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## Cracking the American Climate Negotiators' Hidden Code: United States Law and the Paris Agreement

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### Abstract

The United States' position in, and conduct of, the negotiations leading to the Paris Agreement, as with almost all international diplomacy leading to reciprocal international undertakings conducted by that country, reflected not only internal politics, but also the constraints of domestic law. The United States is not unique in this respect, but it is unusual in the extent to, and manner in, which its municipal law constrains the creation of international commitments. This article disaggregates US international and domestic climate policy as it developed prior to the Paris negotiations and analyses how those dynamics played out on the multilateral stage, influencing the shape of the Paris Outcome even to the name of the instrument. Among the subjects analysed are (1) the extent of the Executive's powers in foreign relations on climate and related issues; (2) the strengths and limitations of existing federal legislation as domestic legal authority for an international agreement on limiting emissions of climate-disrupting gases; (3) domestic implementation of the US INDC; (4) executive agreements as vehicles for undertaking internationally legally binding commitments on climate; and (5) the role of the courts.<sup>1</sup>

### [page 153] 1. Introduction

The Paris negotiations were brought to a standstill in their last moments by what was diplomatically identified as a typographical error in the President's final text. As documented by multiple news accounts,<sup>2</sup> the US delegation held up final adoption of the Paris Agreement, insisting on the hortatory 'should' as opposed to the obligatory 'shall'

<sup>1</sup> This article was supported by a generous grant from the Dr. Thomas F. Carney '47 Gift Fund and is based in part on the author's publication 'The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?', 39(2) *Harvard Environmental Law Review* 515 (2015). The author gratefully acknowledges helpful comments and advice from Lucas Bergkamp, Sherry Xin Chen, Sonja Marrett, and Nigel Purvis. The responsibility for all views expressed in this article is nonetheless the author's own.

<sup>2</sup> See, e.g., Melissa Eddy, 'At Climate Talks, a Few Letters That Almost Sank the Deal', *New York Times*, 16 December 2015, <[www.nytimes.com/interactive/projects/cp/climate/2015-paris-climate-talks/at-climate-talks-three-letters-almost-sunk-the-deal](http://www.nytimes.com/interactive/projects/cp/climate/2015-paris-climate-talks/at-climate-talks-three-letters-almost-sunk-the-deal)>; Amitabh Sinha, 'Paris Talks: Shall/should; The World Between a Wrong Word', *Indian Express*, 14 December 2015, <<http://indianexpress.com/article/world/world-news/paris-talks-climate-change-shallshould-the-world-between-a-wrong-word/>>; and John Vidal, 'How a "typo" nearly derailed the Paris climate deal', *The Guardian*, 16 December 2015, <[www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal](http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal)>. See generally, Daniel Bodansky, 'Reflections on the Paris Conference', *Opinio Juris*, 15 December 2015, <<http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>>.

in article 4(4).<sup>3</sup> This is arguably the most critical undertaking in the Agreement for industrialized states such as the United States, codifying the expectation that developed countries will ‘continue taking the lead by undertaking economy-wide absolute emission reduction targets’.

To the casual observer, this episode might have seemed just an inconsequential quibble with little broader significance. Correctly understood, it is anything but. US Secretary of State John Kerry proclaimed as much, vigorously asserting that, absent this change, the United States would refuse to become party to the instrument.<sup>4</sup> The clash over article 4(4) had been prefigured prior to the opening of COP 21, when President François Hollande had initiated a debate with Secretary Kerry over the legal form of the Paris Outcome, and in particular whether it would be a ‘treaty’.<sup>5</sup> These two exchanges, which bookended the conference proper, are both emblematic of the challenges encountered by the [page 154] United States not just in the UN-sponsored climate negotiations, but also in many other areas of US foreign policy, particularly those involving implementation through domestic regulatory initiatives.

Although the United States’ reengagement with the multilateral climate negotiations and its negotiating strategy have been much praised for shielding the outcome from domestic political and legal attack,<sup>6</sup> the apparent preference for non-binding over binding formats comes at a potentially high price in the form of the durability of the US expressions of intent on the international level. Using the exchanges over the word ‘treaty’ and the US last-minute insistence on ‘should’ over ‘shall’ as examples, this article first reviews the history of the UN-sponsored climate negotiations, with an emphasis on the participation of the United States. Then domestic implementation of international climate-related commitments is examined, an analysis that includes the roles of the Executive Branch, the Senate, the full Congress, and the courts.

Following that, the piece scrutinizes the crucial legal doctrine concerning the ‘executive agreement,’ an instrument of potentially great utility as a vehicle for the United States to make internationally legally binding economy-wide emission-reduction commitments without the participation of the Congress or the Senate. In performing this assessment,

<sup>3</sup> Compare UN Doc. No. FCCC/CP/2015/L.9 (12 December 2015) (President’s final draft of Paris Agreement and accompanying decision as initially presented), <<http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>> with U.N. Doc. No. FCCC/CP/2015/L.9/Rev.1 (12 December 2015) (final as adopted), <<https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>>.

<sup>4</sup> Eddy, supra note 2 (quoting Kerry as saying ‘I said: “We cannot do this and we will not do this. And either it changes, or President Obama and the United States will not be able to support this agreement.”’).

<sup>5</sup> E.g., Michael Stothard and Demetri Sevastopulo, ‘Hollande Rejects Kerry’s Comments on Paris Climate Accord’, *Financial Times*, 12 November 2015, <[www.ft.com/intl/cms/s/0/5ab680d4-8965-11e5-9f8c-a8d619fa707c.html#axzz3yAP8WwU2](http://www.ft.com/intl/cms/s/0/5ab680d4-8965-11e5-9f8c-a8d619fa707c.html#axzz3yAP8WwU2)>; Demetri Sevastopulo and Pillita Clark, ‘Paris Climate Deal will not be a Legally Binding Treaty’, *Financial Times*, 11 November 2015 (quoting Kerry as saying ‘December’s climate change talks will not deliver a “treaty” that legally requires countries to cut their carbon emissions’), <[www.ft.com/cms/s/0/79daf872-8894-11e5-90de-f44762bf9896.html#axzz3yAP8WwU2](http://www.ft.com/cms/s/0/79daf872-8894-11e5-90de-f44762bf9896.html#axzz3yAP8WwU2)>.

<sup>6</sup> E.g., Suzanne Goldenberg, ‘How US Negotiators Ensured Landmark Paris Climate Deal was Republican-Proof’, *The Guardian*, 13 December 2015, <[www.theguardian.com/us-news/2015/dec/13/climate-change-paris-deal-cop21-obama-administration-congress-republicans-environment](http://www.theguardian.com/us-news/2015/dec/13/climate-change-paris-deal-cop21-obama-administration-congress-republicans-environment)>.

the article seeks to elucidate the unseen dynamics behind not only the Paris negotiations, but any number of other multilateral efforts. As a consequence of this assessment, guidance emerges in distinguishing negotiating positions of the Executive Branch that are legally necessary from those that are policy-driven.

## **2. The International Legal Architecture**

There is no question about the Paris Agreement's legal force under international law. After entry into force, the Agreement will be a legally binding treaty within the meaning of the Vienna Convention on the Law of Treaties.<sup>7</sup> The Agreement's provisions on signature, ratification, and entry into force<sup>8</sup> remove any doubt about the intent of the parties to the Agreement to be bound under, and [page 155] hence governed by, international law. Viewed within the regime established by the Framework Convention, however, the legal form of the Paris Agreement displays a number of curious attributes.

### ***2.1. The Copenhagen Negotiations and the Durban Platform***

The possibilities for a 'legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties,' mandated by COP 17<sup>9</sup> and subsequently described by the neutral term 'Paris Outcome' during the negotiations leading to COP 21, are quite clearly identified in the text of the Convention. The most obvious is a new protocol, which would be applicable to all Convention parties including the United States. An additional amendment to the Kyoto Protocol beyond the Doha Amendment<sup>10</sup> might technically meet this test, but would be fraught with procedural and political difficulties, especially given the United States' rejection of Kyoto. The identification of a third commitment period under Kyoto would likely have encountered similar analytical and political difficulties. Another option for a legally binding instrument applicable to all parties could conceivably have been an amendment to the Convention itself, expressly anticipated by article 15.

The United States signalled its discomfort with these choices, by electing the answer, in effect, 'none of the above.' The form of next multilateral climate agreement, as indicated in part by the name of the instrument, was discussed as far back as the year before COP 15 in Copenhagen, which laid the foundation for the broad contours of the Paris Outcome. Since then governments had widely understood that the next agreement could not be called a 'protocol' without complicating US participation.<sup>11</sup> The US submission to the pre-Copenhagen process uses the unexpected (from the perspective of

<sup>7</sup> Vienna Convention on the Law of Treaties, art. 2, para. 1 ("Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.) (hereinafter Vienna Convention).

<sup>8</sup> Paris Agreement, arts. 20 and 21, 12 December 2015 (hereinafter Paris Agreement). Cf. Vienna Convention, supra note 7, arts. 11-16.

<sup>9</sup> Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, para. 2, Dec. 1/CP.17, U.N. Doc. FCCC/CP/2011/9/Add.1 at 2 (15 March 2012).

<sup>10</sup> Doha Amendment, Dec. 1/CMP.8, U.N. Doc. FCCC/KP/CMP/2012/13/Add.1 at 2 (29 February 2013) (adopting Doha Amendment) (hereinafter Doha Amendment).

<sup>11</sup> Personal communication from Nigel Purvis, President and CEO, Climate Advisers (28 January 2016).

the Convention and the Protocol) term ‘implementing agreement’.<sup>12</sup> The US submission prior to COP 20 in Lima in 2014 referred specifically to the ‘Paris Agreement’.<sup>13</sup> [page 156]

## **2.2. The Paris Negotiations**

Early on in the implementation of the ‘bottom-up’ approach based on individual national submissions of INDCs leading to the Paris Agreement, the United States made clear its expectation that the Paris Outcome would be a mixture of both legally binding commitments and non-binding political statements of intent not governed by international law. It also elaborated with considerable specificity the dividing line between the two.

For instance, in a speech at Yale University more than a year before COP 21, Todd Stern, United States Special Envoy on Climate Change, made the following observations:

The Durban mandate says, in effect, that the new agreement will be a legally binding one in at least some respects, but doesn’t specify which ones ... [T]here would be a legally binding obligation to submit a ‘schedule’ for reducing emissions, plus various legally binding provisions for accounting, reporting, review, periodic updating of the schedules, etc. *But the content of the schedule itself would not be legally binding at an international level.*<sup>14</sup>

<sup>12</sup> US Submission on Copenhagen Agreed Outcome (2009), <<http://perma.cc/3PP5-RHAP>>. Cf. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1836 U.N.T.S. 3 (modifying multilateral convention through procedure other than specified in parent agreement). In the end, there was no binding instrument adopted at COP 15, so the issue of its legal form and relationship to the Convention’s structure did not arise at the multilateral level.

<sup>13</sup> See US Submission – September 2014 (US submission to U.N. climate negotiations before the 20th session of the Conference of the Parties to the U.N. Framework Convention on Climate Change in Lima, December 2014), <<http://perma.cc/NH7U-NX7H>>. Cf. Lima Call for Climate Action, Dec. 1/CP.20, U.N. Doc. No. FCCC/CP/2014/10/Add.1 (containing ‘elements for a draft negotiating text’ without specifying title or form of instrument), <<http://unfccc.int/resource/docs/2014/cop20/eng/10a01.pdf#page=2>>.

<sup>14</sup> Todd D. Stern, Special Envoy for Climate Change, US Dep’t of State, ‘Seizing the Opportunity for Progress on Climate (discussing legal form of Paris agreement) (emphasis supplied) (14 October 2014), <<http://perma.cc/65TG-NXSV>>.

The United States' position going into Paris was consistent with this perspective.<sup>15</sup> The text of the US INDC<sup>16</sup> does not identify the legal force of its [page 157] economy-wide target, i.e. emissions cuts of 26-28 per cent measured against 2005 levels by 2025. By contrast, the INDCs of the EU<sup>17</sup> and Norway<sup>18</sup> expressly identified their economy-wide emission-reduction goals as internationally legally binding.

The name of the resulting instrument, the Paris Agreement, is consistent with the 'none of the above' options seemingly preferred by the United States as to legal form. The Agreement and its accompanying decision refer repeatedly to the Convention, as in establishing that the Convention COP will serve as the meeting of the parties under the agreement,<sup>19</sup> that the Convention's Secretariat will service both agreements,<sup>20</sup> and that the Convention's amendment procedures apply to the Paris Agreement as well.<sup>21</sup>

Nonetheless, because the text of the Convention does not anticipate a freestanding agreement connected in a legal manner to the parent instrument, the Paris Agreement's relationship to the Convention, unlike the Kyoto Protocol's and Doha Amendment's, is not entirely clear. More problematically, although the non-binding decision in which the Paris Agreement is embedded makes passing reference to the Kyoto Protocol, the Paris Agreement proper makes not a single reference to that instrument. This is not just a curious attribute, but a potentially serious omission that could raise legal questions about continuity of the climate regime from the Protocol to the new Agreement.

### **3. Domestic Legal Constraints and Opportunities in the Exercise of Executive Power**

Consistent with the British doctrine of the supremacy of Parliament from which the American legal system is derived, the United States is primarily a dualist system. The international and domestic legal orders do not intersect except through the operation of

<sup>15</sup> Testimony of Special Envoy for Climate Change Todd D. Stern, Senate Foreign Relations Committee Subcommittee on Multilateral International Development, Multilateral Institutions, and International Economic, Energy, and Environmental Policy, 20 October 2015, <[http://www.foreign.senate.gov/imo/media/doc/102015\\_Stern\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/102015_Stern_Testimony.pdf)>; Letter from Julia Frifield, Assistant Secretary of State, Legislative Affairs, to Bob Corker, Chairman, Senate Foreign Relations Committee (19 October 2015) ('The intended nationally determined contribution reflected in the U.S. "INDC" submission is not intended to constitute an obligation that the United States must fulfill under international law, and the United States considers that the Paris agreement should reflect that approach more broadly. Thus, we are not seeking an agreement in which parties take on legally binding emissions targets.'), <<https://www.justsecurity.org/wp-content/uploads/2015/12/State-Letter-to-Chairman-Corker-Climate-Negotiations.pdf>>; Submission – September 2014 (2014) (US submission to U.N. climate negotiations before the 20th session of the Conference of the Parties to the U.N. Framework Convention on Climate Change in Lima, December 2014, referring to 'Paris agreement'), <<http://perma.cc/NH7U-NX7H>>.

<sup>16</sup> US Cover Note, INDC, and Accompanying Information (31 March 2015) (hereinafter US INDC), <<http://perma.cc/C92R-7ZTF>>.

<sup>17</sup> Submission by Latvia and the European Commission on Behalf of the European Union and Its Member States (2015) (hereinafter EU INDC), <<http://perma.cc/6ZX2-DM7T>>.

<sup>18</sup> Submission by Norway to the ADP (2015), <<http://perma.cc/Y8KC-WTZG>>.

<sup>19</sup> Paris Agreement, *supra* note 8, art. 16(1).

<sup>20</sup> *Ibid.*, art. 17(1).

<sup>21</sup> *Ibid.*, art 22.

some mechanism linking the two. Binding international agreements, whose parties are states, operate as the legal equivalent of a contract or compact in international law, thereby making law for the states parties to them. Treaties, subordinate to the Constitution, have binding effect on the domestic level as well, typically with the legal force of a statute.<sup>22</sup>

[page 158] On domestic matters, the US Congress adopts binding, prospective legislation, implemented by the President as Chief Executive, who has a constitutionally based duty to ‘take Care that the Laws be faithfully executed’.<sup>23</sup> In the area of foreign relations, by contrast, the text and structure of the US Constitution embody a tension between the President’s power effectively to represent the United States as a unitary state in foreign relations and the essential need to preserve the rule of law at home. Moreover, the US doctrine of separation of powers, constitutionally entrenched and rigorously enforced by the Supreme Court, can produce a situation—as at present—in which both chambers of Congress are controlled by a political party different from that to which the President is affiliated.

### ***3.1. Treaties and Executive Agreements on Environment***

The implicit assumption, dating to the adoption of the Kyoto Protocol in 1997, has been that either Senate advice and consent to ratification, new legislation, or both are necessary before the United States can become party to a substantive agreement under the auspices of the Framework Convention that requires reductions in greenhouse gas emissions. Whether or not that was the case in 1997, or in 2001 when President Bush announced his decision not to ratify Kyoto, or for that matter at COP 15 in 2009, it is a question that is worth re-examining in light of current circumstances.

The text of the US Constitution requires the advice and consent of the Senate, by a two-thirds majority, to the President’s ratification of concluded international agreements.<sup>24</sup> But the Executive Branch also enters into a distinct and much larger category of ‘executive agreements’ on behalf of the United States that, unlike treaties concluded under article II, section 2 of the Constitution, do not require subsequent congressional endorsement.<sup>25</sup> In contrast to [page 159] a treaty in the constitutional sense, which has

<sup>22</sup> US Const. art. VI, § 2 (‘[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land...’). See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); Restatement (Fourth) of the Foreign Relations Law of the United States § 101 (Tentative Draft No. 1 2015) (hereinafter Restatement 4th); Restatement (Third) of the Foreign Relations Law of the United States § 111(1987) (hereinafter Restatement 3d); Louis Henkin, *Foreign Affairs and the Constitution* (New York, New York: Oxford University Press, 2d ed.1996), at 54.

<sup>23</sup> *Ibid.*, art. III, § 3.

<sup>24</sup> US Const. art. II, § 2. See generally, David A. Wirth, ‘The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?’, 39(2) *Harvard Environmental Law Review* 515, at 543 n.166 (2015) (describing structural and institutional mechanics and legal effect of Senate advice and consent process).

<sup>25</sup> From 1939 through 2013 the United States concluded about 17,300 executive agreements, by contrast with approximately 1,100 treaties in the constitutional sense. Michael John Garcia, ‘International Law and Agreements: Their Effect Upon U.S. Law’ (Washington, DC: Congressional Research Service Report no. RL32528, 18 February 2015), at 5, <<https://fas.org/sgp/crs/misc/RL32528.pdf>>.

the same legal force as a statute,<sup>26</sup> the domestic legal effect of an executive agreement which is not expressly authorized by statute or treaty and is concluded without congressional participation can be more difficult to discern. But under international law, it is clear that executive agreements have the same binding force as treaties;<sup>27</sup> the distinction is a purely domestic one peculiar to the United States and largely unknown to other legal systems.

In the case of an article II, section 2 treaty, the Senate's resolution of advice and consent to ratification provides the necessary legal authority not only for the agreement to bind the United States under international law, but also for it to operate as domestic law. With respect to an executive agreement, however, the legal authority for its domestic implementation must be found elsewhere in US domestic law. An executive agreement, like every other act of the President, must be supported by domestic legal authority. An executive agreement has come to be understood as requiring legal authority in the form of one or more of the following: (1) Congressional legislation; (2) an article II, section 2 treaty; or (3) the President's own constitutional powers.<sup>28</sup>

In the environmental field, characterized by a complex web of legislative mandates, the most likely, although not necessarily the only, authority for an executive agreement is a statutory enactment. Although some executive agreements may be concluded based on express statutory authorizations or instruction, neither is necessary as a condition precedent to the legality of an executive agreement. Rather, the Executive may conclude an international agreement without Senate advice and consent so long as the agreement can be implemented relying on existing statutory authority. Any number of binding international agreements on environmental matters, including major multilateral conventions such as the recent Minamata Convention on Mercury<sup>29</sup> adopted in 2013, have been concluded as executive agreements by the United States.<sup>30</sup> [page 160]

### ***3.2. Executive Agreements in the Courts***

The Executive Branch's conclusion of executive agreements dates to the early years of the Republic<sup>31</sup> and has routinely withstood legal challenges in the courts.<sup>32</sup> But international agreements generally, and executive agreements in particular, also present unusual challenges to assuring Executive Branch adherence to the rule of law through judicial review.

<sup>26</sup> US Const. art. VI. See also *Whitney v. Robertson*, supra note 22.

<sup>27</sup> For the sake of precision, the remainder of this article uses the generic term 'international agreement' to identify all instruments binding on the United States under international law. The term 'treaty' is limited to those international agreements for which the Senate's advice and consent to ratification is necessary or has been given under US Constitution Article II, Section 2.

<sup>28</sup> See Restatement 3d, supra note 22, § 303; Henkin, supra note 22, at 215–26.

<sup>29</sup> Minamata Convention, 10 October 2013 (hereinafter Minamata Convention) (not in force). <<http://perma.cc/9F8J-44W3>>. The Supreme Court set aside major rules on mercury emissions from power plants, *Michigan v. EPA*, 135 S. Ct. 2699 (2015), without apparent controversy over US capacity to implement the Convention.

<sup>30</sup> See Wirth, supra note 24, at 552-57 (2015) (collecting binding international agreements done as executive agreements by United States).

<sup>31</sup> See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003).

<sup>32</sup> See Wirth, supra note 24, at 546-51.



Channels for testing the legality of an international agreement are essential to assure that the President remains a creature of law, and that his or her authority to conclude a pact with foreign powers is not an occasion for an aggrandizement of power beyond the constraints of the domestic rule of law. Judicial review of any international agreement, whether an article II, section 2 treaty or an executive agreement concluded without Senate advice and consent, occurs only *post hoc*, after the agreement is already in place as a matter of international law and binding rights and obligations for the United States and the foreign treaty partners have already been created.

Even if a court were to conclude that an international agreement lacks domestic authority, that agreement would remain in force internationally, having already been concluded with foreign powers and having created international law among them to which the United States will be bound regardless of the court's holding.<sup>33</sup> The legal integrity and subsequent validity of an executive agreement consequently benefits from finely tuned Executive Branch determination of the existence—or absence—of legal authority before the instrument is concluded, and care to recognize those international agreements that might exceed existing legal authority.

To facilitate assurances within the Executive Branch of the existence *ex ante* of adequate domestic legal authority, the US State Department has adopted a [page 161] procedure known as 'Circular 175'.<sup>34</sup> Pursuant to that process, the negotiation and conclusion of virtually all international agreements require the prior approval of the Secretary of State or his or her designee.<sup>35</sup> The request for State Department approval is accompanied by a memorandum of law setting out the constitutional and statutory authority supporting the proposed agreement and identifies additional laws or regulations that may be necessary for the agreement's domestic implementation.<sup>36</sup> The process provides for Congressional consultation in appropriate situations.<sup>37</sup>

<sup>33</sup> See Wirth, *supra* note 24, at 548-50 (discussing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 US 221 (1986)). Concern about binding future Presidents, as opposed to the United States as a state, is a distinct concept. Most modern multilateral agreements, including article 25 of the Framework Convention and article 27 of the Kyoto Protocol, contain denunciation or withdrawal clauses that permit a state to terminate its obligations under the instrument. Canada did precisely that with respect to the Kyoto Protocol. Cf. Letter from Harold Hongju Koh, Legal Adviser, Dep't of State, to Hon. Ron Wyden (D-Ore.) (6 March 2012) (identifying denunciation of an executive agreement as an international legal remedy for subsequent changes in domestic law or policy), <<http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf>>.

<sup>34</sup> 21 C.F.R. § 181.4; 11 US Dep't of State, Foreign Affairs Manual § 720; see also Circular 175 Procedure, US Dep't of State, <<http://perma.cc/QHC2-WBBB>>. Abandonment of a non-binding statement of intent most likely would not be judicially reviewable. See notes 50 and 77 *infra*. Cf. *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality holding that President's termination of mutual defense treaty with Taiwan is non-justiciable political question).

<sup>35</sup> 11 US Dep't of State, Foreign Affairs Manual § 724.1 ('Negotiations of treaties, or other 'significant' international agreements, or for their extension or revision, are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized in writing by the Secretary or an officer specifically authorized by the Secretary for that purpose.').

<sup>36</sup> *Ibid.*, at § 724.3(h)(3).

<sup>37</sup> See, e.g., *ibid.*, at §§ 722(4), 723.4, 725.1(5).

Pursuant to a legislative requirement, the Case-Zablocki Act,<sup>38</sup> the Executive is required to transmit executive agreements to Congress. The State Department is also responsible for making legal determinations as to the binding nature of international agreements, which are then collated and published.<sup>39</sup>

### ***3.3. The Framework Convention and the Kyoto Protocol in the Senate***

The George H. W. Bush administration presented the Framework Convention to the Senate, seeking its advice and consent, which was given by division vote.<sup>40</sup> Neither the President's Letter of Transmittal<sup>41</sup> nor the Secretary of State's Letter of Submittal<sup>42</sup> of the Convention to the Senate mentions the domestic procedure anticipated to be followed with respect to subsequent protocols to the UNFCCC. In response to subsequent written questions from the Foreign Relations Committee, the Executive Branch stated that, if a protocol containing targets and timetables 'were negotiated and the United States [page 162] wished to become a party, we would expect such a protocol to be submitted to the Senate'.<sup>43</sup>

The Senate Foreign Relations Committee, in its report on the resolution of ratification for the UNFCCC, expressed the expectation that future actions that would require legally binding emission reductions would require the Senate's advice and consent.<sup>44</sup> This is a preference expressed by a committee of the Senate, and was not included as a formal reservation to the resolution of advice and consent adopted by the full Senate, which has wide discretion to give or withhold its consent to ratification subject to binding conditions or reservations.<sup>45</sup> Committee reports, while perhaps helpful in interpreting the Senate's resolution of advice and consent, do not have the force of law.<sup>46</sup>

The Kyoto Protocol was negotiated for the United States by the Clinton Administration, and the agreement owes much of its content to US government input. But even before the Protocol's adoption, the Senate had expressed its objection to the agreement in a resolution sponsored by Senators Byrd and Hagel and adopted by a vote of 95-0,<sup>47</sup> referencing two factors: the Protocol's failure to identify emissions reduction goals for

<sup>38</sup> 1 U.S.C. § 112b.

<sup>39</sup> Treaties in Force, US Dep't of State, <<http://perma.cc/QJA5-RC3E>>.

<sup>40</sup> 138 Cong. Rec. 33527 (1992)(Senate resolution of advice and consent to Framework Convention).

<sup>41</sup> See S. Treaty Doc. 102-38, at III (102d Cong. 2d Sess. 1992)

<sup>42</sup> *Ibid.*, at V.

<sup>43</sup> U.N. Framework Convention on Climate Change, Hearing Before the Senate Committee on Foreign Relations 106 (102 Cong 2d Sess. 1992) (S. Hrg. 102-970). More generally, the Executive noted that, 'given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter.' *Ibid.*, at 105.

<sup>44</sup> S. Exec. Rep. No. 102-55, at 14 (1992).

<sup>45</sup> See note 24 *supra*.

<sup>46</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (actions taken by subsidiary bodies of the full Congress lack legal force).

<sup>47</sup> S. Res. 98, 105th Cong. (1997).

non-Annex I countries; and anticipated ‘serious harm to the economy of the United States’.

The Clinton Administration consequently had relatively little expectation of obtaining Senate advice and consent to ratification of the Protocol by the two-thirds majority required by article II, section 2 of the Constitution. Vice President Al Gore nonetheless signed the Kyoto Protocol in November 1998, toward the end of the Clinton presidency, presumably on the expectation that the composition of the Senate would shift in a direction more receptive to the agreement. In the end, the Protocol was never submitted to the Senate for its advice and consent. In March 2001, President George W. Bush announced that the United States would not ratify the Kyoto Protocol.<sup>48</sup>

Although the Byrd-Hagel resolution may be indicative of a generalized political sentiment in the Senate opposed to multilateral action on climate, it is [page 163] far from clear that that instrument would prevent the Executive from agreeing to binding emission reductions in the Paris Agreement. First, as a resolution of a single house of the Congress, the resolution lacks legal effect.<sup>49</sup> Second, a principal purpose of the Paris Agreement is to overcome the ‘original sin’ of the Convention and Kyoto Protocol, which assigned substantive reduction obligations only to Annex I developed countries. The Paris Agreement consequently appears to satisfy that portion of the resolution concerning the inclusion of developing countries.

Further, paragraph 2 of the Byrd-Hagel resolution, requesting ‘a detailed explanation of any legislation or regulatory actions that may be required to implement the protocol or other agreement’ applies only to a ‘protocol or other agreement which would require the advice and consent of the Senate to ratification’. The Executive Branch supplied such an analysis in its INDC. In any event, to the extent that an agreement did not require Senate advice and consent—that is, could be legally concluded as an executive agreement—this provision would not apply. That inquiry—the need for Senate advice and consent to ratification of an instrument containing internationally legally binding economy-wide emission reductions—is the subject of the remainder of this article.

### ***3.4. Massachusetts v. EPA and subsequent Executive Branch Actions***

The legal and policy setting domestically within the United States is now entirely different from the late 1990s, at the time of Kyoto when the United States had done little to cut carbon emissions, and has dramatically changed even since the Copenhagen COP.<sup>50</sup> From a structural point of view, the principal development has been President

<sup>48</sup> See Letter from President George W. Bush to Senator Chuck Hagel (R-Neb.) (13 March 2001). Ratification is a political act by the President pursuant to his plenary powers, and has never been subjected to judicial supervision.

<sup>49</sup> Chadha, *supra* note 46.

<sup>50</sup> The Copenhagen Accord, as an expressly non-binding statement of intent, is not a treaty in the Constitutional sense and consequently did not require submission to the Senate for its advice and consent. Similarly, nonbinding undertakings are not subject to judicial review. See generally, Duncan B. Hollis and Joshua J. Newcomer, ‘“Political” Commitments and the Constitution’, 49 *Va. J. Int’l L.* 507 (2009) (advocating legislative assertiveness in oversight of political commitments).

Obama's deployment under existing domestic authority, included but not limited to the Clean Air Act, to effectuate emission reductions in the United States.

*Massachusetts v. EPA*<sup>51</sup> was a proceeding for judicial review of a petition to the US Environmental Protection Agency, requesting the Agency to regulate emissions of greenhouse gases from new motor vehicles under section 202 of the US Clean Air Act.<sup>52</sup> Consistent with President Bush's 2001 decision to [page 164] refrain from ratifying the Kyoto Protocol and to decline to regulate greenhouse gases as pollutants, the EPA denied the petition in 2003.<sup>53</sup> Twelve states, along with several municipalities and public-interest organizations, filed suit, challenging the denial. After they lost in the United States Court of Appeals for the District of Columbia Circuit,<sup>54</sup> the Supreme Court granted certiorari. In *Massachusetts v. EPA*, the Court reversed by a 5-4 vote, rejecting the arguments relied on by the Court of Appeals.

The Court concluded that the EPA has the authority to regulate greenhouse gases,<sup>55</sup> and has a nondiscretionary duty to consider whether GHGs 'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare'.<sup>56</sup> If the EPA were to make such a determination, it would then be under a mandatory duty to regulate emissions of GHGs from mobile sources—principally automobiles and trucks—under section 202 of the Act unless 'it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do'.<sup>57</sup>

The EPA has since promulgated several important regulations requiring improvements in vehicle fuel efficiency that will substantially reduce emissions from automobiles and light-duty trucks.<sup>58</sup> In August 2015, the Agency adopted its Clean Power Plan, which will reduce emissions from electric power plants by thirty-two per cent over 2005 levels by 2030.<sup>59</sup> The President also promulgated his comprehensive Climate Action Plan,<sup>60</sup> including both state-level and voluntary initiatives. Moreover, the United States has

<sup>51</sup> 549 U.S. 497 (2007).

<sup>52</sup> 42 U.S.C. § 7521.

<sup>53</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (8 September 2003) (denial of petition for rulemaking).

<sup>54</sup> *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), rev'd, 549 U.S. 497 (2007).

<sup>55</sup> 549 U.S. at 528–33.

<sup>56</sup> *Ibid.*, at 533–35; see also 42 U.S.C. §7521(a)(1).

<sup>57</sup> *Massachusetts v. EPA*, supra note 51, 549 U.S. at 533.

<sup>58</sup> See generally, Wirth, supra note 24, at 537-38.

<sup>59</sup> Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015), codified in 40 C.F.R. pt.

60. See Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants (3 Aug 2015), <<https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards>>.

<sup>60</sup> Exec. Office of the President, The President's Climate Action Plan (2013) (hereinafter Climate Action Plan), <<http://perma.cc/2DTH-LL89>>. See also The White House, President Obama's Climate Action Plan: Progress Report (2014), <<http://perma.cc/7AGC-HUL6>>.

already reduced its greenhouse gas emissions by nine per cent compared to 2005 levels.<sup>61</sup> [page 165]

The Clean Power Plan has been challenged in a proceeding for judicial review, and the Supreme Court has issued a stay of the rule in the judicial proceedings.<sup>62</sup> Nonetheless, the EPA's previous greenhouse gas regulations have fared well in the Supreme Court, which has so far tended to look favourably on its statutory authority to regulate power plants, in particular. In *American Electric Power Co. v. Connecticut*,<sup>63</sup> the Court concluded that the Clean Air Act generally, and section 111 in particular,<sup>64</sup> which is the statutory authority for the Clean Power Plan, displaces the federal common law of nuisance.

In reaching that conclusion, the Court opined that 'the [Clean Air] Act "speaks directly" to emissions of carbon dioxide from defendants' [power] plants'.<sup>65</sup> Subsequently, in *Utility Air Regulatory Group v. EPA*,<sup>66</sup> the Court reaffirmed that 'The authorization to which we referred was that given in [section 111 of the Clean Air Act], a part of the Act not at issue here and one that no party in *American Electric Power* argued was ill suited to accommodating greenhouse gases'.<sup>67</sup> Consequently, even if portions of the specific regulatory structure of the Clean Power Plan are set aside, there is still every reason to believe that the EPA has the authority to regulate greenhouse gases from power plants.<sup>68</sup>

The legal authority for each of these actions, as well as additional legislative authorization, is enumerated in the US INDC. The Executive Branch has not released its analysis underlying the quantitative economy-wide reductions identified in the INDC, and there is some disagreement about whether they can be met. The World Resources Institute nonetheless has found that existing domestic authority is already sufficient to reach the 26-28 per cent target.<sup>69</sup> That goal is attainable through an amalgam of federal programs already in place (such as vehicle fuel-efficiency standards and the power-plant rules), proposals awaiting finalization (such as controls on methane [page 166] emissions from oil and gas operations), state-level actions either underway or actively contemplated, and existing federal legal authority that has yet to be tapped.

<sup>61</sup> The US INDC references EPA's 1990-2013 Greenhouse Gas Inventory Report, see <<http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html#about>>, which documents a nine per cent reduction in 2013 by reference to 2005. The INDC itself states that '[t]he United States has already undertaken substantial policy to reduce its emissions, taking the necessary steps to place us on a path to achieve the 2020 target of reducing emissions in the range of 17 percent below the 2005 level in 2020,' a pledge dating from 2009.

<sup>62</sup> *West Virginia v. EPA*, No. 15A773, 84 U.S.L.W. 3439 (U.S. Feb. 9, 2016).

<sup>63</sup> 131 S. Ct. 2527 (2011).

<sup>64</sup> 42 U.S.C. § 7411.

<sup>65</sup> *American Electric Power*, supra note 63, 131 S. Ct. at 2537.

<sup>66</sup> 134 S. Ct. 2427 (2014).

<sup>67</sup> *Ibid.*, at 2441 n.5.

<sup>68</sup> In an analogous manner, the Supreme Court set aside major rules on mercury emissions from power plants because of the manner in which the statutory mandate was implemented, *Michigan v. EPA*, 135 S. Ct. 2699 (2015), without creating apparent controversy over US capacity to implement the Minamata Convention, supra note 29.

<sup>69</sup> Karl Hausker, et al., 'Delivering on the U.S. Climate Commitment: A 10-Point Plan Toward a Low-Carbon Future' (Washington, DC: World Resources Institute Working Paper June 2015), <[http://www.wri.org/sites/default/files/WRI15\\_WorkingPaper\\_post-2020\\_0.pdf](http://www.wri.org/sites/default/files/WRI15_WorkingPaper_post-2020_0.pdf)>.

## 4. The Paris Agreement as an Executive Agreement

This complicated web of legal considerations and political factors readily explains both the last-minute fiasco precipitated by the United States over article 4(4) of the Paris Agreement and the perhaps more significant motivation to refrain from offering an INDC with binding, economy-wide emission-reduction targets.

### 4.1. Article 4(4) of the Paris Agreement

While there appears to be no publicly available document setting out behind the US delegation's serious concerns over the precise wording of article 4 (4) of the Paris Agreement, even a cursory glance at the text of that provision with a knowledgeable eye explains the underlying dynamics at play. As proposed by the President of the Paris COP in his final draft, the text read as follows: 'Developed country Parties shall continue taking the lead by undertaking economy-wide absolute emission reduction targets.' After resolution of the disputed language, the mandatory 'shall' was replaced by the hortatory 'should.'

The text directly addresses the hot-button issue of quantified economy-wide emission reductions of the Kyoto variety that had proven so politically controversial in the United States. From a legal point of view, such commitments can be difficult to implement using existing domestic legal authority. The US INDC in effect aggregates sector-specific interventions expressly authorized by federal legislation in such areas as vehicle fuel efficiency and power plant emissions. There is no obvious legal authority for implementing a particular quantified Kyoto-style reduction target across all sectors, some of which may fall within the reserved powers of subnational units, such as the several states.

Lacking specific federal legislation creating such authority, the Executive Branch in its INDC had undertaken something of a 'work around', relying instead on the authority of sector-focused existing legislation. Further reductions beyond the targets stated in the US INDC available through the exercise of that authority could be limited, especially to the extent that the United States' numerical contribution to the Paris Outcome represents something approaching the maximum effort available through the deployment of existing [page 167] authority.<sup>70</sup> A binding, forward-looking promise that the United States will 'continue' to take the lead, in this interpretation, might lack present domestic legal authority.

There is some—and perhaps considerable—room to argue whether this is an excessively cautious legal interpretation of the first sentence of article 4(4) of the Paris Agreement. At least as interpreted by the United States, 'economy-wide absolute emission reduction targets' are not necessarily internationally legally binding. Moreover, 'undertake' in English, the language in which the precise phrasing was

<sup>70</sup> The extent to which the US contribution is achievable is, not surprisingly, subject to some debate. Compare Hausker, et al., *supra* note 68, with C2ES, 'Achieving the United States Intended Nationally Determined Contribution' (Arlington, Virginia: June 2015) (identifying 'remaining gap that needs to be filled' beyond existing authority), <<http://www.c2es.org/docUploads/achieving-us-indc.pdf>>.

contested, has an ambiguous meaning in this context<sup>71</sup> and does not necessarily indicate an intention to be bound. In any event, there is no prohibition on the United States' agreeing in an executive agreement to enter into a subsequent binding commitment.<sup>72</sup>

#### ***4.2. An Executive Agreement with Binding Emission-Reduction Obligations***

The more interesting question, susceptible of analogous analytical treatment, is the extent to which the US INDC submitted in advance of the Paris negotiations could have been concluded as an internationally legally binding commitment instead of as a non-binding, aspirational statement of political purpose.

The Paris Agreement, as discussed above, relies for its domestic implementation in the United States on existing legal authority. These include the 'procedural' requirements for data collection and exchange, periodic reporting, technology transfer, and scientific cooperation already included in the Convention, which received Senate advice and consent to ratification in 1992.<sup>73</sup> The President arguably has the capacity independently to perform all [page 168] these functions both as Chief Executive and in carrying out the foreign affairs function.<sup>74</sup> Indeed, Secretary Kerry impliedly relied on exactly this theory in stating on the day of the Paris Agreement's conclusion that 'this [agreement] doesn't need to be approved by the Congress because it doesn't have mandatory targets for reduction, and it doesn't have an enforcement-compliance mechanism'.<sup>75</sup>

This statement clearly implies that an international agreement—presumably an executive agreement—containing mandatory targets *would* require Senate submission, a question which is eminently susceptible of legal analysis. As described above, the Paris Agreement was consciously structured to avoid the fraught term 'protocol', with all its domestic legal and political baggage in the United States. Hence, there is no a priori necessity to think that the instrument would need to be submitted to the US Senate for its advice and consent to ratification.

The architecture of the Paris Agreement was also expressly constructed by all participating states to assure full participation by developing countries, thus satisfying the requirements of the Byrd-Hagel resolution, which is not binding in domestic law in any event. Most importantly, the economy-wide emission-reduction targets identified in the US INDC rest on an independent statutory foundation that does not require

<sup>71</sup> See Merriam Webster Online Dictionary and Thesaurus, <<http://www.merriam-webster.com/dictionary/undertake>> (defining 'undertake' as meaning 'to begin or attempt (something); to agree or promise to do (something)').

<sup>72</sup> Cf. Memorandum of Intent Between the Government of the United States of America and the Government of Canada Concerning Transboundary Air Pollution, U.S.-Can., 5 August 1980, 32 U.S.T. 2521 (agreeing 'to develop a [subsequent] bilateral agreement...[and] to facilitate the conclusion of such an agreement as soon as possible.')

<sup>73</sup> See text accompanying notes 40-46 *supra*.

<sup>74</sup> See text accompanying note 23 *supra*.

<sup>75</sup> Interview with Chris Wallace, Fox News (12 December 2015), transcript <<http://www.state.gov/secretary/remarks/2015/12/250595.htm>>.

Congressional approval in the form of Senate advice and consent to ratification or otherwise.

These questions are not mere semantic hair-splitting, but have practical, real-world consequences. The United States under the Obama Administration has engaged in many multilateral efforts from a domestic legal point of view as non-binding statements of purpose.<sup>76</sup> These include not just the economy-wide emission-reduction targets in the UN-sponsored climate negotiations, but also the Joint Comprehensive Plan of Action on nuclear issues with Iran.<sup>77</sup> The reason usually given is to protect a presumably intricate, delicately balanced multilateral deal from unilateral meddling by what is assumed to be a recalcitrant Senate.<sup>78</sup> [page 169]

This strategy comes with a potentially high price: the explicit option of summary abandonment or relaxation of the United States' economy-wide target after the end of the Obama Presidency. The US INDC purports to state the intention of the United States to reduce its emissions through 2025. As a matter of both domestic and international law, however, that is only a non-binding statement of political purpose by an Administration that will leave office in January 2017. A new President, perhaps of a different political party, need only say 'I changed my mind' to negate the internationally non-binding assurances made to the other parties to the Paris negotiations, nearly 200 in number -- and in a manner entirely consistent with international law.

Part of the calculation may well have been that, by refraining from exacerbating relations with a recalcitrant Congress, the President would be better positioned to obtain authorization for the funding goals of the Paris Agreement in return.<sup>79</sup> If so, that strategy seems to have backfired, as proposed resolutions introduced in the Congress expressly tie funding to submission of the Paris Agreement to the Senate for its advice and consent to ratification.<sup>80</sup>

Under the Paris Agreement as adopted all NDCs have the same international legal character and are not binding as to result. There is consequently no distinction among NDCs in international law, including that of the EU originally offered as a binding

<sup>76</sup> See David Kaye, 'Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate,' 92(5) *Foreign Affairs*, at 113 (September-October 2013).

<sup>77</sup> Joint Comprehensive Plan of Action (Jul. 14, 2015), <<http://www.state.gov/documents/organization/245317.pdf>>.

<sup>78</sup> Undertakings that are not binding under international law are not 'treaties' within the meaning of Article II, Section 2 of the Constitution and hence have not been subject to Senate advice and consent. See, e.g., Michael D. Ramsey, 'Executive Agreements and the (Non)treaty Power', 77(1) *North Carolina Journal of Law* 133, at 188 (1998). Similarly, nonbinding undertakings are not subject to judicial review. Cf. generally Duncan B. Hollis and Joshua J. Newcomer, *supra* note 50.

<sup>79</sup> Paris Agreement, *supra* note 8, art. 9; Dec. -/CP.21, *supra* note 3, paras. 54 and 115 (identifying collective funding goal from developed countries of US\$100 billion per year).

<sup>80</sup> E.g., H. Con. Res. .97, 114<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2015) (draft resolution 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 (COP-21), and Congress should refuse to consider any budget resolutions and appropriations language that include funding for the Green Climate Fund until COP-21 emissions commitments are submitted to the Senate. '); S. Con. Res. 25, 114<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2015)(same); S. Res. 329, 114<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2015).



commitment. The United States and other countries adopting similar positions consequently prevailed on this issue of legal form, but as applied to the US one cannot help but question at what cost in terms of the longevity of that pledge. President Obama has repeatedly stated that he intends to use his executive authority to its maximum extent, presumably so as to cement his legacy as a leader on climate change as in other fields. But in practice the precise contours of actions taken by his Administration on his behalf may well have been tempered by an excess of caution, unnecessarily accepting the allure of an apparently cost-free Senate-proof strategy at the price of long-term durability.