra* note 13, at 4-5; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1212 (2018).

[17] 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[.]").

[18] *See, e.g.*, Foreign Assistance Act of 1961, Pub. Law No. 87-195 (codified as amended at 22 U.S.C. §§ 2151-2431k) (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 10, at 78-86 (discussing examples congressional-executive agreements).

[19] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 86.

[20] 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 10, at 88.

[21] *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).

[22] *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[.]").

[23] *See* THIRD RESTATEMENT, *supra* note 8, § 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.[24]

Treaty: An international agreement that receives the advice and consent of the Senate and is ratified by the President.[25]

Executive Agreement: An international agreement that is binding, but which the President enters into without receiving the advice and consent of the Senate.[26]

Congressional-Executive Agreement: An executive agreement for which domestic legal authority derives from a preexisting or subsequently enacted statute.[27]

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.[28]

Sole Executive Agreement: An executive agreement based on the President's constitutional powers.[29]

Nonlegal Pacts and Political Commitments: A pact (or a provision within a pact) 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.[30]

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.[31] 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.[32] 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.[33] In those cases, under the Vienna Convention on the Law of Treaties (Vienna Convention),[34] the withdrawing party must give 12 months' notice of its intent to depart from the agreement.[35] In

[24] THIRD RESTATEMENT, *supra* note 8, § 301(1).

[25] For more on variations of the definition of the term "treaty," see *supra* note 14.

[26] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 76.

[27] *See supra* note 18.

[28] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 86; CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by (name redacted) , *supra* note 13, at 5.

[29] *See supra* note 20.

[30] *See supra* notes 21-23.

[31] Vienna Convention, art. 54; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 192. Some rules of international law known as *jus cogens* are recognized by the international community as peremptory, permitting no derogation. THIRD RESTATEMENT, *supra* note 8, § 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.

[32] *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).

[33] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 192.

[34] 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 *supra* note 9, the Vienna Convention is also understood to reflect customary international law in certain respects.

[35] 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.[36]

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.[37]

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, provided such notice complied with applicable treaty withdrawal provisions.[38] 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.[39]

Political commitments are not legally binding between nations, and thus a party can withdraw at any time without violating international law[40] regardless of whether the commitment contains a withdrawal clause.[41] 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.[42]

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.[43] The degree to which the Constitution

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[36] *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).

[37] Vienna Convention, art. 67.

[38] *See id.*

[39] *See infra* § "Withdrawal Under Domestic Law."

[40] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, 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.), 1974 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).

[41] 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).

[42] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 59.

[43] *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 16, 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 may differ depending on the type of pact at issue. And in those cases when the President's authority to terminate an international pact has been challenged in court, discussed below, courts have declined to answer the underlying separation-of-powers question. [44] Instead, the executive and legislative branches largely have been left to resolve disagreement over the termination power through political processes rather than through judicial settlement.

Withdrawal from Executive Agreements and Political Commitments Under Domestic Law

In the case of executive agreements, 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. [45] Thus, observers appear to agree that, when the Constitution affords the President authority to enter into sole executive agreements, the President also may unilaterally terminate those agreements.[46] This same principle would apply to political commitments: to the extent the President has the authority to make nonbinding commitments without the assent of the Senate or Congress,[47] the President also may withdraw unilaterally from those commitments.[48]

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.[49] 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.").

[44] *See infra* § Domestic Legal Challenges to Unilateral Treaty Termination by the Executive.

[45] *See* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1225 (2018); TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 172; THIRD RESTATEMENT, *supra* note 8, § 339 reporters' n. 2.

[46] *See* Bradley & Goldsmith, *supra* note 16, at 1225 ("Presidents clearly have the authority to terminate sole executive agreements and political commitments, since those agreements by Presidents based on their own constitutional authority."); THIRD RESTATEMENT, *supra* note 8, § 339 reporters' n. 2 ("No one has questioned the President's authority to terminate sole executive agreements.").

[47] 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*, by (name re dacted) , *supra* note 13, at 9-12.

[48] *See, e.g.*, Julian Ku, *President Rubio/Walker/Trump/Whomever Can Indeed Terminate the Iran Deal on "Day One,"* OPINIO JURIS (Sep. 10, 2015), https://tinyurl.com/ydfodbbo (arguing that, because the JCPOA is a nonbinding political commitment, the President can unilaterally terminate the arrangement); 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.").

[49] *See* THIRD RESTATEMENT, *supra* note 8, § 339 cmt. a; TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note (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.[50] And for congressional-executive agreements, Congress may dictate how termination occurs in the statute authorizing or implementing the agreement.[51]

Congress also has asserted the authority to direct the President to terminate congressional-executive agreements. For example, in the Comprehensive Anti-Apartheid Act of 1986, which was passed over President Reagan's veto, Congress instructed the Secretary of State to terminate an air services agreement with South Africa.[52] The Reagan Administration complied and provided the requisite notice of termination.[53] Another example of Congress asserting a role in the termination of congressional-executive agreements was via the Trade Agreements Extension Act of 1951. The Act directed the President to "take such action as is necessary to suspend, withdraw or prevent the application of" trade concessions contained in prior trade agreements regulating imports from the Soviet Union and "any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."[54] The Truman Administration relied on this law in terminating certain congressional-executive agreements with the Soviet Union and several Soviet satellite countries.[55]

Presidents also have asserted the authority to withdraw unilaterally from congressional-executive agreements, but there is an emerging scholarly debate over the extent to which the Constitution permits the President to act without the approval of the legislative branch in such circumstances. For congressional-executive agreements that Congress pre-authorized by statute (called *ex ante* agreements), Presidents sometimes have unilaterally terminated the agreement without objection.[56] But for those congressional-executive agreements that are approved by Congress after they are entered into by the President (called *ex post* agreements), commentators disagree on

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10, 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 unless Congress has expressly limited the President's power to withdraw through . . . authorizing legislation[.]").

[50] *See* Third Restatement, supra note 8, § 339 cmt. a.

[51] *See id.* For example, Section 125 of the Free Trade Act of 1974, which authorizes a fast-track process for consideration of legislation implementing free trade agreements, 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).

[52] P.L. 99-440, § 306(b)(1), 313, 100 Stat. 1086, 1100 (1986) [hereinafter Anti-Apartheid Act] ("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. . . ."), *repealed by* South African Democratic Transition Support Act of 1993, P.L. 103-149, § 4, 107 Stat. 1503, 1505. The Anti-Apartheid Act also directed the Secretary of State to terminate a tax treaty with South Africa, discussed *infra* note 79.

[53] *See* South African Airways v. Dole, 817 F.2d 119, 121 (D.C. Cir. 1987), *cert denied*, 484 U.S. 896 (1987).

[54] *See* Pub. L. No. 82-50, § 5, 65 Stat. 72, 73 (1951).

[55] Dep't of State, Office of the Historian, Foreign Relations of the United States, 1951, Europe: Political and Economic Developments, Volume IV, Part 2, https://history.state.gov/historicaldocuments/frus1951v04p2/d169.

[56] For example, the Eisenhower Administration terminated a trade agreement with Ecuador that had been authorized by statute without seeking congressional approval. *See* Proclamation No. 3111, 20 Fed. Reg. 6485 (Sept. 2, 1955). For additional examples of termination of congressional-executive agreements that were pre-authorized in legislation, see Bradley & Goldsmith, *supra* note 16, at 1225 n.93.

whether the President possesses the power of unilateral termination.[57] Some argue that certain congressional-executive agreements—chiefly those involving international trade[58]—are based on exclusive congressional powers, and therefore Congress must approve their termination.[59] Others assert that the President has the power to withdraw from these agreements unilaterally, but he cannot terminate the domestic effect of their implementing legislation in the absence of congressional authorization[60]—an issue discussed in more detail below.[61] Although this debate is still developing, unilateral termination of congressional-executive agreements by the President has not been the subject of a high volume of litigation, and prior studies have concluded that such termination has not generated large-scale opposition from the legislative branch.[62]

Withdrawal from Treaties Under Domestic Law

Unlike the process of terminating executive agreements, which has not generated extensive 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,[63] but it does not describe how they should be terminated.[64]

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 affairs[65] and pursuant

[57] *See* Bradley & Goldsmith, *supra* note 16, at 1225 n.95.

[58] For answers to frequently asked questions on withdrawal from the North American Free Trade Agreement (NAFTA) and other trade agreements, see CRS Report R44630, *U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions*, by (name redacted) , *supra* note 51.

[59] *See* Julian Ku & John Yoo, *Trump Might be Stuck with NAFTA*, L.A. TIMES (Nov. 29, 2016) (arguing that Congress's Commerce Clause authority bars the President from terminating the NAFTA without congressional authorization); Joel P. Trachtman, *Trump Can't Withdraw from NAFTA Without a 'Yes' from Congress*, THE HILL (Aug. 16, 2017), https://tinyurl.com/y9byuyed ("If the president, acting alone, were to terminate U.S. participation in NAFTA, he would be imposing regulation on commerce, without congressional participation. This would be an unconstitutional usurpation of the powers granted to Congress.").

[60] *See* Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. (forthcoming 2018), https://tinyurl.com/yaaumas9 (contending that the President possesses constitutional authority to terminate congressional-executive agreements to the same as extent as presidential authority to terminate Article II treaties); Michael Ramsey, *Could President Trump Unilaterally Withdraw the U.S. from its International Agreements?*, ORIGINALISM BLOG (Sep. 29, 2016), https://tinyurl.com/yc26cfdr (arguing that the President can withdraw the United States from international trade agreements, but that he cannot terminate implementing legislation).

[61] *See infra* § The Effect of Implementing Legislation.

[62] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 208 ("[T]he President's authority to terminate executive agreements . . . has not been seriously questioned in the past"); Bradley, *supra* note 60, at 20 ("Congress has not itself indicated that it views congressional-executive agreements as special with respect to the issue of presidential termination authority.").

[63] *See* U.S. CONST., art. II, § 2, cl. 2.

[64] 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).

[65] *See, e.g.*, Third Restatement, supra note 8, § 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 this authority "due to his preeminent position in foreign affairs and his structural superiority in (continued...)

to the "executive Power" conveyed to the President in Article II, Section 1 of the Constitution.[66] Other proponents of executive authority have likened the power to withdraw from treaties to the President's power to remove executive officers.[67] 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.[68] 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.[69] 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.[70]

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managing international relations."); Bradley, *supra* note 43, 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], 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), https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf.

[66] *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 43, at 780 (analyzing the so-called "Vesting Clause Thesis" and its application to treaty withdrawal); Yoo & Delhunty Memorandum, *supra* note 66, at 3-13 (stating that the "treaty power is fundamentally executive in nature").

[67] *See, e.g.*, DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES 94 (1986); Yoo & Delhunty Memorandum, *supra* note 66, at 6; Bradley, *supra* note 43, at 781-82.

[68] *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.").

[69] *See* sources cited *supra* note 67.

[70] *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, Deputy Assistant Legal Advisor for Treaty Affairs, U.S. Dep't of State, 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 & Delhunty Memorandum, *supra* note 66, at 3-13 (concluding that the Constitution vests the President with authority to terminate or suspend treaties unilaterally).

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.[71] Some have argued that the termination of treaties is analogous to the termination of federal statutes.[72] Because domestic statutes may be terminated only through the same process in which they were enacted[73]—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.[74] 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.[75]

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,[76] past practices related to treaty termination vary considerably.[77] These historical practices can generally be organized into five categories:[78]

1. executive withdrawal or termination pursuant to prior authorization or direction from Congress;[79]

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[71] *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 64, 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 ."

[72] *See, e.g.*, Goldwater, *supra* note 71, at 199-200; Bradley, *supra* note 43, at 781.

[73] *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.").

[74] *See, e.g.*, Wolff, *supra* note 71, 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).

[75] *See, e.g.*, ADLER, *supra* note 64, at 93. For more arguments regarding the role of the legislative branch in treaty termination, see the sources cited *supra* note 71.

[76] *Compare, e.g.*, Hansell Memorandum, *supra* note 70 (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 71, at 198 ("[T]he weight of historical evidence proves that treaties are normally only terminated with legislative approval.").

[77] *See, e.g.*, ADLER, *supra* note 64, 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.").

[78] For more detailed investigation of historical practices, see Bradley, *supra* note 43, at 788-816 and TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 202-208.

[79] *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, 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 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, President Reagan terminated the treaty at issue. *See* Bradley, *supra* note 43, at 814-15 n. 244 (discussing history of the Anti-Apartheid (continued...)

2. executive withdrawal or termination pursuant to prior authorization or direction from the Senate;[80]
3. executive withdrawal or termination without prior authorization, but with subsequent approval by Congress;[81]
4. executive withdrawal or termination without prior authorization, but with subsequent approval by the Senate;[82] and
5. unilateral executive withdrawal or termination without authorization or direction by Congress or the Senate.[83]

During the 19th century, treaties consistently were terminated through one of the first four methods listed above, all of which include joint action by the legislative and executive branches.[84] At the turn of the 20th century, however, historical practices began to change, and the fifth form of treaty termination emerged: unilateral termination by the President without approval by the legislative branch.[85] During the Franklin Roosevelt Administration and World War II, unilateral presidential termination increased markedly.[86] Although Congress occasionally enacted legislation authorizing or instructing the President to terminate treaties during the 20th century,[87] unilateral presidential termination eventually became the norm.[88] In most cases, this presidential

(...continued)

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 43, at 790.

[80] 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. Pres. Franklin Pierce, Third Annual Message (Dec. 31, 1855), 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.").

[81] *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.").

[82] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 10, at 205-06.

[83] *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).

[84] For analysis of 19th century understanding and practice related to treaty termination, see Bradley, *supra* note 43, at 788-801; SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 432-66 (2d ed. 1916).

[85] In 1899, the McKinley Administration terminated certain articles in a commercial treaty Switzerland. *See* Letter from John Hay, U.S. Sec'y of State, to Ambassador Leishman (Mar. 8, 1899), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 753-754 (1901). And in 1927, the Coolidge Administration withdrew the United States from a convention to prevent smuggling with Mexico. *See* Letter from Frank B. Kellogg, U.S. Sec'y of State, to Ambassador Sheffield (Mar. 21, 1927), *in* 3 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1927, at 230, 230–231 (1942).

[86] *See* Bradley, *supra* note 43, at 807-09.

[87] *See, e.g.*, Fishery Conservation and Management Act of 1976, P.L. 94-265, § 202(b), 90 Stat. 331, 340-41 (authorizing the Secretary of State to renegotiate certain fishing treaties and expressing the "sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment."). *See also supra* note 79 (discussing a provision in the Anti-Apartheid Act requiring the President to terminate a tax treaty with South Africa),

[88] *See* Bradley, *supra* note 43, at 807-15.

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 relations with the government of the People's Republic of China (PRC).[89] 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,[90] 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."[91] 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,[92] a group of 16 Members of the House of Representatives and 9 Senators, led by Senator Barry Goldwater, filed suit before the U.S. District Court for the District of Columbia seeking to block the President's action on the ground that the Executive lacks the constitutional authority for unilateral treaty termination.[93]

In the early stages of the litigation, the district court agreed with the Members and entered an order permanently 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]."[94] 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.[95]

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[89] For additional background on *Goldwater v. Carter*, see ADLER, *supra* note 64, at 248-306 and VICTORIA MARIE KRAFT, THE U.S. CONSTITUTION AND FOREIGN POLICY: TERMINATING THE TAIWAN TREATY 1-52 (1991).

[90] 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].

[91] International Security Assistance Act of 1978, Pub. L. No., § 26(b), 92 Stat. 730, 746.

[92] *See* Taiwan Treaty Termination Telegram, *supra* note 83; President Jimmy Carter, Address to the Nation: Diplomatic Relations Between the United States and the People's Republic of China (Dec. 15, 1978), http://www.presidency.ucsb.edu/ws/?pid=30308.

[93] 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.

[94] 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.).

[95] *Goldwater*, 481 F. Supp. at 964.

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."[96]

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. 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.[97] In addition to relying on case law emphasizing the President's role as the "sole organ" in foreign relations,[98] 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 opposition of the President.[99] Of "central significance" to the appellate court's decision was the fact that the Mutual Defense Treaty of 1954 contained a termination clause.[100] 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[.]"[101]

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.[102] Writing for a four-Justice plurality, Justice Rehnquist concluded that the case should be dismissed because it presented a nonjusticiable political question—meaning that the dispute was more properly resolved in the politically accountable legislative and executive branches than in the court system.[103] 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.[104] 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,[105] and not because the President possesses a general, constitutional power over treaty termination.[106] Accordingly, it is not clear that Justice Brennan's reasoning would apply to all

[96] *Id.* at 960.

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

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

[99] *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).

[100] *See id.* at 709.

[101] *Id.* at 708.

[102] Goldwater v. Carter, 444 U.S. 996 (1979) (plurality op.).

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

[104] *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.

[105] 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).

[106] *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).

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,[107] but not all,[108] cases. In 1986, a group of private plaintiffs filed suit seeking to prevent President Reagan from unilaterally terminating a Treaty of Friendship, Commerce, and Navigation with Nicaragua,[109] but the district court dismissed the suit as a nonjusticiable political question following the reasoning of the four-Justice plurality in *Goldwater*.[110]

Sixteen 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.[111] Thirty-two Members of the House of Representatives challenged the constitutionality of that termination in *Kucinich v. Bush*,[112] but the district court dismissed the suit on jurisdictional grounds without reaching the merits for two reasons.[113] 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 branch[114] as set by the Supreme Court in *Raines v. Byrd*.[115] 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.[116] 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

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[107] *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 43, at 815 (identifying unilateral treaty terminations since the State Department's compilation in 2002).

[108] 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, 100 Stat. 1086, 1100, 1104 (1986).

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

[110] *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).

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

[112] 236 F. Supp. 2d 1 (D.D.C. 2002).

[113] *See Kucinich*, 236 F. Supp. 2d at 18.

[114] *See id*. at 9-12. For more background on standing requirements in lawsuits by Members of Congress, see CRS Report R42454, *Congressional Participation in Article III Courts: Standing to Sue*, by (name redacted)

[115] 521 U.S. 811 (1997).

[116] *See Kucinich*, 236 F. Supp. 2d at 12-18.

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.[117] 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."[118] But that resolution was never passed,[119] and it does not appear that Congress has enacted a 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 oft-cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[120] which stated that the President's constitutional powers often "are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."[121] 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.[122]

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."[123] Members of the executive branch have suggested that treaty termination is part of the President's plenary powers,[124] but a counterargument could be made that the legislative branch plays a shared role in the termination process, especially in matters that implicate Congress's enumerated powers.[125]

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

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

[118] S.Res. 15, 96th Cong. (1979).

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

[120] 343 U.S. 579 (1952). *See also* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer....").

[121] *Youngstown Sheet & Tube Co.*, at 635 (Jackson, J., concurring).

[122] *Id.* at 635-38.

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

[124] Yoo & Delahunty Memorandum, *supra* note 65, at 7 ("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.").

[125] *See supra* note 71.

the United States. Some provisions of international agreements are considered self-executing and have the force of domestic law without the need for subsequent congressional action.[126] But for non-self-executing provisions or agreements,[127] implementing legislation from 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.[128] Certain political commitments have also been incorporated into domestic law through implementing legislation.[129]

Under Supreme Court precedent, the repealing of statutes generally must conform to the same bicameral process set forth in Article I that is used to enact new legislation.[130] Accordingly, when Congress has passed legislation implementing an international pact 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.[131] Even when the President may have the power under international law to withdraw the United States from an international pact and suspend U.S. obligations to its pact counterparts,[132] that withdrawal likely would not, on its own accord, repeal the domestic effect of implementing legislation.[133] Moreover, Congress could influence the international pact's role in domestic law by repealing the pact's implementing legislation, and such a repeal could encourage the President to withdraw from the pact.[134]

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[126] *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.").

[127] For analysis of the differences between self-executing versus non-self-executing agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by (name redacted) , *supra* note 13, at 12-14.

[128] *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* THIRD RESTATEMENT, *supra* note 8, § 111(4)(a) & cmt. h.

[129] *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).

[130] *See* sources cited, *supra* note 73.

[131] *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.").

[132] *See supra* § "Withdrawal Under International Law."

[133] *See* sources cited *supra* note 131; 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.").

[134] *See* RESTATEMENT, *supra* note 8, §339 cmt. a ("If Congress enacts legislation that makes it impossible for the United States to carry out its obligations under an international agreement . . . the President normally should take steps to terminate the agreement."); Hathaway, *supra* note 49, at 137 n.296 ("Congress is always able to pass a subsequent statute that revokes either a treaty commitment or congressional-executive agreement as a matter of domestic law[.]"). *Cf.* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing they can (continued...)

In some cases, implementing legislation may dictate the extent to which termination of an underlying international agreement affects domestic law.[135] For example, implementing legislation for several bilateral trade agreements provides that, on the date the agreement terminates, the provisions of the implementing legislation automatically cease to be effective immediately.[136] In other cases, legislation expressly delays the impact that termination of an international agreement would have on domestic law.[137] Consequently, analysis of the terms of the implementing statutes may be necessary to understand the precise legal effect that termination of an international agreement has on U.S. law.

Withdrawal from the Paris Agreement

On June 1, 2017, President Trump announced[138] that he intends 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[.]"[139] 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.[140] Unlike the UNFCCC, which received the Senate's advice and consent in 1992,[141] 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 for which senatorial or congressional approval was not required.[142] President Obama signed an instrument of acceptance of the Paris Agreement on August 29, 2016, which was

(...continued)

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.").

[135] *See, e.g.*, 18 U.S.C. § 3181(a) ("The provisions of this chapter related to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.").

[136] United States-Australia Free Trade Agreement Implementation Act, P.L. 108-286, §106(c), 118 Stat. 919, 923 (2004) (codified in 19 U.S.C. § 3805 note); United States-Korea Free Trade Implementation Act, P.L. 112-41, § 107(c), 125 Stat. 428, 432 (2011).

[137] *See supra* note 51.

[138] Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord [hereinafter Paris Withdrawal Announcement].

[139] 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 (name redacted) and (name redac ted) .

[140] *See supra* note 32.

[141] *See* 138 CONG. REC. S17150 (daily ed. Oct. 7, 1992).

[142] *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 Economics, 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[.]").

deposited with U.N. Secretary General Ban-Ki Moon on September 3, 2016.[143] The Agreement entered into force on November 4, 2016.[144]

Although the Obama Administration described the Paris Agreement as an executive agreement, it did not publicly articulate the precise sources of executive authority on which the President relied in entering into the Agreement.[145] Possible sources include the UNFCCC,[146] existing statutes such as the Clean Air Act and Energy Policy Act,[147] the President's sole constitutional powers,[148] or a combination of these authorities.[149] While the precise source of authority is not readily apparent,[150] there does not appear to be an underlying restriction on unilateral presidential withdrawal (i.e., a treaty reservation,[151] statutory restriction, or other form of limitation) in any of

[143] *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.

[144] *Paris Agreement – Status of Ratification*, UNFCCC (last visited May 1, 2018), http://unfccc.int/paris_agreement/items/9485.php.

[145] 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, BACKGROUNDER NO. 3103 (Heritage Foundation, Mar. 15, 2016), 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).

[146] *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), 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).

[147] *See* UNITED STATES, U.S. COVER NOTE, INDC AND ACCOMPANYING INFORMATION (2015), https://tinyurl.com/oop7jpd [hereinafter U.S. INDC] (citing the Clean Air Act, 42 U.S.C. §§ 7401-7671q, the Energy Policy Act of 1992, 42 U.S.C. §§ 13201-13556), and the Energy Independence and Security Act of 2007, P.L. 110-140, as existing statutes through which the United States would 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 provide a mechanism for the implementation of a contemplated agreement may bolster the Executive's authority to enter into that pact on behalf of the United States. *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).

[148] ELIZA NORTHROP & CHAD SMITH, DOMESTIC PROCESSES FOR JOINING THE PARIS AGREEMENT, TECHNICAL NOTE 4 (2015), https://tinyurl.com/y95t6wka (stating that the U.S. joined the Paris Agreement as a sole-executive agreement).

[149] *See* David A. Wirth, *Is the Paris Agreement on Climate Change a Legitimate Exercise of the Executive Agreement Power?* LAWFARE (Aug. 29, 2016), https://tinyurl.com/zrypkyf (citing multiple sources of executive authority for the Paris Agreement); Borandsky & Spiro, *supra* note 147, at 886 (stating that that Paris Agreement would "fall somewhere in between" a sole executive agreement and a congressional-executive agreement).

[150] *See* Bradley & Goldsmith, *supra* note 16, at 1249 ("Because the [Obama] Administration did not clearly explain its authority under domestic law to make this agreement, and because the answer is not obvious, scholars and commentators have debated what *type* of agreement it was.").

[151] 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*, by (name redacted) , *supra* note 13, at 3.

the potential sources of executive authority. Therefore, the Paris Agreement would likely fall into the category of executive agreements that the Executive has terminated without seeking consent from the Senate or Congress.[152]

Although the President's domestic withdrawal has not been disputed, the terms of the Paris Agreement establish a multiyear withdrawal process that appears to prevent nations from immediately exiting the Agreement. Article 28.1 specifies the procedure for withdrawal, stating: "any time after three years from the date on which this Agreement has entered into force . . ., [a] Party may withdraw from this Agreement by giving written notification" to the Secretary-General of the United Nations. [153] Further, under Article 28.2, a notice of withdrawal does not become effective until one year after the Secretary-General receives written notification.[154] Because the Paris Agreement did not enter into force until November 4, 2016, the United States could not fully withdraw under the Article 28 procedure until November 4, 2020.

President Trump did not mention Article 28 during his June 1, 2017 announcement, and some of the President's statements could be interpreted to suggest that the Trump Administration considered the withdrawal announcement to have terminated the United States' participation in Agreement immediately.[155] However, subsequent actions by the Trump Administration officials have clarified that, although the United States intends to exercise its right to withdrawal from the Agreement "as soon as it is eligible to do so[,]" it will comply with the requirements of Article 28.[156]

Some commentators advocated for withdrawal from the parent treaty to the Paris Agreement—the UNFCCC—as a more expedient method of exiting the Paris Agreement. [157] Article 28 of the Paris Agreement provides that any party that withdraws from the UNFCCC shall be considered also to have withdrawn from the Paris Agreement. The UNFCCC has nearly identical withdrawal requirements to the Paris Agreement,[158] but because the UNFCCC entered into force in 1994,[159]

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[152] *See supra* § "Withdrawal from Executive Agreements and Political Commitments Under Domestic Law." *See also* Ku & Yoo, *supra* note 59 ("President Obama concluded the Paris climate accords and the Iran nuclear deal without the approval of the Senate or House of Representatives. Because Congress never cemented these deals into law, Trump can reverse them with the stroke of a pen on Day One."); Bradley & Goldsmith, *supra* note 16, at 1225 ("There was significant controversy about the policy wisdom of [withdrawing from the Paris Agreement], but no one questioned the President's legal authority to terminate in this context.").

[153] Paris Agreement, art. 28.1.

[154] *Id.* art. 28.2.

[155] *See* Paris Withdrawal Announcement, *supra* note 138 ("I'm willing to immediately work with Democratic leaders to either negotiate our way back into Paris, under the terms that are fair to the United States and its workers, or to negotiate a new deal that protects our country and its taxpayers. . . . But until we do that, we're out of the agreement."). For additional analysis of legal questions arising from the withdrawal announcement, see CRS Legal Sidebar WSLG1817, *President Trump's Withdrawal from the Paris Agreement Raises Legal Questions: Part 1*, by (name redac ted) , and CRS Legal Sidebar WSLG1818, *President Trump's Withdrawal from the Paris Agreement Raises Legal Questions: Part 2*, by (name redacted) .

[156] *See* Nikki R. Haley, U.S. Permanent Representative to the U.N., Diplomatic Note (Aug. 4, 2017) ("[T]he United States will submit to the Secretary-General, in accordance with Article 28, paragraph 1 of the Agreement, formal written notification of withdrawal as soon as it is eligible to do so."). For additional background on Ambassador Haley's diplomatic note, see CRS Insight IN10746, *Paris Agreement on Climate Change: U.S. Letter to United Nations*, by (name redacted).

[157] *See, e.g.*, Oliver Milman, *Quitting UN Climate Change Body Could be Trump's Quickest Exit from Paris Deal*, THE GUARDIAN (Dec. 2, 2016), https://www.theguardian.com/environment/2016/dec/02/trump-break-from-paris-climate-deal-unfccc-exit; STEVEN GROVES, BRETT SCHAEFER AND NICOLAS LORIS, THE U.S. SHOULD WITHDRAW FROM THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, BACKGROUNDER NO. 3130 (Heritage Foundation June 9, 2016), http://thf-reports.s3.amazonaws.com/2016/BG3130.pdf.

[158] *See* UNFCCC, art. 25.

the three-year withdrawal prohibition expired in 1997. Therefore withdrawal from both the parent treaty and the subsidiary Paris Agreement could be accomplished within one year. The Trump Administration, however, has not announced that it intends to take action with respect to the UNFCCC. Therefore, at present, the United States remains a party to the subsidiary Paris Agreement until Article 28's withdrawal procedure is complete—albeit one that has announced its intention to withdraw once it is eligible to do so.

Withdrawal from the Joint Comprehensive Plan of Action

On October 13, 2017, President Trump delivered a speech in which he described his Administration's strategy toward Iran and criticized the Joint Comprehensive Plan of Action (JCPOA) related to Iran's nuclear program that was entered into during the Obama Administration.[160] The JCPOA was finalized in 2015 when Iran and six nations (the United States, the United Kingdom, France, Russia, China, and Germany—collectively known as the P5+1)[161] finalized the "plan of action" placing limitations on the development of Iran's nuclear program.[162] 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.[163]

In his October 2017 speech, the President announced that he would not renew certain certifications related to Iranian compliance with the JCPOA established under Iran Nuclear Agreement Review Act,[164] and the President again declined to certify compliance in January 12, 2018.[165] The certification provisions in the Iran Nuclear Agreement Review Act are related to, but separate from, the commitments made by Iran and the P5+1 in the JCPOA. As discussed in more detail below, the President's certification decisions did not automatically terminate the United States' participation in the JCPOA or re-impose lifted sanctions, even though the President stated that he may take these actions in the future and may have domestic legal authority to do so unilaterally.[166]

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[159] *United Nations Framework Convention on Climate Change, Status of Ratification of the Convention* (last visited May 1, 2018), https://unfccc.int/process/the-convention/news-and-updates.

[160] *Remarks by President Trump on Iran Strategy* (Oct. 13, 2017), https://www.whitehouse.gov/the-press-office/2017/10/13/remarks-president-trump-iran-strategy [hereinafter 2017 Iran Remarks] ("As I have said many times, the Iran Deal was one of the worst and most one-sided transactions the United States has ever entered into.").

[161] 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.

[162] For a comprehensive review of the JCPOA, see CRS Report R43333, *Iran Nuclear Agreement*, by (name redacted) and (name redacted), and for further information related to the sanctions imposed on Iran, see CRS Report RS20871, *Iran Sanctions*, by (name redacted) .

[163] *See* JCPOA at 6.

[164] P.L. 114-17, 129 Stat. 201 (2015) (codified in 42 U.S.C. § 2011 note and *id.* § 2160e).

[165] *See* Letter from Charles S. Faulkner, U.S. Dep't of State, Bureau of Legislative Affairs, to Hon. Bob Corker, Chairman, U.S. Senate Committee on Foreign Relations (July 17, 2017) (on file with author); Statement by President Trump on the Iran Nuclear Deal (Jan. 12, 2018), https://www.whitehouse.gov/briefings-statements/statement-president-iran-nuclear-deal/ [hereinafter 2018 JCPOA Statement].

[166] *See infra* § "The Iran Nuclear Agreement Review Act." For additional analysis related to the result of President Trump's certification decisions, see CRS Report R44942, *Options to Cease Implementing the Iran Nuclear Agreement*, (continued...)

Structure and Terms of the JCPOA

The JCPOA was not signed by any party, and it does not contain provisions for ratification or entry into force, but the bulk of the sanctions addressed by the document were lifted on January 16, 2016, the date referred to as "Implementation Day."[167] Because the JCPOA is an unsigned document that purports to rely on "voluntary measures" rather than binding obligations, the Obama Administration treated the document as a political commitment that did not require congressional or senatorial approval.[168] Many commentators agree with this assessment,[169] but there is some debate over the classification of the plan of action,[170] and its legal status may have been affected by a subsequent U.N. Security 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,[171] but there may be political consequences for this course of action. It is also unlikely that domestic law would require congressional or senatorial approval for withdrawal in light of the Obama Administration's treatment of the JCPOA as a nonbinding commitment.[172]

(...continued)

by (name redacted), (name redacted), and (name redacted) .

[167] *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), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf [hereinafter Treasury Guidance].

[168] *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), 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. . . .").

[169] *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."); Harold Honju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. FORUM 338, 354 (2017) ("[T]he JCPOA is a political, not a legally binding, commitment in both form and substance."); 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.").

[170] *See*, *e.g.*, 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-unconstitutionalmichael-ramsey.html (arguing that the JCPOA should be treated as a treaty that requires the advice and consent of the Senate); Iuilia E. Padeanu, *Is the Trump Administration Bound by the Iran Deal?*, YALE J. INT'L L. (Dec. 1, 2016), http://www.yjil.yale.edu/is-the-trump-administration-bound-by-the-iran-deal/ (asserting that the JCPOA is a congressional-executive agreement that is binding as a matter of international law).

[171] *See* sources cited *supra* note 40.

[172] *See supra* § "Withdrawal from Executive Agreements and Political Commitments Under Domestic Law."

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.[173] "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.[174] On Implementation Day, President Obama issued an executive order revoking all or portions of five prior executive orders that imposed secondary sanctions on Iran.[175] These executive orders generally may be revoked or modified at the will of the President,[176] and therefore nothing in domestic law would prevent President Trump 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.[177]

Other secondary sanctions addressed in the JCPOA were imposed on Iran by statute rather than through executive order.[178] 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.[179] The Obama Administration first exercised this waiver authority on Implementation Day,[180] and the Trump Administration has

[173] JCPOA arts. 21-25.

[174] *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 generally, see CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, by (name redacted) .

[175] *See* Executive Order 13716 of January 16, 2016, *supra* note 167.

[176] *See* CRS Report R43311, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, by (name reda cted) , *supra* note 174, 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 (name redacted) , at 7 (discussing the general power of the President to revoke or modify executive orders).

[177] The Executive's authority to issue sanctions on Iran under the executive order was premised on the National Emergencies Act, 50 U.S.C. §§ 1601-1651, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1708, the Iran Sanctions Act of 1996, P.L. 104-72, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. §§ 8501-8511, the Iran Freedom and Counter-Proliferation Act of 2012, 22 U.S.C. 8801-8811, and the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701-8795. 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 174, at Table 2.

[178] For a summary of the statutory sanctions lifted, see CRS Report R43333, *Iran Nuclear Agreement*, by (name redacted) and (name redacted) , *supra* note 162, 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*, by (name redacted) , *supra* note 174.

[179] *See* 22 U.S.C. § 8803(i) (authorizing waiver of sanctions under the Iran Freedom and Counter-Proliferation Act for 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 174, at Table 3.

[180] *See* Treasury Guidance, *supra* note 167, at 34-37.

continued to issue these waivers, most recently on July 17, 2017 and January 12, 2018.[181] When those waivers expire, nothing in domestic law would prevent the Trump Administration from choosing not to renew them, thereby reinstating U.S. sanctions imposed on Iran by statute.

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,"[182] and it specifies a set of resolutions to be terminated through a future act of the Security Council.[183] 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.[184] Resolution 2231 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]."[185] Although the text of the JCPOA appears to rely on "voluntary measures,"[186] 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.[187]

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.[188] As a matter of international law, many observers[189] agree that "decisions" of the Security Council are generally binding pursuant to Article 25 of the U.N. Charter,[190] but the Security Council's "recommendations," in most cases, lack binding force.[191] Whether a provision is understood as a nonbinding "recommendation" or a

[181] *See* Letter from Charles S. Faulkner, U.S. Dep't of State, Bureau of Legislative Affairs, to Hon. Bob Corker, Chairman, U.S. Senate Committee on Foreign Relations (July 17, 2017) (on file with author); 2018 JCPOA Statement, *supra* note 165.

[182] S.C. 2231, ¶ v (July 20, 2015).

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

[184] S.C. 2231, ¶ 7.

[185] *Id.* at 1.

[186] JCPOA at 6.

[187] *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/ (stating that a Security Council resolution makes a U.S. president "legally required" to comply with the many of the "key provisions" in the JCPOA) ; CRS Report R43333, *Iran Nuclear Agreement*, by (name redacted) and (name redacted) *supra* note 162, 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).").

[188] 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).

[189] *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).

[190] 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.

[191] *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. . . .").

binding "decision" frequently depends on the precise language in the resolution.[192] 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.[193]

Resolution 2231 appears to contain a combination of nonbinding recommendations and binding decisions.[194] 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.[195] 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,"[196] and it is understood to allow the Security Council to issue resolutions that are binding on U.N. Member States.[197]

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[.][198]

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

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[192] *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[.]").

[193] *See* Öberg, *supra* note 192, 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 192, 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.").

[194] *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).

[195] *Id.* ¶¶ 7, 21, 22, 22.

[196] *See* U.N. CHARTER, art 41.

[197] *E.g.* Frederic L. Kirgis, Jr., *The United Nations at Fifty: the Security Council's First Fifty Years*, 80 AM. J. INT'L L. 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).

[198] 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.

parlance.[199] Others have interpreted the phrase to create an obligation under international law to comply,[200] and a third group falls in between, describing the phrase as purposefully ambiguous.[201] Historically, U.N. Member States have ascribed varying levels of significance to the phrase "calls upon" in Security Council resolutions.[202] As a consequence, there may not be a 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.[203] In certain cases, existing statutory enactments may authorize the Executive to implement the provisions of a resolution through economic and communication-related sanctions.[204] But, to the extent Resolution 2231 is not self-executing, domestic law would not, on its own accord, mandate that the President comply with the terms of the resolution.[205]

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[199] *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).

[200] *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.).

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

[202] *See* Fry, *supra* note 200, 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.).

[203] *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 to comply with an ICJ decision).

[204] *See* 22 U.S.C. § 287c(a) ("[W]henever 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.").

[205] *Cf. Medellin*, 552 U.S. at 505-06 ("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.") (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

The Iran Nuclear Agreement Review Act and the Trump Administration

Because the Obama Administration treated the JCPOA as a nonbinding political commitment for which congressional or senatorial consent was not required,[206] Congress did not directly approve the United States' entry into the JCPOA. However, Congress did pass legislation—the Iran Nuclear Agreement Review Act[207]—providing certain congressional review and oversight over the plan of action. Among other provisions,[208] the Iran Nuclear Agreement Review Act requires the President to certify every 90 days that Iran (i) is fully implementing the JCPOA; (ii) has not committed an uncured, material breach of the plan of action; (iii) has not taken action that could significantly advance its nuclear weapons program; and (iv) that the continued suspension of sanctions under the JCPOA is vital to the national security interests of the United States and is "appropriate and proportionate" to Iran's measures to terminate its nuclear weapons program.[209] If the President elects not to certify, the Act allows Congress to use expedited procedures to pass legislation re-imposing U.S. sanctions that the President lifted pursuant to the JCPOA.[210]

In his October 13 announcement, President Trump stated that he is withholding certification under the Iran Nuclear Agreement Review Act on the ground that he cannot certify that the continued lifting of sanctions is "appropriate and proportionate" relative to Iran's measures to terminate its nuclear weapons program.[211] The President did not state that he is *immediately* terminating U.S. participation in the JCPOA or re-imposing U.S. domestic sanctions under his own authority.[212] Rather, declining to certify Iranian compliance provides Congress with an opportunity to utilize the Iran Nuclear Agreement Review Act's expedited procedures to re-impose sanctions on Iran.[213] Still, the President stated that he had the authority to terminate the JCPOA "at any time."[214] And in a January 2018 speech on the JCPOA, President Trump stated that "the United States will not again waive sanctions in order to stay in the Iran nuclear deal[,]" and that he "will withdraw from the deal immediately" unless the JCPOA is renegotiated."[215]

For the reasons described in the sections above, under current domestic law, the President may possess authority to terminate U.S. participation in the JCPOA and to re-impose U.S. sanctions on Iran, either through executive order or by declining to renew statutory waivers.[216] As a matter of international law, by contrast, termination of the JCPOA or re-imposition of sanctions (either by Congress or the President alone) could implicate the question of whether Resolution 2231

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[206] *See supra* note 168.

[207] *See* P.L. 114-17, 129 Stat. 201 (2015) (codified in 42 U.S.C. § 2011 note and *id.* § 2160e).

[208] For additional background and analysis of the Iran Nuclear Agreement Review Act, see CRS Report R43333, *Iran Nuclear Agreement*, by (name redacted) and (name redacted) *supra* note 162, at 23-24.

[209] 42 U.S.C. § 2160e(d)(6).

[210] *Id.* § 2160e(e).

[211] *See* 2017 Iran Remarks, *supra* note 160.

[212] *See id*.

[213] For additional discussion of the procedures and possible congressional options related to the JCPOA, see CRS Report R44942, *Options to Cease Implementing the Iran Nuclear Agreement*, by (name redacted), (name redacted), and (name redacted) , *supra* note 166.

[214] 2017 Iran Remarks, *supra* note 160. ("[I]n the event we are not able to reach a solution working with Congress and our allies, then the [JCPOA] will be terminated. It is under continuous review, and our participation can be cancelled by me, as President, at any time.").

[215] 2018 JCPOA Statement, *supra* note 165.

[216] *See supra* § "Structure and Terms of the JCPOA."

converted the JCPOA's nonbinding political commitments into obligations that are binding under the U.N. Charter. Absent an uncured breach or nonperformance of the JCPOA by Iran, which the Trump Administration has not claimed to date,[217] some argue that unilateral withdrawal from the plan of action or re-imposition of U.S. secondary sanctions would amount to a violation of Resolution 2231.[218] But there is no clear answer on whether this Security Council resolution creates a legally binding obligation to comply with the overall terms of the JCPOA,[219] and the political ramifications of any future U.S. action related to JCPOA may be significant regardless of which legal interpretation is superior.[220]

Dispute Resolution and "Snapback" Procedures

If the Trump Administration believes Iran has not complied with the JCPOA, the terms of the plan of action and Resolution 2231 may offer an avenue for the United States to relieve itself of any commitments under the JCPOA regardless of whether those commitments were converted to legally binding obligations.[221] Article 36 of the JCPOA establishes a multistage dispute resolution procedure that can be invoked if the United States (or another member of the P5+1) believes Iran is "not meeting its commitments" under the plan of action.[222] If the dispute remains unresolved after this process, Article 36 would allow the United States to cease performing its commitments, provided it deems Iran's actions to constitute "significant nonperformance" of the JCPOA.[223]

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[217] Although the President stated that he was unable to certify that continued suspension of sanctions was "appropriate and proportionate" to the measures taken by Iran with respect to terminating its nuclear program, Iran Remarks, *supra* note 160, he did not announce an objection to certifying that "Iran has not committed a material breach with respect to the agreement or, if Iran has committed a material breach, Iran has cured the material breach[.]" 42 U.S.C. § 2160e(d)(6)(ii). The Iran Nuclear Agreement Review Act also requires the President to submit information relating to a "potentially significant breach or compliance incident by Iran" with respect to the JCPOA within 10 calendar days, *id.* § 2160e(d)(2), but the President has not submitted a breach or compliance report. For a discussion of claims of nonperformance, see *infra* § Dispute Resolution and "Snapback" Procedures.

[218] *See*, *e.g.*, James Conca, *The Iran Nuclear Deal Without the United States*, FORBES (Oct. 17, 2017) ("[S]ince the Deal was codified through a United Nations Security Council resolution, re-imposing sanctions by the United States, or withdrawal from the agreement, would contravene international law and place the United States in legal jeopardy."); Lynch & Hudson, *supra* note 187 (arguing that Resolution 2231 makes the JCPOA binding as a matter of international law on the United States).

[219] *Compare*, *e.g.*, Bellinger III, *supra* note 199 (stating that 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") *with* sources cited *supra* note 218 (citing commentators that argue that exiting the JCPOA or re-imposing sanctions would violate Resolution 2231).

[220] For analysis of potential responses from foreign nations to U.S. action on the JCPOA, see CRS Report R44942, *Options to Cease Implementing the Iran Nuclear Agreement*, by (name redacted), (name redacted), and (name re dacted) , *supra* note 166, at 7-9.

[221] For analysis of options to cease implementation of the JCPOA, see CRS Report R44942, *Options to Cease Implementing the Iran Nuclear Agreement*, by (name redacted), (name redacted), and (name redacted) , *supra* note 166, at 1-8.

[222] JCPOA, art. 36. Disagreements are first referred to a "Joint Commission," *id.*, comprised of representatives from Iran and each member of the P5+1. *See id.* Ann. IV, art. 1.2. After consideration by the Joint Commission, any participant may refer the issue to the parties' domestic foreign affairs representative if the dispute remains unresolved, however, consideration at this level is not mandatory. *See id*, art. 36. If the dispute continues to remain unresolved, a party may refer the issue to a three-member "Advisory Board," which will provide a non-binding opinion. *See id*. The JCPOA provides reciprocal rights to Iran, meaning that Iran can invoke the same procedure if it believes the United States or a member of the P5+1 is not performing its commitments under the plan of action. *See id*.

[223] *Id.* ("[I]f the complaining participant deems the issue to constitute significant non-performance, then that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part and/or notify the UN Security Council that it believes the issue constitutes significant non-performance.").

"Significant non-performance" is not defined in the JCPOA or Resolution 2231, but a party may report such nonperformance to the U.N. Security Council.[224] After receiving a notice of nonperformance, Resolution 2231 requires the Security Council to vote on a draft resolution addressing whether it should continue to withhold the U.N. sanctions imposed on Iran through its earlier resolutions.[225] Unless the Security Council votes to continue to lift those sanctions within 30 days of receiving a notice of significant nonperformance, the prior Security Council resolutions "shall apply in the same manner as they applied before the adoption of" Resolution 2231.[226] Thus, the Resolution 2231 creates a procedure—often referred to as the "snapback" process[227]—that places the onus on the Security Council to vote affirmatively to continue to lift its sanctions.[228] As a permanent member of the Security Council,[229] the United States would possess the power to veto any such vote[230] and effectively force the reinstatement of the Security Council's sanctions on Iran.

To date, President Trump has criticized Iran's performance of the JCPOA,[231] but the Administration does not appear to have publicly invoked the dispute resolution mechanisms or the "snapback" process.

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[224] JCPOA, arts. 36, 37; S.C. 2231, ¶¶ 11-12.

[225] S.C. 2231, ¶ 11.

[226] *Id.* 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).

[227] *See*, *e.g.*, Treasury Guidance, *supra* note 167, at 42-43 (discussing the "snapback" procedures in the JCPOA).

[228] *Id.* ¶¶ 11, 12.

[229] *See* U.N. CHARTER, art 23.

[230] 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.

[231] *See* Iran Remarks, *supra* note 160; 2018 JCPOA Statement, *supra* note 165.