

## Pace Environmental Law Review

---

Volume 35  
Issue 2 *Spring 2018*

Article 3

---

April 2018

### President Trump's Unilateral Attempt to Cease All Implementation of the Paris Agreement and to Withdraw from It: Constitutional?

Phillip M. Kannan  
*Colorado College*

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>



Part of the [Constitutional Law Commons](#), [Environmental Law Commons](#), and the [International Law Commons](#)

---

#### Recommended Citation

Phillip M. Kannan, *President Trump's Unilateral Attempt to Cease All Implementation of the Paris Agreement and to Withdraw from It: Constitutional?*, 35 Pace Env'tl. L. Rev. 292 (2018)  
Available at: <https://digitalcommons.pace.edu/pelr/vol35/iss2/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

---

---

## ARTICLE

# President Trump's Unilateral Attempt to Cease All Implementation of the Paris Agreement and to Withdraw from It: Constitutional?

PHILLIP M. KANNAN\*

### TABLE OF CONTENTS

I.	<i>Introduction and Background</i> .....	293
II.	<i>A Genealogy and Summary of the Paris Agreement</i> .....	294
III.	<i>President Trump's Attempt to Cease All Implementation and to Withdraw from the Paris Agreement: Inconsistent with Article II, § 2, cl. 2 of the Constitution?</i> .....	299
	A. <i>Satisfying the Standing Requirement</i> .....	299
	B. <i>Making Substantive Arguments: The Merits of Litigation Challenging President Trump's Actions</i> ....	300
IV.	<i>Conclusion</i> .....	305

*Thus, as of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country. This includes ending the implementation of the nationally determined contribution and, very importantly, the Green Climate Fund which is costing the United States a vast fortune.*<sup>1</sup>

---

\* In memoriam, former Distinguished Lecturer and Legal-Scholar-in-Residence, Colorado College.

1. Press Release, President Donald J. Trump on the Paris Accord (June 1, 2017), <https://perma.cc/XW9A-P7KY>. President Trump confirmed this decision at the G20 meeting in Hamburg, Germany. G20 Summit, *G20 Leader's Declaration, Shaping an Interconnected World*, at 10 (July 7/8, 2017), <https://perma.cc/C8AY-ZK5Q> ("We take note of the decision of the United States of America to withdraw from the Paris Agreement. The United States of America announced it will immediately cease the implementation

## I. INTRODUCTION AND BACKGROUND

With the words quoted above, President Trump set a course to end the United States' status as a party to the Paris Agreement<sup>2</sup> and renounced all activities implementing it. A wide range of political and business leaders criticized the President's decision;<sup>3</sup> however, supporters of the coal industry applauded it.<sup>4</sup>

In his announcement, President Trump also stated that he would comply with the withdrawal provision in the Paris Agreement.<sup>5</sup> This Essay argues that, while compliance with that process may satisfy the treaty obligation, it probably does not conform to U.S. constitutional standards, and therefore, would not be binding on the United States.

The argument demonstrating the failure of the President to satisfy constitutional standards proceeds as follows. Part I develops the context in which the Paris Agreement arose. Part II briefly summarizes the Paris Agreement. In Part III, I argue that President Trump's attempt to cease implementation of the Paris Agreement and, in effect, withdraw from the treaty, does not meet U.S. standards required by the Constitution, specifically Article II, § 2, Clause 2.<sup>6</sup> Finally, in Part IV, I consider the question posed in the title of this Essay and conclude that the answer is probably "no." In addition, I discuss the destabilization to global governance that would result if the answer were "yes."

---

of its current nationally-determined contribution and affirms its strong commitment to an approach that lowers emissions while supporting economic growth and improving energy security needs. The United States of America states it will endeavour to work closely with other countries to help them access and use fossil fuels more cleanly and efficiently and help deploy renewable and other clean energy sources, given the importance of energy access and security in their nationally-determined contributions.”).

2. *See generally* Framework Convention on Climate Change, *Adoption of the Paris Agreement*, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 [hereinafter *Paris Agreement*], <https://perma.cc/R72J-FR62>.

3. *See* Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://perma.cc/A65P-W2JD>.

4. *See id.*

5. *Id.*

6. U.S. CONST. art. II, § 2, cl. 2. (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

## II. A GENEALOGY AND SUMMARY OF THE PARIS AGREEMENT

The Paris Agreement was negotiated under the United Nations Framework Convention on Climate Change (“UNFCCC”).<sup>7</sup> The UNFCCC was opened for signature on June 4, 1992 at the United Nations Conference on Environment and Development (“UNCED” or “Rio Earth Summit”) and entered into force on March 24, 1994.<sup>8</sup> There are currently 197 parties;<sup>9</sup> the United States is one of them.<sup>10</sup>

Administrative structure is included in the Convention. Article 7 establishes a Conference of the Parties (“COP”) and specifies its duties and authority.<sup>11</sup> Article 8 creates a Secretariat as the executive office,<sup>12</sup> and Article 9 calls for a scientific and technical committee.<sup>13</sup>

As its name indicates, the UNFCCC is a framework convention; it is widely acknowledged that it contains procedural requirements but not substantive limits on greenhouse gas emissions.<sup>14</sup> As the discussion below demonstrates, despite the absence of limits on greenhouse gas emissions, there are provisions in the Convention that are consequential because they limit the sovereignty of the parties.<sup>15</sup>

- 
7. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, S. TREATY DOC. NO. 102-38 (1992) [hereinafter UNFCCC].
  8. *Status of Ratification of the Convention*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://perma.cc/BU5Y-HXH2> (“The Convention entered into force on 21 March 1994, in accordance with Article 23, that is on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession.”).
  9. *Id.*
  10. *Id.*
  11. UNFCCC, *supra* note 7, at art. 7 (“A Conference of the Parties is hereby established.”).
  12. *Id.* at art. 8.
  13. *Id.* at art. 9.
  14. *See id.* at art. 4 (“[Developed States agree to report information] with the aim of returning individually or jointly to their 1990 levels [of emissions of greenhouse gases subject to the Convention]”) (emphasis added); DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 665 (5th ed. 2015) (“The [UNFCCC] established a general framework, but delineated few specific or substantive obligations to curb climate change.”).
  15. *See infra* notes 16–24 and accompanying text.

The important procedural requirements for planning in the UNFCCC include preparing inventories of greenhouse gas sources and sinks,<sup>16</sup> integrating environmental planning with economic development,<sup>17</sup> and reporting and exchanging relevant data and plans to mitigate climate change.<sup>18</sup> Developed states must prepare plans to mitigate global climate change by limiting greenhouse gas emissions and enhancing sinks,<sup>19</sup> provide developing states funds to pay for their data collection and distribution,<sup>20</sup> and prepare policies that *aim* to reduce their greenhouse gas emissions to their 1990 levels.<sup>21</sup>

Other procedural provisions include the establishment of a fund to aid developing states<sup>22</sup> and recognition of the option of joint implementation.<sup>23</sup> Finally, the principle of common but differentiated responsibility is included by dividing the parties into two groups: Annex I Parties are developed states and non-Annex I Parties are developing states.<sup>24</sup>

Each of the provisions is a procedural obligation that requires the parties to yield part of their sovereignty. Although one only requires developed parties to *aim* at a reduction to 1990 levels, under the doctrine "*pacta sunt servanda*," it also limits sovereignty.<sup>25</sup>

---

16. UNFCCC, *supra* note 7, at arts. 4.1(a), 12.1(a).

17. *Id.* at art. 4.1(f).

18. *Id.* at art. 4.1(b).

19. *Id.* at art. 4.2(a).

20. *Id.* at art. 4.3.

21. *Id.* at art. 4.2(b) (emphasis added).

22. *Id.* at art. 11.

23. *Id.* at art. 4.2(a).

24. *See id.* at annex I, II.

25. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (defining *pacta sunt servanda* as: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"). Although the United States is not a party to the Vienna Convention, *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <https://perma.cc/CR5P-6NGF>, it has acknowledged *pacta sunt servanda* as binding customary international law. *See* U.N. Conference on the Law of Treaties, 1st Sess., 29th mtg. at 151, U.N. Doc. A/CONF.39/C1/SR.29 (Apr. 18, 1968) [hereinafter Conference on the Law of Treaties], <https://perma.cc/MJ9C-RFU2> ("Mr. Briggs [on behalf of the United States] said that the *pacta sunt servanda* rule had come down through the ages as a self-evident truth. Both comparative law and the history of legal systems showed that it had gained universal acceptance; it had been found to be a legal necessity. The principle had been a basic rule

Predecessors of the UNFCCC in the ancestral lineage of the Paris Agreement include the Kyoto Protocol,<sup>26</sup> the Copenhagen Accord,<sup>27</sup> the Cancun Agreements,<sup>28</sup> and the Durban Platform for Enhanced Action.<sup>29</sup>

The Kyoto Protocol is a top-down treaty that sets limits on greenhouse gas emissions for Annex I Parties.<sup>30</sup> It did not achieve its objectives primarily because China was classified as a non-Annex I Party and because the United States refused to become a party. Thus, the number one and number two emitters of greenhouse gases were not bound by emission caps.<sup>31</sup> The Copenhagen Accord switched to a bottom-up approach in which each party unilaterally determined its goal for reducing its greenhouse gas emissions.<sup>32</sup>

---

of international law from its earliest origins, and was the foundation-stone of further progress and development.”).

26. *Making Those First Steps Count: An Introduction to the Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://perma.cc/5WVX-8SD3>.
27. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, U.N. Doc. FCCC/CP/2009/11Add.1 (Mar. 30, 2010), <https://perma.cc/PB4F-32A6>.
28. *The Cancun Agreements*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://perma.cc/NQF5-A2HC>.
29. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Seventeenth Session, Held in Durban from 28 November to 11 December 2011*, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012), <https://perma.cc/Q3B2-8VES>. The texts of the Kyoto Protocol, the Copenhagen Accord, the Cancun Agreements, and the Durban Platform for Enhanced Action are available at *Background on the UNFCCC: The International Response to Climate Change*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://perma.cc/7T9Q-BJ8R>.
30. *Making Those First Steps Count: An Introduction to the Kyoto Protocol*, *supra* note 26.
31. Phillip M. Kannan, *Mitigating Global Climate Change: Designing a Dynamic Convention to Combat a Dynamic Risk*, 36 WM. & MARY ENVTL. L. & POLY REV. 491, 499–500 (2012). “Inclusion of [Annex I and non-Annex I differentiation] meant that the Kyoto Protocol failed to be a means of marshaling collective action.” *Id.* at 499.
32. Daniel Bodansky, *The Paris Climate Agreement: A New Hope?*, 110 AM. J. INT’L L. 288, 292 (2016). (“[T]he Copenhagen Accord, in embryonic form, pointed the way forward. In contrast to the Kyoto Protocol, which had set emission reduction targets through a collective process of international negotiations, the Copenhagen Accord established a bottom-up architecture, in which countries defined their own targets and actions and then recorded them internationally.”).

The Paris Agreement continued the bottom-up approach.<sup>33</sup> This is achieved by requiring each party to submit its intended nationally determined contributions (“INDC”) to reducing greenhouse gas emissions.<sup>34</sup> Unlike the Copenhagen Accord, the Paris Agreement requires the parties to submit a new INDC every five years.<sup>35</sup> Moreover, it states that “[the] successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition[.]”<sup>36</sup> This strengthened the Paris Agreement by building in the possibilities and goals of adaptive management and continuous improvement for all parties.

The Paris Agreement is also strengthened by the inclusion of procedural standards for developing adaptations,<sup>37</sup> providing financial resources,<sup>38</sup> transferring technology,<sup>39</sup> reporting data,<sup>40</sup> and developing a baseline from which to measure progress.<sup>41</sup> These provisions add standards and structure to the procedures designed to help achieve the *substantive goal or substantive policy* of “[h]olding the increase in the global average temperature to well below 2° C above pre-industrial levels . . . .”<sup>42</sup>

The concept of substantive goals is part of U.S. environmental law and international environmental law. In the U.S., it has been applied in cases interpreting the National Environmental Policy Act (“NEPA”). It was first described and applied by Judge Skelly Wright as follows:

[T]he general *substantive policy* of the [National Environmental Policy] Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substan-

---

33. *See id.* for a thorough history and analysis of the Paris Agreement.

34. *Paris Agreement, supra* note 2, at art. 4.2 (“Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.”).

35. *Id.* at art. 4.9.

36. *Id.* at art. 4.3.

37. *See id.* at art. 7.

38. *Id.* at art. 9.

39. *Id.* at art. 10.

40. *Id.* at art. 13.

41. *Id.* at art. 14.

42. *Id.* at art. 2.1(a) (emphasis added).

tive results in particular problematic instances. However, the Act also contains very important “procedural” provisions—provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them.<sup>43</sup>

The Supreme Court recognized substantive goals and substantive policies in *Strycker’s Bay Neighborhood Council v. Karlen*.<sup>44</sup> It did so in interpreting NEPA’s substantive goal regarding environmental impact statements (“EISs”) for certain federal actions: “to insure a fully informed and well-considered decision.”<sup>45</sup> The agency has not satisfied this requirement until it “has made an adequate compilation of relevant information, has analyzed it reasonably, has not ignored pertinent data, and has made disclosures to the public.”<sup>46</sup>

The concept of substantive goals is also recognized in customary international environmental law. This customary international law<sup>47</sup> is the doctrine called *pacta sunt servanda*, which has been articulated as: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>48</sup> For example, this law prohibits a party to the Paris Agreement from committing to “prepare, communicate and maintain successive nationally determined contributions that it intends to achieve,”<sup>49</sup> and then ignoring this commitment. Each party must prepare and submit a nationally determined contribution, which must aim at “[h]olding the increase in the global average temperature to well below 2° C”<sup>50</sup> and then make good-faith efforts to comply with it.

Although neither the substantive goal norm developed in the domestic law of the U.S. nor the norm that evolved in interna-

---

43. *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis added).

44. 444 U.S. 223, 227 (1980) (“NEPA . . . establish[ed] significant substantive goals . . . .”) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)).

45. *Id.* (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558).

46. *See Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1029 (2d Cir. 1983).

47. *See Vienna Convention*, *supra* note 25, for a discussion of the legal status of *pacta sunt servanda* as customary international law.

48. *Id.* at art. 26.

49. *Paris Agreement*, *supra* note 2, at art. 4.2.

50. *Id.* at art. 2.1(a).



tional law is binding on the other system of governance, each provides a framework for the other system for analyzing the issues regarding substantive norms. They are models that provide guidance for—not precedents binding on—the other system. Using this framework and modifying Judge Wright's articulation of the purpose of substantive policies quoted above regarding the obligations imposed on federal agencies to reflect the international status of the Paris Agreement, the norm in international law may be articulated as follows: customary international law, namely *pacta sunt servanda*, is “designed to see that all [parties] do in fact exercise the substantive discretion [retained by] them.”<sup>51</sup>

### III. PRESIDENT TRUMP'S ATTEMPT TO CEASE ALL IMPLEMENTATION AND TO WITHDRAW FROM THE PARIS AGREEMENT: INCONSISTENT WITH ARTICLE II, § 2, CL. 2 OF THE CONSTITUTION?

Litigation will be required to test the constitutionality of President Trump's actions regarding the Paris Agreement.<sup>52</sup> Such litigation will require (1) a plaintiff with standing and (2) substantive arguments demonstrating the unconstitutionality of these actions.

#### A. Satisfying the Standing Requirement

As noted above, President Trump stated<sup>53</sup> that the United States would comply with the denunciation article in the Paris Agreement.<sup>54</sup> At the earliest, the withdrawal would take effect in November 2019.<sup>55</sup> However, President Trump announced on

---

51. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

52. See Press Release, *supra* note 1, for a description of these actions.

53. *Id.*

54. *Paris Agreement*, *supra* note 2, at art. 28.1 (“At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.”); *id.* at art. 28.2 (“Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.”).

55. See *id.* at art. 28.2; STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE

June 1, 2017 that, “as of today, the United States will cease all implementation . . .”<sup>56</sup> Thus, any person with a concrete and particularized individual injury that is actual or imminent, that is fairly traceable to the cessation of the implementation of the Paris Agreement, and that would likely be redressed by a favorable decision of the court, should have standing to challenge the purported cessation of the implementation of the Paris Agreement.<sup>57</sup> Massachusetts, or any coastal state, should have standing.<sup>58</sup>

### B. Making Substantive Arguments: The Merits of Litigation Challenging President Trump’s Actions

A central part of the plaintiff’s case would be grounded in the principle that compliance with treaty provisions does not necessarily assure compliance with the U.S. Constitution.<sup>59</sup> This is a self-evident principle because, if it were not valid, the President and the Senate acting alone could amend the Constitution in violation of its requirements.<sup>60</sup> Thus, even if the United States complies with the withdrawal procedure in the Paris Agreement,<sup>61</sup> that fact alone does not mean it has complied with the Constitution. Because President Trump took action without obtaining any authority from either the House or the Senate,

---

PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 17 (2017), <https://perma.cc/MGE9-H4MS>.

56. See Press Release, *supra* note 1.

57. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (“To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.”) (internal citations omitted).

58. See *id.* at 522 (“According to petitioners’ unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts’ coastal land.”) (internal citations omitted).

59. See *Medellin v. Texas*, 552 U.S. 491, 505–06 (2008); see also Matthew J. Stanford, *Odd Man Out*, 105 CALIF. L. REV. 929, 975 (2017) (“While some treaties automatically bear the weight of ordinary legislation (‘self-executing’), others require further legislative enactment to become binding domestic law.”).

60. U.S. CONST. art V, § 2, cl. 2.

61. *Paris Agreement*, *supra* note 2, at art. 28.

the question remains: Does the Constitution give the President the unilateral power *claimed in this case*?

While the abstract question of whether the Constitution requires that either Congress or the Senate have a role in the decision to withdraw from a treaty “has been the source of historical debate,”<sup>62</sup> that question regarding this particular treaty can be resolved by an analysis of the UNFCCC. The UNFCCC states that each party shall have one vote in discussions and decisions of the COP.<sup>63</sup> Moreover, the UNFCCC does not change the customary international law that in treaties, “those who do not agree simply do not become bound.”<sup>64</sup> Thus, for decisions to be adopted by its COP of the UNFCCC, unanimous consent is required.

Article 7 of the UNFCCC is pivotal to the argument over the constitutionality of President Trump’s unilateral order to halt implementation of the Paris Agreement. Thus, I first discuss and analyze its relevant provisions in preparation for the argument.

Article 7 of the UNFCCC specifies the responsibilities and duties of the COP, thereby creating its authority.<sup>65</sup> Of particular importance to the argument developed herein is the following subsection:

---

62. See MULLIGAN, *supra* note 55, at 6. See also Phillip M. Kannan, *Reinstating Treaty-Making with Native American Tribes*, 16 WM. & MARY BILL RTS. J. 809, 815 n.36 (2008) (analyzing the conflicting opinions on this topic and citing references); David A. Wirth, *Executive Agreements Relying on Implied Statutory Authority: A Response to Bodansky and Spiro*, 50 VAND. J. TRANSNAT’L L. 741, 741 (2017) (“Until recently, the law surrounding executive agreements has been a subject of attention from a relatively small number of academics concerned with foreign relations law, along with State Department lawyers who have a need to deploy the underlying concepts in concrete determinations.”); David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515, 515 (2015) (arguing that an international agreement can become binding without either Senate advice and consent or new congressional legislation).

63. UNFCCC, *supra* note 7, at art. 18.

64. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 278 (1992) (“Herein lies a fundamental difference between the legislative and the diplomatic process. With legislation everyone is bound by the outcome, including those who do not agree. With treaties those who do not agree simply do not become bound.”).

65. UNFCCC, *supra* note 7, at art. 7.

---

---

The Conference of the Parties . . . may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementations of the Convention. To this end, it shall . . .

(m) Exercise such other functions as are required for the achievement of the objectives of the Convention as well as all other functions assigned to it under the Convention.<sup>66</sup>

By this provision, all parties, including the United States, have yielded sovereignty to the COP to make decisions that are binding on all parties. It is an example of a norm-making article—that is, an article in a treaty that specifies how future obligations for all Parties may be created without going through the amendment or ratification procedures specified elsewhere in the treaty.<sup>67</sup> Sir Geoffrey Palmer called the inclusion of a norm-making article “prolepsis.”<sup>68</sup> He summarized prolepsis as follows:

Procedures for the creation of norms are agreed upon. Those procedures include a provision that in respect of certain rules or in certain circumstances unanimous consent is not required. The norms created by using the procedures did not necessarily receive unanimous consent but are binding on any nation that did not consent because they were created by agreed procedures. *Nations thus consent in advance to be bound by norms whose content is unknown at the time of the consent.*<sup>69</sup>

An example of the successful application of prolepsis can be found in the Montreal Protocol. It includes prolepsis to make adjustments and reductions (but only these two parameters) applicable to the production or consumption of the ozone-depleting substances controlled under the protocol. The following provision achieves this:

The Parties may decide whether . . . adjustments and reductions of production or consumption of the controlled substances should

---

66. *Id.* at art. 7.2(m).

67. Palmer, *supra* note 64, at 273. See also Phillip M. Kannan, *Mitigating Global Climate: Designing a Dynamic Convention to Combat a Dynamic Risk*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 491, 514 (2012) (“Once the norm-creating procedure is agreed to by states, when it is applied to create a norm, all states that consented to the procedure are bound by the norm, whether or not they agree with it.”).

68. Palmer, *supra* note 64, at 273.

69. *Id.* (emphasis added).

be undertaken and, if so, the scope, amount and timing . . . . In taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decision shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting [representing a majority of developed and developing Parties].<sup>70</sup>

The following is an example of how this provision was applied in the Montreal Protocol. For developed states and certain ozone-depleting chemicals, the target production and consumption levels were reduced from 100% of 1986 levels by August 1, 1989 to 0% of 1986 levels by (and for any time following) January 1, 2010.<sup>71</sup> This dramatic achievement demonstrates the power of prolepsis.

Pursuant to the UNFCCC, the COP unanimously adopted the Paris Agreement on January 29, 2016.<sup>72</sup> It created prolepsis by including the following provision: “[t]o this end, [the COP] shall . . . [e]xercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.”<sup>73</sup> The Paris Agreement’s goals include “*enhancing the implementation of the [UNFCCC] by . . . aim[ing to hold] the increase in the global average temperature to well below 2° C.*”<sup>74</sup> This objective of the Paris Agreement is required<sup>75</sup> to achieve the objectives of UNFCCC:

- 
70. Montreal Protocol on Substances that Deplete the Ozone Layer arts. 2(9)(a), (c), Sept. 16, 1987, 1522 U.N.T.S. 3, S. Treaty Doc. No. 100-10 (1987).
71. Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer art. 2A(8), Sept. 21, 2007, 2173 U.N.T.S. 183.
72. *Paris Agreement*, *supra* note 2.
73. UNFCCC, *supra* note 7, at art. 7.2(m).
74. *Paris Agreement*, *supra* note 2, at art. 2.1(a) (emphasis added).
75. Bob Silberg, *Why a Half-Degree Temperature Rise is a Big Deal*, NASA GLOBAL CLIMATE CHANGE (June 29, 2016) (“[T]he jump from 1.5 to 2 degrees—a third more of an increase—raises the impact by about that same fraction, very roughly, on most of the phenomena the study covered. Heat waves would last around a third longer, rain storms would be about a third more intense, the increase in sea level would be approximately that much higher and the percentage of tropical coral reefs at risk of severe degradation would be roughly that much greater.”), <https://perma.cc/7K3Q-ESJM>. See also Fred Pearce, *What Would a Global Warming of 1.5 Degrees Increase Be Like?*, YALE ENV’T 360 (June 16, 2016), <https://perma.cc/CFY3->

---

---

“[t]he ultimate objective of this Convention . . . is to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>76</sup> Thus, when the COP adopted the Paris Agreement, it applied its authority to “exercise such other functions as are required for the achievement of the objectives of the [UNFCCC].”<sup>77</sup> Therefore, when the United States became a party to the Paris Agreement, it was acting in conformance with the U.S. Constitution because the Senate had given its advice and consent via prolepsis.

The above argument based on prolepsis is critical to challenging President Trump’s actions. If the courts ultimately reject prolepsis and consider the Paris Agreement in isolation, the outcome may change.

The framework for the final argument on the merits developed in this Essay is the structure articulated by Justice Jackson to determine the President’s constitutional powers. He stated: “[The President’s constitutional powers] are not fixed, but fluctuate, depending on their disjunction or conjunction with those of Congress.”<sup>78</sup> He then developed a hierarchical structure with three levels of a President’s constitutional powers as follows:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.

---

DCNR (discussing the risks of a 2 degree increase in global warming compared to the risks of a 1.5 degree increase).

76. UNFCCC, *supra* note 7, at art. 2.

77. *Id.* at art. 7.2(m).

78. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .<sup>79</sup>

Justice Jackson's framework has been called "[the] familiar tripartite framework" and adopted in several Supreme Court opinions.<sup>80</sup>

The United States became a party to the Paris Agreement through the acts of President Obama.<sup>81</sup> When he agreed to the United States being bound by the Paris Agreement and submitted its initial NDIC, his presidential authority was at its maximum because these actions were pursuant to an express authorization of the Senate. The express authorization was given when the Senate gave its advice and consent to the UNFCCC<sup>82</sup>—in particular, to the prolepsis mechanism in Article 7.2(m).<sup>83</sup>

When President Trump issued his order for the United States to cease implementation of the Paris Agreement,<sup>84</sup> his presidential authority was at its minimum. His actions were incompatible with the express or implied will of the Senate—namely, the advice and consent given by the Senate to the UNFCCC including Article 7.2(m), which is the prolepsis provision, and Article 2, which states the objectives of the UNFCCC that conflict with President Trump's actions.

#### IV. CONCLUSION

The question presented in the title of this Essay can be answered only by resolving the mutually exclusive actions taken by two presidents, President Obama and President Trump. In this

---

79. *Id.* at 635–37.

80. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from [his concurrence in] *Youngstown Sheet & Tube Co. v. Sawyer* . . .") (internal citations omitted).

81. *See Paris Agreement – Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://perma.cc/3Y92-9BUB> (listing the United States as a Party).

82. George H. W. Bush, Statement on Signing the Instrument of Ratification for the United Nations Framework Convention on Climate Change (Oct. 13, 1992), *collected by* THE AMERICAN PRESIDENCY PROJECT, <https://perma.cc/YXH2-E8TK>.

83. *See supra* notes 68–71 and accompanying text.

84. *See* Press Release, *supra* note 1.

Essay, I propose using the framework developed by Justice Jackson to resolve these contradictory actions. The action taken by President Obama was in conjunction with the Senate; that taken by President Trump was in disjunction with both the Senate and the House. In exercising his presidential powers, President Obama's authority was "at its maximum." In exercising his presidential powers, President Trump's authority was "at its lowest ebb." Given this disparity, it is likely that the answer to the question posed in the title of this article is "no."

If the answer were "yes," and if President Trump does not serve a second term, a subsequent President could assert the unilateral power relied on by President Trump to reverse his decision.

Upholding a President's unilateral authority to withdraw from and stop implementing treaties not submitted to the Senate under Article II, § 2, Clause 2 and not based on legislation will introduce instability into such treaties to which the United States is a party. They will become no more than executive orders of a President that can, in effect, be ended by a unilateral decision of that President or any later President. The international community would not be able to rely on commitments made by the United States in such treaties; such treaties will cease to be an effective means for achieving international governance.

President Trump could avoid the points of contention discussed above and maintain confidence in treaty-making as an effective means of global governance if he acted in *conjunction* with the Senate by seeking its advice and consent. Otherwise, litigation challenging his unilateral assertion of authority will surely be brought. It is the contention of this Essay that this litigation will likely ultimately result<sup>85</sup> in a final decision finding President Trump's actions unconstitutional.

President Trump's approach to the Paris Agreement is contrary to Justice Black's well-known maxim: "[g]reat nations, like

---

85. The argument developed in this Essay is a viable strategy for challenging President Trump's action; it is not a roadmap to a predetermined destination. *See supra* p. 305 ("The above argument based on prolepsis given above is critical to challenging President Trump's actions. If the courts ultimately reject prolepsis and consider the Paris Agreement in isolation, the outcome may change.")



great men, *should keep their word.*"<sup>86</sup> The *United States* gave its word to be bound by the Paris Agreement. A change in administrations does not create the power in the new *President*—one individual—to *unilaterally* change the commitments of the *United States*—a sovereign state. In a conflict between the action of a sovereign state taken in accordance with its constitution and the unilateral action taken by the head of one branch of a later regime violative of a provision in that constitution, the former must prevail.

---

86. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting) (emphasis added).