

# The Legal and Economic Case Against the Paris Climate Treaty

Canceling U.S. Participation Protects Competitiveness and the Constitution

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## Canceling U.S. Participation Protects Competitiveness and the Constitution

By Christopher C. Horner, Esq. and Marlo Lewis, Jr., Ph.D.

### Executive Summary

President Trump should keep his two-part campaign promise to cancel U.S. participation in the Paris Climate Agreement and stop all payments to United Nations global warming programs. The Paris Agreement is a costly and ineffectual solution to the alleged climate crisis. It is also plainly a treaty, despite President Obama's attempt to implement it without the Senate's advice and consent. Failure to withdraw from the agreement would entrench a constitutionally damaging precedent, set President Trump's domestic and foreign policies in conflict, and ensure decades of diplomatic blowback.

For those and other reasons, the Paris Agreement imperils both America's economic future and capacity for self-government.

The Paris Agreement and the 1992 treaty it purports to modify, the United Nations Framework Convention on Climate Change, both contain provisions for withdrawal. Concerns about diplomatic blowback if President Trump withdraws from the Agreement or submits it for the Senate's advice and consent actually confirm the wisdom of exercising one of those options. The Paris Agreement is designed to institutionalize a running campaign of diplomatic blowback unless the U.S. submits to ever-tightening constraints, ratcheting up every five years. If Trump withdraws, any diplomatic blowback would largely be a muted one-off event, without the economic, political, and security costs that staying in the Paris Agreement entails.

To safeguard America's economic future and capacity for self-government, President Trump should pull out of the Paris Agreement. There are several options for doing so, which are discussed in this paper. Regardless of which option Trump selects, his administration

should make the case for withdrawal based on the following key points:

1. The Paris Climate Agreement is a treaty by virtue of its costs and risks, ambition compared to predecessor climate treaties, dependence on subsequent legislation by Congress, intent to affect state laws, U.S. historic practice with regard to multilateral environmental agreements, and other common-sense criteria.
2. In America's constitutional system, treaties must obtain the advice and consent of the Senate before the United States may lawfully join them. President Obama deemed the Paris Agreement to not be a treaty in order to evade constitutional review, which the Agreement almost certainly would not have survived.
3. Allowing Obama's climate coup to stand will set a dangerous precedent that will undermine one of the Constitution's important checks and balances. It will allow a future president to adopt any treaty he and foreign elites want, without Senate ratification, just by deeming it "not a treaty."
4. The Agreement endangers America's capacity for self-government. It empowers one administration to make legislative commitments for decades to come, without congressional authorization, and regardless of the outcome of future elections. It would also make U.S. energy policies increasingly unaccountable to voters, and increasingly beholden to the demands of foreign leaders, U.N. bureaucrats, and international pressure groups.

5. The United States cannot comply with the Paris Agreement and pursue a pro-growth energy agenda. Affordable, plentiful, reliable energy is the lifeblood of modern economic life. Yet, the Paris Agreement's central goal is to make fossil fuels, America's most plentiful and affordable energy source, more expensive across the board. Implementing the agreement's progressively more restrictive five-year emission-reduction pledges—called Nationally Determined Contributions (NDCs)—would destroy U.S. manufacturing's energy price edge.
6. The Agreement entails more cost and risk than the country is willing to bear. A majority of states have sued to overturn the Obama Environmental Protection Agency's end-run around Congress, the Clean Power Plan, which is also the centerpiece of the U.S. NDC under the Paris Agreement. Yet, the CPP is only a start. All of Obama's adopted and proposed climate policies would only achieve about 51 percent of just the first NDC, and the Paris Agreement requires parties to promise more "ambitious" NDCs every five years.
7. The Agreement has no democratic legitimacy. President Obama kept mum about climate change during the 2012 elections. Only after being reelected did he unveil a climate agenda featuring an EPA-redesigned electric power system and the most "ambitious" climate agreement in history.
8. Withdrawing from the Paris Agreement is a humanitarian imperative. The Agreement will produce no detectable climate benefits. Instead, it will divert trillions of dollars from productive investments that would advance global welfare to political uses. Worse, the Agreement's mid-century emission-reduction goals cannot be achieved without drastically reducing energy-poor countries' current access to affordable energy from fossil fuels.

For all the foregoing reasons, President Trump should stick to his campaign promises to end America's participation in the Paris Climate Agreement and stop payments to the U.N. Green Climate Fund.

## Introduction

President Trump should keep his two-part campaign promise to cancel U.S. participation in the Paris Climate Agreement and stop all payments to United Nations global warming programs.<sup>1</sup> The Paris Agreement is a costly and ineffectual solution to the alleged climate crisis. It is also plainly a treaty. For those and other cited reasons, the Paris Agreement imperils both America's economic future and capacity for self-government. Failure to withdraw from the agreement would entrench a constitutionally damaging precedent, set the president's domestic and foreign policies in conflict, and ensure decades of diplomatic blowback.

President Trump is already taking steps to rescind the Clean Power Plan and other greenhouse gas (GHG) emission-reduction policies that President Obama promised to the 21st Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>2</sup> However, Obama had no authority to make such commitments on his own.

The Paris Climate Agreement is a treaty by virtue of its costs and risks, ambition compared to previous climate treaties, dependence on subsequent legislation by Congress, and other common-sense criteria. Under the U.S. Constitution, treaty making is a power shared by the president and Congress. However, Obama refused to submit the pact to the Senate for its

advice and consent, because there is no chance of obtaining the requisite support of "two thirds of the Senators present."<sup>3</sup> Instead, he simply, and without precedent, declared the sweeping pact an "executive agreement" that he could undertake unilaterally.

In short, President Obama tried to imbue his climate agenda with a treaty-like status, but without going through the treaty process. Such a gamble might have worked had Hillary Clinton won the White House and Republicans lost the Senate. But the Paris Agreement could still undermine Trump's energy and deregulatory agendas if he tries to split the policy baby—dismantle Obama administration climate policies while staying in a pact that purportedly makes those policies promises to the world, while mobilizing political pressure to keep those "commitments."

Failure to withdraw also invites climate policy litigation, already intended by non-governmental organizations and activist attorneys general, because joining the Paris Agreement tacitly affirms the preferred narrative that climate change is humanity's greatest peril and "inaction" threatens millions of lives.

U.S. industry has a huge energy price advantage over its global competitors, which underpins the American manufacturing revival Trump campaigned on. The climate policies required to meet President Obama's

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emission reduction commitments under the Paris Agreement would destroy that edge. Obama pledged to reduce U.S. emissions by 26 to 28 percent below 2005 levels by 2025, with deeper cuts every five years thereafter. That is already significant, but he went much further. He also committed the United States to rapidly phase out fossil fuels over 35 years.<sup>4</sup>

Therefore, President Trump should withdraw from the Paris Agreement to dispel the long shadow it casts on America’s energy producers and job creators, and to annul the precedential force of Obama’s attempted end-run around the constitutional treaty process. If Trump does not do so, any future president who wants to join an unpopular or unwise treaty will feel free to simply deem it an “executive agreement” to evade Senate review. Repairing that breach in the constitutional fabric is reason enough to withdraw from the Agreement.

There are several withdrawal options, each with its own relative benefits and risks. The quickest and most durable option is to withdraw from the 1992 parent treaty, the United Nations Framework Convention on Climate Change. All are described below.

### **Climate Coup**

The December 2015 Paris Agreement is a treaty by virtue of its costs, risks, prescriptiveness, “ambition” compared

to previous climate treaties, dependence on subsequent legislation, intent to affect state laws, U.S. historic practice, and other common-sense criteria.<sup>5</sup> Thus, America cannot constitutionally join the Agreement absent the Senate’s advice and consent. President Obama ignored those criteria, which are detailed in a well-known State Department Circular, to which President Trump should refer in following through on his promise to exit the pact.<sup>6</sup>

To evade Senate review, President Obama claimed the Paris Agreement is not a treaty, even after describing it as “the most ambitious climate change agreement in history.”<sup>7</sup> Worse, the Obama administration took the position that the executive alone may determine which agreements are treaties and which are not. Acceptance of this reasoning would allow future presidents to adopt any treaty at whim by simply deeming it “not a treaty.” Thus, the Paris Agreement threatens to reduce the Senate’s “advice and consent” function to a mere rubber stamp for uncontroversial agreements.

Proponents of the Paris Agreement—including, we are informed, some career State Department lawyers advising the Trump White House on the matter—dismiss that danger by claiming it is “non-binding.” In fact, the Agreement’s numerous procedural commitments—which address reporting, monitoring, verification, committee

functions, and conferences—are binding under international law. However, proponents in effect claim the addition of substantive non-binding provisions somehow makes the entirety “not a treaty.”

The Agreement has two principal, substantive commitments:

1. Five-year emission-reduction pledges called Nationally Determined Contributions (NDCs); and
2. Foreign aid pledges called “climate finance.”

Signatory countries are legally obligated to make such promises but are not legally obligated to keep them. However, for the United States, that is a distinction without a difference. As all parties are aware, it is U.S. practice to keep the country’s promises, and the American people expect their leaders to do so. As designed by Obama administration officials, the Paris climate regime would create plenty of opportunities for America to be “named and shamed” into keeping Obama’s non-binding promises.<sup>8</sup> The Paris Agreement is the framework document for a multi-decade, global, political-pressure campaign by climate activists and their political allies to force the U.S. and other industrialized nations to suppress the production and use of the United States’—and the world’s—most affordable, reliable, and abundant energy sources.

The Agreement provides for the creation or continuation of at least 17 multilateral committees specializing in such matters as mitigation, adaptation, compliance, implementation, technology transfer, and finance. Some eight committees may have a role in monitoring Nationally Determined Contributions and related actions.<sup>9</sup> Nearly a dozen committees may have a role in debating, monitoring, and reporting on financial contributions.<sup>10</sup> In addition, every annual Conference of the Parties meeting will provide a forum for 160-plus developing countries to demand more foreign aid under the name of “climate finance.”

In short, the Paris Agreement envisions endless rounds of meetings, which create myriad opportunities to “name and shame”<sup>11</sup> countries whose governments question the alleged climate consensus, deviate from their five-year NDC plans, or fail to make more “ambitious” commitments every five years.<sup>12</sup> Inevitably, the United States will face relentless political pressure to promise much, and to keep the initial and all subsequent promises. Thus, concerns about “diplomatic blowback” if Trump withdraws from the Agreement actually confirm the wisdom of pulling out. The Paris Agreement is constructed to institutionalize a running campaign of diplomatic blowback, ratcheting up every five years.

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Moreover, the Paris Agreement will grow the U.S. administrative state while aligning it with an international coalition beyond the reach of U.S. voters. The U.S. Environmental Protection Agency (EPA)—an agency already prone to overreach—would lead the development and implementation of U.S. commitments under the Agreement. Federal climate regulators would become even less accountable to Congress, as they work “cooperatively” with their counterparts in foreign governments, multilateral organizations, and “civil society” pressure groups.

The Paris Agreement is hard-wired to narrow the American people’s policy options and political choices in three ways:

1. Pressure President Obama’s successors, future Congresses, and even courts to uphold the Clean Power Plan and other climate regulations by rebranding those policies as “promises” America has made to the world.
2. Pressure future U.S. policy makers to pledge increasingly “ambitious” Nationally Determined Contributions every five years starting in 2020, implement those promises via ever-more stringent regulations, and grow the international echo chamber via ever-more lavish “climate finance” handouts.

3. Make U.S. energy policies increasingly unaccountable to voters, and instead increasingly beholden to the demands of foreign leaders, U.N. bureaucrats, and environmental lobbyists.

In short, in addition to licensing an unconstitutional power grab, the Paris Agreement is a mechanism to lock in progressive policies regardless of electoral outcomes.

### **The Paris Agreement and the Trump Administration—Engineering Policy Conflict**

Trump’s advisors are reportedly divided on whether he should keep his campaign promise to cancel America’s participation in the Paris Agreement.<sup>13</sup> At the same time, a White House spokesperson says that even if Trump stays in the Agreement, he will “knock out”<sup>14</sup> Obama’s Climate Action Plan,<sup>15</sup> for which he has now issued an executive order.<sup>16</sup> Yet, the Agreement is the Action Plan’s capstone, committing the United States to preserve that Plan and strengthen it.

Rescinding Obama’s climate policies and maintaining the Paris Agreement are irreconcilable objectives. Such baby-splitting would commit the Trump administration to conflicting policy directions, hobble his deregulatory and energy agendas, and put America

in a political straitjacket hostile to the administration's policies.

The pro-Paris camp is itself conflicted. On the one hand, beguiled by Obama's claim that the Agreement is "non-binding," "non-enforceable," and, thus, supposedly, "not a treaty," they view it as posing no threat to anything conservatives care about. On the other hand, they warn that withdrawing from the treaty will provoke political and diplomatic blowback, second only to withdrawing from NATO,<sup>17</sup> which implies it carries grave responsibilities and has teeth.<sup>18</sup>

They supposedly worry about upsetting allies who claim to be counting on the United States to make the Agreement work. During the Paris negotiating sessions, the Obama administration claimed the EPA's Clean Power Plan (CPP), the single largest component of the proposed U.S. emission reduction commitment, was legally "bullet-proof."<sup>19</sup> However, no serious negotiating party could fail to notice that Obama's commitments were an audacious roll of the legal and political dice.

Secretary of State John Kerry signed and President Obama "accepted" the Agreement on behalf of the United States despite an unprecedented Supreme Court stay of the Clean Power Plan, which was itself concocted as an end-run around Congress. As all parties were aware, a majority of U.S. states were suing to overturn the CPP, and

the stay, in *West Virginia, et al. v. EPA*, meant five justices thought petitioners were likely to prevail on the merits.

The parties also knew that Republicans in Congress and one of the two major-party candidates in the 2016 presidential race would oppose such a deal. Thus, much of the blowback if Trump withdraws from the Agreement will be political theater. Protest over the Paris Agreement will fade once Trump makes clear America is getting out and there is no turning back.

In contrast, if Trump fails to get out now and affirms Obama's claim to have made America a party to the Agreement, "diplomatic blowback" will become a running saga. The Paris pressure machine will trigger blowback every time this president, Congress, or future administrations deviate from Obama's NDC emission-reduction promises, hesitate to fund or increase "climate finance," or fail to adopt more stringent NDCs every five years, as well as the accompanying laws and regulations required to implement them.

Obama's commitments under the Paris Agreement went much further than the climate rules Trump is rescinding. The goals of just the first U.S. NDC surpasses the emission reductions achievable by the entire suite of Obama's adopted and proposed climate policies by about 49 percent.<sup>20</sup> Of course, subsequent NDCs promise to go even further than that.



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Trump campaigned against Obama’s overreach, specifically regarding the Clean Air Act—including, for example, the greenhouse gas emissions rules that are the largest component of Obama’s plan to implement the Paris Agreement. That law instructs the EPA to periodically review its regulations and make them more stringent if it finds the situation and technology warrant it. This very model underlies the Paris climate regime, which would grant the same bureaucracy, driven by the same philosophy—not only at the EPA but also across the massive sweep of the federal government—the ability to determine every five years whether expanding their power over individuals and the economy is warranted or not.

Trump can either keep his promise to the people who elected him or keep the promises Obama made to the United Nations in an attempt to circumvent American constitutional constraints. He cannot do both. Hoping to square this circle, some conservatives argue that because the Paris Agreement provides no legal penalties for non-compliance, Trump can stay in it yet ignore it.<sup>21</sup> That is not politically viable. Americans expect their leaders to keep all bona fide commitments, whether or not those are legally enforceable. To paraphrase the GEICO ad, “When you’re the United States, you keep your promises; it’s what you

do.” Under the Paris Agreement, a nation honors its “non-binding” emission-reduction and climate-finance commitments by turning those promises into enforceable obligations—domestic laws and regulations. Thus, the only way to unplug from the pressure machine is to withdraw from the Agreement.

A similar have-your-cake-and-eat-it-too recommendation is for Trump to “effectively withdraw” from the Paris treaty by declaring it was never properly ratified. While we agree with that assessment, this does nothing to restrain activist courts. Words without deeds are not politically persuasive. To extricate America from the pressure box and annul the precedential force of Obama’s evasion of the treaty process, Trump must withdraw from Paris, not merely criticize it.

As for claims that the world looks to the United States for “climate leadership,” U.S. leadership would be squandered by signing on to a deal that will produce no detectable climate benefits<sup>22</sup> and divert trillions of dollars from more productive investments that would actually improve living standards and health.<sup>23</sup> Worse, the agreement is a potential humanitarian disaster, as its mid-century emission reduction goals cannot be achieved without drastically reducing energy-poor countries’ *current* access to affordable energy from fossil fuels.<sup>24</sup>

Renegotiating the Paris Agreement, so that it leaves open a future for coal and other fossil fuels, is also a nonstarter. That supposedly would be accomplished by scaling back Obama's first NDC and obtaining an international commitment to develop and commercialize carbon capture and storage (CCS) technology.<sup>25</sup> This not only ignores that the Paris Agreement is supposedly the instrument that would force the development of a CCS breakthrough, but that no amount of "forcing" of CCS will bring it about. The U.S. government has been trying to develop such technologies for decades, and there is still not a single utility-scale carbon capture and storage power plant in operation anywhere that does not depend on taxpayer and ratepayer subsidies.<sup>26</sup> Pouring more taxpayer dollars into uneconomic energy is no way to drain the swamp.

More importantly, whatever rhetorical concessions other parties might make to keep America at the table (in the hope that Trump's successor will pick up where Obama left off), the main political forces driving the Agreement are dedicated to eliminating the production and use of fossil fuels. The climate lobby and its allies in legislatures, agencies, and attorney general (AG) offices will not stop trying to use the Paris Agreement to constrain U.S. energy policy choices. Moreover, whatever deal Trump makes today could be undone by any of his successors. In short, no modifications

negotiated by the Trump administration can secure the future of U.S. energy producers as well as exiting an agreement designed to bankrupt them.

### **Lessons from Kyoto**

To draw some political lessons from history, the Trump administration should look to President George W. Bush's political struggles over the Kyoto Protocol—a global warming treaty with little popular support that was nixed in advance by the U.S. Senate.<sup>27</sup>

On March 27, 2001, the Bush administration reportedly "rejected" the Kyoto Protocol—which President Bill Clinton signed despite Senate "advice" to the contrary—when newly appointed EPA Administrator Christine Todd Whitman said, "we have no interest in implementing that treaty," while National Security Advisor Condoleezza Rice proclaimed, "Kyoto is dead."<sup>28</sup> Actually, Bush never "unsigned" or otherwise officially rejected Kyoto. Rather, the George W. Bush administration merely continued the Clinton administration policy of not seeking Senate ratification. For the United States, Kyoto remains a signed treaty pending ratification.<sup>29</sup> Nonetheless, under a fusillade of diplomatic and media opprobrium, which seemed to have caught the White House off guard, the Bush administration soon found itself making excuses for something it had not done.<sup>30</sup>

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Consider this June 2001 post mortem from National Security Advisor Rice:

[T]he President had made clear when he was a candidate that he did not believe the Kyoto Protocol addressed the problem of climate change in a way that the United States could support. He had the backing, by the way, of a Senate that was under no means prepared to ratify such an accord. ... In retrospect, perhaps the fact that we understood that we had already said this was not immediately observable to everybody, and it might have been better to let people know again, in advance, including our allies, that we were not going to support the protocol. But as I said to European ambassadors, I was surprised that anyone was surprised.<sup>31</sup>

Bush officials should have anticipated the controversy and environmentalist pushback, and developed a plan to set the terms of debate before announcing their decision. For example, Bush could have announced he was continuing the Clinton administration policy of not seeking ratification of the Kyoto Protocol. He then could have challenged critics to explain why non-ratification was sound policy under Clinton but not his successor. Alternatively, Bush could have submitted Kyoto to the Senate for a

ratification debate, especially considering that many Democrats likely would have opposed ratification at the time. The treaty almost certainly would have failed to obtain the requisite support of “two thirds of the Senators present.” Much of the “diplomatic blowback” could have been avoided, or at least mitigated. The climate lobby now seeks to rerun the Bush playbook against Trump, with near-identical talking points, right down to the “diplomatic blowback” claims.<sup>32</sup>

Trump should avoid entreaties to compromise with a “Paris Lite” policy that ignores Obama’s first NDC yet affirms Obama’s claim to have made the United States a party to the Agreement, which purports to commit us to deeper cuts every five years. Any such equivocation will embolden the climate lobby to demand further concessions and position the next progressive administration to use the Paris Agreement as the global bully pulpit and wealth transfer program Obama envisioned.

### **Don’t Admit It Is a Treaty**

After having failed to get climate change legislation through Congress, President Obama kept mum about climate change in the 2012 presidential race. Only after getting reelected did Obama resume his climate change agenda as a priority, and went on to unveil the Paris Agreement and Clean

Power Plan as “legacy” policies.<sup>33</sup> These rules represented an effort to go around the legislature, which refused to grant him this authority. Similarly, to push the Paris Agreement through, the Obama administration claimed it is not a treaty subject to Senate review.

However, Obama administration officials explained matters differently. On November 24, 2015, National Security Council member Paul Bodnar briefed reporters on the impending COP 21 Paris Climate Change Summit. The Obama administration, he explained, had “absorbed the hard lessons of Kyoto”:

On the international stage, we knew a new approach would be needed to rally all nations to take action. We absorbed the hard lessons of Kyoto and heeded bipartisan concerns. We concluded that climate targets should be set by countries themselves, not imposed on them; that all countries should be expected to act even though developing countries faced unique challenges; and that we should expect strong transparency and accountability from all countries. That’s the deal this administration has been fighting for.<sup>34</sup>

But were Kyoto’s hard lessons simply that the next agreement should rely on self-chosen targets and challenge developing countries to participate?

Clearly not, because despite those features, the Agreement was no more likely than Kyoto and the subsequent Copenhagen Accord to overcome Congress’ concerns.<sup>35</sup>

The key lesson the Obama team and its negotiating partners took from Kyoto and Copenhagen is that the United States will not ratify new climate treaties, so next time just insist it is *not a treaty*. That “lesson” was the heart of the Obama administration’s plan. Consider a December 2009 email to then-EPA Administrator Lisa Jackson (obtained by CEI in Freedom of Information Act litigation over her pseudonymous “Richard Windsor” email account), which is redacted in its entirety except for the topline caution:

[Please note: It is important to refer to the goal at Copenhagen as an “accord” (and especially not as a “treaty”)].<sup>36</sup>

As of August 2014, long before the terms or legal form of the Paris treaty were agreed upon, the Obama administration’s key negotiating partners knew not to call the pact a treaty. Laurence Tubiana, the French climate change ambassador to the U.N. and President of the Paris COP, told the *New York Times*:

There’s a strong understanding of the difficulties of the U.S. situation, and a willingness to work with the U.S. to get out of

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this impasse. There is an implicit understanding that this not require ratification by the Senate.<sup>37</sup>

Six months before the COP 21 meeting in Paris, negotiators openly discussed the reality that under America’s constitutional treaty-making process, any climate deal submitted to the Senate for its advice and consent would be dead on arrival. Addressing a group of African delegates at the June climate change conference in Bonn, Germany, COP 21 host Laurent Fabius expressed his desire to negotiate an agreement that could bypass Congress:

We must find a formula which is valuable for everybody and valuable for the U.S. without going to Congress. ... [W]e know the politics in the U.S. Whether we like it or not, if it comes to the Congress, they will refuse.<sup>38</sup>

In late August 2015, still months before the Paris Agreement had taken its final form, Obama asserted that it is not a treaty and therefore he could make America a party to it without the Senate’s consent.<sup>39</sup> Numerous State Department emails obtained under FOIA by the Energy and Environment Legal Institute (E&E Legal) show close consultation with ideological climate activists on legal concerns regarding the Agreement.<sup>40</sup>

Two weeks before the Paris Climate Summit, Kerry told the *Financial*

*Times* the Agreement is “definitively not going to be a treaty.”<sup>41</sup> Then, at Kerry’s behest, COP 21 President Fabius agreed, only two days before the conference, to instruct all 25,000-plus COP delegates that they were not to call the Agreement a “treaty.”<sup>42</sup> Yet, just two months later the U.N. Climate Change Secretariat issued a legal memorandum to the parties outlining “next steps” for ensuring “the proper execution of all *treaty action* related to the agreement.”<sup>43</sup>

Unfortunately, the Senate set the stage for Obama’s climate power grab when it caved to the Obama administration’s claim that the Joint Comprehensive Plan of Action, also known as the Iran deal, is not a treaty. Despite widespread criticism by GOP leaders that the Iran deal is a treaty requiring Senate review,<sup>44</sup> Congress in May 2015 instead passed the Iran Nuclear Agreement Review Act (H.R. 1191), which authorized the House and Senate to block the deal by passing a joint resolution of disapproval.<sup>45</sup> The resolution was subject to a presidential veto, effectively requiring supermajorities in both chambers for passage. The Senate never got to vote on the resolution, because a procedural motion to move to a final vote fell two votes short of the 60 needed to overcome a filibuster.<sup>46</sup>

The Act was a caricature of the treaty process which, in recognition of the seriousness with which the institution

is supposed to take such entanglements, empowers 34 senators (or fewer if fewer than 100 are present) to stop an agreement. Substituting H.R. 1191 for the constitutional process, on a matter as critical and controversial as a nuclear arms deal, sent an unmistakable signal that the Senate would avoid institutional confrontation at all costs. It let opponents blow off steam while Obama got his way. Then when Obama inevitably followed this by deeming the Paris Agreement to be an executive agreement he could approve on his own, the Senate did not even go through the motions of putting up a fight.

Fortunately, that does not necessarily end the discussion. Even if a president could unilaterally decide what is and is not a treaty, his successor would be free to conclude the Paris Agreement is a treaty and therefore not a commitment of the United States until approved by the Senate. Under this “what are you going to do about it?” approach, things are what one branch of government says until another branch or successor claims otherwise.

Here again, the Iran deal reveals the Obama administration’s disdain for the treaty process. In July 2015, Secretary of State Kerry told the House Foreign Affairs Committee that the administration did not pursue the Iran arms deal as a treaty because obtaining the Senate’s advice and consent to treaties has “become physically

impossible.”<sup>47</sup> Kerry was wrong. The Bush administration secured the Senate’s consent to 163 treaties from 2001 to 2009.<sup>48</sup> The Senate even approved a multilateral nuclear security treaty two days after Kerry pronounced the treaty process defunct.<sup>49</sup>

What is hard—by constitutional design—is to obtain the Senate’s consent to major international commitments that lack broad political support. That the treaty process does not give the president free rein to do as he pleases is not a reason to evade the process, but rather to vigilantly protect it.

The fragility of Obama’s climate coup is reflected in the parties’ rush to bring the pact into effect before the U.S. election. As the *New York Times* observed:

Complex and controversial international accords usually take several years to enter into legal force. But the haste on the Paris accord was driven at least in part by the looming American election. Donald J. Trump, the Republican candidate, has vowed to pull the United States out of the accord if he is elected. If the deal comes into legal force before the presidential inauguration, it will take four years under the accord’s rules for the United States to legally withdraw. That would keep the country bound to the measure through the first term of

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the next administration. “We have no time,” Mr. Ban [Ki Moon, UN Secretary General] said, addressing the General Assembly on Tuesday. “I urge you to bring the Paris agreement into force this year.”<sup>50</sup>

“Complex and controversial international accords” certainly suggests a pact important enough to warrant Senate review. If Trump were to declare the Paris Agreement a treaty for Article II purposes, climate activists would have to identify and put forward rational criteria for distinguishing treaties from non-treaties. Fortunately, the State Department has already done so, but regardless, such a debate could be healthy for the republic. It might revive the old constitutional spirit in the Senate to defend Congress’ institutional prerogatives and make “checks and balances” once again a household term.

### **The Framers’ Perspective**

The most important reason for treaty making to be a shared power is to check the president’s discretion. As Alexander Hamilton argued in *Federalist 75*:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse

with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.<sup>51</sup>

By “created and circumstanced,” Hamilton meant the president is not a monarch, but a temporary custodian of executive power, so his personal interests and those of the nation are more likely to diverge. Given his limited tenure in office, a president is likely to face greater temptation than a monarch to negotiate treaties for personal or partisan gain. The “most ambitious climate change agreement in history” would necessarily affect “momentous” interests. Thus, leaving the approval of such a pact to the executive’s discretion would be unwise.

Article II of the Constitution also establishes treaty making as a shared power because it partakes of both executive and legislative functions. *Federalist 75* continues:

Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the

legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.<sup>52</sup>

Two points are noteworthy. First, the treaty power partakes “more of the legislative than the executive character.” Second, Hamilton was proved more correct than he knew. The Framers did not anticipate modern health, labor, and environmental treaties, which typically require extensive enactment of new laws and regulations “prescribed by the sovereign to the subject.”

The predominately legislative character of the Paris Agreement is obvious, as affirmed by the Paris construct’s resemblance to the Clean Air Act. A party’s NDC is inescapably a promise to enact new laws and regulations to meet ever-more stringent emission reduction targets. As noted, Obama pledged to reduce U.S. emissions by 26 to 28 percent below 2005 levels by 2025 and to rapidly phase out fossil fuels over the next 35 years.<sup>53</sup> The laws and regulations required to implement NDCs primarily affect the U.S. economy and domestic policy priorities, not America’s relations with other nations. In addition, climate finance payments drawn from the Treasury must be pursuant to appropriations by Congress. By what constitutional logic does the Senate have no role in making a pact promising new laws and more foreign aid?

*Federalist* 63 is also relevant. A key reason for the Senate’s comparatively small size, long tenures, and staggered elections is to foster a “due sense of national character”:

A FIFTH desideratum, illustrating the utility of a senate, is the want of a due sense of national character [under the Articles of Confederation]. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable

*By what constitutional logic does the Senate have no role in making a pact promising new laws and more foreign aid?*



*Dollars spent on climate change mitigation and adaptation produce far less social, economic, or environmental benefit than the same dollars spent on dozens of other development targets.*

policy, proceeding from the causes already mentioned, but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.<sup>54</sup>

Some might argue that a “sensibility to the opinion of the world” requires President Trump to stay in the Paris Agreement, which supposedly represents the collective aspirations of mankind. A pact designed to provide trillions of dollars in “climate finance” to supranational organizations and elites in developing countries and expand every government’s control of private energy-related capital investment has many cheerleaders.<sup>55</sup> George Bernard Shaw said it best: “A government that robs Peter to pay Paul can always depend on the support of Paul.”<sup>56</sup>

However, the notion that such voices speak for the interests of humanity is debatable, to put it mildly. For example, the Copenhagen Consensus finds that dollars spent on climate change mitigation and adaptation produce far less social, economic, or environmental benefit than the same dollars spent on dozens of other development targets, such as reducing child malnutrition and improving health outcomes.<sup>57</sup>

Moreover, despite all the government-orchestrated PR behind it, the Paris

Agreement’s supposed beneficiaries do not seem to buy the party line. The U.N.’s “My World” survey of nearly 10 million people worldwide places “action on climate change” at the bottom of 16 development priorities, well behind a good education, better health care, better job opportunities, and honest governance.<sup>58</sup>

Acting with a “sensibility” to world opinion does not mean aligning with the policy preferences of foreign elites. If that were the case, the Framers would not have adopted a republican form of government. During the 1980s, the United States often showed strength of character by standing alone, or nearly alone, in opposing agendas at the U.N. that were hostile to American interests and American allies.<sup>59</sup> More fundamentally, leaders with a due sense of national character honor the rules of international engagement laid down in the Constitution. How can foreign governments rely on us if we allow passions of the moment or partisan agendas to upend our constitutional arrangements?

If America’s trustworthiness as a negotiating partner is now in doubt, it is because Obama did not vet his promises with the Senate before signing on the dotted line. EPA Administrator Gina McCarthy’s assurance that the Clean Power Plan is legally “bulletproof” may have impressed some delegates at the Paris COP, but few Senators would put much stock in such

boasting (at least five Supreme Court justices were less than awestruck).<sup>60</sup>

Involving the Senate through its constitutional treaty-making role would have spared everyone the current controversy.

The advice and consent process is a quality control filter. Although not infallible, it is unique to international agreements because of their seriousness. Combined with the supermajority ratification requirement, it ensures that no treaty will be adopted without broad-based political support. That discourages the executive from promising others more than the political composition of the country and statutory authorities actually allow him, or his successors, to deliver. The treaty process minimizes the risk that national interest concerns will impel one executive to upend international commitments made by his predecessor. Disregarding it creates great risks.

If Obama's defiance of the treaty process is allowed to stand, it will become precedent, tempting future administrations to make grandiose promises deficient in public support and statutory authority. A due sense of national character counsels Trump to repudiate Obama's climate diplomacy power grab, as he promised he would do.

### **“Not-A-Treaty” Word Games**

We now examine several claims that allegedly prove the Paris Climate

Agreement is not a treaty subject to Senate review.<sup>61</sup>

**CLAIM I:** *It's non-binding.*

**ANALYSIS:** False and irrelevant. First, the Agreement's numerous procedural requirements *are* binding. Second, “not binding” has never meant “not a treaty.” Many treaties contain non-binding provisions. Exhibit A: the UNFCCC *treaty* ratified on October 15, 1992, establishing *non-binding goals*, which the Paris Agreement purports to modify or supplement.

The treaty status of the UNFCCC, with its non-binding emission targets, has never been challenged. Not by the Clinton administration, which cited the UNFCCC's “non-binding goal” as the treaty's fundamental weakness that needed to be remedied via the Kyoto Protocol.<sup>62</sup> Not by Senator John Kerry at a 2007 Senate Foreign Relations Committee lamenting the insufficiency of the UNFCCC's “voluntary” emission-reduction goals.<sup>63</sup> Not by reporters supportive of the Paris Agreement at major media outlets.<sup>64</sup>

**CLAIM I (modified):** *By insisting that Article 4.4 use “should” instead of “shall,” the Obama team ensured Paris is not a treaty subject to Senate review.*

The argument here is that “shall” is a term of legal obligation, and “should” merely a term of moral suasion or aspiration. Examples abound: “The

*Involving the Senate through its constitutional treaty-making role would have spared everyone the current controversy.*

*How does the more prescriptive, inclusive, and ambitious Paris Agreement qualify as the one non-treaty among the three?*

one word that almost sank the climate talks” (*Politico*),<sup>65</sup> “The One Word That Almost Scuttled the Climate Deal” (Slate),<sup>66</sup> “How US negotiators ensured landmark Paris climate deal was Republican-proof” (*The Guardian*).<sup>67</sup> Curiously, the “shall” version remains the one posted at the UNFCCC website, agreed before the heroic intervention of lore to save the deal.<sup>68</sup>

**ANALYSIS:** This is pure rhetorical sleight of hand. The words “should” and “shall” appear in all manner of agreements, treaty and non-treaty alike, and both appear throughout the Paris Agreement, including Article 4.

Consider this question: Which of the following provisions is from the UNFCCC treaty and which is the magical Paris language that supposedly transformed the latter pact into a non-treaty?

“Accordingly, *the developed country Parties should take the lead in combating climate change and the adverse effects thereof...*”

“*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets.*”

The word “continue” is the only thing that gives it away. The Paris

Agreement’s “should continue taking the lead” echoes the UNFCCC’s “should take the lead” (Art. 3.1) So, according to the Obama administration, a pact with “should take the lead” is a treaty, a pact that contains “should *continue* taking the lead”—and in a more specific, prescriptive way through economy-wide absolute emission reduction targets—is not a treaty.

There are important differences between the two pacts, but in ways that confirm the Paris Agreement’s treaty status. The Paris treaty is more prescriptive by the specific promises it requires of developed countries. It is more inclusive than either the UNFCCC or the Kyoto Protocol, as it abandons their bright-line division between Annex I developed country parties, which have quantified emission-reduction goals, and non-Annex I developing country parties, which have not. The Paris Agreement is also more “ambitious” than Kyoto because parties “shall communicate a nationally determined contribution every five years” (Art. 4.9), such that each successive NDC “will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition” (Art. 4.3). How does the more prescriptive, inclusive, and ambitious Paris Agreement qualify as the one non-treaty among the three?

Try this thought exercise: Take out the Paris Agreement’s Article 4.4 allusion to the UNFCCC and leave the rest of the pact that promises all of the climate finance; all of the reporting, monitoring, and verification; and the first-ever commitments surpassing those of the Kyoto Protocol. Delete Article 4.4, and Paris is still more ambitious than Kyoto, still more prescriptive the UNFCCC, and still more inclusive than both. Moreover, the U.S. NDC pledge to “reduce emissions by 26-28 percent below 2005 levels by 2025, and to make best efforts to reduce by 28 percent” is more stringent than the U.S. emission reduction target under the Kyoto Protocol.<sup>69</sup>

Remove Article 4.4, and Paris is still a treaty. U.S. negotiators’ last-minute substitution of “should” for “shall” does not a treaty unmake.

**CLAIM I (modified further):** *It is not a treaty because it lacks legally binding emission reduction targets.*

The following statements are illustrative of this line of argumentation. “[I]t is becoming clear that it may lack the elements that would suggest *the need for congressional consent*, such as legally binding national emissions reduction targets” (Center for American Progress).<sup>70</sup> “A deal that would have assigned legal requirements for countries to cut emissions at specific

levels *would need to go* before the United States Senate for ratification” (*New York Times*).<sup>71</sup>

ANALYSIS: An agreement with legally binding emission reduction targets would require Senate review due to its potential costs and risks. No dispute there—but the converse does not hold. Just because a climate agreement lacks binding targets does not make it a non-treaty exempt from Senate review. The Paris Agreement imposes many new binding commitments on the United States with significant implications for the U.S. economy and domestic policy. That is sufficient to make the Agreement a treaty for purposes of the U.S. constitutional system.

As noted, whether an agreement’s provisions are binding or non-binding is less important in U.S. politics than whether a promise has been made or mere aspirations declared. Americans expect their government to keep its promises, whether or not those are binding under international law. Parties to the Paris Agreement meet their voluntary emission reduction and climate finance commitments by turning them into legal commitments—domestic laws and regulations. No chains are more binding than those we forge for ourselves.

To borrow the Framers’ terminology, whether an agreement engages interests

*U.S. negotiators’ last-minute substitution of “should” for “shall” does not a treaty unmake.*

“momentous” enough to warrant Senate review does not depend on whether certain provisions are declared binding. For example, Senate review is warranted if the pact might later be found to damage important national interests. The Paris Agreement clearly falls into that category. Senate review is also warranted if the pact might compromise the “national character”—America’s credibility and good name—by making promises lacking broad political support and clear statutory authority. Paris also fits that description.

**CLAIM II:** *It is not a treaty because there is no enforcement mechanism.*

**ANALYSIS:** This is another red herring. The UNFCCC had no enforcement mechanism. The presence or absence of such a mechanism does not determine a pact’s status with respect to the constitutional treaty process. Even the Kyoto Protocol’s emission reduction targets are binding in name only. That does not make either pact a non-treaty.

The Kyoto Protocol’s Article 18 requires the parties to establish mechanisms and procedures to address cases of non-compliance, including “development of a list of consequences.” At its 2001 Marrakesh meeting, the Conference of the Parties decided that in the treaty’s second commitment period, 2013-2020, developed countries “shall” reduce emissions by 1.3 tons for every ton exceeding their emission

reduction targets in the first commitment period, 2008-2012.<sup>72</sup>

Even in theory the Kyoto enforcement mechanism has almost no sting. In practice, the 1.3-ton non-compliance sanction is a nullity. As Hannah Chang of Columbia University’s Climate Law Center explains:

For one thing, like an individual indefinitely passing on debt into the future, a country could simply borrow from one commitment period to the next and never meet its target. If the international community failed to “force” the country to meet its target in the first compliance period, it’s unclear how it might force the country to meet its target with the included penalty in the subsequent period. Second, each party negotiates its own target for each commitment period, so a non-complying party could simply negotiate a higher [less stringent] target in a second period to accommodate the 30 percent penalty, effectively negating any impact of the enforcement mechanism.<sup>73</sup>

National Public Radio agrees: “The reality, however, is that even a legally binding framework such as the Kyoto Protocol doesn’t punish infractions. Nations that miss their mark are simply expected to try harder next time (if there is a next time).”<sup>74</sup>

**CLAIM III:** *Paris is not a treaty because it merely updates the UNFCCC, which the Senate ratified in 1992.*

**ANALYSIS:** Here we come to the crux of proponents' argument that the Paris Agreement is not a treaty. It goes like this. In 1992, the Senate approved a treaty obligating the parties to "report" or "communicate" their actions to reduce emissions. The UNFCCC also authorizes the parties to amend the treaty. Ergo: a) the parties at any time may alter the content and form of what is to be communicated, and b) the executive is free to accept whatever the parties decide. Although a) is correct, b) is nonsense. Again, because America is a nation that keeps its promises, the Senate cannot give the president a blank check to make subsequent promises to other countries or international bodies that the United States will adopt whatever legislative and regulatory initiatives he proposes.

In fact, the Senate specifically declined to do so when it approved the UNFCCC. The Senate Foreign Relations Committee expressly stipulated, and the George H. W. Bush administration agreed, that any future decision by the parties to "adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement."<sup>75</sup>

At the Paris COP 21 meeting, the parties made a decision to adopt targets and timetables in the form of NDCs. The U.S. NDC, for example, is a pledge to reduce U.S. emissions by 26 to 28 percent below 2005 levels by 2025.<sup>76</sup> So, by the terms on which the Senate approved U.S. ratification of the UNFCCC, Obama had no authority to join the Paris Agreement without obtaining the Senate's further advice and consent.<sup>77</sup>

Consider also that the UNFCCC—widely acknowledged as a treaty—has a time-limited objective. It aims to return parties' emissions to 1990 levels "by the end of the present decade."<sup>78</sup> In contrast, the Paris Agreement requires parties to submit more "ambitious" NDCs every five years, in perpetuity. The Senate's reservation against a decision to adopt targets and timetables applies with greater force against an agreement that includes automatically escalating targets and timetables.

More importantly, had there been no such express reservation, the Senate still could not be presumed to have given future presidents a blank check to promise changes in U.S. domestic law and regulation. Such an open-ended delegation to the executive conflicts with Article I of the Constitution, which vests "all legislative powers" in Congress.<sup>79</sup>

This *carte blanche* view of the UNFCCC has another bizarre

*An open-ended delegation to the executive conflicts with Article I of the Constitution, which vests "all legislative powers" in Congress.*

*That obtaining the Senate's consent to bad treaties is hard is an argument against negotiating bad treaties, not for overturning the constitutionally established treaty-making process.*

implication. Most climate policies aim to curb—and ultimately eliminate—the production and use of fossil fuels. Consequently, climate policies have an enormous potential to raise energy costs and depress economic growth. If the UNFCCC authorizes the executive to make increasingly ambitious emission reduction promises without obtaining the Senate's advice and consent, then the treaty is effectively an economic suicide pact (albeit one agreed under false pretenses). The UNFCCC as amended by the Paris Agreement, and as interpreted by progressive politicians and activists, threatens America's economic future and capacity for self-government. Trump should withdraw from it as well.

**CLAIM IV:** “[I]t has become physically impossible... you can't pass a treaty anymore.”

That is a quote from Secretary of State John Kerry during his July 28, 2015, testimony before the House Foreign Affairs Committee on why the administration did not negotiate the Iran deal as a treaty.<sup>80</sup> Translation: The treaty process is dead.

**ANALYSIS:** As noted, Kerry's “physically impossible” assessment is woefully inaccurate. The treaty process is not dead, though ignoring the Obama administration's efforts to cut out the Senate does threaten to kill it. Approval of treaties is difficult under America's constitutional system—

intentionally so. That obtaining the Senate's consent to bad treaties is hard is an argument against negotiating bad treaties, not for overturning the constitutionally established treaty-making process.

**CLAIM V:** *President George W. Bush “joined important international environmental agreements by using executive agreements.”*

**ANALYSIS:** Aside from being an example of the “everybody does it” fallacy, the quote above from Obama climate advisor Brian Deese is incorrect.<sup>81</sup> Bush's environmental executive agreements provide no precedent for Obama's adoption of the most ambitious climate pact ever as an executive agreement.

Deese provided no examples of important environmental pacts joined by previous presidents as executive agreements, so we decided to check. Using the search terms “environment” and “conservation” in the State Department's searchable database,<sup>82</sup> we found 15 Bush-era environmental executive agreements.<sup>83</sup>

Deese did not define what he meant by an “important” agreement. The “most ambitious ... ever” Paris Agreement is clearly at the high end of the scale. It aims to mobilize trillions of dollars in climate finance over the next 15 years, and “govern, regulate and incentivize the next generation of climate actions” in nearly 200 countries.<sup>84</sup>

The Bush environmental executive agreements were small potatoes by comparison. None entailed commitments or risks affecting the nation as a whole. Three are bilateral agreements to promote environmental education in public schools, and eight are bilateral agreements to promote forest conservation via debt-for-nature swaps. The largest annual expenditure authorized for any of those agreements was \$7.1 million.

All the Bush environmental executive agreements were clearly authorized by Congress, by current treaties of the United States, or by the president's inherent powers as commander-in-chief or chief executive. For example, the \$7.1 million authorization is part of a bilateral side agreement with Mexico that was included in the North American Free Trade Agreement at Congress' behest, as a condition for approving the trade treaty.<sup>85</sup>

### **State Department Treaty Criteria**

The State Department uses eight factors to assess whether an agreement should be negotiated as a treaty requiring the Senate's advice and consent. Those criteria, set forth in a document titled Circular 175, distinguish treaties from other types of agreements the president may adopt on his own or with the approval of simple majorities in both chambers.

The Paris Agreement plainly qualifies as a treaty under several criteria, and arguably under all.<sup>86</sup>

#### ***1. The extent to which the agreement involves commitments or risks affecting the nation as a whole.***

Achieving just the initial U.S. NDC will require costly new regulations to decarbonize all major sectors of the U.S. economy. As noted, just the first U.S. NDC emission reduction pledge outstrips the achievable emission reductions of all adopted and proposed Obama climate policies, including the Clean Power Plan and other regulations Trump is rescinding, by about 49 percent.

As also noted, just this initial NDC is more stringent than the U.S. emission reduction target under the Kyoto Protocol. Moreover, Paris Agreement parties are required to report a new NDC of increasing "ambition" every five years, in principle through 2050. In contrast, the Kyoto Protocol envisioned two commitment periods—2008-2012 and 2013-2020—while only assuring one.<sup>87</sup> So from the perspective of cost and risk, the Paris Agreement is more of a treaty than the Kyoto Protocol, which no one has claimed is not a treaty.

#### ***2. Whether the agreement is intended to affect state laws.***

For the Obama administration, the Paris Agreement was part of a political strategy to shield the Clean Power Plan from hostile

*The Paris Agreement plainly qualifies as a treaty under several criteria.*



*Only Congress has the power to appropriate monies from the Treasury.*

legislation and litigation. For example, on December 3, 2015, top U.S. climate negotiator Todd Stern urged the D.C. Circuit Court of Appeals not to stay the rule. A stay, he argued, would cast doubt on U.S. “leadership” in international climate negotiations, which could induce other countries to scale back or renege on their NDCs.<sup>88</sup> So according to Stern—before the Paris Summit convened and months before the treaty opened for signature on April 22, 2016—the pact already made the CPP too important for courts to tamper with.<sup>89</sup> Translated: *You should reject states’ petition to stay the CPP because it is a major component of our intended commitment under the Paris Agreement.*

The EPA openly acknowledged the CPP would compel states to change their laws regarding electricity fuel mix, energy dispatch policy, demand management, and carbon trading.<sup>90</sup> Like the Paris treaty, the CPP is a framework for increasingly ambitious emission reduction targets, and the Obama administration intended for the two policies to develop in coordination. As NDCs become more ambitious, so would CPP compliance targets, requiring further changes in state laws.

**3. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress.** New legislation would be required to meet both the initial NDC and future more ambitious NDCs. In

addition, the Agreement falls apart unless Congress ponies up billions for the Green Climate Fund. Only Congress has the power to appropriate monies from the Treasury.<sup>91</sup>

President Obama’s Fiscal Year 2017 budget provides a telling example of the treaty’s dependence on subsequent legislation. The budget calls for a \$10 per-barrel tax on oil to fund Obama’s 21st Century Clean Infrastructure Plan,<sup>92</sup> a proposal touted as helping the United States meet its NDC.<sup>93</sup> Imposing any revenue-raising measure requires an act of Congress.<sup>94</sup> More such revenue-raising would be needed to comply with increasingly stringent future NDCs.

**4. Past U.S. practice regarding similar agreements.** To our knowledge, all major pre-Paris multilateral environmental agreements negotiated by the United States were subject to the Senate’s advice and consent, including both of the Paris treaty’s predecessor agreements, the UNFCCC and Kyoto Protocol.<sup>95</sup> As noted, the Paris treaty is more prescriptive than the UNFCCC and more ambitious and inclusive than both the UNFCCC and Kyoto. The Obama White House boasted the Agreement was in a class of its own in terms of ambition, so the fact that even one predecessor climate pact was a treaty is largely determinative.

**5. The preference of Congress as to a particular type of agreement.** The most authoritative expression of

congressional preference is the Senate Foreign Relations Committee's stipulation when it approved the UNFCCC that a decision of the parties to adopt targets and timetables would have to be reviewed as a treaty:

The committee notes that a decision by the Conference of the Parties to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement.<sup>96</sup>

While the Paris Agreement was being negotiated, the Senate Republican caucus affirmed almost unanimously that Senate review is required for any new international climate commitments.<sup>97</sup>

**6. *The degree of formality desired for an agreement.*** The Paris Agreement contains more Articles than its predecessor climate treaties. At 31 pages, its 29 treaty Articles, as well as the 140 paragraphs of the accompanying "Decision of the Parties," contain detailed instructions with regard to mitigation, adaptation, finance, technology transfer, capacity building, transparency, implementation, and compliance.<sup>98</sup>

There is also a high degree of formality in the treaty's genesis. The Agreement and Decision are expressly pursuant to

the "Platform," adopted in December 2011 by the 17th Conference of the Parties in Durban, South Africa, to "develop" and "adopt" a "protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020."<sup>99</sup>

**7. *The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement.*** The proposed duration of the Paris Agreement greatly exceeds that of the Kyoto Protocol.

White House Deputy National Security Advisor for Strategic Communications Ben Rhodes acknowledged this important treaty criterion, telling reporters that "our task in Paris is to secure a long-term framework in which countries set successive rounds of targets into the future, beyond 2030, and ratchet down their carbon emissions over the course of the coming decades in the context of strong transparency and accountability provisions."<sup>100</sup>

While United Nations Secretary General Ban Ki-moon and others felt an urgency to beat the U.S. electoral calendar, there was no inherent need for a prompt conclusion that might justify bypassing the ratification process, for three reasons.

First, it makes no difference to potential climate change impacts whether

*Although the “T” word was verboten at the Paris Summit, the U.N. Climate Change Secretariat administers the Agreement as a treaty.*

mitigation actions begin in one year rather than another.

Second, the Agreement’s first commitment period does not begin until 2020, which would allow the Senate plenty of time to debate the pros and cons of the treaty.

Third, the formality of the treaty process was not an impediment to prompt conclusion. The Obama administration sought to avoid not delay, but outright rejection. For example, the Conference of the Parties adopted the Paris Agreement on December 12, 2015; Secretary Kerry signed it on April 22, 2016; and President Obama accepted it on September 3, 2016—a period of 265 days. In contrast, the gestation period for the UNFCCC, from adoption to signing to ratification, was only 152 days.<sup>101</sup> President George H.W. Bush, acting through the treaty process, ratified the UNFCCC more quickly than President Obama joined the Paris Agreement by evading that process.

Thus, the Paris Agreement is a treaty according to the first element of Factor 7, and bypassing Senate review cannot be justified by appeal to the other elements.

**8. General international practice regarding similar agreements.** The Paris Agreement is the successor to the UNFCCC and Kyoto Protocol, both demonstrably treaties requiring the Senate’s consent for U.S. participation.

The Agreement developed from the Durban Platform commitment to develop and adopt a “protocol, another legal instrument, or an agreed outcome with legal force.” Those descriptors are synonyms for “treaty,” just like “Convention” in the UNFCCC.

Although the “T” word was verboten at the Paris Summit, the U.N. Climate Change Secretariat administers the Agreement as a treaty on a par with any other U.N.-sponsored multilateral agreements.<sup>102</sup> Note the following excerpt from the Secretariat’s legal memorandum, “The Paris Agreement: Next Steps.”

Section 4: “Article 26 of the Paris Agreement provides that the Secretary-General will be responsible for ensuring the proper execution of all *treaty action related to the agreement*.”

Section 5: “Pursuant to Article 29 of the Paris Agreement, the texts of the Agreement in Arabic, Chinese, English, French, Russian and Spanish ... will be transmitted by the UNFCCC Executive Secretary to the *Treaty Section* of the Office of Legal Affairs of the United Nations in New York shortly after that document becomes available in all six authentic languages of the Agreement. The *Treaty Section* assists the Secretary-General in

carrying out his depositary function relating to *multilateral treaties*.” ...

Section 7: “In accordance with *treaty law*, signing the Paris Agreement would indicate the intention of a Party to the Convention to take steps to express its consent to be bound by the Agreement at a later date (see paragraph 10 below).”<sup>103</sup>  
[Emphases added]

Of the 139 countries joining the Agreement, 132—95 percent—have “ratified” it.<sup>104</sup> Four countries besides the United States—Belarus, Iceland, Japan, and the United Arab Emirates—chose to “accept” the Agreement, while two others chose to “approve” it. However, the six other non-ratifying parties are not evidence the Paris Agreement is not a treaty. Different countries have different legal systems. Japan also “accepted” the UNFCCC and the Kyoto Protocol, which are treaties for purposes of our legal system.

### What if They Say ...

Here we address certain talking points President Trump will likely encounter if he has not already.

**TALKING POINT:** *Unprecedented!* The charge here is that there is no precedent for a president canceling a predecessor’s executive agreement on

the grounds that it is a non-ratified treaty.

**RESPONSE:** Claiming there is no precedent for blocking an unprecedented usurpation proves too much. The absence of precedent arises precisely because we have never confronted an executive who dares the Senate to stop him from denying its shared role in the treaty process. The “unprecedented” move was Obama’s decision to abandon established custom, practice, and law with a coordinated effort to claim an obvious treaty is not a treaty, in order to evade a constitutional system established to prevent executives from binding the United States to schemes lacking broad political support.

Moreover, the United States has withdrawn from agreements before. Indeed, like all pacts, the Paris Agreement includes a procedure for withdrawal.

**TALKING POINT:** *Calling it a treaty dignifies it!* This is a claim made by Republicans who want to duck a fight and, we are informed, career State Department lawyers. They note that “even Obama says it’s not a treaty.”

**RESPONSE:** Confirming that the Paris Agreement is a treaty does not strengthen the U.S. commitment to the agreement, but neuters it. Giving the Paris Agreement treaty status freezes it for U.S. purposes unless and until the Senate votes on it—like the other 400-

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*Apparently, some Republicans would prefer to avoid almost any inconvenience today, on their watch, in return for massive problems for somebody else later.*

plus signed but never ratified treaties, which now gather dust on shelves.

**TALKING POINT:** *Don't say the Paris Agreement is a treaty subject to Senate review or else Democrats will challenge Trump's executive agreements!*

**RESPONSE:** This concern—which according to our understanding has also been advanced by State Department lawyers—is either overblown or disingenuous. The Senate could no more force Trump to submit a bona fide executive agreement for its review than it could force Obama to submit the Paris Agreement, a pact with all the hallmarks of a treaty. What the Senate can do is consider an agreement for approval as a treaty on its own volition, although in recent years senators have shown no appetite for that sort of institutional confrontation. To persuasively argue that an executive agreement is actually a treaty, senators would have to articulate non-partisan criteria, such as the State Department Circular 125 factors, which rebut Obama's claim that the Paris Agreement is not a treaty. Perhaps what the lawyers really want is to enable Trump to do what Obama did—evade Senate review by deeming treaties to be non-treaties. The dubious legality of such reasoning aside, no political self-interest warrants maintaining such a dangerous precedent.

**TALKING POINT:** *There's no urgency to withdraw from the Paris Agreement.* This is an argument made by some Republicans in Congress seeking to avoid a fight. As E&E News reported: "Sen. Bob Corker (R-Tenn.), chairman of the Foreign Affairs Committee, recently noted to reporters that the deal doesn't require the United States to take even procedural steps until late in Trump's term."<sup>105</sup>

**RESPONSE:** It is not surprising that the very parties into whose lap the work would fall by acknowledging Paris is a treaty are advising Trump to punt on the issue. The same parties went to great lengths to avoid institutional confrontation over the treaty status of the Iran arms deal. Apparently, some Republicans would prefer to avoid almost any inconvenience today, on their watch, in return for massive problems for somebody else later.

Fortunately, others understand that "politically binding" promises are not harmless, and that Trump cannot wait until 2020 to disavow an agreement with a first compliance period that starts in 2020. E&E News reports:

The U.S. Chamber of Commerce's Stephen Eule, who attended U.N. summits as a delegate during the George W. Bush administration, said that failing to withdraw from the Paris Agreement would allow subsequent administrations to

pick up where the Obama administration left off, even though the Senate never approved it.

Paris isn't as nonbinding as it might appear, argues Eule, who is vice president of climate and technology at the chamber's Institute for 21st Century Energy.

If the United States remains a party, it will have to participate in actions in 2018 and later that lead to a tougher emissions-reduction commitment. It will also have to make a statement on climate finance for poor countries.

"That commitment is not legally binding, but of course we know when America makes a commitment, it usually sticks with that commitment just because of the way we do things," Eule said.

"Strictly from a political aspect, why would you subject yourself to getting hammered like that for four years?" he said.<sup>106</sup>

Republicans are kidding themselves if they think staying in the Agreement will spare this administration political pain, let alone avert more widespread problems arising from it. As a former Trump transition team member

observed, dismantling Obama's NDC will require several battles, so you might as well play to win:

"If you roll back the regulations, you roll back the [nationally determined contribution]," the former official said.

The U.S. pledge to cut emissions between 26 and 28 percent compared with 2005 levels by 2025 was supported by policies like the Clean Power Plan, which faces certain doom in a U.S. EPA [run] by former Oklahoma Attorney General Scott Pruitt (R).

"If you don't meet the commitment, you're going to get it no matter what," the official said, referring to criticism. "You may as well withdraw from Paris."<sup>107</sup>

### Litigation Risk

Because the Paris Agreement's emission-reduction commitments are non-binding, it is easy to assume that neither the U.S. government nor any American firm could ever be sued for failure to pursue the Agreement's goal to limit "the increase in the global average temperature to well below 2 °C above pre-industrial levels" (Art. 2.1). However, the U.S. government cannot join a pact affirming the necessity for drastic emission reductions to avert

*Republicans are kidding themselves if they think staying in the Agreement will spare this administration political pain.*

*Courts can leverage non-binding commitments into legal obligations.*

planetary disaster without tacitly confessing that its “inaction” endangers millions of people around the world. That sets up decades of climate litigation.

Attorney and law professor Lukas Bergkamp warns:

The Paris Agreement thus may turn out to be a Trojan horse. ... While the agreement does little to reduce the threats it identifies, it creates risks of a different kind: it threatens our constitutional arrangements, including the separation of powers. In deciding on ratification, countries should consider not only the need for international coordination of climate policy, but also the protection of their constitutions, representative democracy, and the rule of law. Specifically, once they agree to Paris’ high collective ambition and ambitious substantive requirements, countries need to be mindful of the risks of the judiciary taking over when it becomes clear that the world will not deliver.<sup>108</sup>

This is not mere legal theory. The Netherlands recently found how easily courts can turn ostensibly non-binding promises and declarations into enforceable obligations. Green activist lawyer Roger Cox was lead counsel representing the Urgenda Foundation and Dutch citizens in litigation against the Dutch government. Cox argued

that the government’s commitment to reduce emissions by 16 percent did not go far enough given positions affirmed by the Conference of the Parties. After considering this argument and arguments opposing it, the Hague District Court ordered the government to cut greenhouse gas emissions by at least 25 percent by 2020.<sup>109</sup> The government has appealed the ruling. Nonetheless, the case is a cautionary tale for President Trump.

Courts can leverage non-binding commitments into legal obligations. In a 2015 paper, Cox explains the theory underpinning his litigation:

[N]ational governments have made quite explicit statements—in the context of the United Nations Framework Convention on Climate Change (UNFCCC) and its annual climate change conferences—regarding the danger of climate change and what should be done about it. They have consistently done so based on the scientific findings of the UN’s Intergovernmental Panel on Climate Change (IPCC).<sup>110</sup>

Consequently, those governments have embraced a “duty of care,” which creates climate torts when they fail to take actions deemed necessary to limit global warming to 2°C.

Cox won his lawsuit by invoking decades of official statements affirming the reality of the climate “crisis” and

necessity for “climate action.” As he explained:

The court first of all recognized that the stipulations included in the UNFCCC, the Kyoto Protocol and the no-harm principle of international law do not have a binding force. ... [However,] the court found that the stipulations included in the UNFCCC, the Kyoto Protocol and the no-harm principle of international law need to be taken into account when determining the state’s duty of care in relation to climate change ...<sup>111</sup>

Cox enthuses: “The decision of the Dutch court in *Urgenda v. The State of the Netherlands* creates new angles for using a tort-law as an approach against governmental inaction to address climate change.”<sup>112</sup> The lesson for Trump is clear. Words matter and cheap environmental virtue can be costly.

In the United States, Justice Anthony Kennedy has turned to international opinions and other sources for guidance, and Justice Stephen Breyer has defended the propriety of using such sources in U.S. jurisprudence.<sup>113</sup> It is entirely possible the lower courts will provide them another chance to apply that perspective before they retire.

Certainly activist state attorneys general intend to act. Using state open records laws, the Energy and

Environment Legal Institute obtained a March 7, 2016 recruiting letter sent by New York Attorney General Eric Schneiderman and Vermont AG Eric Sorrell, which stated:

The commitments of the United States and other nations at last year’s Paris climate change conference are very significant steps forward, but states must still play a crucial role in ensuring that the promises made in Paris become reality. ... That’s why we believe that this is the moment for Attorneys General who share this mission ... to discuss ongoing and potential legal actions and to consider mechanisms to support these actions.<sup>114</sup>

Following this pitch, at a March 29, 2016 press conference in Manhattan, Al Gore, Schneiderman, seven other AGs, and legal representatives from 11 states announced the formation of AGs United for Clean Power, a coalition proposing to “investigate” fossil fuel companies and their allies for allegedly “misleading” the public on climate change.<sup>115</sup> Some of the AGs had already initiated investigations of ExxonMobil for its opposition to the climate agenda. Suing to require compliance with the Paris Agreement is hardly a stretch for such committed activists. Indeed, E&E Legal had previously obtained from the New York attorney general’s office the draft “Factual



Background” sections of a complaint, clearly targeting federal agencies, citing the litany of supposedly aspirational, hortatory agreements building on the UNFCCC.<sup>116</sup>

These AGs have explored numerous fronts. Other emails obtained by E&E Legal reveal that AGs United consulted with Michael Burger, executive director of the Sabin Center for Climate Change Law at the Columbia University law school. In a January 2016 report, Burger and several coauthors argue that the Paris Agreement “provides a strong basis” for invoking a “powerful” but seldom-used provision of the Clean Air Act, Section 115, to compel greenhouse gas emission reductions across all sectors of the U.S. economy.<sup>117</sup>

Section 115 of the Clean Air Act authorizes the EPA to control U.S. emissions contributing to “air pollution” in another country, but only if the agency determines the other country is taking or will take comparable actions to curb emissions contributing to such air pollution. Burger argues that the Paris Agreement, with its quantified NDCs and “enhanced transparency framework,” satisfies the requisite “reciprocity determination.” Under Section 115, states reduce their “international air pollution” by modifying the state implementation plans they adopted to meet national ambient air quality standards (NAAQS).

All of this is dubious because there are no NAAQS for carbon dioxide and other greenhouse gases, although environmental advocacy groups have toyed with the idea of trying to force their creation.<sup>118</sup> Thus, Section 115 may have no lawful application to greenhouse gases until the EPA promulgates NAAQS for greenhouse gas emissions.

Moreover, if a Section 115 petition actually succeeded in turning Obama’s NDC into legally binding requirements, the political backlash would be even stronger than that triggered by the Clean Power Plan. As attorney Brian Potts commented in *Politico*:

But if the Republican reaction to Obama’s other environmental regulations is any indication, they would freak out. Even some Democrats would likely be concerned at the federal government’s intrusion into powers traditionally reserved for the states. Through the completion of an international climate deal, this plan would effectively allow the president to sidestep Congress and take full control over each [state’s] energy sector. It would give the White House enormous power. States’ rights activists would rightly scream bloody murder.<sup>119</sup>

Nonetheless, litigation groups are poised to demand that the EPA use Section 115 to require domestic emission reductions at least as aggressive as those undertaken by other parties to the Paris Agreement. Withdrawing from the Paris Agreement would not preclude such litigation but would make it less likely to succeed. Even the most activist judges would think twice about citing an Agreement from which the United States had withdrawn.

Finally, as a general matter, staying in the Paris Agreement will increase litigation risk by influencing U.S. domestic politics. Courts do not decide climate-related regulatory and tort cases in a political vacuum. As the saying goes, even judges read the *New York Times*. Retaining the Paris Agreement as an official U.S. commitment can only increase the likelihood that courts will reach decisions in accord with those “commitments.”

### **Withdrawal Options**

The Paris Agreement entered into force on November 4, 2016.<sup>120</sup> That date is significant for evaluating withdrawal options.

There are three principal options, which we will call 1) *Paris Only*, 2) *Paris Plus UNFCCC*, and 3) *Advice and Consent*.

***Paris Only.*** Under Article 28 of the Paris Agreement, a party that wishes to withdraw must wait at least three years after the pact’s entry into force before submitting a written notification to the depositary, the U.N. Secretary General. Withdrawal takes effect one year after the depositary receives the notification. Thus, the earliest President Trump could cancel America’s participation in the Paris treaty via this option would be November 4, 2020, near the end of his term. This approach would ensure almost four years of “diplomatic blowback” pushing him to reverse that decision. As noted, not pursuing any option ensures endless blowback, by design.

Also, were Trump to pursue the Paris Only approach, and lose his reelection bid, his successor could claim to unilaterally rejoin the pact. Even if Trump were to win reelection, the next president might still reactivate the Obama policy in 2025. Thus, this option would not resolve the issue.

***Paris Plus UNFCCC.*** Article 28 further states: “Any Party that withdraws from the Convention [UNFCCC] shall be considered as also having withdrawn from this Agreement.” The UNFCCC similarly requires a party to wait three years before submitting a withdrawal notification, and wait another year before withdrawal takes effect. However, the UNFCCC waiting period ended in May 1997, so Trump

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*Gaining approval for treaties is hard, intentionally, and signing but not ratifying treaties is not unusual.*

could immediately submit a notification of withdrawal. America would be out of the UNFCCC and Paris Agreement one year later—by April 2018. The “diplomatic blowback” would be a one-off and, if done soon, would be in the rearview mirror by mid-2018.

**Advice and Consent.** Gaining approval for treaties is hard, intentionally, and signing but not ratifying treaties is not unusual. President Trump could submit the Paris Agreement to the Senate and ask for its advice and consent. There is no chance two-thirds of Senators would support ratification. Thus, the Paris treaty would join 400-plus other treaties the United States signed but did not ratify.

The Advice and Consent option can be combined with either of the other withdrawal options.

We now briefly assess these approaches’ comparative benefits and risks.

*Paris Only* takes four years to complete. It would allow a future president to put America back into the Agreement by same means Obama purported to join—with the stroke of a pen.

*Paris Plus UNFCCC* takes one year to complete. It would require a future president to obtain the Senate’s consent to re-ratify the UNFCCC in order to rejoin the Paris Agreement. As Steven Groves of the Heritage Foundation notes: “[W]ithdrawing will prevent future Administrations from

using the existing UNFCCC framework to avoid Senate advice and consent in the treaty process as required by Article II Section 2 of the U.S. Constitution.”<sup>121</sup>

Another point in favor of *Paris Plus UNFCCC* is that the scripted “blowback” likely will be indistinguishable whether Trump withdraws from both pacts or just the Paris Agreement. Thus, *Paris Plus UNFCCC* is the quicker and more durable withdrawal option for the same PR pain.

*Paris Plus UNCCC* is also the superior option due to an unexpected legal complication. It is longstanding U.S. policy that Palestinian statehood is a matter to be negotiated by Israel and the Palestinians, not imposed on Israel by the United Nations. To put teeth into that policy, Congress prohibited the U.S. government from funding any U.N. agency that “accords the Palestine Liberation Organization the same standing as member states” (Public Law 101-246) or “grants full membership as a state in the United Nations to any organization or group that does not have the internationally recognized attributes of statehood” (Public Law 103-236).<sup>122</sup>

On December 18, 2015, the Palestinian Authority submitted its instruments of accession to the UNFCCC, and on March 17, 2016, the “State of Palestine” was accepted as a full member. Under

U.S. law, therefore, all U.S. government funding for the UNFCCC should stop. The funding prohibitions dovetail with candidate Trump's promise not only to "cancel" U.S. participation in the Paris Agreement but also "stop all payment of U.S. tax dollars to U.N. global warming programs."

It makes little sense to stay in the UNFCCC once the U.S. terminates funding for the U.N. agency that administers it. In addition, as a party to the treaty, America cannot stop payments to the UNFCCC without going into arrears on financial commitments to the U.N. Thus, withdrawing from the UNFCCC would avoid the conflict between U.S. financial commitments under the treaty and the requirements of U.S. law.

A potential downside of *Paris Plus UNFCCC* is that although the Paris Agreement is highly controversial, the UNFCCC is not. Many people are unaware of its existence. A Republican administration negotiated the UNFCCC. Many Republicans who opposed the Kyoto Protocol have professed support for the UNFCCC. Thus, withdrawing from the UNFCCC is more easily attacked as "extreme" than withdrawing from the far more ambitious Paris Agreement.

However, the UNFCCC, as amended by the Paris Agreement, has been transformed into a very different treaty from the pact the United States ratified

in 1992. The Senate gave its consent to the UNFCCC on the condition that any decision by the Conference of the Parties to adopt targets and timetables would be submitted for its advice and consent as well. In the Paris negotiations, the Conference not only announced its decision to adopt targets under agreed timetables, in the form of NDCs, it collaborated with Obama to bypass Senate review. The Conference has abandoned the condition and shared assumptions on which the United States joined the UNFCCC, leaving the administration no real option but to withdraw.

The *Advice and Consent* option would clearly expose the Paris Agreement's lack of political support, allow the Senate to reclaim its constitutional role in the treaty-making process, and clarify for the public the extent of the Obama administration's unauthorized executive lawmaking.

Of course, *Advice and Consent* would require Republican Senators to debate climate policy on the merits, which will entail expending political capital.<sup>123</sup> However, regardless of whether the Senate holds a ratification debate, Trump should formally withdraw from the Paris Agreement under one of the two Article 28 procedures. That is the only way to avoid further legal controversy on whether America is in or out of the treaty. In addition, good relations with the nearly 200 other

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*The Paris Agreement is no mere “update” of the UNFCCC.*

governments participating in the Paris negotiations suggests that withdrawal is better carried out through the prescribed procedures.

**Conclusion**

Americans expect their government to honor its commitments, whether deemed binding or not. To paraphrase the GEICO ad, “When you’re the United States, you keep your promises; it’s what you do.” With that in mind, the Constitution provides a process for vetting proposed international agreements with potentially far-reaching consequences.

To claim he properly committed the U.S. to the Paris Agreement, President Obama pretended that way back in 1992, when the Senate consented to ratification of the U.N. Framework Convention on Climate Change, it also authorized unknown future executives to commit the United States to undertakings of far greater cost and risk. However, even if the Senate Foreign Relations Committee report accompanying UNFCCC ratification had never stipulated that the Senate must review any decision by the Conference of the Parties to adopt targets and timetables, such as the mandatory NDCs that are the central feature of the Paris Agreement, it is inconceivable that when the Senate ratified the UNFCCC in 1992 it gave future presidents carte blanche to make

costly and prescriptive legislative commitments without obtaining the Senate’s advice and consent.

The Paris Agreement is no mere “update” of the UNFCCC. Given its prescriptiveness, ambition, costs, risks, dependence on subsequent legislation by Congress, and intent to affect state laws, the Paris Agreement—no less than the Kyoto Protocol and in key respects more so—is a whole new treaty. Alternatively, the Paris Agreement amends the UNFCCC into a very different treaty from that which the United States ratified. Either way, it purports to commit the U.S. to treaty-like obligations without Senate approval.

If allowed to stand as precedent, Obama’s end-run around the treaty making process, along with the implicit assertion that the executive can unilaterally decide whether or not an agreement is subject to Senate review, would undermine one of the Constitution’s most important checks and balances.

Far from being toothless, the Paris Agreement would compel U.S. leaders to continually negotiate domestic energy policy with a coalition of foreign governments, multilateral agencies, and environmental pressure groups, all exaggerating climate change risks, and all demanding urgent action to restrict America and the world’s access to affordable, plentiful, reliable carbon-

based energy. It is designed to do this in perpetuity, and cannot be remedied by various “tweaks” that have been suggested.

Remaining in the Paris Agreement would undermine President Trump’s energy agenda, endanger America’s economic future, and grow the administrative state at the expense of representative government. It will enrich autocrats and rent-seekers without making a detectable dent on the alleged climate crisis. Worse, its mid-century emission reduction goal cannot be achieved without putting energy-poor nations on an energy diet.

To safeguard America’s economic future and capacity for self-government, President Trump should pull out of the Paris Agreement. There are several options for doing so, which are discussed above. Regardless of which option Trump selects, his administration should make the case for withdrawal based on the following key points:

1. The Paris Agreement is a treaty by virtue of its costs and risks, ambition compared to predecessor climate treaties, dependence on subsequent legislation by Congress, intent to affect state laws, U.S. historic practice with regard to multilateral environmental agreements, and other common-sense criteria.

2. In America’s constitutional system, treaties must obtain the advice and consent of the Senate before the United States may lawfully join them. President Obama deemed the Paris Agreement to not be a treaty in order to evade constitutional review, which the Agreement almost certainly would not have survived.
3. Allowing Obama’s climate coup to stand will set a dangerous precedent that will undermine one of the Constitution’s most important checks and balances. It will allow the president to adopt any treaty he and foreign elites want, without Senate ratification, just by deeming it “not a treaty.”
4. The Agreement endangers America’s capacity for self-government. It empowers one administration to make legislative commitments for decades to come, without congressional authorization, and regardless of the outcome of future elections. It would also make U.S. energy policies increasingly unaccountable to voters, and increasingly beholden to the demands of foreign leaders, U.N.

- bureaucrats, and international pressure groups.
5. The United States cannot comply with the Paris Agreement and pursue a pro-growth energy agenda. Affordable, plentiful, reliable energy is the lifeblood of modern economic life. Yet, the Paris Agreement's central goal is to make fossil fuels, America's most plentiful and affordable energy source, more expensive across the board. Implementing President Obama's NDC would destroy U.S. manufacturing's energy price edge.
  6. The Agreement entails more cost and risk than the country is willing to bear. A majority of states have sued to overturn the Obama EPA's end-run around Congress, the Clean Power Plan, which is also the centerpiece of the U.S. NDC under the Paris Agreement. Yet, the CPP is only a start. All of Obama's adopted and proposed climate policies would only achieve about 51 percent of just the first NDC, and the Paris Agreement requires parties to promise more "ambitious" NDCs every five years.
  7. The Agreement has no democratic legitimacy. President Obama kept mum about climate change during the 2012 elections. Only after being reelected did he unveil a climate agenda featuring an EPA-redesigned electric power system and the most "ambitious" climate agreement in history.
  8. Withdrawing from the Paris Agreement is a humanitarian imperative. The Agreement will produce no detectable climate benefits. Instead, it will divert trillions of dollars from productive investments that would advance global welfare to political uses. Worse, the Agreement's mid-century emission-reduction goals cannot be achieved without drastically reducing energy-poor countries' current access to affordable energy from fossil fuels.

For all the foregoing reasons, President Trump should stick to his campaign promises to end America's participation in the Paris Climate Agreement and stop payments to the U.N. Green Climate Fund.

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## About the Authors

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Horner is regularly mentioned and published by *The Washington Times*, National Review Online, Daily Caller, *Investor's Business Daily*, Washington Free Beacon, and *Washington Examiner*. He has been cited on several recent occasions in *The Wall Street Journal's* editorial pages. He has also written for *Human Events*, *PJ Media*, United Press International, *Energy Tribune*, Spain's *Actualidad Economica*, and Brussels' *EU Reporter*. Horner has discussed legal, policy, and political issues hundreds of times on television and radio programs in the United States, Europe, Canada, and Australia.

Horner is the author of four books including three on global warming and environmental policy, law and politics, including two best-sellers, *The Politically Incorrect Guide to Global Warming and Environmentalism* (2007) and *Red Hot Lies: How Global Warming Alarmists Use Threats, Fraud and Deception to Keep You Misinformed* (2008). The former spent six months on *The New York Times* bestseller list and earned him an appearance on "The Daily Show" with Jon Stewart.

Horner has testified before the Senate Foreign Relations and Environment and Public Works committees. He has worked on legal and policy issues with various public policy organizations around the globe. He has given lectures at universities in the U.S., Europe, and Central America, as well as numerous addresses in the European Parliament and before policy makers in multiple European capitals on a variety of topics relating to energy and environmental issues.

Horner serves on The Federalist Society's International and National Security Law Practice Group's Executive Committee. He is also a senior legal fellow at the Energy and Environment Legal Institute. He received his *Juris Doctorate* from Washington University in St. Louis, where he received the Judge Samuel Breckenridge Award for Advocacy.

Marlo Lewis, Jr. is a senior fellow at the Competitive Enterprise Institute, writing on global warming, energy policy, and public policy issues.

Lewis has been published in *The Washington Times*, *Forbes*, *National Review*, *Investors' Business Daily*, *Engage*, *Environmental Law Institute Forum*, *The Hill*, FoxNews.com, Real Clear Policy, *Public Utility Fortnightly*, *University of Richmond Law Review*, *Interpretation: A Journal of Political Philosophy*, and other publications. He has appeared on various television and radio programs, including on the Oprah Winfrey show, where he provided counterpoint to Al Gore's *An Inconvenient Truth*. He produced, wrote, and narrated the documentary film, *Policy Peril: Why Global Warming Policies Are More Dangerous than Global Warming Itself*.

Lewis has testified before the Senate Environment and Public Works Committee, the House Permanent Select Committee on Intelligence and House Select Committee on Energy Independence and Global Warming, and House Government Reform Subcommittees on the Census and Regulatory Affairs.

Prior to joining CEI in 2002, he served as Director of External Relations at the Reason Foundation. During the 106th Congress, Lewis served as staff director of the House Government Reform Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. He has also served as research director for Citizens against Government Waste. Earlier, he was a staff consultant to the House Foreign Affairs Subcommittee on International Economic Policy and Trade, a special assistant at the State Department Bureau of Inter-American Affairs and Bureau of International Organization Affairs, and a Visiting Assistant Professor of Political Science at Claremont McKenna College.

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