

ESSAY

# The Case for Climate Protection Authority

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### INTRODUCTION

In order to protect Earth's climate system, the United States should classify new international agreements in response to climate change as executive agreements rather than as treaties. Unlike treaties, which require the advice and consent of two-thirds of the Senate, executive agreements are entered into either solely by the president based on previously delegated constitutional, treaty, or statutory authorities, or by the president and Congress together pursuant to a new statute. Although limits exist on the types of climate agreements the president could enter into without congressional approval, the president's authority is broader than many policymakers realize and could be relied on if Congress fails to craft a strong bipartisan policy.

The president and Congress should handle the most significant climate change agreements—ones that would limit U.S. greenhouse gas emissions, change the terms of international trade, or impose substantial costs on the U.S. economy or treasury—as congressional-executive agreements, which require approval by a simple majority of both houses of Congress. Handling climate agreements as congressional-executive agreements would speed the development of a genuinely bipartisan U.S. climate change foreign policy, improve coordination between the executive and legislative branches, strengthen the hand of U.S. climate negotiators to bring home worthwhile agreements, increase the prospects for U.S. participation in those agreements, protect U.S. competitiveness, and spur international climate action.

As a matter of U.S. law, virtually any international agreement the United States rightfully could join as a treaty could alternatively be implemented as a congressional-executive agreement. Congressional-executive agreements are far from novel; they are the most common form of international agreement entered into by the United States. Con-

gressional-executive agreements are used by the president and Congress to tackle dozens of important global issues, and, in both legal and policy terms, they are ideally suited for the climate problem.

More specifically, Congress should enact “Climate Protection Authority,” which would define U.S. negotiating objectives in a statute and require the president to submit concluded congressional-executive agreements to Congress for final approval. See Table 1 below for a preview of how Climate Protection Authority might work.

TABLE 1: CLIMATE PROTECTION AUTHORITY—A PREVIEW:  
HOW IT MIGHT WORK IN PRACTICE<sup>1</sup>

Early-2009	President Barack Obama makes climate change a top priority for the United States. The President and Congress consult on the objectives and strategies for U.S. foreign and domestic climate policy, including the importance of immediately enacting strong domestic legislation and the benefits of negotiating new international climate change executive agreements rather than treaties.
Mid-2009	Congress approves, and the President signs into law, legislation that sets an environmentally appropriate and economically feasible, mandatory U.S. emissions target. This target is determined nationally, not negotiated internationally. The statute requires U.S. emissions to be <i>X</i> percent below today's levels by 2020 without international preconditions. As part of this legislation, Congress also approves "Climate Protection Authority," which (i) authorizes the President to negotiate new climate change executive agreements; (ii) defines U.S. negotiating objectives or principles; (iii) creates mechanisms for improving coordination between both branches during the negotiations; (iv) directs the President to submit concluded agreements to both houses of Congress for approval by a simple majority of each body; and (v) provides for simplified congressional review of these agreements, such as a straight up-or-down vote in both houses of Congress within ninety legislative days, without conditions, holds, filibusters, or amendments. The Climate Protection Authority statute envisions strengthening the U.S. emissions target by an additional <i>Y</i> percent below 2020 levels if Congress determines that the world's other major emitters have made equitable and nationally appropriate climate commitments.

1. The dates are merely illustrative. Both domestic legislation and international climate negotiations are likely to take longer. Also, the legislative and negotiating processes could proceed in many ways. Other variations might include enacting Climate Protection Authority prior to enactment of a domestic emissions reduction target with the expectation of Congress approving both a global agreement and domestic legislation simultaneously at a later point.

December 2010	In close consultation with Congress, and pursuant to the terms of Climate Protection Authority, the President negotiates, concludes, and submits to Congress for its approval a new global climate change agreement. By its own terms, the agreement shall not enter into force unless all five of the world's largest emitters ratify the agreement, along with countries representing two-thirds of global emissions.
March 2011	Congress, in accordance with statutory procedures, approves the new climate agreement along with implementing legislation needed to allow both the agreement and the new, more stringent U.S. emissions target to go into effect under domestic law once the agreement enters into force.
April 2011	The President signs the implementing legislation into law and completes formalities necessary to make the United States a party to the new agreement once it enters into force.
December 2012	The new agreement and the more stringent U.S. target enter into force when the last of the world's major emitters joins the agreement and enough other nations also have ratified the deal.

This approach should apply both to the new global climate change agreement being negotiated in the United Nations by the United States and the rest of the international community, as well as to other future arrangements between the United States and a smaller number of major emitting nations.

This Essay has six Parts. Part I provides some needed policy context by reviewing past, present, and future U.S. climate foreign policy. Part II explains U.S. options for authorizing, concluding, and approving international agreements generally. Part III examines situations in which the president and Congress may turn to executive agreements as substitutes for treaties and describes past U.S. practice in this regard. Part IV applies these general legal principles to climate change and evaluates

the usefulness of executive agreements to the climate issue. Part V makes the case for creating, by statute, Climate Protection Authority as a new procedural mechanism for defining and implementing U.S. climate foreign policy. Finally, Part VI explains why this approach would further the interests of key stakeholders.

## I. THE CLIMATE POLICY CONTEXT

### A. *New Challenges and Opportunities for Progress*

The scientific evidence is now overwhelming: climate change is a serious global threat that demands forceful U.S. leadership and a strong international response.<sup>2</sup> The adverse impacts of climate change at home and abroad will harm our economy, threaten our security, and imperil our communities and ecosystems.<sup>3</sup>

President Barack Obama has said he will make climate protection a top priority for his administration. His administration has two major opportunities for progress. First, the United States and other nations plan to negotiate a new global climate agreement by the end of 2009. The controversial 1997 Kyoto Protocol<sup>4</sup> expires at the end of 2012 and new arrangements are urgently needed. The current round of global climate talks provides a real chance for all nations to ensure strong, equitable action by major greenhouse gas-emitting countries—including the United States, China, and India—which have in the past resisted obligations to mitigate their emissions. Second, the Obama administration intends to work with Congress to develop credible bipartisan legislation that would substantially reduce U.S. emissions unilaterally over the next few decades. President Obama and congressional leaders have proposed “cap-and-trade” bills<sup>5</sup> that would return U.S. emissions back to 1990

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2. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 SYNTHESIS REPORT (2007), available at <http://www.ipcc.ch/ipccreports/ar4-syr.htm>.

3. See, e.g., CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE (2007), available at <http://securityandclimate.cna.org/report/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf>.

4. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148.

5. Federal cap-and-trade legislation would set a mandatory national target, or cap, and allow major polluters to comply with their emissions obligations by acquiring rights to tradable emissions permits issued by the government. This would afford companies the flexibility to buy and sell permits, thereby helping to ensure cost-effective action. The United States uses this approach quite successfully under the Clean Air Act to reduce the emissions that cause acid rain. See, e.g., ENVTL. PROT. AGENCY, ACID RAIN AND RELATED PROGRAMS 2007 PROGRESS REPORT (2009),

levels by 2020, a more than fifteen percent reduction from today's levels.<sup>6</sup> Most Washington insiders and climate experts expect new legislation of this type (but not necessarily these emission numbers) by 2010 or shortly thereafter.

Aligning these fast-moving domestic and international efforts will be key to success in managing climate change. New domestic laws must help spur international cooperation, and new international agreements must mesh with domestic emissions reduction strategies. The United States cannot solve the climate challenge alone, nor can the United States allow the international community to dictate U.S. policy. Cooperation between the president and Congress will be essential because climate change affects the constitutional authorities of both political branches of government. Although the president leads U.S. diplomatic efforts, Congress initiates legislation to strengthen the economy, manage government spending, and protect the general welfare. Climate change is a global problem that requires international solutions, but climate solutions also will affect nearly every aspect of U.S. domestic society because emissions are byproducts of almost every part of its economy and culture.

Regrettably, political leaders in the White House and Congress have rarely been on the same page when it comes to climate change. In fact, since the beginning of international climate cooperation in the 1980s, U.S. climate policy has been highly contentious and partisan. President George H.W. Bush opposed binding national targets at the 1992 Rio "Earth Conference," whereas Democratic leaders in Congress supported them. The administration under Bill Clinton negotiated the Kyoto Protocol, which found few champions in Congress and faced strong opposi-

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available at <http://www.epa.gov/airmarkt/progress/arp07.html>. The European Union (EU) has adopted a cap-and-trade system to regulate a major portion of its climate emissions under the EU Emissions Trading System. See EUROPEAN COMM'N, EU ACTION AGAINST CLIMATE CHANGE: THE EU EMISSIONS TRADING SYSTEM (2008), available at [http://ec.europa.eu/environment/climat/pdf/brochures/ets\\_en.pdf](http://ec.europa.eu/environment/climat/pdf/brochures/ets_en.pdf). Most climate policymakers expect that when the United States does set a mandatory national emissions limit, it will rely on cap-and-trade legislation to help meet that target. See, e.g., John M. Broder, *2 Democrats Introduce Far-Reaching Bill on Energy and Warming*, N.Y. TIMES, Apr. 1, 2009, at A19; Darren Samuelsohn, *Senate Leader Says Energy, Climate Bills Will Be Combined*, CLIMATEWIRE, Mar. 5, 2009, available at <http://www.climateark.org/shared/reader/welcome.aspx?linkid=120395>.

6. See, e.g., Video: Barack Obama, Message to the Governors' Global Climate Summit (2008), available at [http://change.gov/newsroom/entry/president\\_elect\\_obama\\_promises\\_new\\_chapter\\_on\\_climate\\_change/%20target=](http://change.gov/newsroom/entry/president_elect_obama_promises_new_chapter_on_climate_change/%20target=) (transcript available in Press Release, Office of the President-elect, President-elect Barack Obama to Deliver Taped Greeting to Bi-partisan Governors Climate Summit (Nov. 18, 2008), at [http://change.gov/newsroom/entry/president\\_elect\\_barack\\_obama\\_to\\_deliver\\_taped\\_greeting\\_to\\_bi\\_partisan\\_gover](http://change.gov/newsroom/entry/president_elect_barack_obama_to_deliver_taped_greeting_to_bi_partisan_gover)).

tion from Republicans. President George W. Bush rejected the Kyoto agreement but refused to propose an alternative, whereas Congress urged U.S. reengagement in global negotiations.

While President Obama and Democratic congressional leaders hold similar policy views on climate change, enacting domestic climate legislation and securing U.S. participation in new international climate agreements remain enormous challenges. Legislation similar to that now supported by President Obama, for example, failed to pass the Senate in 2008.<sup>7</sup> Plus, the United States has not joined a major global environmental agreement in more than fifteen years. Policymakers continue to have radically different views about the most appropriate role for the federal government in solving the climate problem. The approaches discussed include mandatory emission limits, voluntary targets and standards, an Apollo Project scale increase in government funding for clean energy research and development, a “Clean Energy Marshall Plan” program of foreign aid to help developing nations grow more cleanly, carbon taxes, border taxes on imports from nations that are not mitigating their emissions, reduced subsidies for fossil fuel industries, and elimination of trade barriers for clean energy products. The scale of the climate crisis probably requires that policymakers find common ground on a number of these approaches. Politically, this is a tall order given the economic, geopolitical, and environmental stakes.

### *B. The Risks America Faces*

Uncertainty about the future of domestic climate legislation and international climate agreements creates three serious risks for the United States. First, absent a clear, workable, and broadly supported American climate foreign policy, U.S. negotiators are unlikely to craft an international climate agreement that is both politically realistic and effective. Instead, the United States may end up with another UN treaty that America cannot join because it is perceived to be too costly, or it will not join if there is insufficient action by others. Other nations may have little confidence that the United States will participate in climate agreements and may, therefore, resist making needed but politically difficult concessions. Alternatively, the United States might negotiate an agreement that it could join but that would not do enough globally to solve the climate crisis. Either way, the consequences could be catastrophic.

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7. Lieberman-Warner Climate Security Act of 2008, S. 3036, 110th Cong. (2008).

Second, the president's climate change foreign policy may divide the country because too few policymakers and leaders appreciate the trade-offs the United States must make in highly complex and contentious global climate negotiations. A politicized foreign policy regarding the climate, in turn, could become a major impediment to domestic climate action just as disagreements over the Kyoto Protocol crowded out serious consideration of less controversial policies.

Third, Congress may fail to design domestic climate legislation with the international community firmly in mind. Without a clear vision of international goals, domestic legislation is unlikely to engage other nations as much as it should. A go-it-alone approach in the United States would have it forgo important opportunities provided by its own domestic climate laws to entice and cajole other nations to act responsibly. For example, U.S. cap-and-trade legislation may not create the carrots and sticks needed to move China and India toward more climate-friendly growth. U.S. domestic laws must contribute to a workable global solution.

Precisely because reaching a consensus will be challenging, political leaders must approach the task in the most constructive way possible. The United States needs to adopt *procedural mechanisms* that make the back-and-forth on policy options as conducive to reaching consensus as possible. The United States must not cling to preconceived notions of how it as a country negotiates and reviews international climate agreements. Rather, the United States must look for inspiration from other more successful areas of American foreign policy.

## II. TREATIES AND OTHER INTERNATIONAL AGREEMENTS

In this Part, I examine U.S. foreign relations law and practice to explain the procedural options for entering into new climate change agreements. In particular, I distinguish between treaties and other types of international agreements, including executive agreements. I place special emphasis on executive agreements that receive the formal approval of Congress.

### A. *International Agreements*

Under both international and U.S. law, an international agreement is an arrangement "between two or more states or international organizations that is intended to be legally binding and is governed by interna-

tional law.”<sup>8</sup> Although international agreements are, by definition, legally binding on state parties, they may nevertheless contain a mix of enforceable and unenforceable, or voluntary and legally binding commitments. Some international agreements contain nonbinding promises along with binding commitments. Similarly, some legally binding commitments in international agreements are not enforceable, such as agreements that fail to provide recourse for cases of noncompliance.

As a matter of international law, most international agreements come into force for each state party only after domestic review and approval in accordance with domestic law. Some agreements, however, enter into force immediately, once concluded or signed, because they require no further domestic process. Multilateral agreement often conditions entry into force on domestic approval by some minimum number of nations. By signing such an agreement, a nation merely acknowledges that a given text correctly expresses the proposed agreement and that the signing country intends to seek domestic approval to join the agreement.<sup>9</sup> Apart from domestic approval, a nation may also fulfill certain international formalities that indicate to other nations that it intends to be bound by the agreement (e.g., by depositing formal instruments of ratification with an international body, such as the United Nations). Beyond this, a country is bound only once the international agreement has entered into force pursuant to the agreement’s own terms, such as by obtaining a minimum number of state parties.

U.S. domestic law provides two distinct ways for the United States to become a party to an international agreement and thereby bind itself with respect to other parties: treaties and executive agreements. Under international law, these two types of instruments are indistinguishable in that both can create binding international obligations.<sup>10</sup> Even under U.S. law, once approved and in force, both treaties and executive agreements are equivalent to federal statutes;<sup>11</sup> either type of agreement becomes the “supreme law of the land” until changed by a later conflicting federal statute, subsequent international agreement, or a constitutional

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8. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (1987) [hereinafter RESTATEMENT (THIRD)]; *see also* CONG. RESEARCH SERV., COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 1 (Comm. Print 2001) [hereinafter SENATE FOREIGN RELATIONS COMMITTEE REPORT].

9. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); *see also* RESTATEMENT (THIRD), *supra* note 8, § 312 cmt. d.

10. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 4; RESTATEMENT (THIRD), *supra* note 8, pt. III, introductory notes, at 144–46.

11. RESTATEMENT (THIRD), *supra* note 8, § 303 cmts. c, e.

amendment.<sup>12</sup> However, the domestic processes the United States uses to negotiate, review, and approve treaties and executive agreements are quite different. Herein rests a common source of confusion. The United States may deem an international agreement an “executive agreement” for purposes of its domestic review, even though the international community may decide to call the pact a “treaty.” Similarly, the United States may determine that an international agreement is a treaty, whereas the rest of the world might call it an agreement, protocol, convention, or something else entirely.

### B. *U.S. Treaty Practice*

The U.S. Constitution sets forth the formalities the United States must follow to approve international agreements that are deemed treaties under domestic law. The Constitution states that the president “shall have Power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”<sup>13</sup> Under U.S. law, most treaties do not become binding as a matter of domestic law unless and until Congress enacts a statute that gives the treaty domestic effect, usually referred to as “implementing legislation.” These “non-self-executing” treaties create international legal obligations for the United States without changing U.S. domestic law. True compliance with such treaties may depend on the degree to which the domestic implementing legislation faithfully mirrors the obligations of the treaty. It is the longstanding practice of the executive branch not to take the final steps necessary to bind the United States internationally to treaties duly approved by the Senate unless both houses of Congress have approved needed implementing legislation.<sup>14</sup> For example, the 1989 Basel Convention, which regulates the transboundary movement and disposal of hazardous waste, received the advice and consent of the Senate,<sup>15</sup> but

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12. See U.S. CONST. art. VI, cl. 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; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.”); see also RESTATEMENT (THIRD), *supra* note 8, § 115.

13. U.S. CONST. art. II, § 2, cl. 2.

14. Robert E. Dalton, *National Treaty Law and Practice: United States, in NATIONAL TREATY LAW AND PRACTICE: AUSTRIA, CHILE, COLUMBIA, JAPAN, THE NETHERLANDS, UNITED STATES* 189, 208 (Monroe Leigh et al. eds., 1999).

15. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 1673 U.N.T.S. 57. The Senate Committee on Foreign Relations recommended that the Senate give its advice and consent to ratification of the Basel Convention in S. EXEC. REP. NO. 102-36, at 17 (1991), which the Senate later approved. 138 CONG. REC. 22,860–61 (Aug. 11, 1991).

the United States is not yet a party to the Basel Convention because Congress has not approved needed implementing legislation.<sup>16</sup>

Securing the consent of two-thirds of the Senate to a treaty, along with the consent of both houses of Congress for implementing legislation, is a daunting task. By design, the Constitution's supermajority requirement for treaties—among the highest bars imposed by the Constitution—allows ideological or regional minority interests in the Senate to frustrate the will of the majority. The treaty clause has never worked as the Framers of the Constitution intended. First, the Framers expected international agreements to be relatively rare. That assumption, of course, has been wrong for more than a century and today is entirely out of step with reality. International agreements are essential tools through which the United States advances its national interests in a heavily interconnected and rapidly globalizing world.

Second, the Framers imagined that the Senate, which had only twenty-six members at its inception, would remain small and nimble enough to serve as an active counselor to the president throughout the negotiating process. Even at the start of the Republic, the Senate did not live up to the Framers' expectations in this regard.<sup>17</sup> From George Washington on, presidents have considered the Senate too large and diverse to provide useful, timely, and confidential advice.<sup>18</sup> Today, the one-hundred-member Senate is almost double the original size of the House of Representatives, which the Framers considered too big to advise the president on treaties. In practice, the Senate's "advice and consent" has been reduced to just "consent."<sup>19</sup>

Third, the Senate's treaty practice has evolved in ways that the Framers could not have anticipated. The Senate typically takes up treaties only after they have been approved by its Committee on Foreign Relations. As a general rule, that committee will not act on a treaty if a minority of the Committee objects and demands further time to consider

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16. Congressional bills with the express purpose of implementing the Basel Convention that have failed to make it out of committee include the Waste Export and Import Control Act of 1994, H.R. 3965, 103d Cong. (2d. Sess. 1994) and the Hazardous and Additional Waste Export and Import Act of 1991, S. 1082, 102d Cong. (1st Sess. 1991).

17. Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1280 (2008).

18. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 807–13 (1995); Hathaway, *supra* note 17, at 1280 ("President George Washington regarded the Senate as a 'council of advice' in the treaty-making process. And yet eight years later, he had almost entirely ceased seeking the Senate's advice.")

19. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 177 (2d ed. 1996); see also SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 2–3.

the matter, resulting in an informal committee “hold.”<sup>20</sup> The objection of a single senator has prevented some treaties from ever being voted on by the Committee (let alone the full Senate); in some cases, this has left treaties in limbo for many decades.<sup>21</sup> Although the Senate has only rejected seven treaties in the past century, twenty-seven treaties currently languish in the Senate, some of these dating back to the 1940s.<sup>22</sup> Several of these agreements have been joined by practically every major democracy in the world except the United States.<sup>23</sup> These figures fail to count the number of agreements presidents negotiated but never submitted to the Senate (including the Kyoto Protocol) and agreements presidents chose not to negotiate as a result of expected Senate opposition.

The Senate’s recent experience with the UN Convention on the Law of the Sea illustrates the challenge of moving a treaty through that body.<sup>24</sup> Negotiations to update the international law of the sea began in 1973 and were concluded in 1982. When the United States objected to the deep sea mining provisions of the original agreement, the international community agreed to modify those provisions to accommodate

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20. THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET BACK ON TRACK* 9–10 (2006).

21. *See, e.g.*, Freedom of Association and Protection of the Right to Organize Convention, No. 87, July 9, 1948, 68 U.N.T.S. 17 [hereinafter Convention No. 87]; *see also* Steve Charnowitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AM. J. INT’L L. 696, 698 (2004) (citing the hold up of certain treaties, including Convention No. 87, *supra*, in the Senate Committee on Foreign Relations); Hathaway, *supra* note 17, at 1308–15.

22. Dep’t of State, *Treaties Pending in the Senate* (Mar. 16, 2009), at <http://www.state.gov/s/l/treaty/pending/index.htm>.

23. *See, e.g.*, Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Vienna Convention on the Law of Treaties, *supra* note 9; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; *see also* United Nations Treaty Collection, Status of Convention on Biological Diversity, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&id=525&chapter=27&lang=en> (last visited Apr. 8, 2009) (listing over 180 countries that are parties to the treaty); United Nations Treaty Collection, Status of Convention on the Elimination of All Forms of Discrimination Against Women, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&id=326&chapter=4&lang=en> (last visited Apr. 8, 2009) (listing over 180 countries that are parties to the treaty); United Nations Treaty Collection, Status of Vienna Convention on the Law of Treaties, at <http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=UNTS&id=468&chapter=23&Temp=mt&lang=en> (last visited Apr. 8, 2009); United Nations Treaty Collection, Status of International Covenant on Economic, Social and Cultural Rights, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&id=321&chapter=4&lang=en> (last visited Apr. 8, 2009).

24. *See* CITIZENS FOR GLOBAL SOLUTIONS, *LAW OF THE SEA BRIEFING BOOK 4* (2007), available at [http://www.globalsolutions.org/files/general/Law\\_of\\_the\\_Sea\\_Briefing\\_Book.pdf](http://www.globalsolutions.org/files/general/Law_of_the_Sea_Briefing_Book.pdf) (discussing the history of the U.S. ratification process of the UN Convention on the Law of the Sea).

the United States and secure its participation in the treaty. Certain modifications were proposed by the first Bush administration and were secured in 1994 by the Clinton administration, which then submitted the treaty to the Senate for its advice and consent. The revised agreement has received broad, enthusiastic support, from President George W. Bush, the U.S. military, the U.S. national security community, major corporations, and leading environmental groups. Nevertheless, a very small but vocal minority in the Senate has blocked, until very recently, consideration of the agreement by the full Senate for more than a decade.<sup>25</sup> The Joint Chiefs of Staff have stated that the United States' failure to ratify the treaty creates significant security risks for our country, partly because other nations use our nonparty status to inhibit the safe passage of U.S. Navy vessels and because the United States is not represented in various international lawmaking bodies.<sup>26</sup>

As Oona Hathaway has demonstrated, the manner in which the United States approves treaties is very unusual.<sup>27</sup> The vast majority of other countries approve international agreements in the same way they approve domestic statutes. Other than the United States, only twenty-three countries have a different voting process for domestic and international law. Of these, only seven nations provide for some level of automatic incorporation of international commitments into domestic law, as does the United States through self-executing agreements. Among these, only three countries other than the United States (Ethiopia, the Philippines, and Tajikistan) provide for less involvement by a part of the legislature in the treaty approval process than they require for enacting domestic statutes. Only three countries other than the United States (Ecuador, Serbia, and the Slovak Republic) impose higher voting standards for treaties than for domestic legislation. The United States is the only nation in the world that does all of this: the United States allows for full and automatic incorporation of international commitments into domestic law, disenfranchises part of its legislature in the treaty-making process,

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25. The Senate Committee on Foreign Relations approved the Convention on the Law of the Sea in October 2007, the first time it was able to take up the modified accord. This agreement now lies before the full Senate. *Id.*

26. Letter from Peter Pace, Chairman of the Joint Chiefs of Staff, to Joseph Biden, U.S. Senator (June 26, 2007), in CITIZENS FOR GLOBAL SOLUTIONS, *supra* note 24, at 20.

27. See Hathaway, *supra* note 17, at 1271–74 (discussing empirical data gained from a recent and exhaustive study comparing U.S. treaty practices to international lawmaking practices in other countries).

and requires approval by a supermajority of the part of the legislature that does have a say in the treaty-making process.<sup>28</sup>

America's unique approach to treaty approval has very real consequences. The difficulty inherent in moving treaties through the Senate has increased the incentive for presidents to find alternatives to the treaty process, often keeping Congress in the dark and further removed than the Framers of the Constitution intended. The Senate's treaty practice also has discouraged presidents from negotiating good agreements that would be unlikely to secure the support of two-thirds of the Senate. This treaty practice has harmed the credibility of the United States. In the eyes of the world, the United States is an unreliable treaty partner. More frequently than any other major power, the United States insists on major concessions during the negotiating process but then does not join the final agreements. Finally, U.S. treaty practice limits the effectiveness of the international system. The United States is often an indispensable party. Because the goal of negotiating international agreements is to bind countries, particularly indispensable ones, the United States' trouble joining international agreements undermines the agreements' usefulness as a means of regulating international action. The United States' failure to develop strong institutions and norms for effectively managing global public goods harms all nations, including the United States.

### C. *Executive Agreements*

In contrast to treaties, executive agreements lack explicit constitutional formality and authority. In fact, the Constitution does not mention them as such, and Congress has never passed a general statute that authorizes the president to negotiate them.<sup>29</sup> Nevertheless, the constitutionality of three different types of executive agreements is well-established, including approval by U.S. courts.<sup>30</sup> Congress authorized the first executive agreements in 1792.<sup>31</sup> They grew popular in the 1930s and 1940s and, since World War II, the United States has approved over ninety percent of its international agreements as executive

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28. *Id.* at 1274.

29. The only time the Constitution references international agreements other than treaties is when it prohibits U.S. states from "enter[ing] into any treaty, alliance or confederation" while simultaneously requiring that they obtain the consent of Congress before entering into "any agreement or compact with . . . a foreign power." U.S. CONST., art. I, § 10.

30. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 4–5; RESTATEMENT (THIRD), *supra* note 8, § 303.

31. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 38.

agreements rather than as treaties.<sup>32</sup> The number of executive agreements, moreover, is growing more rapidly than the number of treaties.<sup>33</sup> Over its history, the United States has become a party to roughly fifteen thousand executive agreements.<sup>34</sup>

### 1. *Form of Agreement*

Executive agreements come in three constitutionally permissible forms.

First, sole executive agreements, sometimes called presidential-executive agreements, are negotiated, concluded, and approved without the explicit authorization of Congress. Sole executive agreements are not uncommon, but they represent a small minority of executive agreements.<sup>35</sup> Whether this is because presidents believe they may only bind the United States without the consent of Congress under limited circumstances or because presidents generally seek the consent of the Senate or Congress for political reasons is unclear. Presidents derive authority to enter into sole executive agreements from numerous provisions of the Constitution, ranging from those dealing with the general executive authority of the office and its obligation to faithfully execute federal statutes<sup>36</sup> to the president's foreign affairs powers as general executive, commander-in-chief, receiver of ambassadors, implementing authority for treaties, and representative of the nation in foreign relations (taken together, the "foreign affairs powers").<sup>37</sup> The U.S. Supreme Court has stated that "our cases have recognized that the president has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."<sup>38</sup> Examples of sole execu-

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32. *Id.* at 38–40; see also *The November 26 Declaration of Principles: Implications for UN Resolutions on Iraq and for Congressional Oversight: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 17 n.6 (2008) [hereinafter *Declaration of Principles Hearing*] (statement of Oona A. Hathaway, Professor, Yale Law School) (comparing the similarity of her findings to a 1984 study by the Senate Committee on Foreign Relations).

33. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 39 tbls. II-1 & II-2.

34. Dep't of State, Treaty Affairs, at <http://www.state.gov/s/l/treaty/> (last visited Mar. 20, 2009); see also U.S. DEP'T OF STATE, TREATIES IN FORCE 2007 (2007), available at <http://www.state.gov/s/l/treaty/treaties/2007/index.htm>.

35. A 1984 study by the Senate Committee on Foreign Relations reports that 5.5% of U.S. international agreements between 1946 and 1972 were sole executive agreements. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 41.

36. U.S. CONST. art. II, § 3.

37. See *id.* art. II, § 1; *id.* art. II, § 2, cls. 1–2; *id.* art. II, § 3.

38. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003). The Court upheld a presidential

tive agreements include the Yalta Agreement of 1945, the Vietnam Peace Agreement of 1973, and the Iran Hostage Agreement of 1981.<sup>39</sup>

Second, treaty-executive agreements are explicitly or implicitly authorized by a treaty previously ratified by the United States with the advice and consent of at least two-thirds of the Senate. Like sole executive agreements, treaty-executive agreements require no further action by Congress to enter into force, the Senate having already given its explicit or implied blessing when it approved the parent treaty.<sup>40</sup> Treaty-executive agreements are somewhat rare. Only about six percent of the international agreements the United States has joined since World War II have been treaties receiving the advice and consent of the Senate.<sup>41</sup> Very few of these treaties authorize the president to negotiate executive agreements that do not require further congressional review. In the exceptional cases where treaties do delegate negotiating authority to the president, many times that authority is implied in the text rather than explicitly stated. Examples of treaty-executive agreements include subsidiary arrangements under the North Atlantic Treaty, the General Agreement on Tariffs and Trade, the Panama Canal Treaty, and various subordinate agreements governing the status of U.S. military forces stationed abroad.<sup>42</sup> Although the constitutional authority of the president to

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executive agreement with Germany that established a mechanism to settle U.S. Holocaust era claims and preempted state restitution laws. Even the dissent recognized the constitutionality of sole executive agreements. *Id.* at 436 (Ginsburg, J., dissenting).

39. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 88.

40. *See* RESTATEMENT (THIRD), *supra* note 8, § 303 cmt. f (equating treaty-executive agreements with treaties if the executive agreement can “fairly be seen as implementing the treaty”); *see also* *Wilson v. Girard*, 354 U.S. 524, 528–29 (1957) (holding that Senate approval of a security treaty between Japan and the United States authorized a subsequent treaty-executive agreement regarding jurisdiction over criminal offenses committed in Japan by members of the U.S. armed forces); U.S. DEP’T OF STATE, HANDBOOK ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS, 11 FOREIGN AFFAIRS MANUAL § 723.2-.2(A) (2006) [hereinafter HANDBOOK ON TREATIES] (basing the president’s authority to conclude an international agreement pursuant to a treaty on prior consent by the Senate). Now known as the “Handbook on Treaties and Other International Agreements,” the original “Circular 175” was a 1955 Department of State circular that prescribed a process for coordination of approval of treaties and other international agreements, though still referred to as the “Circular 175” procedure, the requirements now appear at 22 C.F.R. § 181.4 (2007) and in the State Department’s *Foreign Affairs Manual*, 11 FOREIGN AFFAIRS MANUAL §§ 721–29.

41. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 39; *see also Declaration of Principles Hearing*, *supra* note 32, at 17 n.6 (statement of Professor Oona A. Hathaway) (citing a 1984 study by the Senate Committee on Foreign Relations, which found that 6.2% of international agreements reached between 1946 and 1972 were treaties).

42. *See* SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 5; *see also* RESTATEMENT (THIRD), *supra* note 8, § 303 reporters’ note 6 (referencing a security agreement concluded pursuant to a treaty, which defined jurisdiction over U.S. forces in Japan).

conclude executive agreements pursuant to treaties is uncontested, controversy occasionally arises about whether particular agreements indeed were authorized by the Senate.<sup>43</sup>

Third, congressional-executive agreements, by far the most common form of executive agreements, are concluded by the president and explicitly authorized by Congress through statute. Although some members of the Senate and a very few legal scholars still believe that many congressional-executive agreements are unconstitutional, this view is not supported by U.S. practice, case law, or the weight of scholarly opinion.<sup>44</sup> These agreements are now used by the United States in “virtually every area of international law”<sup>45</sup> and represent eighty-five to ninety percent of all international agreements today.<sup>46</sup> Since 1980, the United States has concluded roughly three thousand congressional-executive agreements in over one hundred different subject areas, ranging from nuclear cooperation and arms control to space exploration, trade, and international fisheries.<sup>47</sup>

## 2. *Timing of Congressional Action*

Congress and the president use three distinct approaches for securing congressional approval. Influenced by political expediency and changing attitudes toward the Senate’s role in the treaty process, these approaches have evolved organically without an explicit constitutional basis.

In some instances, Congress authorizes and approves an agreement before the agreement has been concluded, often doing so before negotiations have even begun. Sometimes Congress has granted the president *ex ante* authority to conclude a large number of similar agreements, and sometimes Congress gives the president a far more limited and highly

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43. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 5.

44. *See, e.g.*, Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). *But cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4–5, at 228 n.18 (2d ed. 1988) (stating that congressional-executive agreements are “coextensive with the treaty power,” thereby contradicting Laurence Tribe’s more recent advocacy position).

45. Hathaway, *supra* note 17, at 1239.

46. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 41; *see also Declaration of Principles Hearing*, *supra* note 32, at 17 n.6 (statement of Professor Oona A. Hathaway) (citing a 1984 study by the Senate Committee on Foreign Relations, which found that “88.3 percent of international agreements between 1946 and 1972 were based at least partly on statutory authority”).

47. Hathaway, *supra* note 17, at 1259–69.

tailored authority.<sup>48</sup> Occasionally, Congress requires that congressional-executive agreements negotiated by the president pursuant to ex ante authority must lie before Congress for some number of days before they enter into force.<sup>49</sup> This waiting period provides Congress the opportunity to pass a statute of disapproval which, like any statute, would be subject to a presidential veto. Congress often uses the ex ante approach with respect to negotiations that are noncontroversial and technical in nature (e.g., postal agreements, scientific cooperation) and when Congress views its role primarily as an appropriator of government funding.<sup>50</sup>

Other times, the president will negotiate an executive agreement without prior congressional authority, relying instead on the president's own powers under the Constitution and applicable statutes. The president then submits the final agreement to both the House and Senate for their review and approval. These ex post congressional-executive agreements reflect the increasing number of international arrangements in a globalizing economy and Congress's difficulty in staying ahead of fast-moving, executive branch-driven foreign policy.<sup>51</sup>

Over the past century, Congress and the president have tended to take a third approach when addressing the most important and potentially controversial executive agreements. In place since World War II, the modern congressional-executive agreement approach is a hybrid of the prior two. Specifically, Congress has sometimes chosen to enact a framework statute that explicitly (i) grants the president the authority to

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48. For example, many of the 167 international agricultural commodity agreements concluded over the past fifty years were negotiated under a single statute, the Agricultural Trade Development and Assistance Act of 1954 §§ 101–109, 7 U.S.C. §§ 1701–1709 (2006), and have not required further congressional review. Hathaway, *supra* note 17, at 1268 & n.76. The contemporaneous Trade Agreements Extension Act of 1955, U.S.C. §§ 1351(a)–(c), (e), 1352(c), 1352a, 1363(b), 1364(a)–(b), (e) (2006) in contrast, gave the president authority to conclude trade agreements in very specific, well-defined areas. Hathaway, *supra* note 17, at 1266 n.68.

49. See SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 236–37, tbl.X-3 (listing numerous examples of agreements that Congress required the president to transmit to Congress, although many of these agreements required no further congressional action or approval).

50. In 2005, for example, Congress chose to give ex ante approval to the agreement that allowed the United States to join the international consortium seeking to build an experimental electricity-producing fusion power plant (ITER). Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project, available at [http://www.iter.org/JIA\\_text.htm](http://www.iter.org/JIA_text.htm). A main policy consideration for Congress was the high cost of the project. Having decided to fund the program, Congress did not ask to approve the final agreement. The ITER agreement was not submitted to Congress before it entered into force.

51. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 18, 27, 33; Hathaway, *supra* note 17, at 1299–1300.

negotiate one or more agreements; (ii) establishes somewhat general negotiating objectives for the United States; (iii) requires regular consultation between the executive and legislative branches; (iv) gives life to this requirement by demanding periodic reports from U.S. negotiators and by creating a formal congressional observer group to the negotiations; and, most importantly, (v) creates a streamlined review and approval process for Congress to consider both the new agreement and any domestic implementing legislation needed to give the agreement effect under domestic law. This hybrid approval process—authorization, instruction, participation, and simplified approval—has become the primary means for congressional review of economically significant international agreements. Most trade agreements are approved this way.<sup>52</sup> The modern approach allows Congress to shape international negotiations from start to finish. Congress not only defines the terms for the future agreement, but also creates for itself a place at the negotiating table. In exchange for this augmented role, Congress gives both the president and U.S. allies a simplified approval process for securing U.S. participation. That simplified approval process strengthens the hand of U.S. negotiators to extract concessions from other nations to ensure that the final agreement meets Congress's objectives. Other nations understand very clearly what the agreement must look like to secure Congress's blessing, and they have confidence that if they meet U.S. demands the United States will become a party to the agreement.

Courts have upheld all three types of executive agreements.<sup>53</sup> Most scholars consider them to be equally consistent with the Constitution, but that view is not universal.<sup>54</sup> Critics of executive agreements have been most hostile to *ex post* congressional-executive agreements, be-

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52. Charnowitz, *supra* note 21, at 696–98. In August 2002, for example, the United States passed the Trade Act of 2002, Pub. L. No. 107-210, 166 Stat. 933 (codified at 19 U.S.C. §§ 3801–13 (2006)). Until it expired in 2007, that law gave the president Trade Promotion Authority (TPA). International trade agreements negotiated under TPA were guaranteed a straight up-or-down vote in Congress within ninety days. Agreements submitted under TPA could not be filibustered or blocked in committee. Approval in both houses depended merely on a simple majority, the Senate having already reached cloture at the time it debated and approved TPA. Nearly every major international trade agreement the United States has joined in the past thirty years was negotiated, reviewed, and approved in a similar manner, including the World Trade Organization and North American Free Trade Agreement (NAFTA). Charnowitz, *supra* note 21, at 696–98, 707.

53. See RESTATEMENT (THIRD), *supra* note 8, § 303 reporters' note 7.

54. *Id.* § 303 reporters' note 8; see, e.g., Ackerman & Golove, *supra* note 18 (making the strongest recent case for the "interchangeability" of congressional-executive agreements and treaties). *But see*, e.g., Tribe, *supra* note 44 (arguing that *ex ante* and modern hybrid congressional-executive agreements are constitutionally suspect).

cause Congress arguably has the least say in shaping these pacts, given that they merely vote “yea” or “nay” at the end of the negotiations. Ex ante agreements also appear to be losing favor with Congress, which is growing increasingly concerned about whether it has delegated too much authority to the president to enter into international obligations on behalf of the United States. Assuming that any president would veto a bill that would invalidate an executive agreement negotiated by the president, ex ante authorization in effect reverses the balance of power between Congress and the president by requiring a supermajority of both houses to stop an executive agreement from binding the United States.

### III. EXECUTIVE AGREEMENTS AS SUBSTITUTES FOR TREATIES

Some disagreement exists about when the president and Congress may employ executive agreements instead of treaties. Most commentators agree that the Constitution requires that some international agreements receive the approval of Congress or the Senate. I explore these issues below.

#### A. *Limits on Sole Executive Agreements*

Sole executive agreements must rest squarely within the president’s own constitutional authorities.<sup>55</sup> The president may not conclude a sole executive agreement that violates rights protected by the Constitution, including the Bill of Rights. The president’s legitimate constitutional authorities include the power to conduct foreign affairs<sup>56</sup> and the power to implement laws enacted by Congress.<sup>57</sup> Of course, the right of the president to conclude sole executive agreements in furtherance of authorities delegated to the president by Congress via statute depends on the substance of the statute(s) in question. The limit of this authority, therefore, is difficult to analyze in the abstract. Importantly, however, the statutes in question need not explicitly authorize the president to enter into sole executive agreements.<sup>58</sup> Rather, the president must be able to defend any sole agreements entered into pursuant to statute as a nec-

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55. RESTATEMENT (THIRD), *supra* note 8, § 303(4) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”).

56. *See supra* notes 35–36 and accompanying text.

57. U.S. CONST. art. II, § 3 (“[The President] shall take care that the laws be faithfully executed . . .”).

58. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 92.

essary and proper application of the authority granted by the statute. In other words, it must be appropriate to implement the obligations created for the United States under existing statutory authorities.

Presidents have concluded sole executive agreements relatively sparingly. Most sole executive agreements to date can be defended as legitimate extensions of the president's foreign affairs powers, relating as they do to military or diplomatic matters having little direct impact on private interests in the United States.<sup>59</sup> But this is not always the case, as when presidents have used sole executive agreements either to alter or extinguish the rights of U.S. citizens and companies to pursue commercial claims against foreign governments or to restrict importation of certain foreign goods.<sup>60</sup> How far can the president stretch the foreign affairs powers? The Supreme Court has held that the president may not usurp legislative authorities the Constitution reserves for Congress.<sup>61</sup> Although the Court has not explicitly addressed the question of when a sole executive agreement would usurp congressional powers, some hypothetical cases seem relatively straightforward. The president, for example, could not conclude a sole executive agreement that obligated the United States to appropriate funds. The Constitution reserves this power for Congress alone and requires that all fiscal bills originate in the House of Representatives.<sup>62</sup>

Also, many scholars rely on the usurpation principle to argue that the president alone may not override an existing federal statute. Courts have ruled somewhat inconsistently on this matter.<sup>63</sup> As noted above, valid executive agreements (including those made solely by the president) carry the same force as a federal statute. Allowing the president to trump a prior act of Congress without the consent of Congress would appear to circumvent the legislative process. However, the Supreme Court has determined that sole executive agreements can override and preempt (at least some) domestic state laws in areas where the federal government has the authority to overturn state legislative action, such as on economic and trade matters.<sup>64</sup> As Louis Henkin wryly observed, there are permissible sole executive agreements and impermissible sole

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59. RESTATEMENT (THIRD), *supra* note 8, § 303 reporters' note 11.

60. *See id.*

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952) (ruling that President Harry Truman could not take control of U.S. steel mills during the Korean conflict without an act of Congress).

62. U.S. CONST. art. I, § 7.

63. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 93–94.

64. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–16 (2003).

executive agreements, but neither the Supreme Court nor anyone else has told us which ones are which.<sup>65</sup>

*B. Limits on Treaty-Executive Agreements*

In general terms, treaty-executive agreements must relate to matters over which one or both of the political branches of the federal government have competence under the Constitution. Neither the president nor Congress may use a treaty or a treaty-executive agreement to abridge rights guaranteed to individuals by the Constitution.<sup>66</sup> Apart from this general restriction, the requirement that treaty-executive agreements fall within the powers of Congress and the president may not place any meaningful limits on the use of that method of binding the United States. Most international arrangements cover matters of war and peace, trade between nations, or other areas over which the president or Congress have clear and often overlapping authority.<sup>67</sup> The Supreme Court has consistently held that the powers of the president and Congress to manage foreign relations and regulate international economic matters are expansive. It is possible to conjure up a hypothetical agreement that could be approved as a treaty but not as a treaty-executive agreement.<sup>68</sup> As a practical matter, however, the Senate may authorize the president to negotiate treaty-executive agreements on any subject matter simply by giving its advice and consent to a parent treaty that provides for future agreements.<sup>69</sup>

Some scholars consider treaty-executive agreements merely a subset of sole executive agreements. In their view, treaties are merely one source of authority the president may point to when justifying a decision to implement an international agreement without further congressional action. Unlike statutes, however, most treaties are not self-executing. Non-self-executing treaties do not have the force of a statute for purposes of domestic law; they can only be enforced domestically through implementing legislation enacted by Congress. Thus, for non-self-

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65. HENKIN, *supra* note 19, at 222.

66. See *Reid v. Covert*, 354 U.S. 1 (1957).

67. But see John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 768 (2001) (arguing for a far narrower reading of Congress's powers to regulate international commerce).

68. See the hypothetical case described *infra* note 93.

69. The Senate is not required to provide its advice and consent to a treaty after the treaty is completed; therefore, the Senate may use its advice and consent vote on one treaty to give its approval to future agreements. The permissible scope of those agreements is broad. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (upholding the power of the federal government to conclude agreements that exceeded even the enumerated powers of the Constitution).

executing treaties, the president may look to the treaty for authority to enter into a new international obligation under the parent treaty, but the president may not use the treaty to justify domestic implementation on an executive agreement. The president would need to defend domestic implementation on other grounds. In contrast, self-executing treaties lend Congress's authorities to the president for purposes of both domestic and international implementation. A duly authorized treaty-executive agreement concluded as a self-executing treaty, therefore, could allow the president to implement domestic programs that go well beyond the requirements of the original treaty. This distinction is relevant to the types of treaty-executive agreements the president may implement under existing climate change treaties. In Part IV of this Essay, I consider whether prior climate treaties entered into by the United States authorize the president to conclude treaty-executive agreements and, if so, under what circumstances.

It is somewhat difficult to predict how a court would handle a conflict between the president and Congress over whether the Senate authorized an executive agreement when it approved a prior treaty. I am unaware of any instance in which the president has found, over the objections of the Senate, an explicit or implied authority to conclude a treaty-executive agreement. No courts appear to have ruled on what standard would apply to such a case, or what deference, if any, the president should be afforded in these matters. It seems likely, however, that U.S. courts would give equal weight to the claim of each political branch and would decide the matter as they would for any other statutory interpretation issue: by looking at the plain language of the texts and by reviewing the legislative history for indications of congressional intent. Were the president to claim an implied authority, a court might reasonably place the burden of proof on the president to demonstrate Senate consent.

### *C. Limits on Congressional-Executive Agreements*

In contrast to the two other types of executive agreements, congressional-executive agreements are well-understood, even in the abstract, and case law serves as a better guide for analysis. Like treaty-executive agreements, congressional-executive agreements originate from the powers of the president, and Congress and must not exceed the powers granted to either of them under the Constitution. Once again, for most international agreements, this limitation is of little consequence given the breadth of powers enjoyed by the modern federal government. The

more fundamental question is whether some international agreements are inherently treaties under the Constitution, or whether the president and Congress always have discretion to treat an international agreement as a congressional-executive agreement instead of as a treaty.

Legal scholars have considered this question for the better part of a century. Throughout that time, the dominant legal view has remained unchanged: congressional-executive agreements and treaties are complete and equal substitutes, regardless of the subject matter or other factors.<sup>70</sup> As far back as 1947, President Harry Truman reported to Congress that treaties and executive agreements were interchangeable.<sup>71</sup> Henkin summarizes the situation this way: “[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.”<sup>72</sup> The highly authoritative *Restatement (Third) of the Foreign Relations Law of the United States*, the single best legal treatise in this area, states that “the prevailing view is that the congressional-executive agreement can be used as an alternative to the treaty method in every instance.”<sup>73</sup> Case law also supports a permissive approach. For more than a century, the Supreme Court has consistently rejected or sidestepped claims that specific congressional-executive agreements should have been deemed treaties.<sup>74</sup> Indeed, no court has ever invalidated a congressional-executive agreement on the grounds that it should have been handled as a treaty.<sup>75</sup>

It is certainly not the case that the most important international agreements need to be treaties. For example, congressional-executive agreements were used to approve the Bretton Woods agreement (creating the World Bank and the International Monetary Fund), the North American Free Trade Agreement (NAFTA) and World Trade Organization (WTO) (which regulate roughly a third of the goods and services in the U.S. economy), the first Strategic Arms Limitation Talks agreement

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70. See Ackerman & Golove, *supra* note 18, at 805; see also Yoo, *supra* note 67, at 768–72 (reaffirming that this is the consensus view but taking issue with it).

71. Yoo, *supra* note 67, at 772–73 (citing H.R. DOC. NO. 80-378, at 2 (1947)).

72. HENKIN, *supra* note 19, at 217.

73. RESTATEMENT (THIRD), *supra* note 8, § 303 cmt. e.

74. See, e.g., *Field v. Clark*, 143 U.S. 649, 694 (1892) (upholding congressional delegation of authority to the president to approve certain trade and tariffs agreements); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001), *cert. denied*, 534 U.S. 1039 (2001) (finding that the president and Congress had the power to conclude NAFTA as a congressional-executive agreement); see also *Holland*, 252 U.S. at 435 (upholding international agreements that exceeded the specific enumerated powers of Congress).

75. Yoo, *supra* note 67, at 762.

with the Soviet Union, agreements creating major UN agencies, and the legal instruments incorporating Texas and Hawaii into the United States.<sup>76</sup>

The U.S. State Department's treaty manual lists eight qualitative factors for the Department to consider when classifying an international agreement, including the agreement's urgency and duration, the scope of its obligations, the wishes of Congress, and past U.S. practice.<sup>77</sup> The treaty manual, however, makes clear that these factors are not legal tests. Rather, they are merely indicators of conformity with historical practice and guideposts for avoiding political conflict with Congress. These considerations, the State Department confirms, do not constrain the president and Congress.<sup>78</sup>

The discretion the president and Congress have to bind the United States through a congressional-executive agreement is so broad that both branches can use that method to modify substantially the obligations of the United States under an existing treaty that received the advice and consent of the Senate.<sup>79</sup> This is most clearly the case when the president negotiates a new standalone agreement with U.S. treaty partners. The new executive agreement supersedes the old treaty but does not formally amend the treaty or become adopted pursuant to it; thus the difference in form does not raise legal questions. New agreements trump old agreements regardless of their form. Recently, the Senate has expressed its desire to provide advice and consent to formal amendments to treaties. Whether such amendments must be approved with the advice and consent of two-thirds of the Senate is a matter of debate between the Senate and the executive branch.<sup>80</sup> The Senate has taken a more flexible approach toward executive agreements that supersede treaty obligations, but members of the Senate have sometimes objected in these cases too.<sup>81</sup> The power to alter, via executive agreements, obligations contained in existing treaty commitments will prove relevant to climate change.

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76. *See id.* at 761.

77. HANDBOOK ON TREATIES, *supra* note 40, § 723.3; *see supra* text accompanying note 40.

78. Interview with Susan Biniaz, Deputy Legal Adviser, U.S. Dep't of State, in Washington, D.C. (Feb. 8, 2008); *see also* HANDBOOK ON TREATIES, *supra* note 40, §§ 714–23.

79. 20 Op. Off. Legal Counsel 389, 389 (1996); *see* SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 181.

80. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 179.

81. *See, e.g.*, 20 Op. Off. Legal Counsel 246 (1996) (describing legislation intended to prevent the president from altering commitments or expanding the scope of the 1972 Anti-Ballistic Missile Treaty via an executive agreement).

Before settling on the view that treaties and congressional-executive agreements are interchangeable, however, the United States must contend with certain historical practices and trends. Recently, a few helpful empirical studies have sought to make sense of when and why the United States turns to treaties versus congressional-executive agreements.<sup>82</sup> Some of these studies have analyzed thousands of international agreements in order to characterize U.S. practice in each area of international law. The most rigorous of these studies has concluded that the U.S. government has been inconsistent.<sup>83</sup> The United States has approved congressional-executive agreements in just about every subject matter area, including international trade, foreign aid, monetary policy, environment, nuclear cooperation, space exploration, international security, and arms control. But the United States has also approved treaties in these areas. Further, U.S. historical practice has evolved. Many areas formerly handled as treaties are now handled as congressional-executive agreements, such as agreements setting tariffs on a range of commodities.<sup>84</sup> The evolution of U.S. practice, however, does not fully explain away inconsistencies in its treaty practice. In some areas, such as trade, the United States has consistently negotiated treaties and executive agreements side by side. Yet studies demonstrate that, despite these unexplainable inconsistencies, the president and Congress have *tended* to favor the treaty form when international agreements relate to extradition, human rights, dispute resolution, arms control, aviation, labor standards, consular relations, taxation, telecommunications, and the environment and natural resources.<sup>85</sup>

What should one make of these historical tendencies? Some scholars argue that the Constitution should be interpreted to require executive agreements and treaties to occupy “separate spheres”—that is, the United States should reserve some international subject matters for treaties and perhaps use congressional-executive agreements exclusively in other areas.<sup>86</sup> On its face, this theory is not unreasonable. On questions relating to foreign affairs, where the text of the Constitution does not provide clear guidance, the Supreme Court looks to the actual practice of the president and Congress to help it resolve the constitutionality of

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82. See generally Hathaway, *supra* note 17; Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); Yoo, *supra* note 67, at 768.

83. Hathaway, *supra* note 17, at 1238–41.

84. See, e.g., Charnowitz, *supra* note 21.

85. Hathaway, *supra* note 17, at 1240.

86. See, e.g., Yoo, *supra* note 67.

the question.<sup>87</sup> The most complete, current, and persuasive empirical review of U.S. treaty practice to date finds “no persuasive explanation” for when treaties should be used instead of congressional-executive agreements “based on the subject matter, form, topic, or any other substantive difference.”<sup>88</sup> Rather, the study finds that any consistency in classifying certain types of agreements lies in historical accident and anachronistic tradition, rather than law and principle.<sup>89</sup> Therefore, any existing tendencies to classify certain types of agreements as treaties rather than executive agreements should not and do not bind the president and Congress going forward.

Interestingly, at least one scholar believes that past practice demonstrates that congressional-executive agreements should be encouraged for issues that fall within the authorities granted Congress by Section 8 of Article I of the Constitution, which delineates legislative powers to regulate interstate and international commerce.<sup>90</sup> Review by both houses of Congress is essential in this view, when an international agreement is very similar to traditional domestic legislation. For example, economic agreements and those regulating individual behavior should be handled as congressional-executive agreements, according to this view. This reasoning appears to justify climate change congressional-executive agreements because climate policies affect every aspect of the U.S. economy and society.<sup>91</sup> But overall, the view that treaties and congressional-executive agreements occupy separate spheres is not supported by the actual practice of the United States. In many areas of international law—including investment, maritime matters, education, nuclear safety and technology, judicial and criminal assistance, and trade<sup>92</sup>—the

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87. 20 Op. Off. Legal Counsel 389, 399 (1996) (citing SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 86–87).

88. Hathaway, *supra* note 17, at 1240.

89. *See id.* at 1248.

90. Yoo, *supra* note 67, at 823 (arguing that congressional-executive agreements are “constitutionally necessary” when implementing international agreements akin to Congress’s Article I, Section 8 powers).

91. John Yoo reaches a somewhat different conclusion. Citing the Supreme Court’s recent narrowing of the Commerce Clause, Yoo indicates that the “non-commercial nature of proposed international environmental agreements . . . may require use of the treaty form” rather than a congressional-executive agreement. *Id.* at 849. This disregards the Supreme Court’s holding that the Commerce Clause and other constitutional authorities do allow the federal government to regulate the environment in very broad and fundamental ways. *See Massachusetts v. EPA*, 549 U.S. 497 (2007); *see also Gonzales v. Raich*, 545 U.S. 1 (2005). If one accepts this more mainstream and traditional understanding of congressional power, then international environmental agreements would be exactly the type of agreement that Yoo concedes should, or even must, be concluded by congressional-executive agreement. *See id.* at 823–29, 849.

92. Hathaway, *supra* note 17, at 1264.

United States uses both methods to create binding international obligations.

Thus, the law is relatively settled. Over the past seventy years, U.S. courts, the weight of scholarly opinion, and the empirical practice of the United States support the proposition that, for virtually any international agreement the United States could enter into as a treaty, it could alternatively enter into as a congressional-executive agreement.<sup>93</sup> Of course, the legality of approving an international agreement as a congressional-executive agreement does not mean that Congress—and the Senate in particular—will agree to do so.

#### D. *Who Decides the Form?*

The president may bring into force sole executive agreements and treaty-executive agreements without review by Congress. For international agreements that require explicit congressional approval, the president and Congress may properly decide to secure congressional approval either via the treaty process or by statute via congressional-executive agreements. Deciding among these options is sometimes politically controversial and can give rise to litigation. This potential for disagreement gives rise to the question of who may decide how any specific international agreement will be classified and reviewed.

The short answer is that the president decides in consultation with Congress. Federal courts have held that deciding whether to classify an international agreement as a treaty or an executive agreement is a “political question” to be made *solely* by the president and Congress.<sup>94</sup> The

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93. However, it is possible to imagine a hypothetical case. Congressional-executive agreements rest on those powers enumerated to Congress by the Constitution. Powers such as the treaty power in Article I of the Constitution are “additional to and independent of the delegations to the Congress.” HENKIN, *supra* note 19, at 190–91 (discussing Justice Oliver Wendell Holmes’s opinion in *Missouri v. Holland*, 252 U.S. 416, 433–35 (1920), where it was found that an international treaty regulating migratory birds was permissible even where a similar federal statute would be outside the constitutionally enumerated powers of Congress). In light of recent Supreme Court states’ rights and federalism cases, which have found limits on the scope of the Commerce Clause, it is theoretically possible that an international agreement might be outside the Commerce Clause powers but within the treaty powers of the federal government. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). This hypothetical situation is unlikely to arise, however, because the Supreme Court has tended to see any international matter as falling within the foreign affairs and commerce powers of the federal government. *See, e.g.*, Hathaway, *supra* note 17, at 1342–43 & n.314 (describing the Supreme Court’s “more expansive interpretation of the Commerce Clause power” in recent cases such as *Gonzalez v. Carhart*, 550 U.S. 1610 (2007), and *Gonzalez v. Raich*, 545 U.S. 1 (2005)).

94. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319–20 (11th Cir. 2001); *see also* RESTATEMENT (THIRD), *supra* note 8, § 303 cmt. e; Charnowitz, *supra* note 21, at 700.

United States Court of Appeals for the Eleventh Circuit, for example, vacated a lawsuit by labor and manufacturing interests that challenged the constitutionality of NAFTA. The court ruled that the decision by the president and Congress to classify NAFTA as an executive agreement rather than as a treaty was nonjusticiable (i.e., not for the courts to review).<sup>95</sup> The courts' decision in this and other similar cases reflects the general inclination of U.S. courts to defer to the political branches in matters of foreign affairs. When Congress and the president decide jointly to take up an international agreement as a congressional-executive agreement, they may do so without judicial review, and therefore without regard to any rights asserted by private citizens, corporations, or even specific members of Congress. As a matter of law and practice, therefore, the president and Congress may bind the United States under international law via a congressional-executive agreement "on any subject that falls within the powers of Congress and of the president under the Constitution."<sup>96</sup> Any such congressional-executive agreement functions as the supreme law of the land in the sense that it overrides inconsistent state laws and prior federal laws, as well as prior international agreements, including treaties.<sup>97</sup> The State Department's treaty manual reaffirms the political nature of classification decisions when it calls for the Department to consult with Congress on potentially controversial decisions about how to treat an international agreement.<sup>98</sup>

But what if the president and Congress disagree? Formally, the classification decision is made solely by the president when the executive branch transmits the agreement to the Senate or Congress for review.<sup>99</sup> In practice, presidents are reluctant to ignore the advice of Congress. If it disagrees with the president's classification decision, Congress may disapprove the agreement by voting it down (in the case of a congressional-executive agreement) or by passing a subsequent statute that invalidates it (in the case of a sole executive agreement). Congress may even refuse to consider a treaty or congressional-executive agreement at all, absent a prior statute requiring Congress to act. The president would have no legal recourse to challenge these purely legislative acts. Major disputes between the president and Congress regarding how to classify an international agreement are rare. Presidents need Congress's coop-

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95. *Made in the USA Found.*, 242 F.3d at 1319–20.

96. RESTATEMENT (THIRD), *supra* note 8, § 303(2).

97. *Id.* § 101(1) cmt. d.

98. *Id.*

99. See HANDBOOK ON TREATIES, *supra* note 40, § 723; see also SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 233–35.

eration for many reasons. Important international agreements are often controversial with the American people, and presidents usually seek the support of Congress as a proxy for securing the consent of the public at large. Furthermore, securing the concurrence of Congress, even when it is not legally necessary, is often good politics.

When conflicts do arise, they are generally between the president and the Senate rather than Congress as a whole.<sup>100</sup> The Senate tends to play a more active role in foreign affairs than the House of Representatives. In the context of congressional-executive agreements, moreover, it is the Senate's monopoly concerning treaties that seems diminished. It is not surprising, therefore, that the Senate has adopted procedures for promoting consultation between the executive branch and Congress on the form of prospective international agreements.<sup>101</sup> These procedures require regular State Department consultation with appropriate congressional committees in advance of international negotiations. They also require the State Department to send the foreign relations committees of the Senate and House a list of significant international agreements under negotiation to ensure that Congress is fully informed and has a chance to weigh in with the executive branch on both substance and form. In contrast to the Senate, the House prefers congressional-executive agreements over treaties because the House plays a formal role only in approving the former. Yet the House usually has a say either way because most major treaties require implementing legislation—approved by both the House and the Senate—to give them effect under domestic law, and presidents generally consider securing that legislation a prerequisite for the United States to join such agreements.<sup>102</sup>

#### IV. ENVISIONING CLIMATE CHANGE EXECUTIVE AGREEMENTS

In this Part, I use the general legal framework discussed above to evaluate the usefulness of climate change executive agreements. Specifically, I analyze the commitments the United States might make in future climate agreements and examine whether those commitments

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100. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 24–27.

101. *Id.* at 233–35.

102. As a matter of longstanding practice, presidents do not complete the international formalities necessary to make congressional-executive agreements and treaties binding on the United States until the Departments of Justice and State conclude that the president has all of the authority necessary to ensure that the United States can honor the commitments in these agreements. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 152.

would prove suitable for the three different types of executive agreements.

A. *Types of Climate Commitments*

Substance affects the form of an international agreement. For both sole executive agreements and treaty-executive agreements, the nature of U.S. commitments in an agreement helps determine whether the president may bring the agreement into force without congressional action. And even though congressional-executive agreements lend themselves to virtually any subject, the nature of the agreements may influence the Senate's willingness to forgo the treaty process. To understand whether executive agreements on climate change might prove useful, therefore, the United States must first consider what future climate agreements might require of the country.

To date, international climate policy discussions have centered on a handful of possible, and not necessarily mutually exclusive, climate change commitments. An illustrative list of the most widely discussed options is provided in Table 2.

TABLE 2: ILLUSTRATIVE CLIMATE COMMITMENTS<sup>103</sup>

- National or regional emissions abatement targets and timetables of various sorts, including absolute, economy-wide targets (e.g., Kyoto Protocol), indexed or intensity targets (e.g., linked to GDP), and conditional targets such as escape clauses or “safety-valves” if costs run too high.
- Nationally determined, but not internationally negotiated, policies or standards, such as efficiency standards, renewable energy production targets, or sustainable forestry measures.
- Harmonized international, sector-specific standards or codes of conduct (e.g., defining common fuel economy standards for automobiles, requiring the use of renewable energy sources).
- Science and technology cooperation to research and develop technologies such as fuel cells and carbon capture and sequestration, or to assess potential geo-engineering approaches.
- Efforts to facilitate broader access to new and emerging climate friendly energy technologies.
- Measures to help countries, particularly poor and vulnerable developing nations, adapt to inevitable climate change.
- Creation of new financial mechanisms or funds to advance any of these goals.

This universe of potential climate commitments can be lumped into three broad categories for purposes of U.S. foreign relations law: economic regulation, fiscal policy, and the exercise of traditional foreign affairs powers.

(1) Economic Regulation. The United States could regulate its economy to control its greenhouse gas emissions and to provide incentives for other nations to do so. For example, the United States could (i) bind itself internationally to a national emissions target and timetable (as intended by the Clinton administration under the Kyoto Protocol); (ii) adopt new energy efficiency or technology mandates for various commercial sectors (e.g., motor vehicles, appliances, electricity generation, buildings, manufacturing); or (iii) agree to alter existing rules governing

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103. Adapted from DANIEL BODANSKY & ELLIOT DIRINGER, PEW CTR. ON GLOBAL CLIMATE CHANGE, TOWARDS AN INTEGRATED MULTI-TRACK CLIMATE FRAMEWORK 3 (2007), available at <http://www.pewclimate.org/docUploads/Multi-Track-Report.pdf>.

international trade and access to U.S. markets to create incentives for other nations to reduce emissions.

(2) Fiscal Policy. The United States could agree to specific fiscal policies by taxing actual emissions or emissions-intensive goods or by spending public monies to promote climate solutions (e.g., funding research and development programs for advanced energy technologies). Although global climate agreements to date have included some fiscal commitments, these obligations have tended to be very general and therefore largely unenforceable.<sup>104</sup> One could imagine, however, a massive publicly funded effort to develop the next generation of energy technologies or a global strategy to assist developing nations to acquire clean energy technologies.

(3) Traditional Diplomacy. The United States could create international organizations, processes, and institutions to facilitate climate cooperation, strengthen information sharing, deepen scientific collaboration, promote “best practices” by private companies, and improve public education on climate change. Such an approach is exemplified by the Intergovernmental Panel on Climate Change, whose scientific contributions to climate change were awarded the Nobel Peace Prize in 2007.

Although perhaps overly simplistic, these categories are helpful because they line up nicely with specific constitutional authorities held by the president and Congress. Therefore, these three categories of climate commitments influence the availability and usefulness of the three types of executive agreements.

### *B. Sole Executive Climate Agreements*

The president may conclude sole executive climate agreements if they are pursuant to legitimate presidential authority and do not usurp the exclusive legislative function of Congress. The first two types of climate commitments—economic regulation and fiscal policy—are legislative powers under the Constitution, as discussed earlier. The president has the power under the Constitution to implement U.S. fiscal policy but may not alter U.S. tax and appropriation laws without the approval of Congress in the form of a new statute. Sole executive agreements that create new taxes and spending obligations for the United States would therefore be difficult to defend. Further, the Constitution gives Congress, not the president, the power to regulate interstate

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104. See, e.g., United Nations Framework Convention on Climate Change arts. 4, 11, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

and international commerce.<sup>105</sup> Sole executive agreements intended to regulate the U.S. economy—by capping emissions, by imposing efficiency, technology, or other performance standards, or by changing U.S. tariffs or other provisions relating to international trade—would prove difficult to defend unless Congress had already authorized the president to implement such regulations under an existing statute.

The president, however, does have authority under the Constitution to implement federal statutes.<sup>106</sup> This means that the president may implement economic regulation, spend monies, and raise taxes pursuant to authorities appropriately delegated by Congress within a statute. Congress appropriates funds annually, and no existing statute provides a compelling basis for the president to create a long term climate change spending obligation. Similarly, Congress has not authorized the president to obligate the United States to change its tax laws for climate change purposes. In contrast, Congress may very well have authorized the president, via the Clean Air Act, to regulate the U.S. economy to control climate pollution.<sup>107</sup> With respect to traditional diplomacy, the executive branch has a somewhat freer hand because of the president's inherent foreign affairs authorities under the Constitution. I examine, in this Section, the extent to which these authorities provide a basis for sole executive agreements on climate change.

### 1. *The Clean Air Act*

The Clean Air Act of 1963, as amended, authorizes the Environmental Protection Agency (EPA) to regulate air pollutants to protect public health.<sup>108</sup> The traditional targets of the Act have been dangerous levels of smog and local air pollution. Opinions have differed regarding whether the Clean Air Act provides a sufficient statutory basis to control and reduce U.S. greenhouse gas emissions. The Clinton administration believed the Act could be made to work for that purpose even if its authorities were not ideally crafted for climate change. The administra-

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105. U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”).

106. *Id.* art. II, § 3 (“[The President] shall take care that the laws be faithfully executed . . .”).

107. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000 & Supp. V 2006).

108. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in scattered sections of 42 U.S.C.). Congress has supplemented and amended the act on several occasions, including the Air Quality Act in 1967, Pub. L. No. 90-148, 81 Stat. 485; the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

tion of George W. Bush maintained that the statute does not provide the EPA with authority to enact climate regulations.<sup>109</sup> In 2007, a sharply divided Supreme Court held that the EPA has authority to regulate greenhouse gas emissions under the Clean Air Act, subject to certain scientific findings the agency must now examine regarding the extent of the threat posed by climate change.<sup>110</sup> The EPA is poised to begin regulating greenhouse gas emissions pursuant to these new findings.<sup>111</sup> If this is the case, the Clean Air Act could be used by the president to justify sole executive agreements that obligate the United States internationally to take whatever measures the EPA has authority to undertake domestically pursuant to the Act, absent a new statute enacted by Congress altering the EPA's newly validated climate authority.

The Clean Air Act explicitly authorizes the president to negotiate international agreements to protect Earth's upper atmosphere. The statute provides:

The president shall undertake to enter into international agreements to foster cooperative research which complements studies and research authorized by this subchapter, and to develop standards and regulations which protect the stratosphere consistent with regulations applicable within the United States. For these purposes the president . . . shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums and shall report to Congress periodically on efforts to arrive at such agreements.<sup>112</sup>

This provision was enacted in connection with international efforts to address ozone depletion in the upper atmosphere under the 1987 Montreal Protocol.<sup>113</sup> Whether this provision of the Clean Air Act authorizes international climate agreements may rest on whether authority to negotiate agreements to "protect the stratosphere" includes the authority to negotiate agreements that protect the stratosphere and other parts of the atmosphere equally.<sup>114</sup>

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109. *See Massachusetts v. EPA*, 549 U.S. 497, 510–13 (2007).

110. *Id.* at 527–35.

111. *See, e.g.*, Juliet Eilperin, *EPA Presses Obama to Regulate Warming under Clean Air Act*, WASH. POST, Mar. 24, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/23/AR2009032301068.html?hpid=topnews>.

112. Clean Air Act § 7671p(a).

113. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989).

114. The stratosphere begins roughly five to six miles above Earth's surface. Greenhouse

But even if the Act does not explicitly authorize the executive branch to negotiate international agreements, the president could rely on the general authority provided by the Clean Air Act to regulate air pollution. That authority, assuming it exists domestically, could justify sole executive agreements that furthered the purposes of the Act even if such agreements were not envisioned by the Act. The Supreme Court has held that domestic statutes need not explicitly authorize international negotiations for the president to rely on those statutes to implement executive agreements, provided that the agreements can be implemented under domestic law consistent with those statutes.<sup>115</sup> The Convention on Long-Range Transboundary Air Pollution (LRTAP), a multilateral agreement that creates a framework to reduce the pollution its name describes, was entered into by the United States as a sole executive agreement precisely because the Clean Air Act provided sufficient authority for the president to comply with the agreement.<sup>116</sup> Congress never authorized the LRTAP negotiations, nor did it bless the final executive agreement. U.S. practice includes several similar examples of executive agreements having to do with the environment that were concluded without the authorization of Congress and implemented based entirely on existing environmental statutes.<sup>117</sup>

Assuming that the Clean Air Act is found to allow the EPA to regulate climate emissions, the Act as it stands today might reasonably provide the legal basis for sole executive agreements that require the United States to set domestic standards for emissions from mobile and stationary sources. The Clean Air Act provides the EPA clear regulatory authority in each of these areas. To the extent that any of these regulations create private markets for tradable emissions permits, the president could probably enter into sole executive agreements that link comparable U.S. and international markets for carbon-denominated securities, including Europe's Emissions Trading System. Such an agreement could be implemented domestically by the EPA through a regulation al-

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gases are found in the stratosphere but in smaller quantities than the troposphere, the area beneath the stratosphere and above Earth's surface. See National Weather Service, Layers of the Atmosphere, at <http://www.srh.noaa.gov/srh/jetstream/atmos/layers.htm> (last visited Apr. 8, 2009).

115. SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 92.

116. Interview with Susan Biniarz, *supra* note 78; see also Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217.

117. Interview with Susan Biniarz, *supra* note 78; see, e.g., Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, June 14, 1994, 2030 U.N.T.S. 125; Agreement on Air Quality, U.S.-Can., Mar. 13, 1991, T.I.A.S. No. 11,783.

lowing U.S. companies to demonstrate compliance with domestic climate regulations by depositing qualifying foreign emissions permits with the EPA. The president might also enter into an executive agreement requiring the United States to allow U.S. companies to demonstrate their compliance with any new Clean Air Act climate regulations by purchasing rights to verified emissions reductions achieved in developing nations (sometimes called “offsets”). Taken together, this fairly robust suite of international commitments could go a long way toward helping the United States convince other nations to abate their emissions, and thus could constitute a major climate change foreign policy.

However, the Clean Air Act may not authorize all that a president may wish to do regarding climate change. It is debatable whether the Clean Air Act would authorize the EPA to create an economy-wide cap-and-trade program because the Act provides different authorities for each major source of air pollution. If such a program were to be the centerpiece of U.S. climate foreign policy, as many climate policy experts believe, then that potential shortcoming is serious. The Clean Air Act, in addition, provides no applicable authority to regulate international trade and amend U.S. tariff schedules, although it does allow the EPA to regulate equally both foreign and domestic goods in the U.S. economy. The Clean Air Act does not authorize the president to obligate the United States to provide financial assistance to developing nations that would enable them to mitigate their emissions or adapt to climate change.<sup>118</sup> Even if it did, Congress still would need to appropriate funds annually.

## 2. *Foreign Affairs Powers*

The president’s foreign affairs power includes the right to decide, absent a statute to the contrary, how best to carry forward U.S. diplomacy. The president could rather easily defend sole executive agreements that obligate the United States to take steps designed to facilitate the *process* of climate diplomacy. Such sole executive agreements might, for example, accomplish the following:

- Protect the competitiveness of U.S. companies and promote international climate action by creating a framework authorizing nations to impose certain trade restrictions or other measures against nations that do not take sufficient action to abate their

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118. The Clean Air Act only authorizes international assistance to help developing nations phase out the use of ozone depleting substances. 42 U.S.C. § 7671p(b) (2000 & Supp. V 2006).

emissions, provided that those measures would neither violate U.S. obligations under the WTO or other international agreements nor require changes in U.S. tariff schedules;

- Create international mechanisms to help developing nations acquire access to clean energy technologies and reduce emissions from deforestation, provided that U.S. obligations to fund these programs depend on future congressional appropriations;
- Create an international fund to help developing nations adapt to climate change, provided that U.S. obligations to contribute to the fund depend on future congressional appropriations;
- Obligate the United States to participate in a more robust system for reporting and reviewing national climate programs and emissions, provided that this does not violate any provision of domestic law; and/or
- Strengthen international scientific cooperation, subject to congressional appropriation of funds.

Thus, the president could rely on his or her inherent foreign affairs powers to jump start the process of U.S. climate diplomacy. That said, the caveats mentioned in each case highlight the need for congressional approval when the process of climate diplomacy turns substantive. Because the Constitution makes foreign affairs an area of shared responsibility between the president and Congress, the president may not go it alone even in some of these process areas. The president, for example, may not commit the United States to membership in a new international organization such as a new global energy technology research agency for more than one year without the approval of Congress.<sup>119</sup>

### 3. *Observations on Sole Executive Agreements*

The examples given above, as related to the Clean Air Act and foreign affairs powers, describe what the president may do as a matter of law, not what the president should do as a matter of policy. Whether authorized by the Constitution or the Clean Air Act, the president could obligate the United States to implement a wide range of economically, environmentally, and diplomatically significant climate commitments. Some of these commitments would require a subsequent act of Congress

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119. State Department Basic Authorities Act of 1956 § 5, 22 U.S.C. § 2672(a) (2006).

to give them effect (such as an appropriation), but many climate commitments would not. If the president entered into a major climate change sole executive agreement, this would undoubtedly create a domestic political firestorm. Widespread bipartisan political support is a precondition for an effective and enduring U.S. climate change foreign policy. That kind of policy is unlikely to emerge if the president charges ahead without Congress. On the other hand, congressional inaction should not handcuff the president and derail international climate cooperation. On matters that are sure to engender domestic controversy, perhaps the prospect of sole executive agreements should encourage Congress to find common ground with the president and the international community. For controversial matters that would impose major costs on the U.S. economy, the president should turn to sole executive agreements as a last resort.

### C. *Treaty-Executive Climate Agreements*

The president may conclude, without further congressional review, an executive agreement on climate change that the Senate authorized explicitly or implicitly when it gave its advice and consent to a prior treaty. In late 1992, the Senate approved and the United States became a party to a major climate treaty, the 1992 UN Framework Convention on Climate Change (UNFCCC), which provides a framework for international cooperation in this area. The treaty set forth principles to guide international efforts, including provisions allocating (in the most general terms) the responsibility for action among developed and developing nations. The UNFCCC also imposed reporting obligations on parties to improve information sharing and future decision making.<sup>120</sup>

In view of the Supreme Court's recent holding in a treaty case,<sup>121</sup> the UNFCCC would not be considered self-executing so its provisions probably do not have status under domestic law directly.<sup>122</sup> The

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120. UNFCCC, *supra* note 104, arts. 4, 12.

121. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

122. Congress usually has a bias against self-executing treaties, and some members of the Senate appear to have taken the view in 1992 that the UNFCCC is not self-executing. See SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 274–76. The Office of Legal Counsel at the Department of Justice currently takes the view that treaties are not self-executing absent an express indication to the contrary, either in the text of the treaty or in the debate surrounding U.S. ratification. This standard is different from that historically advanced by the Office of the Legal Adviser in the Department of State, which has tended to view international agreements as self-executing absent evidence to the contrary. Interview with John Kim, Assistant Legal Adviser for Oceans, Env't & Sci., and former Dir., U.S. Dep't of State Treaty Office, in Washington, D.C. (Mar. 11, 2008). The *Restatement (Third) of the Foreign Relations Laws of the United*

UNFCCC itself is silent on the self-execution issue. The United States was able to implement the Convention under existing statutes without passing new implementing legislation. Accordingly, the Senate's advice and consent to the UNFCCC may provide no additional basis for the president to implement any executive agreements domestically. Instead, for purposes of domestic implementation the president probably needs to rely on the authorities granted by the Constitution and those delegated by Congress through statute, including the Clean Air Act. What new domestic authority, if any, however, does the UNFCCC provide for the president to bind the United States internationally, without regard to domestic implementation?<sup>123</sup>

The UNFCCC envisions that the parties to the agreement will adopt additional legal instruments under it. Article 2 states:

The ultimate objective of this Convention *and any related legal instruments that the Conference of the Parties may adopt* is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>124</sup>

The Convention also provides that state parties may amend the agreement from time to time. Article 15 stipulates that amendments shall enter into force for those parties that agree to be bound by the amendments once three-fourths of all parties to the UNFCCC have so agreed. State parties that do not so agree shall not be bound by the amendments.<sup>125</sup>

The UNFCCC created a number of international bodies, vesting them with distinct roles and decision making powers. Foremost among these is the Conference of Parties (COP), which the Convention describes as the "supreme body" of the treaty.<sup>126</sup> Article 7 of the UNFCCC stipulates that the COP should meet yearly to review implementation of the UNFCCC and "related legal instruments" that the COP may adopt to

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*States* takes the Department of State view. It states that treaties that do not require implementing legislation are presumed to be self-executing. RESTATEMENT (THIRD), *supra* note 8, § 111.

123. As a matter of international law, any commitment the president makes with the intention of binding the United States internationally, subject to the completion of certain international formalities, creates an international obligation for the United States even if the president did not have authority under domestic law to make the commitment. An unauthorized international obligation, however, cannot be relied upon as a basis for domestic action. *See* SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 56; RESTATEMENT (THIRD), *supra* note 8, § 311(3).

124. UNFCCC, *supra* note 104, art. 2 (emphasis added).

125. *Id.* art. 15.

126. *Id.* art. 7.

achieve the objective of the Convention.<sup>127</sup> The UNFCCC also provides that the COP shall review the “adequacy of commitments” by state parties and take appropriate action, including the adoption of new commitments needed to achieve the objective of the Convention.<sup>128</sup> Notably, the sole purpose of Article 17 of the UNFCCC is to spell out rules by which the COP may “adopt protocols to the Convention.”<sup>129</sup> These rules describe the process to be followed at the international level but do not address how the United States would review new protocols under domestic law.

Given the emphasis the UNFCCC places on subsidiary climate agreements or protocols, it is perhaps not surprising that, at the time the Senate debated the treaty, its members inquired about the domestic process the United States would follow to review amendments and protocols to the Convention. During a hearing on the UNFCCC before the Senate Committee on Foreign Relations, committee members asked the administration of George W. Bush whether protocols to the Convention would be submitted to the Senate for its approval. The administration responded in writing that it expected that protocols to the Convention would come before the Senate, depending on the substance of the new agreements.<sup>130</sup> The administration gave a similar answer with respect to amendments to the UNFCCC.

The Committee also asked specifically how the first Bush administration would treat an amendment or protocol to the UNFCCC that contained legally binding greenhouse gas emissions reduction targets. At the time, the international community was already discussing this idea and several witnesses before the Committee, including then vice presidential candidate Al Gore, called on the United States to move in this direction.<sup>131</sup> The administration responded to the Committee’s question in writing by noting that it “would expect such a protocol to be submitted to the Senate.”<sup>132</sup> The administration did not say explicitly that it

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127. *Id.*

128. *Id.* art. 4.

129. *Id.* art. 17.

130. *UN Framework Convention on Climate Change: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong., app. at 105–06 (1992) [hereinafter *UNFCCC Hearing*] (responses of the administration to questions asked by the Committee on Foreign Relations).

131. During early negotiations on the treaty, the EU and some developing nations had advocated including such targets in the UNFCCC. The first Bush administration insisted that emissions targets in the UNFCCC needed to be nonbinding, and ultimately they were. This international debate made the Senate attuned to the prospect that the parties to the Convention, meeting as the COP, might agree in the future to legally binding emissions targets.

132. *UNFCCC Hearing*, *supra* note 130, app. at 106 (responses of the administration to ques-

would handle such protocols as treaties, merely that the agreements would come before the Senate for approval. As the first Bush administration did not mention congressional-executive agreements, the Committee may have inferred that the administration would treat any such protocol as a treaty.

When the Senate approved the UNFCCC, it did not seek formally to condition its consent on amendments or protocols to the Convention coming back before the Senate. The report of the Committee on Foreign Relations, however, included language intended to protect the Senate's prerogatives.<sup>133</sup> The report stated that, in the view of the Committee, any amendment or protocol to the UNFCCC that adopted emissions targets would have to be submitted to the Senate. The Committee's opinion on this matter and the first Bush administration's views were cited by at least one senator during the full Senate's debate on the Convention.<sup>134</sup>

Legally, the legislative history in the context of treaty-executive agreements is not controlling. The first Bush administration's assurances and opinions do not bind future presidents. Further, the first Bush administration did not promise to submit all protocols to the UNFCCC to the Senate, nor did the Senate condition its approval on congressional review of subordinate agreements. Congress and the president remain free to decide that the Senate has already authorized amendments and protocols to the UNFCCC freeing up the president to enter into treaty-executive agreements. U.S. courts probably would consider such a decision to be a nonjusticiable political question and would defer to the political branches.

Given the legislative record, however, the Senate today may expect that it would give advice and consent to major protocols and amendments to the UNFCCC. The depth and strength of this sentiment would surely depend on the politics of the moment, but any administration must assume that enough key senators would insist that the president would think twice before ignoring their views. Presidents usually bow to the Senate's desire to review international agreements once the Senate provides informal assurances that the agreements will receive timely and fair consideration.<sup>135</sup>

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tions asked by the Committee on Foreign Relations).

133. S. EXEC. REP. NO. 102-55, at 14 (1992).

134. See 138 CONG. REC. 33,521 (1992) (statement of Sen. McConnell).

135. Interview with John Kim, *supra* note 122; see also SENATE FOREIGN RELATIONS COMMITTEE REPORT, *supra* note 8, at 233.

In sum, it would be difficult for the president to implement protocols and amendments to the UNFCCC without first securing the Senate's approval one way or another. Moreover, the president has little incentive to do so. Because the Convention may not be self-executing, the president might not be able to point to it as authority to implement new executive agreements on climate change under domestic law. All told, treaty-executive agreements provide little benefit in the climate context at present.

#### *D. Congressional-Executive Climate Agreements*

Presidents, Congress, the courts, and the vast majority of U.S. legal scholars consider congressional-executive agreements complete and equally valid substitutes for virtually all treaties. Were Congress to approve a congressional-executive climate change agreement, the courts would be highly likely to uphold the agreement.<sup>136</sup>

But what if a court concluded that treaties and congressional-executive agreements are not interchangeable because the Constitution should be interpreted to require them to occupy separate spheres? Even in this unlikely event, a court might hold that many major climate change agreements may be handled by the president and Congress as congressional-executive agreements. A climate change agreement that created new mandatory emissions limits for the United States, for example, could prove costly and affect every sector of the U.S. economy. Implementing such an agreement would require the federal government to regulate commerce, create new controls on private action, and make substantial appropriations. Under the separate spheres theory, these are precisely the circumstances under which congressional-executive agreements are most legitimate because they most closely resemble domestic statutes that require the approval of both houses of Congress.<sup>137</sup>

As a matter of law, the president and Congress are free to disregard past U.S. practice in terms of obtaining the advice and consent of the Senate on international agreements. The tendency of the United States

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136. No court has invalidated a decision by Congress and the president to use the congressional-executive agreement form. *See Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001) (holding that the president and Congress had the power to conclude NAFTA as a congressional-executive agreement).

137. *See Yoo, supra* note 67, at 838–44. Although this conclusion is a logical application of Yoo's separate spheres theory, he might disagree on other grounds. He seems to believe that many domestic environmental statutes are unconstitutional because, in his view, the power of Congress to regulate interstate commerce should be interpreted more narrowly than the Supreme Court permits today. *See, e.g., id.* at 849.

to use the treaty form in certain areas, however, may create political, rather than legal, obstacles. The president and Congress tend to treat multilateral environmental agreements as treaties, but this practice has not been uniform. The United States, for example, is using a congressional-executive agreement to handle a recent protocol to the LRTAP convention that will reduce global stocks of the most dangerous persistent organic pollutants.<sup>138</sup> The original LRTAP convention under which the protocol was negotiated was also handled by the United States as an executive agreement. Thus, in terms of multilateral agreements addressing air pollution and the atmosphere generally, neither the president nor Congress should claim too strong an expectation regarding form.

The global negotiations on climate change that were launched by the international community in December 2007 are occurring under the UNFCCC.<sup>139</sup> The legislative history of the Senate's approval of the Convention highlighted the Senate's nonbinding but nonetheless clear desire to review major protocols or amendments to the Convention. Of course, the legislative history of the UNFCCC would be irrelevant with respect to any climate agreement that the president concluded *outside* the Convention because that idea would not have arisen during the ratification debate in 1992. This insight is relevant because the international community has the legal authority to decide that the new global climate pact should stand alone, outside the UNFCCC, even though that is not currently the approach being taken. This outcome would be highly unlikely unless the United States insisted. India, China, Brazil, and other developing nations attach great importance to the Convention's general principles and, other things being equal, prefer to keep all global climate pacts under that UNFCCC umbrella. One can only speculate whether an engaged president could convince these nations to take a different approach and what incentives might be necessary to convince them.

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138. Interview with John Kim, Assistant Legal Adviser for Oceans, Env't & Sci., and former Dir., U.S. Dep't of State Treaty Office, in Washington, D.C. (Mar. 7, 2008); *see also* Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, June 24, 1998, 2230 U.N.T.S. 79, *available at* <http://treaties.un.org/doc/source/RecentTexts/27-1peng.htm>. While the United States became a signatory to the 1998 protocol on June 24, 1998, the protocol still has not been ratified as of December 2008. *See* U.N. Econ. Comm'n for Eur., *Status of the Convention of Long-Range Transboundary Air Pollution and Its Related Protocols* at 2 (Dec. 17, 2008), *at* <http://www.unece.org/env/lrtap/status/Status%20of%20the%20Convention.pdf>.

139. *See* UNFCCC Report of the Conference of the Parties on Its Thirteenth Session, Bali, Indon., Dec. 3–15, 2007, *Bali Action Plan*, at 3, FCCC/CP/2007/6/Add.1, decision 1/CP.13 (Mar. 14, 2008), *available at* <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>.

Therefore, the United States may assume that the new global agreement will remain formally under the Convention. A protocol to a treaty, however, does not have to be a treaty. As a matter of law, “it lies within the power of Congress to authorize the president [by means of a congressional-executive agreement] substantially to modify the United States’ domestic and international legal obligations under a prior treaty.”<sup>140</sup> As U.S. treaty practice evolves, many agreements that formerly would have been concluded as treaties are now done as congressional-executive agreements or even sole executive agreements. Examples of this include tariff agreements on commodities, security agreements, and debt agreements.<sup>141</sup> A decision to treat a protocol to the UNFCCC as a congressional-executive agreement therefore would not be unprecedented and would, in fact, reflect the overall evolution of U.S. international agreements. Furthermore, the fact that a supermajority of the Senate already approved the Convention arguably makes an expeditious approach to subordinate agreements even more legitimate.

Four points stand out from the legislative history of U.S. ratification of the UNFCCC. First, as a matter of law, the Senate may handle new climate change agreements, including those negotiated under the Convention, as congressional-executive agreements. Second, the first Bush administration did not promise the Senate that it would submit all protocols to the Convention as treaties.<sup>142</sup> Third, it remains unclear from the legislative record whether the Senate attached particular importance to the treaty process per se or merely sought assurances that the president would not enter into protocols to the UNFCCC without Senate or congressional review. Neither the first Bush administration nor the Senate appears to have considered whether future Senate review should be achieved via the treaty process or through congressional-executive agreements.<sup>143</sup> Fourth, today’s Senate could make a reasonable argument that the legislative history—and the somewhat inconsistent ten-

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140. 20 Op. Off. Legal Counsel 389, 389 (1996) (noting that the president could alter U.S. obligations under the 1972 Anti-Ballistic Missile Treaty).

141. Given the structure of the State Department’s treaty records, it is difficult to determine the form of an international agreement. Nevertheless, historical and empirical analysis shows the general trend toward executive agreements even within categories that used to be handled as treaties. See generally Ackerman & Golove, *supra* note 18, at 807–13; Hathaway, *supra* note 17, at 1286–89.

142. *UNFCCC Hearing*, *supra* note 130, app. at 105–06 (responses of the administration to questions asked by the Committee on Foreign Relations).

143. Interview with Susan Biniiaz, *supra* note 78. Susan Biniiaz has been the lead U.S. government lawyer on climate change cooperation for almost twenty years, including during Senate consideration of the Convention.

dency of the United States to treat multilateral environmental agreements as treaties—gives rise to an expectation that protocols and amendments to the Convention will be treaties. However, any administration must not assume that the Senate’s views on this matter are immutable. As support builds for federal action on climate change, so too will interest build in negotiating and ratifying a global agreement that creates a level playing field for U.S. companies by requiring other nations to take climate action seriously. This dynamic is a familiar pattern in U.S. environmental diplomacy.<sup>144</sup> In addition, the Senate understands that U.S. opposition to global climate agreements is a symbol of a “go it alone” U.S. foreign policy that President Obama and the Democratic-controlled Congress are seeking to bury. Yet any president would be wise to consult with the Senate before deciding to use the congressional-executive agreement form. Because the Senate’s consent will be needed for a congressional-executive agreement anyway, President Obama cannot afford to alienate the Senate by presuming to decide unilaterally the form of future climate agreements.

#### V. THE CASE FOR CLIMATE PROTECTION AUTHORITY

New climate change agreements, including the new global agreement being negotiated now, should be treated as modern congressional-executive agreements. The United States should create “Climate Protection Authority” that allows it to negotiate and approve climate agreements in a process similar to international trade agreements. In this Part, I discuss the virtues of the trade model, make the case for applying that model to climate change, and highlight the immediate opportunity U.S. policymakers have to do just that.

The United States should export four aspects of its international trade agreement practice to its handling of climate change deals. First, major trade agreements are congressional-executive agreements. Second, most trade agreements are negotiated and approved pursuant to Trade Promotion Authority (TPA) such that Congress passes a framework statute that authorizes the president to negotiate new trade deals and instructs the president to submit any concluded agreements to Congress for its final approval (i.e., the modern congressional-executive agreement discussed

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144. For example, when the United States decided to phase out ozone depleting substances, U.S. industry quickly lobbied for an international agreement that would require other countries to follow suit. See RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* 31–39 (1998).

above). Third, TPA creates mechanisms for improving coordination between the executive branch and Congress during the negotiating process. Fourth, TPA commits Congress to review trade agreements such that each agreement receives a timely, straight up-or-down vote without amendments. Climate Protection Authority would apply these policies and procedures to international climate agreements.

It is important to distinguish between understanding the procedural characteristics of TPA, on the one hand, and determining, on the other hand, whether existing trade agreements have been good for the United States. In this Essay, I do not take a position on the latter question. Instead, I argue that importing the process the United States uses in trade agreements makes sense for climate change agreements. Most opponents of TPA—environmental, labor, and consumer groups—have not advocated against TPA’s procedural mechanisms per se; rather, they have opposed TPA bills and trade agreements that place little emphasis on strengthening environmental protection, labor standards, and consumer rights. If U.S. trade negotiating objectives made improving environmental, labor, and consumer standards a top priority, interest groups would have different views on the TPA mechanisms. In other words, where one stands on TPA depends on what one expects from the trade agreements negotiated under it. The same would be true of climate change. I provide an initial political analysis of why the trade model might advance the interests of many interest groups in the final portion of this Essay. What I wish to emphasize now, however, is that in a strictly procedural sense the trade model works. The United States is often able to reach a bipartisan consensus on trade negotiations via TPA legislation and presidents usually bring back trade agreements that Congress approves although often by a small margin.

Why is this the case? TPA empowers U.S. trade negotiators to reach better trade agreements by making the United States a more credible and reliable negotiating partner.<sup>145</sup> Under TPA, U.S. negotiating positions carry more weight internationally because U.S. demands enjoy broad domestic political support and are enacted into law.<sup>146</sup> Other nations are more likely to make politically difficult trade concessions when they believe Congress is unlikely to ask the president to renegotiate key terms and when U.S. domestic approval is probable and should

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145. Remarks to the Business Roundtable, 37 WEEKLY COMP. PRES. DOC. 946, 949–50 (June 20, 2001).

146. Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track*, 35 GEO. WASH. L. REV. 1, 32 (2003).

occur without unwarranted delay.<sup>147</sup> Simplified congressional review procedures are especially important for global trade negotiations because such deals are highly complex, take years and sometimes decades to conclude, involve a very large number of nations, and are particularly difficult to renegotiate. By reducing the requirement for Senate approval from two-thirds to a simple majority, TPA increases the likelihood that the United States will join new trade agreements. Trade agreements are too important to subject them to the will of a vocal minority of the Senate. Every recent president has considered TPA essential, and Congress has agreed to grant it periodically.

The rationale for TPA applies equally well to climate change. By speaking with one voice and providing a clear path to U.S. participation in international agreements, the United States can secure more favorable terms. Global climate agreements are arguably more complex than trade agreements and require a similarly lengthy negotiation process. Multilateral climate agreements are difficult to conclude and even more difficult to renegotiate, in part because they involve more countries than trade deals. The geopolitics of climate change are as challenging as the politics of international trade, and perhaps more so because the benefits of freer trade are more immediate than the benefits of mitigating emissions.

With Climate Protection Authority, Congress should (i) authorize the president to negotiate new congressional-executive agreements; (ii) define U.S. negotiating objectives and principles; (iii) create mechanisms for improving coordination between both branches during these negotiations; and (iv) provide for a straight up-or-down vote on climate agreements in both houses of Congress within ninety days without conditions, holds, filibusters, or amendments. By enacting Climate Protection Authority as part of a federal cap-and-trade bill, the United States could offer to make the U.S. emissions target more stringent, but only if other nations commit themselves to nationally appropriate and equitable climate action in a new global climate pact. This conditional offer would create a powerful incentive for other nations to make concessions to U.S. climate negotiators, thereby helping to protect U.S. economic and foreign policy interests while reserving for Congress the final decision on whether a new agreement meets legislative conditions.<sup>148</sup>

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147. R. Glenn Hubbard, *Why the U.S. Needs the Trade Promotion Authority*, OECD OBSERVER, May 1, 2002, at 19, available at [http://www.oecdobserver.org/news/fullstory.php/aid/687/Why\\_the\\_U.S.\\_needs\\_the\\_Trade\\_Promotion\\_Authority.html](http://www.oecdobserver.org/news/fullstory.php/aid/687/Why_the_U.S._needs_the_Trade_Promotion_Authority.html).

148. See *supra* Table 1.

Climate Protection Authority may not be perfect, but the alternatives are worse. Continuing to treat climate deals as treaties makes little sense. Compared to congressional-executive agreements, treaties are less democratic in that they disenfranchise only a portion of the legislature; they are, therefore, less legitimate. Because treaties generally are not self-executing, implementing legislation is needed to give them effect. Implementing legislation requires the approval of the House; therefore, it makes sense to seek that body's consent to join the international agreement in the first place. Treaties are cumbersome because Congress takes up approval of the international agreement and its implementing legislation separately and this often leads to delay. In contrast, with congressional-executive agreements Congress approves both the agreement and its implementing legislation simultaneously. The need for implementing legislation for treaties also creates the risk of a gap between what the United States is required to do internationally under a treaty and what the federal government actually does domestically under the implementing statute. The treaty process created by the Framers in the Constitution requires an exceptional degree of national consensus that is no longer reasonable given the frequency and importance of international cooperation today. Further, unless Congress provides an alternative to the treaty form, presidents may obligate the United States without congressional approval, relying instead on their authority to make sole and treaty-executive agreements. Although legally permissible in many cases, this approach would prove politically controversial, vulnerable to changes in political power, and a poor basis for a durable U.S. climate foreign policy.

## VI. POLITICAL ANALYSIS

In this final Part of this Essay, I examine possible reactions from Congress and show why Climate Protection Authority might help address the concerns of various stakeholders.

### A. *Congressional Reactions*

The Obama administration should embrace Climate Protection Authority because it would help find common ground with Congress on international climate policy earlier than might otherwise be the case. It would also enhance the credibility of U.S. negotiators and improve the prospect of U.S. participation in an agreement negotiated by the administration.

The House of Representatives prefers congressional-executive agreements over treaties. After all, the House plays no formal role during the negotiation and approval of treaties, whereas its role in congressional-executive agreements is substantial and identical to that of the Senate—both houses must approve the measures by majority vote. Passing climate legislation is a top priority for the expanded Democratic majority in the House. The willingness of the House to add Climate Protection Authority to a new cap-and-trade bill will depend on whether the Obama administration asks for the authority as well as the attitudes of traditional Democratic Party stakeholders, including environmental and labor groups. The House, however, should have little philosophical opposition to Climate Protection Authority.

The Senate has had a pragmatic view of congressional-executive agreements over the past few decades. A vocal minority in the Senate remains a staunch defender of the Senate's remaining treaty prerogatives; but as a whole, the Senate is usually willing to treat international agreements as executive agreements. The greatest obstacle to Senate concurrence may be the expectations created by the tendency (albeit inconsistent and not legally binding) of the president and the Senate to use the treaty form for certain types of agreements, including multilateral environmental accords.

Why would the Senate set aside any expectations it may have regarding climate treaties? If President Obama asks for Climate Protection Authority, the strong Democratic majority in the Senate might be nearly sufficient to give it to him. Senate leaders may also appreciate the geopolitical importance of U.S. participation in a new global climate pact. Like it or not, the United States' refusal to join the Kyoto Protocol has become a symbol of American unilateralism and exceptionalism (a perceived belief that the United States should not be bound by global norms). Perhaps few changes in U.S. foreign policy would more effectively demonstrate a renewed American commitment to multilateral cooperation.

Interestingly, securing the Senate's consent to Climate Protection Authority might only require a majority of the Senate. Assume that Climate Protection Authority is introduced as an amendment to a cap-and-trade bill on the Senate floor. Under the Senate's rules, the amendment would be adopted by a simple majority vote. Securing the Senate's approval of the cap-and-trade bill as a whole, of course, would require sixty votes, or cloture, to avoid a filibuster. Arguably, few senators would probably base their cloture vote on whether the cap-and-trade bill designated new

international agreements as congressional-executive agreements. Most undecided Senators would vote based on how their constituents view the legislation, which would depend on the economic consequences of the cap-and-trade program in their home states. The inclusion of Climate Protection Authority in the bill would be unlikely to alter significantly that calculation. In other words, enacting Climate Protection Authority as a stand alone statute would require sixty votes in the Senate (not far from the sixty-seven needed for a treaty), but doing so through a cap-and-trade program would require only a majority of the senators present and voting.

The Senate Committee on Foreign Relations, with whom the executive branch would consult on matters of international agreement form, may be quite amenable to handling climate change agreements as congressional-executive agreements. Today's Committee members are mostly internationalists who understand the benefits of U.S. participation in global agreements. The Committee could maintain its dominant role in managing the Senate's review of international climate agreements by (i) defining the negotiating objectives for the United States; (ii) overseeing a formal Senate observer group to the negotiations; and (iii) seeking assurances for the Senate's leadership that the Committee would manage the Senate's review of any climate change congressional-executive agreements concluded by the president.

### *B. Stakeholder Reactions*

The positions taken by the Obama administration and Congress on Climate Protection Authority will be informed by the views of leading interest groups and stakeholders in the climate change policy debate. Most major stakeholders are focused on domestic climate legislation at present instead of international climate cooperation. They are likely to judge the recommendations in this Essay based on how they might influence the substance and timing of a domestic cap-and-trade bill. Below are a few reasons why congressional-executive agreements and Climate Protection Authority could advance the interests of several key interest groups.

First, Climate Protection Authority would give U.S. companies greater certainty about the future direction of U.S. international climate policy. U.S. negotiating objectives would be worked out with Congress (not just with the executive branch) and would be enacted into law. Many of the largest U.S. multinational corporations, including members of the influential U.S. Climate Action Partnership, actively support a

domestic cap-and-trade program.<sup>149</sup> Many of these companies also support the proposition that the United States should join the next global climate change agreement.<sup>150</sup> After the United States adopts mandatory emissions limits under domestic law, U.S. businesses will have an interest in any international agreement that can help create a level playing field around the world.

Second, labor unions and businesses in energy-intensive sectors currently worry about how an international climate agreement might harm the competitiveness of U.S. companies and workers. Congressional-executive agreements and Climate Protection Authority would advance several of their core interests. For example, the framework legislation Congress adopts to authorize climate negotiations could instruct the president to negotiate robust compliance provisions that include both positive and negative incentives for other nations to take equitable climate action (such as border tax adjustments on goods coming from countries that are not taking appropriate climate action). Labor groups and energy-intensive industries have a special interest in seeing that other nations take on a legally binding international obligation to control their emissions. U.S. participation in an international agreement will be essential to securing legally binding commitments from other nations, including China and India. Moreover, Climate Protection Authority could direct the president to ensure that new climate agreements make any competitiveness provisions of U.S. climate laws less vulnerable to WTO challenge. WTO case law shows that WTO dispute panels are less likely to rule against environmentally-oriented trade measures when those measures are authorized by a multilateral agreement.<sup>151</sup> Also, Climate Protection Authority could make plain that Congress would reject any climate agreement that did not create a safe harbor for certain types of trade and competitiveness safeguards. In a traditional treaty ne-

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149. See generally U.S. CLIMATE ACTION PARTNERSHIP, A BLUEPRINT FOR LEGISLATIVE ACTION (2009), available at [http://www.us-cap.org/pdf/USCAP\\_Blueprint.pdf](http://www.us-cap.org/pdf/USCAP_Blueprint.pdf). The United States Climate Action Partnership includes Alcoa, BP, Chrysler, ConocoPhillips, Duke Energy, Dow, Dupont, Ford, General Electric, General Motors, Pepsi, Shell, and many other major corporations. See *id.* at 27. The coalition has called for reducing U.S. emissions by ten to thirty percent of today's levels within fifteen years, and by sixty to eighty percent by 2050. *Id.* at 5.

150. *Id.* at 4

151. See Steve Charnovitz, *The WTO's Environmental Progress*, 10 J. INT'L ECON. L. 685 (2007); see also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW (May 15, 1998); Report of the Panel, *United States—Restrictions on Imports of Tuna* (June 16, 1994), GATT/DS29/R (unadopted); Report of the Panel, *United States—Restrictions on Imports of Tuna* (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) (unadopted).

gotiation, by contrast, business and labor groups would have no guarantee that the president would attach a high priority to securing such provisions.

Last, because congressional-executive agreements and Climate Protection Authority would improve the prospects of agreements that require action by all major emitters, including the United States, these ideas should resonate with the environmental community. The United States would be more likely to join climate agreements negotiated pursuant to Climate Protection Authority. Environmentalists should also find intriguing the proposition that climate agreements would receive the same “fast track” treatment that trade agreements have enjoyed on and off for decades.

#### CONCLUSION

After almost twenty years of negotiating climate change treaties under three different presidents, the United States still lacks a strong bipartisan climate change foreign policy. A policy that articulates a compelling and credible vision of how the United States can engage the world to solve this major global threat is required. This continuing failure creates the serious risk that the United States will neither manage inevitable climate change nor avoid unmanageable climate disasters, or that it will do so without safeguarding the U.S. economy. In immediate terms, the United States runs the dual risk of another global climate agreement the United States cannot join, and that the United States will fail to use possible new federal climate laws to engage other countries effectively on the environment and other economic aspects of climate policy.

The current treaty practice of the United States is highly cumbersome and ill-suited for climate change. The odds are slim that the United States will join major new climate treaties because securing the constitutionally required two-thirds approval of the Senate would be exceptionally difficult for any economically significant agreement. Other nations understand this and are, therefore, less willing to make the concessions the United States needs to even have a chance of convincing the Senate. In addition, the treaty approach does not do enough to promote cooperation between the president and Congress. Stronger coordination between the president and Congress is especially important for climate change given the depth and range of domestic interests, the need for implementing legislation to give international agreements ef-

fect under domestic law, and the highly legislative nature of potential U.S. commitments. New approaches are needed.

Instead of continuing down the treaty path, the United States should handle climate change agreements as it does trade deals: as executive agreements. Executive agreements carry the same force of law as treaties under international law and are equivalent to a federal statute under domestic law. Unlike treaties, executive agreements are entered into either solely by the president based on previously delegated constitutional, treaty, or statutory authorities, or by the president and Congress together pursuant to a new statute. Though limits exist on the types of climate agreements the president could enter into without the approval of Congress, the president's authorities are broader than many policymakers realize. The Clean Air Act, together with the president's foreign affairs powers and the authority granted by the Senate's approval of the UNFCCC in 1992, arguably give the president wide latitude to conclude major climate change agreements, including ones that would entail substantial new economic costs.

Although unilateral presidential leadership may prove necessary if Congress refuses to act, it should be a last resort. Instead, the president should seek first to convince Congress to treat future climate change agreements as congressional-executive agreements, the routine form used for the vast majority of U.S. international agreements in hundreds of subject areas, including highly important and sometimes controversial issues. Congressional-executive agreements require the approval of a simple majority in both houses of Congress and are equivalent to treaties under international law. They have the force of law domestically too, trumping prior federal and state statutes.

Specifically, Congress should enact legislation that would create Climate Protection Authority, which would define U.S. negotiating objectives, create mechanisms for coordination between the political branches of government, and require the president to submit concluded agreements to Congress for final approval using simplified procedures that ensure a timely and fair hearing. This approach should apply to the new global climate change agreement being negotiated in the United Nations and to other future arrangements with a smaller number of major emitting nations.

Handling climate agreements as congressional-executive agreements and enacting Climate Protection Authority would speed the development of a genuinely bipartisan U.S. climate change foreign policy, improve coordination between the executive and legislative branches,

strengthen the hand of U.S. climate negotiators to bring home worthwhile agreements that protect both the environment and the economy, increase the prospects for U.S. participation in those agreements, protect the competitiveness of vulnerable economic sectors and energy-intensive industries, and spur equitable international climate action.