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The Paris Climate Agreement Is a Treaty Requiring Senate Review Why and How Congress Should Fight President Obama's Power Grab

By Marlo Lewis, Jr.*

President Obama claims the recently adopted Paris Agreement on climate change is not a treaty but rather an executive agreement—a pact he can approve on his sole authority, with the stroke of a pen.¹ Why is he doing this? Because if he were to follow the constitutional treaty-making process, and submit the agreement to the Senate for its advice and consent, the treaty would be dead on arrival.

In fact, the Paris Agreement *is* a treaty. That is the only reasonable conclusion based on U.S. historic practice, the Agreement's potential costs and risks, its prescriptiveness and “ambition” compared to predecessor climate treaties, and international protocol, including recent instructions from the United Nations Climate Change Secretariat to the Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC).²

Obama claims the Paris Agreement is not a treaty because America's emission-reduction commitments under it are “non-binding.” That is a non sequitur. Our emission-reduction commitments under the Senate-ratified UNFCCC are also non-binding, yet no one disputes that the UNFCCC is a treaty.

The administration readily admits that parts of the Agreement are indeed “binding”: the procedural (reporting and monitoring) commitments, just not the substantive (emission-reduction and climate finance) commitments. But for the United States, that is a distinction without a difference. Americans expect their government to keep all solemn promises, whether or not those are deemed legally binding. Under the Paris Agreement, nations honor their “non-binding” promises by turning them into binding domestic laws and regulations.

Some in Congress, including some conservative lawmakers, may be tempted to dismiss the Paris Agreement as a paper tiger because it imposes no penalties for non-compliance. Yet by doing so, they overlook what chiefly determines climate and energy policy: politics.

Far from being toothless, the Paris Agreement is the framework for a multi-decade global campaign of political pressure directed chiefly against Republican leaders, Red State voters, and the fossil fuel industry. Specifically, the treaty is designed to advance three political objectives:

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1. Deter the next president, future Congresses, and even courts from overturning the Environmental Protection Agency's (EPA) so-called Clean Power Plan (CPP) and other climate regulations, including some not yet proposed, by rebranding those policies as "promises" America has made to the world.
2. Pressure future U.S. policy makers to make increasingly "ambitious" emission-reduction pledges—known as Intended Nationally Determined Contributions (INDCs)—every five years starting in 2020, implement those pledges via ever-more stringent regulations, and pony up untold billions in "climate finance"—foreign aid to subsidize "green energy" ventures in developing countries.
3. Make U.S. energy and climate policy increasingly unaccountable to Congress and to the American people, and increasingly beholden to the demands of foreign leaders, multilateral bureaucrats, international pressure groups, and their media allies.

To safeguard America's economic future and capacity for self-government, congressional leaders must expose Obama's climate diplomacy as an attempted end-run around the Constitution's treaty-making process. They should do so before the President signs the Agreement on Earth Day, April 22, at a United Nations ceremony in New York.

The centerpiece of this counteroffensive should be a Sense of Congress resolution emphasizing a clear and simple message: The Paris Agreement is a treaty, and therefore, under Article II, Section 2 of the U.S. Constitution, the United States is not a party, and therefore not bound to its terms, unless the Senate ratifies it. Absent Senate approval, Obama's climate pledges to the United Nations are just administration proposals, not commitments of the United States.

Changing "Shall" to "Should" Does Not Transform a Treaty into a "Non-Treaty." According to media reports, the Paris Agreement negotiations nearly collapsed at the 11th hour because one treaty provision—Article 4.4—stipulated that developed country parties "shall" adopt quantified emission-reduction targets. U.S. Secretary of State John Kerry supposedly saved the pact by successfully lobbying for "shall" to be changed to "should."

The tale, as told by *Politico*,³ *The Washington Post*,⁴ ABC News, and other media outlets goes like this.⁵ In climate diplomacy, "shall" implies a legal obligation and "should" does not. An agreement with binding emission limits is a treaty, while one with non-binding limits is not. If the Paris Agreement is a treaty, it must be submitted to the Republican-controlled Senate, where it would face certain death. Kerry told his counterparts the United States would not support the agreement unless they agreed to delete "shall." They did so, knowing the agreement would collapse without U.S. participation. Kerry's one-word tweak not only saved the climate deal, it also positioned President Obama to bypass Senate review and make America a party to the Agreement by executive fiat. Or so the story goes.

Yet, the notion that the Paris Agreement is not a treaty is implausible on its face. No one ever disputed that its predecessor agreements—the UNFCCC⁶ and the Kyoto Protocol—are

treaties subject to the Senate's advice and consent.⁷ The White House hails the Paris pact as "the most ambitious climate change agreement in history."⁸ Shouldn't this "most ambitious" climate agreement be a preeminent candidate for Senate review?

A Climate Agreement Does Not Need Legally Binding Emission-Reduction Targets to Qualify as a Treaty. No such litmus test is set forth in previous climate agreements, Supreme Court decisions, or other legal authorities. The UNFCCC is indisputably a treaty of the United States, yet its emission-reduction goals are understood to be voluntary and aspirational because it specifies no deliverables and provides no penalties for non-compliance.⁹ For example, recently declassified State Department documents¹⁰ show the Clinton administration launched the Kyoto Protocol negotiations precisely to replace the UNFCCC's "non-binding" emission-reduction goals with binding targets.¹¹

Even the Kyoto Protocol's emission-reduction targets are binding in name only. Kyoto's Article 18 states that the Conference of the Parties "shall" establish mechanisms and procedures to address cases of non-compliance, including "development of a list of consequences." At its 2001 Marrakesh meeting, the Conference decided that in the "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).¹² Yet, the 1.3 ton penalty is effectively 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.¹³

Like the UNFCCC and the Paris Agreement, the Kyoto Protocol's emission-reduction commitments are *politically* binding—enforced via political pressure rather than economic sanctions authorized or imposed by an international tribunal. Yet no one has ever claimed the Kyoto Protocol is not a treaty or that President Clinton could have made America a party to the agreement through his sole action.

What matters from a constitutional standpoint is not whether one or more provisions of an agreement are binding, but whether the agreement as a whole may have consequences large and serious enough to warrant Senate review.

For the United States, Binding Versus Non-Binding Is a Distinction without a Difference. The Paris Agreement includes a handful of "non-binding" substantive commitments and numerous "binding" procedural commitments.¹⁴ The latter contain the word "shall," which occurs 116 times in the text.

The key substantive commitments are the emission-reduction pledges outlined in industrialized countries' Intended Nationally Determined Contributions and the "collective quantified goal" of contributing at least \$100 billion annually to developing countries by 2020.¹⁵ The procedural commitments chiefly involve monitoring and reporting on the substantive commitments.¹⁶

Although nations' INDCs and climate-finance goals are technically non-binding, those voluntary commitments become solemn promises once a nation deposits its "instruments of ratification, acceptance, approval or accession" for the Paris Agreement.¹⁷ Promise keeping is a time-honored attribute of our national character. In a country with a strong rule of law tradition like the United States, citizens expect their government to keep all solemn promises, whether or not there are legal consequences for breaking them.

Consequently, if Americans believe the United States is a party to the Paris Agreement, green activists, politicians, and pundits will demand that future Congresses and administrations honor "our commitments." It is possible even that courts will come down the same way. Under the Paris Agreement, nations meet their voluntary emission-reduction and climate finance commitments by turning them into *binding domestic laws and regulations*. No chains are more binding than those we forge for ourselves.

If congressional leaders do not want to be bound by the "non-binding" Paris Agreement, they must debunk President Obama's claim that he can make America a party to the Agreement without the Senate's advice and consent. To succeed they must assert, in the first place, that the agreement is a treaty.

The Executive Branch Cannot Alone Determine whether an Agreement is a Treaty. Treaty making is a shared power, like appointing justices to the Supreme Court. Both powers are set forth in Article II, Section 2 of the Constitution. Notably, the Senate has more power than the President in respect to treaties, compared to judges. The President may make temporary (recess) appointments of judges, but he cannot make "recess" accession to treaties. Whereas appointing a judge only requires the approval of a majority of Senators, ratifying a treaty requires the approval of "two thirds of Senators present."

In short, the Constitution requires the President to obtain a greater degree of consent to make a treaty than to appoint a Justice to the highest court in the land. No one would dare claim that the President can avoid Senate review of a Supreme Court nominee just because a majority is likely to oppose confirmation. Any claim that Article II does not apply because the President's appointee on the bench is "not a Justice" would be laughed out of court.

If the President can unilaterally declare that an agreement is not a treaty because acknowledging as much would result in the death of the treaty, then he effectively throws out Article II of the Constitution, thereby neutering the Senate on key foreign policy issues. Allowing the administration to set a precedent that the Senate's role in treaty making exists at the Executive's pleasure would vitiate an important element of the Constitution's checks and balances. The Senate can no more afford to duck a fight over the Paris power grab than it could to allow the President to appoint judicial nominees without its consent.¹⁸

The Paris Agreement Does More than Merely “Update” the UNFCCC. The Obama administration claims the Paris Agreement does not require Senate review because it merely updates the UNFCCC, which the Senate ratified in 1992 (12 Congresses ago).¹⁹ The UNFCCC authorizes the Conference of the Parties (COP) to adopt amendments (Article XV) and Protocols (Article XVII). According to the administration, all the Paris COP did was adopt new procedural requirements and mechanisms to encourage emission reductions and climate finance—goals already adopted in the UNFCCC.

Even if that were so, it still would not mean the Senate gave carte blanche to any future President to bind the United States to unknown future procedural requirements designed to significantly and continually increase U.S. emission-reduction and climate finance “commitments.”

In 1992, the Senate Foreign Relations Committee—well aware that the vast majority of politicians, U.N. officials, and environmental organizations participating in that year’s Rio Earth Summit came to negotiate a treaty with emission-reduction targets and timetables—agreed to report the UNFCCC to the Senate floor only on the condition that the Senate would review any future decision by the Conference of the Parties to adopt targets and timetables.²⁰ The report accompanying the Committee’s resolution stated:

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.²¹

At the Paris meeting, the Conference of the Parties decided to adopt an agreement with targets and timetables, in the form of Intended Nationally Determined Contributions. In fact, INDCs are the heart of the Agreement. The U.S. INDC,²² a pledge to “reduce our emissions by 26-28 percent below 2005 levels by 2025, and to make best efforts to reduce by 28 percent,” is more ambitious than the U.S. emission-reduction target under the Kyoto Protocol, which never came close to winning Senate approval.²³

Thus, under the terms of the Senate’s advice and consent to the UNFCCC, the Paris Agreement must also be approved by the Senate for the United States to be a party. Of course, President Obama can still sign the treaty in New York on April 22, but his signature, like President Clinton’s November 11, 1998 signature on the Kyoto Protocol, would only make the United States a signatory pending ratification, not a party to the agreement.

How the Paris Agreement Would Impose Obligations on the U.S. The Paris Agreement’s numerous procedural commitments are designed to exert political pressure on nations to promise and achieve “ambitious” substantive commitments. For example, the Agreement does not legally bind any party to promise any specific emission-reduction target, nor to do what it promises. But it binds each party to communicate what it “intends to achieve” (Article 4.2), to communicate a new INDC every five years (Article 4.9), and to promise more ambitious targets in each successive INDC (Article 4.2-3).²⁴

Similarly, each developed country's specific contribution toward the collective goal of providing at least \$100 billion annually in "climate finance" by 2020 is non-binding. However, the agreement does stipulate that financial support for developing countries "shall be provided" (Article 4.5), and that each developed country "shall biennially communicate indicative quantitative and qualitative information" regarding its efforts to mobilize and provide financial resources for developing countries (Article 9.5).

To exert and focus political pressure on the parties, 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 INDCs and related actions.²⁵ Nearly a dozen committees may have a role in debating, monitoring, and reporting on financial contributions.²⁶ In addition, every annual COP meeting will provide a forum for 160-plus developing countries to complain about not getting as much "climate finance" as they want. As a full-employment program for international bureaucrats, though, it could not be better designed.

In short, the Paris Agreement envisions endless rounds of meetings and reports, which will provide countless media opportunities to "name and shame" countries whose governments doubt the alleged climate consensus, deviate from their five-year INDC plans, or fail to demonstrate sufficient "ambition."²⁷ By design, the United States will face relentless pressure to promise much and keep its promises—and Americans' widely shared belief that leaders should keep their promises will make us particularly susceptible to such pressure. To protect America from the Paris pressure cooker, congressional leaders must act quickly to clarify that President Obama's expected acceptance or approval of the Agreement is an administration proposal, not a commitment of the United States.

How the Paris Agreement Would Control U.S. Energy and Climate Policy.

President Obama seeks to use the Paris Agreement to harden his climate agenda against hostile action by the next president, future Congresses, and courts. For example, on December 3, 2015, top U.S. climate negotiator Todd Stern²⁸ urged the D.C. Circuit Court of Appeals not to put a stay on the EPA's so-called Clean Power Plan.²⁹ 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 INDCs. So according to Stern, even before the Paris Agreement was negotiated in early December, before it was adopted on December 12, 2015, and months before the treaty opens for signature on April 22, the pact already made the CPP too important for courts to tamper with because the administration intends to promise it to other countries.³⁰

It is an understatement to note that Stern's plea is not a legal argument. The Supreme Court did not find it a persuasive one.³¹

The Paris Agreement creates the legal framework for a permanent global coalition of nearly 200 foreign governments, legions of U.N. bureaucrats, and scores of green pressure groups, all primed to point fingers and cry "you promised, you promised," if future U.S. leaders attempt to repeal the CPP or any other federal climate regulations. Obama's current and

proposed climate policies only account for about 55 percent of the emission reductions pledged in the U.S. INDC.³² So the global coalition will demand that the next President and Congress implement any additional policies needed to keep “America’s promise.”

Moreover, the Paris Agreement stipulates that parties “will”³³ submit more “ambitious” INDCs in 2020 and every five years thereafter (Article 4.3).³⁴ So the Agreement will continually pressure U.S. policy makers to pledge ever-more stringent INDCs and turn those five-year plans into enforceable commitments—that is, domestic laws and regulations.

The Necessity for Senate Review. Article II, Section 2 of the Constitution states: “The President ... shall have the power, by and with the consent of the Senate, to make treaties, provided two thirds of Senators present concur.”³⁵ The Framers gave the Senate a shared role in treaty making to check the President’s discretion. As Alexander Hamilton argued in the *Federalist*, it would be unwise 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.”³⁶

In the debate on the Iran nuclear deal, Secretary Kerry argued that a sole executive agreement was the only path forward because it is “physically impossible” to obtain the Senate’s advice and consent to treaties. That is nonsense. The Bush administration secured the Senate’s advice and consent to 163 treaties from 2001 to 2009.³⁷ The Senate even approved a multilateral nuclear security treaty two days after Kerry pronounced the treaty process defunct.³⁸ The two-thirds requirement does not make treaties impossible to pass; it just ensures that treaties will not be adopted unless they enjoy broad political support.

Lack of broad support is precisely why President Obama seeks to circumvent the Article II treaty process. The Clean Power Plan is the most important policy component of the U.S. INDC, and 27 States are now suing to overturn it.³⁹ The CPP is evolving into a framework for state and regional cap-and-trade programs.⁴⁰ Cap-and-trade, of course, was a key factor in Democrats’ loss of control of the House in 2010.⁴¹ No wonder Obama ran from, not on, climate policy in the 2012 elections.⁴² Candidate Obama mentioned neither his plan to restructure state electric power sectors, nor his ambition to negotiate “the most ambitious climate agreement in history.”

The Paris Agreement is, as *New York Times* columnist Thomas Friedman describes it, “a big, big deal.”⁴³ It aims to transform global energy markets, technology, and infrastructure. It is intended to remain in force for decades—as a compact of all nations, with national and multilateral partners working with thousands of “non-party stakeholders” in “civil society, the private sector, financial institutions, cities, and subnational governments.”⁴⁴ It is more prescriptive than the UNFCCC and more “ambitious” than the Kyoto Protocol.

Confining the EPA to its lawful powers under the Clean Air Act is already dauntingly difficult.⁴⁵ Development and implementation of INDCs will give the agency even more control over U.S. climate and energy policy than it already has. Meanwhile, federal climate regulators will become even less accountable to Congress as they work “cooperatively” with

their counterparts in foreign governments, multilateral organizations, and “civil society” pressure groups.

To implement the Paris Agreement, the Conference of the Parties calls for the transfer of trillions of dollars from developed to developing countries. For perspective, the \$100 billion “floor” in Global Climate Fund contributions promised for 2020⁴⁶ roughly equals the World Bank’s development assistance total for 2013.⁴⁷ The Green Climate Fund’s executive director says post-2020 contributions should reach \$450 billion annually.⁴⁸

Proponents undoubtedly hope the Agreement will set a precedent for future executive-legislative relations. If so, the treaty process will be as dead as Secretary Kerry claims it already is—certainly for pacts styled as “environmental” agreements. The President will declare unpopular treaties not to be treaties, and conclude them unilaterally.

Given the magnitude of its ambition and its intended transformative impact on our economy and political institutions, the Paris Agreement is inherently a treaty—a pact sufficiently “momentous” to warrant Senate review.

A Treaty by State Department Criteria. The State Department establishes eight factors for distinguishing treaties—international agreements requiring the Senate’s advice and consent for entry into force—from other types of agreements the President may adopt on his own or with the approval of simple majorities in both chambers.⁴⁹ The Paris Agreement qualifies as a treaty under each factor.⁵⁰

1. **The extent to which the agreement involves commitments or risks affecting the nation as a whole.** Achieving the U.S. INDC will require the development and implementation of costly regulations to decarbonize all major sectors of the U.S. economy. The Paris Agreement entails significant commitments and risks, especially considering its ratchet mechanism to increase “ambition” every five years, in perpetuity.
2. **Whether the agreement is intended to affect state laws.** For Obama, the Paris Agreement is partly a political strategy to shield the Clean Power Plan from hostile legislation and litigation. The CPP will require changes in state laws regarding electricity fuel mix, energy dispatch policy, demand management, and carbon trading.⁵¹
3. **Whether the agreement can be given effect without the enactment of subsequent legislation by Congress.** Imposing any revenue-raising measure requires an act of Congress.⁵² The Paris Agreement falls apart unless Congress ponies up billions for the Green Climate Fund. Even if Congress or the courts do not block or roll back EPA regulations, subsequent legislation will also be required to implement increasingly ambitious INDCs. For example, the President’s Fiscal Year 2017 budget calls for a \$10 a barrel tax on oil to fund his 21st Century Clean Infrastructure Plan⁵³—a proposal touted as helping the United States meet its INDC.⁵⁴
4. **Past U.S. practice regarding similar agreements.** Nearly all international environmental agreements negotiated by the United States have been subject to

the Senate's advice and consent.⁵⁵ The Paris Agreement is more prescriptive and ambitious than the UNFCCC, which no one ever claimed is not a treaty.

5. **The preference of Congress as to a particular type of agreement.** The Senate Republican caucus is nearly unanimous in affirming that Senate review is required for any new international climate commitments.⁵⁶
6. **The degree of formality desired for an agreement.** The Paris Agreement and the accompanying "Decision of the Parties" to adopt the agreement contain detailed instructions with regard to mitigation, adaptation, finance, technology transfer, capacity building, transparency, implementation, and compliance.
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 Paris Agreement's first commitment period does not start until 2020. The Agreement calls for INDCs through 2025 and 2030, and aims to be self-renewing after 2030. It makes no difference to potential long-term climate change impacts whether mitigation actions begin in one year rather than another. There is no plausible exigency justifying avoidance of the Article II treaty-making process.
8. **General international practice regarding similar agreements.** The Paris Agreement is the successor to the UNFCCC and Kyoto Protocol, both indisputably treaties requiring the Senate's consent for U.S. participation. In addition, as discussed in the next section, United Nations legal documents reveal that the Paris Agreement is a treaty according to all international criteria.⁵⁷

A Treaty by United Nations Criteria. At the behest of Secretary Kerry, COP 21 President Laurent Fabius agreed, only two days before the conference, to instruct the delegates—25,000 or more—that they were not to call the Agreement a "treaty."⁵⁸ But on January 29, 2016, the United Nations Climate Change Secretariat issued a legal memorandum, "The Paris Agreement: Next Steps," which let the cat out of the bag.⁵⁹ As the following sections make clear, the Secretariat considers the Agreement to be a treaty.

- **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)."

- **Section 10:** “In accordance with Article 20, paragraph 1, of the Paris Agreement, in order to become a Party to the Agreement, a State or regional economic integration organization that is a Party to the Convention would need to deposit its instrument of ratification, acceptance, approval or accession with the Depositary.”⁶⁰

Note the clear implication of Sections 7 and 10: President Obama’s expected participation in the U.N. signing ceremony on April 22 will not make the United States a party to the Agreement. Signing does not “express” a state’s consent to be bound, only its intention to “take steps” toward that end. Under Article II of the U.S. Constitution, the next step is to submit the Agreement for the Senate’s advice and consent. If two thirds of Senators present approve the Agreement, the final step is to deposit the nation’s instrument of ratification. Only then is America a party to the treaty.

The administration might contend that “acceptance,” “approval,” and “accession” are somehow different from ratification, hence the President can accept, approve, or accede to the Paris treaty without submitting it to the Senate for its review. But as the U.N. Convention on Biological Diversity explains, all four terms “signify the consent of a State to be bound by a treaty.” Approval and acceptance “apply under the same conditions as those that apply to ratification,” and “the legal effect is the same as ratification.” U.N. treaties use the three terms interchangeably to accommodate “the diversity of legal systems.”⁶¹

There is a technical difference between ratification and accession, but both terms apply to treaties. In U.N. parlance, “ratification” signifies that a state has signed a treaty before giving its “consent to be bound,” which it does by fulfilling its “domestic legislative requirements,”⁶² or that its legislature has approved it pursuant to that state’s requirements, while “accession” signifies that a state consents to be bound by a treaty it did not sign when the agreement was “open for signature.”⁶³ President Obama intends to sign the Paris Agreement on the first day it opens for signature. Accordingly, the United States can become a party to the Agreement only by ratifying it—a decision subject to the Senate’s advice and consent.

UNICEF’s introduction to the U.N. Convention on the Rights of the Child provides additional evidence that Obama’s game plan flouts international treaty norms.⁶⁴ According to UNICEF, to become a party to any U.N.-sponsored treaty, a state must signify its “agreement to be bound by the terms of a particular treaty” through an act of ratification or accession. Both ratification and accession have “the same legal effect,” the only difference being that accession is “not preceded by an act of signature.” To ratify or accede, “the appropriate national organ of a State—Parliament, Senate, the Crown, Head of State or Government, or a combination of these—*follows its domestic approval procedures*” or “*follows domestic constitutional procedures.*” [Emphasis added] Then and only then does the state make “a formal decision to be a party to the treaty.”

Political Fallout. Congressional leaders can ill-afford to dismiss the Paris Agreement as a “non-binding” feel-good exercise by the administration. In reality, it is part of President Obama’s broader agenda to radically transform America’s economy and political landscape.

Consider the political implications of the Clean Power Plan, the most important single component of the U.S. INDC. Under the CPP, state energy policies from coast to coast will be subject to the EPA's direction and control. If successfully implemented, it will make every state's energy policies more like those of California and the Northeast Regional Greenhouse Gas Initiative—complete with cap-and-trade and aggressive renewable energy quota.⁶⁵ The CPP will narrow the differences between Red and Blue State energy policies by narrowing Red States' energy policy choices. If implemented, the CPP will tend to shift national politics in a leftward direction, as there is little point in electing Red State politicians if “We the People” are only allowed to have Blue State policies.

The Paris Agreement is designed to lock in the Clean Power Plan and many other extant, pending, and potential future carbon-suppression policies, while exerting heavy pressure to ratchet up climate “ambition” over time. The desired outcome is a future in which even former opponents concede: “On energy, we are all Progressives now.”

If denied the opportunity to enact principled alternatives, the GOP will become the “Me-Too” party on energy, offering no real alternative to the Democrats. Unless effectively challenged, the Paris Agreement will marginalize Red State politicians and Red State voters.

Counteroffensive. To counter Obama's political pressure strategy, congressional leaders need to mount a counteroffensive informed by two tactical imperatives.⁶⁶

1. **Seize the constitutional moral high ground.** Specifically, cast a political cloud over President Obama's expected signature, on April 22, purporting to signal to the world that the United States is now a party to the Paris Agreement. Stress that joining the Agreement absent Senate approval is an attempt at an illegitimate end-run around the Senate's Article II advice-and-consent role.
2. **Unite around that central message quickly.** Blowback from global warming alarmists will be fierce regardless of when conservatives in Congress make a stand. But if they wait until after the next president takes office, it may be too late. By then, they could be accused of blindsiding America's “treaty partners,” undermining an extant agreement, and upsetting expectations on which multi-billion dollar investments depend. Moreover, undoing EPA rules in the courts, Congress, and through the regulatory process will be far less difficult if the Senate makes plain, up front, that the world cannot rely on the commitments Obama made in Paris because the Senate has not ratified them.

Congressional leaders should also work with presidential candidates to garner earned media before the April 22 U.N. signing ceremony and prepare for the ratification battle in 2017. They should encourage every GOP presidential candidate to pledge that, if elected, he will follow the Article II treaty process, submit the agreement to the Senate for its review, and ask for vote against ratification. The objective is to clarify for the record that the administration's claim to have made America a party to Paris is executive freelancing.

Most importantly, House and Senate leaders should move a concurrent resolution to frame the issues for the 2016 elections. Key points should include:

1. Treaty making is a shared power. The Senate's role does not exist at the pleasure of the Executive. The President does not get to decide unilaterally what is and is not a treaty subject to Article II advice and consent.
2. The Paris Agreement, by virtue of its costs, risks, ambition, prescriptiveness, previous national practice, dependence on subsequent legislation, international protocol, and other factors, is a treaty.
3. The United States is not a party to a treaty unless the Senate ratifies it.

Given that courts may be reluctant to try to settle a dispute between Congress and the Executive Branch on whether a particular agreement is a treaty, the sole remedy for Obama's overreach is a counteroffensive by Congress. A majority vote for the resolution in the Senate, echoed by overwhelming passage in the House, would be a shot heard 'round the world. Failure to mount a counteroffensive will not avoid battles over climate policy. Rather, it only ensures that we become entangled in the Paris process, making such battles much harder to win.

Conclusion. Americans expect their government to honor all solemn commitments, whether deemed binding or not. As a GEICO ad might put it, "When you're the United States, you keep your promises—it's what you do." For that very reason, the Constitution provides a process for vetting proposed international agreements with far-reaching consequences. For that same reason, the current administration, with the assistance of other countries, pretends the United States has made promises without going through the checks and balances that our system requires before treaty proposals become commitments.

The Paris Agreement is no mere "update" of the U.N. Intergovernmental Framework Convention on Climate Change. Given its prescriptiveness, ambition, costs, and risks, the Agreement—no less than the Kyoto Protocol—is a whole new treaty.

Even if the Senate Foreign Relations Committee had never stipulated that the Senate must review any decision by the Conference of the Parties to adopt targets and timetables, it is inconceivable that when the Senate ratified the UNFCCC in 1992, it simultaneously authorized future presidents to approve far more prescriptive and ambitious international climate commitments without asking for its advice and consent. The claim that the Senate signed off on the Paris Agreement in advance, nearly a quarter century ago, is absurd.

Far from being toothless, the Paris Agreement will subject U.S. climate policy to a coalition of foreign governments, multilateral agencies, and green 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.

To foil Obama's climate coup, congressional leaders must call out the President's end-run around the Constitution before he signs the Paris Agreement on Earth Day, April 22, 2016.

Notes

¹ The treaty is officially known as the Paris Agreement. The text and accompanying Decision of the Parties to adopt the treaty are available at <http://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>.

² On February 15, Fiji became the first country to ratify the treaty. Others are sure to follow. Madeleine Cuff, “Fiji becomes first country in the world to ratify Paris Agreement,” *The Guardian*, February 15, 2016, <http://www.theguardian.com/environment/2016/feb/15/fiji-becomes-first-country-in-the-world-to-ratify-paris-agreement>.

³ Andrew Restuccia, “The one word that almost sank the climate talks,” *Politico*, December 12, 2015, <http://www.politico.com/story/2015/12/paris-climate-talks-tic-toc-216721>.

⁴ John Warrick, “How one word nearly killed the climate deal,” *Washington Post*, December 13, 2015, https://www.washingtonpost.com/politics/anatomy-of-a-deal-how-the-climate-accord-was-won--and-nearly-lost/2015/12/13/2a9b3416-a1df-11e5-b53d-972e2751f433_story.html.

⁵ Melissa Clarke, “Paris climate deal: The word that almost brought down a global agreement,” ABC News, December 13, 2015, <http://www.abc.net.au/news/2015-12-13/the-word-that-almost-brought-down-the-paris-climate-accord/7024142>.

⁶ United Nations Framework Convention on Climate Change, 1992, <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

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⁸ The White House, “U.S. Leadership and the Historic Paris Agreement to Combat Climate Change,” December 12, 2015, <https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change>.

⁹ United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*, <http://www.state.gov/documents/organization/218912.pdf>.

¹⁰ National Security Archive, The George Washington University, “The Clinton Whitehouse and Climate Change: The Struggle to Restore U.S. Leadership,” December 11, 2015, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB537-Clinton-White-House-Frustrated-in-Attempts-to-Forge-US-Global-Leadership-on-Climate-Change-in-1990s/>.

¹¹ PRD-12, Global Climate Policy Decision Paper, pp. 4, 7, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB537-Clinton-White-House-Frustrated-in-Attempts-to-Forge-US-Global-Leadership-on-Climate-Change-in-1990s/documents/Document%201.pdf>.

¹² Marrakesh Declaration, XV.5(a), http://unfccc.int/cop7/documents/accords_draft.pdf.

¹³ Hannah Chang, “A ‘Legally Binding’ Climate Agreement: What Does It Mean? Why Does It Matter?” Earth Institute, Columbia University, February 23, 2010, <http://blogs.ei.columbia.edu/2010/02/23/a-%E2%80%9Clegally-binding%E2%80%9D-climate-agreement-what-does-it-mean-why-does-it-matter/>.

¹⁴ Jean Galbraith, “The Legal Structure of the Paris Agreement,” Penn Program on Regulation REG BLOG, December 21, 2015, <http://www.regblog.org/2015/12/21/galbraith-legal-structure-paris-agreement/>.

¹⁵ The minimum (“floor”) collective contribution of \$100 billion annually is spelled out in the accompanying Decision of the Parties (paras. 54, 115) rather than in the Agreement itself.

¹⁶ One may wonder what penalty the Paris Agreement imposes to enforce compliance with “binding” procedural commitments. The answer is none. The Agreement calls for creation of a “non-adversarial,” “non-punitive” “mechanism” to “facilitate compliance” (Article 15.1-2). Again, however, that does not mean the Paris Agreement is not a treaty. The UNFCCC and Kyoto Protocol also contain no penalties for non-compliance with the “binding” procedural commitments.

¹⁷ This is a standard formula for how nations consent to be bound by treaties. It also occurs in the UNFCCC and Kyoto Protocol.

¹⁸ I am indebted to my colleague Christopher Horner for the argument of this section.

¹⁹ Coral Davenport, “Obama Pursuing Climate Accord in Lieu of Treaty,” *New York Times*, August 26, 2014, http://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html?_r=3.

²⁰ Sen. Malcolm Wallop, “The Rio Treaty: Its Genesis and Ratification,” speech at conference, “Countdown to Kyoto: The Consequences of Mandatory Carbon Dioxide Reductions,” Canberra, Australia, August 20, 1997, http://www.pennsylvaniacrier.com/filemgmt_data/files/The%20Rio%20Treaty%20-%20Its%20Genesis%20and%20Ratification.pdf.

²¹ David M. Ackerman, *Global Climate Change: Selected Legal Questions about the Kyoto Protocol*, Congressional Research Service, October 1, 2002, p. 4, <http://www.au.af.mil/au/awc/awcgate/crs/98-349.pdf>.

²² The White House, FACT SHEET: U.S. Reports its 2025 Emission Reduction Target to the UNFCCC, March 31, 2015, <https://www.whitehouse.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc>.

²³ The U.S INDC translates into a Kyoto Protocol target of 12-19 percent below 1990 levels. The U.S. Kyoto Protocol target was 5 percent below 1990 levels. Climate Action Tracker, <http://climateactiontracker.org/countries/usa.html>.

²⁴ Just as the Paris Agreement’s non-binding commitments are binding in effect, so its procedural commitments are substantive in effect—designed to encourage “ambition” and preclude backsliding. For example, according to the U.N. Climate Change Secretariat, after a party signs the Agreement, it “has the opportunity of enhancing its INDCs by communicating a more ambitious NDC, if it so desires, before or when submitting its respective instrument of ratification, acceptance, approval or accession.” There is apparently no opportunity to submit a less ambitious NDC. Myron Ebell, “UN Framework Convention on Climate Change Secretariat Announces Steps for Signing and Ratifying the Paris Climate Treaty. The Next Step Is up to the Senate,” *GlobalWarming.Org*, January 29, 2016, <http://www.globalwarming.org/2016/01/29/un-framework-convention-on-climate-change-secretariat-announces-steps-for-signing-and-ratifying-the-paris-climate-treaty-the-next-step-is-up-to-the-senate/>.

²⁵ Those include the Technology Mechanism, Compliance Related Mechanism, Forum on the Impact of the Implementation of Response Measures, Subsidiary Body for Scientific and Technical Advice, Subsidiary Body for Implementation, Adaptation Committee, Climate Technology Center and Network, and Capacity-Building Initiative for Transparency.

²⁶ These include the Financial Mechanism, Compliance-Related Mechanism, Subsidiary Body for Implementation, Least Developed Countries Expert Group, Adaptation Committee, Green Climate Fund, Warsaw Mechanism on Loss and Damage, Global Environment Facility, Least Developed Countries Fund, Special Climate Change Fund, and Paris Committee on Capacity-Building.

²⁷ Meet the Press, Chuck Todd interview with Secretary of State John Kerry, December 13, 2015, <http://www.nbcnews.com/meet-the-press/meet-press-december-13-2015-n479241>. Coral Davenport, “Nations Approve Landmark Accord in Paris,” *New York Times*, December 12, 2015, http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html?_r=0.

²⁸ Declaration of Todd Stern, *State of West Virginia et al. v. United States Environmental Protection Agency et al.*, USCA Case #15-1363, December 3, 2015, <http://www.globalwarming.org/wp-content/uploads/2015/12/TS-BS.pdf>.

²⁹ Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units*, 80 FR 64662-64964, October 23, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf>.

³⁰ On February 9, 2016, the Supreme Court granted the application of 29 states to put a stay on the Clean Power Plan, halting enforcement of the rule during litigation on the merits—a process that could take years. Administration officials have been at pains to reassure the European Union, India, and China that the EPA will win the case and the United States can fulfill its INDC even without the CPP. Coral Davenport, “Supreme Court’s Blow to Emissions Efforts May Imperil Paris Climate Accord,” *New York Times*, February 10, 2016, http://www.nytimes.com/2016/02/11/us/politics/carbon-emissions-paris-climate-accord.html?_r=0. Nonetheless, judging from climate activists’ denunciation of Justice Roberts, they will undoubtedly invoke the Paris Agreement as a reason courts must rule in favor of the EPA and uphold the CPP. See, for example, Joe Romm, “Will Justice Roberts Destroy His Reputation and a Livable Climate at the Same Time?” *Think Progress*, February 9, 2016, <http://thinkprogress.org/climate/2016/02/09/3747972/john-roberts-climate/>.

³¹ The Supreme Court granted states’ application for a stay on the Clean Power Plan on February 9, 2016: <http://www.globalwarming.org/wp-content/uploads/2016/02/Supreme-Court-Grants-Motion-to-Stay-Feb-9-2016.pdf>.

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- ³² The U.S. INDC pledges to reduce greenhouse gas emissions by 26-28 percent below 2005 levels by 2025. The Obama administration's current and proposed greenhouse gas regulations account for about 55 percent of the promised reductions. Stephen Eule, "Update: Mind the Gap: The Administration's International Climate Pledge Doesn't Add Up," U.S. Chamber Institute for 21st Century Energy, August 10, 2015, <http://www.energyxxi.org/mind-gap-obama-administrations-international-climate-pledge-doesnt-add>.
- ³³ Neither the Paris Agreement nor the UNFCCC explain the difference between "shall," "will," and "should." Regardless of the language, once the United States joins an agreement, all commitments become binding as a practical matter, due to the importance of honoring commitments in American political culture.
- ³⁴ On the significance of the "escalator clause," see Rupert Darwall, "Paris: The Treaty That Dare Not Speak Its Name," *National Review*, December 14, 2015, <http://www.nationalreview.com/article/428448/paris-climate-agreement-bad-us-needs-congressional-approval>.
- ³⁵ Heritage Foundation, *Heritage Guide to the U.S. Constitution*, Treaty Clause, <http://www.heritage.org/constitution/#!/articles/2/essays/90/treaty-clause>.
- ³⁶ By "created and circumstanced," Hamilton meant that the President is not a monarch, but a temporary custodian of executive power, so his personal interests and those of the state are more likely to diverge. The President faces a greater temptation than a monarch to negotiate a treaty for personal gain or partisan advantage. Library of Congress, *The Federalist Papers*, Federalist No. 75, http://thomas.loc.gov/home/histdox/fed_75.html.
- ³⁷ John B. Bellinger III, "Without White House muscle, treaties left in limbo," *Washington Post*, June 11, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061004356.html>.
- ³⁸ Andrew McCarthy, "Kerry Claims 'You Can't Pass a Treaty Anymore' Two Days before U.S. Ratifies a Treaty," *National Review*, August 4, 2015, <http://www.nationalreview.com/corner/422035/kerry-claims-you-cant-pass-treaty-anymore-two-days-us-ratifies-treaty-andrew-c>.
- ³⁹ E&E's Power Plan Hub, Legal Challenges, http://www.eenews.net/interactive/clean_power_plan#legal_challenge_status_chart.
- ⁴⁰ William Oremus, "Obama's Climate Plan Is Basically Cap-and-Trade," *Slate*, August 4, 2015, http://www.slate.com/blogs/moneybox/2015/08/04/clean_power_plan_obama_s_climate_plan_is_cap_and_trade_after_all.html.
- ⁴¹ Patrick Michaels, "The IPCC political suicide pill," *National Review*, September 26, 2013, <http://www.nationalreview.com/article/359556/ipcc-political-suicide-pill-patrick-j-michaels>.
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- ⁴³ Thomas Friedman, "Paris Climate Accord Is a Big, Big Deal," *New York Times*, December 16, 2015, <http://www.nytimes.com/2015/12/16/opinion/paris-climate-accord-is-a-big-big-deal.html?ribbon-ad-idx=4&rref=collection/newseventcollection/un-climate-change-conference>.
- ⁴⁴ Decision of the Parties, paras. 134, 135.
- ⁴⁵ Marlo Lewis, "EPA Regulation of Fuel Economy: Congressional Intent or Climate Coup?" *Engage* Volume 12, Issue 3, November 2011, <http://www.fed-soc.org/publications/detail/epa-regulation-of-fuel-economy-congressional-intent-or-climate-coup>.
- ⁴⁶ Decision of the Parties, para. 54.
- ⁴⁷ World Bank, Net official development assistance and official aid received (current U.S. \$), <http://data.worldbank.org/indicator/DT.ODA.ALLD.CD>.
- ⁴⁸ Alister Doyle, "New UN climate fund to take risks to promote green tech," Reuters, June 5, 2015, <http://www.reuters.com/article/climatechange-funds-idUSL5N0YR23F20150605>.
- ⁴⁹ U.S. Department of State, Foreign Affairs Manual 11—Political Affairs, Circular 175 Procedure, <http://www.state.gov/documents/organization/88317.pdf>.
- ⁵⁰ My analysis of the eight factors closely follows that of Steve Groves, "Obama's Plan to Avoid Senate Review of the Paris Protocol," Backgrounder No. 3055, Heritage Foundation, September 21, 2015, http://thf_media.s3.amazonaws.com/2015/pdf/BG3055.pdf.
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⁵² U.S. Constitution, Article I, Section 7: “All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.”

⁵³ The White House, “FACT SHEET: President Obama’s 21st Century Clean Transportation System,” February 4, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/04/fact-sheet-president-obamas-21st-century-clean-transportation-system>.

⁵⁴ Camille von Kaenel, “Obama Proposes \$10-per-barrel Oil Tax to Fund Green Transit,” *Scientific American*, February 5, 2016,

<http://www.scientificamerican.com/article/obama-proposes-10-per-barrel-oil-tax-to-fund-green-transit/>.

⁵⁵ “As a matter of historical practice, some types of international agreements have traditionally been entered into as treaties in all or nearly every instance, including compacts concerning mutual defense, extradition and mutual legal assistance, human rights, arms control and reduction, *environmental protection*, taxation, and the final resolution of boundary disputes.” [Emphasis added] Michael John Garcia, *International Law and Agreements: Their Effect upon U.S. Law*, Congressional Research Service, February 18, 2015, <https://fas.org/spp/crs/misc/RL32528.pdf>.

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⁵⁷ My analysis here follows that of Myron Ebell (see Note 23).

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<http://www.cnbc.com/2015/11/28/france-bows-to-obama-and-backs-down-on-climate-treaty.html>.

⁵⁹ United Nations Climate Change Secretariat, “The Paris Agreement: Next Steps,” January 29, 2016, http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_next_steps_post_adoption.pdf.

⁶⁰ *Ibid.*

⁶¹ UN Convention on Biological Diversity, Treaty State Description, <https://www.cbd.int/world/ratification.shtml>.

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⁶³ Accession enables nations to join treaties long after the period of signature has closed. For example, the Nuclear Non-Proliferation Treaty (NPT) was open for signature from July 1, 1968 to March 5, 1970. China and France acceded to the treaty in 1992. One hundred and ninety-one countries are parties to NPT. Of those, 78 became parties through accession. United Nations Office of Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, <http://disarmament.un.org/treaties/t/npt>.

⁶⁴ UNICEF.

⁶⁵ California Air Resources Board, Assembly Bill 32 Overview, <http://www.arb.ca.gov/cc/ab32/ab32.htm>; Regional Greenhouse Gas Initiative, <http://www.rggi.org/>.

⁶⁶ For both points, I am indebted to Christopher Horner.