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SYMPOSIUM ON TREATY EXIT AT THE INTERFACE OF DOMESTIC AND INTERNATIONAL LAW

THE PRESIDENT'S POWER TO WITHDRAW THE UNITED STATES FROM INTERNATIONAL AGREEMENTS AT PRESENT AND IN THE FUTURE

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An uneasy equilibrium exists with respect to how the United States exits international agreements.[1] In general, exit is easy as a matter of legal doctrine but, for important agreements, difficult as a matter of political practice. While presidents *can* withdraw the United States from most major international agreements, they have done so only rarely—and never yet with deep costs to the stability of our world order.

Enter the Trump Administration. So far, President Trump has not withdrawn the United States from any treaties entered into with the advice and consent of two-thirds of the Senate, but he has announced the future U.S. withdrawal from the Paris Agreement on climate.[2] And his campaign rhetoric at times targeted for criticism other international agreements to which the United States is a party, including the North American Free Trade Agreement (NAFTA) ("the worst trade deal in history") and the North Atlantic Treaty Organization (NATO) ("obsolete").[3] To the extent that President Trump has acted with respect to these other contexts to date, he has focused on renegotiation rather than withdrawal. Yet President Trump has shown himself more than willing to follow through on extreme rhetoric on other fronts, and we are still less than a year into his presidency.

This essay discusses the legal parameters regarding withdrawal from international agreements by the United States and considers how the Trump Administration may affect the current equilibrium. I begin by surveying the current legal landscape on exit. Although international rules governing exit are generally straightforward, the domestic legal landscape is messy, convoluted, and pocketed with uncertainty. But overall it leaves presidents with the power unilaterally to withdraw the United States from most international agreements. I then consider ways in which different institutional actors might rework this landscape if President Trump's actions leave them concerned about the scope of presidential discretion with respect to withdrawal. I suggest that changes in the underlying constitutional law are unlikely, but that we may see more limits to presidential discretion included in particular international agreements or built into underlying administrative procedures.

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[1] I use the phrase "international agreements" to refer to agreements concluded between nations that are binding under international law, reserving the term "treaties" for only those international agreements for which the advice and consent of two-thirds of the Senate is obtained prior to ratification by the United States. I do not discuss exit as it relates to nonbinding "soft law" commitments. At times I use the term "President" as a shorthand for the executive branch more generally.

[2] White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017).

[3] Vicki Needham, *Trump Says He Will Renegotiate or Withdraw from NAFTA*, The Hill (June 28, 2016); Nahal Toosi, *Obama Reassures NATO Leader After Trump Rants*, Politico (Apr. 4, 2016).

Exit and the Law

International law on withdrawal from international agreements is relatively clear and coherent. International agreements can contain provisions authorizing withdrawal—and usually do so.[4] For agreements that do not have withdrawal provisions, the Vienna Convention on the Law of Treaties provides that withdrawal is an option if the parties so intended or if the nature of the agreement so implies.[5] In addition, for all agreements, withdrawal is available if particular circumstances are satisfied, such as impossibility of performance.[6] Practically speaking, the overall result is that nations have internationally lawful ways to withdraw from most agreements, provided that they are willing to be patient about the exact timing. Only a modest number of important agreements (most notably certain human rights treaties) lack any clear path to withdrawal.[7]

By contrast, U.S. domestic law on withdrawal is both complicated and opaque. The Constitution provides that the President can make treaties with the advice and consent of two-thirds of the Senate, but it says nothing specific about what domestic actor or actors have the power to withdraw the United States from treaties.

As Curtis Bradley has shown, "[h]istorical practice through at least the late nineteenth century suggests an understanding that congressional or senatorial approval was constitutionally required for the termination of U.S. treaties."[8] Over the course of the twentieth century, however, presidents came to assert and exercise the power to withdraw the United States from treaties, at least where withdrawal was permissible under international law.[9] In 1978, withdrawal became a high-profile issue when President Carter gave notice that the United States would withdraw from its defense treaty with Taiwan. This triggered a lawsuit that went up to the Supreme Court. As described in more length in Curtis Bradley and Laurence Helfer's contribution to this symposium,[10] the Court held that the issue was nonjusticiable, effectively giving President Carter the green light to proceed.[11]

Since this incident, presidents have continued to claim and employ the power to terminate treaties.[12] Currently the mainstream position is that "the President has the authority on behalf of the United States in … withdrawing the United States from treaties, either on the basis of terms in the treaty allowing for such action (such as a

[4] *See* Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1582 (2005) (noting that exit clauses are "pervasive"); Barbara Koremenos, The Continent of International Law: Explaining Agreement Design 143 (2016) (finding withdrawal clauses in 70% of the sample of treaties in her study).

[5] Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 UNTS 331, 345 (further requiring one year of notice prior to withdrawal).

[6] *Id.* arts. 54, 59–62, 64 (discussing the parameters under which a treaty can be terminated due to the consent of the parties, the development of a later treaty on the same subject, a material breach, impossibility, a fundamental change of circumstances, or the emergence of a new peremptory norm).

[7] *See* Helfer, *supra* note 4, at 1642 note 172 (identifying several human rights treaties for which withdrawal as a matter of international law is likely precluded).

[8] Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex. L. Rev. 773, 800 (2014).

[9] *Id.* at 801–16. For a discussion of how the legality of withdrawal under international law was used rhetorically to justify this constitutional development, see Jean Galbraith, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 Tex. L. Rev. *See Also* 121 (2014).

[10] Curtis A. Bradley & Laurence R. Helfer, *Treaty Exit in the United States: Insights from the United Kingdom or South Africa*, 111 AJIL Unbound 428 (2017).

[11] Goldwater v. Carter, 444 U.S. 996 (1979) (resulting in no controlling opinion for the Court, as four justices concluded that the case presented a political question and Justice Powell concluded that the case was not ripe for review). The Federal District Court had ruled that President Carter lacked the constitutional power to initiate withdrawal, and the Federal Appellate Court had ruled that President Carter had the requisite constitutional power. *See* Bradley, *supra* note 8, at 812–14 (describing these opinions).

[12] Bradley, *supra* note 8, at 814–16.

withdrawal clause) or on the basis of international law that would justify such an action."[13] But as with all practice-based constitutional conclusions, there is always the chance that the Supreme Court will one day decide otherwise. Moreover, this position leaves some intriguing questions unanswered. Can the President withdraw the United States from treaties (at least for all domestic law purposes) where international law does not permit withdrawal? Under what circumstances will the President's withdrawal of the United States from a treaty trigger the suspension or the sunset of an existing statute that implements the treaty?[14]

U.S. law related to withdrawal is made even more complicated by the existence of international agreements other than treaties. Over time, the United States has come to make international agreements in ways other than those specified in the Treaty Clause, including (1) sole executive agreements, which are negotiated and ratified solely by executive branch actors; (2) ex ante congressional-executive agreements, which are authorized to at least some degree by congressional statutes prior to being negotiated and ratified by executive branch actors; and (3) ex post congressional-executive agreements, which are negotiated by executive branch actors, approved by Congress with accompanying implementing legislation, and then ratified by executive branch actors. The courts have for the most part not addressed what branch or branches within the federal government can withdraw from these agreements. For the first two ways, which include the Paris Agreement, logic strongly suggests that the President has the constitutional power to trigger withdrawal.[15]

Ex post congressional-executive agreements present a harder issue. Presently, major trade agreements are typically made as ex post congressional-executive agreements: NAFTA is one, the U.S.-Korea Free Trade Agreement is another, and the Trans-Pacific Partnership Agreement would have been yet another if it had made it through the domestic approval process instead of being abandoned postnegotiation by President Trump. May the President withdraw the United States from these agreements as though they were treaties, or does he or she need to obtain congressional approval for withdrawal? There are substantial arguments on both sides,[16] and the issue may one day be forced by presidential withdrawal. Assuming that the President does have this power, a further question is under what circumstances withdrawal will automatically suspend or terminate implementing legislation. Sometimes implementing legislation specifies that it will not outlive the underlying agreement,[17] but other implementing legislation lacks such obvious signals.

Exit and the Future

In practice, the President has the ability to withdraw the United States from at least most international agreements. Yet this formal flexibility has historically been balanced out by functional stability. While presidents can exit

[13] Restatement (Fourth) of Foreign Relations Law: Treaties § 113(1) (Am. Law Inst., Tentative Draft No. 2, 2017).

[14] On occasion, a statute will specifically address this issue. *E.g.*, 18 U.S.C. § 3181(a) (2012) (providing that the "provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government").

[15] *See* Stephen P. Mulligan, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement* 6–7 (Cong. Research Serv., Feb. 9, 2017) (making this observation with respect to sole executive agreements). Congress authorizes ex ante congressional-executive agreements prior to their negotiation and thereby delegates substantial discretion to the executive branch. At least in the absence of clear legislative language otherwise, it seems likely to conclude that this discretion permits or at least does not forbid later withdrawal by the executive branch.

[16] For a recent argument that trade agreements should require congressional consent to termination, see Joel P. Trachtman, *Terminating Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty* (Working Paper, Oct. 16, 2017).

[17] *E.g.*, United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 107 (c), 125 Stat. 428, 432 (2011) ("On the date on which the Agreement terminates, this Act … shall cease to have effect").

international agreements, they have many reasons to be cautious in doing so. The United States joined these agreements in the first place because of their perceived value. The arguments in their favor may remain strong—or have become even stronger over time due to embeddedness or other factors. Factors independent of the merits can also favor continuation, including international reputational costs that might arise from withdrawal, bureaucratic entrenchment, and overall preferences for the status quo. It is not surprising that presidents have been chary in their use of withdrawal, especially with respect to major multilateral agreements.

The Trump Administration is disrupting this comfortable balance. The announced future withdrawal from the Paris Agreement, the indications that NAFTA hangs by a thread, the intermittent disparaging remarks about other international agreements, and the general aura of chaos overhanging the Trump Administration all make concerns about exit highly salient. Whether or not the Trump Administration actually ends up exiting major agreements, we may see future attempts to curb presidential discretion with respect to exit. In what follows, I identify five institutions that might take such steps and describe what these steps might look like. I suggest that the underlying constitutional law is relatively unlikely to change to limit presidential discretion, but that we may see more limits arise with respect to particular international agreements or more generally through the development of statutory or administrative constraints.

First, U.S. courts hold the keys to new limits on presidential power with respect to constitutional law and to the interpretation of implementing legislation. As examples in the constitutional domain, the Supreme Court could one day hold (1) that the President lacks the power to terminate treaties, (2) that the President lacks the power to terminate ex post congressional-executive agreements, or (3) drawing on *Clinton v. City of New York*,[18] that presidential withdrawal from an international agreement can never trigger the termination of implementing legislation whose content has an independent justification in Article I of the Constitution. But such holdings would be bold ones for a court that has traditionally been wary of placing fetters on presidential foreign affairs powers. More modestly, as a matter of interpretation the Court could require clear statements from Congress for implementing legislation to be suspended or terminated upon U.S. withdrawal from an international agreement. Such a requirement would be in keeping with the canon against implied repeals.[19]

Second, Congress could do more to push back against presidential unilateralism with respect to exit. The easiest and most likely way for this to happen is through soft law mechanisms, such as committee hearings, nonbinding resolutions, or hortatory language in statutes. In the summer of 2017, Congress included such language with respect to NATO in a broader statute, expressing the "sense of Congress" that "the United States remains fully committed to the North Atlantic Treaty Organization and will honor its obligations enshrined in Article 5."[20] The Senate or Congress could also take control of exit more aggressively: the Senate could condition its advice and consent to a treaty on legislative approval of withdrawal or on for-cause justifications;[21] Congress could do the same with respect to an ex post congressional-executive agreement; and Congress could make clear that the lifespan of a particular piece of implementing legislation is independent of withdrawal from the international agreement. As a matter of political economy, however, if a major international agreement does get through the Senate or Congress, it usually does so with swing voters who are just barely in favor of it—and who therefore might not want to deprive the President of flexibility with respect to exit.

[18] Clinton v. City of New York, 524 U.S. 417 (1998).

[19] In *Bond v. United States*, the Court signaled that the typical canons of statutory construction should apply to treaty-implementing legislation. Bond v. United States, 134 S. Ct. 2077, 2088 (2014).

[20] Countering America's Adversaries through Sanctions Act, Pub. L. No. 115-44 § 292(b) (2017).

[21] *Cf.* Kristen Eichensehr, *Treaty Termination and the Separation of Powers*, 53 Va. J. Int'l L. 247 (2013) (arguing that the Senate cannot constitutionally mandate legislative approval for withdrawal but could build in a for-cause requirement for withdrawal).

Third, a future administration could strengthen internal procedural rules with respect to decision-making around exit. With respect to the termination of international agreements, the C-175 Procedure at the State Department presently requires that the Secretary of State (or designatee) sign off on the initiation of termination and that a memorandum "should be prepared that takes into account the views of the relevant government agencies and interested bureaus within the Department."[22] Future administrations could revise these procedures to make them more deliberative or transparent, such as by requiring congressional consultation, providing expressly that the preparation of the C-175 Procedure memorandum must precede notification of withdrawal, or establishing a notice-and-comment public process prior to termination of significant agreements. Such procedural changes could also be imposed by Congress. This would involve the usual difficulties of obtaining legislation, but would result in stickier rules in the long run.

Fourth, international negotiators could pursue more restrictive withdrawal provisions in international agreements. What with Brexit, President Trump, and other developments covered in this symposium, the issues of exit and related disentanglement have become exceedingly salient internationally. It is possible that international negotiators will do more in future agreements to make exit harder. For example, future exit clauses could include longer trigger periods, could more frequently provide that nations may exit only for particular reasons and must explain their exit based on these reasons,[23] or could otherwise disincentivize exit. Negotiators from the Trump Administration might not agree to such terms, but "[s]tates are not static."[24] Later U.S. negotiators might pursue such terms precisely in order to restrict the discretion available to future presidents.

Fifth, U.S. states and cities might take actions with legal significance in response to exit. Following President Trump's announcement that the United States would withdraw from the Paris Agreement, several states and numerous cities announced their intent to "continue to support climate action to meet the Paris Agreement."[25] State and local regulations cannot formally alter the President's discretion with respect to withdrawal, but they can blunt some of its practical effects.

As the examples given suggest, we are already seeing some of these developments in practice. It is left for the future to unveil whether others will be deployed and, for them all, how effective they will be at constraining presidential discretion with regard to withdrawal or at limiting the results of withdrawal. Were the Supreme Court to change the constitutional ground-rules under which the executive branch currently operates in one or more of the ways mentioned above, that would be the most drastic change (and, in my view, the least wise one). By contrast, administrative reforms and actions specific to particular agreements would reduce the risks of ill-considered decision-making in more targeted ways, while still leaving the President with substantial flexibility.

[22] 11 FAM § 724.8.

[23] *See* Helfer, *supra* note 4, at 1598 (noting that some agreements, especially in the arms control context, permit nations to withdraw only for certain specified reasons).

[24] Rachel Brewster, *Unpacking the State's Reputation*, 50 Harv. Int'l L.J. 231, 256 (2008).

[25] Open Letter to the International Community and Parties to the Paris Agreement from U.S. State, Local, and Business Leaders, available at WeAreStillin.com.