

Legal Sidebar

Can the President Withdraw from the Paris Agreement?

12/05/2016

Recently, [media outlets](#) have reported that President-elect Donald Trump is considering options to withdraw the United States from the [Paris Agreement](#)—an international agreement intended to reduce the effects of climate change by maintaining global temperatures “well below 2°C above pre-industrial levels[.]” As detailed in this earlier [CRS report](#), the Paris Agreement entered into force on November 4, 2016 and has been accepted by [112 parties](#), including the [United States](#) and the European Union.

The Paris Agreement is a subsidiary to the 1992 United Nations Framework Convention on Climate Change ([UNFCCC](#)), a broader, framework treaty entered into during the George. H. W. Bush Administration. Unlike the UNFCCC, which received the Senate’s [advice and consent](#) in 1992, the President has not submitted the Paris Agreement to the Senate for approval. Instead, the Obama Administration appears to have treated the Paris Agreement as an [executive agreement](#), which the President may unilaterally execute, rather than a [treaty](#), which requires the advice and consent of the Senate. (The key distinctions are analyzed in this [report](#) and [infographic](#).) No legislation implementing the UNFCCC or the Paris Agreement into domestic law has been enacted, nor has the executive branch asserted that the provisions in either are [self-executing](#), a term used to describe international obligations that have the force of domestic law without subsequent congressional action. Rather, the commitments made by the United States under the UNFCCC and the Paris Agreement have been carried out domestically through pre-existing legislation, including the [Intermodal Surface Transportation Energy Efficiency Act of 1991](#) and the [Clean Air Act](#).

What Rules Govern Withdrawal from International Agreements?

The legal requirements for withdrawing from international agreements differ depending on (1) whether the withdrawal is analyzed under international law or domestic law; (2) the type of agreement at issue (executive agreement versus treaty); and (3) whether implementing legislation has been passed. Under international law, the legal rules are generally identical for executive agreements and treaties: a nation may withdraw from either with the consent of all parties, in accordance with the terms of the agreement, or following certain superseding events (described in more detail [here](#)). If the agreement does not expressly permit withdrawal, international law may allow for an [implied](#) right to do so, but the modern practice is to define the procedures for withdrawal in the text of the agreement itself.

Under domestic law, the requirements for withdrawal depend on the type of agreement. For executive agreements, the President has generally terminated such agreements without authorization from the legislative branch, and this practice [has not been challenged](#) by Congress or the Senate.

The constitutional requirements for withdrawal from Senate-approved treaties, on the other hand, have been the subject of dispute between the executive and legislative branches. While the Constitution is clear that the Senate must provide its [advice and consent](#) in the process of making treaties, it is silent with respect the power to withdraw from them. Moreover, past practices have differed considerably depending on the circumstances. In some cases, the President has received advance authorization for withdrawal from either the [Senate alone](#) or [Congress as a whole](#). In others, the legislative branch has [approved](#) withdrawal after the President has already taken action. Finally, in [certain cases](#), the President has unilaterally terminated treaties without any form of legislative approval.

Judicial opinions thus far have done little to illuminate the correct constitutional process for withdrawing from a treaty. Members of Congress twice filed lawsuits challenging the President's efforts to unilaterally terminate a treaty: first in 1979 over the Carter administration's withdrawal from the [1954 Mutual Defense Treaty](#) with the government of Taiwan, and next in 2002 over the George W. Bush administration's withdrawal from the [1972 Anti-Ballistic Missile Treaty](#) (ABM Treaty) with Russia. In the first case, *Goldwater v. Carter*, the D.C. Circuit [reversed](#) a lower court's [ruling](#) and held that the President may unilaterally terminate a mutual defense treaty, but the Supreme Court [dismissed](#) the case on jurisdictional grounds with no majority opinion and without reaching the merits of the constitutional question. In the 2002 litigation over the termination of the ABM Treaty, *Kucinich v. Bush*, the district court likewise dismissed the case without reaching the merits, holding that the plaintiff-Members lacked standing and raised a non-justiciable [political question](#).

How Do these Rules Apply to the Paris Agreement?

[Historical practice](#) would appear to suggest that, because the Paris Agreement is an executive agreement, domestic law would allow the President to unilaterally withdraw from the Agreement without approval from the legislative branch. From the perspective of international law, [Article 28](#) of the Paris Agreement allows for any party to voluntarily withdraw by providing written notice to the United Nations depository, and that withdrawal becomes effective one year after notice is received. Article 28's right to withdraw, however, is not available until three years after the Paris Agreement became effective. Because the Agreement entered into force on November 4, 2016, the right of withdrawal would not be available until November 4, 2019.

Article 28 also provides that any party that withdraws from the UNFCCC shall be considered to have also withdrawn from the Paris Agreement. The UNFCCC has [nearly identical](#) withdrawal requirements to the Paris Agreement, but, because the UNFCCC entered into force in 1994, the three-year withdrawal prohibition expired in 1997. Certain [media outlets](#) have reported that the Trump Administration may be considering withdrawing from the UNFCCC as a more expedient method of terminating the Paris Agreement. To effectuate this withdrawal under international law, the incoming Administration would need to provide written notice to the U.N. pursuant to [the terms](#) of the UNFCCC, and withdrawal from both the UNFCCC and the Paris Agreement would become effective one year later.

The fact that the UNFCCC was approved by the Senate, however, makes the withdrawal procedure under domestic law less straightforward. Given the diverse nature of past practice and the unsettled state of the law relating to the legislative branch's role in treaty termination, it is unclear whether the incoming Administration would be required to receive approval from Congress should it decide to withdraw from the UNFCCC. And while past efforts to challenge the President's assertion of unilateral withdrawal authority in *Goldwater* and *Kucinich* proved unsuccessful, both cases addressed the President's termination of defense treaties and implicated the President's dealings with a specific country. A reviewing court could potentially hold that, because an environmental treaty related to climate change implicates a core congressional interest (i.e., Congress' enumerated powers over [interstate and foreign commerce](#) in [Article I, §8, cl. 3](#)), Congress is entitled to a greater role in reviewing the propriety of withdrawing from such a treaty. On the other hand, if a court were to conclude that that the President has the constitutional authority over treaty termination as the "[sole organ of the government in the field of foreign relations](#)[,]” a court might ultimately approve the President's unilateral withdrawal from the UNFCCC.

Posted at 12/05/2016 10:06 AM