

# BACKGROUND

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## Obama's Plan to Avoid Senate Review of the Paris Protocol

Steven Groves

### Abstract

*The Paris Protocol climate change agreement—to be negotiated between November 30 and December 11, 2015—should be submitted to the Senate for its advice and consent. President Obama seems poised to circumvent Congress and prevent the Senate from having any input on the agreement. That is alarming behavior on the President's part, since international commitments made by the executive branch often have significant domestic implications. Such a circumvention, if undertaken by the Administration, would evince an unprecedented level of executive unilateralism, and should be opposed by Congress by any and all means.*

The Obama Administration is planning an end run around the U.S. Senate in regard to a major international climate change agreement—the Paris Protocol—that will be negotiated between November 30 and December 11 at the 21st annual session of the Conference of Parties (COP 21) of the United Nations Framework Convention on Climate Change (UNFCCC). The Administration's plans to avoid Senate scrutiny of the protocol should come as no surprise. During a March 31, 2015, press briefing, White House spokesman Josh Earnest was asked whether Congress has the right to approve the protocol:

[Reporter]: ...Is this the kind of agreement that Congress should have the ability to sign off on?

[Earnest]: ...I think it's hard to take seriously from some Members of Congress who deny the fact that climate change exists, that they should have some opportunity to render judgment about a climate change agreement.<sup>1</sup>

### KEY POINTS

- The Obama Administration is planning an end run around the U.S. Senate regarding a major international climate change agreement—the Paris Protocol—that will be negotiated between November 30 and December 11, 2015.
- The White House believes that no legislator who questions the Administration's climate change policies is competent to review such an agreement. That is an alarming view of the constitutional role of the Senate and the treaty-making process.
- The Administration should reverse its plan to act unilaterally in Paris, and should submit any agreement negotiated there to the Senate for advice and consent. To do otherwise would be to violate a commitment made by the executive branch to the Senate in 1992.
- If the Administration sticks to its scheme to avoid scrutiny of the Paris Protocol, Congress should withhold all funds to implement any aspect of the protocol, especially the billions of dollars to developing countries for adaptation purposes.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3055>

The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | heritage.org

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The host of the upcoming conference in Paris, French foreign minister Laurent Fabius, agrees with Earnest that congressional scrutiny must be avoided. Addressing a group of African delegates at the June climate change conference in Bonn, Germany, Fabius expressed his desire to bypass Congress on the Paris Protocol: “We must find a formula which is valuable for everybody and valuable for the U.S. without going to Congress.... Whether we like it or not, if it comes to the Congress, they will refuse.”<sup>2</sup>

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

The Obama Administration should reverse course on its plan to act unilaterally in Paris, and should submit any agreement reached there to the Senate for advice and consent. To do otherwise would be to violate a commitment made by the executive branch in 1992 in connection with ratification of the UNFCCC. The President’s plans also violate internal State Department regulations concerning the legal form of international agreements.

If the Administration sticks to its scheme to avoid scrutiny of the Paris Protocol, Congress should withhold any appropriations to implement any aspect of the protocol and block the billions of dollars to be distributed to developing countries for climate change adaptation purposes. The Senate should also pass a resolution criticizing the Obama Administration’s ploy to circumnavigate the Senate in violation of previous commitments.

### **What Will the Obama Administration Do in Paris?**

It has been widely reported that the Obama Administration intends to negotiate an agreement

in Paris that, in its view, will require neither the advice and consent of the Senate as a treaty nor approval by both houses of Congress as a congressional-executive agreement. In August 2014 *The New York Times* reported that the Administration plans to negotiate a “hybrid” agreement in Paris geared toward “naming and shaming” countries that fail to cut their emissions:

American negotiators are instead homing in on a hybrid agreement—a proposal to blend legally binding conditions from [the UNFCCC] with new voluntary pledges. The mix would create a deal that would update the treaty, and thus, negotiators say, not require a new vote of ratification.

Countries would be legally required to enact domestic climate change policies—but would voluntarily pledge to specific levels of emissions cuts and to channel money to poor countries to help them adapt to climate change. Countries might then be legally obligated to report their progress toward meeting those pledges at meetings held to identify those nations that did not meet their cuts.<sup>3</sup>

This “hybrid” approach was confirmed in October 2014 by the Administration’s Special Envoy for Climate Change, Todd Stern, in a speech at Yale University:

Finally, let’s talk about the legal form of the Paris agreement. 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. We think the most interesting proposal on the table is New Zealand’s, under which there 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.

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1. “Earnest: House GOP Climate Deniers Not the Right People to Vote on Emissions Deal,” Grabien, undated, [https://grabien.com/story.php?id=25399&utm\\_source=cliplist20150401&utm\\_medium=email&utm\\_campaign=cliplist&utm\\_content=story25399](https://grabien.com/story.php?id=25399&utm_source=cliplist20150401&utm_medium=email&utm_campaign=cliplist&utm_content=story25399) (accessed August 6, 2015).

2. “Climate Deal Must Avoid US Congress Approval, French Minister Says,” *The Guardian*, June 1, 2015, <http://www.theguardian.com/world/2015/jun/01/un-climate-talks-deal-us-congress> (accessed August 6, 2015).

3. Coral Davenport, “Obama Pursuing Climate Accord in Lieu of Treaty,” *The New York Times*, August 26, 2014, [http://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html?\\_r=0](http://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html?_r=0) (accessed August 6, 2015).

But the content of the schedule itself would not be legally binding at an international level.<sup>4</sup>

The “interesting proposal” referenced by Stern is a March 2014 submission made by New Zealand to the Ad Hoc Working Group on the Durban Platform for Enhanced Action.<sup>5</sup> In that submission, New Zealand suggested that the Paris agreement will likely be a “package...made up of a concise, legally binding agreement supported by COP decisions, and a national schedule for each Party.” Further, “[e]ach schedule will be supplementary to the legally binding agreement and will detail the Party’s nationally determined commitment” which would “sit in national schedules supplementary to, and outside the legally binding agreement.”<sup>6</sup>

Stern made it clear that, in harmony with New Zealand’s proposal, U.S. commitments for emissions reductions (mitigation) made in Paris would not be legally binding: “Some are sure to disapprove of the New Zealand idea, since the mitigation commitment itself is not legally binding, but we would counsel against that kind of orthodoxy.”<sup>7</sup>

So as it stands, the Obama Administration is contemplating that a “hybrid” agreement will emerge from Paris where the central element—the commitment to mitigate greenhouse gas (GHG) emissions—would be only *politically* binding on the United States, while other elements—such as provisions on measurement, reporting, and verification (MRV)—would be *legally* binding. The mitigation targets and timetables would be appended to the legally binding agreement as a “schedule” or an “information document” (INF).<sup>8</sup>

## Will the President Submit the Paris Protocol to the Senate?

Statements made by Todd Stern after his Yale

speech indicate that the Administration is at least contemplating sending some, but not all, of the Paris Protocol to the Senate. During a December 2014 press conference Stern was asked whether the agreement would need to be submitted to the Senate, to which he circularly replied, “We will submit any kind of agreement that requires that kind of submission” and, thus, it “will depend entirely on how the agreement is written.”<sup>9</sup>

The likelihood, however, is that the Administration will treat the legally binding provisions of the Paris Protocol as a “sole executive agreement” not requiring Senate approval. In doing so, the Administration will cite the fact that the U.S. is already party to the UNFCCC, which requires the U.S. to implement a national program to address climate change and to submit reports on its emissions to the COP; it also authorizes the COP to assess U.S. implementation of its commitments. The Administration will likely assert that the legally binding parts of the Paris Protocol merely reflect existing UNFCCC commitments and therefore those provisions of the protocol need not be “re-approved” by the Senate. As suggested by one commentator:

The President would be on relatively firm legal ground accepting a new climate agreement with legal force, without submitting it to the Senate or Congress for approval, to the extent it is procedurally oriented, could be implemented on the basis of existing law, and is aimed at implementing or elaborating the UNFCCC....

If the Paris climate change agreement solely elaborated [UNFCCC] requirements—for example, by establishing a process for parties to submit their national mitigation and adaptation measures,

4. Todd D. Stern, “Seizing the Opportunity for Progress on Climate,” U.S. Department of State, October 14, 2014, <http://www.state.gov/s/climate/releases/2014/232962.htm> (accessed August 6, 2015).

5. UNFCCC, “New Zealand: Submission to the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work Stream 1,” March 2014, [http://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp2-4\\_submission\\_by\\_new\\_zealand\\_submission\\_20140312.pdf](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp2-4_submission_by_new_zealand_submission_20140312.pdf) (accessed August 6, 2015).

6. UNFCCC, “New Zealand,” ¶¶ 5, 9.

7. *Ibid.*

8. IDDDRI, “A Comprehensive Assessment of Options for the Legal Form of the Paris Climate Agreement,” *Working Paper*, November 2014, p. 12, [http://www.idddri.org/Publications/Collections/Idees-pour-le-debat/WP1514\\_SMD%20MW%20TS\\_legal%20form%202015.pdf](http://www.idddri.org/Publications/Collections/Idees-pour-le-debat/WP1514_SMD%20MW%20TS_legal%20form%202015.pdf) (accessed August 17, 2015).

9. Ronald Bailey, “Obama’s Possible Paris Climate Agreement End Run Around the Senate,” *Reason*, December 10, 2014, <http://reason.com/archives/2014/12/10/obamas-possible-paris-climate-agreement#.n5cntf:8Hen> (accessed August 6, 2015).

report on implementation, and accept international review—then arguably this new agreement could be concluded by the president acting alone.<sup>10</sup>

It is therefore entirely plausible that the Obama Administration will not submit even the legally binding parts of the Paris Protocol to the Senate for its advice and consent. That is likely the Administration's intention, given the fact that any climate change agreement submitted to the Senate would face significant, perhaps insurmountable, opposition.

The Administration will also likely claim that the Paris Protocol requires no Senate approval because the executive branch possesses the statutory authority necessary to enforce new international commitments through domestic regulations. It may cite in support the fact that in 1979, the Carter Administration negotiated and signed the Convention on Long-Range Transboundary Air Pollution (LRTAP) as a sole executive agreement, and based its authority to do so on compliance with the Clean Air Act of 1963. Congress neither authorized the LRTAP negotiations, nor was the agreement submitted to the Senate as a treaty or to Congress as a congressional-executive agreement.<sup>11</sup>

The Obama Administration may follow the LRTAP precedent in regard to the Paris Protocol. The Administration could then use existing statutory and regulatory provisions to enforce its international commitments domestically. The Administration has already made clear its intention to do so. Specifically, on March 31, 2015, it submitted an “intended nationally determined contribution” (INDC) to the UNFCCC.<sup>12</sup> The INDC submission identified the Clean Air Act, the Energy Policy Act, the Energy Independence and Security Act, and regulations (existing and proposed) thereunder as the provisions relevant to implementation of the U.S. mitigation commitment under the protocol.<sup>13</sup>

In sum, based on statements from White House climate negotiators and on the Obama Administration's INDC submission, it is more likely than not that the Administration intends to bypass the Senate entirely regarding the Paris Protocol.

### **White House Breach of Prior UNFCCC Promise**

Whatever the Obama Administration's intentions, any agreement reached in Paris that commits the United States to specific emissions targets or timetables should be submitted to the Senate for its advice and consent. This should be done regardless of whether the commitments are made in a binding treaty document or in a non-binding “schedule” to a treaty document. That was the commitment of the executive branch when it sought Senate consent to ratification of the UNFCCC in 1992.

The UNFCCC was negotiated, signed, and ratified by the U.S. in 1992 during the Administration of President George H. W. Bush. By ratifying the convention, the United States agreed to be legally bound by its provisions. However, while the UNFCCC requires the U.S. to “adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases,”<sup>14</sup> it did not require the U.S. to commit to specific emissions targets or timetables.

The ratification history of the UNFCCC indicates that the Senate intended any future agreement negotiated under the auspices of the convention that adopted emissions targets and timetables would be submitted to the Senate.<sup>15</sup> Specifically, during the hearing process before the Senate Foreign Relations Committee regarding ratification of the UNFCCC, the Bush Administration pledged to submit future protocols negotiated under the convention to the Senate for its advice and consent. In response to

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10. Daniel Bodansky, “Legal Options for U.S. Acceptance of a New Climate Change Agreement,” Center for Climate and Energy Solutions, May 2015, pp. v and 16, <http://www.c2es.org/docUploads/legal-options-us-acceptance-new-climate-change-agreement.pdf> (accessed August 17, 2015).
  11. Nigel Purvis, “The Case for Climate Protection Authority,” *Virginia Journal of International Law*, Vol. 50 (2009), p. 1043.
  12. News release, “Fact Sheet: U.S. Reports its 2025 Emissions Target to the UNFCCC,” The White House, March 31, 2015, <https://www.whitehouse.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc> (accessed August 6, 2015).
  13. UNFCCC, “Party: United States of America—Intended Nationally Determined Contribution,” March 31, 2015, <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> (accessed August 17, 2015).
  14. UNFCCC, Art. 4.2(a).
  15. See Emily C. Barbour, “International Agreements on Climate Change: Selected Legal Questions,” Congressional Research Service, April 12, 2010, pp. 7–8, <http://fpc.state.gov/documents/organization/142749.pdf> (accessed August 6, 2015).

written questions from the committee, the Administration responded as follows:

Question. Will protocols to the convention be submitted to the Senate for its advice and consent?

Answer. We would expect that protocols would be submitted to the Senate for its advice and consent; however, given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter.

Question. Would a protocol containing targets and timetables be submitted to the Senate?

Answer. If such a protocol were negotiated and adopted, and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate.<sup>16</sup>

When the Foreign Relations Committee reported the UNFCCC out of committee, it memorialized the executive branch's commitment: "[A] decision by the Conference of the Parties [to the UNFCCC] to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement."<sup>17</sup>

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

The fact is that the Paris Protocol contemplated by the Obama Administration—as described in its

own public statements and indicated by its endorsement of the New Zealand proposal—falls within the parameters of the commitments made by the Bush Administration to the Senate in 1992. A "hybrid" agreement composed of both binding provisions (such as measurement, reporting, and verification requirements) as well as non-binding mitigation targets and timetables still qualifies as a "protocol containing targets and timetables."

As such, the Administration's intentions should be seen for what they are—an attempt to skirt prior commitments made to the Senate by cobbling together a "hybrid" agreement of dubious legitimacy.

### **Is the Administration Violating State Department Regulations?**

The Obama Administration's disregard for the agreements made in 1992 between the Senate and the executive branch flies not only in the face of intra-governmental comity, but also violates internal regulations adopted by the State Department, known as the Circular 175 Procedure (C-175).<sup>18</sup>

C-175 establishes, *inter alia*, eight factors for determining whether an international agreement should be negotiated as a treaty (and therefore approved by the Senate through the standard Article II process) or as an "international agreement other than a treaty" (such as an executive agreement):

- (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- (2) Whether the agreement is intended to affect state laws;
- (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- (4) Past U.S. practice as to similar agreements;
- (5) The preference of the Congress as to a particular type of agreement;
- (6) The degree of formality desired for an agreement;
- (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- (8) The general international practice as to similar agreements.<sup>19</sup>

16. Hearing, *U.N. Framework Convention on Climate Change (Treaty Doc. 102-38)*, Committee on Foreign Relations, U.S. Senate, 102nd Cong., 2nd Sess., September 18, 1992, pp. 105-106.

17. S. Exec. Rept. 102-55, 102d Cong., 2d Sess., 1992, p. 14.

18. U.S. Department of State, *Foreign Affairs Manual*, Vol. 11 (2006), Section 720, et seq., <http://www.state.gov/documents/organization/88317.pdf> (accessed August 17, 2015).

19. *Ibid.*, Section 723.3.



Even a cursory review of those factors compels the conclusion that the Obama Administration should treat the Paris Protocol as an Article II treaty and submit it to the Senate for advice and consent:

- **Commitments affecting the nation.** The agreement certainly “involves commitments or risks affecting the U.S. as a whole.” The Administration has made clear that it intends to fulfill its mitigation commitments under the Paris Protocol by enforcing emissions standards through existing and new regulations on vehicles, buildings, power plants, and landfills.<sup>20</sup> These are multi-sectoral, comprehensive, nationwide commitments that have no geographic limitation. The commitments made in the Paris Protocol will affect the entire nation, and therefore the protocol should be treated as a treaty.
- **Subsequent congressional legislation.** As contemplated, the Paris Protocol would include major financial commitments by the United States to assist developing countries in adapting to climate change. The committed amount is likely to be many billions of dollars—funds that must be authorized and appropriated by Congress. Since key provisions of the Paris Protocol cannot be given effect without the enactment of legislation, the protocol should be treated as a treaty.
- **Past U.S. practice.** Major international environmental agreements are usually concluded as treaties and submitted to the Senate.<sup>21</sup> Past environmental agreements treated in this manner include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1973 International Convention for the Prevention of Pollution from Ships, the 1985 Vienna Convention for the Protection of the Ozone Layer (and the 1987 Montreal Protocol

thereto), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1991 Protocol on Environmental Protection to the Antarctic Treaty, and the 1994 U.N. Convention to Combat Desertification.

Regarding climate change, the UNFCCC was submitted to the Senate by the first Bush Administration, and the Kyoto Protocol was treated as a treaty and would have been submitted to the Senate had the Senate not already rejected it out of hand in the Byrd–Hagel Resolution by a vote of 95 to 0.<sup>22</sup> Since past U.S. practice has been to submit major international environmental agreements to the Senate, the protocol should be treated as a treaty.

- **Preference of Congress as to legal form of agreement.** Gauging congressional preference as to the legal form of an international climate change agreement is difficult, but to date no one in Congress has advocated that the Paris Protocol be negotiated as an executive agreement and that Congress be bypassed. By contrast, according to a Bloomberg report, Senate Republicans are “nearly unanimous in arguing that U.S. participation in a global climate deal should be subject to advice and consent in the Senate.”<sup>23</sup>

Several prominent Senate Republicans have made clear that they object to the White House’s planned end run. Senator John McCain (R-AZ) stated, “All treaties and agreements of that nature are obviously the purview of the United States Senate, according to the Constitution.” Senator McCain added that “the President may try to get around that...but I believe clearly [that the] constitutional role, particularly of the Senate, should be adhered to.” Chairman of the Senate Republican

20. UNFCCC, “Party: United States of America—Intended Nationally Determined Contribution.”

21. “Yet studies demonstrate that...the president and Congress have *tended* to favor the treaty form when international agreements relate to...the environment and natural resources.” Purvis, “The Case for Climate Protection Authority,” p. 1034.

22. S. Res. 98, A Resolution Expressing the Sense of the Senate Regarding the Conditions for the United States Becoming a Signatory to any International Agreement on Greenhouse Gas Emissions Under the United Nations Framework Convention on Climate Change,” July 25, 1997, Congress.gov, <https://www.congress.gov/bill/105th-congress/senate-resolution/98> (accessed August 6, 2015).

23. Dean Scott and Anthony Adragna, “Senate Republicans Mull Options for Review of the U.S. Participation in Paris Climate Talks,” Bloomberg BNA, May 19, 2015, <http://www.bna.com/senate-republicans-mull-n17179926673/> (accessed August 6, 2015).

Conference John Thune (R–SD) stated that any deal that commits the U.S. to cut GHG emissions “needs to be reviewed, scrutinized and looked at and I think Congress has a role to play in that.”<sup>24</sup>

Given widespread opposition to proposed Environmental Protection Agency regulations to reduce GHG emissions<sup>25</sup> upon which the Obama Administration is basing its international mitigation commitments, Senate Majority Leader Mitch McConnell (R–KY) issued a warning to the other nations negotiating the Paris Protocol: “[O]ur international partners should proceed with caution before entering into a binding, unattainable deal.”<sup>26</sup>

- **Degree of formality.** Whatever else it is, the Paris Protocol, as contemplated, is not an “informal” international agreement. The current draft of the negotiating text, with all its options and counter-options, is nearly 100 pages long, in small text.<sup>27</sup> The draft agreement covers a wide range of topics, including mitigation, adaptation, finance, technology transfer, capacity-building, transparency, implementation, compliance, and other matters. It is, by any measure, a “formal” agreement, and should therefore be treated as a treaty.
- **Duration.** The proposed duration of the Paris Protocol is subject to negotiation, but it is likely to contain a commitment period that ends in 2025 or 2030. However, it is contemplated that more stringent standards will be negotiated in the years ahead by amending the protocol’s mitigation commitment schedules. There is clearly no need for “prompt conclusion” of the protocol

(having been negotiated over several years’ time) and there is no desire to conclude it as a “routine or short-term agreement.” Since the duration of the protocol is effectively open-ended, and the protocol is not a “routine” or “short-term” agreement, it should be treated as a treaty.

In sum, at least five of the eight C-175 factors lean in favor of treating the Paris Protocol as a treaty that must be submitted to the Senate for advice and consent. While the C-175 factors need not be cleaved without discretion,<sup>28</sup> they represent an effort to harmonize the U.S. government’s approach to making international agreements, and must be given “due consideration.”<sup>29</sup> That the Obama Administration apparently disregarded them entirely is indicative of its intention to bypass the Senate.

### Countering President Obama’s End Run

The only conclusion that may fairly be drawn from the Obama Administration’s actions is that it intends to avoid Senate review of the Paris Protocol for a simple reason—the protocol would not receive the Senate’s consent for ratification. The protocol would likewise not receive majority support in the House and Senate if the Administration submitted it to Congress as a congressional-executive agreement.

Problematically for the Obama Administration, the first Bush Administration specifically committed to submit any agreement along the lines of the Paris Protocol to the Senate. The Bush Administration pledged that any future protocol “containing targets and timetables” would be sent to the Senate for its advice and consent.<sup>30</sup> The Obama Administra-

24. Ibid.

25. Nicolas Loris, “The Many Problems of the EPA’s Clean Power Plan and Climate Regulations: A Primer,” Heritage Foundation *Backgrounder* No. 3025, July 7, 2015, <http://www.heritage.org/research/reports/2015/07/the-many-problems-of-the-epas-clean-power-plan-and-climate-regulations-a-primer> (accessed August 17, 2015). The President’s Clean Power Plan is in addition to regulations concerning new power plants, light and heavy-duty vehicles, airplanes, and methane emissions from hydrocarbon development.

26. Coral Davenport, “Obama’s Strategy on Climate Change, Part of Global Deal, Is Revealed,” *The New York Times*, March 31, 2015, <http://www.nytimes.com/2015/04/01/us/obama-to-offer-major-blueprint-on-climate-change.html> (accessed August 6, 2015).

27. UNFCCC, “Ad Hoc Working Group on the Durban Platform for Enhanced Action: Work of the Contact Group on Item 3, Negotiating Text,” February 12, 2015, [https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf) (accessed August 6, 2015).

28. According to one commentator, the eight factors listed in C-175 are “merely indicators of conformity with historical practice and guideposts for avoiding political conflict with Congress” and are not considered legally binding on the executive branch. Purvis, “Climate Protection Authority,” p. 1032.

29. C-175, 11 FAM 723.3.

30. Hearing, *U.N. Framework Convention on Climate Change (Treaty Doc. 102-38)*.

tion's plan violates both the letter and spirit of its predecessor's commitment to the Senate. In response to that violation of trust, the Senate should:

- **Demand that the Paris Protocol be submitted to the Senate.** In the spirit of the 1997 Byrd-Hagel Resolution, the Senate should express its sense that the Obama Administration is purposefully renegeing on its predecessor's commitment to submit protocols "containing targets and timetables" to the Senate for its advice and consent. The Paris Protocol, however it is configured during COP 21, will include emissions targets and timetables, even if they are part of a non-binding "schedule." The Administration's machinations to avoid Senate approval should be noted and denounced in the Senate resolution.
- **Block funding for the Paris Protocol.** An illegitimate Paris Protocol should not be legitimated by subsequent congressional action. One step that Congress can take is to refuse to authorize any funds to implement the protocol, including the billions of American taxpayer dollars in adaptation funding to which the U.S. will commit itself. The Obama Administration has successfully received at least \$7.5 billion in U.S. taxpayer dollars from Congress to fulfill a "nonbinding" international climate change agreement—the 2009 Copenhagen Accord.<sup>31</sup> That "success" should not be repeated in connection with the Paris Protocol. Moreover, if the "developing" countries understand that the U.S. will not transfer billions of dollars to them for adaptation, they will be less likely to support the protocol.
- **Withhold funding for the UNFCCC.** If the Administration bypasses the Senate in contravention of the commitments made by the first Bush Administration in 1992, it goes to prove what mischief can result from ratifying a "framework" convention such as the UNFCCC. The

Administration will likely base its Senate end run on the argument that the UNFCCC authorizes it to do so. As such, the UNFCCC will have become precisely the danger that the Senate sought to prevent in 1992. Defunding the UNFCCC would prevent the U.S. from participating in future conferences, submitting reports, and otherwise engaging in the dubious enterprise.

- **Take prophylactic legislative measures.** In addition to specific legislative efforts to ensure that no adaptation funding committed under the Paris Protocol is authorized, Congress should include language in all legislation regarding the Environmental Protection Agency and related executive agencies and programs that no funds may be expended in connection with the implementation of any commitment made in the protocol.

While Presidents should have a certain amount of discretion to choose the legal form of international agreements they are negotiating, President Obama has placed his desire to achieve an international environmental win above governmental comity and historical U.S. treaty practice. Major environmental treaties that have significant domestic impacts should not be developed and approved by the executive alone. An agreement with far-reaching domestic consequences like the Paris Protocol will lack democratic legitimacy unless the Senate or Congress as a whole, representing the will of the American people, gives its approval.

The White House plan shows contempt for the U.S. treaty process and the role of Congress, particularly the Senate. It is an attempt to achieve through executive fiat that which cannot be achieved through the democratic process. All indications are that the Obama Administration intends to ignore the presidential assurances made to the Senate in 1992, categorize the Paris Protocol as a "sole executive agreement" in order to bypass the Senate, and enforce that protocol through controversial and deeply divi-

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31. According to the White House, the U.S. has "fulfilled our joint developed country commitment from the Copenhagen Accord to provide approximately \$30 billion of climate assistance to developing countries over FY 2010–FY 2012. The United States contributed approximately \$7.5 billion to this effort over the three year period." Executive Office of the President, "The President's Climate Action Plan," June 2013, p. 20, <https://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf> (accessed August 17, 2015).



sive regulations, such as the Clean Power Plan. Such actions, if taken by the Administration, evince an unprecedented level of executive unilateralism, and should be opposed by Congress by any and all means.

—*Steven Groves is Bernard and Barbara Lomas Senior Research Fellow in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.*