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Executive Overreach in Foreign Affairs

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Thank you, Mr. Chairman, for inviting me to testify today about executive overreach in foreign affairs.

The debate over the proper scope of executive power in foreign affairs has been going on for more than 200 years. It arose in 1793 during George Washington's presidency when he announced that the U.S. would remain neutral in an armed conflict between France and Great Britain. The Monroe Doctrine, FDR's "Destroyers for Bases Agreement", the War Powers Act, and the Iran-Contra affair are just a few historical examples where the U.S. government had to confront significant questions regarding executive authority and the separation of powers in the conduct of foreign affairs.

And here we are today having the same debate. In our defense, this is really not our fault. The text of the Constitution, while fairly specific on the enumeration of powers in the domestic sphere, is less helpful in the foreign affairs arena. The Constitution was written to remedy certain pre-constitutional disputes, and as a result we are often forced to strain to find textual guidance to address many of the issues that arise today, particularly in foreign affairs.

There is the commander-in-chief clause, of course, but much of the executive's foreign affairs powers have developed as historical practice over the past two centuries.

To make things more difficult, for better or worse federal courts rarely step in to clarify executive powers in foreign affairs because such cases are usually non-justiciable since they present "political questions" that courts are loathe to answer one way or the other.

I'd like to focus on the President's actions in the area of treaty-making and how, in my view, he has overreached or even abused his authority. Not unlike in the domestic arena, the President has a problem in making international agreements knowing full well that Congress will not approve. This Task Force has heard testimony regarding the President's executive orders regarding immigration and health care that constitute overreach. In the foreign affairs realm, the President does the same thing, but through so-called "sole executive agreements".

Specifically, the President's decision to treat the Paris Agreement on climate change as a "sole executive agreement" was an overreach and an abuse

of his executive authority.

Never before has an agreement of such international import been treated as a sole executive agreement. The President stated that the Paris Agreement will literally "save our planet" and yet the Agreement somehow does not rise to the level of a treaty.

The Paris Conference of Parties

From November 30 to December 12, 2015, the Obama Administration was well represented at the 21st Conference of Parties (COP-21) to the United Nations Framework Convention on Climate Change (UNFCCC) in Paris. The President attended the opening of the conference, and in his speech to the assembled delegates characterized COP-21 as a "turning point" when "we finally determined we would save our planet."[1] Senior Administration officials including Secretary of State John Kerry, Environmental Protection Agency (EPA) Administrator Gina McCarthy, and Secretary of Energy Ernest Moniz stayed on in Paris to negotiate the final terms of a new climate change pact, the Paris Agreement. Ten U.S. senators (all Democrats) also appeared at the conference to send the message that they had "the president's back."[2]

Clearly the negotiation of the Paris Agreement was of major importance to the Administration, the United States, and the entire world. Also clear is the fact that the President had no intention of consulting or including either the Senate or Congress as a whole in the negotiation of this global compact. This came as no surprise to anyone paying attention to the Obama Administration's plans leading up to the conference. On March 31, 2015, months before COP-21, White House spokesman Josh Earnest was asked at a press briefing whether Congress has the right to approve the climate change agreement set to be negotiated at COP-21:

> [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.[3]

President Obama seemingly believes that no Member of Congress who questions climate science or disagrees with his Administration's environmental policies is competent to review a major international climate change agreement. That view of Congress's role, particularly the Senate's, is especially alarming in this case because the international commitments made by the executive branch alone in the Paris Agreement have significant domestic implications.

The White House sentiment regarding the role of Congress was parroted by other foreign officials, 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 negotiate an agreement at COP-21 that would bypass Congress: "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."[4]

The Obama Administration's unilateral treatment of the Paris Agreement is particularly disquieting for two reasons: (1) the agreement has all the hallmarks of a treaty that should be submitted to the Senate for its advice and consent under Article II, 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

[1]News release, "Remarks by President Obama at the First Session of COP21," The White House, November 30, 2015, https://www.whitehouse.gov/the-press-office/2015/11/30/remarks-president-obama-first-session-cop21 (accessed March 1, 2016).
[2]Natasha Geiling, "10 U.S. Senators Travel to Paris to Show Their Support for an International Climate Deal," Climate Progress, December 5, 2015, http://thinkprogress.org/climate/2015/12/05/3728661/democratic-senators-support-climate-deal-in-paris/ (accessed March 1, 2016).
[3]"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 (accessed March 1, 2016).
[4]"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 (accessed March 1, 2016).

agreement to the Senate breaches a commitment made by the executive branch to the Senate in 1992 during the ratification process of the UNFCCC.

Unless and until the White House submits the Paris Agreement to the Senate for its advice and consent, the Senate should block all funding for its implementation, including any funds for the Green Climate Fund (GCF) or any other financing mechanism included in the President's umbrella Global Climate Change Initiative (GCCI). [5] Congress should also withhold funding for the UNFCCC to prevent future Administrations from participating in COP meetings and causing additional harm to U.S. national interests. Finally, Congress should take preventative legislative measures to ensure that no funding tied to implementation of the Paris Agreement is authorized or expended through other vehicles such as appropriations for the EPA or other executive branch agencies.

The Paris Agreement Is a Treaty

In form, in substance, and in the nature of the commitments made, the Paris Agreement is a treaty—not a sole executive agreement—and should be submitted to the Senate. The commitments made pursuant to the agreement are significant, open-ended, and legally binding on the United States, seemingly in perpetuity.

One of the key elements of the Paris Agreement—and a clear departure from the general commitments made in the UNFCCC—is that each party must make a specific, measurable, and time-sensitive commitment to mitigate its greenhouse gas (GHG) emissions. Those commitments are communicated by each party via nationally determined contributions (NDC) submitted to the UNFCCC secretariat. An NDC should include a GHG mitigation "target" (a percentage reduction from status quo GHG emissions) and a "timetable" (a baseline date and a future date in which the party will meet its mitigation target). [6] For instance, the U.S. NDC commits to "achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28 per cent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%." [7]

Significantly, the Paris Agreement also requires parties to update and submit a new NDC every five years, starting in 2020. [8] By contrast, the UNFCCC required parties only to adopt national policies that would mitigate GHG emissions and did not require parties to submit specific "targets and timetables" in perpetuity. Finally, each new NDC must be more "ambitious" than the party's previous NDC. [9] That is to say that new NDC can neither lessen in ambition nor maintain the status quo. The White House has referred to this provision of the agreement as "ratcheting up ambition over time." [10]

This is a serious international commitment that should not be made via a sole executive agreement. President Obama has promised (1) that his successors will submit new and revised NDC to the UNFCCC secretariat in 2020, 2025, 2030, and beyond, and (2) that each successive NDC will be more ambitious than the one he submitted in 2015. The fact that the U.S. is party to the UNFCCC does not authorize the President to bind the U.S. in perpetuity to successively aggressive GHG mitigation goals. While President Obama has some leeway to implement framework conventions like the UNFCCC through sole executive agreements, membership in the UNFCCC does not grant unbridled authority to commit the U.S. to endless and "ratcheted up" carbon emissions reductions.

For this reason alone, President Obama should

[5] Richard K. Lattanzio, "The Global Climate Change Initiative (GCCI): Budget Authority and Request, FY2010—FY2016," Congressional Research Service, February 6, 2015, https://www.fas.org/sgp/crs/misc/R41845.pdf (accessed March 1, 2016). The GCCI is a platform within President Obama's 2010 Policy Directive on Global Development, which integrates climate change considerations into U.S. foreign assistance programs. It is funded through the Administration's Executive Budget, Function 150 account, for State, Foreign Operations, and Related Programs.

[6] See UNFCCC, "Lima Call for Climate Action," advance unedited version, December 11, 2014, ¶ 14, https://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf (accessed March 1, 2016).

[7] UNFCCC, "Party: United States of America—Intended Nationally Determined Contribution," ("U.S. INDC"), March 31, 2015, http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx (accessed March 1, 2016).

[8] Adoption of the Paris Agreement, Annex, December 12, 2015 ("Paris Agreement"), Art. 4(9) ("Each Party shall communicate a nationally determined contribution every five years in accordance with [the decision of COP-21 adopting the Paris Agreement]").

[9] Paris Agreement, Art. 4(3) ("Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition…").

[10] News release, "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," The White House, December 12, 2015, https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change (accessed March 1, 2016).

feel obligated to submit the Paris Agreement to the Senate so that it would acquire the democratic legitimacy of having passed Senate review and approval. Indeed, if the President followed the State Department's own regulations, none of this would even be at issue.

The State Department's Circular 175 Procedure

In treating the Paris Agreement as a sole executive agreement, President Obama is using the fact that there is no statutory definition of what is and is not a "treaty." This strategy, however, ignores the fact that the State Department has an established process, known as the Circular 175 Procedure (C-175), to guide its decision to designate an international agreement.[11]

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

> (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.[12]

C-175 provides no guidance as to 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 before designating an international agreement as a treaty. The terms of the Paris Agreement satisfy most or all of the eight factors and should be considered a treaty requiring the advice and consent of the Senate. Each of the eight factors is 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 that solely affects a particular 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. This makes sense because the more an agreement principally involves foreign matters, the more likely it may be concluded under the President's executive authority alone. In contrast, if the commitments made in an agreement directly impact the United States "as a whole," it is more likely to be a treaty requiring Senate approval, since the President should not be able to commit U.S. resources or affect U.S. domestic matters without congressional review and approval.

The Paris Agreement certainly "involves commitments or risks affecting the nation as a whole." Under the agreement, the United States is obligated to undertake "economy-wide absolute emission reduction targets" [13] and provide an unspecified amount of taxpayer dollars "to assist developing country Parties with respect to both mitigation and adaptation." [14] 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" (in contrast to foreign commitments that may best be dealt with via sole executive agreements).

Moreover, the Obama Administration made

[11]U.S. Department of State, *Foreign Affairs Manual*, Vol. 11 (2006), Section 720, et seq., http://www.state.gov/documents/organization/88317.pdf (accessed March 1, 2016), and "Circular 175 Procedure," U.S. Department of State website, http://www.state.gov/s/l/treaty/c175/ (accessed March 1, 2016). 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.

[12]Ibid., Section 723.3.
[13]Paris Agreement, Art. 4(4).
[14]Paris Agreement, Art. 9(1).

clear in its NDC 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 landfills.[15] These regulations constitute multi-sectoral, comprehensive, nationwide commitments without geographic limitation and will affect the entire nation since American taxpayers, energy consumers, energy producers, vehicle manufacturers, landfill operators, and construction companies across the nation will be impacted by them.

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 to be a treaty than a sole executive agreement.

2. Whether the Agreement Is Intended to Affect State Laws. While the Paris Agreement is silent on specific changes to U.S. state laws, the intentions of the Obama Administration to enforce the agreement through changes to state laws is clear. Specifically, in its NDC, 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 EPA will set state-specific emissions limits based on the GHG emissions rate of each state's electricity mix.[16] Individual states are then required to develop and implement their own plans to meet the limits set by the EPA.

The Administration intends to implement the Paris Agreement through changes to state laws, and as such the agreement should more likely than not be considered a treaty.

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. Any and all such funds must be authorized and appropriated by Congress. As such, the 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 agreement it meets the criteria of a treaty rather than a sole executive agreement.

The funding required by the Paris Agreement will be significant and continuing. The principal depository for such funds is the GCF, which assists developing countries in adapting to climate change. The GCF was established by the 2009 Copenhagen Accord, a sole executive agreement that committed developed countries by 2020 to provide $100 billion per year to developing countries, every year, seemingly in perpetuity.[17] 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."[18] 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."[19] Only developed nations like the U.S. are obligated to contribute to the GCF, while developing nations are merely "encouraged" to make "voluntary" contributions.[20]

The amount the U.S. is obligated to pay into the GCF beginning in 2020 is likely to be several billion dollars each year. President Obama committed to contribute at least $3 billion as an initial down payment to the GCF, and Republicans were unsuccessful in blocking the first $500 million of that pledge in the 2016 omnibus spending legislation.[21]

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

[15]U.S. INDC.
[16]U.S. Environmental Protection Agency, "FACT SHEET: Components of the Clean Power Plan," http://www.epa.gov/cleanpowerplan/fact-sheet-components-clean-power-plan (accessed March 1, 2016).

[17]Copenhagen Accord, December 18, 2009, ¶ 8, http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf (accessed March 1, 2016).
[18]Paris Agreement, Art. 9(1).
[19]Adoption of the Paris Agreement, ¶ 54.
[20]Paris Agreement, Art. 9(2).
[21]Lincoln Feast and Timothy Gardner, "Obama, in Latest Climate Move, Pledges $3 billion for Global Fund," *Reuters*, November 14, 2014, http://www.reuters.com/article/us-usa-climatechange-obama-idUSKCN0IY1LD20141115 (accessed March 1, 2016), and Devin Henry, "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 (accessed March 1, 2016).

Agreements. Past U.S. practice regarding significant international environmental agreements is that such agreements are usually concluded as treaties and submitted to the Senate. Significant environmental 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.

Significant climate change agreements have also been submitted to the Senate as treaties. The UNFCCC was submitted to the Senate by the first Bush Administration; the Clinton Administration negotiated the Kyoto Protocol as a treaty and would have submitted it to the Senate had the Senate not preemptively rejected it out of hand when it passed the Byrd–Hagel Resolution by a vote of 95 to 0.[22]

The Paris Agreement qualifies as a significant 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."[23] The White House also released a statement referring to the agreement as "historic" and "the most ambitious climate change agreement in history."[24] Secretary of State John Kerry stated that the agreement "will empower us to chart a new path for our planet."[25]

An international agreement of such import and historic significance should merit review by the legislative branch. Almost all other significant environmental and climate change agreements were completed as treaties, not sole executive agreements. Past U.S. practice has been to submit such agreements to the Senate, a practice that should be followed with regard to 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 many Members of Congress 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, Senator Mike Lee (R-UT) and Representative Mike Kelly (R-PA) introduced a concurrent resolution expressing the sense of Congress that the President should submit the Paris Agreement to the Senate for advice and consent. 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.[26]

In addition, several prominent Senate Republicans made clear that they object to the White House's end run around the Senate. Senator 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." Senator 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." Chairman of the Senate Republican Conference John Thune (R–SD)

[22]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," July 25, 1997, Congress.gov, https://www.congress.gov/bill/105th-congress/senate-resolution/98 (accessed March 1, 2016).
[23]Elizabeth Chuck and Associated Press, "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 (accessed March 1, 2016).
[24]News release, "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," The White House, December 12, 2015, https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change (accessed March 1, 2016).
[25]"Factbox: World Reacts to New Climate Accord," Reuters, December 12, 2015, http://www.reuters.com/article/us-climatechange-summit-reaction-factbox-idUSKBN0TV0Q420151213 (accessed March 1, 2016).
[26]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," Congress.gov, November 19, 2015, https://www.congress.gov/bill/114th-congress/senate-concurrent-resolution/25 (accessed March 1, 2016), and 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," Congress.gov, November 19, 2015, https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/97 (accessed March 1, 2016).

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."

While gauging congressional preference as to the legal form of an international agreement is necessarily more art than science, the available evidence indicates that many Members of Congress would prefer the Paris Agreement be treated as a treaty.

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 preambular language, 29 operative articles dealing with a comprehensive set of binding obligations including mitigation, adaptation, finance, technology transfer, capacity-building, transparency, implementation, compliance, and other matters. The agreement cross-references 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 establishes new bodies (such as a committee to facilitate compliance and implementation of the agreement).[27]

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, how instruments of ratification may be deposited, and under what conditions a party may withdraw from the agreement once ratified.[28]

Since the Paris Agreement is more formal than informal, it is more likely a treaty than a sole executive 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.

Sometimes it is necessary for the President, acting as the "sole organ" of the U.S. government in the field of international relations[29] to promptly negotiate routine international agreements of limited duration. The President must have the flexibility and authority to conclude such agreements without receiving the advice and consent of the Senate on every occasion. 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. By the terms of the agreement, parties are legally obligated to communicate a new mitigation target and timetable commitment every five years.[30] There is no stated end date to that commitment. Nor is there any termination date for the agreement as a whole.

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 several years), 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 environmental and 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 are, of course, the predecessors to the Paris Agreement—the UNFCCC and the Kyoto Protocol, which were negotiated and completed as treaties, as opposed to aspirational or political agreements. Other significant environmental agreements have been, as noted above, negotiated as treaties.

The UNFCCC process has, in the past, produced

[27]Paris Agreement, Art. 15.
[28]Paris Agreement, Art. 20, 28.
[29]See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
[30]Paris Agreement, Art. 4(3), (9).

political agreements and COP decisions not reaching the level of a treaty. These include such interim agreements as the Bali Action Plan and the Durban Platform for Enhanced Action.[31] An example of the international community negotiating an agreement as a non-binding, political agreement is the Copenhagen Accord, completed at COP-15 in December 2009.

A comparison of the Copenhagen Accord and the Paris Agreement is telling. The former is an informal, 12-paragraph agreement that had no binding commitments or emissions targets and timetables. It was not treated by any UNFCCC party as a treaty, nor did any party engage in a ratification process for the accord. To the contrary, the Paris Agreement is a formal, binding, long-term, comprehensive agreement, and indications are that all UNFCCC parties (save the United States) are treating it as a treaty requiring formal signature and ratification.

Since the general international practice as to environmental and climate change agreements is to treat them as treaties, it is more likely than not that the Paris Agreement should be treated as such.

In sum, arguably all eight of the C-175 factors, when applied to the Paris Agreement, indicate that it should be treated as a treaty requiring the advice and consent of the Senate:

1. The agreement involves commitments that will affect the U.S. on a nationwide basis;
2. The Obama Administration intends to meet those commitments by requiring changes to state law;
3. The agreement cannot be given effect without congressional legislation;
4. The U.S. has, in the past, treated pacts such as the agreement as treaties, and not sole executive agreements;
5. Significant numbers of Senators and Representatives have stated their preference to treat the agreement as a treaty;
6. The agreement is highly formal in nature, and not informal in any way that would suggest it was only a sole executive agreement;
7. The agreement is not routine, of limited duration, and was not promptly concluded;
8. The general international practice as to significant climate change agreements is to conclude them as treaties as opposed to non-binding political agreements.

Much has been made of the fact that the U.S. NDC "targets and timetables" are not legally binding and therefore the Paris Agreement is not a "treaty" requiring the advice and consent of the Senate. That sentiment simply has no basis in law: None of the eight C-175 factors turns on whether the terms of the international agreement are binding or non-binding.

Treaties may contain both binding and non-binding terms. For example, human rights treaties include both mandatory provisions (i.e. parties "shall" protect certain rights) and more aspirational provisions (i.e. parties "undertake" certain duties). Sole executive agreements may be binding on the parties (e.g. the 2008 U.S.-Iraq Status of Forces Agreement) or non-binding (e.g. the 2009 Copenhagen Accord).

The Paris Agreement is replete with legally binding provisions regarding mitigation, adaptation, financing, and other matters. The fact that the actual targets and timetables in the U.S. NDC are non-binding is irrelevant since that fact alone does not transform the entire agreement into a non-binding, political document.

Regardless, the fact that the Paris Agreement contains targets and timetables at all—binding or non-binding—obligates the President to submit it to the Senate for its advice and consent due to a commitment to do so made in 1992.

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. The UNFCCC requires the U.S. to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its

[31] UNFCCC, "Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007," March 14, 2008, http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf (accessed March 1, 2016), and UNFCCC, "Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011," March 15, 2012, http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf (accessed March 1, 2016).

anthropogenic emissions of greenhouse gases,"[32] but it does not require the U.S. to commit to specific emissions "targets and timetables."

The ratification history of the UNFCCC indicates that the Senate intended any future agreement negotiated under its auspices that adopted emissions targets and timetables would itself be submitted to the Senate.[33] Specifically, when the Senate Foreign Relations Committee considered 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 made specific commitments to that end:

> *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.[34]

In addition, if the UNFCCC conference of parties adopted targets and timetables on its own accord without negotiating a new agreement, 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."[35]

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 1992 agreement struck between the Democrat-controlled Senate and the Republican President 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 "shared understanding" that future agreements "containing targets and timetables" be submitted to the Senate for advice and consent.

The NDC targets and timetables are integral to the Paris Agreement since they reflect the mitigation commitments made by each party. The fact that the NDC are submitted separately by each nation and posted on a UNFCCC website is irrelevant since they are incorporated by reference throughout the agreement. NDC are referenced 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). 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.

Restoring the Role of Congress

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

[32]United Nations Framework Convention on Climate Change, May 9, 1992, Art. 4.2(a), https://unfccc.int/resource/docs/convkp/conveng.pdf (accessed March 1, 2016).

[33]See Emily C. Barbour, "International Agreements on Climate Change: Selected Legal Questions," Congressional Research Service *Report for Congress*, April 12, 2010, pp. 7–8, http://fpc.state.gov/documents/organization/142749.pdf (accessed March 1, 2016).

[34]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.

[35]S. Exec. Rept. 102-55, 102d Cong., 2d Sess., 1992, p. 14.

environmental treaties that have significant domestic impacts should not be 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 consent to be bound.

To attain that legitimacy, President Obama should submit the Paris Agreement to the Senate so that hearings may be held regarding its impact on the U.S. economy and American sovereignty. An international agreement such as this must be tested by the Article II advice and consent process before its costs are imposed on the American people. It is very likely that there is currently insufficient support in the Senate to approve the agreement, but that is no excuse for not following U.S. custom and practice or respecting the C-175 Procedure.

The President will not submit the Paris Agreement to the Senate because it would die there, but unless and until he does so, Congress should:

- **Block funding for the Paris Agreement and other climate change funding streams.** An illegitimate Paris Agreement should not be legitimized by congressional action. The President's fiscal year 2017 budget request proposes $1.3 billion for the President's GCCI, $750 million of which is earmarked for the GCF.[36] Congress should block these requests in their entirety. Over the past several years, the Obama Administration has successfully received at least $7.5 billion in taxpayer dollars from Congress for international climate change projects to satisfy U.S. commitments under the 2009 Copenhagen Accord.[37] Congress should not repeat that error when it comes to appropriations tied to the Paris Agreement or related international climate change funding requests.

- **Withhold funding for the UNFCCC.** If the Obama Administration continues to bypass the Senate in contravention of the commitment made by the 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 end run around the Senate, 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 U.S. participation in the UNFCCC would prevent the U.S. from attending future conferences, submitting reports, and otherwise engaging in that dubious enterprise.

- **Take preventative legislative measures.** In addition to specific legislative efforts to ensure that no funding committed under the Paris Agreement is authorized, Congress should include language in all legislation regarding the EPA and related executive agencies and programs that no funds may be expended in connection with the GCCI or implementation of any commitment made in the agreement.

- **Conduct oversight hearings regarding the Paris Agreement.** To date, the Senate has failed to conduct significant oversight into the negotiation of the Paris Agreement. The Senate Foreign Relations Committee has been particularly absent from the fray, consigning its oversight of the matter to a single subcommittee hearing last year.[38] Given the White House's blatant disregard for the Senate's role in the treaty-making process, the full Foreign Relations Committee should engage and examine, at a minimum, whether the President has breached the commitment made in 1992 during the committee's consideration of the UNFCCC. The Senate

[36] "The President's Budget for Fiscal Year 2017," Office of Management and Budget, https://www.whitehouse.gov/omb/budget (accessed March 1, 2016).

[37] According to the White House, 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 (accessed March 1, 2016).

[38] "2015 Paris International Climate Negotiations: Examining the Economic and Environmental Impacts," Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy, Committee on Foreign Relations, U.S. Senate, October 20, 2015, http://www.foreign.senate.gov/hearings/2015-paris-international-climate-negotiations-examining-the-economic-and-environmental-impacts_102015p (accessed March 1, 2016).

Committee on Environment & Public Works also held a hearing last year,[39] but now that the agreement has been completed, the committee should determine the domestic, economic, and environmental impact of the President's international promises.

- **Clarify and, to the extent possible, codify the treaty process.** Which international agreements do or do not constitute treaties requiring Senate advice and consent in accordance with Article II of the Constitution is often subject to dispute. This uncertainty is amply demonstrated by the debate over whether the Paris Agreement on climate change constitutes a treaty. This uncertainty persists despite the C-175 procedure. Congress should examine past practice on how various subjects have been treated historically (treaty, sole executive agreement, or congressional-executive agreement) and specify the issues or context that should mandate consideration of international agreements as treaties under Article II and press the next administration to update and modernize the C-175 procedure in order to restore its original role as an effective mechanism for distinguishing various forms of international commitments. Congress should also explore legislative solutions to clarifying the treaty-making process in the future.

The executive branch has shown its contempt for the U.S. treaty-making process and the role of Congress, particularly the Senate. The President is attempting to achieve through executive fiat that which he could not achieve through the democratic process. The Obama Administration, by ignoring the commitment made to the Senate in 1992 by his predecessor and 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, the enforcement of which has already drawn skeptical treatment by the U.S. Supreme Court.[40]

The President's actions in connection with the Paris Agreement evince an unprecedented level of executive unilateralism, the fruits of which Congress should oppose by any and all means.

[39]"Examining the International Climate Negotiations," Senate Committee on Environment & Public Works, November 18, 2015, http://www.epw.senate.gov/public/index.cfm/hearings?ID=0BFAE2BB-416F-40A1-9698-5BED0FE72BDC (accessed March 1, 2016).

[40]Adam Liptak and Coral Davenport, "Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions," *The New York Times*, February 9, 2016, http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html?_r=0 (accessed March 1, 2016).

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