

U.S. POLICY

LEGAL OPTIONS FOR U.S. ACCEPTANCE OF A NEW CLIMATE CHANGE AGREEMENT

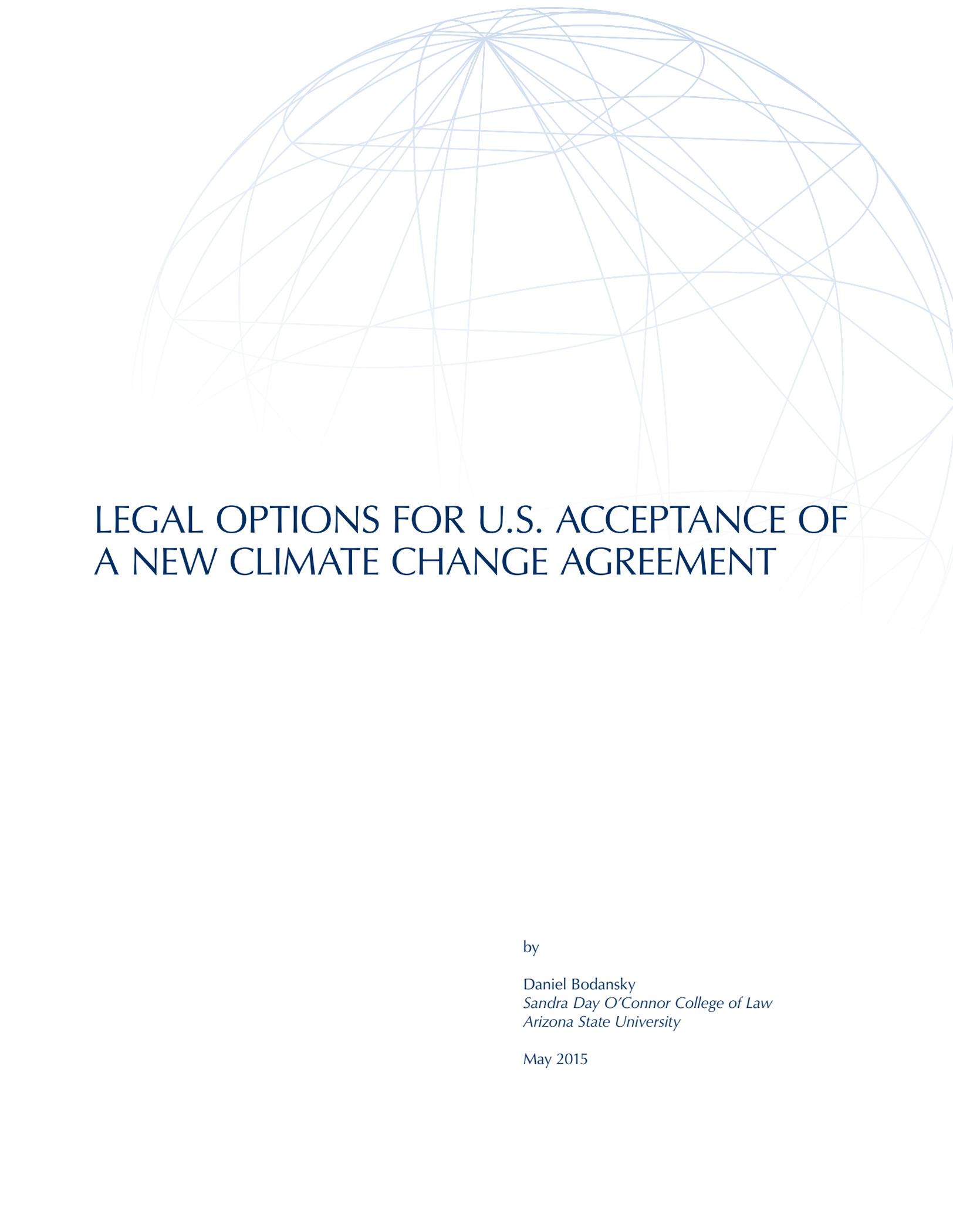


CENTER FOR CLIMATE
AND ENERGY SOLUTIONS

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May 2015



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■ EXECUTIVE SUMMARY

The success of ongoing negotiations to establish a new global climate change agreement depends heavily on the agreement's acceptance by the world's major economies, including the United States. The new agreement is being negotiated under the United Nations Framework Convention on Climate Change (UNFCCC), a treaty with 195 parties that was ratified by the United States in 1992 with the advice and consent of the U.S. Senate. U.S. acceptance of the new agreement may or may not require legislative approval, depending on its specific contents.

U.S. law recognizes several routes for entering into international agreements. The most commonly known, under Article II of the Constitution, requires advice and consent by two-thirds of the Senate. In practice, however, the United States has accepted the vast majority of the international agreements to which it is a party through other procedures. These include congressional-executive agreements, which are approved by both houses of Congress, and presidential-executive agreements, which are approved solely by the president.

The President would be on relatively firm legal ground accepting a new climate agreement with legal force, without submitting it to the Senate or Congress for approval, to the extent it is procedurally oriented, could be implemented on the basis of existing law, and is aimed at implementing or elaborating the UNFCCC. On the other hand, if the new agreement establishes legally binding emissions limits or new legally binding financial commitments, this would weigh in favor of seeking Senate or congressional approval. However, the exact scope of the President's legal authority to conclude international agreements is uncertain, and the President's decision will likely rest also on political and prudential considerations.

I. INTRODUCTION

In December 2011, UNFCCC parties adopted the Durban Platform for Enhanced Action, which established an Ad Hoc Working Group (ADP) to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties.”¹ The ADP is to conclude its work in 2015, for adoption at the 21st Conference of the Parties (COP 21) in Paris.

The success of the Paris outcome will depend crucially on the participation of the world’s major economies, including the United States. A major weakness of the Kyoto Protocol has been its limited coverage, due both to the unwillingness of the United States to become a party and to the protocol’s lack of new mitigation commitments for developing countries, which now account for the majority of global greenhouse gas (GHG) emissions. Participation by the United States in the Paris outcome is, of course, not sufficient to assure success, but it is necessary. Unless the Paris outcome applies to the world’s biggest emitters, it cannot significantly advance the international climate effort.

The Paris outcome appears likely to include a number of different components, with a legally binding agreement at its core. Although some elements of the agreement have already begun to take shape, most remain to be negotiated. Recent COP decisions² suggest that a key part of the Paris outcome will be nationally determined contributions (NDCs) to limit greenhouse gas emissions. But the legal character of these NDCs, the commitments of parties relating to them, and any commitments relating to adaptation and finance—all of these issues are still unresolved.

If the Paris agreement turns out to be political rather than legal in nature, like the 2009 Copenhagen Accord, then the president would be free to accept the agreement pursuant to his foreign affairs powers (Bradley 2013, at 95-96). But if, as most observers expect, the Paris conference adopts a legal agreement establishing binding obligations, then the question would arise: what are the options for U.S. acceptance? In contrast to most countries, which provide only a single procedure for entering into international legal agreements (usually involving

parliament),³ U.S. law and practice recognize several routes. The best-known procedure involves advice and consent by two-thirds of the Senate pursuant to Article II of the Constitution. However, international agreements may also be adopted on the basis of congressional approval or, in some circumstances, by the president acting alone, without the express approval of either the Senate or Congress.

This paper surveys the options for the United States to join a Paris climate change agreement.⁴ **Section II** begins with several preliminary considerations about the relationship between international and domestic law relating to international agreements. **Section III** then discusses the different types of international agreements under U.S. law, including Article II treaties, congressional-executive agreements, treaty-executive agreements, and presidential-executive agreements. **Section IV** provides background on the United Nations climate change regime and **Section V** discusses the Durban Platform negotiations. **Section VI** explores the options for U.S. acceptance of a Paris climate change agreement. **Section VII** considers potential Paris outcomes and their implications for U.S. acceptance. **Section VIII** considers whether the president’s decision on the process used to accept an agreement can be overturned.

The paper concludes that the options available to the United States will depend on the specific contents of the Paris agreement. To the extent that it is limited to procedural commitments that elaborate the obligations contained in the UNFCCC—for example, relating to reporting and review—then it arguably could be concluded using any of the options under U.S. law for entering into international agreements, including acceptance by the president on the basis of his existing constitutional, statutory and treaty authority, without submission to the Senate or Congress. To the extent that the Paris agreement contains legally binding, quantitative limits on emissions or new legally binding financial commitments, these would weigh in favor of seeking Senate or congressional approval for U.S. participation.

II. INTERNATIONAL AND DOMESTIC LAW RELATING TO INTERNATIONAL AGREEMENTS

Initially, it is important to understand the relationship of international and U.S. law regarding international legal agreements. The international law is codified in the Vienna Convention on the Law of Treaties,⁵ which generally reflects customary international law. U.S. law, in contrast, addresses the status of an international agreement as domestic law and is grounded in the U.S. Constitution, whose scant provisions on international agreements have been elaborated through more than two centuries of practice and case law.

One difference between U.S. and international law concerns whether international agreements come in a single variety or different varieties. As discussed in **Section III**, U.S. law distinguishes between several types of international agreements, which have different domestic legal effects. For example, Article II treaties are on the “same footing, and made of like obligation” as legislation, and supersede earlier-in-time, inconsistent federal laws, whereas presidential-executive agreements do not.⁶ In contrast, as a matter of international law, all treaties have the same status and are equally binding on the United States, regardless of whether they are styled “conventions,” “protocols,” “amendments,” “covenants,” “conventions,” or some other term. What matters internationally is not what an agreement is called or how it was approved domestically, but whether it is intended to be governed by international law.⁷

Similarly, the domestic approval process for an international agreement should not be confused with the act by which a state expresses its consent to be bound by the agreement internationally. As a matter of U.S. law, international agreements can be approved by two-thirds of the Senate, by Congress, or by the president acting alone. But, regardless of the domestic approval process, the international act of accepting an international agreement is performed by the president.⁸ As the “sole organ” of the United States internationally,⁹ it is the president who consents on behalf of the United States—for example, through signature, ratification, or accession.¹⁰

Because international law focuses only on the international act of treaty acceptance, not the domestic approval process, it can reach a different conclusion than U.S. law about whether the United States has validly joined an international agreement. Under U.S. law, an international agreement is invalid if the domestic approval process does not satisfy the Constitution. But, as a matter of international law, an agreement would be binding on the United States internationally even if the president, in consenting to the agreement, acted unconstitutionally. The only exception is if the constitutional violation was “manifest,”¹¹ a condition unlikely ever to be met, given the uncertainties about the scope of the president’s power to enter into agreements without Senate or congressional approval (Henkin 1996, 500 n.174).

It is also important to distinguish the effects of a legal agreement in international and domestic law. A validly adopted agreement is binding on the United States as a matter of international law. But unless an agreement is deemed “self-executing,”¹² it is not judicially enforceable until Congress has adopted implementing legislation giving the agreement domestic legal effect.

International and U.S. law also provide different rules for withdrawing from legal agreements. Under international law, a state may withdraw from an agreement only in accordance with the terms of the agreement or, if the agreement does not have a withdrawal provision, of the Vienna Convention on the Law of Treaties (Helfer 2005). As with treaty acceptance, the president acts on behalf of the United States internationally (Henkin 1996, 212). Under U.S. law, in contrast, international agreements are not superior to federal statutes, so Congress can terminate an agreement as U.S. law by passing a later-in-time statute that is inconsistent with the agreement. In addition, the president can, in practice, terminate an international agreement unilaterally, since the Supreme Court has declined to review the constitutionality of presidential treaty termination.¹³

Finally, the nomenclature used to describe agreements differs internationally and domestically. In international law, the term “treaty” is used to refer to any legal agreement between states in writing. In U.S. practice,

the term “treaty” has a narrower meaning, and is usually reserved for international agreements that receive the advice and consent of two-thirds of the Senate pursuant to Article II of the Constitution.¹⁴

III. TYPES OF INTERNATIONAL AGREEMENTS UNDER U.S. LAW

The U.S. Constitution contains only four provisions directly concerning international agreements. First, Article II provides that 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.”¹⁵ Second, Article VI declares treaties to be part of the “supreme law of the land.”¹⁶ Third, cases arising under treaties fall within the Article III jurisdiction of the federal courts. Fourth, Article I, Section 10, prohibits states of the United States from entering into “any Treaty, Alliance, or Confederation,” but allows them to enter into an “agreement or compact” with a foreign power with the consent of Congress.¹⁷

ARTICLE II TREATIES

The only procedure specified in the Constitution for entering into international legal agreements is set forth in Article II. Two features of the Article II treaty-making process are noteworthy, and distinguish it from Congress’s law-making power under Article I of the Constitution:¹⁸ First, Article II gives a role only to the Senate, not the House of Representatives; second, it requires the Senate to approve treaties by a super-majority, two-thirds vote. The first factor—the special role of the Senate—is usually explained by the Senate’s function in the constitutional scheme as the representative of the states, and by the framers’ belief that, as a smaller body than the House of Representatives, the Senate provided a stronger assurance of secrecy.¹⁹ The second factor—the super-majority voting requirement in Article II—was intended to prevent the adoption of treaties favoring one region of the country over another (Hathaway 2008, 1282-84).

EXECUTIVE AGREEMENTS

Although the Constitution explicitly specifies only the Article II treaty-making procedure, three additional modes of concluding international legal agreements are today recognized as constitutional:

- First, Congress can authorize the conclusion of “congressional-executive agreements.”
- Second, existing treaties can authorize the conclusion of “treaty-executive agreements.”

- Third, the president can adopt “presidential-executive agreements” based on his existing legal authority, including his independent constitutional authority over foreign affairs.

These non-Article II procedures for entering into international agreements have several textual underpinnings. First, Article I, Section 10, implies that not all international agreements constitute “treaties,” since states are precluded from entering into “treaties” with other countries, but are allowed to enter into “agreements” and “compacts” with congressional approval. Since Article II, by its terms, applies only to “treaties,” it leaves open the procedure for approving other types of international agreements. Second, Article II does not state that its treaty-making procedure is exclusive. Third, the extensive powers granted by the Constitution to Congress and the president provide bases for agreement-making that are additional to the Article II procedure. For example, international agreements may be made by Congress in the exercise of its Article I power to regulate foreign commerce, and by the president in the exercise of his constitutional power to recognize foreign governments.

Historical practice and case law have firmly established the constitutionality of congressional-executive, treaty-executive, and presidential-executive agreements (CRS 2001, 77). The United States has adopted more than 18,000 treaties as “executive agreements,” approximately 95 percent of all international agreements to which the United States is a party (Garcia 2015, 5). Although a few commentators continue to maintain that Article II provides the exclusive procedure for concluding international agreements (Tribe 1995), the constitutionality of non-Article II agreements seems well settled. Today, legal debates mostly concern the extent to which the different processes are interchangeable and, if not, what factors determine which domestic approval process should be used for which international agreements.

Congressional-Executive Agreements

Congressional-executive agreements are the most common form of international agreement to which the United States is a party (CRS 2001, 40-41). They differ

BOX 1: Types of International Agreements under U.S. Law

- Article II Treaties (consent by 2/3 of Senate)
- Congressional-Executive Agreements (legislative approval by Congress)
 - *Ex post* approval by statute
 - *Ex ante* authorization by statute
- Treaty-Executive Agreements (accepted by the President under a prior treaty)
- Presidential-Executive Agreements (accepted by the President)
 - President has independent constitutional authority
 - Agreement consistent with and can be implemented under existing U.S. law

from Article II treaties in that they are approved through the normal legislative process, involving both houses of Congress using their ordinary voting rules, rather than by a supermajority of the Senate. The lack of a two-thirds voting requirement in the Senate to approve congressional-executive agreements can be crucial. The League of Nations Covenant received a majority vote in the Senate and might conceivably have been approved as a congressional-executive agreement.²⁰ But it failed to gain the requisite two-thirds majority to be adopted as an Article II treaty. Conversely, the North American Free Trade Agreement (NAFTA) was approved by a 61-38 vote in the Senate, enough to be adopted as a congressional-executive agreement, but not as an Article II treaty.²¹

Since World War II, the United States has approved most international agreements through congressional action rather than Senate advice and consent, including many of the most important agreements to which the United States is a party, such as the WTO Uruguay Round agreements and the agreements establishing the International Monetary Fund and the World Bank. Congress can give its approval to an international agreement either *ex ante* or *ex post*, or both.²²

Ex ante approval is provided through legislation that explicitly pre-authorizes the executive branch to enter into a specific agreement or kind of agreement. For example, the International Dolphin Conservation Act authorizes the secretary of state to “enter into international

agreements to establish a global moratorium to prohibit harvesting of tuna through the use of purse seine nets.”²³ Similarly, the Postal Act authorizes the secretary of state to enter into postal treaties with other countries, without submitting the agreements to the Senate or Congress for approval.²⁴

Less commonly, Congress approves international agreements after they have been completed. Examples of *ex post* congressional-executive agreements include the Bretton Woods agreements,²⁵ NAFTA,²⁶ the World Trade Organization (WTO) agreements, and the Strategic Arms Limitation Talks (SALT) agreement.²⁷ In some cases, the *ex post* legislation explicitly approves the agreement and adopts it into U.S. law.²⁸ But sometimes the approval is implicit, flowing from the adoption of implementing legislation or from the failure by Congress to object to an agreement within a specified period of time.²⁹

The constitutionality of congressional-executive agreements is “well established” (CRS 2001, 5), at least to the extent an agreement is within the combined powers of the president and Congress, as is true of trade agreements, which fall within Congress’s power to regulate foreign commerce. Indeed, some scholars argue that congressional-executive agreements have become almost fully interchangeable with Article II treaties (Restatement §303, Comment E; Henkin 1996, 217; McDougal and Lans 1945),³⁰ although others dispute this claim (Tribe 1995; Yoo 2001). Thus far, no court has struck down a congressional-executive agreement as unconstitutional.

Congressional-executive agreements have one distinct advantage over Article II treaties. If an international agreement requires implementing legislation or the appropriation of funds, then approval by the Senate is not sufficient to permit U.S. implementation; the agreement must still receive congressional action, which requires the approval of the House of Representatives. In contrast, if an international agreement is approved by Congress as a congressional-executive agreement, then the resolution of approval can also address implementation, thereby combining the approval and implementation processes (Henkin 1996, 217).

Treaty-Executive Agreements

Closely related to *ex ante* congressional-executive agreements are treaty-executive agreements, where the authorization for the president to conclude an agreement is provided by an existing agreement rather by

legislation.³¹ Since international agreements generally do not address the issue of how states will domestically approve amendments, protocols, and other types of supplementary agreements, the authorization for executive action provided by an agreement is usually implicit rather than explicit. For example, the US-Japan Migratory Birds Convention provides that new species may be added to the list of protected species by an “exchange of diplomatic notes”³²—a form of international communication that implicitly does not require Senate or congressional approval. Similarly, the ozone regime provides for the adoption of adjustments to the Montreal Protocol’s control measures and amendment of its annexes without the usual formalities of treaty acceptance.³³ These adjustments and annex amendments are, in effect, new international agreements, which apply directly to all parties, without requiring any act of ratification, accession, or acceptance. In approving the Montreal Protocol, the Senate implicitly approved its ongoing law-making process, in which the executive branch participates without any further congressional or Senate involvement.³⁴

Administrative arrangements pursuant to an existing treaty can also qualify as treaty-executive agreements. According to the Congressional Research Service:

Early agreements of this type consist of instruments accepting the results of boundary surveys mandated by a pre-existing treaty, accepting the accession of additional parties to a previously concluded treaty, or implementing transit rights across foreign territory as envisioned by a treaty of earlier date. Modern examples of agreements pursuant to treaties may be found in the many arrangements and understandings implementing the North Atlantic Treaty Organization (NATO) Treaty (CRS 2001, 86).

Presidential-Executive Agreements

Even in the absence of congressional or treaty authorization, the president may enter into international agreements based on his own constitutional or statutory authority. These so-called presidential-executive agreements have a long history. As the Supreme Court said in the *Garamendi* case, “our cases have recognized that the president has the authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.”³⁵

According to Louis Henkin, perhaps the preeminent foreign relations scholar of his generation, “no one denies that the president has the power to make some

agreements on his own authority.” (Henkin 1996, 219) The Supreme Court has upheld presidential-executive agreements in the context of recognizing foreign governments and settling international claims,³⁶ and the courts have never struck down a presidential-executive agreement as unconstitutional. But because the contours of the president’s powers are “difficult to determine and to state” (Henkin 1996, 222) and because there have been few judicial decisions, the extent of the president’s authority to conclude executive agreements is uncertain.³⁷

Although many presidential-executive agreements concern routine matters, some have been very consequential. The Congressional Research Service observes:

Some idea of both the modern scope and contentious nature of presidential agreements may be gained by noting that such agreements were responsible for the open door policy toward China at the beginning of the 20th century, the effective acknowledgment of Japan’s political hegemony in the Far East pursuant to the Taft-Katsura Agreement of 1905 and the Lansing-Ishii Agreement of 1917, American recognition of the Soviet Union in the Litvinov Agreement of 1933, the Destroyers-for-Bases Exchange with Great Britain prior to American entry into World War II, the Yalta Agreement of 1945, a secret portion of which made far-reaching concessions to the Soviet Union to gain Russia’s entry into the war against Japan, the 1973 Vietnam Peace Agreement, and, more recently, the Iranian Hostage Agreement of 1981 (CRS 2001, 88).

One basis of presidential-executive agreements is the president’s independent constitutional powers. Agreements approved on this ground are sometimes referred to as “sole executive agreements.” According to the State Department’s *Foreign Affairs Manual*, the president’s independent executive powers include:

1. The president’s authority as Chief Executive to represent the nation in foreign affairs;
2. The president’s authority to receive ambassadors and other public ministers, and to recognize foreign governments;
3. The president’s authority as “Commander-in-Chief”; and
4. The president’s authority to “take care that the laws be faithfully executed.”³⁸

The president’s authority to enter into presidential-executive agreements is bolstered if (a) there is some indication of legislative support, or at least acquiescence, and (b) the agreement is consistent with and can be implemented under existing law (Koh 2013, 732). Agreements

of this kind might be considered “presidential-executive agreements plus,” since the president relies on more than his independent executive powers in joining the agreement; there is some statutory support as well.

An example of an executive agreement-plus is the Anti-Counterfeiting Trade Agreement (ACTA), which was not expressly authorized by Congress, but was consistent with legislation calling on the president to “work with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.”³⁹ On the basis of this legislation, as well as the fact that ACTA was consistent with existing law and did not require any implementing legislation, the State Department concluded that it could be adopted as a presidential-executive agreement.⁴⁰ Similarly, an agreement between the United States, Canada, and Japan prohibiting smoking on commercial airplane flights⁴¹ represented an executive agreement-plus, because it furthered the U.S. policy to prohibit smoking on flights, reflected both in U.S. law and by an International Civil Aviation Organization (ICAO) resolution supported by the United States that urged countries to ban smoking on international flights (Chang 2010, 361). In *Dames & Moore v. Regan*,⁴² the Supreme Court upheld a presidential-executive agreement, the Algiers Accords, which ended the Iranian hostage crisis. Although President Ronald Reagan entered into the Algiers Accords without any congressional or Senate approval, the Supreme Court found that “closely related” legislation showed a “legislative intent to accord the president broad discretion” in settling claims, which “invited” presidential action.⁴³ This legislative support bolstered the president’s independent authority to enter into the Algiers Accords and was “crucial” to the Court’s decision.⁴⁴

Conversely, the president’s authority to enter into a presidential-executive agreement is weakest when the agreement is as odds with the will of Congress. As Justice Robert H. Jackson said in the *Youngstown case*:

When the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.⁴⁵

In the *Capps case*,⁴⁶ the U.S. Court of Appeals for the Fourth Circuit struck down a presidential-executive agreement with Canada concerning trade in potatoes on the ground that the agreement contravened the procedure Congress had established for addressing potato imports. As the court stated, “whatever the power of the

executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering such an agreement avoid complying with a regulation prescribed by Congress.”⁴⁷

CHOICE AMONG DOMESTIC PROCEDURES

In practice, the decision as to how the United States joins an international agreement is made by the president, as the actor who ratifies international agreements on behalf of the United States. The president’s decision will in some cases hinge on both legal and political considerations. The Department of State’s *Foreign Affairs Manual (FAM)*, which governs the department’s work, identifies eight factors that are relevant to the selection among constitutionally authorized procedures for concluding an international agreement:

1. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
2. Whether the agreement is intended to affect state laws;
3. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
4. Past U.S. practice as to similar agreements;
5. The preference of the Congress as to a particular type of agreement;
6. The degree of formality desired for an agreement;
7. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
8. The general international practice as to similar agreements.⁴⁸

These factors are not legal tests and do not represent legal constraints on the president. Rather, they are guides to the exercise of presidential discretion in the choice among constitutionally permissible alternatives. Necessarily, this choice involves political as well as legal considerations. In *Made in America Foundation v. United States*, the Fourth Circuit Court of Appeals held that the choice of domestic approval options for international agreements is a non-justiciable political question.⁴⁹ But, if the president chooses to accept an agreement without submitting it to the Senate, the Case Act requires that the president transmit the text of the agreement to Congress within 60 days of the agreement’s entry into force.⁵⁰

IV. BACKGROUND ON THE UN CLIMATE CHANGE REGIME

The United Nations Framework Convention on Climate Change (UNFCCC) establishes the basic structure of governance of the U.N. climate change regime, including its objective and principles, the general obligations of the parties, and the regime's governing institutions (including, most important, the annual Conference of the Parties or COP). The Senate gave its advice and consent to the UNFCCC on October 7, 1992, less than five months after it was adopted, and President George H.W. Bush ratified the convention on behalf of the United States a week later, one of the first countries to do so.

In joining the UNFCCC, the United States and other parties committed to:

- Develop, periodically update, and publish national inventories of greenhouse gas emissions (Article 4.1(a)).
- Formulate, implement, publish, and regularly update national programs containing measures to mitigate and adapt to climate change (Article 4.1(b)).
- Promote and cooperate in technology transfer (Article 4.1(c)), scientific and technological research (Article 4.1(g)), exchange of information (Article 4.1(h)), and education, training and public awareness (Article 4.1(i)).
- Report to the COP on its national greenhouse gas inventories and the steps it has taken to implement the convention (Article 12.1).

In addition, Annex II parties, including the United States, committed collectively to provide financial resources to developing countries, to assist in meeting adaptation costs, and to promote, facilitate and finance the transfer of technology. The convention also authorizes the COP to regularly review the implementation of the convention and any related legal instruments the COP may adopt, and to make, within its mandate, the decisions necessary to promote the effective implementation of the convention (Article 7.2). Finally, the convention established a non-binding aim for developed country

parties (listed in Annex I of the convention) to return their emissions to 1990 levels by the year 2000.

In 1997, the parties to the UNFCCC adopted the Kyoto Protocol, which established binding quantitative limits on Annex I party emissions, but did not establish any quantitative targets for non-Annex I (developing country) parties. Prior to the adoption of the protocol, the Senate adopted by a vote of 95-0 the Byrd-Hagel Resolution, which expressed the sense of the Senate that the United States should not join any new climate agreement that would mandate emission reductions for Annex I parties but not developing country parties or that would seriously harm the U.S. economy.⁵¹ Although President Bill Clinton nevertheless signed the Kyoto Protocol in 1998, it was never submitted to the Senate or ratified and, in 2001, President George W. Bush announced that the United States did not intend to become a party.

In 2009, the leaders of more than 25 countries,⁵² including all of the major economies, adopted the Copenhagen Accord, a political agreement that elaborated the UNFCCC provisions by establishing processes for both Annex I and non-Annex I parties to list their targets and actions to limit emissions, to report on their mitigation actions, and to undergo a process of international assessment and review (for Annex I parties) or of international consultation and analysis (for non-Annex I parties). Developed countries also committed to a goal of mobilizing \$100 billion a year for climate finance by 2020. As a political rather than a legal agreement, President Barack Obama did not submit the Copenhagen Accord to either the Senate or Congress for approval, and the pledges to limit emissions and to mobilize \$100 billion are not legally binding.⁵³ The following year, the COP adopted a set of decisions, known as the Cancun Agreements, which incorporated and elaborated the main elements of the Copenhagen Accord. Like the Copenhagen Accord, the Cancun Agreements, as COP decisions, are not international legal agreements and therefore do not require any of the three domestic approval processes described in this paper.

V. DURBAN PLATFORM NEGOTIATIONS

In 2011, the parties adopted the Durban Platform, which launched a new round of negotiations to develop “a protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC applicable to all Parties.” The Durban Platform outcome is to be adopted in 2015 at COP 21 in Paris and to apply from 2020.

The Paris COP is likely to adopt a number of different instruments pursuant to the Durban Platform mandate, including a core legal agreement and related COP decisions. The decisions adopted at the Warsaw and Lima COPs, in 2013 and 2014 respectively, suggest that a central element of the Paris outcome will be nationally determined contributions (NDCs) to mitigate and, in some cases, adapt to climate change. On March 31, 2015, the United States announced its intended NDC, namely to achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28 percent below its 2005 levels in 2025.⁵⁴

Issues relating to the Paris agreement that remain to be determined include:

- **Commitments with respect to NDCs:** Will the core agreement establish only procedural commitments regarding NDCs (for example, to put forward an NDC, provide supporting information, maintain an NDC throughout the life of the agreement, regularly update one’s NDC, report on implementation, allow international review) or will it establish substantive commitments (for example, to implement or achieve one’s NDC)?
- **Legal character of NDCs:** Will NDCs be legally binding?⁵⁵ This will be determined by the commitments relating to NDCs (see previous bullet). If the commitments are only procedural in nature, then the NDCs will not be binding. If the agreement requires parties to achieve their NDCs, then this will mean that NDCs are legally binding.
- **Parameters for NDCs:** What parameters, if any, will the agreement establish for NDCs—for example, that NDCs be quantifiable, that they be supported by national laws and regulations, that they articulate a long-term emissions pathway, that they include an economy-wide emissions target, and so forth?
- **Housing of NDCs:** Will NDCs be housed inside the core agreement in, for example, an annex, or outside the core agreement in an information document, secretariat website, or some similar form?
- **Adaptation:** What commitments, if any, will the core agreement include regarding adaptation?
- **Finance:** What commitments, if any, will the core agreement include regarding finance?
- **Transparency/Accountability:** What will the core agreement provide regarding transparency and accountability?

As discussed in **Section VII**, how these issues are resolved will have significant implications for the options available to the United States in joining the agreement.

VI. OPTIONS FOR U.S. ACCEPTANCE OF THE PARIS AGREEMENT

If the Paris agreement, like the Copenhagen Accord, is political in character or is phrased in hortatory terms, then the president would clearly be able to accept it without the involvement of the Senate or Congress. However, the Paris agreement is likely to be legal, not political, in character, and the following discussion assumes that it will establish legally binding obligations.

The adoption of the UNFCCC as an Article II treaty, with the advice and consent of the Senate, does not prejudge how the United States might adopt subsequent climate change agreements, including the Paris agreement. Indeed, when the UNFCCC was considered by the Senate in 1992, the Senate Foreign Relations Committee specifically asked about the approval process for any subsequent protocols. In response, the George H.W. Bush administration explicitly left open the possibility of using a non-Article II procedure, stating: “We would expect that protocols would be submitted to the Senate for advice and consent to ratification; however, given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter.”⁵⁶

With respect to a possible Paris agreement, the following options are potentially available to the president:

- First, submit the agreement to the Senate for advice and consent to ratification, as an Article II treaty;
- Second, seek congressional approval of the agreement as an *ex post* congressional-executive agreement. This would require both houses of Congress to enact a law approving the agreement.
- Third, accept the agreement without seeking Senate or congressional approval, based on the president’s existing statutory, treaty, or constitutional authority.

SUBMISSION TO THE SENATE AS AN ARTICLE II TREATY

Submission of the Paris Agreement to the Senate for advice and consent to ratification would be legally uncontroversial. The Constitution does not impose any

explicit restrictions on the treaty-making power, and the U.S. Supreme Court has not recognized any limits on the contents of an Article II treaty, save that the treaty may not violate the U.S. Constitution.⁵⁷ Moreover, there is considerable historical precedent for the adoption of multilateral environmental agreements as Article II treaties. Among others, the International Convention for the Prevention of Pollution from Ships (MARPOL), the Convention on International Trade in Endangered Species (CITES), and the Montreal Protocol on Substances that Deplete the Ozone Layer were all adopted as Article II treaties, with the advice and consent of two-thirds of the senators present. To the extent that the United States wants a high degree of formality for the Paris agreement, adoption as an Article II treaty would be appropriate.⁵⁸

Although approval of the Paris agreement as an Article II treaty would be legally uncontroversial, it would be politically difficult. In recent years, the Senate has been reluctant to give its consent to international agreements. Treaties that the Senate has declined to approve include the UN Convention on the Law of the Sea (despite amendments to the agreement to address U.S. concerns), the Convention on Biological Diversity, and the Comprehensive Nuclear Test Ban Treaty.⁵⁹ Even seemingly modest agreements like the Disabilities Convention,⁶⁰ which was modeled on U.S. law, have been unable to gain the consent of two-thirds of the Senate.

Moreover, since the Paris Agreement would not be self-executing, it would require implementing legislation if it included commitments that went beyond existing U.S. law.⁶¹ Similarly, if the Paris agreement involved new binding financial commitments for the United States, Congress would need to appropriate the funds to fulfill these commitments, since the Constitution specifically requires the expenditure of funds to be approved by Congress (Henkin 1996, 203).⁶²

SUBMISSION TO CONGRESS AS A CONGRESSIONAL-EXECUTIVE AGREEMENT

Although there is little past practice of concluding multilateral environmental agreements as congressional-

executive agreements, there seems little doubt that the Paris Agreement could be adopted in this manner.⁶³ Most foreign relations law scholars believe that congressional-executive agreements are constitutional so long as they address an issue within the combined powers of Congress and the president. Since Congress clearly has the authority under the Commerce Clause to enact legislation addressing climate change, it also has the authority to approve an international climate change agreement. Moreover, if Congress approved the agreement in the context of adopting implementing legislation, this approach would combine the approval and implementation processes, and could include the appropriation of funds to meet new financial commitments. Approval of the Paris agreement by Congress as a congressional-executive agreement, however, would face the same political difficulties as approval as an Article II treaty.

ACCEPTANCE BY THE PRESIDENT ON THE BASIS OF EXISTING AUTHORITY

Finally, depending on its contents, the president might be able to join the Paris agreement on the basis of existing constitutional, statutory, and/or treaty authority, without submitting it to the Senate or Congress for approval. The president has concluded a number of environmental agreements in this manner. For example, the United States entered into the 1991 Air Quality Agreement (AQA) with Canada,⁶⁴ without any action by the Senate or Congress, on the basis that the commitments contained in the agreement tracked the requirements of the 1990 Clean Air Amendments.⁶⁵ Similarly, the United States entered into several protocols under the 1979 Long-Range Transboundary Air Pollution Convention (LRTAP) as presidential-executive agreements, including the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone,⁶⁶ on the ground that the commitments contained in these agreements mirrored existing U.S. laws and regulations.⁶⁷ More recently, the president concluded a major new global environmental agreement without seeking Senate or congressional approval—the Minamata Convention on Mercury—even though it included quite detailed commitments regarding domestic policies and measures,⁶⁸ on the basis that the agreement can be implemented “under existing legislative and regulatory authority” and “complements domestic measures by addressing the transnational nature of the problem.”⁶⁹ The president’s action did not provoke any reaction, much less criticism, by Congress.⁷⁰

The president could arguably rely on a combination of three legal bases—grounded, respectively, in constitutional, statutory and treaty authorities—to adopt a Paris climate change agreement without submitting it to the Senate or Congress for approval:

First, the president’s core foreign affairs powers include communicating with foreign governments. To the extent that the Paris agreement was limited to procedural obligations relating to reporting and review, then it would arguably fall within the president’s independent constitutional authority.

Second, an international agreement addressing climate change would complement existing law. In *Massachusetts v. EPA*, the Supreme Court held that the Clean Air Act authorizes the Environmental Protection Agency (EPA) to find that carbon dioxide is a pollutant and to regulate it as such.⁷¹ Since the threat posed by carbon dioxide emissions requires international action, the president could argue that the authority to negotiate an international agreement is a necessary adjunct to the regulation of domestic emissions. This argument is bolstered by the Global Climate Protection Act of 1987, which found that “the global nature of [the climate change] problem will require vigorous efforts to achieve international cooperation aimed at minimizing and responding to adverse climate change,”⁷² as well as by Section 115 of the Clean Air Act, addressing “international air pollution,” which authorizes federal action, on a reciprocal basis with other states, to address pollutants that cause transboundary damage (Wirth 2015, 45-48).

Finally, an agreement that solely implemented or elaborated the UNFCCC’s existing commitments would arguably be within the scope of the Senate’s original advice and consent to the convention, and therefore would constitute a treaty-executive agreement.⁷³ The Durban Platform supports this conclusion, by specifically providing that the new agreement will be “under the Convention.”

Whatever the legal basis for the president’s acceptance of the Paris agreement as a presidential-executive agreement, the president’s authority would be bolstered by the inclusion of a withdrawal provision, which would expressly permit a future president to terminate the United States’ international obligations under the agreement, and thereby diminish the ability of one president to tie a successor’s hand by concluding an executive agreement.⁷⁴ Withdrawal clauses are a common feature of multilateral environmental agreements, including the UNFCCC.⁷⁵

VII. POTENTIAL PARIS OUTCOMES: IMPLICATIONS FOR U.S. ACCEPTANCE

The choice among these three options for U.S. acceptance of the Paris agreement will depend significantly on the contents of the agreement. The following sections consider the implications of different potential provisions for the method of U.S. acceptance.

LEGALLY BINDING EMISSIONS TARGETS

As noted earlier, nationally determined mitigation contributions (NDCs) are expected to be a central element of the Paris agreement, but it is still unresolved whether these contributions will be legally binding—that is, whether parties will have a legal obligation to achieve the emissions reductions specified in their NDCs—as well as whether the NDCs will be housed within the agreement (for example, in an annex), or outside the agreement in a related document or on the UNFCCC website. Regardless of the placement of NDCs, if the Paris agreement required the United States to achieve its NDC, then this would weigh in favor of sending the agreement to the Senate or Congress for approval. However, if the United States' NDC were a political rather than a legal commitment, then this would not limit the president's authority to conclude the agreement acting alone.

The ratification history of the UNFCCC suggests an expectation that an agreement containing legally binding emissions targets would be adopted as an Article II treaty. During the Senate's consideration of the convention, the Senate Foreign Relations Committee asked specifically whether a protocol containing targets and timetables to limit emissions would be submitted to the Senate. The Bush administration responded, "If such a protocol were negotiated and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate."⁷⁶ In its report on the convention, the Senate Foreign Relations Committee expressed the same expectation.⁷⁷ Although these statements do not bind the president, they are relevant to the president's exercise of discretion, and counsel that the Paris agreement be submitted to the Senate for approval if it contains legally binding emissions limits.

A Paris agreement containing legally binding emissions limits could also be adopted as a

congressional-executive agreement. Although this would go against the expectation expressed by both the executive and the Senate Foreign Relations Committee at the time of the UNFCCC's ratification, the Senate did not condition its acceptance of the UNFCCC on this factor, and Congress clearly has authority to adopt binding emissions limitations, so the subject matter of the agreement would be within Congress's constitutional powers. Indeed, if the emissions target in the United States' NDC goes beyond the reductions that could be achieved under existing law, the Paris agreement would require implementing legislation, even if it were adopted as an Article II treaty. Adoption of an agreement with binding targets as a congressional-executive agreement would thus be simpler procedurally, since it would combine the acceptance and implementation processes.

In contrast, adoption of the agreement as a presidential-executive agreement would be more questionable. An international commitment to achieve an emissions target has generally been understood as a different kind of commitment than a commitment to implement policies and measures; that is why the Senate, in 1992, when giving its consent to the UNFCCC, specifically focused on a protocol containing a legally binding emissions target when expressing its expectation about the need for Senate advice and consent to ratification. If the United States NDC simply reflected an emissions target that was already part of U.S. law, then adoption of the Paris agreement by the president might be justified on the same theory as the LRTAP protocols, the US-Canada Air Quality Agreement, and the Minamata Convention. But the United States does not currently have a domestic emissions cap and it is doubtful whether existing law authorizes the president to adopt one,⁷⁸ so committing to a target internationally without Senate or congressional approval would go beyond past practice.

DOMESTIC IMPLEMENTATION COMMITMENT

Rather than legally commit each party to *achieve* the emissions target specified in its NDC (an "obligation of result"), the Paris agreement might commit each

party to *implement* its NDC through domestic laws and regulations (an “obligation of conduct”). In principle, if the contents of the United States’ NDC reflected existing U.S. law, then the president could accept a “commitment to domestically implement” without approval from the Senate or Congress. But since the intended NDC put forward by the United States—an economy-wide target to reduce emissions by 26-28 percent below 2005 levels by 2025⁷⁹—is not itself reflected in U.S. law, then a domestic implementation commitment, like an obligation to achieve the target, would arguably require Senate or congressional approval. Joining the agreement without Senate or congressional approval would be legally committing the United States internationally to implement a target that was not part of existing domestic law.

In this respect, a Paris agreement requiring the United States to implement its NDC through domestic laws and regulations would differ from precedents such as the LRTAP protocols, the US-Canada Air Quality Agreement, and the Minamata Convention. Each of these was concluded as a presidential-executive agreement on the basis that the specific policies and measures the United States committed to implement reflected existing U.S. law. Although the United States has adopted, or is in the process of adopting, a wide variety of measures to limit U.S. greenhouse gas emissions pursuant to existing law, including the Clean Air Act,⁸⁰ these measures are not directly reflected in the United States’ NDC and may or may not be sufficient to achieve the U.S. target. If the Paris agreement committed the United States to have or put in place domestic measures to implement its NDC, the United States would be committing to implement not simply policies and measures already reflected in U.S. law, as was true of the Minamata Convention, but rather a target that is not currently part of U.S. law.

PROCEDURAL COMMITMENTS

Rather than establish substantive requirements for parties to achieve or implement their NDCs, the Paris agreement could be procedurally oriented. It might include, for example, a commitment to submit and maintain an NDC; a commitment to report on implementation of its NDC; common accounting standards; and a commitment to undergo international implementation review. It might even specify required parameters for NDCs (for example, that they include

nationally binding laws and regulations and/or an emissions target), without losing its procedural character, so long as it didn’t establish substantive commitments to implement and/or achieve one’s NDC.

An agreement containing procedural rather than substantive commitments could be concluded using any of the three options available to the president to join an international agreement: as an Article II treaty, a congressional-executive agreement, or a presidential-executive agreement. Conclusion of a procedurally oriented agreement as an Article II treaty or a congressional-executive agreement would be legally uncontroversial. Concluding it as a presidential-executive agreement also has a strong legal basis, grounded in three factors:

First, as noted earlier, a core part of the president’s foreign affairs power is to communicate with foreign governments. To the extent that a new climate change agreement simply involved communication with other parties—for example, through the submission of a nationally determined contribution, and periodic reports on U.S. implementation—then the president’s foreign affairs power arguably provides sufficient authority to join the agreement.

Second, the UNFCCC already commits the United States to undertake mitigation actions and to report on these actions, and provides for a process of international review. So a procedurally oriented agreement could be justified as simply implementing these existing treaty provisions, which have received the Senate’s blessing. For example, the UNFCCC requires parties to “formulate, implement, publish and regularly update national... programmes containing measures to mitigate climate change” (UNFCCC Article 4.2(b)), and to submit regular reports on their emissions and policies (UNFCCC Article 12), and authorizes the COP to “assess... the implementation of the Convention by the Parties (UNFCCC Article 7.2(e)). If the Paris climate change agreement solely elaborated these requirements—for example, by establishing a process for parties to submit their national mitigation and adaptation measures, report on implementation, and accept international review—then arguably this new agreement could be concluded by the president acting alone.

Third, a procedurally oriented agreement would not require any changes to existing U.S. law, and is bolstered by congressional expressions of support for U.S. participation in international cooperation to address

climate change, as well as the Senate's acceptance, when it consented to the UNFCCC, of the convention's objective of stabilizing atmospheric concentrations of greenhouse gases at levels that would prevent dangerous anthropogenic interference with the climate system (UNFCCC Article 2).

FINANCIAL COMMITMENTS

The United States, along with other developed countries, accepted financial commitments in the UNFCCC that, while collective and non-specific, are legally binding. When the executive branch presented the UNFCCC to the Senate for consent to ratification, it acknowledged that implementation of these commitments would require future appropriations from time to time.⁸¹ By contrast, the Copenhagen Accord and Cancún Agreements included quantified, collective financial commitments, but did not require approval by the Senate or Congress, as they are not legally binding.

If the Paris agreement included new legally binding financial obligations for the United States, then it arguably would need to be concluded as an Article II treaty or a congressional-executive agreement, not as a presidential-executive agreement. If, however, the Paris

Agreement simply repeated or reaffirmed the existing financial commitments under the UNFCCC, then this would not be an obstacle to adoption of the agreement by the president without Senate or congressional approval.

The Paris Agreement might also include a variety of other financial provisions, without undermining the legal basis to adopt it as a presidential-executive agreement. For example, it could:

- Include procedural commitments relating to finance—for example, relating to the reporting of financial contributions.
- Include non-binding provisions, such as a collective pledge to “mobilize” or provide financial resources (like the Copenhagen and Cancún agreements) or an “invitation” to contribute to the financial mechanism (like the Minamata Mercury Convention).⁸²
- Establish a regular pledging process for contributions to the Global Climate Fund and other UNFCCC-related funds.
- Elaborate modalities for parties to contribute money for projects or activities on a voluntary basis.

VIII. COULD THE PRESIDENT'S DECISION BE CHALLENGED OR OVERTURNED?

Could the president's decision about how to adopt a new climate change agreement be overturned by the courts, or changed by a future president or Congress? Or would the president's decision, in effect, be final?

JUDICIAL CHALLENGE

As far as judicial challenge is concerned, to date, there have been only a handful of Supreme Court decisions considering the domestic approval process for international agreements. In all of these cases, the Supreme Court upheld the agreements. But the existing case law has considered only a narrow range of agreements, mostly involving the recognition of foreign governments and the settlement of international claims, so it is uncertain what the courts would do in other contexts.

Two doctrines would make legal challenges difficult: the political question doctrine, and the doctrine of legislative standing.

The political question doctrine excludes federal courts from deciding cases that involve "political questions." In two cases concerning the treaty-making power, courts have declined to reach the merits on the ground that the dispute involved a non-justiciable political question:

- First, in *Goldwater v. Carter*,⁸³ four justices of the U.S. Supreme Court declined to hear a case brought by several senators challenging the right of President Jimmy Carter to terminate a mutual defense agreement with Taiwan, on the ground that the case raised a political question, because it "involves the authority of the president in the conduct of... foreign relations."⁸⁴ The justices argued the dispute "should be left for resolution by the Executive and Legislative Branches of the Government... each of which has resources available to protect and assert its interests."⁸⁵
- Second, in a case challenging the constitutionality of NAFTA, the U.S. Court of Appeals for the Eleventh Circuit held that the question of whether

NAFTA must be approved as a treaty pursuant to Article II is a political question that cannot be resolved by the courts.⁸⁶ Among other reasons, the court observed that determining whether NAFTA was "significant"—one of the factors that is arguably relevant in determining whether an international agreement constitutes an Article II treaty—was beyond its expertise. As the court concluded, determining the significance of the agreement would "unavoidably thrust [the court] into making policy judgments of the sort unsuited for the judicial branch."⁸⁷

Recently, however, the Supreme Court has shown greater willingness to adjudicate separation of powers disputes relating to foreign affairs, rejecting the application of the political question doctrine in a case involving a dispute between the executive branch and Congress over whether the State Department must, on consular documents and passports, list Israel as the place of birth of people born in Jerusalem.⁸⁸ So it is unclear whether the political question doctrine would bar adjudication of a case challenging the president's action in adopting a Paris climate change agreement.

Apart from the political question doctrine, it is also unclear who would have standing to bring a legal challenge questioning the constitutionality of a presidential-executive agreement on climate change. In order to establish standing, a party must show that it has "personally... suffered some actual or threatened injury as a result of the putatively illegal conduct by the defendant" and "is likely to be redressed by a favorable decision."⁸⁹

In the *Zivotofsky* case, the plaintiffs were private citizens who wanted Israel to be listed on their son's passport as his place of birth. They clearly alleged a particularized injury, not shared by the general public, which could be redressed by a favorable decision. In contrast, private actors would lack standing to challenge the validity of a new climate change agreement, since the agreement would not be self-executing under domestic

law and would not apply directly to individuals. Any injury suffered by individuals would result from the regulations adopted by EPA pursuant to the agreement, rather than from the agreement itself.

Under the doctrine of legislative standing, senators could possibly bring a lawsuit claiming that their treaty-making powers had been infringed. But, in *Raines v. Byrd*,⁹⁰ the Supreme Court took a very narrow view of legislative standing, concluding that a group of congress-people lacked a sufficient personal stake to be able to challenge the constitutionality of the line item veto, which allows the president to veto particular legislative appropriations.

WITHDRAWAL BY A FUTURE PRESIDENT OR CONGRESS

Legally, the choice among domestic acceptance options does not affect one way or the other the ability of a future president or Congress to withdraw from the

agreement. As a matter of international law, the United States could withdraw from the Paris agreement only in accordance with the terms of the agreement or, if the agreement does not provide for withdrawal, in accordance with the Vienna Convention on the Law of Treaties. This is true, regardless of how the United States approves the Paris agreement—whether as an Article II treaty, a congressional-executive agreement, or a presidential-executive agreement. Conversely, as a matter of domestic law, regardless of how the Paris agreement is approved, U.S. participation could in practice be terminated either by a future president, through executive action, or by Congress, through the enactment of an inconsistent, later-in-time statute.⁹¹

Politically, however, approval of an agreement as an Article II treaty or as a congressional-executive agreement may suggest broader political support than approval as a presidential-executive agreement, making subsequent withdrawal less likely in practice.

IX. CONCLUSION

Whether the president decides to approve a new climate change agreement by executive action, or to send it to the Senate or Congress for their approval, will depend both on legal analysis of what is constitutionally permissible and, within the permissible zone, on political and prudential considerations.

The president's authority to enter into agreements without Senate or congressional approval is firmly established. However, given the slim judicial record, the precise scope of that authority is uncertain. The legal options available to the president will depend on the specific provisions of the agreement—in particular, which of the commitments it contains would be binding on the United States. In general, however, the more a new climate agreement reflects and complements existing U.S. law, the firmer the president's authority to enter into it without Senate or congressional approval.

While not definitive, there are strong arguments, both legal and prudential, for seeking Senate or congressional approval for an agreement containing legally binding

emissions limits or new binding financial commitments. The president would be on much firmer legal ground to join a new climate change agreement with legal force, without submitting it to Congress or the Senate, if the agreement:

1. Is consistent with, and could be implemented on the basis of, existing U.S. law;
2. Does not establish a legally binding emissions cap;
3. Does not establish new binding financial commitments;
4. Establishes only procedurally oriented binding commitments; and
5. Serves to elaborate or implement the UNFCCC, which was ratified by the United States with the advice and consent of the Senate.

The degree to which the president is willing to test the limits of his legal authority, in accepting a Paris agreement, will depend not simply on legal analysis but on political and prudential considerations.

ENDNOTES

- 1 “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action,” Decision 1/CP.17, 11 December 2011, UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012).
- 2 “Further Advancing the Durban Platform,” Decision 1/CP.19, 23 November 2013, UN Doc. FCCC/CP/2013/10/Add.1 (31 January 2014); “Lima Call for Climate Action,” Decision 1/CP.20, 14 December 2014, UN Doc. FCCC/CP/2014/10/Add.1 (2 February 2015).
- 3 Hathaway 2008, 1242 (calling U.S. practice “extraordinary unusual”).
- 4 Earlier analyses along similar lines include Chang 2010a and Purvis 2008.
- 5 Vienna Convention on the Law of Treaties, 27 January 1980, 1155 UNTS 331, 8 ILM 679.
- 6 *Ex post* congressional-executive agreements are adopted through legislation, which supersedes existing federal and state laws, to the extent they are inconsistent. The status of *ex ante* congressional-executive agreements and treaty-executive agreements *vis à vis* existing, inconsistent federal legislation is unclear.
- 7 Vienna Convention on the Law of Treaties, art. 2(1)(a) (defining “treaty” as “an international agreement concluded between States in written form and governed by international law,... whatever its particular designation”).
- 8 Rather than acting directly, the president can instead grant “full powers” to someone else to negotiate or consent to an international agreement on behalf of the United States.
- 9 *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936) (describing the president as “the sole organ of the federal government in the field of international relations”).
- 10 Although the Senate is often described as “ratifying” treaties, this usage is incorrect. Strictly speaking, the role of the Senate is to give advice and consent to ratification by the president.
- 11 Vienna Convention on the Law of Treaties, art. 46 (providing that a state may not invoke the fact that its consent to be bound by an agreement was in violation of its domestic law regarding competence to conclude treaties, unless the violation was “manifest”). “Manifest” is defined as “objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.” Vienna Convention on the Law of Treaties, art. 46.2. This limitation on the effect of domestic law relieves other states of the burden of mastering a state’s internal law regarding treaty acceptance, to determine whether the act expressing the state’s consent to be bound was authorized or *ultra vires*.
- 12 For example, in *Asakura v. City of Seattle*, 265 U.S. 332 (1924), the Supreme Court found that a friendship, commerce and navigation treaty between the United States and Japan was self-executing and could be given direct effect by courts, without any implementing legislation. Similarly, when the United States joined the Vienna Convention on Consular Relations, the State Department said that the Vienna Convention was self-executing and did not require implementing legislation. S. Exec. Rpt. No. 91-9, Appendix at 5 (1969). In contrast, multilateral environmental agreements are generally considered non-self-executing, and therefore are not given direct effect by U.S. courts.
- 13 *Goldwater v. Carter*, 444 U.S. 996 (1979) (discussed in **Section VIII** below); Restatement (Third) of Foreign Relations Law of the United States, §339 (1987). In *Goldwater*, the Court of Appeals upheld the president’s power to terminate treaties, but only one Justice reached the merits. A four-Justice plurality dismissed the case on political question grounds.
- 14 The State Department’s *Foreign Affairs Manual* refers to treaties that are “brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate” as “international agreements

other than treaties.” *Foreign Affairs Manual*, vol. 11, §723.2-2. But the Supreme Court has interpreted the statutory use of the term “treaty” as encompassing executive agreements. See Garcia 2015, 2 n.8.

15 U.S. Constitution, art. II, § 2, clause 2.

16 U.S. Constitution, art. VI, clause 2.

17 U.S. Constitution, art. I, §10, clauses 1 and 3.

18 According to Oona Hathaway, the Constitution’s distinction between law-making and treaty-making “has almost no parallel abroad.” Hathaway 2008, 1244.

19 Today, “the 100-member Senate is almost double the original size of the House of Representatives, so it is hardly the small, intimate body that the Framers of the Constitution envisaged. Purvis 2008, 10.

20 This fact was not lost on proponents of the post-World War II international institutional architecture (including the United Nations, the International Monetary Fund, and the World Bank), who promoted the use of congressional-executive agreements as a means of bypassing the Senate’s two-thirds voting requirement for treaties. Ackerman and Golove 1995.

21 The constitutionality of NAFTA was vigorously debated by legal scholars. Compare Ackerman and Golove 1995 (arguing that adoption of NAFTA as a congressional-executive agreement was constitutional) with Tribe 1995 (arguing that NAFTA is unconstitutional). In *Made in the USA Foundation v. United States*, 54 F.Supp.2d 1226 (W.D. Alabama 1999), a U.S. district court held that the failure to use the treaty process to approve NAFTA did not render NAFTA unconstitutional. On appeal, the Eleventh Circuit Court of Appeals held that the issue of whether NAFTA must be approved as an Article II treaty was a non-justiciable political question, 242 F.3d 1300 (11th Circuit 2001), and the Supreme Court denied *certiorari*.

22 In the case of trade agreements, Congress has acted both *ex ante* and *ex post*, first authorizing the president to negotiate trade agreements, and later approving the agreements after they were completed.

23 International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat 3425 (1992).

24 39 USC §407(b)(1) (giving the secretary of state “power to conclude postal treaties, conventions, and amendments”). The Foreign Assistance Act of 1961, Pub. L. 87-195, 75 Stat. 424, authorizes the executive to enter into international agreements on a wide variety of topics, including defense and judicial assistance. Hathaway 2008, 1256 n.48.

25 Bretton Woods Agreements Act of 1945, 22 USC §286.

26 North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057.

27 Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809.

28 For example, the US-Japan Fishery Agreement Approval Act of 1987, Pub. L. No. 100-220, 101 Stat. 1458, specifically approved a fishery agreement between the United States and Japan.

29 For example, the Fishery Conservation and Management Act of 1976 established a tacit approval process, under which fisheries agreements were submitted to Congress, which had sixty days to disapprove the agreement by a joint resolution. Fishery Conservation and Management Act, § 203, 16 U.S.C. § 1823.

30 Congressional-executive agreements must fall within Congress’s Article I powers combined with the president’s Article II powers. In contrast, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court held that treaties can address matters beyond the Article I powers of Congress. To the extent that Article II treaties and congressional-executive agreements are interchangeable, then an international agreement could be adopted under either approach, so the choice between options is determined by politics and historical practice, rather than by the Constitution.

31 The president’s authority to conclude treaty-executive agreements is also arguably grounded in the president’s duty under Article II, Section 3 of the Constitution “to take care that the laws be faithfully executed,” although no case has been decided specifically on this basis. Chang 2010a, 352. In *Wilson v. Girard*, 354 U.S. 524 (1957), the Supreme Court

upheld an administrative agreement between the United States and Japan pursuant to a security treaty between the two countries, on the basis that the Senate, in approving the security treaty, implicitly authorized the executive branch to conclude the administrative arrangement. The precedent is quite narrow, however, because the administrative agreement had already been completed before the Senate acted on the treaty, and was considered by the Senate before it gave its consent.

32 US-Japan Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, art. II, 4 March 1972, 25 UST 3329.

33 Montreal Protocol, art. 2(9) (adjustments); Vienna Convention on Substances that Deplete the Ozone Layer, art. 10 (annex amendments). Adjustments to the Montreal Protocol's control measures can increase the stringency, or speed up the timing, of commitments to limit the consumption and production of regulated substances.

34 The UNFCCC establishes a similar, informal procedure for annex amendments. UNFCCC, art. 16. Because the UNFCCC itself authorizes the conclusion of annex amendments without ratification, the administration stated, in response to a question from the Senate Foreign Relations Committee during the ratification process, that it did not intend to submit annex amendments to the Senate for advice and consent.

35 *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003); see generally Mathews 1955.

36 *United States v. Belmont*, 301 U.S. 324 (1937) (upholding executive agreement associated with U.S. recognition of the USSR); *United States v. Pink*, 315 U.S. 203 (1942) (same); *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (upholding executive agreement with Germany settling Holocaust-era claims). The *Belmont* and *Pink* cases were comparatively easy, because recognition decisions are usually considered to fall within the president's exclusive foreign affairs power, where the president's authority to enter into an executive agreement is at its strongest. In holding that the president could enter into the Litvinov Agreement without any involvement by the Senate or Congress, the court concluded that the agreement had "as much legal validity and obligation as if [it] proceeded from the legislature" and was as much a "law of the land" as a treaty. *Pink*, at 230.

37 As Henkin remarks, "One is compelled to conclude that there are agreements which the president can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither [the Supreme Court] nor anyone else has told us which are which." (Henkin 1996, 222).

38 *Foreign Affairs Manual*, vol. 11, § 723.2-2(C).

39 Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110-403, § 303(a)(6), 122 Stat. 4256, 4267.

40 The United States did not end up joining ACTA on other grounds.

41 Agreement to Ban Smoking on International Commercial Flights, 1 November 1994, TIAS No. 12578.

42 *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

43 *Id.* at 678.

44 *Id.* at 680.

45 *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

46 *United States v. Guy W. Capps*, 204 F.2d 655 (4th Cir. 1953), *aff'd* on other grounds, 348 U.S. 296 (1955).

47 *Id.* at 660.

48 11 FAM § 723.3.

49 *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1319-20, cert. denied 534 U.S. 1039 (2001).

50 1 U.S.C. 112b(a).

51 S. Res. 98, 105th Congress, 1st Session (1997).

52 Ultimately, 141 countries associated themselves with the Accord by submitting emission pledges.

53 The United States pledged under the Copenhagen Accord to reduce emissions “in the range of 17 percent” below 2005 levels in 2020. Letter of Todd Stern to Yvo De Boer, executive secretary of the UNFCCC, January 28, 2010.

54 “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action,” Decision 1/CP.17, 11 December 2011, UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012).

55 The Warsaw Decision on the ADP expressly stated that national submissions of NDCs would be “without prejudice to the legal nature of the contributions.” Decision 1/CP.19, para. 2.

56 Senate Foreign Relations Committee 1993, at 106.

57 *Reid v. Covert*, 354 U.S. 1 (1957). In *Geofroy v. Riggs*, the Supreme Court said, “The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and of the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of the States, or a cession of any portion of the territory of the latter, without its consent... But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.” 133 U.S. 258, 267 (1890).

58 This is the eighth factor on the State Department’s list of relevant factors for the choice among treaty-making procedures.

59 Treaties Pending in the Senate (updated as of 23 April 2013), <http://www.state.gov/s/1/treaty/pending/index.htm>.

60 Convention on the Rights of Persons with Disabilities, 13 December 2006.

61 In general, multilateral environmental agreements have not been considered self-executing, and hence are not directly enforceable by U.S. courts. In the Byrd-Hagel Resolution, the Senate expressed its view that any international climate agreement requiring the advice and consent of the Senate be accompanied by “a detailed explanation of any legislative or regulatory actions that would be required” for implementation. S. Res. 98, §1, para. 4.

62 See **Section VII** below.

63 Purvis 2008.

64 US-Canada Air Quality Agreement, 13 March 1991, 30 ILM 676.

65 Pub. L. 101-549, 42 USC §7401.

66 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication, and Ground-Level Ozone, 30 November 1999, 2319 UNTS 81.

67 The NAFTA side agreement was also arguably adopted as a presidential-executive agreement. Although Congress specifically approved the North American Free Trade Agreement, Public L. 103-182, Dec. 8, 1993, 107 Stat. 2061, § 101(a), it did not expressly authorize the North American Agreement on Environmental Cooperation (the so-called NAFTA Side Agreement). Instead, it merely authorized the United States to participate in the Commission for Environmental Cooperation established under the side agreement and authorized a first contribution to the CEC budget, 107 Stat. 2164, §532 (a).

68 The Minamata Convention includes commitments to limit the manufacture, import, and export of mercury-added products; to reduce emissions of mercury; and to ensure the environmentally sound storage of mercury.

69 “United States Joins Minamata Convention on Mercury,” Media Note, U.S. Department of State, 6 November 2013, <http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm>.

70 Although acceptance of the Minamata Convention occurred during the government shutdown, there was no discussion or criticism of the Executive's action in the Senate when it resumed meeting after the shutdown ended.

71 *Massachusetts v. EPA*, 549 U.S. 497, 528-33 (2007). See discussion in Wirth 2015.

72 Global Climate Protection Act of 1987, P.L. 100-204, Title XI, §1102(5).

73 In addition, like the Montreal Protocol, the UNFCCC establishes a tacit acceptance procedure for annex amendments (UNFCCC art. 16), so, arguably, if the parties decided to amend the annexes, these annex amendments could be accepted by the president as treaty-executive agreements. In contrast, the UNFCCC does not create a similar procedure for amendments of its provisions; instead, it requires that treaty amendments require ratification, accession or some other affirmative expression of a state's consent to be bound. Consequently, the UNFCCC does not provide a basis for the president to accept treaty amendments as presidential-executive agreements, and the president has not claimed this authority. During the Senate's consideration of the UNFCCC in 1992, the Executive Branch stated, in response to questions from the Senate Foreign Relations Committee, that it would seek Senate advice and consent to ratification of treaty amendments, but not annex amendments. Senate Foreign Relations Committee 1993, at 105

74 The *Foreign Affairs Manual* lists "the proposed duration of the agreement" as one of the relevant factors in choosing among approval options. 11 FAM 723.3(7).

75 UNFCCC art. 25.

76 Senate Foreign Relations Committee 2013, at 106.

77 S. Exec. Rep. 102-55 (1992), discussed in Chang 2010a, 348.

78 Some commentators argue that Section 115 of the Clean Air Act authorizes the Environmental Protection Agency to adopt emissions targets, see, e.g., Chang 2010b, at 10903 (arguing that Section 115 authorizes the EPA to adopt emission budgets for each state), but this legal theory remains untested.

79 United States Intended Nationally Determined Contribution, March 31, 2015, available at [http://www4.unfccc.int/submissions/indc/Submission percent20Pages/submissions.aspx](http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx).

80 These measures include fuel efficiency and renewable fuel standards for mobile sources, and emissions limits for stationary sources, including new and existing power plants.

81 See Senate Foreign Relations Committee 1993, at 44, 92 (stating the administration's position at the time of ratification that "periodic appropriations will be necessary to meet U.S. financial obligations under the Convention").

82 Minamata Convention on Mercury, 10 October 2013, art. 13(12).

83 *Goldwater v. Carter*, 444 U.S. 996 (1979).

84 *Id.* at 1002.

85 *Id.* at 1003, 1004.

86 *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001).

87 *Id.* at 1317.

88 *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012); see Cohen 2015.

89 *Valley Forge Christian College v. Americans United for the Separation of Church & State*, 454 U.S. 464, 472 (1982).

90 *Raines v. Byrd*, 521 U.S. 811 (1997).

91 If an international agreement is adopted as a congressional-executive agreement, however, a future president can withdraw from the agreement, but cannot terminate the Act of Congress that approved it. Conversely, a future Congress can terminate only an agreement's status as domestic law, not as international law.

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U.S. law provides different routes for entering into an international agreement. With talks underway toward a new global climate change agreement, this report analyses potential outcomes and whether the agreement could be accepted by the President or must be approved by the Senate or Congress.

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