MEMORANDUM

DATE: April 24, 2017

FROM: Christopher Horner, Esq, Marlo Lewis, PhD

SUBJECT: Options for addressing President Trump's Paris Climate Pact Promise

Executive Summary

This memo analyzes two principal options for dealing with the Paris Climate Agreement, U.S. participation in which Trump promised to "cancel".[1] It first sets forth, in brief, the Paris agreement's genesis and context, its "legal form" (treaty), legal implications of remaining in, and certain other material considerations before addressing options. It develops the following points.

The Paris Agreement is a treaty subject to the Senate's advice and consent.

- The Obama administration claimed Paris is not a treaty but rather an executive agreement, hence not subject to Senate consideration under Constitution Art. II, Sec. 2.

- In fact, the Agreement is a treaty by virtue of its costs and risks, ambition compared to previous climate treaties, dependence on subsequent legislation by Congress, intent to affect state laws, U.S. historic practice as to similar agreements, and other long-established criteria, set forth in State Department guidelines known as Circular 175.

- Executive agreements are agreements between the heads of government of two or more nations without requiring approval by the legislature. However, among parties to the Paris Agreement, executives in countries with parliamentary systems sought legislative approval, even though those countries had already ratified the parent treaty, the UN Framework Convention on Climate Change (UNFCCC).

- Examples include France — which insisted Paris be kept from the U.S. Senate— and Germany (followed by the European Parliament), Australia, Japan, China, and others. Obama's treatment of Paris as an executive agreement is an outlier.

Obama's purported unilateral "acceptance" of the Paris Agreement flouts the U.S. Constitution's treaty process (Art. II, Sec. 2) and thus U.N. treaty norms as well.

- Under UN criteria, nations must follow their national constitutional procedures before they can become parties to UN-sponsored agreements. Specifically, to ratify or accede, "the appropriate national organ of a State—Parliament, Senate, the Crown, Head of State or Government, or a combination of these—*follows its domestic approval procedures" or "follows domestic constitutional procedures*."

- Then and only then does the state make "a formal decision to be a party to the treaty."

Binding vs. Non-Binding is deceptive wordplay.

[1] See e.g., Andrew Freedman, "Trump backs away from pledge to 'cancel' Paris Agreement," Mashable, November 22, 2016, http://mashable.com/2016/11/22/trump-climate-paris-agreement-nyt-interview/#E._iyMrrqqqE.

- Proponents claim the Paris Agreement is "not a treaty" on the basis that, although many of its provisions are "legally binding", its emission-reduction obligations aren't. But the UNFCCC is indisputably a treaty, and its emission-reduction goals are non-binding.

- In practice, even the Kyoto Protocol's targets were binding only politically, not legally. But that is exactly what makes climate agreements serious business, because political pressure is chiefly what drives climate and energy policy.

- Note, too, that the Paris Agreement's treatment of targets and timetables is not materially different from the Kyoto Protocol's, which no one disputes is a treaty. Targets under each are agreed by the party. The distinction is that, instead of a country including its agreed targets in the document itself (Kyoto), they commit as part of the agreement to submit them every five years (Paris). Much ink has been spilled seeking to inflate this distinction into an important, "negotiated" difference. It isn't; it's wordplay.

- Especially for the United States, binding vs. non-binding is a distinction without a difference. Americans expect their government to keep all promises, whether those are legally enforceable or not. As a GEICO ad might say, "it's what you do."

- For that very reason, all proposed international commitments with large potential impacts on the U.S. economy and domestic policy priorities should be run by the Senate before they can be declared commitments of the United States.

If allowed to stand, Obama's end-run around the constitutional treaty process will establish a dangerous precedent.

- Emboldened by Obama's example, future executives will feel free to collude with foreign allies and unilaterally adopt unpopular treaties just by deeming them to be non-treaties.

The UNFCCC is not a legislative blank check.

- When the Senate Foreign Relations Committee recommended UNFCCC Senate approval in 1992, it stipulated that "a decision of the Conference of the Parties to adopt targets and timetables would have to be submitted to the Senate for its advice and consent."[2]

- At COP21, the Conference made a decision to adopt targets and timetables in the form of Nationally Determined Contributions (NDCs), and timetables for their delivery.

- Thus, in joining the Paris Agreement without seeking Senate advice and consent, President Obama violated the condition on which the Senate consented to the UNFCCC.

- The Obama administration's legal theory bizarrely implies that, in 1992, the Senate approved in advance executive promises to provide approximately $23 billion annually in additional foreign aid to developing countries and approve increasingly stringent NDCs, every five years, in perpetuity; or, that the Senate's role exists only if it is likely to agree.

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[2] S. Exec. Rept. 102-55, 102d Cong., 2d Sess. (1992), at 14. A *separate* Senate condition noted that any "decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions to the United States would alter the 'shared understanding' of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent." Id.

- NDC promises are legislative in nature, and primarily affect the U.S. economy and domestic policy priorities, not America's relations with other nations. In addition, climate finance payments drawn from the Treasury must be pursuant to appropriations by Congress. By what constitutional logic does the Senate have no role in making a pact promising new laws and regulations and more foreign aid?

Remaining in an agreement urging "ambitious" action to avert planetary disaster and affirming a duty to "act" invites climate regulatory and tort litigation.

- Open records productions and other records confirm that the activist coalition of "climate RICO" state attorneys general have organized to "ensur[e] that the promises made in Paris become reality."[3] Proposed enforcement strategies include use of Clean Air Act § 115, which requires state implementation plans to curb U.S. "international" air pollution.[4]

- Remaining in the Paris Agreement will also incentivize climate tort litigation, claiming either public trust doctrine or a climate "duty of care." One non-governmental organization, which cited various "non-binding" COP declarations and agreements, persuaded The Hague District Court to compel the Netherlands to adopt more stringent greenhouse gas regulations.[5] A U.S. court will be found to sanction such actions.[6]

- Canceling U.S. participation in the Paris Agreement would provide significant protection from such litigation. Even an activist judge would think twice about citing an agreement from which the United States had withdrawn as anything but rejection of those vows.

"Unprecedented" is an excuse or rationalization, not an argument.

- Pro-Paris advisors claim rejecting an executive agreement because it was not negotiated as a treaty would be unprecedented.

- However, *any* response to an unprecedented usurpation will also largely be unprecedented. "Unprecedented" is not an argument against corrective action that restores checks and balances and strengthens political accountability in policymaking.

Fear of "diplomatic blowback" if the United States pulls out of the Paris Agreement *confirms* the wisdom of getting out before we get in any deeper.

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[3] Letter to select state attorneys general from Eric Schneiderman, William Sorrell, March 7, 2016.

[4] The argument, unsupported by computer models, is that even a little GHG reduction has a little climate impact, and therefore presumably climate benefit, although such changes are too small to detect or verify. That is typically combined with the further assumption that U.S. action would induce other nations to act similarly and, together, cited as justification for requiring individual U.S. regulations. Oral argument in Massachusetts v. EPA, S.Ct. No. 05-1120, November 29, 2006, Souter, J., pp. 37, 38, respectively https://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1120.pdf.

[5] *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015) Hague District Court.

[6] In April 2016, a U.S. District Court in Oregon declined to dismiss a lawsuit by a group of youngsters (aged 8-19) to require the U.S. government to implement policies to reduce atmospheric CO2 concentrations to 350 parts per million by 2100. Richard Glick, "Children's Crusade to Combat Climate Change to Continue," Energy & Environmental Law Blog, April 14, 2016, http://www.energyenvironmentallaw.com/2016/04/14/childrens-crusade-to-combat-climate-change-continues/

- The Agreement is *designed* to ensure an ongoing campaign of "diplomatic blowback" and domestic political protest, peaking every five years when each new, more "ambitious" promise of regulations is required by Art. 4.

- History also suggests that no commitment will satisfy the global warming movement's demands and, regardless, **each new commitment merely launches a new five-year campaign cycle for the next, deeper commitment**.

- Withdrawing from Paris as promised is the only way to minimize "diplomatic blowback."

Adjusting the U.S. NDC downward rather than withdrawing is legally dubious and ensures years of "blowback."

- The notion that the Agreement merely "encourages" parties that revise their NDCs to make them more ambitious finds no support in the Agreement. Article 4—the only provision addressing adjustment—states: "A Party may at any time adjust its existing nationally determined contribution with a view to *enhancing* its level of ambition" (Art. 4.11), and each new NDC "*will* represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition" (Art. 4.3).

- Moreover, replacing Obama's "ambitious" NDC with BAU would invite all of the vaunted "diplomatic blowback" some advisors warn withdrawal would trigger, but without the benefit of actually escaping the Agreement's obligations and associated political pressure campaigns. *In toto*, it is arguably the worst conceivable approach.

W**ithdrawal from the Paris Agreement would not make other nations reluctant to conclude executive agreements with the United States.**

- Keeping the promise to start over would only make other countries think twice before again cooperating with a U.S. president to circumvent the U.S. constitutional system, as was admittedly the case with Paris.[7] Discouraging efforts to cut the Senate out of its constitutional role in treaty making has every appearance of being a benefit.

The best policy option is to withdraw from the Agreement after submitting it to the Senate with a recommendation that it not be ratified.

- Trump should declare that the Paris Agreement is a treaty by U.S. custom and practice and traditional criteria, such as those set forth in State Department Circular 175, and transmit the pact to the Senate for its consideration pursuant to Art. II, Sec. 2 of our Constitution. Alternately, actual resolution is found in withdrawing from UNFCCC.

- Reaffirming that our Senate's treaty role does *not* only exist when it can be counted on as a rubber stamp affirms that we are a nation of laws, not men, and discourages both our negotiating partners and future U.S. officials from attempting to circumvent our system.

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[7] "Climate Deal Must Avoid US Congress Approval, French Minister Says," The Guardian, June 1, 2015, http://www.theguardian.com/world/2015/jun/01/un-climate-talks-deal-us-congress.