LEGAL NOTE: COULD A FUTURE PRESIDENT REVERSE U.S. APPROVAL OF THE PARIS AGREEMENT?

CENTER FOR CLIMATE AND ENERGY SOLUTIONS

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The Paris Agreement will soon enter into force. Like other treaties, the agreement includes provisions spelling out the manner in which a party may choose to exercise its right to withdraw. This note summarizes these provisions; relevant provisions of the U.N. Framework Convention on Climate Change (UNFCCC); related international law; and related provisions and practices under U.S. law. It also looks beyond these legal considerations at the potential diplomatic ramifications should the United States withdraw from the Paris Agreement.

WITHDRAWAL UNDER THE TERMS OF THE PARIS AGREEMENT

As a matter of both international law and U.S. law, the president could withdraw from the Paris Agreement pursuant to Article 28.1, which allows a party to withdraw by giving one year's written notification to the Depositary (i.e., the U.N. Secretary-General), beginning three years after the Paris Agreement's entry into force for that party. A party need not provide any reason or justification for withdrawing; the only limitations imposed by the Paris Agreement relate to timing. The Paris Agreement will come into force on November 4, 2016. This means that starting on November 4, 2019, the president could give written notice of withdrawal, and the withdrawal would take effect one year later, on November 4, 2020.

WITHDRAWAL FROM THE UNFCCC

A second option, which would enable the president to withdraw from the Paris Agreement more quickly, would be to withdraw from its parent agreement, the UNFCCC. Article 25.1 of the UNFCCC allows parties to withdraw by giving one year's notice. Article 28.3 of the Paris Agreement further provides that "any party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement." Thus, a president could withdraw the United States from the Paris Agreement in only a year, by giving notice of withdrawal from the UNFCCC.

Although this method of withdrawal is clearly permitted internationally, there is some question whether the president may withdraw from the UNFCCC without Senate approval as a matter of U.S. constitutional law. Unlike the Paris Agreement, which President Obama accepted under his executive authority, the UNFCCC was ratified by President George H.W. Bush after receiving the Senate's consent pursuant to the Article II of the U.S. Constitution. Consequently, there is a plausible argument that the president may not withdraw from the UNFCCC without the Senate's consent, for the same reason that the president may not unilaterally rescind a law enacted by Congress: Namely, termination of a law requires action by the same institutional actors that adopted the law—in this case, the president acting in conjunction with two-thirds of the Senate.

In practice, however, it is very unlikely that the legality of a decision by the president to withdraw from the UNFCCC could be successfully challenged. The issue of presidential authority to terminate Article II treaties was litigated in the late 1970s, when President Jimmy Carter unilaterally terminated the Sino-American Mutual Defense Treaty with the Republic of China (Taiwan), as

part of his decision to recognize the People's Republic of China. The Mutual Defense Treaty had been approved by the Senate, and several senators, led by Barry Goldwater, brought a lawsuit challenging President Carter's action, arguing that treaty termination requires Senate approval. In a 6-3 vote, the Supreme Court dismissed the complaint (*Goldwater v. Carter*, 444 U.S. 996 (1979)), but the six justices that joined the judgment disagreed on the grounds for doing so, and there was no majority decision.[1]

Although *Goldwater v. Carter* was not a decision on the merits, it has reinforced the view that presidents may terminate treaties without seeking Senate approval, and President George W. Bush's termination of the Anti-Ballistic Missile (ABM) Treaty with Russia in 2002, though challenged by some senators, was generally accepted as a permissible exercise of presidential authority.

WITHDRAWAL OUTSIDE THE TERMS OF THE PARIS AGREEMENT AND THE UNFCCC

A president could, alternatively, seek to withdraw from the Paris Agreement outside the terms of either the Paris Agreement or the UNFCCC, arguing that President Obama did not have authority to join the Paris Agreement in the first place. Such a decision would violate international law.

International law recognizes that a head-of-state has "full powers" to enter into international agreements, which President Obama exercised in accepting the Paris Agreement. For reasons explored elsewhere, President Obama had ample constitutional authority to join the Paris Agreement. But even if critics of the President's decision were correct and Obama lacked legal authority, this would not invalidate U.S. acceptance of the Paris Agreement internationally. Article 46 of the Vienna Convention on the Law of Treaties (VCLT) specifically provides that a state may not withdraw from a treaty on the grounds that its acceptance violated domestic law, unless the violation was "manifest." Although the United States is not a party to the VCLT, its provisions are generally regarded as reflecting customary international law and hence apply to the United States. Given the many uncertainties about the extent of presidential treaty-making power, it could not be plausibly claimed that President Obama manifestly lacked authority to join the Paris Agreement.

Thus, a decision by a future president to withdraw from the agreement outside its terms would not be recognized internationally. The United States would still be bound by its commitments under the Paris Agreement, including the obligations to maintain and periodically update a nationally-determined contribution (NDC) that it intends to implement (Article 4.2), to pursue domestic implementation measures (Article 4.2), and to report on its emissions and its progress in implementing and achieving its NDC (Article 13.7).

EFFECTS OF U.S. WITHDRAWAL ON THE PARIS AGREEMENT

If the United States were to withdraw from the Paris Agreement, what would be the effects for the treaty's continuation? The Paris Agreement's entry into force required acceptance by 55 countries representing 55 percent of total global greenhouse gas emissions (Article 21.1). If U.S. withdrawal were to reduce the total greenhouse gas emissions of parties below 55 percent of global emissions, would the treaty thereby "exit out of force"? The answer, clearly, is no, since the Vienna Convention specifically provides that, unless a multilateral treaty otherwise provides, "a multilateral treaty does not terminate by reason only of fact that the number of parties falls below the number necessary for entry into force." (Vienna Convention on the Law of Treaties, Article 55).

Although U.S. withdrawal from the Paris Agreement would not terminate the agreement, other countries could conceivably claim a legal right to terminate or withdraw on the ground that U.S. withdrawal caused a "fundamental change in circumstances." Article 62 of the VCLT provides that "a fundamental change of circumstances" (*rebus sic standibus*) may be invoked by a party as a grounds for withdrawing from a treaty, if the existence of these circumstances "constituted an essential basis" of its consent, the change in circumstances was "not foreseen by the parties," and the "effect of the change is radically to transform the extent of the obligations still to be performed under the treaty."

However, even if a country could argue that U.S. participation in the Paris Agreement constituted

an "essential basis" of its consent, and that U.S. withdrawal was not foreseen—both of which are highly contestable—there does not appear to be a plausible argument that U.S. withdrawal would "radically transform" the extent of the obligations still to be performed, since the Paris Agreement's obligations are largely procedural—for example, to prepare, submit and maintain an NDC. Consequently, U.S. withdrawal would not give other states a basis to withdraw under the doctrine of *rebus sic standibus*.

POTENTIAL RAMIFICATIONS OF U.S. WITHDRAWAL

Beyond legal issues, any decision on whether to enter into or withdraw from an international agreement typically takes into account political and diplomatic considerations as well.

The United States played a strong leadership role in the negotiation and entry into force of the Paris Agreement. Diplomatic efforts with China led to a series of joint leader-level announcements that helped ensure broad participation in the agreement. Other countries, disappointed by past U.S. climate efforts, have welcomed and applauded the United States' role in establishing the Paris Agreement. President Obama's acceptance of the agreement has drawn virtually no opposition in the Congress.

Given overwhelming international support for the Paris Agreement—and especially given the importance of U.S. leadership in achieving it—U.S. withdrawal from the agreement would likely have serious diplomatic consequences. Many countries, including major U.S. allies, could be expected to loudly condemn a decision to withdraw, even if legally permissible. As the world's largest historic greenhouse gas emitter, the United States would be seen as abandoning its responsibility to meet an urgent global challenge. And walking away from the Paris Agreement—one of the most significant multilateral achievements of recent times—would be viewed as a decided turn toward unilateralism. The United States would face a serious risk that other countries would be less inclined to cooperate on U.S. priorities.

Moreover, the manner of U.S. withdrawal would also likely matter. For example, withdrawing from the UNFCCC would be even more controversial than withdrawing from only the Paris Agreement, since the UNFCCC was accepted by the United States on a bipartisan basis with the unanimous approval of the Senate, and has been the foundation of international cooperation on the climate issue since its adoption almost 25 years ago. And withdrawing in a manner that did not conform to the requirements of the Paris Agreement or the UNFCCC would damage the United States' reputation as a law-abiding member of the international community.

ENDNOTES

1 Justice Rehnquist, joined by three other justices, argued that the case raised a non-justiciable political question. Justice Powell wrote a separate opinion arguing that the case was not ripe for judicial resolution. And Justice Marshall simply joined the result, without providing an opinion. Two justices dissented, arguing that the case deserved full consideration. Only Justice Brennan voted to uphold the President's decision, although even he did not do so on the basis of a presidential authority to terminate treaties, but rather because the termination was incidental to the generally accepted presidential power to recognize foreign governments.

2 See Restatement (Third) of the Foreign Relations Law of the United States §339 (1987) (President may unilaterally withdraw from a treaty so long as there is a basis for termination in international law); Curtis A. Bradley," Treaty Termination and Historical Gloss," 92 *Texas Law Review* 773 (2014).

3 Daniel Bodansky, *Legal Options for U.S. Acceptance of a New Climate Agreement* (C2ES, May 2015).

Other C2ES Resources:

Legal Options for U.S. Acceptance of a New Climate Change Agreement, May 2015.

Achieving the United States' Intended Nationally Determined Contribution, September 2016.

Paris Climate Agreement Q&A, October 2016.

Toward 2015: An International Climate Dialogue, July 2015.

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