President Trump and Treaties
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President Obama and President-elect Trump could not be more different than when it comes to international affairs.

To list a few examples, President Obama’s administration negotiated the Joint Comprehensive Plan of Action, otherwise known as “the Iran Nuclear Deal,” and Mr. Trump has repeatedly threatened to walk away from it. President Obama has been an active proponent and participant in the North Atlantic Treaty Organization, or NATO, while Mr. Trump has questioned its utility on repeated occasions. President Obama has taken steps to fight climate change, including by taking a leadership role in climate negotiations. It is not clear whether Mr. Trump believes that climate change is a real or worrisome phenomenon. He tweeted in November 2012 that “[t]he concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”

President Obama’s administration negotiated and promoted the Trans-Pacific Partnership, or “TPP,” a trade deal that includes 12 countries and would represent 40% of the world’s GDP. Mr. Trump made his disdain of trade deals, including TPP, crystal clear throughout the campaign. President Obama signed Executive Orders to ban the Central Intelligence Agency from using torture as an interrogation method, while Mr. Trump has expressed an affinity for bringing back interrogation methods “worse than waterboarding.”

Yet, it is quite difficult to discern exactly what changes a President Trump will make.

The reasons are that his Cabinet nominees have taken different and sometimes contrary stances on a number of these issues, and he himself has made contradictory statements. For example, Retired Marine Corps General James Mattis, President-elect Trump’s nominee for Secretary of Defense, has spoken out against the use of torture as an interrogation technique, saying that a pack of cigarettes and a couple of beers are a more effective method, as has Mike Pompeo, the nominee for Director of the Central Intelligence Agency. General Mattis also spoke in favor of the importance of NATO and the Iran Nuclear Deal.

Secretary of State Nominee Rex Tillerson said at his confirmation hearings that “the risk of climate change does exist” and that “action should be taken.” He also said, “I think it’s important that the United States maintain its seat at the table in the conversation on how to address threats of climate change.” And he remarked that NATO’s mutual defense guarantee is inviolable.

Despite the daylight between Mr. Trump and his nominees, let us assume that a President Trump hopes to withdraw or at least attempt to renegotiate some agreements and treaties.

What are the limits on his power to do so?

Constitutional Law

While our Constitution provides guidance for the making of treaties, it does not explain how to undo them. For example, Article II, section 2 provides that the President has the power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two-thirds of Senators concur. There are also other kinds of agreements that the President can conclude, like Congressional Executive Agreements and Sole Executive Agreements, either with the consent of a majority of both houses of Congress, or on his own.
But the Constitution says nothing about the termination of treaties. So what happens if the President wants to terminate a treaty and the Congress disagrees?

There is no clear answer to this question, and only a few cases have addressed it.

The leading case is *Goldwater v. Carter*. It involved President Carter’s decision to terminate a treaty with Taiwan without first obtaining the consent of the Senate. The Supreme Court did not rule on the issue on the merits, instead relying on abstention doctrines. Four Justices said it was a non-justiciable political question, and one said it was not ripe for decision. One unique feature of that case is that although the Senate considered a resolution stating that their consent was required for termination, no final vote was taken. The facts could very well be different in a Trump Administration.

In other words, so far, it is up to the political branches, not the courts, to figure out how to deal with each other on these issues. Nonetheless, if the treaty involved did not require Congressional approval, like sole executive agreements, it is difficult to argue that Congressional involvement is constitutionally required for withdrawal.

*International Law*

From an international law perspective, each individual agreement or treaty must be examined to determine what it says about denunciation or treaty withdrawal.

In late November 2016, the State Department made clear that the Iran Nuclear Deal is not a treaty of any kind. Rather, it is a political commitment. What that means it that President Trump can do whatever he wants with that document from an international law standpoint. NATO, on the other hand, is a treaty which entered into force in 1949. Its text allows State Parties to denounce the treaty once it has been in force for 20 years, and one year after announcing the intention to denounce.

The United Nations Framework Convention on Climate Change, which has 197 state parties, including the US, also has a provision permitting withdrawal three years after the convention has entered into force, and one year after providing a notice of withdrawal. The Paris Agreement, which entered into force in November of last year, has the same requirements. Since that Agreement entered into force in November 2016, the earliest that the US could withdraw from it is November 2020.

As for the Transpacific Partnership, or the TPP, it has not been ratified by the US. We are not a party to it at this point. President Obama signed the agreement, but it still requires a majority of both houses of Congress for the domestic ratification process to be completed. It is tough to imagine Congress voting for that trade deal any time soon.

What if Mr. Trump’s true intention is not to denounce, but rather to renegotiate? It is important to know that the process for amending these multilateral agreements is long and complex. It is often tantamount to writing a completely new treaty.

*Implications*

While US Constitutional law and international law may not prohibit President Trump from working to withdraw from agreements or treaty commitments, or to renegotiate them, a rash approach to these issues can have serious ramifications not just for the environment, the economy and geopolitics, but also for the rule of law.

The US played a pivotal role in establishing the post-World War II order. Eleanor Roosevelt led the drafting of the Universal Declaration of Human Rights. Americans have been deeply involved in the drafting, monitoring and implementation of treaties of all kinds, ranging from international criminal
justice to trade. International law is an essential tool in our international relations and diplomatic toolkit, and it is tough to solve vexing global problems all by ourselves.

To the extent that the United States chooses to withdraw from an engaged and proactive approach to international law, stops being an international law player or ceases its compliance with international obligations, it weakens its own influence on the international stage and undermines a global order based on the rule of law, rather than brute force.

Exactly what President Trump will do at this point is not clear, but whatever he chooses to do is likely to have meaningful consequences far beyond our borders.