

## CHOOSE THE BEST ANSWER: ORGANIZING CLIMATE CHANGE NEGOTIATION IN THE OBAMA ADMINISTRATION

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Bureaucratic reorganization may well constitute the most dismal swamp of policy analysis. Agencies are restructured, responsibilities re-assigned, bureaus renamed, boxes are moved around—yet all too often, nothing happens. This failure, of course, leads to yet another fruitless round of thrashing about.

But organizational choices matter. At the start of the War on Terror, President Bush made two crucial decisions: he gave the CIA (rather than the FBI) control over the interrogations of high-value terror suspects<sup>1</sup> and he gave the Defense Department (rather than State) control of postwar Iraqi reconstruction.<sup>2</sup> These choices carried disastrous results. Bush's earlier decision to grant Vice President Dick Cheney essentially free rein throughout the executive branch also had critical consequences for the substantive outcomes of his administration.<sup>3</sup>

So it is with international climate change negotiations. Which American agency or entity would be the most capable choice to design effective international climate change architecture? This Essay examines the usual suspects—the Department of State, the Environmental Protection Agency, the Council on Environmental Quality, a “Climate Czar,” and a special climate change representative—and considers the advantages and pitfalls of each.

I conclude, however, that the (tentatively) best choice is one never mentioned by commentators: the Office of the United States Trade Representative (USTR). Although USTR does not perfectly fit the task, it has fewer shortcomings than other available agencies. While hardly without problems, the USTR represents the best maximization of advantages and minimization of problems.

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<sup>1</sup> See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE AMERICAN WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 155–57, 270 (2008).

<sup>2</sup> See MICHAEL R. GORDON & BERNARD E. TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ* (2006).

<sup>3</sup> See generally BARTON GELLMAN, *ANGLER: THE CHENEY VICE PRESIDENCY* (2008).

## I. THE NATURE OF CLIMATE CHANGE NEGOTIATION

Before assessing alternatives, it makes sense to understand the nature of climate change negotiation more fully. Put another way, which characteristics of climate change negotiation bear relevance to its bureaucratic home?

*Saliency.* This Essay takes the normative position that mitigating and adapting to climate change is a policy challenge of supreme and fundamental importance. The science is not in doubt: even the most optimistic scientific assessments predict severe losses and dislocations over the next several decades as a result of climate change.<sup>4</sup> Those commentators, however, who use a very high discount rate may not be persuaded by this analysis.<sup>5</sup>

*The Two-Level Game.* Climate change differs from other types of international negotiations, such as arms control, because it is also a domestic issue. Global collective action problems require international coordination as well as a strong domestic political coalition in order to get the appropriate commitments to emissions reductions or carbon pricing. Successful climate negotiation will require adept maneuvering within the “two-level game” that Robert Putnam famously described two decades ago.<sup>6</sup> Assignment of the climate change brief to any agency unable to mobilize or appease domestic constituencies stands little chance of success.

*Breadth of Economic Impact.* Perhaps no regulatory scheme will affect as many sectors as deeply as climate change regulation and thus require the involvement of a wide range of interest groups. Analysis has focused appropriately on energy and transportation sectors; they will have a powerful interest in climate change issues, as will the many industries that depend on energy and transportation industries.

Moreover, the politics are extremely difficult because climate change represents a classic case of concentrated costs and diffuse benefits. Certain U.S. industries—particularly auto, steel, cement, and energy—will face profound adjustment challenges to any new climate change regime. But many within and outside the United States would benefit. Such a pattern requires

<sup>4</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 72 (2007) (stating that “[w]arming of the climate system is unequivocal” and “likely . . . human-induced”).

<sup>5</sup> See, e.g., David A. Weisbach & Cass R. Sunstein, *Climate Change and Discounting the Future: A Guide for the Perplexed*, (Harvard Law School Program on Risk Regulation Research Paper No. 08-12, 2008) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1223448](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1223448) (link). For a thorough critique of this view, see John Quiggin, Stern and the Critics of Discounting (Dec. 20, 2006) (unpublished manuscript, on file with the Northwestern University Law Review), available at <http://johnquiggin.com/wp-content/uploads/2006/12/sternreviewed06121.pdf> (link). The discount rate, or social time discount rate, is the rate used to compare the wellbeing of people alive today to those of future generations. See, e.g., Hal R. Varian, *Recalculating the Costs of Global Climate Change*, N.Y. TIMES, Dec. 14, 2006, at C1 (link).

<sup>6</sup> See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

skilled political entrepreneurialism to build broad support for a highly technical topic without immediate and sharp impact.<sup>7</sup>

To address the breadth of industries involved, the bureaucratic structure would require the ability to coordinate and work with a wide variety of constituencies and executive agencies as well as strong connections with Congress. Any one agency will not have the institutional competence to comprehend the issue alone, and the economic impact of regulations means that Congress will take a keen interest in policing the issue.

*Iterations.* While climate change itself is highly complex, the negotiation of a treaty seems comparatively less so, especially because the Kyoto cap-and-trade model requires only an emissions target, not a series of specific actions. Indeed, that seems to be the point of the policy tool: individuals, firms, and nations can determine how to maximize efficiency better than international regulators. However, designing an ongoing climate change regime includes several challenges.

First, a climate change treaty will have a finite life, requiring major periodic changes in response to scientific and economic developments. Climate change negotiations thus fundamentally differ from the Montreal Protocol, which “represent[ed] a diplomatic breakthrough” and is “widely thought of as a successful and appropriate response to the threats posed by ozone depletion.”<sup>8</sup> One can easily envision the climate change regime comprising a series of rounds to grapple with new data and technology.

Second, the task of monitoring nations’ compliance, and establishing monitoring procedures, will require detailed, drawn-out, and regularly reconsidered provisions.

Third, the emerging climate change regime might well comprise a series of overlapping and inconsistent institutions. The Kyoto Protocol’s failure to achieve emissions reductions from the major greenhouse gas emitters suggests the need for new approaches. The negotiation of international sectoral agreements within specific industries might be fruitful,<sup>9</sup> as might multilateral (yet nonuniversal) compacts that could construct a regime from the bottom up.

*The No Line Authority Advantage.* Though an international climate negotiator will face many challenges, it will not be responsible for direct enforcement of the agreement. Enforcement will fall to existing regulating

<sup>7</sup> See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 75–83 (1989). Wilson famously distinguished between four types of politics based upon the distribution of costs and benefits. Entrepreneurial politics characterizes an area where the benefits are diffuse but the costs are concentrated. See *id.*

<sup>8</sup> DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 625 (3d ed. 2007).

<sup>9</sup> See Daniel Bodansky, *International Sectoral Agreements in a Post-2012 Climate Framework* (Pew Center on Global Change Working Paper, 2007), available at <http://www.pewclimate.com/docUploads/International%20Sectoral%20Agreements%20in%20a%20Post-2012%20Climate%20Framework.pdf> (link).

agencies, including the Environmental Protection Agency (EPA) and the Department of Energy (DOE), both of which have the experience and infrastructure necessary to enforce regulatory requirements.

*The Heads Banging Against Wall Disadvantage.* International climate change negotiation has failed in large part due to the inability of the developed nations to reach an accommodation with India and China. India and China have refused to accept any binding emissions caps, and so far have seemed immovable because of economic development priorities and resentment against the United States for what they see as unfair American insistence that they cap their emissions when they did not cause the problem. This suggests the necessity of trading across issue areas. While India and China are not eager to regulate emissions now, there are other issues that they are eager to address.<sup>10</sup> An agency with the capacity and incentives to look beyond climate change policy would thus be well-placed to make progress.

## II. THE USUAL SUSPECTS

In light of these factors, this section scrutinizes the agencies most typically mentioned as likely candidates for leading negotiations and outlines their strengths and weaknesses.

### A. *The State Department*

Since climate change involves international negotiations, it stands to reason that State should have authority in the area. Congress seemed to feel that way in 1987, when it assigned responsibility to Foggy Bottom.<sup>11</sup> Certainly, the Department's longstanding expertise in international diplomacy and intelligence make it a reasonable choice.

However, State's preeminence also raises substantial problems. Like all Cabinet Departments, it performs poorly at interagency coordination, and since Kyoto, it seems to have completely ignored the statutory mandate for coordination. Without such capacity, State will be completely unable to trade across issue areas.

Such inefficacy might stem from the way climate change has been submerged in the Department's bureaucracy. The highest official who can reasonably be expected to spend close to full-time on the issue is the Under-

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<sup>10</sup> See, e.g., JOSHUA KURLANTZICK, *CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD* (2008) (delineating a broad Chinese strategy, including the desire for foreign direct investment, trade, and natural resource security); INDIA AND THE WTO (Aaditya Madoo & Robert M. Stern eds., 2003) (proposing an ambitious Indian agenda for the Doha Development Round).

<sup>11</sup> Global Climate Protection Act of 1987, Pub. L. No. 100-204, § 1103(c), 101 Stat. 1407, 1409 (1987).

secretary for Global Affairs, a third (or even fourth) tier position<sup>12</sup>—a recipe for impotence. Even the once-prestigious Policy Planning Staff has been eclipsed by the proliferation of agencies and in-house think tanks.<sup>13</sup>

In any event, climate change does not loom large on Foggy Bottom's radar screen: prestige comes from nuclear proliferation, counterterrorism, political affairs, and the like. The Department itself did not establish an Undersecretaryship for Economic Affairs until Congress mandated it in 1972, and its willingness to bargain away international economic issues led Congress to create USTR's predecessor in 1962.<sup>14</sup> The Undersecretary for Global Affairs can hardly stand up against the combined weight of the Department's regional bureaus, which often block even the highest-level State initiatives.<sup>15</sup> The problem figures only to get worse in subsequent years because the most far-reaching ideas for enhancing the Department's capacity and workload lie not with the environment, but rather in "civilian instruments of national security—diplomacy, strategic communications, foreign assistance, civic action, and economic reconstruction and development."<sup>16</sup>

Finally, State's relationships with both Congress and critical constituencies range from nonexistent to hostile. The Republican Party's antipathy to State carries a proud lineage from Joe McCarthy to Newt Gingrich<sup>17</sup>; even in the midst of massive defense buildups, State's budget has been cut repeatedly. Domestic constituencies might not regard Foggy Bottom as an enemy, but they hardly see it as a friend. Instead, it merely is not a force to be reckoned with.

### B. *The Environmental Protection Agency*

If State is a poor choice, the obvious alternative is the Environmental Protection Agency (EPA), which not only has vast technical expertise on climate change issues, but would be less likely to dismiss the issue than State. Moreover, current federal law gives the EPA the authority to regulate greenhouse gas emissions under the Clean Air Act.<sup>18</sup> Certainly, the agency

<sup>12</sup> Behind the Secretary herself and the Deputy Secretary. Moreover, traditionally within State the *primus inter pares* is the Undersecretary of State for Political Affairs, thus relegating the position to fourth tier.

<sup>13</sup> See Amy B. Zegart, *Policy Planning in the 21st Century: Why the Best is Not Yet to Come* 10–11 (May 2, 2008) (unpublished manuscript on file with author).

<sup>14</sup> See STEVE DRYDEN, *TRADE WARRIORS: USTR AND THE AMERICAN CRUSADE FOR FREE TRADE* 52–55 (1995).

<sup>15</sup> See, e.g., STROBE TALBOTT, *ENGAGING INDIA: DIPLOMACY, DEMOCRACY, AND THE BOMB* 28–29 (2004) (describing the battle in the State Department on nuclear proliferation between "functionalists," who focus on particular substantive issues, and "regionalists," who focus on maintaining strong ties between the U.S. and other countries). The negotiation and ratification of a U.S.-India nuclear deal represents a triumph for the regionalists.

<sup>16</sup> Robert M. Gates, Sec'y of Def., Landon Lecture at Kansas State University (Nov. 26, 2007) available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1199> (link).

<sup>17</sup> See Neal Gabler, *The GOP's McCarthy Gene*, L.A. TIMES, Nov. 30, 2008, at A34 (link).

<sup>18</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007).

negotiating climate change should have intimate knowledge of how emissions reductions work in practice. And unlike State, EPA personnel have established important connections with key members and committees in Congress.

The EPA should be part of any U.S. negotiating strategy, however, the agency should not lead the process. The EPA's Office of International Affairs is a comparatively tiny unit within its massive bureaucracy. EPA personnel have never had to negotiate a treaty. Therefore, it has few if any connections with similar organizations or constituencies in other countries. While the EPA does serve as the principal U.S. representative to the NAFTA Commission for Environmental Cooperation, the Commission has become famous for its inefficacy.<sup>19</sup>

Perhaps even more importantly, the EPA could hardly be credible domestically as the lead agency. Since international climate negotiations could involve binding commitments for emissions reductions, the suspicion could arise that the EPA would essentially be delegating regulatory authority to itself, destroying its credibility as an honest broker. Additionally, the agency's connections to domestic constituencies are often hostile. Emitters of greenhouse gases are also emitters of criteria pollutants, and their interactions with the agency usually take the form of hostile comments in a rule-making record and dueling briefs in the D.C. Circuit. To some extent, this is as it should be if EPA takes its enforcement responsibilities seriously. But it hardly serves as a promising template for negotiators to learn exactly how much industries can or cannot reduce greenhouse gas emissions.

Finally, the EPA is poorly designed for interagency cooperation. Its own statutory mandates are so strong and complex that it is unable to accommodate other agencies' perspectives. For example, as the *Massachusetts v. EPA*<sup>20</sup> Court noted, despite the EPA's protests that domestic climate change regulation would undercut foreign policy goals, the agency never managed to consult with the State Department.<sup>21</sup>

### C. *The Council on Environmental Quality*

The Council on Environmental Quality (CEQ)—the agency within the Executive Office of the President (EOP) whose mission is to coordinate executive branch environmental efforts—could be a viable candidate with a close relationship to the President.<sup>22</sup> Presidents have used the CEQ as a ve-

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<sup>19</sup> See David L. Markell & John H. Knox, *Conclusions*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 299, 310 (David L. Markell & John H. Knox eds. 2003) (observing that the volume's contributions all "sharply question the effectiveness of the CEC as a trade and environment[al] institution").

<sup>20</sup> 549 U.S. 497 (2007).

<sup>21</sup> See *id.* at 532–34.

<sup>22</sup> See 42 U.S.C. §§ 4342–4347 (2006) (establishing the Council on Environmental Quality); Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371–4374 (2006).

hicle for administering their pet projects. George W. Bush has used it as his principal environmental enforcer: for the last eight years, its staff has moved aggressively to delete and distort scientific conclusions, particularly about climate change, in the President's Annual Environmental Quality Report.<sup>23</sup> Thus, to the extent that the CEQ has succeeded in knocking heads in the executive branch under Bush, it might do so again under a President who takes climate change seriously. And while mere geography can be overstated, the CEQ's presence within the EOP might have a marginal benefit in gaining the President's ear.

Yet, despite the CEQ's mandate to coordinate federal activities and set overall policy, there is precious little evidence that it has actually done so. A recent comprehensive look at environmental policy inside the White House mentions the CEQ only once and only in passing.<sup>24</sup> Even careful readers of the scholarly and popular literature will have to look hard for anything that can be regarded as a CEQ accomplishment or signature initiative.

Perhaps this invisibility simply reflects that the CEQ has the weaknesses of its strengths: as an EOP agency, it cannot hope to have the bureaucratic ballast and power of a Cabinet agency or independent commission. Size also matters. With only twenty-four employees,<sup>25</sup> the CEQ cannot hope to have any staying power, institutional memory, or long-term political strength.

#### D. *The Climate Czar*

Another possible solution, which journalists started talking up less than 24 hours after the election, is a "Climate Czar."<sup>26</sup> Al Gore was mooted as an "ambassador-at-large" for climate change, and the Great Mentioner<sup>27</sup> brought up Arnold Schwarzenegger. Finally, Barack Obama settled on former EPA Administrator Carol Browner, who has close ties to Gore.

Special White House offices without statutory mandates, however, are notorious for inefficacy. Adding new offices in the Executive Office of the

<sup>23</sup> See Andrew C. Revkin, *Bush Aide Edited Climate Reports*, N.Y. TIMES, June 8, 2005, at A1 (link).

<sup>24</sup> See generally PAINTING THE WHITE HOUSE GREEN: RATIONALIZING ENVIRONMENTAL POLICY INSIDE THE EXECUTIVE OFFICE OF THE PRESIDENT (Randall Lutter & Jason F. Shogren eds., 2004). The one reference to CEQ is at page 33.

<sup>25</sup> Charles W. Schmidt, *Messenger From the White House: Council on Environmental Quality*, 111 ENVTL. HEALTH PERSP. 224, 226 (2003), available at [http://findarticles.com/p/articles/mi\\_m0CYP/is\\_4\\_111/ai\\_102102862?tag=artBody;col1](http://findarticles.com/p/articles/mi_m0CYP/is_4_111/ai_102102862?tag=artBody;col1) (noting the number of CEQ staff members) (link).

<sup>26</sup> See, e.g., Deborah Zabarenko, *Could Obama Appoint a "Climate Czar"?*, REUTERS, Nov. 6, 2008, <http://www.reuters.com/article/topNews/idUSTRE4A51BT20081106?feedType=RSS&feedName=topNew> (link).

<sup>27</sup> For the origins and significance of the Great Mentioner, see William Safire, *The Great Mentioner*, N.Y. TIMES, Nov. 8, 2004, at A23 (link).

President (EOP) simply bureaucratizes the White House. As the EOP gets bigger, the more it begins to resemble the very Cabinet agencies that it was designed to transcend.<sup>28</sup>

Even more importantly, special White House offices have no institutional memory and are often blocked by cabinet departments jealous of their turf. When Tom Ridge became the White House homeland security “czar” in 2001, he quickly found himself stymied within the bureaucracy and worked to gain statutory authority. That effort, too, was blocked in the executive branch until it became clear that Congress was going to pass legislation establishing a new Homeland Security Department.<sup>29</sup>

One might suppose that the “czar problem” could be avoided because it would be a negotiating position, not an enforcement or line authority position. Thus, a special representative would not have the same problems as Ridge, whose brief required him to intrude on the day-to-day workings of other departments. In contrast, ozone negotiations were effectively conducted by a special representative.<sup>30</sup>

Even though the climate change negotiator will not have to intrude inside other departments, it will have to get departments to agree on negotiating positions. The climate change negotiator will not administer agricultural subsidies, for example, but it will have to convince the infamously captured Agriculture Department to agree to reduce them. That will require expertise at the sort of bureaucratic infighting that a free-standing, new climate negotiator will not have. Ozone serves as a good comparison. The Montreal Protocol negotiations involved nowhere near the scope of interest that climate change does; it involved only a handful of major chemical firms and did not need to address other departments. Climate change will.

The Montreal Protocol was also essentially a one-shot deal. Follow-up agreements and enforcement have been necessary, but commentators can refer credibly to the success of the regime because the negotiations achieved their goal.<sup>31</sup> Climate negotiation will require far more intense, drawn-out, complex, and ongoing procedures. It will not be over for dec-

<sup>28</sup> As I.M. Destler cogently observes, “[O]nce one applies [a] White-House based ‘solution’ to enough policy areas, the biases toward particular policy interests and the boundaries between departments and agencies become replicated in the organizational and jurisdictional divisions within the President’s Executive Office.” I.M. Destler, *United States Food Policy 1972–1976: Reconciling Domestic and International Objectives*, 32 INT’L ORG. 617, 653 (1978).

<sup>29</sup> For an excellent description of Ridge’s frustrations as the director of the White House Office of Homeland Security, see EDWARD ALDEN, *THE CLOSING OF THE AMERICAN BORDER: TERRORISM, IMMIGRATION, AND SECURITY SINCE 9/11* (2008).

<sup>30</sup> See generally RICHARD E. BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* (1998) (detailing the actions of the special representative).

<sup>31</sup> See, e.g., SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING* (2005). Barrett specifically argues that Montreal cannot be used as a precedent for climate change negotiations because of the reasons outlined in this paper. *Id.* at 2.



ades or longer. That means that it needs to have bureaucratic heft over several administrations. No ambassador-at-large—even a former Vice president and Nobel Prize winner, or Terminator—will be able to accomplish that.

### III. AN UNUSUAL SUSPECT: THE OFFICE OF THE U.S. TRADE REPRESENTATIVE

Alternatively, the United States Trade Representative (USTR), while hardly perfect, may be right for the job. USTR is a unique agency. Located within the Executive Office of the President, it is second-largest of all EOP agencies, and Congress has made it “responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries. The head of USTR is the U.S. Trade Representative, a Cabinet member who serves as the president’s principal trade advisor, negotiator, and spokesperson on trade issues.”<sup>32</sup>

Such an express statutory mandate gives USTR institutional strength, but the agency’s mission is also particularly revealing. The USTR does not implement or enforce trade or investment deals and has no line authority. Instead, its challenging task is to achieve a unified American position on international trade talks. It does this through two key bodies: the Trade Policy Staff Committee (TPSC) and the Trade Policy Review Group (TPRG). USTR chairs and administers these groups, which comprise nineteen federal agencies and offices. The TPSC, the primary operating group, has representation at the senior civil service level. More than ninety subcommittees responsible for specialized areas and several task forces working on particular issues support the TPSC. If the TPSC does not reach agreement, or if an issue involves significant policy questions, the TPRG (Deputy USTR, Under Secretary level) takes up the issue. If agencies still cannot reach agreement, then issues are resolved in the White House.<sup>33</sup>

This interagency process resolves issues at the lowest possible level and leaves the most intractable issues for resolution by the most accountable policymakers. But USTR is more than a mere convener. “[I]n practice, USTR dominates the bureaucratic process due to informational asymmetries arising from its primary responsibility for policy implementation,” and although it does not chair the White House committee, the agency “remains the most influential single voice due to its bureaucratic stake in trade policy formation and implementation.”<sup>34</sup>

Thus, coordinating and resolving interagency disputes represents a large part of USTR’s core competence. Such expertise gives it an important

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<sup>32</sup> Office of the United States Trade Representative, Mission of the USTR, [http://www.ustr.gov/Who\\_We\\_Are/Mission\\_of\\_the\\_USTR.html](http://www.ustr.gov/Who_We_Are/Mission_of_the_USTR.html) (last visited Oct. 6, 2008) (link).

<sup>33</sup> See Marcus Noland, *Chasing Phantoms: The Political Economy of USTR*, 51 INT’L ORG. 365, 367 (1997).

<sup>34</sup> *Id.*

advantage over other candidates to run climate change negotiations. Given USTR's other major role—conducting trade negotiations—the agency hardly takes a back seat to State in diplomatic competence. But how can we expect an agency with neither substantive expertise nor interest in environmental issues to be an effective negotiator or coordinator? Why should anyone at USTR care about climate?

#### A. *USTR as Goldilocks: Just the Right Size*

First, consider the USTR's size and structure. While it is large for an EOP agency, at roughly 200 employees, it is small compared to Cabinet departments and the ratio of political appointees to civil servants is quite high.<sup>35</sup> A President committed to adding climate change to the USTR's brief, then, can do so through the appointments process. Movement conservatives have long embraced the motto, "personnel is power,"<sup>36</sup> and they are basically right: getting the appropriately "committed" people in the right positions can move the bureaucracy. Indeed, one key reason for Dick Cheney's unprecedented authority lay in his ability to place key supporters in previously unheralded positions.<sup>37</sup>

While it is possible that USTR civil servants would attempt to subvert its new expanded role, it is unlikely. The agency's relatively small size means that initiatives from political appointees cannot get lost within labyrinthine bureaucratic halls because, quite literally, those halls do not exist. The USTR's mandate seems to have created, at least for climate change negotiation purposes, an administrative sweet spot—large enough to have weight, but not so large as to become unwieldy. Accordingly, academic accounts and personal anecdotes reveal that individual trade representatives make a huge difference in the day-to-day workings and culture of the agency.

#### B. *Issue Trading and Bureaucratic Incentives*

Adding climate change to the USTR might contribute to the facilitation of trade and investment agreements, giving long-time USTR personnel a powerful reason for embracing their new mission. Climate change would contribute to the USTR's ability to trade across issues. More than twenty years ago, Robert Keohane suggested that nations might demand interna-

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<sup>35</sup> See, e.g., STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, 110TH CONG., POLICY AND SUPPORTING POSITIONS 8–9 (Comm. Print 2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_senate\\_committee\\_prints&docid=f:40210.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_senate_committee_prints&docid=f:40210.pdf) (listing an equivalent number of political appointees and career appointments for policy jobs within USTR) (link).

<sup>36</sup> See GELLMAN, *supra* note 3, at 35.

<sup>37</sup> *Id.* at 35–40.

tional regimes because such organizations would foster issue trading.<sup>38</sup> Agreements are costly; one institution capable of bringing parties together on different issue areas would reduce the costs of finding mutual beneficial deals.

Keohane's insight applies particularly well to the climate-trade interface. Talks may have broken down between the United States and developing countries on two issues, but combining might change the political calculus. The Doha Round of trade talks broke down when India and other developing countries insisted on automatically restraining agricultural imports if such imports became too great for them—a device already used by developed nations. American and European refusals to accept such a demand—no doubt brought about by domestic agricultural lobbies—created the impasse. On the climate side, the United States has refused to adhere to any climate treaty in which India, China, and other developing nations refuse to accept binding carbon emissions.

We might imagine a deal in which China and India agree to impose a moderate carbon tax (not a binding limitation) in exchange for American acceptance of the agriculture trigger. The United States might agree to such a trade-off because the prospect of *some* Indian and Chinese climate regulation would promise major benefits for American firms. With new EPA policy and various state initiatives, domestic climate change regulation is coming and American industry will want to level the playing field. Trade concessions might be the way to do so.

Less optimistically, USTR supervising climate change negotiations would also be far more capable of threatening border tax adjustments (BTAs) for carbon footprints than either a special climate change negotiator without any trade authority or the State Department. The trade rules concerning BTAs are complex and malleable, and developing the appropriate record to use them for climate purposes will be critical. For example, Joost Pauwelyn has suggested that in order for climate-based BTAs to pass legal muster, a nation proposing to impose them should demonstrate that it has made a good faith effort to negotiate a climate accord.<sup>39</sup> An agency with the requisite expertise before tribunals such as the WTO Appellate Body will best handle defining “good faith” and the steps necessary for persuading such tribunals.

Indeed, placing climate negotiating authority with USTR might also “green” international trade law. Since the WTO Appellate Body constitutes one of the few truly effective international lawmaking institutions, leveraging WTO enforcement authority potentially constitutes an enormous gain for international environmental governance.

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<sup>38</sup> See Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 332–55 (1982).

<sup>39</sup> Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law* 40 (Nicholas Institute for Environmental Policy Solutions Working Paper No. 07-02, 2007), available at <http://www.env.duke.edu/institute/internationaltradelaw.pdf> (link).

All of this points to an overarching fact: as an issue, climate change *looks* a lot like trade. Both issues involve a complex series of negotiations where overall international welfare would be enhanced by a particular policy (free trade and a comprehensive carbon reduction regime), but collective action problems and unequal distribution of costs and benefits often prevent agreement. In the language of international theory, both issue areas involve large stakes for both absolute and relative gains. In contrast, traditional international security issues predominantly concern relative gains.<sup>40</sup> If we peer inside states themselves, both trade and climate change affect powerful domestic constituencies that also influence political processes. While groups might vehemently disagree about national security policy, those disagreements revolve around ideology and perceptions of the national interest, not rent-seeking interest groups.

Thus, climate change and international economic policy will generate profitable issue trades. Keohane argues that institutions can promote cooperation where there exists suitable “issue density” to allow for trading across issue areas.<sup>41</sup> This notion of density, however, implies a fit or equivalence between issues that generates tradeability. Climate and trade have this sort of fit. Thus, USTR personnel should embrace their new role because they will receive strong guidance from political appointees and because it will assist them in pursuing their traditional role.

#### IV. REORGANIZATION AND THE NATIONAL ENERGY COUNCIL

Climate policy’s connection to national energy strategy has led some to suggest reorganizing government departments altogether. For example, Richard Haass has argued that the government’s entire energy portfolio should be reorganized into one strong agency because “energy policy is national security policy.”<sup>42</sup> The politics of the next two or three years, however, strongly counsels against doing so.

The United States is now heading into what figures to be a long and deep recession. The country is mired in two wars. Unless the nation can reorganize its health care system, which currently comprises 16% of GDP,<sup>43</sup> it has little hope of achieving long-term economic prosperity.

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<sup>40</sup> Even in traditional international security areas, absolute gains are involved. It would benefit two states both to reduce their armaments in the same ratios that they currently have them in order to protect public finances. Thus, conventional arms control agreements, such as the 1921–1922 Washington Naval Conference, can sometimes succeed. See ROGER DINGMAN, *POWER IN THE PACIFIC: THE ORIGINS OF NAVAL ARMS LIMITATION 1914–22* (1976).

<sup>41</sup> See Keohane, *supra* note 38, at 339–41.

<sup>42</sup> Richard N. Haass, *The President’s Inbox: The World That Awaits*, NEWSWEEK, Nov. 3, 2008, at 28 (link).

<sup>43</sup> Marc Kaufman & Rob Stein, *Record Share of Economy Spent on Health Care*, WASH. POST, Jan. 10, 2006, at A01 (link).

In these circumstances, it hardly seems wise for a new administration to spend political capital in a highly partisan environment on bureaucratic reorganization. Haass himself concedes, “it is rarely a good idea to remodel the operating room when the patient is on the table.”<sup>44</sup> It makes more sense to deliver on those issues that need legislative support rather than climate change, where there is already statutory authority.

Still, creating a new Cabinet department creates vast new accountability problems on its own. Even after Congress created the Department of Homeland Security (DHS), it remained ineffective—in part due to the inevitable congressional eagerness to ensure that its new creation did its job, an eagerness that helped to ensure that it could not. DHS had to answer to *eighty* congressional committees and subcommittees.<sup>45</sup> Every member of the Senate had some sort of oversight responsibility. Top officials spent virtually all of their time testifying, preparing testimony, or responding to questions and requests for information from Capitol Hill.<sup>46</sup>

What, then, of the proposal for a National Energy Council (NEC)?<sup>47</sup> The NEC, according to its promoters, would “coordinate the relevant policies of all agencies of the federal government, outreach with states, localities, and the private sector, and U.S. leadership and partnership in international efforts to reduce global emissions.”<sup>48</sup> First, CAP sees this office as domestically oriented, specifically noting that its proposal for decarbonizing the U.S. economy does not concern “the complicated set of questions concerning the policies and diplomacy needed to bring about a low-carbon economy globally.”<sup>49</sup> This makes good sense. The Herculean effort to transform the U.S. economy and federal bureaucracy is large enough without also having to conduct perhaps the most complex negotiation in diplomatic history.

Just as importantly, there is no contradiction between the NEC structure and giving lead responsibility to USTR. As noted above, when negotiating trade deals, USTR’s interagency process funnels top-level issues to the NEC. Lead responsibility does not mean dictatorial power. Indeed, the NEC proposal dovetails nicely with USTR’s lead role because of USTR’s experience working with White House coordinating committees. Critical international decisions—on trade, climate change, or anything else—will require White House approval. The challenge is organizing that process to

<sup>44</sup> *Id.*

<sup>45</sup> See Alden, *supra* note 29, at 226.

<sup>46</sup> For an excellent description of how DHS’s inefficacy under the Bush Administration, see *id.* at 228–29.

<sup>47</sup> The Obama Administration seems to have accepted this idea, appointing former EPA Administrator Carol Browner to be coordinator of energy and climate policy. See Editorial, *Mr. Obama’s Green Team*, N.Y. TIMES, Dec. 13, 2008, at A20 (link).

<sup>48</sup> JOHN PODESTA, TODD STERN & KIT BATTEN, CAPTURING THE ENERGY OPPORTUNITY: CREATING A LOW-CARBON ECONOMY 7 (2007).

<sup>49</sup> *Id.* at 66.

ensure that relevant facts and options are presented most completely and fairly, that all players have a chance to have input, that decisionmaking does not fall victim to paralysis by analysis, and that the most accountable actors actually make the important choices. Whatever the NEC's final status, USTR should still play a key role in determining the international dimensions of U.S. climate policy.

#### CONCLUSION: CHOOSE THE BEST ANSWER

Bureaucratic structures hardly ensure optimum policy results. FDR's chaotic decisionmaking process produced some of the most successful policies that the nation has ever seen. Jimmy Carter's careful attention to executive reorganization was overwhelmed by events and his own indecisiveness.

Still, procedure has substantive consequences and can give talented politicians the support they need to advance constructive policies. Climate change negotiation has faltered for many reasons. The Bush Administration's head-in-the-sand approach has done significant damage, but it is too facile to solely blame this posture for failure. Whatever happens to the Kyoto process, the next phase of climate diplomacy will be difficult and contentious. In such an atmosphere it makes sense to construct a policy process that reduces unnecessary obstacles. Giving USTR the lead role in climate negotiation avoids the risk of an ineffective new White House office or the virtual certainty of it being buried in far larger Cabinet agencies. It also carries the potential of better integrating trade and environment issues. It thus may not be the perfect answer, but it is the best one.