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Exiting Paris: What the Climate Accord Teaches about the Features of Treaties and Executive Agreements

Eugene Kontorovich

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EXITING PARIS: WHAT THE CLIMATE ACCORD TEACHES ABOUT THE FEATURES OF TREATIES AND EXECUTIVE AGREEMENTS

*Eugene Kontorovich**

In 2017, President Trump announced the United States' intention to withdraw from the Paris Climate Accord. This article explores why the distinction between treaties and executive agreements cuts against treating the Accord as binding on the United States. The Accord's unusual features—a protracted withdrawal period and broad multilateral structure—preclude it having an effect as a sole executive agreement. These features should be regarded as signs that an international agreement is a treaty requiring Senate ratification.

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INTRODUCTION

President Barack Obama's signing of the Paris Climate Accord¹ generated significant debate as to whether it should have been submitted to the Senate for ratification as a treaty.² The debate has focused on numerous features of the agreement, such as its creation of

* Professor, George Mason University Antonin Scalia Law School.

1. "Paris Climate Accord," "Paris Accord," and "Paris Agreement" will be used interchangeably.
2. Compare DANIEL BODANSKY, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, LEGAL OPTIONS FOR U.S. ACCEPTANCE OF A NEW CLIMATE CHANGE AGREEMENT 2 (2015), with Steven Groves, *The Paris Agreement Is a Treaty and Should Be Submitted to the Senate*, THE HERITAGE FOUNDATION (Mar. 15, 2016), <https://www.heritage.org/environment/report/the-paris-agreement-treaty-and-should-be-submitted-the-senate> [<https://perma.cc/5NZZ-9HMD>].

domestic obligations,³ the treatment of prior climate agreements,⁴ and other factors.⁵ President Trump's announcement of the U.S.'s intention to withdraw from the agreement has renewed focus on whether Obama's entering into the agreement bound the U.S. in the first place.⁶

This essay identifies several previously unexamined features of the Paris Climate Accord that cut heavily against it being treated as the kind of arrangement that can be entered into by a president on his own authority. First, it has a four-year waiting period for withdrawal, quite unlike traditional executive agreements.⁷ Second, it is a large multilateral deal,⁸ while the typical executive agreement is bilateral.⁹ Moreover, the other parties to the Agreement have invariably regarded, for the purposes of their municipal systems, as a treaty that

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3. Compare David A. Wirth, *Is the Paris Agreement on Climate Change a Legitimate Exercise of the Executive Agreement Power?*, LAWFARE (Aug. 29, 2016), <https://www.lawfareblog.com/paris-agreement-climate-change-legitimate-exercise-executive-agreement-power> [<https://perma.cc/CCE4-TPUY>], with Michael Ramsey, *Declaring the Paris Climate Accord Unconstitutional*, THE ORIGINALISM BLOG (June 1, 2017), <https://originalismblog.typepad.com/the-originalism-blog/2017/06/declaring-the-paris-climate-accord-unconstitutionalmichael-ramsey.html> [<https://perma.cc/4CET-XCVG>].
 4. Brad Plumer, *Past Climate Treaties Failed. So the Paris Deal Will Try Something Radically Different*, VOX (Dec. 14, 2015, 10:50 am EST), <https://www.vox.com/2015/12/14/10105422/paris-climate-deal-history> [<https://perma.cc/FX82-7QAQ>].
 5. Dana Nuccitelli, *Climate Scientists Debate a Flaw in the Paris Climate Agreement*, THE GUARDIAN (Mar. 29, 2018, 6:00 EDT), <https://www.theguardian.com/environment/climate-consensus-97-percent/2018/mar/28/climate-scientists-debate-a-flaw-in-the-paris-climate-agreement> [<https://perma.cc/7APJ-L822>].
 6. Groves, *supra* note 2.
 7. Paris Agreement, art. 28, Apr. 22, 2016.
 8. Robert N. Stavins & Robert C. Stowe, *The Paris Agreement and Beyond: International Climate Change Policy Post-2020*, HARV. PROJECT ON CLIMATE AGREEMENTS, BELFER CTR. (Oct. 2016), <https://www.belfercenter.org/publication/paris-agreement-and-beyond-international-climate-change-policy-post-2020> [<https://perma.cc/Q6UE-3ZK6>].
 9. See U.S. DEP'T OF STATE, A LIST OF TREATISES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2018 (2018), available at <https://www.state.gov/documents/organization/282222.pdf> [<https://perma.cc/JP86-D339>] (cataloguing the numerous bilateral treaties that make up most executive agreements).

requires domestic ratification.¹⁰ Whatever that means for U.S. constitutional purposes, it does suggest other countries should hardly protest if President Trump merely follows their example and refuses to give it legal authority in the absence of ratification. These features – a protracted withdrawal period, and broad multilateral structure – are extremely unusual, or unprecedented, for sole executive agreements.¹¹ This essay explains why they go to the heart of the treaty/executive agreement distinction.

Because of these features, President Obama's signing of the treaty without Senate ratification means that the Accord does not obligate the U.S. internationally or domestically.¹² While this may seem a moot point given President Trump's withdrawal, it is relevant for reasons particular to Paris, and more general ones. The announced U.S. withdrawal generated wide criticism domestically and internationally.¹³ President Trump's announced exit will not take effect until a few months before the end of his term, and can be reversed at any point before then.¹⁴ Moreover, a future Democratic

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10. *FAQs About How the Paris Agreement Enters into Force*, WORLD RESOURCES INST'T, <https://www.wri.org/faqs-about-how-paris-agreement-enters-force> [https://perma.cc/FU7J-7XQ2].
 11. Eugene Kontorovich, *The U.S. Can't Quit the Paris Climate Agreement, Because it Never Actually Joined*, WASH. POST: VOLOKH CONSPIRACY (June 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/01/the-u-s-cant-quit-the-paris-climate-agreement-because-it-never-actually-joined/?utm_term=.294de1620eac [https://perma.cc/6YK3-WXQ6].
 12. President Trump's announcement of the U.S. intent to withdraw from the Agreement did not make clear whether he regarded it as binding *ab initio*. However, subsequent statements by the State Department make it clear that the U.S. is exiting the agreement pursuant to the agreement's own terms. This may suggest that the Trump Administration views the deal as binding in some sense; it may also suggest a belt-and-suspenders approach, where the Administration does not wish to resolve the constitutional issues involved and exits in conformity with the accord's provisions to cover all possible legal bases. See *Communication Regarding Intent To Withdraw From Paris Agreement*, U.S. DEP'T OF STATE (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm> [https://perma.cc/EF2Q-YM6M].
 13. Philip Rucker & Jenna Johnson, *Trump Announces U.S. Will Exit Paris Climate Deal, Sparking Criticism at Home and Abroad*, WASH. POST (June 1, 2017), https://www.washingtonpost.com/politics/trump-to-announce-us-will-exit-paris-climate-deal/2017/06/01/fbcb0196-46da-11e7-bcde-624ad94170ab_story.html?utm_term=.010d29fb4dd5 [https://perma.cc/7WJ4-5QW6].
 14. Chelsea Harvey, *Withdrawing from the Paris Deal Takes Four Years. Our Next President Could Join Again in 30 days.*, WASH. POST (June 5, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/05/withdrawing-from-the-paris-deal-takes->

president is likely to promptly “rejoin” the Accord, but again without the Senate’s advice and consent. None of these actions would, this essay argues, make the Accord binding on the U.S. Moreover, ambitious multilateral agreements will likely become more common for environmental and other matters in the foreseeable future. The Senate will likely remain reluctant to ratify them, and thus presidents will more frequently seek to enter into such agreements through their authority to make executive agreements. In short, the Paris Accord is the first but not last of such attempts. This essay identifies several features that such executive agreements cannot have; that is, features that would require an agreement to be submitted to the Senate before it could have legal effect.

Part I of this essay briefly sketches the constitutional distinction between treaties, congressional-executive agreements, and sole executive agreements. Part II examines the Paris Accord’s uniquely onerous withdrawal provisions and shows why they preclude treating it as a SEA. Part III examines the Paris Agreement’s multilateral nature and shows how it does not accord with the past practice for SEAs.

I. THE ROLE OF EXECUTIVE AGREEMENTS

The Constitution allows the president to “make Treaties,” subject to the consent of two-thirds of the Senate.¹⁵ Such treaties fully bind the U.S. and have a domestic status equivalent to statutes.¹⁶ At the same time, it is well accepted that there is a class of international agreements that the president can commit the U.S. to without invoking the treaty process.¹⁷ Indeed, the vast majority of America’s international agreements are not made through the constitutional treaty process.¹⁸ Such agreements are of two kinds. “Congressional-

four-years-our-next-president-could-join-again-in-30-days/?utm_term=.9b4548a4f240 [https://perma.cc/BK8P-3WTA].

15. U.S. CONST. art. II, § 2, cl. 2.

16. U.S. CONST. art. VI, cl. 2.

17. STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 6–8 (2018). In international law, the term “treaty” is one of the many terms for a binding international agreement, none of which are legally significant. In international law, an agreement, however denominated, is binding. Not all agreements that are “treaties” in the international law sense – i.e., that create a binding international obligation – are “Treaties” in the constitutional sense. *See* Vienna Convention on the Law of Treaties, art. 1, May 23, 1969, 1155 U.N.T.S. 331 (applying to treaties).

18. Curtis Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L. J. 1615, 1626 (2018).

executive agreements” are entered into by the president pursuant to legislative authorization.¹⁹ While they are not ratified by two-thirds of the Senate, they have a different kind of supermajority support—majorities in both houses of Congress.²⁰ Given the broad authorities of the president and Congress in matters of foreign trade and policy, such agreements are not controversial.²¹

Finally, presidents have entered into many agreements without invoking the treaty process or congressional authorization.²² However, the constitutionally permissible scope of the “sole executive agreement” (“SEA”) category is a matter of great dispute.²³ Such agreements are typically justified by the president’s invocation of his inherent constitutional powers, such as recognition and foreign relations, or as commander-in-chief.²⁴ They typically deal with low-level bilateral issues of cooperation and take the form of exchanges of letters, memoranda of understanding, and the like.²⁵ While the use of SEAs is both venerable and vast, the precise line between what international agreements can be entered into by the president on his own authority and those that require congressional action remains vague.

For most purposes, SEAs are not controversial. Yet important agreements raise the issue of the constitutionally permissible scope and effect of SEAs. Scholars have suggested that the distinction

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19. *Id.* at 1625.
 20. John C. Yoo, *Laws as Treaties: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 758 (2000).
 21. *See Congressional-Executive Agreement*, ENCYCLOPAEDIA BRITANNICA (June 5, 2016), <https://www.britannica.com/topic/congressional-executive-agreement> [<https://perma.cc/GU86-JFW9>] (defining congressional-executive agreements). As a textual matter, the Constitution recognizes the existence of agreements other than Art. III “Treaties” – in particular, the “compacts” and “agreements” that states can enter into with congressional consent. *See* U.S. Const. art. 1, § 10. cl. 3.
 22. *See* Daniel Bodansky & Peter J. Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT’L L. 885, 887 (2016) (defining a new type of agreement known as executive-agreements+, distinct from other types of international agreements). Some scholars have gone so far as to argue that the Paris Agreement represents an exotic and previously unidentified species of international deals that fall between congressional-executive agreements and SEAs. *Id.*
 23. *See* MULLIGAN, *supra* note 17, at 7–9 (demonstrating the Supreme Court’s determination on whether the President has authority to enter agreements in certain contexts).
 24. *See Id.* at 7–8 (delineating where the President has exclusive constitutional authority).
 25. *See Id.* at 8 (discussing two prior agreements handling assets assignment and ending US involvement in Vietnam).

between treaties and SEAs lies in the “length and importance of the agreement.”²⁶ As this essay shows, the Paris Climate Accord differs in kind and degree from prior SEAs on both these criteria, and instead looks more like a treaty.

While there are no clear rules about the treaty/executive agreement, the Paris Accord has some features, not yet analyzed in this context, that do not follow the pattern of past SEAs. Simply pointing out that there *are* such things as SEAs does not mean the Paris Accord is one of them, given that it departs from the SEA model in significant ways.

II. DELAYED WITHDRAWAL PROVISIONS IN EXECUTIVE AGREEMENTS

One formal feature of the Paris Climate Accord distinguishes it from the extensive past use of SEAs—the withdrawal provision. This Part shows that distinction has constitutional significance and places the Paris Accord outside the accepted constitutional scope of SEAs.

The Paris Accord has a four-year delayed exit period: at the time the agreement comes into force, a state party to the deal can only withdraw after four years.²⁷ There is no constitutional limit on delayed withdrawal periods in treaties²⁸—ten years is the standard waiting period under U.S. bilateral investment treaties.²⁹ However, typical withdrawal periods are much shorter.³⁰ Most treaties do not provide for any waiting period for withdrawal.³¹ However, the Vienna

26. Michael D. Ramsey, *Executive Agreements and the (Non)treaty power*, 77 N.C. L. REV. 133, 184 (1998).

27. CONG. RESEARCH SERV., PRESIDENT TRUMP’S WITHDRAWAL FROM THE PARIS AGREEMENT RAISES LEGAL QUESTIONS: PART 1 (2017). The actual withdrawal period requires one-year notice; but no withdrawal is permitted at all for the first three years after the agreement comes into force. In practice, the earliest permitted withdrawal for the U.S. under the terms of the Agreement is Nov. 4, 2016, the day after the next U.S. presidential election. *Id.*

28. See CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 1 (2018) (“Although the Constitution sets forth a definite procedure whereby the Executive has the power to make treaties with the advice and consent of the Senate, it is silent as to how treaties may be terminated.”).

29. Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World* 19 (Org. for Econ. Co-operation and Dev., Working Paper No. 02, 2015). Indeed, almost all BITs have an initial 10-year limitation on withdraw, followed by waiting periods that are 12.5 years on average. *Id.*

30. Kontorovich, *supra* note 11.

31. *Id.*

Convention on the Law of Treaties provides one year as a default withdrawal period for treaties containing no explicit withdrawal provisions.³² But many treaties do have such terms—almost invariably shorter than four years.³³ Indeed, six months or a year are the most common waiting periods.³⁴

However, withdrawal provisions for SEAs look quite different. In that context, the Paris Accord restrictions are truly remarkable, and go far beyond the kind of “thin” agreement allowed under sole executive authority. The justification of SEAs is that they are an inherent part of a president’s foreign affairs powers because the conduct of foreign affairs requires the frequent formal arrangements between countries.³⁵ But he can also unmake them as needed.³⁶

Indeed, the “temporary” nature of executive agreements has long been seen as one of their defining and self-limiting features.³⁷ President Theodore Roosevelt took the view that an SEA does not even bind the signing president’s successors unless explicitly renewed.³⁸ While extensive usage appears to reject that strong position, there is also no support for its converse—that an SEA can bind or restrict the ability of a successor to exit it.³⁹

A protracted withdrawal period in an SEA would allow one president to unilaterally pre-commit his successor and limit the latter’s powers. Such action could be deliberate. Numerous news accounts suggest that the Paris Agreement’s four-year period was not accidental.⁴⁰ Rather, it was specifically designed to block U.S. exit in

32. Vienna Convention on the Law of Treaties, art. 56, May 23, 1969, 1155 U.N.T.S. 331.

33. Kontorovich, *supra* note 11.

34. *Id.*

35. MULLIGAN, *supra* note 17, at 7–8.

36. Bradley, *supra* note 18, at 1626.

37. See Edwin Borchard, *Treaties and Executive Agreements—a Reply*, 54 YALE L. REV. 616, 640–41 (1945) (demonstrating the over 70 years of acceptance that Presidents can unilaterally withdraw from SEAs).

38. F.M. Brewer, *Executive Agreements*, EDITORIAL RESEARCH REPORTS (1943), <http://library.cqpress.com/cqresearcher/cqresrre1943070100> [<https://perma.cc/4XQY-VVRD>].

39. Borchard, *supra* note 37 (“The successor cannot be bound by the executive agreements of his predecessor”).

40. Tim McDonnell, *Have We Solved Climate Change Yet?*, SLATE (Apr. 22, 2016), <https://slate.com/technology/2016/04/signing-the-paris-agreement-is-one-small-step-forward-for-fighting-climate-change.html> [<https://perma.cc/WW5D-5X2J>]; see also Brian Palmer, *Is America Actually Out of the Paris Agreement?*, NRDC (Aug. 30, 2017), <https://www.nrdc.org/stories/america-actually-out-paris-agreement> [<https://perma.cc/DT32-XX2R>].

the event of a possible Republican presidential victory in 2016.⁴¹ Indeed, the narrow window for the U.S. exit President Trump seeks to employ (from Nov. 4, 2020 until the inauguration of the next president) may largely have been an unintended consequence of the Agreement receiving the necessary number of ratifications to enter into effect faster than had been expected.⁴²

This is not to say the motives of an agreement's drafters in crafting the withdrawal provision should determine whether it can be entered into by the U.S. as an SEA. Rather, it demonstrates the sound policy reasons for restricting the scope of SEAs—whose constitutional basis is already less than pellucid—to agreements that can be conveniently exited by a successor administration. To be sure, this leaves open the question of how long an acceptable withdrawal period can be. Even a year-long waiting period can limit the discretion of a successor if entered into in the last days of the prior administration. As with many constitutional questions of time limits, the question does not admit of a bright-line answer.⁴³ In practice, the vast precedent of past SEAs should serve as useful guides, and as will be seen, the four-year period is far outside accepted norms.⁴⁴

An examination of many executive agreements from various decades shows that withdrawal periods longer than a year are quite extraordinary. From 1928 to 1945, the State Department published executive agreements in a separate collection, the Executive Agreements Series.⁴⁵ While obviously containing older agreements, this collection does not require winnowing agreements from treaties. A search of the entire collection found no agreement with a withdrawal

41. McDonnell, *supra* note 40; *see also* Palmer, *supra* note 40.

42. *See* Palmer, *supra* note 40 (explaining how the Paris Agreement seemed designed to prevent right-leaning, leaders from exiting the agreement during their tenure).

43. *See Coleman v. Miller*, 307 U.S. 433, 451–53 (1939) (holding that the time period a constitutional amendment remains open for ratification is non-justiciable, because there is no judicial method of determining what is too short or too long a time period). For this reason, the Court has treated analogous time-limit questions as non-justiciable political questions. *Id.*

44. *See generally* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L. J.* 140, 258–59 (2009) (arguing that agreements that do not allow withdraw for a period of more than one year should not be entered into as SEAs, but rather as some kind of congressional-executive agreement).

45. *Finding Agreements*, U.S. DEP'T OF STATE, <https://www.state.gov/s/1/treaty/text/> [https://perma.cc/5FQH-9WS5].

period longer than six months, with thirty days being perhaps the most common time period.⁴⁶

To examine whether more recent agreements have lengthier withdrawal provisions, I compiled a list of all SEAs in 2008, 2009, 2016, and 2017—the two most recent years at the time the research was conducted, and two prior years picked for convenience.⁴⁷ The agreements made in these years had a variety of withdrawal provisions ranging from one month to a year, but none longer than one year.⁴⁸ Based on my findings, the average for 87 agreements in 2008 was 137 days; 165 days in 2009, and 226 days in 2016.⁴⁹ Thus, it seems the most common withdrawal notice requirement in SEAs is half a year; durations longer than one year may be unprecedented.

One might argue that entering into a SEA with a protracted withdrawal period does not limit subsequent presidents, because as a matter of domestic authority, they can always quit a SEA, even in violation of the agreement's provisions. But this would breach international commitments, making it harder in practice for the subsequent president to use his undisputed executive authority. Indeed, this is precisely the argument many made against Trump's exit of the Paris Accords – that it breaches U.S. obligations. His adherence to the withdrawal provision period underscores how significant a constraint such agreements are, and the need for congressional authorization in such cases.

Such deep commitment cannot be made without the involvement of the Senate. This quite unusual feature of President Obama's agreement strongly suggests it cannot be treated as an SEA, and thus it has no force until the Senate ratifies it.

II. MULTILATERAL NATURE AND OTHER PARTIES' PRACTICE

This Part deals with several aspects of the multilateral structure of the Paris Accord. Firstly, the multilateral nature of the agreement

46. Eugene Kontorovich, *Collection of SEAs from 2008-09 and 2016-17*, available at <https://perma.cc/JTQ3-KLS9> [hereinafter SEA Spreadsheet].

47. *See id.* The State Department publishes all U.S. international agreements, in a collection known as Texts of International Agreements to Which the United States is a Party. This collection makes no distinction between treaties, SEAs, and congressional-executive agreements. That distinction is only sometimes clear from the titles, and even the text of the agreements, and thus examining SEAs particularly requires individually identifying them by determining whether they were submitted to the Senate. *Finding Agreements*, *supra* note 45.

48. *See SEA Spreadsheet*, *supra* note 46.

49. *Id.*

is itself exceptional for SEAs. Moreover, the Paris Accord is a particular type of multilateral agreement—one held open for membership to all states of the world, and contemplating universal participation.⁵⁰ To facilitate this, the U.N. Secretary General serves as the depositary for the agreement.⁵¹ All these features correlate strongly with the importance and breadth of the agreement, and thus point towards constitutional treaty status. Moreover, these factors are fairly formal, and thus well-suited to a legal test that must make a binary distinction between SEAs and other agreements. Finally, the other Paris Accord signatories have overwhelmingly approached it as an agreement requiring domestic ratification processes.⁵² While not strictly relevant to its U.S. constitutional status, the fact that apparently only the U.S. entered into it as an executive agreement is certainly noteworthy, and at least is relevant to whether an American exit can legitimately be seen by other nations as a breach of international commitments.

A. *Formal Structure of the Agreement*

The difference between broad multilateral treaties and bilateral agreements is recognized in international law,⁵³ as well as U.S. foreign relations practice.⁵⁴ Multilateral obligation also correlates strongly with the scope, duration, and importance of the obligation being undertaken.⁵⁵ One indication that multilateral treaties are “bigger deals” is the far lower ratification rates they enjoy in the Senate.⁵⁶

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50. *What is the Paris Agreement?*, UNFCCC, <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> [<https://perma.cc/S5DT-D3ZC>] (last visited Nov. 11, 2018).
51. *FAQs*, *supra* note 10.
52. *Id.*
53. *See* Vienna Convention on the Laws of Treaties art. 60, Jan. 27, 1980, 1155 U.N.T.S. 331 (distinguishing the difference between breach of a bilateral treaty versus a multilateral treaty).
54. *See* Brett Schaefer, *The Role and Relevance of Multilateral Diplomacy in U.S. Foreign Policy*, THE HERITAGE FOUNDATION (Feb. 14, 2011), <https://www.heritage.org/global-politics/report/the-role-and-relevance-multilateral-diplomacy-us-foreign-policy> [<https://perma.cc/9NQG-H4JN>] (discussing the importance of difference diplomatic approaches to multilateral versus bilateral treaties).
55. Jeffery S. Peake & Glen S. Krutz, *President Barack Obama, Partisanship, and the Politics of International Agreement*, 1 SSRN J. 16 (Aug. 1, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587806 [<https://perma.cc/T8ZG-5DNE>] (“Multilateral treaties, by their nature, typically involve more significant and controversial issues, including human rights, arms control, and the environment.”).
56. *See* Johannes Thimm, *The United States and Multilateral Treaties*, in THE UNITED STATES AND MULTILATERAL TREATIES: A POLICY PUZZLE 1

Most, if not all the past practice supporting executive agreements consists of exchanges of notes and settlement agreements – all of which are bilateral.⁵⁷ Certainly such agreements were almost entirely bilateral until the 20th century, as multilateral agreements of any kind were quite rare until then.⁵⁸

Multilateral executive agreements remain exceedingly rare, and perhaps unprecedented, according to several studies.⁵⁹ Moreover, these studies do not distinguish between SEAs and congressional-executive agreements, making it unclear if there is any precedent for broad multilateral SEAs.⁶⁰ To be sure, some important multilateral treaties—for example, the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) Agreement—have not been submitted to the Senate, but were done pursuant to explicit congressional grants of authority and not as SEAs.⁶¹

(2016) (“More often than not, America remains outside of multilateral treaties, including some that enjoy almost universal membership otherwise.”).

57. MULLIGAN, *supra* note 17 at 7–9
58. BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS VOL. 1, 3 (Simon Lester et al. eds., 2016).
59. See JEFFREY S. PEAKE & GLEN S. KURTZ, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 90 (University of Michigan Press eds., 2009) (finding that the “baseline probability of a . . . multilateral agreement being a treaty is .63” and that multilateral nature is by far the biggest predictor of an agreement being a treaty rather than an executive agreement); see also S. Rep. No. 106-71, at 42 (reporting that multilateral treaties represent a much smaller share of executive agreements (4.6%) than of Senate-submitted treaties).
60. See Mark Bond, *The Minamata Convention and the Paris Climate Agreement: Insights Into Senate-less Adoption*, CLIMATE L. BLOG (Feb. 16, 2015), <http://blogs.law.columbia.edu/climatechange/2015/02/16/the-minamata-convention-and-the-paris-climate-agreement-insights-into-senate-less-adoption/> [https://perma.cc/M4GB-FLHX] (discussing how the Minamata Convention is somewhere between a sole-executive and congressional-executive agreements). *But see* Bodansky, *supra* note 22, at 910-11 (noting that the Minamata Convention may properly be understood as a congressional-executive agreement).
61. See JANE M. SMITH ET AL. CONG. RESEARCH SERV., 7-5700, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN TREATIES 1 (2013) (discussing how the Omnibus Trade and Competitiveness Act of 1988 (OTCA) and the Trade Act of 1974 granted the President authority to enter tariff and nontariff trade barrier agreements.). Status of forces agreements provide a telling example. These are among the most well accepted contexts for sole executive agreements, relying in part on the Commander-in-Chief authority. The NATO SOFA is the only multilateral one to which the U.S. is a party, and it is also the only such

Multilateralism is of course a matter of degree.⁶² As a matter of principle, it would be hard to justify a constitutional distinction between bilateral, and say, trilateral executive SEAs. After that of course, everything is a matter of degree. But the Paris Accord is a particular kind of ultra-multilateral agreement. It is a “universal” agreement - which international law recognizes is qualitatively, not just quantitatively, different from agreements that happen to have multiple parties.⁶³ A “plurilateral treaty” is one that is open to numerous members, but from a limited set of countries with a particular interest in a certain matter, for example, sharing of natural resources in a lake or a mutual defense agreement.⁶⁴ On the other hand, the Paris Agreement and other major modern multilateral agreements seek “universal participation.”⁶⁵ When an agreement aims at full participation, this is seen as an essential part of its character.⁶⁶ Such treaties are, because of their subject matter and broad regulatory aims, more ambitious than other agreements.⁶⁷

It is important to note another related formal trapping of the Paris Agreement—the role of the U.N. Secretary General as depositary.⁶⁸ The Secretary General only accepts this role for “multilateral treaties of worldwide interest” and treaties open

agreement to have submitted to the Senate as a treaty. *See* R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SODA): WHAT IS IT AND HOW HAS IT BEEN UTILIZED? 1-2 (2009).

62. Joseph S. Nye, *America Can't Go It Alone: Unilateralism vs. Multilateralism*, N.Y. TIMES (June 13, 2002), <https://www.nytimes.com/2002/06/13/opinion/IHT-america-cant-go-it-alone-unilateralism-vs-multilateralism.html> [https://perma.cc/F74R-J4XQ].
63. *See* Naghmeh Nasirtousi & Karin Bäckstrand, *International Climate Politics in the post-Paris era*, NORDIC ECON. POLICY R. (forthcoming April 2019) (describing the Paris Agreement as “a new model of ‘hybrid multilateralism’...”).
64. PROF. DR. RAYMOND SANER, PLURILATERAL AGREEMENTS: KEY TO SOLVING IMPASSE OF WTO/DOHA ROUND AND BASIS FOR FUTURE TRADE AGREEMENTS WITHIN THE WTO CONTEXT 3-5 (2012).
65. EMILY O'BRIAN & RICHARD GOWEN, WHAT MAKES INTERNATIONAL AGREEMENTS WORK: DEFINING FACTORS FOR SUCCESS 4 (2012).
66. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 51, at 10 (May 28,) (noting as relevant to the treaty's interpretation “the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention.”).
67. O'BRIAN & GOWAN, *supra* note 65, at 31.
68. Paris Agreement, art. 26, Dec 12, 2015, U.N.T.C. No. 54113.

generally to membership, such as those negotiated at U.N. conferences.⁶⁹ Thus, the Paris Agreement is among the “most” multilateral kinds of treaties.⁷⁰ It is not clear if the U.S. has even used an executive agreement to join any multilateral treaty of which the Secretary General serves as the depositary.⁷¹ Current State Department guidelines about what constitutes a treaty and what an SEA (known as Circular 175) list numerous criteria for determining which agreements should be treated as treaties, such as past U.S. practice with similar agreements, the general international practice with similar agreements, the degree of formality, and so forth.⁷² All of these factors, as applied to universal multilateral treaties, point towards treating the Paris Accords as a treaty. That is, other universal agreements have always been regarded by the U.S. as treaties for constitutional purposes.

One of the fundamental difficulties in policing the treaty/SEA line is that while there is broad agreement on numerous relevant factors, there is no test for how many of them are needed and how they are balanced.⁷³ Moreover, many of the Circular 175 factors themselves are qualitative in nature.⁷⁴ It may be that the universal multilateral nature of an agreement would serve as a good, formal test—a rule of inclusion, not exclusion—for which agreements should be regarded as treaties.

B. *Other Parties Treat it as a Treaty*

The fundamental American exceptionalism with regards to the Paris Accord lies not in President Trump’s decision to exit, but in President Obama’s decision to not seek ratification. The U.S. appears to be alone in its “non-treaty” interpretation.⁷⁵ The signatory states

69. Off. of Legal Aff., Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, U.N. Doc. ST/LEG/7/Rev.1 at 7. (1999).

70. See JOSEPH ALDY ET AL., *THE PARIS AGREEMENT AND BEYOND: INTERNATIONAL CLIMATE CHANGE POLICY POST-2020* 1 (2016) (noting that the Paris Agreement is “a breakthrough in multilateral efforts..”).

71. See *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS TREATY COLLECTION (Participant Search: United States of America).

72. See DEP’T OF STATE, *Memorandum on Power to Enter into International Arms Control Agreements* (Feb. 27, 2002), <https://www.state.gov/s/1/38636.htm> [<https://perma.cc/U59Z-V427>] (discussing the factors to consider when entering treaties).

73. Groves, *supra* note 2.

74. DEP’T OF STATE, *Circular 175 Procedure*, <https://www.state.gov/s/1/treaty/c175/> [<https://perma.cc/Q4J6-QQ9Q>].

75. Groves, *supra* note 2.

seem invariably to have accepted the Paris Agreement as a treaty that requires going through their internal treaty-ratification processes, typically made by submission to the legislature.⁷⁶ The United Kingdom, China, and Jamaica have ratified it through their legislatures, and so has Brazil, Japan, the Philippines, and Australia.⁷⁷ In the latter, the question of whether it was a binding international accord requiring submission to Parliament received some discussion, and a parliamentary analysis concluded it was a “major treaty” that needed to be submitted.⁷⁸ While this essay does not examine all 180 current ratifications of the Agreement, it seems to have overwhelmingly gone through domestic processes for treaties rather than processes for agreements.

The universal interpretation of the Agreement as a treaty cuts against President Obama’s insistence that it is not one. A treaty is an international agreement, and in a multilateral treaty, the views of other signatories are at least probative of the question of whether it creates binding obligations upon ratification. Indeed, the State Department practice treats “general international practice as to similar agreements” —whether they are regarded as treaties or not— as a relevant factor in the domestic determination.⁷⁹ This certainly implies that “international practice” as to the *specific* agreement in question would be highly relevant.

To be sure, the question of what kind of agreements must be submitted to the Senate is not governed by a foreign country’s rules about treaty ratification—the meaning of the U.S. Constitution is determined endogenously, not by reference to other countries’ constitutional practices.⁸⁰ In particular the U.S. definition of “treaty” for constitutional purposes is considerably narrower than the

76. *FAQs*, *supra* note 10.

77. *See Paris Agreement Ratification Tracker*, CLIMATE ANALYTICS (2017), <https://climateanalytics.org/briefings/ratification-tracker/> [<https://perma.cc/QM3F-4JTP>] (listing all countries who have ratified the Paris Agreement).

78. *See generally* Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, Report 163, *Paris Agreement, Kyoto Protocol - Doha Amendment* (Nov. 2016) (outlining the discussion about the ratification of the Paris Agreement through the Australian Parliament).

79. DEP’T OF STATE, 11 FAM 723.3 CONSIDERATIONS FOR SELECTING AMONG CONSTITUTIONALLY AUTHORIZED PROCEDURES (2006).

80. For a discussion on Constitutional interpretation and its relationship to international law, *see* Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”*: *International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005).

definition of “treaty” in international law.⁸¹ The definition in various other countries’ constitutions may also be broader or narrower. So it is not the other country’s decision to seek legislative ratification that is relevant, but rather the view that it creates binding international commitments.

However, when the Constitution incorporates international legal terms of art—such as in the “Treaty” Clause⁸²—it may incorporate international law by reference, with respect to those specific provisions.⁸³ Thus from the earliest cases, courts have looked to international law for the purpose of distinguishing treaties from other agreements.⁸⁴ The writings of Emmerich de Vattel, the international law author most familiar to the Framers,⁸⁵ have played a large role in these discussions.⁸⁶ Indeed, the Supreme Court has suggested that the international legal trappings of an agreement are relevant to the constitutional treaty-sole executive agreement distinction.⁸⁷ Yet this essay does not intend to argue that international law conclusively determines what constitutes a constitutional “treaty,” because overwhelming precedent establishes that constitutional category to be far narrower than the international legal one.⁸⁸

Thus while the treatment by other signatories of the Paris Agreement as may not be strictly relevant for constitutional purposes, it is nonetheless useful for understanding the nature of the U.S.’s international obligations under the Agreement. Some have argued

81. See S. Prt. 106-71, at 1 (2001) (“However, the word treaty does not have the same meaning in the United States and in international law. Under international law, a ‘treaty’ is any legally binding agreement between nations. In the United States, the word treaty is reserved for an agreement that is made ‘by and with the Advice and Consent of the Senate...’”).

82. U.S. CONST. art II, § 2, cl. 2.

83. See generally Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 157-59 (2009) (discussing whether the incorporation of international law by specific constitutional provisions which use international law terms of art fixes the content of that law as it stood in 1789, or allows it to track changes in international law).

84. See *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) (“For when we speak of ‘a treaty,’ we mean an instrument written and executed with the formalities customary among nations . . .”).

85. Jason Steinhauer, Blog, *Emer Vattel and His Influence on Early America*, LIBRARY OF CONGRESS (May 6, 2016), <https://blogs.loc.gov/kluge/2016/05/the-influence-of-emer-vattel/> [<https://perma.cc/UF6A-BSTB>].

86. *Id.*

87. See *Jennison*, 39 U.S. at 571.

88. S. Prt. *supra* note 81.

that even if President Trump's non-acceptance of obligations under the Agreement would be consistent with the Constitution, it would be a breach of an international obligation and weaken foreign trust in U.S. commitments.⁸⁹ Yet foreign countries are in no place to complain if the U.S. insists on treating the Agreement as a treaty requiring submission to the legislature because that is exactly how they have treated it themselves.⁹⁰ Knowing that the Agreement was not ratified by the U.S. Senate, they should not expect the U.S. to be bound, as they would not regard themselves bound under similar circumstances.

CONCLUSION

President Trump did not quit the Paris Accord because the U.S. was never in it in the first place. Several features of the Agreement, such as its extensive withdrawal delay time and its strong multilateral structure, distinguish it functionally and formally from past SEAs. A future president who rejoins Paris will be in the same position President Obama was in: at least as a matter of domestic constitutional law, he will not have committed the U.S.

Looking forward, the difficulty of the U.S. constitutional treaty process makes it quite likely that future presidents will be tempted to enter into broad, long-lasting multilateral commitments in areas such as environmental regulation through SEAs.⁹¹ This is particularly tempting because the constitutional limits on SEAs are fuzzy. But the Paris Agreement's extremely long withdrawal period, along with its structure as broad multilateral U.N. treaty, clearly distinguish it from past executive agreements, and require it to be treated as a treaty to have domestic effect.

89. Tess Bridgeman, *Paris is a Binding Agreement: Here's Why That Matters*, JUST SECURITY (June 4, 2017), <https://www.justsecurity.org/41705/paris-binding-agreement-matters/> [<https://perma.cc/9RTN-JBY5>].

90. See *Paris Agreement Ratification Tracker*, *supra* note 79 (outlining how numerous foreign countries have ratified the Paris Agreement, unlike the U.S.).

91. David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. OF TRANSNAT'L L. 741, 755 (2017).