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Paris Climate Promise: A Bad Deal for America

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It should come as no surprise that the Obama Administration has no intention to submit the Paris Agreement on climate change to the Senate for its advice and consent. Months before the 21st Conference of Parties (COP-21) the White House made its plan clear. During a March 31, 2015, press briefing, White House spokesman Josh Earnest was asked whether Congress has the right to approve the climate change agreement set to be negotiated in Paris:

> [Reporter]: …Is this the kind of agreement that Congress should have the ability to sign off on?
>
> [Earnest]: …I think it's hard to take seriously from some Members of Congress who deny the fact that climate change exists, that they should have some opportunity to render judgment about a climate change agreement.[1]

The White House view was mirrored by other nations as well, including the host of COP-21, French foreign minister Laurent Fabius. Addressing a group of African delegates at the June climate change conference in Bonn, Germany, Fabius expressed his desire to bypass Congress on the Paris Agreement: "We must find a formula which is valuable for everybody and valuable for the U.S. without going to Congress…. Whether we like it or not, if it comes to the Congress, they will refuse."[2]

Apparently, no Member of Congress who questions climate science, or who disagrees with the Obama Administration's climate change policies, is competent to review a major international agreement negotiated by the President. That is an alarming view on the role of Congress and particularly the Senate where, as in this case, the international commitments made by the executive branch in the Paris Agreement have significant domestic implications.

The Administration's position regarding the Paris Agreement is particularly alarming for two reasons: (1) the Agreement negotiated in December has all the hallmarks of a treaty that should be submitted to the Senate for its advice and consent under Article II,

[1] "Earnest: House GOP Climate Deniers Not the Right People to Vote on Emissions Deal," *Grabien*, undated, https://grabien.com/story.php?id=25399&utm_source=cliplist20150401&utm_medium=email&utm_campaign=cliplist&utm_content=story25399.

[2] "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.

Section 2 of the U.S. Constitution; and (2) the Agreement contains targets and timetables for emissions reductions and, as such, the Administration's failure to submit the Agreement to the Senate breaches a commitment made by the executive branch to the Senate in 1992 in regard to ratification of the U.N. Framework Convention on Climate Change (UNFCCC).

THE PARIS AGREEMENT SHOULD BE TREATED AS A TREATY

There is no statutory definition of what constitutes a treaty versus an international agreement that is not a treaty. There is, however, a process established by the State Department to guide its decision to designate an international agreement one way or the other. This is known as the Circular 175 Procedure (C-175).[3]

C-175 establishes, *inter alia*, eight factors for determining whether a proposed international agreement should be negotiated as a treaty (requiring Senate approval through the standard Article II process) or as an "international agreement other than a treaty" (such as a "sole executive agreement"). In determining how to treat an international agreement, the executive branch must give "due consideration" to the following:

> (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole; (2) Whether the agreement is intended to affect state laws; (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; (4) Past U.S. practice as to similar agreements; (5) The preference of the Congress as to a particular type of agreement; (6) The degree of formality desired for an agreement; (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and (8) The general international practice as to similar agreements.[4]

C-175 provides no guidance whether any one of the eight factors should be given more weight than the others, or whether one, some, or all of the factors must be satisfied. In any event, the terms of the Paris Agreement satisfy most or all of the eight factors indicating that it should be considered a treaty requiring the advice and consent of the Senate. Each of the eight factors are discussed below.

(1) *The extent to which the agreement involves commitments or risks affecting the nation as a whole*.

If the executive branch negotiates an international agreement that is geographically limited or affects a situation in a foreign country (e.g. a status of forces agreement) it is likely that the President may conclude such an agreement as a sole executive agreement. In contrast, if the commitments made in an agreement directly impact the United States "as a whole" it is likely to be a treaty requiring Senate approval.

The Paris Agreement certainly "involves commitments or risks affecting the U.S. as a whole." Under the Agreement, the United States is obligated to undertake "economy-wide absolute emission reduction targets"[5] and provide an unspecified amount of taxpayer dollars "to assist developing country Parties with respect to both mitigation and adaptation." [6] Commitments to reduce carbon emissions across the U.S. economy and send billions of taxpayer dollars to poor nations "affects the nation as a whole" as opposed to narrow commitments that may best be left to sole executive agreements.

Moreover, the Obama Administration made clear in its nationally determined contribution submission to the COP that it intends to fulfill its mitigation commitments under the Paris Agreement by enforcing emissions standards through existing and new regulations on power plants, vehicles, buildings, and

[3] U.S. Department of State, *Foreign Affairs Manual*, Vol. 11 (2006), § 720, et seq., http://www.state.gov/documents/organization/88317.pdf ; "Circular 175 Procedure," U.S. Department of State website, http://www.state.gov/s/l/treaty/c175/ ("The Circular 175 procedure refers to regulations developed by the State Department to ensure the proper exercise of the treaty-making power. Its principal objective is to make sure that the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits, and with appropriate involvement by the State Department. The original Circular 175 was a 1955 Department Circular prescribing a process for prior coordination and approval of treaties and international agreements.")

[4] Ibid., § 723.3.

[5] Paris Agreement, Art. 4(4), December 12, 2015, https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.

[6] Ibid, Art. 9(1).

landfills.[7] These are multi-sectoral, comprehensive, nationwide commitments without geographic limitation. These commitments will affect the entire nation since American taxpayers, energy consumers and energy producers alike, will be impacted by the President's regulations.

As such, the comprehensive nature and breadth of the Paris Agreement "involves commitments or risks affecting the nation as a whole" and is therefore more likely a treaty than a sole executive agreement.

(2) *Whether the agreement is intended to affect state laws*.

While the Paris Agreement does not mandate specific changes to state laws in the U.S., the intentions of the Obama Administration to enforce the Agreement through changes in state laws is abundantly clear. Specifically, in its nationally determined contribution the Administration committed that the U.S. would enforce the Agreement domestically through the implementation of regulations, among them the "Clean Power Plan" (CPP) to reduce emissions from power plants. Under the CPP the Environmental Protection Agency will set state-specific emissions limits based on the greenhouse-gas-emissions rate of each state's electricity mix.[8] Individual states are then required to develop and implement their own plans to meet the limits set by the EPA.

As such, it is clear that the Administration intends the Paris Agreement to affect state laws.

(3) *Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress*.

The Paris Agreement requires major financial commitments by the United States. All such funds must be authorized and appropriated by Congress—i.e. the Paris Agreement cannot be "given effect without the enactment of subsequent legislation by the Congress." Since subsequent Congressional legislation is necessary to give effect to the Paris Agreement it meets the criteria of a treaty rather than an executive agreement.

The funding required by the Paris Agreement will be significant and continuing. The principal depository for such funds is the "Green Climate Fund" (GCF), which assists developing countries in adapting to climate change. The GCF was established by the 2009 Copenhagen Accord, which committed developed countries by 2020 to provide $100 billion per year, every year, seemingly in perpetuity.[9] The Paris Agreement obligates developed countries such as the U.S. to "provide financial resources to assist developing country Parties with respect to both mitigation and adaptation."[10] In the decision adopting the Paris Agreement, the COP-21 set the goal of these funds at "a floor of USD 100 billion per year."[11] Only developed nations like the U.S. are obligated to contribute to the GCF, while developing nations are "encouraged" to make "voluntary" contributions.[12]

The amount the U.S. is obligated to pay into the GCF is likely to be many billions of dollars each year. President Obama has pledged to contribute at least $3 billion as a down payment to the GCF, and Republicans were unsuccessful in blocking the first $500 million of that pledge in the 2016 omnibus spending legislation.[13]

In any event, a central aspect of the Paris Agreement—green climate finance—cannot be given effect without the enactment of legislation by Congress, indicating that the Agreement is more likely a treaty than a sole executive agreement.

(4) *Past U.S. practice as to similar agreements*.

Past U.S. practice regarding international environmental agreements has been uniform—such agreements are usually concluded as treaties and submitted to the Senate. Major environmental

[7] UNFCCC, "Party: United States of America—Intended Nationally Determined Contribution," March 31, 2015, http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx.
[8] "FACT SHEET: Components of the Clean Power Plan," Environmental Protection Agency website, http://www.epa.gov/cleanpowerplan/fact-sheet-components-clean-power-plan.

[9] Copenhagen Accord, ¶ 8, December 18, 2009, http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf.
[10] Paris Agreement, Art. 9(1).
[11] Adoption of the Paris Agreement, December 12, 2015, FCCC/CP/2015/L.9/Rev.1, ¶ 54.
[12] Paris Agreement, Art. 9(2).
[13] "Obama, in latest climate move, pledges $3 billion for global fund," *Reuters*, November 14, 2015, http://www.reuters.com/article/us-usa-climatechange-obama-idUSKCN0IY1LD20141115; "Funds for Obama climate deal survive in spending bill," *The Hill*, December 16, 2015, http://thehill.com/policy/energy-environment/263447-spending-bill-wont-stop-funds-for-obama-climate-deal.

agreements treated in this manner include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1973 International Convention for the Prevention of Pollution from Ships, the 1985 Vienna Convention for the Protection of the Ozone Layer (and the 1987 Montreal Protocol thereto), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1991 Protocol on Environmental Protection to the Antarctic Treaty, and the 1994 U.N. Convention to Combat Desertification.

Regarding climate change, the UNFCCC was submitted to the Senate by the first Bush Administration as a treaty, and the Clinton Administration treated the Kyoto Protocol as a treaty and would have submitted it to the Senate had the Senate not already rejected it out of hand when it passed the Byrd–Hagel Resolution by a vote of 95-0.[14]

The Paris Agreement certainly qualifies as a major international environmental agreement. After its adoption in Paris, President Obama said the Agreement "represents the best chance we have to save the one planet we've got."[15] The White House also released a statement to the press referring to the Agreement as "historic" and "the most ambitious climate change agreement in history."[16] Secretary of State John Kerry stated that the Agreement "will empower us to chart a new path for our planet."[17]

An international agreement of such import and historic significance should merit review by the legislative branch. Almost all other significant environmental agreements were not completed as sole executive agreements. Past U.S. practice has been to submit significant international environmental agreements to the Senate, and so should the Paris Agreement.

(5) *The preference of the Congress as to a particular type of agreement*.

Determining congressional preference as to the legal form of an international climate change agreement is difficult, but it is significant that the major agreements leading up to COP-21—i.e. the UNFCCC and the Kyoto Protocol—were both considered treaties requiring the Senate's advice and consent. Moreover, a significant number of members in both houses have expressed their specific preference regarding the Paris Agreement, and have demanded that President Obama submit it to the Senate for advice and consent.

Prior to COP-21, Sen. Mike Lee (R-UT) and Rep. Mike Kelly (R-PA) introduced a concurrent resolution expressing the sense of Congress that the President should submit the Paris climate change agreement to the Senate for advice and consent.[18] The resolution urged Congress not to consider budget resolutions and appropriations language that include funding for the GCF until the terms of the Paris agreement were submitted to the Senate. The concurrent resolution currently has 33 Senate cosponsors and 74 House cosponsors.

In addition, several prominent Senate Republicans made clear that they object to the White House's end run around the Senate. Sen. John McCain (R–AZ) stated, "All treaties and agreements of that nature are obviously the purview of the United States Senate, according to the Constitution." Sen. McCain added that "the President may try to get around that…but I believe clearly [that the] constitutional role, particularly of the Senate, should be adhered to."

[14] S.Res.98, "A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change," https://www.congress.gov/bill/105th-congress/senate-resolution/98.

[15] "Obama: Climate Deal is 'Best Chance We Have to Save the One Planet We've Got'," *NBC News*, December 12, 2015, http://www.nbcnews.com/news/us-news/obama-climate-deal-best-chance-we-have-save-one-planet-n479026.

[16] "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," The White House, Office of the Press Secretary, December 12, 2015, https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change.

[17] "Factbox: World reacts to new climate accord," *Reuters*, December 12, 2015, http://www.reuters.com/article/us-climatechange-summit-reaction-factbox-idUSKBN0TV0Q420151213.

[18] S.Con.Res.25, "A concurrent resolution expressing the sense of Congress that the President should submit the Paris climate change agreement to the Senate for its advice and consent." https://www.congress.gov/bill/114th-congress/senate-concurrent-resolution/25; H.Con.Res.97, "Expressing the sense of Congress that the President should submit to the Senate for advice and consent the climate change agreement proposed for adoption at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, to be held in Paris, France from November 30 to December 11, 2015," https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/97.

Chairman of the Senate Republican Conference John Thune (R–SD) stated that any deal that commits the U.S. to cut greenhouse gas emissions "needs to be reviewed, scrutinized and looked at and I think Congress has a role to play in that."

(6) *The degree of formality desired for an agreement*.

It stands to reason that the more formal an international agreement is the more likely that it should require approval by the Senate, whereas less formal agreements may be completed as sole executive agreements.

The Paris Agreement is certainly a "formal" agreement. It contains 29 articles dealing with a comprehensive set of binding obligations including mitigation, adaptation, finance, technology transfer, capacity-building, transparency, implementation, compliance, and other matters. These articles refer to obligations concerning other treaties and bodies (such as the UNFCCC and the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts) and establish new bodies such as a committee to facilitate compliance and implementation of the Agreement.[19]

There is nothing "informal" about the Agreement, which has all the hallmarks of a treaty. It has clauses regarding when it will be open for signature and how instruments of ratification may be deposited and under what conditions a party may withdraw from the Agreement once ratified.[20]

(7) *The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement*.

Sometimes it is necessary for the President, acting as the "sole organ" of the U.S. government in the field of international relations [21] to promptly negotiate routine international agreements of limited duration. The President must have the flexibility and authority to conclude such sole executive agreements without receiving the advice and consent of the Senate. If, however, there is no need for prompt conclusion of an agreement, or if the agreement commits the U.S. for a lengthy duration, or if the agreement is not "routine" then it should likely be completed as a treaty.

The Paris Agreement is not "routine" in any regard, and has been touted by some, including President Obama, as a measure that will save Planet Earth. Nor was there a need for a "prompt conclusion" of the Agreement, which was negotiated beginning in 2011 with the launch of the Durban Platform at COP-17. Finally, the Agreement is not "short-term" by any measure. In fact, the Agreement appears to be completely open-ended with no termination date. By the terms of the Agreement, parties are legally obligated to communicate a new mitigation commitment every five years, and each successive commitment must be a "progression" beyond its previous commitment.[22] There is no stated end date to those commitments.

Since the Paris Agreement is of unlimited duration, is not "routine" by any meaning of that term, and did not require prompt conclusion (having been negotiated over a five-year period), it is more likely than not a treaty, and not a sole executive agreement.

(8) *The general international practice as to similar agreements*.

To the extent that a "general international practice" exists regarding significant international climate change agreements, that practice has been to conclude them as formal treaties rather than non-binding political agreements.

The best examples of this practice is, of course, the predecessors to the Paris Agreement—the UNFCCC and the Kyoto Protocol, both of which were negotiated and completed as binding treaties, as opposed to non-binding aspirational or political agreements. Other significant environmental agreements have been, as noted above, negotiated as treaties.

In sum, arguably all eight of the C-175 factors, when applied to the terms of the Paris Agreement, indicate that it should be treated as a treaty requiring the advice and consent of the Senate: The Agreement involves commitments that will affect the U.S. on a nationwide basis, and the Obama Administration intends to meet those commitments by requiring changes to state law; The Agreement cannot be given effect without congressional legislation, particularly in

[19] Paris Agreement, Art. 15.
[20] Ibid., Art. 20, 28.
[21] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
[22] Paris Agreement, Art. 4(3), (9).

terms of providing appropriations for the Green Climate Fund; The U.S. has, in the past, treated pacts such as the Agreement as treaties, and not sole executive agreements; Significant numbers of Senators and Representatives have stated their preference to treat the Agreement as a treaty; The Agreement is highly formal in nature, and not informal in any way that would suggest it was only a sole executive agreement; The Agreement is of unlimited duration and was negotiated over a term of several years; Finally, the general international practice as to climate change agreements is to conclude them as treaties as opposed to non-binding political agreements.

THE PRESIDENT IS BREAKING A COMMITMENT MADE DURING UNFCCC RATIFICATION

The UNFCCC was negotiated, signed, and ratified by the U.S. in 1992 during the Administration of President George H. W. Bush. By ratifying the convention, the United States agreed to be legally bound by its provisions. However, while the UNFCCC requires the U.S. to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases,"[23] it does not require the U.S. to commit to specific emissions targets or timetables.

The ratification history of the UNFCCC indicates that the Senate intended any future agreement negotiated under the auspices of the convention that adopted emissions targets and timetables would be submitted to the Senate.[24] Specifically, during the hearing process before the Senate Foreign Relations Committee regarding ratification of the UNFCCC, the Bush Administration pledged to submit future protocols negotiated under the convention to the Senate for its advice and consent. In response to written questions from the committee, the Administration responded as follows:

> *Question*. Will protocols to the convention be submitted to the Senate for its advice and consent?
>
> *Answer*. We would expect that protocols would be submitted to the Senate for its advice and consent; however, given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter.
>
> *Question*. Would a protocol containing targets and timetables be submitted to the Senate?
>
> *Answer*. If such a protocol were negotiated and adopted, and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate.[25]

Moreover, in the event that the UNFCCC conference of parties adopted targets and timetables, that too would require Senate advice and consent. When the Foreign Relations Committee reported the UNFCCC out of committee, it memorialized the executive branch's commitment on that point: "[A] decision by the Conference of the Parties [to the UNFCCC] to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement."[26]

The Senate gave its consent to ratification of the UNFCCC based on the executive branch's explicit promise that any future protocol "containing targets and timetables" would be submitted to the Senate. The agreement struck between the Democrat-controlled Senate and the Republican President in 1992 made no exception for "non-binding" targets and timetables. Rather, the Senate relied on the good faith of future presidential Administrations to adhere to the commitment that any future agreement "containing targets and timetables" be submitted to the Senate for advice and consent.

Emissions targets and timetables—referred to in the Paris Agreement as "nationally determined contributions"—are integral to the Agreement since they reflect the mitigation commitments made by each party to the Paris Agreement. The term "nationally determined contributions" is used in Article 3, Article 4(2), (3), (8)-(14), (16), Article 6(1)-(3), (5), (8), Article 7(11), Article 13(5), (7), (11), (12), and Article 14(3). The fact that the nationally determined

[23] United Nations Framework Convention on Climate Change, Art. 4.2(a), May 9, 1992, https://unfccc.int/resource/docs/convkp/conveng.pdf.
[24] *See* Emily C. Barbour, "International Agreements on Climate Change: Selected Legal Questions," Congressional Research Service, April 12, 2010, pp. 7–8, http://fpc.state.gov/documents/organization/142749.pdf.
[25] Hearing, *U.N. Framework Convention on Climate Change (Treaty Doc. 102-38)*, Committee on Foreign Relations, U.S. Senate, 102nd Cong., 2nd Sess., September 18, 1992, pp. 105–106.
[26] S. Exec. Rept. 102-55, 102d Cong., 2d Sess., 1992, p. 14.

contributions are themselves submitted separately by each nation and posted on a website is irrelevant since they are incorporated by reference throughout the Agreement. By any measure, then, it must be conceded that the Paris Agreement "contains targets and timetables".

Because the Paris Agreement contains targets and timetables, and the Obama Administration has refused to submit it to the Senate, the Administration is breaching the commitment made during the ratification process for the UNFCCC.

CONCLUSION

While the executive branch must be permitted a certain amount of discretion to choose the legal form of international agreements it is negotiating, there must also be a corresponding duty by the executive branch to treat comprehensive, binding agreements that result in significant domestic impact as treaties requiring Senate approval.

President Obama has placed his desire to achieve an international environmental "win" and bolster his legacy above historical U.S. treaty practice and intragovernmental comity. Major environmental treaties that have significant domestic impacts should not be developed and approved by the President acting alone. An agreement with far-reaching domestic consequences like the Paris Agreement lacks sustainable democratic legitimacy unless the Senate or Congress as a whole, representing the will of the American people, gives its approval.

Unless and until the White House submits the Paris Agreement to the Senate for its advice and consent, the Senate should:

- ***Block funding for the Paris Agreement.*** An illegitimate Paris Agreement should not be legitimated by subsequent congressional action. One step that Congress should take is to refuse to authorize or appropriate any funds to implement the Agreement, including the tens of billions of American taxpayer dollars in adaptation funding to which the U.S. will commit itself annually. The Obama Administration has successfully received at least $7.5 billion in U.S. taxpayer dollars from Congress to fulfill a "nonbinding" international climate change agreement—the 2009 Copenhagen Accord.[27] That "success" should not be repeated in connection with the Paris Agreement.
- ***Withhold funding for the UNFCCC.*** If the Administration bypasses the Senate in contravention of the commitment made by the first Bush Administration in 1992, it goes to prove what mischief can result from ratifying a "framework" convention such as the UNFCCC. The Administration has based its Senate end run, in part, on the argument that the UNFCCC authorizes it to do so. As such, U.S. ratification of the UNFCCC has become precisely the danger that the Senate sought to prevent in 1992. Defunding the UNFCCC would prevent the U.S. from participating in future conferences, submitting reports, and otherwise engaging in the dubious enterprise.
- ***Take prophylactic legislative measures.*** In addition to specific legislative efforts to ensure that no adaptation funding committed under the Paris Agreement is authorized, Congress should include language in all legislation regarding the Environmental Protection Agency and related executive agencies and programs that no funds may be expended in connection with the implementation of any commitment made in the Agreement.

The Executive Branch has shown its contempt for the U.S. treaty process and the role of Congress, particularly the Senate. The President is attempting to achieve through executive fiat that which could not be achieved through the democratic process. The Obama Administration has ignored the assurances made to the Senate in 1992 by his predecessor by treating the Paris Agreement as a "sole executive agreement" in order to bypass the Senate, and by seeking to enforce the Agreement through controversial and deeply divisive regulations. Those actions evince an unprecedented level of executive unilateralism, and should be opposed by Congress by any and all means.

[27] The U.S. has "fulfilled our joint developed country commitment from the Copenhagen Accord to provide approximately $30 billion of climate assistance to developing countries over FY 2010–FY 2012. The United States contributed approximately $7.5 billion to this effort over the three year period." Executive Office of the President, "The President's Climate Action Plan," June 2013, p. 20, https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

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