Congressional Testimony

Pitfalls of Unilateral Negotiations at the Paris Climate Change Conference

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My name is Andrew Grossman. I am an attorney in the Washington, D.C., office of Baker & Hostetler LLP and Adjunct Scholar at the Cato Institute. The views I express in this testimony are my own and should not be construed as representing those of my law firm, its clients, or the Cato Institute.

The Committee has requested that I address the legal aspects of the climate agreement being negotiated in Paris, particularly the limitations that domestic law imposes on the President's ability to make commitments on behalf of the United States. In this instance, the law cannot be viewed in isolation—at least, not if one desires to understand the constraints as perceived by the Administration as it negotiates in Paris. To be sure, there are real legal barriers that will restrict the President's flexibility in Paris. Not all of them, however, are directly enforceable, and overreaching where judicial review can be avoided or evaded has been, as we all know, a hallmark of this Administration's approach to policymaking. Even so, whatever international-law obligations it may purport to impose on the United States, any treaty that comes out of Paris will have to be implemented by Congress through legislation to have a meaningful domestic effect.

As a legal matter, then, Paris is a charade. While the President and his allies may attempt to use a Paris agreement as a political bludgeon, it cannot and will not alter the legal obligations of any American.

That conclusion has implications for Congress, for the President, and for our negotiating partners in Paris. First, Congress can and should continue to make clear its policy views so that there is no ambiguity at Paris regarding the U.S. position on what can and will be implemented. Second, the President should exercise restraint and refuse to make commitments that go beyond clearly existing legal authority, unless he is willing to put the deal to a vote. Making nominally binding international commitments that the nation has no intention of actually carrying out, so as to influence domestic politics, would be stunningly cynical and irresponsible, inflicting unnecessary injury to the United States' credibility in international affairs for the sake of scoring political points. But, third, if the President does follow that cynical course, our negotiating partners should not be deceived about the extent of the President's authority, his reliability as a negotiating partner, and the likelihood that the United States will honor commitments made unilaterally by the President in reliance on his sole authority.

I. The Limitations of Executive Agreements

The legal status of an agreement struck in Paris involves two kinds of issues: first, the contents of the agreement itself and the obligations it establishes as a matter of international law; and, second, the extent to which the agreement imposes binding obligations within the United States. Logically, these are separate things: not every international agreement becomes or is im-

plemented in U.S. law. But as a practical matter, they are interconnected: the President wants to negotiate an agreement in which the United States is a participant, not a bystander. And in theory, that means he has to grapple with the requirements that U.S. law imposes regarding international agreements and attempt to negotiate an agreement that stands a chance of becoming law in the United States.

There are two ways that the United States can become party to a formal international agreement. The Treaty Clause of the Constitution empowers the President of the United States to propose and chiefly negotiate agreements, which must be confirmed by a two-thirds vote of the Senate—67 votes.[1]

Longstanding practice, validated by legislative and judicial actions, also recognizes that the President may enter into certain international agreements without separate ratification by the Senate.[2] According to a recent tally by the Congressional Research Service ("CRS"), over 18,500 such "executive agreements" have been completed—with the bulk from recent decades—compared to 1,100 ratified treaties.[3]

Executive agreements are generally divided into three categories:

- Congressional-executive agreements are those approved by majorities in both chambers of Congress, as with normal legislation. Trade agreements like the North American Free Trade Agreement ("NAFTA") are often implemented in this manner. Congressional authorization can come either before or after the President signs the agreement.
- Treaty-executive agreements are those that add annexes, protocols, or the like pursuant to the terms of an existing treaty. For example, the United States is a party to the Convention on International Trade in Endangered Species ("CITES"), which requires parties to regulate the import and export of listed species. The Convention provides a mechanism to list additional species, and such additions are regarded as treaty-executive agreements.

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[1] U.S. Const. Art II, § 2, cl. 2.

[2] *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.").

[3] Michael John Garcia, International Law and Agreements: Their Effect upon U.S. Law, CRS Report No. RL32528, Feb. 18, 2015, at 5.

- Sole executive agreements are those based solely on the President's authority—typically his power as Commander in Chief or as representative of the nation in foreign affairs. Such agreements have traditionally concerned things such as the recognition of foreign states and international emergencies. For example, the Algiers Accords terminated private lawsuits in U.S. courts against Iran, and released Iranian property, in exchange for the release of U.S. hostages held by Iran. The Accords were upheld by the Supreme Court on the ground that the agreement was consistent with U.S. policy, as evidenced by statutes concerning the "President's authority to deal with international crises, and from the history of congressional acquiescence in executive claims settlement."[4] The Executive Branch has taken the view that the President may enter into sole-executive agreements that can be implemented pursuant to existing statutory authority that the President is duty-bound to faithfully execute.[5]

The availability of the executive agreement as a means of concluding international agreements raises a question: what, exactly, is the difference in scope or legal effect between a treaty entered pursuant to the Treaty Clause and an executive agreement? In other words, are there certain agreements that can only be concluded through a treaty ratified by the Senate (or through congressional approval), or are the two means of concluding agreements functionally identical?

Unsurprisingly, the State Department's view is that the only difference between a treaty and an executive agreement, even one executed on the President's sole authority, is that a treaty is ratified by the Senate. In other words, there is no class of agreements that can only be ratified as treaties, rather than by the executive acting alone.[6] The Senate, of course, takes a different view. Its position is that any significant international commitment should be entered into as a treaty or at least as an executive agreement with authorizing legislation.[7]

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[4] *Dames & Moore v. Regan*, 453 U.S. 654, 656 (1981)

[5] See 11 Foreign Affairs Manual § 723.2-2.

[6] U.S. Dep't of State, Treaty vs. Executive Agreement, http://www.state.gov/s/l/treaty/faqs/70133.htm.

[7] *See, e.g.*, U.S. Senate, Treaties, http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm.

Being seldom litigated, the line between treaties and executive agreements is not one clearly delineated in the case law. What we do know is that historical practice and Congress's consent count for a lot in this area. "[L]ong-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent."[8] Likewise, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned may be treated as a gloss on 'Executive Power' vested in the President."[9] Accordingly, the President's authority to enter into executive agreements is secure where he draws on consistent support in historical practice and congressional acquiescence, but his power is at its lowest ebb where he lacks those things.[10]

A final, but important, background point is that merely signing a Paris agreement will not necessarily give the agreement's strictures force as domestic law that is enforceable against Americans. While international agreements "may comprise international commitments…[,] they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[11] Instead, "when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[12] The key question is whether "the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative."[13] The need for legislation may be due to the text of the agreement itself, the need for specificity and imple-

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[8] *Dames & Moore*, 453 U.S. at 686 (alterations omitted and quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

[9] *Id*. (alterations omitted and quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). *See also Garamendi*, 539 U.S. at 414–15.

[10] *Cf. Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

[11] *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C.J.)).

[12] *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

[13] *Medellin*, 552 U.S. at 505. (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). *See also* Restatement (Third) of Foreign Relations Law of the United States § 111, Reporter's Note 5 (citing cases in support of the proposition that, "[i]n general, agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing….").

mentation, or constitutional requirements[14]—for example, that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."[15] In this respect, congressional action may be necessary for an international agreement's terms to have domestic legal force.

II. What Exactly Can the President Cram into a Sole Executive Agreement?

Based on governing legal principles, as well as drafts and news reports regarding pre-Paris negotiations, one can evaluate the potential terms of an agreement and how they are likely to be implemented. At this time, a surprising amount remains to be decided. The pre-meeting draft agreement runs to 51 pages, with more alternatives and options than a diner menu.[16] Everything seems to be in flux. Developing nations are demanding binding financial commitments. Some European Union nations want emissions reductions—referred to, in exquisite bureaucratese, as "Intended Nationally Determined Contributions" ("INDC")—to be binding. Others want only implementation measures to be binding. One proposed article on "compliance" would establish an "International Tribunal of Climate Justice" to rule on countries' compliance on "mitigation, adaptation, provision of finance, technology development and transfer and, capacity-building" and exact punishment—what kind isn't said. An alternative to that option is "No reference to facilitating implementation and compliance"—in other words, strike the article altogether. In typical fashion, there's a third alternative: set up a committee to hold more meetings and publish another report. Procedural commitments like regularly updating INDCs, which had once seemed to be a point of agreement, are now in contention. Even the exact form that a final agreement may take is up in the air: for months, the Obama Administration has touted the possibility of a "hybrid agreement" that separates binding and non-binding commitments and buries more controversial items in separate annexes.[17] But the parties are still arguing over what goes where.

In the domestic context, one thing we know for sure is that the the President's legal flexibility is limited. No Paris agreement is going to be ratified by

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[14] Restatement (Third) of Foreign Relations Law of the United States § 111(4).

[15] U.S. Const. Art. I, § 7.

[16] Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Version of 23 October 2015@23:30hrs.

[17] Todd D. Stern, "Seizing the Opportunity for Progress on Climate," U.S. Department of State, Oct. 14, 2014, http://www.state.gov/s/climate/releases/2014/232962.htm.

the Senate as a treaty: the President lacks the votes. Likewise, the President lacks the votes for approval by both chambers of Congress as a congressional-executive agreement. This also means that there is no likelihood, at least for the foreseeable future, that Congress will enact legislation to implement any provisions of an agreement that are not self-executing. Accordingly, only those provisions supported by prior treaty authority or statutory authority, or falling within the Executive's exclusive purview, can be carried out under the President's sole authority. As a practical matter, then, the President's ability to conclude or give effect to many potential components of a Paris agreement is severely constrained.

But the details matter. There are certain items, likely to be part of a final agreement, that are probably within the President's authority to adopt. But the key items, the ones that would give a Paris accord actual substance commensurate with the hype, are not among them. Let's consider, then, the legal basis for adoption of the major components of the most recent draft agreement.

A. Aspirational Gibberish? Sure!

Inevitably, the first few pages—or even more—of the final agreement will consist of aspirational language with no intended legal effect. For example, from the draft:

> Emphasizing the importance of respecting and taking into account [, subject to jurisdiction] [right to development,] human rights [including people under occupation], gender equality [and women's empowerment], [the rights of indigenous peoples,][local communities,] intergenerational equity concerns, and the needs of [migrants] [particularly vulnerable groups] [people in vulnerable situations], [including people under [foreign] occupation,] women, children and persons with disabilities, when taking action to address climate change….

(Brackets indicate optional language that will be subject to further negotiation.)[18]

Another portion of the draft that I cannot resist quoting states that the parties, in implementing the agreement, will act to "ensur[e] the integrity and resilience of natural ecosystems, [the integrity of Mother Earth, protection of health, a just transition of the workforce and creation of decent work and quality jobs in accordance with nationally defined development priorities] and the respect, protection, promotion and fulfillment of human rights for all, including the right to health and sustainable development, [including the right

[18] And it's not just the first few pages. The draft is shot through with this stuff.

of people under occupation] and to ensure gender equality and the full and equal participation of women, [and intergenerational equity]."

Not bad for a climate treaty, right?

There's no real legal objection to any of this. Yes, it is silly. Yes, it will probably be cited as leverage for the next agreement or other future measures. And yes, there's no good reason for the United States to throw its weight behind empty platitudes and empty promises that range from the merely ponderous (e.g., "adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, [respecting [human rights][right to life][rights of people under occupation] and] taking into consideration vulnerable groups, communities and ecosystems," etc., etc.) to the positively Orwellian (e.g., espousing a commitment "to mobilize public support for climate policies and action"). But as a practical matter, the chief impact of all these provisions will be to contribute further emissions from the diplomats negotiating them. Then again, the extra pages to print it all are a carbon sink, so it may be a wash.

More seriously, it would be difficult to overestimate the time and effort that has been and will be devoted to fixing the Paris agreement's preambular and otherwise non-substantive provisions. The United States, for example, won the plaudits of climate activists for its push to have the agreement declare a long-term goal of "decarbonisation of the global economy over the course of this century."[19] Given the limitations on the President's ability to conclude and carry out substantive commitments, expect the United States delegation in Paris to fight hard over substance-free provisions that can be highlighted in victory-lap speeches and press releases. These things will make up a substantial part of the President's "climate legacy," which is apparently a central concern of the Administration.[20]

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[19] *See* Gwynne Taraska, An Inside Look at the U.N. Climate Negotiations in Bonn, ThinkProgress, Oct. 26, 2015, http://thinkprogress.org/climate/2015/10/26/3716028/bonn-un-session-wrap-up/.

[20] *See* Colleen McCain Nelson, Barack Obama's Dual Mission at Climate Talks in Paris, Wall Street Journal Washington Wire, Nov. 25, 2015, http://blogs.wsj.com/washwire/2015/11/25/barack-obamas-dual-mission-at-climate-talks-in-paris/ ("During the months leading up to the talks, administration officials pointed to the Paris summit as the capstone in the president's climate legacy, an anticipated opportunity to demonstrate U.S. leadership and secure a deal to slow global warming.").

B. Procedural and Reporting Commitments? Probably.

While the headlines may go to INDCs and financial commitments, a central plank of any Paris agreement will be procedural and reporting commitments. The draft refers to many of these provisions under the heading "Transparency." For example, parties may commit to regularly report their "national inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases," projected emissions, progress in achieving INDCs, mitigation funding to other nations, etc., all for review by experts and other nations. One proposal, which has proven controversial among some developing nations, would require parties to regularly review and update their INDCs.[21] When the Administration speaks of a "hybrid" agreement, these kinds of procedural obligations are the part that it anticipates would be binding.

Generally speaking, these procedural commitments refer back to the United Nations Framework Convention on Climate Change ("UNFCCC"), a prior treaty ratified by the United States Senate in 1992. As a framework treaty, the UNFCCC contains no substantive requirements itself, instead setting forth procedures to negotiate subsequent deals concerning emissions, financing, and the like. A number of its provisions concern reporting. For example, it requires parties to publish "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases," to publish descriptions of any "programmes containing measures to mitigate climate change," and to report to the Conference of the Parties on its national greenhouse gas inventories and the steps it has taken to implement the Convention.[22]

Arguably, reporting obligations that attach to the government—rather than to private parties—are supported by the UNFCCC. They could be viewed as simply implementing or amending the Convention[23] and therefore as permissible subject matter for a treaty-executive agreement, particularly if they can be implemented under the President's existing authority. Moreover, an argument can (and has) been made that reporting is part and parcel of "the president's foreign affairs power is to communicate with foreign govern-

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[21] *See* Lee Logan, Review Provision in Paris Climate Deal Faces Host of Unresolved Details, InsideEPA/climate, Nov. 19, 2015.

[22] Arts. 4.1(a), 4.1(b), 12.1.

[23] Article 15 provides that "Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties" by a three-fourths majority vote.

ments."[24] Of course, any reporting or other procedural requirements that impose burdens on third parties would be subject to a more critical analysis.

C. Monetary Commitments? Nope.

President Obama lacks any authority to bind the United States to "mobilize" "climate finance"—that is, to make transfer payments to the governments of foreign countries in exchange for their denying their citizens economic activity and growth and associated emissions. Putting aside the moral and ethical issues inherent in such a scheme, the legal issue is insurmountable. The U.S. Constitution provides that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law."[25] For that reason, it is well established that "an international agreement providing for the payment of money by the United States requires an appropriation of funds by Congress in order to effect the payment required by the agreement."[26] An agreement containing binding commitments cannot be executed on the President's sole authority.

Moreover, Congress has already weighed in: the Senate rejected the President's request for a $500 million down payment on climate financing by a vote of 98 to 1.[27] Concurrent resolutions now pending before the House and Senate would make this point absolutely clear.[28]

That is not to say, however, that the agreement will not contain some kind of financial "commitment." There will surely be aspirational language regarding the developed world's "obligation" to pay for climate mitigation and adaptation projects in the developing world. And there will most likely be things in the agreement referred to as "commitments," only those things won't actually be commitments, as that word is commonly understood. Instead, the model will be the 2009 Copenhagen Accord, in which parties, including the United States, made "political commitments" (i.e., not commitments) to "provide adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation

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[24] Daniel Bodansky, Legal Options for U.S. Acceptance of a New Climate Change Agreement 16 (2015).

[25] U.S. Const. Art. I, § 9, cl. 7.

[26] Restatement (Third) of Foreign Relations Law of the United States § 111 Comment i.

[27] http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00085.

[28] S. Con. Res. 25, 114th Cong. (2015–2016); H. Con. Res. 97, 114th Cong. (2015–2016).

action in developing countries."[29] The President may unilaterally accept a deal containing such a "commitment," but only because it is not a commitment at all.

D. Intended Nationally Determined Contributions? Nope.

As described above, historical practice and Congress's consent are key in assessing the scope of the President's ability to enter into international agreements on his sole authority. Both historical practice and congressional consent weigh heavily against the President's authority to commit the nation to binding emissions reductions—to the point that even those who support the Administration's climate agenda and favor a strong deal have recognized that legally binding commitments to reduce emissions would be, at best, dubious.[30]

As a matter of historical practice, the CRS's survey of international agreements places those concerning "environmental protection" in the class of "international agreements [that] have traditionally been entered as treaties in all or nearly every instance."[31] That includes, of course, the UNFCCC, which was put to Senate ratification despite its lack of substantive provisions.

The UNFCCC's ratification history rebuts any claim of congressional acquiescence in this area.[32] To begin with, the Senate sought and extracted a pledge from the Bush Administration, prior to ratification, that any future

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[29] UNFCCC, Copenhagen Accord, Dec. 18, 2009, at ¶ 3.

[30] *See, e.g.*, Bodansky, *supra*, at 15 (concluding that "committing to a target internationally without Senate or congressional approval would go beyond past practice"); Stern, *supra* (speech by Special Envoy for Climate Change recognizing that "many countries, including major ones, won't be willing to make their mitigation commitment legally binding at the international level"); Gwynne Taraska and Ben Bovarnick, The Authority for U.S. Participation in the Paris Climate Agreement, Center for American Progress, July 2015, at 11 ("An agreement with national emissions reduction targets that are binding under international law would suggest the need for formal congressional consent after the agreement has been negotiated, as would an agreement with national targets for providing climate finance that are binding under international law.").

[31] Garcia, *supra*, at 7–8. *See also* John H. Knox, The United States, Environmental Agreements, and the Political Question Doctrine, 40 N.C. J. Int'l L. & Com. Reg. 933, 944–45 (2015).

[32] *See* Restatement (Third) of Foreign Relations Law § 314(2) ("When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding.").

protocols setting forth substantive commitments would be subject to Senate ratification:

> 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.[33]

That pledge, in turn, was memorialized in the stated understandings of the Senate Foreign Relations Committee when it reported the UNFCCC out of committee:

> [A] decision by the Conference of the Parties 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. The Committee notes further that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the "shared understanding" of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent.[34]

Subsequently, the Senate reaffirmed that understanding in the 1997 Byrd-Hagel Resolution. The resolution expressed the Senate's opposition to the "targets and timetables" protocol that was soon to be negotiated in Kyoto, Japan.[35] It further stated that "any such protocol…would require the advice

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[33] Hearing, U.N. Framework Convention on Climate Change (Treaty Doc. 102-38), Committee on Foreign Relations, U.S. Senate, 102nd Cong., 2nd Sess., Sep. 18, 1992, pp. 105–06.

[34] S. Exec. Rept. 102-55, 102d Cong., 2d Sess. (1992), at 14.

[35] S. Res. 98, 105th Cong., 1st Sess., 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.

and consent of the Senate" and demanded "a detailed explanation of any legislation or regulatory actions that may be required to implement the protocol."[36] President Clinton went on to sign the Kyoto Protocol, which set binding emissions targets, but it was never sent to the Senate for ratification, was never implemented, and was ultimately abandoned by the George W. Bush Administration. In short, the Kyoto Protocol was regarded as a treaty subject to Senate ratification, and, due to the inability to secure Senate ratification, the United States never deposited an instrument of ratification binding it to Kyoto's terms.[37]

All of this undermines any claim by the Administration that the UNFCCC authorizes it to adopt and implement binding emissions reductions.[38] If that were so, the Clinton Administration could have ratified the Kyoto Protocol on its own authority, by passing the Senate. The fact that it did not do so, and that the Senate as a body expressed its opposition to the deal, is decisive. In the field of international relations, this is extraordinarily strong precedent. And that precedent, as the CRS concluded, would lead any court weighing the claim that the UNFCCC authorizes the President "to adopt and implement quantitative emissions restrictions…[to] most likely deem the Executive's action an unconstitutional usurpation of congressional power…."[39]

Nor is the President's ability to adopt binding emissions limitations supported by existing statutory authority. To begin with, the statutory authority most commonly cited by the Administration's supporters—Section 111(d) of the Clean Air Act, which underlies the Environmental Protection Agency's disputed "Clean Power Plan" emissions limitations for power plants—was in place at the time of the UNFCCC's ratification, the Byrd-Hagel Resolution, and the rejection of the Kyoto Protocol. Given the ratification history of the UNFCCC, the argument that the President actually had the power all along to adopt binding emissions limitations on his sole authority is not one that can be taken seriously. Moreover, the existence of Section 111(d) does nothing to alter Congress's view, repeatedly expressed, that any agreement containing such limitations must be subject to congressional approval.

In any case the Clean Power Plan and the other emission-reduction initiatives identified by the Administration do not actually achieve its INDC tar-

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[36] *Id*.

[37] *See* UNFCCC, Status of Ratification of the Kyoto Protocol, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

[38] *Cf. Medellin v. Texas*, 552 U.S. 491, 518, 530 (2008).

[39] Emily C. Barbour, International Agreements on Climate Change: Selected Legal Questions, CRS Report No. R41175, April 12, 2010, at 8.

get of reducing gas emissions 26 to 28 percent below 2005 levels by 2025. Even under the rosiest of scenarios—"rosy," in this instance, favoring slower economic growth, reduced energy consumption, and other generally bad things—there remains a substantial gap of nearly ten percentage points.[40] Even that figure assumes that the Administration's "Climate Action Plan" continues on course and achieves the upper bound of expected emissions reductions; that no portion of the plan is delayed (as every major climate action has been to date); and that even legally vulnerable actions—including the centerpiece Clean Power Plan, the lawfulness of which is currently being litigated[41]—are upheld by the courts. Alter any of those assumptions, and the gap grows. For that reason, among others, the President would also be unable to commit the United States to implementation of its INDC, rather than to achievement of the target itself.[42]

None of this is to say, however, that the final agreement won't contain emission-reduction targets that are "binding" in the same way that its financial terms constitute "commitments." The Copenhagen Accord is again an example of this kind of sham obligation, purporting to "commit" parties to obtain "quantified economy-wide emissions targets" while, in reality, committing no one to anything at all.[43] In other words, the very centerpiece of the Paris agreement—binding emissions reductions—would have no actual legal effect in the kind of "hybrid agreement" anticipated by the Obama Administration.

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[40] *See, e.g.*, Center for Climate and Energy Solutions, Achieving the United States' Intended Nationally Determined Contribution, June 2015, http://www.c2es.org/docUploads/achieving-us-indc.pdf. *See also* Obama clean power plan welcomed – but won't avoid dangerous warming, The Guardian, Aug. 4, 2015, http://www.theguardian.com/environment/2015/aug/04/obama-clean-power-plan-welcomed-but-wont-avoid-dangerous-warming.

[41] It should be noted here that the Clean Power Plan is legally suspect, on both statutory and constitutional grounds. *See generally* David B. Rivkin, Jr., Andrew M. Grossman, and Mark W. DeLaquil, Does EPA's Clean Power Plan Proposal Violate the States' Sovereign Rights?, Engage, February 2015, available at http://object.cato.org/sites/cato.org/files/articles/grossman-engage-feb2015.pdf.

[42] And the idea that the President could, on his sole authority, subject the United States as a sovereign state, let alone its citizens, to the authority of an "International Tribunal of Climate Justice" or the like is so extraordinary as to require no further comment. No one, so far as I am aware, has suggested that the President could conclude an agreement containing such a term.

[43] UNFCCC, Copenhagen Accord, Dec. 18, 2009, at ¶ 4.

III. A More Cynical View

So far, this analysis has relied on settled legal understandings and extrapolated from them to project how the Administration could structure the terms of a Paris agreement. But the assumption that the Administration will hew to settled legal understandings may be an unrealistic one. After all, the current Administration has been unusually aggressive in upsetting settled legal understandings that it believes are not strictly binding on it or legally enforceable.[44] So perhaps we should relax that assumption.

If we do, the first thing to consider is that the Administration has no intention of not concluding an agreement. In other words, it (along with the other Paris attendees) has every incentive to complete some kind of deal; the failure to conclude an agreement would be unthinkable. As would the conclusion of a deal that does not include the United States—just imagine the blow to the President's climate legacy! This means the Administration, at the end of the day, must be flexible in its approach, so as to ensure that it reaches the finish line: from its perspective, empty promises are far preferable to returning home empty-handed, and even crossing what some may view as red lines regarding legal authority would not be out of the question if that is the cost of striking a deal. Indeed, crossing those red lines may not be a "cost" at all when it can be spun as leadership.

The easiest red line for the Administration to cross—or leap over joyfully—is that barring the President from unilaterally committing the nation to emissions reductions. While the President could not rely on such a commitment to adopt limitations binding within the United States as a matter of domestic law—for example, by imposing a cap-and-trade scheme in reliance on a Paris agreement—it would nominally establish an international-law obligation that (the President and his allies would then argue) Congress is obligated to carry out, lest the nation fall short of its international commitments. This commitment would be only nominal because, as described above, the President lacks the authority to establish such an obligation on his sole authority. But assuming that this Administration and its successors do not attempt to implement such an obligation administratively—and they would be insane to try—it is doubtful that any party would have standing to bring a court challenge.

Another red line that may prove illusory is the bar on unilateral financial commitments. Again, standing would complicate any potential legal challenge. I suspect, however, that this line may prove durable in practice, given the clear assignment of spending power to Congress and lack of even an arguable basis for the President to make such a commitment. But if developing

[44] *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

nations continue to insist that any deal must establish international-law obligations, constitutional niceties may fall by the wayside.

The decision to pursue a more cynical course—to commit the nation to international obligations that the President lacks the power to carry out and that are chiefly intended as a trump in domestic policy debates—is less a legal decision than a political one. On the plus side: burnishing the President's climate legacy, claiming international "leadership," obtaining additional leverage, in the form of international obligations, to wield in domestic policy debates over climate policy, and exerting an influence on the climate policies of successor administrations. The minuses, unfortunately, appear to be few; the chief one is the risk of a backlash from…those who are not inclined to support the President's climate agenda anyway. Over the longer term, there is the damage to the rule of law and the nation's international credibility. How those things figure in the Administration's decisionmaking is anyone's guess.

So far, at least, the Administration has paid lip service to the settled understandings.[45] But we should not assume that this means it will necessarily exercise restraint at Paris—even if officials' statements regarding the limitations of Presidential authority have been sincere, the imperative of reaching a deal may prove overwhelming. For that reason, Congress has a valuable role to play in bolstering the position of restraint by making clear the limits of the President's flexibility, particularly in terms of implementation. In that way, Congress can provide additional leverage to those negotiating on behalf of the United States who wish to avoid breaching the red lines that hem the President's lawful authority.

IV. Conclusion

The Paris conference is a farce. It is highly unlikely that a final agreement will mandate anything beyond reporting and the like. But even an agreement that does purport to require emissions reductions and financial commitments will not, in the end, actually require anyone to do anything. Instead, changing the law in the United States to implement the U.S. INDC or to make financial commitments will require the President to come to Congress—one party with whom he has apparently no intention of negotiating.

I thank the committee for the opportunity to testify on these important issues.

[45] *See, e.g.*, Stern, *supra*; William Mauldin and William Horobin, Paris Climate Talks Face High Barriers and High Hopes, Wall St. J., Nov. 27, 2015 (reporting U.S. officials' continued support for "nonbinding targets").

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