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Paving the Way for U.S. Climate Leadership

*The Case for Executive Agreements and
Climate Protection Authority*

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Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority

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Abstract

The United States should classify new international agreements to protect the Earth's climate system 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. The President and Congress should handle the most significant climate change agreements 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 good agreements, increase the prospects for U.S. participation in those agreements, protect U.S. competitiveness, and spur international climate action. 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. 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 and to other future arrangements with a smaller number of major emitting nations.

Key Words: Climate change, global warming, U.S. foreign policy, international affairs, executive agreements, treaties

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Introduction

The United States should classify new international agreements to protect the Earth's climate system 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 the approval of Congress, the President's authorities are 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 good 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 it could implement as a congressional–executive agreement. Congressional–executive agreements are far from novel; they are, by far, the most common form of international agreement entered into by the United States. Congressional–executive

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agreements are used by the President and Congress to tackle dozens and 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 Box 1 below for a preview of how Climate Protection Authority might work.) 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 and to other future arrangements with a smaller number of major emitting nations.

This paper has six sections. The first section gives some needed policy context by reviewing past, present, and future U.S. climate foreign policy. The second section explains U.S. options for authorizing, concluding, and approving international agreements generally. The third section 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. The fourth section applies these general legal principles to climate change and evaluates the usefulness of executive agreements to the climate issue. The fifth section makes the case for creating, by statute, Climate Protection Authority as a new procedural mechanism for defining and implementing U.S. climate foreign policy. And the final section explains why this approach would further the interests of key stakeholders.

Box 1: Climate Protection Authority—A Preview
How it might work in practice

- Jan. 2009: The President makes climate change a top priority for the United States. The President and Congress consult on the objectives and strategies for U.S. climate foreign policy, including the importance of immediately enacting strong domestic legislation and the benefits of negotiating new international climate change executive agreements rather than treaties.
- June 2009: Congress approves, and the President signs into law, legislation that sets an environmentally appropriate and economically feasible mandatory U.S. emissions target that is determined nationally, not negotiated internationally. The statute requires U.S. emissions to be X 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 90 legislative days, without conditions, holds, filibusters, or amendments. The Climate Protection Authority statute envisions strengthening the U.S. emissions target by an additional Y percent below 2020 levels if Congress determines that the world's other major emitters have made equitable and nationally appropriate climate commitments.
- Dec. 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.
- Mar. 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.
- Apr. 2011: The President signs the implementing legislation into law and completes formalities needed to make the United States a party to the new agreement once it enters into force.
- Dec. 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 have ratified the deal.

I. The Climate Policy Context

A. *New Challenges and Opportunities*

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

U.S. policymakers now have two major opportunities to tackle the climate challenge. In December 2007, the United States and the rest of the international community agreed to a roadmap for negotiating a new U.N. climate treaty by December 2009. The controversial 1997 Kyoto Protocol expires at the end of 2012 and new arrangements are urgently needed. This new round of 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. The U.S. Congress, moreover, is actively considering an ever-growing number of credible bipartisan legislative proposals that would substantially reduce U.S. emissions over the next few decades. Regardless of who wins the presidential election in 2008, the United States seems likely to enact mandatory domestic greenhouse gas emissions limits.

Aligning these 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. We cannot solve the climate challenge alone, nor can we allow the international community to dictate U.S. policy. To engage other nations effectively, the United States must pursue the following goals:

1. Take domestic action to reduce our own emissions and thereby move the U.S. economy in the right direction, demonstrate our seriousness to the international community, and bolster U.S. credibility.
2. Articulate a credible and comprehensive vision of international climate cooperation for the next few decades, including the concrete mechanisms, institutions, and resources needed to get the job done.
3. Set forth clear and realistic negotiating objectives that not only advance our own national interests, but also take into account those of other countries.

4. Convince other nations that if they work with the United States to advance a common vision, the United States will follow through by joining and implementing new international agreements that embody the approach.

To achieve these goals cooperation between the President and Congress is essential because climate change affects the constitutional authorities of both political branches of government. Although the President leads our diplomatic efforts, Congress initiates legislation to strengthen our economy, manage government spending, and protect our general welfare. Climate change is a global problem that requires international solutions, but climate solutions will affect nearly every aspect of our domestic society because emissions are byproducts of almost every part of our economy and culture. In short, climate change is both a domestic and an international issue with relevance for the environment, economy, international development, and security. So far the President and the Congress have not found common ground on climate change. In the 1990s, the Republican Congress did not support the Clinton administration's approach as reflected in the Kyoto Protocol; more recently, the Democratic Congress has not supported the Bush administration's rejection of binding national emissions targets.

Enhancing the role of Congress in setting climate foreign policy will help the next President engage other nations effectively. With more active involvement, Congress would gain new appreciation for the complex diplomatic realities inherent in climate negotiations. Legislators would be inclined to take an ownership interest in America's success and, therefore, would be more likely to champion good, but imperfect, agreements that represent the best deals that could be reached under difficult circumstances. Congress is unlikely to accept an international consensus that it did not help design and shape—as evidenced by widespread hostility toward the Kyoto Protocol in the 1990s—and the President will be less likely to ignore Congress if the latter is engaged and offering constructive solutions.

Regrettably, the United States has met none of the conditions for success in climate diplomacy. We have neither a clear bipartisan vision regarding the ideal shape of future international climate cooperation, nor a sound bipartisan strategy for working with other nations in a multilateral negotiating process. We even lack bipartisan negotiating objectives for the international climate negotiations that are already underway. President Bush and the Democratic Congress have radically different views about the optimal strategies. We also lack a

comprehensive plan for using future domestic climate laws, such as proposed “cap-and-trade”¹ systems, to engage other nations. Moreover, policymakers feel torn by the substantive imperative to encourage global action and the perceived political liability of proposing any specific new U.N. climate deal, which would probably involve assistance to China and other rapidly growing developing nations to help their economies grow more cleanly.

B. On the Wrong Path

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

Second, the next President’s climate change foreign policy may divide the country because too few policymakers and opinion leaders appreciate the trade-offs the United States must make in highly complex and contentious global climate negotiations. A politicized climate foreign policy, 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 our international goals, domestic legislation is unlikely to engage other nations as much as it should. A go-it-alone approach in the United

¹ 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, affording 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. Europe has adopted a cap-and-trade system to regulate a major portion of its climate emissions under the European Emissions Trading System. 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.

States would have us forgo important opportunities provided by our 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. Our domestic laws must contribute to a workable global solution.

Our past policy failures and the urgency of the problem argue for a fresh approach. Many of our national politicians and policymakers have radically different views about the most appropriate role for the Federal government in solving the climate problem. The approaches debated by policy makers include mandatory emission limits (in a cap-and-trade program), voluntary targets and standards, an Apollo Project-scale increase in government funding for clean energy research and development, a “clean energy Marshall Plan” program 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, elimination of trade barriers for clean energy products. Our national political leaders will have to find common ground to craft a strong and enduring climate change foreign policy.

Because reaching a consensus on these substantive policy issues will be challenging, we must ensure that we are approaching the task in the most constructive way. In other words, we must have in place *procedural mechanisms* that make the back-and-forth on policy options as conducive to reaching consensus as possible. We must not cling to preconceived notions of how our country negotiates and reviews international climate agreements. Rather, we must look for inspiration from other, more successful, areas of American foreign policy.

II. Treaties and Other International Agreements

In this section, 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 international law.”² Sometimes the international community describes an international agreement simply as an agreement, but the words treaty, charter, covenant, protocol, convention, accords, and a number of other appellations are also common. As a matter of international law, the name makes no difference—all can create international law obligations for state parties.³ Sometimes nations use similarly arcane terms to describe international arrangements that are not intended to be legally binding under international law. For example, declarations, final acts of conferences, communiqués, and joint statements generally are not considered international agreements but they can be.⁴ It is the intention of the parties that counts.⁵

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 (e.g., the agreements fail to provide recourse for noncompliance).

As a matter of international law, most international agreements come into force for each state party only after domestic review and approval. Some agreements, however, enter into force immediately, when concluded or signed, because they require no further domestic process. Multilateral agreements—those involving many nations—often condition entry into force on domestic approval by some minimum number of nations. When domestic approval is required, each nation may carry out its review process in accordance with its own domestic laws. 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.⁶ Internationally, a country is bound by an international agreement only after it has completed its domestic approval process and, when provided for by the agreement, has finished certain international formalities that indicate to other nations that it intends to be bound

² Restatement (Third) of the Foreign Relations Law of The United States, Section 202 (1987) [hereinafter “Restatement (Third)”]. See Congressional Research Service, *Treaties and Other International Agreements: the Role of the United States Senate*, S. Prt. 106–71, at 1, (2001) [hereinafter “CRS, Treaties and Other Agreements”].

³ Restatement (Third), Section 301, Comment a, at 149.

⁴ Id., Section 301, Reporters’ Note 1, at 151.

⁵ CRS, Treaties and Other Agreements, at 4.

⁶ Vienna Convention on the Law of Treaties, Article 18; Restatement (Third), Section 312; Digest of International Law, Vol. 14 (1968), at 40.

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 its 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 indistinguishable⁷ in that both can create binding international obligations. Even under U.S. law, once approved and in force, both treaties and executive agreements are equivalent to federal statutes;⁸ either type of agreement becomes the “supreme law of the land” until changed by a later conflicting Federal statute or a Constitutional amendment.⁹ Very importantly, 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.”¹⁰ 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.” Treaties of this type are said to be non-self-executing; once they enter into force, they 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

7 Restatement (Third), Part III, Introductory Notes, at 144–146; CRS, Treaties and Other Agreements, at 4.

8 Restatement (Third), Section 303.

9 Restatement (Third), Section 115. See U.S. Constitution, Article VI.

10 U.S. Constitution, Article II, Section 2, Clause 2.

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.¹¹ The 1989 Basel Convention, which regulates the transboundary movement and disposal of hazardous waste, received the advice and consent of the Senate but the United States is not yet a party to the Convention because Congress has not approved needed implementing legislation. A diagram of the path the United States takes to enter into a treaty is provided at Appendix 1.

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 it is entirely out of step with reality. International agreements are essential tools through which our nation advances its national interests in a heavily interconnected and rapidly globalizing world. Second, the framers imagined that the Senate, which had only 26 members at its inception, would remain small and nimble enough to serve as active counselors 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.¹² From George Washington on, Presidents have considered the Senate too large and diverse to provide useful, timely, and confidential advice. Today, the 100-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."¹³

11 R. Dalton, *National Treaty Law and Practice: United States*, in *National Treaty Law and Practice* 11 (M. Lee et al. eds., 1999).

12 B. Ackerman and D. Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799, 807–813 (1995), O. Hathaway, *Treaties' End: The Past, Present, and Future of International Law Making in the United States*, 118 *Yale L. J.* 103, 144 (forthcoming summer 2008) [hereinafter "O. Hathaway, *Treaties' End*"].

13 L. Henkin, *Foreign Affairs and the U.S. Constitution* (2d ed.), at 177 (paraphrase). See also CRS, *Treaties and Other Agreements*, at 2.

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 the matter, resulting in an informal committee "hold." 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.¹⁴ Although the Senate has only rejected seven treaties in the past century, 45 treaties currently languish in the Senate, some of these dating back to the 1940s.¹⁵ Several of these agreements have been joined by practically every major democracy in the world except the United States.¹⁶

The Senate's recent experience with the U.N. Convention on the Law of the Sea illustrates the challenge of moving a treaty through that body. 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 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, our national security community, major corporations, and leading environmental groups. Nevertheless, a very small but vocal minority in the Senate has, until very recently, blocked consideration of the agreement by the full Senate for more than a decade.¹⁷ 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 the United States is not represented in various international lawmaking bodies.

14 See, e.g. International Labor Organization Convention Concerning Freedom of Association and Protection of the Right to Organize (1949). See also O. Hathaway, *Treaties' End*, at 172–181 and S. Charnowitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 *Amer. J. Int'l L.* 696, 698 (2004).

15 U.S. Department of State, *Treaties Pending in the Senate* (Rev. December 7, 2007).

16 See, e.g. the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on International Economic, Social and Cultural Rights; the Vienna Convention on the Law of Treaties; and the Convention on Biodiversity.

17 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. The agreement now lies before the full Senate.

As Yale Law Professor Oona Hathaway has demonstrated, the manner in which the United States approves treaties is very unusual.¹⁸ The vast majority of other countries approve international agreements in the same way they approve domestic statutes. Other than the United States, only 23 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 for self-executing agreements. Among these, only three countries other than the United States (Ethiopia, 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: we allow for full and automatic incorporation of international commitments into domestic law, disenfranchise part of our legislature in the treaty-making process, and require approval by a supermajority of the part of the legislature that does have a say.¹⁹

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 farther 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. The treaty practice has harmed the credibility of the United States: in the eyes of the world, we are an unreliable treaty partner. More frequently than any other major power, we insist on major concessions during the negotiating process but then do not join the final agreements. Finally, our treaty practice limits the effectiveness of the international system. The United States is often an indispensable party. As the whole point of negotiating international agreements is to bind countries, particularly indispensable ones, our trouble joining international agreements undermines their usefulness as a means of regulating international action and this, in turn, harms the entire world.

18 O. Hathaway, *Treaties' End*, at 137–140. All of the empirical data in this paragraph come from Prof. Hathaway's recent and exhaustive study.

19 O. Hathaway, *Treaties' End*, at 138.

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.²⁰ Nevertheless, the constitutionality of three different types of executive agreements is very well established, including by our courts.²¹ Congress authorized the first executive agreements in 1792.²² They grew popular in the 1930s and 40s and, since World War II, the United States has approved over 90 percent of its international agreements as executive agreements rather than as treaties.²³ The number of executive agreements, moreover, is growing more rapidly than the number of treaties.²⁴ Over its history, the United States has become a party to roughly 15,000 executive agreements.²⁵ The steps followed by the United States to enter into executive agreements are diagrammed in Appendix 2.

Executive agreements come in three constitutionally permissible forms.

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.²⁶ 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 somewhat 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

20 The only time the Constitution references international agreements other than treaties is when it prohibits U.S. states from “entering 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. Constitution, Article I, Section 10.

21 Restatement (Third), Section 303; CRS, *Treaties and Other Agreements*, at 4–5.

22 CRS, *Treaties and Other Agreements*, at 38.

23 CRS, *Treaties and Other Agreements*, at 39. See also O. Hathaway, Statement before the House Committee on Foreign Affairs, Subcommittee on International Operations, Human Rights and Oversight, at n.6, February 8, 2008.

24 CRS, *Treaties and Other Agreements*, at 39.

25 U.S. Department of State, *Treaty Database* (2008).

26 Between 1946 and 1972, one study reports, 5.5% of U.S. international agreements were sole executive agreements. CRS, *Treaties and Other Agreements*, at 41, note 48.

obligation to faithfully execute Federal statutes²⁷ 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").²⁸ The U.S. Supreme Court has stated that "our cases have recognized that the President has the 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."²⁹ Examples of sole executive agreements include the Yalta Agreement of 1945, the Vietnam Peace Agreement of 1973, and the Iran Hostage Agreement of 1981.

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.³⁰ Treaty-executive agreements are somewhat rare. Only about 6 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.³¹ 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.³² Although the

27 U.S. Constitution, Article II, Section 3.

28 *Id.*, Article II, Sections 1, 2 (Clauses 1 and 2) and 3.

29 *Am. Ins. Ass'n v. Garamedni*, 539 U.S. 396 (2003). The case upheld a presidential-executive agreement with Germany settling U.S. Holocaust-era claims and preempting state restitution laws. Even the dissenting opinion, written by Justice Ginsburg, recognizes the constitutionality of sole executive agreements.

30 Restatement (Third), Section 303, Comment f (equating treaty-executive agreements with treaties); Circular 175, at Section 721.2b(1) (basing executive's authority to conclude an international agreement pursuant to treaty on prior consent by Senate). See also *Wilson v. Girard*, 354 U.S. 524, 528-529 (1957) (holding that Senate approval of a security treaty with Japan authorized subsequent treaty-executive agreement regarding criminal offenses).

31 CRS, *Treaties and Other Agreements*, at 39. See also O. Hathaway, Statement before the House Committee on Foreign Affairs, Subcommittee on International Organization, Human Rights and Oversight, February 8, 2008, at 2, n.6, citing 1984 Senate Committee on Foreign Relations report.

32 CRS, *Treaties and Other Agreements*, at 5; Restatement (Third), Section 303, Reporters' Note 6.

constitutional authority of the President to conclude executive agreements pursuant to treaty is uncontested, controversy occasionally arises about whether particular agreements indeed were authorized by the Senate.³³

Congressional–executive agreements, by far the most common form of executive agreements, are concluded by the President and explicitly authorized by Congress by enacting a statute. Although some members of the Senate and a very few legal scholars³⁴ 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. These agreements are now used by the United States in “virtually every area of international law,”³⁵ and represent 85–90 percent of all international agreements today.³⁶ Since 1980, the United States has concluded roughly 300 congressional–executive agreements each year in over 100 different subject areas,³⁷ ranging from nuclear cooperation and arms control to space exploration, trade, and international fisheries.

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

Ex Ante. 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 tailored

33 CRS, *Treaties and Other Agreements*, at 5.

34 See, e.g. E. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 *Yale L.J.* 664 (1944) and L. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221 (1999). But see L. Tribe, *American Constitutional Law* 228 n.18 (2d ed. 1988) (stating that congressional–executive agreements are “coextensive with the treaty power,” thereby contradicting his more recent advocacy position).

35 O. Hathaway, *Treaties’ End*, at 104.

36 CRS, *Treaties and Other Agreements*, at 40. See also O. Hathaway, *Statement before the House Committee on Foreign Affairs, Subcommittee on International Operations, Human Rights and Oversight*, at n.6, February 8, 2008.

37 O. Hathaway, *Treaties’ End*, at 117–137.

authority.³⁸ 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.³⁹ This waiting period allows 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 (postal agreements, scientific cooperation) and when Congress views its role primarily as an appropriator of government funding.⁴⁰

Ex Post. 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. The majority of congressional–executive agreements are *ex post* agreements, reflecting the increased number of international arrangements in a globalizing economy and Congress’s difficulty in staying ahead of fast-moving Executive Branch-driven foreign policy.

Modern Congressional–executive Agreements. 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, this 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 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, importantly, (v) creates a streamlined

38 For example, many of the 168 international agricultural commodity agreements concluded by the President over the past fifty years were authorized by a single statute (the 1954 Agricultural Trade Development and Assistance Act) and have not required further congressional review. The contemporaneous Trade Agreements Extension Act of 1955, in contrast, gave the President authority to conclude trade agreements in very specific, well-defined areas. O. Hathaway, *Treaties’ End*, at 120.

39 CRS, *Treaties and Other Agreements*, at 236 (listing numerous examples of agreements Congress required the President to transmit to Congress; many of these agreements required no further congressional action or approval).

40 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). 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 did lie before Congress before it entered into force.

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 done this way.⁴¹ 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 our 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.⁴² Most scholars consider them to be equally consistent with the Constitution, but that view is not universal.⁴³ Critics of executive agreements have been most hostile to *ex post* congressional–executive agreements because arguably Congress has the least say in shaping these pacts, given that they merely vote “yeah” 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

41 In August 2002, for example, the United States passed the Trade Act of 2002. 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 (no amendments) in Congress within 90 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 30 years was negotiated, reviewed, and approved in a similar manner, including the WTO and NAFTA.

42 Restatement (Third), Section 303, Reporters' Note 7.

43 Restatement (Third), Section 303, Reporters' Note 7 and 8. See B. Ackerman and D. Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995) (making the strongest recent case for “interchangeability”). But see L. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1994) (arguing that *ex ante* and modern hybrid congressional–executive agreements are constitutionally suspect).

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 in the following paragraphs.

A. *Limits on Sole Executive Agreements*

Sole executive agreements must rest squarely within the President's own constitutional authorities.⁴⁴ The President may not conclude a sole executive agreement that violates rights protected by the Constitution, including in the Bill of Rights. The President's legitimate constitutional authorities include the power to conduct foreign affairs⁴⁵ and the power to implement laws enacted by Congress.⁴⁶ 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.⁴⁷ Rather, the President must be able to defend any sole agreements entered into pursuant to statute as a necessary 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

44 Restatement (Third), Section 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”).

45 See “foreign affairs powers” above in the paragraph on sole executive agreements.

46 U.S. Constitution, Article II, Section 3 (the President shall “take care that the laws be faithfully executed”).

47 CRS, *Treaties and Other Agreements*, at 92.

private interests in the United States.⁴⁸ But this is not always the case, as when Presidents have used sole executive agreements to (i) alter or extinguish the rights of U.S. citizens and companies to pursue commercial claims against foreign governments, or (ii) restrict importation of certain foreign goods.⁴⁹ 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.⁵⁰ Although the court has not explicitly addressed the question of when a sole executive agreement would usurp congressional powers, some hypothetical cases seem relatively straight forward. 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.

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.⁵¹ 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 action by statute, such as on economic and trade matters.⁵² As Louis Henkin, the dean of the academic community on U.S. foreign relations law, wryly observed, there are permissible sole executive agreements and impermissible sole executive agreements, but neither the Supreme Court nor anyone else has told us which ones are which.⁵³

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

48 Restatement (Third), Section 303, Reporters' Note 11.

49 Id.

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

51 CRS, *Treaties and Other Agreements*, at 93.

52 *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), at 415.

53 L. Henkin, *Foreign Affairs and the U.S. Constitution* 222 (2d ed. 1996).

Constitution. Neither the President nor Congress may use a treaty or a treaty–executive agreement to abridge rights guaranteed individuals in the Constitution. 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.⁵⁴ 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.⁵⁵ 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.⁵⁶

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-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 to the President Congress’s authorities for purposes of both domestic and international implementation. Duly authorized treaty–executive agreements concluded under 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

54 But see J. Yoo, *Laws as Treaties?: The Constitutionality of Congressional–Executive Agreements*, 99 Mich. L. Rev. 757, 768 (2001) (arguing for a far narrower reading of the Congress’s powers to regulate international commerce).

55 See hypothetical case described, *infra* note 69.

56 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. *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding the power of the Federal government to conclude agreements that exceeded even the enumerated powers of the Constitution).

President may implement under existing climate change treaties. In part IV of this paper, 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 opined on what standard would be applied in reviewing such a case, or what deference, if any, the President should be afforded in these matters. It seems likely, however, that our courts would give equal weight to the claim of each political branch and would decide the matter as they would any statutory interpretation, 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 other two 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 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.⁵⁷ As far back as 1947, President Truman reported to Congress that treaties and executive

⁵⁷ B. Ackerman and D. Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995). See also J. Yoo, *Laws as Treaties?: The Constitutionality of Congressional–Executive Agreements*, 99 Mich. L. Rev. 757, 768 (2001) (reaffirming that this is the dominant view but taking issue with it).

agreements were interchangeable.⁵⁸ Louis Henkin summarizes the situation this way: “It 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.”⁵⁹ 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.”⁶⁰ Case law also supports a permissive approach. The U.S. Supreme Court has, for more than a century, consistently rejected or sidestepped claims that specific congressional–executive agreements should have been deemed treaties.⁶¹ Indeed, no court has ever invalidated a congressional–executive agreement on the grounds that it should have been handled as a treaty.⁶²

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 (i) the Bretton Woods agreement (creating the World Bank and International Monetary Fund), (ii) the NAFTA and WTO (which regulate roughly a third of the goods and services in the U.S. economy), (iii) the first Strategic Arms Limitation Talks agreement with the Soviet Union, (iv) agreements creating major U.N. agencies, and (v) the legal instruments incorporating Texas and Hawaii into the United States.⁶³

The 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.⁶⁴ 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

58 H. Doc. No. 378, 80th Cong., 1st Sess. (July 3, 1947) cited in J. Yoo *supra*.

59 L. Henkin, *Foreign Affairs and the U.S. Constitution*, 217, 2d ed. (1996).

60 *Restatement (Third)*, at 303 (emphasis added).

61 See *Field v. Clark*, 143 U.S. 649, 651 (1892) (upholding congressional delegation of authority to the President to approve certain trade and tariffs agreements) and *Made in USA Foundation v. United States*, 56 F. Supp.2d 1226 (1999), vacated, 242 F.3d 1300, 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 *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding international agreements that exceeded the specific enumerated powers of Congress).

62 J. Yoo, *Laws as Treaties?: The Constitutionality of Congressional–Executive Agreements*, 99 Mich. L. Rev. 757, 762 (2001).

63 *Id.*, at 761.

64 U.S. Department of State, 11 FAM 711, sometimes called the Circular 175 procedures.

with Congress. These considerations, the State Department confirms, do not constrain the President and Congress.⁶⁵

The discretion the President and Congress have to bind the United States through a congressional–executive agreement is so broad that they can use that method to substantially modify the obligations of the United States under an existing treaty that received the advice and consent of the Senate.⁶⁶ This is most clearly the case when the President negotiates a new standalone agreement with our treaty partners, in which case the new executive agreement supersedes the old treaty, but does not formally amend the treaty or become adopted pursuant to it. 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.⁶⁷ 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.⁶⁸ The power to alter, via executive agreements, obligations contained in existing treaty commitments will prove relevant to climate change.

Before settling on the view that treaties and congressional–executive agreements are interchangeable, however, we 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.⁶⁹ Some of these studies have analyzed thousands of international agreements to characterize U.S. practice in each area of international law. The most rigorous of these studies has concluded that our government has been inconsistent. The United States has approved congressional–executive agreements in just about every subject matter area, including international trade, foreign aid, monetary policy,

65 Id.

66 Memorandum from the Office of Legal Counsel, U.S. Department of Justice, to Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, November 25, 1996. See CRS, *Treaties and Other Agreements*, at 181.

67 Id., at 179.

68 Memorandum for John Quin, Counsel to the President, from Walter Dellinger, Assistant Attorney General (June 26, 1996) (describing bills intended to block the President from altering commitments in the 1972 Anti-Ballistic Missile Treaty via an executive agreement).

69 See O. Hathaway, *Treaties' End*, J. Yoo, *Laws as Treaties?: The Constitutionality of Congressional–Executive Agreements*, 99 Mich. L. Rev. 757, 768 (2001) and P. Shiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 Tex. L. Rev. 961 (2001).

environment, nuclear cooperation, space exploration, international security, and arms control. But we have also approved treaties in these areas. Further, our 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. The evolution of U.S. practice, however, does not fully explain away inconsistencies in our treaty practice. In some areas, such as trade, we have consistently negotiated treaties and executive agreements side-by-side. Yet the 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.

What should one make of these historical tendencies? Some scholars argue that the Constitution should be interpreted as requiring executive agreements and treaties to occupy “separate spheres”—that is, we should reserve some international subject matters for treaties and perhaps use congressional–executive agreements exclusively in other areas. 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 interpret the Constitution.⁷⁰ 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.”⁷¹ 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.⁷² 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, one scholar believes that past practice demonstrates that congressional–executive agreements should be encouraged for issues that fall within the authorities granted Congress by Article I, Section 8 of the Constitution, which delineates legislative powers to

70 See Franfurter concurring opinion cited in Dellinger opinion.

71 O. Hathaway, *Treaties’ End*, at 105.

72 O. Hathaway, *Treaties’ End*, at 171.

regulate interstate and international commerce.⁷³ 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 our economy and society.⁷⁴ 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 trade⁷⁵—the 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 any⁷⁶ international agreement the United States could enter into as a treaty, it could alternatively enter into as a congressional–executive agreement. 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.

73 J. Yoo, *Laws as Treaties?: The Constitutionality of Congressional–Executive Agreements*, 99 Mich. L. Rev. 757, 768 (2001).

74 Professor Yoo reaches a somewhat different conclusion. He believes that many domestic environmental statutes are on somewhat shaky constitutional ground. He holds a narrow view of the powers of Congress under the commerce clause of the Constitution. Therefore, he is reluctant to say that international environmental agreements fall within the powers of Congress under Article 1, Section 8. The Supreme Court, of course, has held that the commerce clause and other Constitutional authorities do allow the Federal government to regulate the environment in very broad and fundamental ways. If one accepts this more mainstream and traditional understanding of Congressional power, then international environmental agreements would be exactly the type of agreement that Professor Yoo believes should, or even must, be concluded by congressional–executive agreement. See *Id.*, at 829, 849.

75 O. Hathaway, *Treaties’ End*, at 117.

76 It is possible to imagine a hypothetical case, however. Congressional–executive agreements rest on the enumerated powers of Congress and the President in the Constitution. In contrast, the landmark Supreme Court case *Missouri v. Holland* determined that the treaty power is “additional to and independent of the delegations to the Congress” in Article I of the Constitution. 252 U.S. 416 (1920). 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 *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000). 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 also *Gonzalez v. Raich*, 545 U.S. 1 (2005) and *Gonzalez v. Carhart*, 550 U.S. 1610 (2007) cited in O. Hathaway, *Treaties’ End*, at note 310.

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. 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 executive agreement is a “political question” to be made *solely* by the President and Congress.⁷⁷ The U.S. 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).⁷⁸ The court’s 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.”⁷⁹ 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.⁸⁰ The State Department’s treaty manual reaffirms the political nature of classification decisions when it calls

77 *Made in USA Foundation v. United States*, 56 F. Supp.2d 1226 (1999), vacated, 242 F.3d 1300, 1319–1320, cert denied, 534 U.S. 1039 (2001); Restatement (Third), Section 303, Comment e. See also S. Charnowitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AJIL 696, 700 (2004).

78 *Id.*

79 Restatement (Third), Section 303(2).

80 Restatement (Third), Section 101(1), Comment d.

for the Department to consult with Congress on potentially controversial decisions about how to treat an international agreement.⁸¹

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.⁸² 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 presidential 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 cooperation 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. Further, securing the concurrence of Congress, even when it is not legally necessary, is often good politics.

When conflicts do arise, generally they are between the President and the Senate rather than Congress as a whole.⁸³ The Senate tends to play a more active role in foreign affairs than the House. 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.⁸⁴ 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

81 Id.

82 U.S. Department of State Treaty Manual, Circular 175, 11 FAM 711; CRS, *Treaties and Other Agreements*, at 233–235.

83 CRS, *Treaties and Other Agreements*, at 24–27.

84 CRS, *Treaties and Other Agreements*, at 233–235.

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 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 the agreements.⁸⁵

IV. Envisioning Climate Change Executive Agreements

In this section, 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 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, we must first consider what future climate agreements might require of the United States.

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 Box 2. 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.

⁸⁵ 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 U.S. Department of Justice and U.S. Department of State conclude that the President has all of the authority necessary to ensure that the United States can honor the commitments in these agreements. CRS, *Treaties and Other Agreements*, at 152.

Economic Regulation. The United States could regulate its economy to control its greenhouse gas emissions and 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’s policies toward the Kyoto Protocol); (ii) adopt new energy efficiency or technology mandates for various commercial sectors (motor vehicles, appliances, electricity generation, buildings, and manufacturing); or (iii) agree to alter existing rules governing international trade and access to U.S. markets to create incentives for other nations to reduce emissions.

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., by 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. 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 acquire clean energy technologies.

Traditional Diplomacy. The United States could create international

Box 2: Illustrative Climate Commitments*

- National or regional emissions abatement targets and timetables of various sorts, including absolute, economy-wide targets (like Kyoto), 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; for example, defining common fuel economy standards for automobiles or 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.
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* Adapted from D. Bondansky and E. Diringer, *Advancing the International Effort Against Climate Change: Towards an Integrated Multi-Track Framework*, Pew Center on Global Climate Change (2007).

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 authorities 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 and international commerce.⁸⁶ Sole executive agreements intended to regulate the U.S. economy—by capping emissions; 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 does have authority under the Constitution to implement Federal statutes, however.⁸⁷ This means that the President may implement economic regulation, spend monies, and raise taxes pursuant to authorities appropriately delegated by Congress by 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

⁸⁶ U.S. Constitution, Article I, Section 8, Clause 3 (“Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes”).

⁸⁷ U.S. Constitution, Article II, Section 3 (The President shall “take care that all laws be faithfully executed”).

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,⁸⁸ to regulate the U.S. economy to control climate pollution. 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. Clean Air Act

The Clean Air Act of 1963, as amended,⁸⁹ authorizes the U.S. Environmental Protection Agency (EPA) to regulate air pollutants to protect public health. The traditional targets of the act have been dangerous levels of smog and local air pollution. Opinions have differed on 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 Bush administration has maintained that the statute does not provide EPA with authority to enact climate regulations. In 2007, a sharply divided Supreme Court held that 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.⁹⁰ Most observers believe that EPA ultimately will be obligated to regulate greenhouse gas emissions. 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 EPA's newly validated climate authority.

The Clean Air Act explicitly authorizes the President to negotiate international agreements to protect the 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 title, and to develop standards and regulations which

88 Supra, note 81.

89 Congress has supplemented and amended the act on several occasions, including the Air Quality Act in 1967, the Clean Air Act Extension of 1970, and Clean Air Act Amendments in 1977 and 1990.

90 *Massachusetts v. EPA*, 549 U.S. (unassigned page number) (2007), Slip Opinion 05-1120.

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.⁹¹

This provision was enacted in connection with international efforts to address ozone depletion in the upper atmosphere under the 1987 Montreal Protocol.⁹² 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.⁹³ 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 they 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.⁹⁴ 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. 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.

Assuming that the Clean Air Act is found to allow EPA to regulate climate emissions, the act as it stands today might reasonably provide the legal basis for sole executive agreements that

⁹¹ Clean Air Act, Title VI, Section 617.

⁹² Montreal Protocol on Substances that Deplete the Ozone Layer (1987).

⁹³ The stratosphere begins roughly five to six miles above the surface of the Earth. Greenhouse gases are found in the stratosphere but in smaller quantities than the troposphere, the area beneath the stratosphere and above the Earth’s surface.

⁹⁴ CRS, *Treaties and Other Agreements*, at 92.

require the United States to set domestic standards for emissions from mobile and stationary sources. The Clean Air Act provides 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 U.S. and comparable international markets for carbon-denominated securities, including Europe's Emissions Trading System. Such an agreement could be implemented domestically by EPA through a regulation allowing U.S. companies to demonstrate compliance with domestic climate regulations by depositing qualifying foreign emissions permits with 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 on climate change. It is debatable whether the Clean Air Act would authorize EPA to create an economy-wide cap-and-trade program since the act provides different authorities for each major source of air pollution. If such a program ought 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 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.⁹⁵ Even if it did, Congress 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

⁹⁵ The Clean Air Act only authorizes international assistance to help developing nations phase out use of ozone depleting substances. Section 617(b).

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 or other measures against nations that do not take sufficient action to abate their 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 did not violate any provision of domestic law.
- Strengthen international scientific cooperation, subject to congressional appropriation of funds.

Thus, the President could rely on his or her inherent foreign affairs powers to jumpstart 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.⁹⁶

3. Observations on Sole Executive Agreements

The examples given above 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

⁹⁶ P.L. 84–885, U.S. Department of State Basic Authorities Act, Section 5.

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 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 U.N. Framework Convention on Climate Change (the “Convention”), 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 Convention also imposed reporting obligations on parties to improve information sharing and future decision making.

In view of the Supreme Court’s recent holding in a treaty case,⁹⁷ the Convention is probably not self-executing so its provisions probably do not have status under domestic law

⁹⁷ *Medellin v. Texas*, Slip Opinion 06-984, decided March 25, 2008.

directly.⁹⁸ (The Convention 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 Convention 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 Convention provide for the President to bind the United States internationally, without regard to domestic implementation?⁹⁹

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

“[T]he 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.” (Emphasis added.)

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

98 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 Convention is not self-executing. The Office of Legal Counsel at the U.S. 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 U.S. 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, Environment and Science and former director of the U.S. Department of State Treaty Office, March 11, 2008.) The Restatement (Third) takes the U.S. Department of State view. It states that treaties that do not require implementing legislation are presumed to be self-executing (Section 111).

99 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 CRS, *Treaties and Other Agreements*, at 56. Restatement (Third), at 311(3).

bound by the amendments once three-fourths of all parties to the Convention have so agreed. State parties that do not so agree shall not be bound by the amendments.

The Convention 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. Article 7 of the Convention stipulates that the COP should meet yearly to review implementation of the Convention and “related instruments” that the COP may adopt to achieve the objective of the Convention. The Convention 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. Notably, the sole purpose of Article 17 of the Convention is to spell out rules by which the COP may “adopt protocols to the Convention.” (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 Convention 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 Convention before the Senate Committee on Foreign Relations, committee members asked the first Bush administration 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.¹⁰⁰ The administration gave a similar answer with respect to amendments to the Convention.

The Committee also asked specifically how the first Bush administration would treat an amendment or protocol to the Convention 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 Vice Presidential candidate Al Gore, called on the United States to move in this direction.¹⁰¹ The administration responded to the

100 Hearing before the Senate Committee on Foreign Relations, 102d Cong., 2d Sess. (1992), at 105 (Appendix).

101 During early negotiations on the treaty the European Union and some developing nations had advocated including such targets in the Convention. The first Bush administration insisted that emissions targets in the Convention 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.

Committee’s question in writing by noting that it “would expect such a protocol to be submitted to the Senate.”¹⁰² The administration did not say explicitly that it 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 Convention, it did not seek to formally 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.¹⁰³ The report stated that, in the view of the Committee, any amendment or protocol to the Convention 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.¹⁰⁴

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 Convention 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 Convention, freeing up the President to enter into treaty–executive agreements. Our 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 Convention. The depth and strength of this sentiment would surely depend on the politics of the moment, but we must assume that enough key Senators would insist that any President think twice before ignoring their views. Presidents usually bow to the Senate’s desire to review international agreements

102 *Id.*, 106.

103 S. Exec. Rpt. 102–55, 102d Cong., 2d. Sess. (1992), at 14.

104 See 138 Cong. Rec. 33521, October 7, 1992, statement of Sen. McConnell (R-KY).

once the Senate provides informal assurances that the agreements will receive timely and fair consideration.¹⁰⁵

In sum, it would be difficult for the President to implement protocols and amendments to the Convention 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 under domestic law new executive agreements on climate change. All told, treaty–executive agreements provide little benefit in the climate context at present.

D. Congressional–executive Climate Agreements

Presidents, the 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.¹⁰⁶

But what if a court concluded that treaties and congressional–executive agreements are not interchangeable because the Constitution should be interpreted as requiring 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

105 Interview with John Kim, former director of the U.S. Department of State Treaty Office (March 11, 2008). See CRS, *Treaties and Other Agreements*, at 233.

106 No court has invalidated a decision by Congress and a President to use the congressional–executive agreement form. See *Made in USA Foundation v. United States*, 56 F. Supp.2d 1226 (1999), vacated, 242 F.3d 1300, cert denied, 534 U.S. 1039 (2001) (finding that the President and Congress had the power to conclude NAFTA as a congressional–executive agreement).

agreements are most legitimate because they most closely resemble domestic statutes that require the approval of both houses of Congress.¹⁰⁷

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. However, the tendency of the United States to use the treaty form in certain areas 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 convention¹⁰⁸ that will reduce global stocks of the most dangerous persistent organic pollutants. The original LRTAP convention under which the protocol was negotiated also was 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 Convention. 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 Convention would be irrelevant with respect to any climate agreement that the President concluded *outside* the Convention because that idea did not arise 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 Convention, 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 umbrella. One can only speculate whether an engaged U.S. President could convince these nations to take a different approach and what incentives might be necessary to do so.

107 See J. Yoo. (Although this conclusion is a logical application of Professor 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.)

108 Interview with John Kim, Assistant Legal Adviser for Oceans, Environment and Science, U.S. Department of State (March 7, 2008).

Therefore, we may assume that the new global agreement will remain formally under the Convention. But a protocol to a treaty 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.”¹⁰⁹ 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.¹¹⁰ A decision to treat a protocol to the Convention 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 Convention. 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.¹¹¹ 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 Convention 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.¹¹² Fourth, today’s Senate could make a reasonable argument that the legislative history—and the somewhat inconsistent tendency of the United States to treat multilateral

109 Office of Legal Counsel, U.S. Department of Justice, Memorandum to Alan Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, November 25, 1996 (noting that the President could alter U.S. obligations under the 1972 Anti-Ballistic Missile Treaty).

110 Given the structure of the U.S. Department of State’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, B. Ackerman and D. Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 807–813 (1995) and O. Hathaway, *Treaties’ End*.

111 At Senate Committee on Foreign Relations, Hearing Report, September 18, 1992, at 105–106.

112 Interview on February 8, 2008, with Susan Biniarz, Deputy Legal Adviser, U.S. Department of State, and the lead U.S. government lawyer on climate change cooperation for almost twenty years, including during Senate consideration of the Convention.

environmental agreements as treaties—gives rise to an expectation that protocols and amendments to the Convention will be treaties. However, we must not assume that the Senate’s views on this matter are immutable. As support builds for Federal action on climate change, so will interest in bringing into force a global agreement that creates a level playing field for U.S. companies by requiring other nations to take climate action. This dynamic is a familiar pattern in U.S. environmental diplomacy.¹¹³ 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 the next President and Congress will wish to bury. Yet the 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, the President can ill 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 our country to negotiate and approve climate agreements as we do international trade deals. In this section, I highlight 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 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,

¹¹³ 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 R. Bendick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (1998).

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 the procedural characteristics of TPA, on one hand, and the question of 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 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, the opponents of TPA might favor it and businesses might oppose the mechanism. 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 paper. 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.¹¹⁴ Under TPA, U.S. negotiating positions carry more weight internationally because our demands enjoy broad domestic political support and are enacted into law.¹¹⁵ 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 occur without unwarranted delay.¹¹⁶ Simplified congressional review procedures are especially important for global trade negotiations because those 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

114 Remarks by President George W. Bush to the Business Roundtable, June 20, 2001.

115 H. Shapiro and L. Brainard, Trade Promotion Authority Formerly Known as Fast Track, 35 Geo. Wash. L. Rev. 1, 32 (2003).

116 R.G. Hubbard, Why the U.S. Needs the Trade Promotion Authority, The OECD Observer, 231, May 2002.

simple majority, TPA increases the likelihood that the United States will join new trade agreements. Trade agreements are too important to subject to the will of a vocal minority of the Senate. Every recent President has considered TPA essential and Congress has agreed 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 secures 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 do 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 would (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 in both houses of Congress on climate agreements 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 met the legislative conditions. (See Box 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 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 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 of 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 on their authority to make sole and treaty–executive agreements. Although legally permissible, this approach would prove politically controversial, vulnerable to changes in political power, and a poor basis for a durable U.S. climate foreign policy.

The President and Congress now have before them an important opportunity to pass legislation that creates Climate Protection Authority. A half dozen serious cap-and-trade bills are pending before Congress, and most climate policy experts predict that the United States will enact a cap-and-trade bill in the next few years. In the upcoming presidential election in November, each candidate supports cap-and-trade legislation and has declared it a top-tier priority.¹¹⁷ Each will have voted for similar legislation in the past.¹¹⁸ Recently, senior Republican Party strategists have suggested that President Bush would sign a cap-and-trade bill if it reached his desk before he leaves office, although that is not official policy.¹¹⁹ Any cap-and-trade bill approved by Congress should serve as the framework statute for U.S. climate change foreign policy. It should stipulate that future climate agreements will be handled by the United States as congressional–executive agreements and create mechanisms for strengthening coordination between Congress and the President on international negotiations. In addition, the statutes should create streamlined TPA-style procedures to allow Congress to tighten the U.S. emissions cap if Congress approves an international climate agreement that obligates other nations to do their part to address the climate challenge. The next President should call on

117 The official websites for each major party candidate maintain position papers and speeches on energy and climate policy that identify tackling climate change as a high priority. See www.johnmccain.com, www.hillaryclinton.com and www.barackobama.com.

118 Senators McCain, Obama and Clinton each voted for the McCain–Lieberman Climate Stewardship Act of 2003, which did not pass the Senate. That bill would have relied on a federal cap-and-trade system to reduce U.S. emissions roughly 40% by 2020. As the name of the legislation suggests, Senator McCain was a primary author of the legislation.

119 P. Baker, In Bush's final year, the agenda gets greener, *Washington Post*, December 29, 2007 and D. Samuelsohn, His former advisers predict Bush would sign emissions bill, *Greenwire*, January 21, 2008. But see D. Samuelsohn, Bush adviser cautions against "recessionary" Senate emissions bill, *Energy & Environment Daily*, March 18, 2008.

Congress to enact Climate Protection Authority shortly after taking office. (An illustration of what the President might say on this topic shortly after the inaugural address is provided in Box 3.).

VI. Political Analysis

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

A. Congressional Reactions

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. With Democratic control of the House likely to increase in the next national election, the importance the House attaches to enacting Federal climate legislation will increase. The willingness of the House to add Climate Protection Authority to a new cap-and-trade bill will depend on 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 staunch defenders of the Senate’s remaining treaty

Box 3: President’s First Climate Address *Late January 2009*

My fellow Americans, climate change represents a grave threat to our country. Fighting this threat will be one of my top priorities as President. I will work with Congress to craft a genuinely bipartisan climate policy that protects our environment and economy. Because America must lead, I will ask Congress to enact legislation that reduces U.S. climate emissions X percent below today’s levels by 2020. And I will ask Congress to agree in advance that the United States will reduce its emissions by an additional Y percent if other major emitters commit to doing their fair share as well. To secure these commitments, I will also ask Congress for authority to negotiate new international agreements with other nations. In these negotiations, it will be vitally important for our nation to speak with one voice and for other nations to believe that we will uphold our end of the bargain. That is why I will ask Congress to approve “Climate Protection Authority” legislation, which will layout bipartisan negotiating goals and guarantee that new climate change agreements receive a fair and timely hearing in Congress. With the support of the American people and bipartisan cooperation in Congress, the United States can lead the international community, create good jobs at home, and protect the Earth’s climate system for future generations.

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? For one thing, Senate leaders may appreciate the geopolitical importance of U.S. participation in a new global climate pact. Like it or not, our refusal to join the Kyoto Protocol has become a symbol of American unilateralism and exceptionalism (our perceived believe 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 ("cloture") to avoid a filibuster. Arguably, few Senators would 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 significantly alter that calculation. In other words, enacting Climate Protection Authority as a standalone 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

Congress also will listen to 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 paper based on how they might influence the substance and timing of a domestic cap-and-trade bill. Here are a few reasons why congressional–executive agreements and Climate Protection Authority could advance the interests of several key interest groups.

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 the 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,¹²⁰ actively support a domestic cap-and-trade program. Many of these companies also support the proposition that the United States should join the next global climate change agreement. 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.

Labor unions and businesses in energy-intensive sectors 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 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

¹²⁰ The Climate Action Partnership includes General Electric, Dupont, Dow, Alcoa, Ford, General Motors, Chrysler, BP, Conoco Phillips, Shell, Pepsi, Duke Energy and many other major corporations. The coalition has called for reducing U.S. emissions by 10–30% of today's levels within fifteen years and by 60–80% by 2050. See www.us-cap.org.

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. 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 treaty negotiation, in contrast, business and labor groups would have no guarantee that a President would attach a high priority to securing such provisions. I elaborate the competitiveness benefits of Climate Protection Authority in a forthcoming paper tentatively entitled *Mind the Gap: The Competitiveness Benefits of Congressional–executive Agreements*.

Since 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—one that articulates a compelling and credible vision of how the United States can engage the world to solve this major global threat. This continuing failure creates the serious risk that we will neither manage inevitable climate change nor avoid unmanageable climate disasters, or that we will do so without safeguarding the U.S. economy. In immediate terms, we run the dual risk that (i) the recently launched U.N. climate negotiations will produce a flawed agreement and (ii) the United States will fail to use new Federal climate change laws to engage other countries effectively on the environment or economic aspects of climate policy.

The 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 less willing to make the concessions we need 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 effect under domestic law and the highly legislative nature of potential U.S. commitments. New approaches are needed.

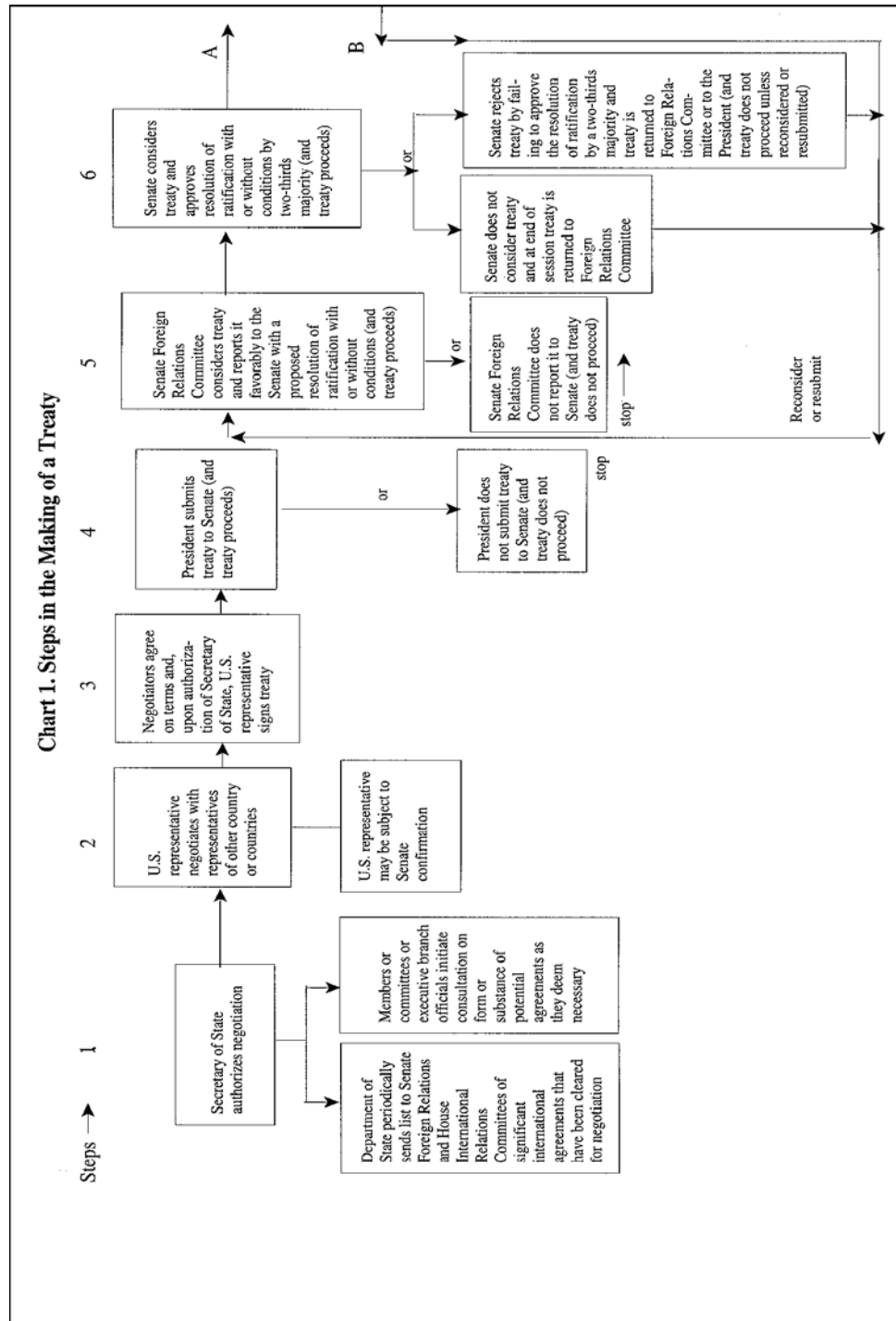
Instead of continuing down the treaty path, the United States should handle climate change agreements as we do trade deals, as executive agreements. Executive agreements carry the same force of law as treaties under international law and are equivalent to a Federal statute under domestic law. Unlike 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 1992 U.N. Framework Convention on Climate Change, 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.

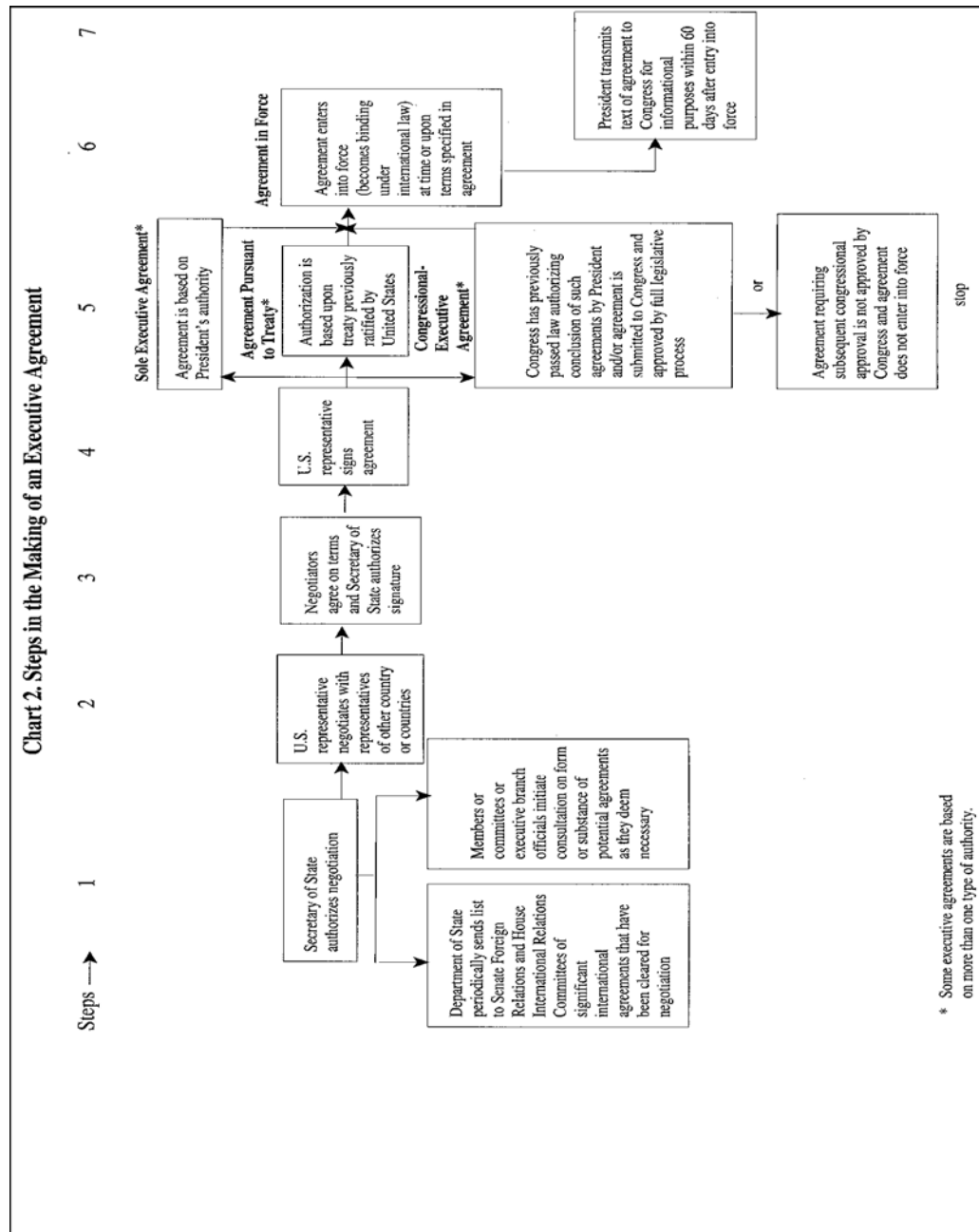
Specifically, Congress should enact legislation that would create Climate Protection Authority, which would define U.S. negotiating objectives, create mechanisms for coordination between the political branches of government, and require the President to submit concluded agreements to Congress for final 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 good 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.



*Reprinted from CRS, Treaties and Other Agreements, *supra* note 2.



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