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I. Committing the U.S. in a New Way

In the first weeks of December 2015, parties to the UN Framework Convention on Climate Change (FCCC) will meet in Paris to establish a new "protocol," aimed at limiting atmospheric accumulations of gases thought to be driving global warming. The Paris Protocol would replace the Kyoto Protocol, negotiated in 1997 and designed to establish emission limits (principally on carbon dioxide) until the end of 2012.

The United States did ratify the FCCC but never became a party to the Kyoto Protocol. President Clinton signed the new treaty and acknowledged that, like the prior Framework Convention, it would require a two-thirds majority in the Senate to become a binding treaty. When it became obvious that the Senate would not approve the Kyoto treaty, President Clinton declined to submit it for ratification. President Bush subsequently announced that his administration would not be obligated to implement the Kyoto Protocol.

In 2008, environmental advocates hoped for a new approach in a subsequent administration. Worried about the difficulties of securing a two-thirds Senate majority to ratify a new treaty, some environmental advocates urged alternative approaches. A prominent Washington advocacy organization urged an approach modeled on trade negotiations: Let Congress authorize the President to negotiate new environmental agreements, which could then gain the force of law if endorsed by simple majorities in each house.[1] No one seemed to think a new climate treaty could be implemented without any role for Congress.

The new Obama administration did not seek such authority, however. It has taken an active role in international negotiations for a new climate treaty to supersede Kyoto. It has not asked Congress to authorize these negotiations or commit to voting on any resulting agreement under provisions analogous to those used in trade agreements. A Republican Congress has recently authorized trade promotion authority for the President but is most unlikely to authorize the

[1] Nigel Purvis, *Paving the Way for U.S. Climate Leadership, The Case for Executive Agreements and Climate Protection Authority* (Resources for the Future, April 2008)

president to commit the United States to an ambitious international agreement on climate change.

So the Obama administration has suggested that it will endorse the results of the scheduled Paris conference as a set of "commitments," requiring no role at all for Congress. Some parts might be implemented on the president's sole executive authority, some parts implemented through reinterpreting existing statutes or treaties. The remaining elements of the Paris Protocol would then be embraced by the President as a "political commitment." That characterization is supposed to impose moral or strategic obligations on Congress to implement in the future. But the President would not be required to seek any direct congressional authority to commit the United States to the program.[2]

This approach may sound too fanciful to be taken seriously. As a matter of fact, there are precedents for every element of this project. That makes it, in my view, more disturbing. Under the claim of extending a small number of specialized or exceptional precedents, it would establish a new precedent in which the general way we make international agreements would be fundamentally changed – not simply at the margin or on the edges of policy but on the largest and most complex international agreements we undertake.

II. Leaping Beyond Past Precedents

There is no doubt that the President has some authority to make agreements with foreign nations on his own. Certainly, presidents have done so with great frequency since the Nineteenth Century. In most instances, these agreements have no legal effects within the United States and usually have no practical effects within the United States. In a few famous incidents, presidents have signed agreements with foreign governments that did purport to have legal effect within the United States and even to supersede state laws.

When President Roosevelt recognized the Soviet Union in 1937, he simultaneously agreed to take ownership of assets held in American banks that were claimed by the Soviet government (as property of Czarist-era Russian companies, nationalized under Soviet law). A Supreme Court otherwise skeptical of administrative actions unanimously endorsed this agreement and held that it could

[2] Coral Davenport, "Obama Pursuing Climate Accord in Lieu of Treaty," THE NEW YORK TIMES, Aug. 27, 2014. While confiding its strategy to friendly reporters, the administration has not yet issued a formal statement of its plans. Two recent studies analyze legal options on the assumption that this strategy will be implemented: Daniel Bodansky, "Legal Options for U.S. Acceptance of A New Climate Change Agreement," Center for Climate and Energy Solutions, May 2015; David A. Wirth, "The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?" HARVARD INT'l LAW REV (2015)

supersede state law.[3] When President Carter negotiated for the release of American hostages in Iran, he agreed that Iranian government assets would be released – even when claimed by American firms in ongoing contract disputes with the Iranian government. That agreement was also upheld by the Supreme Court.[4]

But in these cases, the presidential agreement was a relatively contained, one-time matter, resolving a particular dispute with an immediate, simultaneous set of transactions. And it could be argued that the president drew on a distinct grant of constitutional power – the power to "receive ambassadors" in Art II, which has been taken to mean the power to decide which governments to recognize, therefore to undertake agreements related to the act of recognition. Or else these agreements drew on the power to settle particular claims disputes (regarding monetary compensation for particular past damage to American rights or holdings), which had long been accepted by Congress (as by enacting subsequent appropriations).

If the President can commit the United States to a vast program of domestic environmental regulation by executive agreement, that would be a vast step beyond these precedents. The implementation will take decades, imposing hundreds of billions of dollars in costs on the American economy. As commander-in-chief, the President may have certain inherent powers to deploy the armed forces to protect Americans or discrete American interests abroad. If the President has inherent powers to commit to vast new environmental policies, he must be supposed to have some inherent constitutional authority to protect the earth's climate.

So even advocates suggest a sole-presidential agreement would have to be limited to procedural commitments – as in reporting to foreign governments or international institutions on U.S. progress in reaching its emission reduction commitments.[5] Beyond that, the President would fall back on existing law, now implemented to satisfy these international commitments.

Advocates point out that this is not unprecedented. The United States promised to implement trans-boundary pollution controls with Canada – without explicit congressional authorization or consent. It also promised, by presidential agreement, to abide by international agreement limiting mercury.[6] In both cases, it is claimed, the agreements were legally binding because the required implementation measures were already authorized – independently – by federal environmental legislation (principally the Clean Air Act). So President Obama – or his successors – could draw on existing legislation to implement global warming reductions. It has been argued, in a somewhat similar way, that Senate consent to

[3] *U.S. v. Belmont*, 301 U.S. 324 (1937)
[4] *Dames & More v. Regan*, 453 U.S. 654 (1981)
[5] Bodansky, "Legal Options" at 16
[6] *Id*. at 14, citing 1991 Air Quality Agreement with Canada and Minamata Convention on Mercury (2013)

the 1992 Framework Convention on Climate Change might be read to imply advance consent to follow-on measures of implementation.[7]

These arguments are not altogether implausible. If executive agencies already have the authority to impose regulations under domestic law, they can continue to do what they might have done anyway, even if they have received some additional motive to do so from a presidential agreement with foreign nations. If international agreements add nothing to existing regulatory powers, they are not very interesting – at least not very relevant to an assessment of executive powers.

But in the background is the tempting argument that statutes should be interpreted to avoid conflict with international law. It is a doctrine that dates back to Chief Justice Marshall[8] and has been invoked by the Supreme Court even in the past decade.[9] But the doctrine has previously been invoked to restrict the scope of American statutes outside the United States (to avoid offending foreign states), not to extend the reach of American statutes domestically (to force American citizens or U.S. companies to implement the aspirations of foreign governments).

Moreover, this doctrine (interpreting statutes to avoid conflict with international law) developed at a time when the status of international law in the U.S. legal system was more unsettled than it is today. In 2007, the Supreme Court clarified that treaties (and presumably, other international agreements) do not have direct effect in U.S. law unless the treaty or the Senate ratification instrument gives very clear indication that they should. The Court specifically repudiated the idea that the President could give domestic effect to an international treaty (even one ratified by the Senate) on his own.[10]

In that case, the Supreme Court denied that the President could order a U.S. state to comply with a ruling of the International Court of Justice. If the President can't give domestic legal effect to a ratified treaty, it is hard to see how he can give domestic effect to an executive agreement that has not been endorsed by the Senate. Then it is equally hard to understand why, if an agreement has no direct effect in U.S. law, courts should still take that agreement into account when interpreting U.S. statutes.

Meanwhile, the Supreme Court has decided Michigan v. EPA, denying EPA's authority to impose costly controls on electric power plants to control mercury emissions.[11] The bare five-justice majority found EPA had neglected to give adequate attention to the cost-benefit analysis in its regulatory venture. The majority gave no notice to the international convention on mercury control. Not

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[7] Id. at 14, though acknowledging that the Bush administration promised in 1992 that amendments to the FCCC would be presented as new treaties, requiring separate Senate consent.
[8] *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804)
[9] *Morrison v. National Australian Bank*, 561 U.S. 247(2010)
[10] *Medellin v. Texas*, 552 U.S. 491 (2008)
[11] *Michigan et al. v. Environmental Protection Agency* (No. 14-46, Decided June 29, 2015)

even Justice Kagan's dissent did so. The government does not seem to have stressed this argument. Perhaps it recognized that the argument would appear strained – or feared to see the argument expressly repudiated by the Supreme Court.

To get around such limitations, the final piece of the current strategy is to fall back on "political commitments." The argument is that constraints on sole-executive agreements do not apply to "political commitments" because they are not legally binding. And, the argument continues, past presidents have repeatedly offered commitments in this form. Commonly cited examples are the "Gentleman's Agreement" between Theodore Roosevelt and the Japanese government, restraining immigration from Japan or the "Yalta Agreement" by which Roosevelt, Churchill and Stalin set out plans for the last stages of the Second World War. So, the argument goes, if presidents can do such things on the subjects of traditional diplomacy or grand strategy, why not on international environmental regulation?

Or does the Constitution set some limits? The question has provoked at least one very thoughtful study, by legal scholars Duncan Hollis and Joshua Newcomer, published in 2009 in the *Virginia Journal of International Law*.[12] They argued that nations deliberately structure some agreements as "political commitments" to allow for greater flexibility in implementing what they have promised. Even though such commitments purport not to be legally binding (even under international law), they are negotiated and announced to the world because they are still expected to impose some sense of mutual obligation to their terms.

Hollis and Newcomer argue that such commitments should require more congressional support when they are more formal in the way they are presented, more detailed in substance, more elaborate in the provisions they make for organizing future compliance and when their implementation will be more entangled in (or require extensive changes in) domestic law. They argue that any one of these variables, if it is at the high end of the scale (regarding formality, intricacy, organizing of compliance, entanglement in domestic law) should be understood to trigger some constitutional obligation for congressional approval before the "commitment" is made.

When it comes to the climate change accords, all four of these variables argue in favor of some congressional participation before the United States is "committed" – even if the commitment is called merely "political." The Paris Protocol (or whatever it is called) will not be adopted as the outcome of quiet negotiations between a few diplomats (like the "Gentleman's Agreement" with Japan). It will be the culmination of a decade of intense, highly publicized UN-sponsored conferences. It will not be a vague statement of general principles (like those announced by Roosevelt and Churchill in 1941, trumpeted as "the Atlantic Charter" at the time and little remembered afterward). It will be hundreds of pages of very detailed

[12] Duncan B. Hollis and Joshua J. Newcomber, "'Political' Commitments and the Constitution," 49 VIRGINA J. INT'L L. 507 (2009)

provisions. It will not be a set of general principles for bilateral diplomatic relations (like the "Shanghai accord" that formalized U.S.-China relations after Nixon's visit to China in 1972). Instead, implementation of the Paris Protocol will be monitored by highly formal, regularly scheduled public conferences of the nations subscribing to this agreement, along with various international administrative organs, established in the treaty, perhaps even a new, specialized international tribunal. And the Paris Protocol will not just deal with troops stationed abroad or recognition of foreign governments – the traditional stuff of diplomacy –but with major aspects of energy production and transportation within the United States, engaging some of the most intrusive federal regulatory programs at home.

On the face of things, the Paris accords would be an unprecedented exertion of unilateral presidential power – committing the United States to what would otherwise require a formal treaty but doing so here on the sole say-so of the President. It may well fail in its intentions. Other nations may not trust an American commitment that is offered in such an informal way. The Paris conference may not reach any meaningful result in these circumstances. Or various nations may express approval but not feel genuinely bound. Whatever happens abroad, Congress may feel that it is not bound by commitments which it never approved. Where legislation is required to implement the Paris agreement – as by appropriations of money or changes in U.S. domestic law. Congress may respond grudgingly, sowing doubts about the reliability of the U.S. commitment and making it easier for other nations to deliver less than what they promised. Congress may refuse to cooperate at all, leaving the President exposed as a hollow boaster who cannot even secure needed support from his own national legislature. If the President relies on existing legislation to implement new commitments, we don't know to whether U.S. courts will permit statutes to be reinterpreted for this purpose.

Even if it does not work as intended, however, this end-run around a formal treaty may pose serious risks. It may push our international policies a long step away from traditional constitutional safeguards and political limits.

III. Risks to Constitutional Order

To see the stakes here, we should think first about why presidents have not resorted to this practice – at least on this scale and in these circumstances – in the past. President Clinton declined to submit the Kyoto Protocol to the Senate, when he realized he could not persuade two-thirds of the Senate to ratify it. Why didn't he recast it as a legislative-executive agreement, requiring only majority support in the House and the Senate (rather than 2/3 approval in the Senate)? Why did he not claim that the United States would make a "political commitment" to observe all its provisions and try to persuade Congress on that basis?

One can ask the same questions about other treaties urged by recent presidents. The United States has not become a party to the UN Convention on the Law of the Sea (urged by Presidents Clinton, Bush and Obama) nor to a number of human rights treaties (such as the Children's Rights Convention, urged by President Clinton and the Convention on the Rights of Persons with Disabilities, urged by President Obama). These conventions could not secure the two-thirds support in the Senate required for formal treaties. Why were they never presented to the Senate in any other form?

The central reason, I believe, is that such treaties had always been presented to the Senate as formal treaties in the past. It would have affronted the Senate to suddenly change course. Perhaps climate change is more urgent today than it was in the late 1990s, but Vice-President Gore built a second career warning about the extreme and urgent dangers posed by global warming – almost as soon as he lost the 2000 election for president.

If one accepts that there is urgent need to go forward with a new climate change convention – or assortment of executive agreements, statutory recasting and political commitments – one has to worry about checks and balances down the road. After all, this will be presented as one of the central foreign policy achievements of the Obama era (which has not been notable for foreign policy achievements). Bare majorities of the Supreme Court have held that doubts about the constitutional validity of the Affordable Care Act should be set aside, along with doubts about whether the law is now being implemented as its actual text would seem to require. Chief Justice Roberts voted with justices more routinely sympathetic to such programs. It is widely suspected that he wanted to avoid placing the Supreme Court in confrontation with the signature domestic achievement of the Obama administration.

If that dynamic operates even in domestic constitutional and statutory disputes, there may be a similar inhibiting effect on judges when it comes to implementing a celebrated international venture. Courts traditionally defer to executive leadership in international affairs. At any rate, there is an impassioned constituency for climate control ventures – as impassioned as any advocates for national health insurance, since environmentalists believe the stakes are so much higher when it comes to climate control.

The danger down the road is that this approach to committing the United States won't be seen as exceptional but as a general precedent for how our country coordinates its law with international standards in the era of global governance. That poses serious concerns.

The first is that we no longer make any meaningful or reliable distinctions between categories of international commitment. We used to think environmental treaties required formal consent by two-thirds of the Senate. If we now acknowledge that the President can circumvent that practice for climate change,

why not for other pressing concerns? Why limit these concerns to the environment? Why not do the same for regulation of the oceans – or human rights or health standards … or general agreements on treatment of refugees and non-lawful alien residents? Certainly, the response to climate change won't be a one-time measure. Even optimists (or especially optimists) envision a series of follow-on agreements which will impose further reductions in emission of greenhouse gases. No one thinks "climate" will "fixed" by anything done in the near term. So if we do this now, why not again? If here, why not in other fields? Environmental activists think climate is uniquely important. Activists for human rights protection, for arms control and a half other dozen causes will claim similar urgency for the international "commitments" they favor.

The Constitution itself is quite sparse in its actual provisions regarding international commitments. It is fair to question whether the Constitution itself actually indicates that trade agreements can be approved by legislative-executive agreements (with simple majorities in each house) while human rights treaties and arms control and environmental treaties require a two-thirds Senate approval. We can stipulate that customary practice in this area does not rest on unassailable logic and should not be regarded as immutable. But we face the real risk that by tossing aside customary practice regarding the form of international agreements – without any serious debate on how far or why we are changing it – we will be left with no structure at all. All future negotiations will then be governed by whatever tactical calculations move future presidents.

We should also be disturbed at the notion that presidents can harness executive agreements to drive existing American law in new directions. It is one thing to say – as current administrative law doctrine affirms – that Congress may delegate interpretative authority over the law to U.S. regulatory officials[13] (Chevron). At least U.S. officials are subject to Senate confirmation before they taken office and remain answerable thereafter to congressional oversight and congressional budget pressures in their regulatory decisions. It would be a great leap beyond such controlled administrative discretion to say that U.S. regulatory statutes should also be interpreted to accord with priorities established by foreign governments and by international bodies.

We cannot go very far down that road before the idea that we are governed by law starts to look like a fable for school children. Our own elected Congress will share its legislative powers and responsibilities with the world at large – as the president (or his officials) borrow the authority of congressional enactments for purposes not endorsed and perhaps not even clearly contemplated by the enacting Congress.

In 2006, an environmental advocacy group sued the Environmental Protection Agency, demanding that EPA tighten emissions standards on chemicals

[13] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

thought to be threatening the earth's ozone layer. Environmentalists pointed out that the United States was a party to the Montreal Protocol on Ozone Depletion (duly ratified by the Senate) but the signatory states had agreed, at an international conference, that standards should be now be tightened. A panel of the D.C. Circuit rejected this claim, protesting that if the Clean Air Act were interpreted in light of subsequent international resolutions, Congress would be delegating its own legislative powers to foreign diplomats.[14]

The doctrine of that ruling has not been formally endorsed by the Supreme Court (though it has not been rejected, either), so its status as constitutional law is uncertain. But it illustrates a serious issue. To adopt the view favored by environmental advocates for implementing the Paris Protocol is, in effect, to say international conferences can be a third legislative chamber in our legislative process – as long as the President prefers that third chamber to the two established by our Constitution.

Finally, to the extent this process relies on "political commitments," we should be uneasy about the implications for foreign policy. It is one thing to cede great leeway to presidents in the conduct of foreign affairs – if we think of foreign affairs as largely concerned with what happens in foreign places, as with stationing of troops or delivery of supplies. It is one thing for the President announce a very general policy – like the Monroe Doctrine or the Truman doctrine – which identifies general American concerns without specifying particular responses in future circumstances. It is something else for the President to make a "political commitment" regarding a very elaborate and detailed program, which we would seem to be committed to pursue, whether all other "committed" nations actually do follow through on their own "commitments" or not.

If we think American international prestige is at stake in honoring the President's unilateral commitments, there is something very dangerous about letting the President make promises about how the American energy and transport sectors will operate over a period of two decades. If the reputation and "credibility" of the United States can be undermined because Congress refuses to follow the President's international pledges, Congress is placed in a very difficult position – and ultimately the American people.

The truth is that some "commitments" are hard to avoid. If the President sends troops to a foreign conflict zone, it is hard for Congress to refuse support to the troops and unavoidably damaging when it doesn't. That is why the War Powers Resolution tried to regulate such commitments. If that measure has not constrained presidents as some of its sponsors hoped, that merely confirms that it is hard to limit the consequences of presidential "commitments" in the midst of the immediate challenges of military responses.

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[14] *Natural Resources Defense Council v. Environmental Protection Agency,* 464 F.3d 1206 (D.C. Cir. 2006)

Whatever one thinks of climate change as a long term challenge, it surely will be an issue for decades to come. It is not like the challenge of armed aggression, where terrible consequences may follow from failing to respond within a period of weeks or months. To make a "political commitment" on controlling climate change is to make a generational commitment.

As it happens, the last round of dispute about "political" commitments arose at the end of the Bush administration, when it was trying to negotiate a status of forces agreement with Iraq. The Bush administration claimed the president could do so on his own authority as Commander-in-Chief, without any particular authorization from Congress – or could station U.S. troops in Iraq on the basis of a "political" commitment regarding their status. Critics in Congress were outraged and the Bush administration backed off that proposal. There was a lot at stake in the sense that a status of forces agreement seemed to imply a long-term U.S. commitment to Iraq.

The problem addressed by "political" commitments on climate change is not only less urgent but harder to assess, because the underlying policy is so abstract. We won't know within the period of this "commitment" whether it is succeeding in halting or slowing down climate change. So there is something entirely open-ended about the commitment – in contrast to the typical military commitment. The issue won't be whether the President's policy is "succeeding" but simply whether Congress has "supported" the President by giving him what he wants.

We don't normally assume that the President should get all or even most of what he proposes in a State of the Union speech. Should the President have more claim on Congress because he has made a "political commitment" to foreign governments, rather than political promises to American voters? It may be that foreign governments will lose confidence in American leadership if presidential commitments are not honored. It may be that the honor and credibility of the United States are at stake in the way Congress responds to "political commitments." That is all the more reason presidents should be constrained to seek some form of congressional acquiescence before they pledge the honor and credibility of the United States.

IV. A Reasonable Response

The general trend, over the past few decades, has been to let more and more governing authority fall to the hands of administrative officials. It is not reassuring to be told that in the future, U.S. officials will not be acting alone but in international networks. That will take us down the road which European countries have followed within the European Union, where power is delegated to bureaucrats who consult with other bureaucrats and ordinary voters are more and more confused about who actually is responsible for what happens in their own country.

No one piece of legislation can deal with the larger trend. But there is a simple remedy for the immediate challenge. In 1997, the Senate adopted a sense of the Senate resolution indicating that the Senate would not support a climate control convention which did not impose emission reduction targets on all nations. The Kyoto conference went ahead and adopted a treaty text which exempted developing nations (that is, the majority of nations) from its emission reduction targets. The world may have been disappointed that President Clinton declined to seek Senate ratification. No one can say the world was not warned.

The Senate, on its own, can pass a resolution in the next few months indicating that it will not feel bound to support any "political" commitment on climate change to which it has not been given the chance to express previous consent in some form. It can say in the same resolution that it does not support reinterpretation of U.S. law to satisfy unilateral promises made by the President to foreign leaders. A Senate resolution now can't bind a future Senate – which might, down the road, decide that it does want to help implement agreements made in Paris in 2015. Courts are not bound by post-enactment resolutions of legislative chambers, so in any future court case on the reach of existing legislation, the view of the Senate would not necessarily carry great weight. A resolution of the Senate is not binding law.

But even a non-binding resolution can have valuable effects. It can put the world on notice that unilateral "political" commitments of the President should not necessarily be taken as a fully reliable statement of future American policy. That may weaken the President's negotiating leverage with foreign countries and that may be regrettable. But a Senate resolution will also preempt later protests that we have taken other governments by surprise and betrayed their trust if Congress does not follow through on everything promised by the President. In effect, a resolution of this kind will strengthen the independence of Congress in deciding what it wants to do in the future, regarding amendments to the Clean Air Act and other matters.

Second, a resolution of this kind can at least provide some background balance for debates over the proper interpretation of existing statutes. A Senate resolution is not a legally binding gloss on a duly enacted statute, but neither is a unilateral presidential commitment, especially when it does not even purport to be a legally binding agreement but is merely a "political" commitment. The risks involved in disappointing foreign governments may have some claim to consideration in regulatory policy and statutory interpretation. Surely the risk of disappointing members of Congress – and the American citizens who elected them – has some claim as well.

Down the road, what may matter most about how we handle this round of global policy on climate change is not the details of the current agreement but the precedent it sets – on the question of how the United States makes international commitments involving vast costs to its own internal economy. Precedents can be

resounding – proving to people down the road that we do, indeed, operate this way. Or they can be muffled and confused, encouraging policy makers of the future to think carefully about how we should do things.

When the Supreme Court decides a controversial case, the outcome is determined by the majority, even if it is the barest majority of five justices. In such cases, dissenters still argue their opposing views, seeking to limit the precedential weight of the decision in future cases. A resolution of the Senate, even if it can't force a change in the Paris Protocol, can affect the weight it receives in later domestic disputes both in Congress and in the courts.

Finally, a Senate resolution here can serve as a caution to future presidents – a warning that they should not assume they can simply work around all constitutional constraints in making "political commitments" to change U.S. policy without seeking any prior commitment from Congress. I believe that is the best reason to pursue a Senate resolution in advance of the Paris conference on climate change.