

# IN BRIEF: LEGAL OPTIONS FOR U.S. ACCEPTANCE OF A NEW CLIMATE CHANGE AGREEMENT



CENTER FOR CLIMATE  
AND ENERGY SOLUTIONS

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U.S. acceptance of the new climate agreement being negotiated under the United Nations Framework Convention on Climate Change (UNFCCC) may or may not require legislative approval, depending on its contents. U.S. law recognizes several routes for entering into international legal agreements. 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. The brief is based on the C2ES report, *Legal Options for U.S. Acceptance of a New Climate Change Agreement*, which provides a fuller legal analysis.

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## INTRODUCTION

In December 2011, UNFCCC parties launched a new round of negotiations to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties.” The agreement is to be adopted at the 21<sup>st</sup> 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. 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. Although some elements of the agreement have already begun to take shape, most remain to be negotiated. Recent COP decisions 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 are all 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 it pursuant to his foreign affairs powers. 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 the United States becoming a party?

In contrast to most countries, which provide only a single procedure for entering into international legal agreements (usually involving parliament), 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. In fact, however, most international agreements to which the United States is a party were accepted through other procedures—either approved by both houses of Congress or, in some circumstances, by the president acting alone, without the express approval of either the Senate or Congress.

Which of these avenues is appropriate for the new climate change agreement will depend on its content.

## BACKGROUND ON TREATY LAW

International legal agreements are governed by both international and U.S. law, which differ in important respects:

- U.S. law distinguishes between different types of international agreements, but these all have the same status in international law.
- As a matter of U.S. law, international agreements can be approved by the president, the Senate, or Congress. But the international act of accepting an international agreement is always performed by the president or his designee.
- 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 is generally binding on the United States even if the president, in consenting to the agreement, exceeded his authority.
- In international law, the term “treaty” is used to refer to any legal agreement between states in writing. But in U.S. practice, the term 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.

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

Although the Constitution explicitly identifies only a single procedure for entering into international

agreements—the Article II treaty-making procedure involving advice and consent by two-thirds of the Senate—several additional modes of concluding international agreements are today widely recognized as constitutional, and are equally binding on the United States internationally: (1) “congressional-executive agreements,” authorized by a majority of both houses of Congress; (2) “treaty-executive agreements,” authorized under existing agreements; and (3) “presidential-executive agreements,” based on the president’s existing legal authority.

Historical practice and case law have firmly established the constitutionality of these alternative procedures for joining international agreements. President George Washington negotiated the first executive agreement in 1789 and since then the United States has concluded more than 18,500. Indeed, non-Article II executive agreements now represent the vast majority of all international agreements to which the United States is a party.

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.

In practice, the choice among these options is the president’s, and, thus far, the courts have been unwilling to second-guess presidential decision-making.

## 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 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, and there is considerable historical precedent for the adoption of multilateral environmental agreements as Article II treaties. But 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

U.N. Convention on the Law of the Sea (despite amendments to the agreement to address U.S. concerns), the Convention on Biological Diversity, the Comprehensive Nuclear Test Ban Treaty, and the Disabilities Convention.

### **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 approved by Congress through its normal legislative process, rather than by a supermajority of the Senate. Since World War II, the United States has approved most international agreements through congressional action rather than Senate advice and consent, including the WTO Uruguay Round agreements and the agreements establishing the International Monetary Fund and the World Bank. Congressional-executive agreements are the most common form of international agreement to which the United States is a party, and their constitutionality is well established, 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. 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. Some of the most important and high-profile international agreements entered into by the United States have been executive agreements concluded by the president alone, including:

- The Algiers Accords (1981), which ended the Iranian hostage crisis.
- The Paris Peace Accords (1973), which ended the war in Vietnam.
- The Yalta Agreement (1945), which established the arrangements for post-World War II Europe.

### **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

The president has entered into several international environmental agreements as presidential-executive agreements, on the ground they were consistent with and could be implemented under existing law. Examples include the U.S.-Canada Air Quality Agreement, the Long-Range Transboundary Air Pollution Convention and several of its protocols, and, most recently, the Minamata Convention on Mercury.

The president could arguably rely on a combination of three legal bases to adopt a Paris climate change agreement without submitting it to the Senate or Congress for approval: first, the president's core foreign affairs power to communicate with foreign governments; second, existing U.S. law, which authorizes the Environmental Protection Agency to classify carbon dioxide emissions as a pollutant and which the Paris agreement would complement; and third, the Senate's approval of UNFCCC, to the extent that new agreement implements or elaborates the earlier agreement.

### **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.

## LEGALLY BINDING EMISSIONS TARGETS

Nationally determined mitigation contributions are expected to be a central element of the Paris agreement, but it is still unresolved whether NDCs will be legally binding—that is, whether parties will have a legal obligation to achieve the emissions reductions specified in their NDCs. If NDCs are political rather than legal commitments, then this would not limit the president’s authority to conclude the agreement acting alone. However, if the Paris agreement requires parties to achieve their NDCs, then this would weigh in favor of sending the agreement to the Senate or Congress for approval. 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. Moreover, since the United States does not currently have a domestic emissions cap, adoption of an agreement with a binding emissions target as a presidential-executive agreement would go beyond past practice, in which the president accepted agreements that reflected existing U.S. law.

## DOMESTIC IMPLEMENTATION COMMITMENT

Rather than legally commit each party to *achieve* the emissions target specified in its NDC, the Paris agreement might commit each party to *implement* its NDC through domestic laws and regulations. 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 the intended NDC put forward by the United States—an economy-wide target to reduce emissions by 26-28 percent below 2005 levels by 2025—is not itself reflected in U.S. law. Moreover, 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, these measures may or may not be sufficient to achieve the U.S. target. Consequently, adoption by the president of a domestic implementation commitment without Senate or congressional approval, like adoption of a binding emissions target, would go beyond existing precedents such as the Minamata Convention.

## PROCEDURAL COMMITMENTS

If the Paris agreement contained procedural rather than substantive commitments—for example, commitments to submit and maintain an NDC; to

report on implementation of its NDC, and to undergo international implementation review—concluding it as a presidential-executive agreement would have a strong legal basis. First, a core part of the president’s foreign affairs power is to communicate with foreign governments. So, 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. 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.

## FINANCIAL COMMITMENTS

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. In contrast, if 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. Other financial provisions that appear compatible with adoption as a presidential-executive agreement include:

- Procedural commitments relating to finance—for example, relating to the reporting of financial contributions.
- Non-binding provisions such as a collective pledge to “mobilize” or provide financial resources.
- Modalities for parties to contribute money for projects or activities on a voluntary basis.

## COULD THE PRESIDENT’S DECISION BE REVERSED?

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

A judicial challenge to the president's decision to accept the Paris agreement would face two obstacles. First, the courts might decline to hear the case under the political question doctrine. In two cases concerning the treaty-making power, courts found that the dispute involved a non-justiciable political question. In *Goldwater v. Carter*, four justices of the U.S. Supreme Court found that a challenge by several senators of President Jimmy Carter's decision to terminate a mutual defense agreement with Taiwan raised a political question, because it "involves the authority of the President in the conduct of ... foreign relations." Similarly, in a case challenging the constitutionality of NAFTA, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit held that the question of whether NAFTA must be approved as an Article II treaty is a political question that cannot be resolved by the courts.

Second, it not clear who would have standing to question 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 injury that a favorable decision would likely redress. Private actors would lack standing because the Paris agreement would be non-self-executing and hence would not apply to them directly. Under the doctrine of legislative standing, senators could possibly bring a lawsuit claiming that their treaty-making powers had been infringed. But the Supreme Court has taken a very narrow view of legislative standing, concluding, for example, that a group of members of Congress lacked a sufficient personal stake to be able to challenge the constitutionality of the line-item veto.

## WITHDRAWAL BY A FUTURE PRESIDENT OR CONGRESS

Legally, the choice among domestic acceptance options would 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.

## CONCLUSION

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, 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 firmer legal ground to join a new climate 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.

Ultimately, however, 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.

The full report on which this brief is based, *Legal Options for U.S. Acceptance of a New Climate Change Agreement*, is available at [www.c2es.org](http://www.c2es.org).

## OTHER C2ES RESOURCES

Toward 2015: An International Climate Dialogue

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

*Building Flexibility and Ambition into a 2015 Climate Agreement*, June 2014

*Issues for a 2015 Climate Agreement*, May 2014

*Evolution of the International Climate Effort*, May 2014

*The Durban Platform: Issues and Options for a 2015 Agreement*, December 2012

Available at [www.c2es.org/international/2015-agreement](http://www.c2es.org/international/2015-agreement)



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