

International Executive Agreements on Climate Change

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INTRODUCTION

The fifteenth Conference of the Parties (“COP15”) to the United Nations Framework Convention on Climate Change (“UNFCCC”), held in December 2009, culminated in the non-binding, three-page Copenhagen Accord. The Accord does not establish emissions reduction targets or otherwise commit countries to preventing

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potentially catastrophic interference with the global climate system; nor does it establish a deadline for the signing of a binding international agreement that would do so.¹ Although it is heralded by some as a “a big step forward”² for having brought together heads of state for direct negotiations and involving major developing economies such as China and Brazil, the Accord nevertheless is plainly “not enough,” in President Obama’s words.³

The future of international action on climate change remains uncertain. The Accord’s bottom-up approach to international greenhouse gas (“GHG”) mitigation merely asks individual countries to pledge emission reductions that are then subject to some form of international review.⁴ The Accord’s initial call for countries to submit their national pledges—“quantified economy-wide emissions targets” for developed countries and “nationally appropriate mitigation actions” for developing countries—by January 31, 2010 was downgraded to a mere “flexible” deadline in mid-January 2010.⁵ As of March 31, 2010, seventy-six countries have submitted their pledges to the UNFCCC Secretariat in accordance with the Copenhagen Accord.⁶

Domestic action is paramount to the success of an international framework that relies on individual countries’ fulfillment of emission reduction pledges to limit global temperature increase to the extent necessary to prevent “dangerous anthropogenic interference with the climate system.”⁷ Despite the Accord’s reliance on domestic actions, however, the future of U.S. domestic action on climate change is uncertain. The United States has

1. Copenhagen Accord, Decision -/CP.15 (Dec. 18, 2009) ¶ 1 (Apr. 23, 2010) [hereinafter Copenhagen Accord], available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf.

2. David Doniger to Switchboard, http://switchboard.nrdc.org/blogs/ddoniger/the_copenhagen_accord_a_big_st.html (Apr. 23, 2010, 21:43 EST).

3. John M. Broder, *Many Goals Remain Unmet in 5 Nations’ Climate Deal*, N.Y. TIMES, Dec. 18, 2009, at A1, available at http://www.nytimes.com/2009/12/19/science/earth/19climate.html?_r=1.

4. Tomilola Akenle et al., *Summary of the Copenhagen Climate Change Conference*, EARTH NEGOTIATIONS BULL., Dec. 22, 2009, at 29 [hereinafter *ENB Summary*], available at <http://www.iisd.ca/download/pdf/enb12459e.pdf>.

5. Richard Black, *UN Climate Deadline Turns Out to be “Flexible,”* BBC NEWS, Jan. 21, 2010, available at <http://news.bbc.co.uk/2/hi/science/nature/8471593.stm>.

6. This figure includes the twenty-seven individual member countries of the European Union. See Press Release, UNFCCC, UNFCCC Publishes Reports Summing up Results of 2009 UN Climate Change Conference in Copenhagen (Mar. 31, 2010), available at http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20100331_pr_cop_report_v2.pdf.

7. Copenhagen Accord, *supra* note 1, ¶ 1.

pledged provisional emissions reduction targets “[i]n the range of 17%, in conformity with anticipated U.S. energy and climate legislation, recognizing that the final target will be reported to the Secretariat in light of enacted legislation.”⁸ Meanwhile, multiple climate bills remain stranded in the Senate⁹ as efforts are made to gain the sixty votes necessary to overcome a Senate filibuster.¹⁰

The conventional view is that the U.S. Congress must adopt a nationally coherent mitigation strategy through climate legislation before the country can commit to an internationally binding climate regime.¹¹ The Treaty Clause of the U.S. Constitution, after all, requires a two-thirds vote of the Senate for treaty ratification,¹² and the Senate’s repudiation of the 1997 Kyoto Protocol¹³ has led to an acute awareness that the United States can commit to an international climate agreement only if the agreement is in conformity with domestic legislation¹⁴—legislation that does not presently exist.

As this Article shows, however, the conventional view is unnecessarily limited and fails to appreciate the President’s legal authority to enter into binding international agreements *without the*

8. Attachment to Letter from Todd Stern, Special Envoy for Climate Change, U.S. Dep’t of State, to Yvo de Boer, Executive Secretary, UNFCCC (Jan. 28, 2010), *available at* http://unfccc.int/files/meetings/application/pdf/unitedstatesphaccord_app.1.pdf.

9. *See, e.g.*, Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009); Carbon Limits and Energy for America’s Renewal Act, S. 2877, 111th Cong. (2009).

10. Since November 2009, Senators Kerry, Lieberman, and Graham have been working together to develop a bipartisan climate bill, a brief outline of which was revealed in March 2010. *See* Darren Samuelsohn, *As Senate Trio Advances Climate Measure, Energy-Only Bill Remains a Possibility*, N.Y. TIMES, Mar. 18, 2010, *available at* <http://www.nytimes.com/cwire/2010/03/18/18climatewire-as-senate-trio-advances-climate-measure-ener-84418.html>.

11. *See, e.g.*, Union of Concerned Scientists, *The International Climate Treaty and U.S. Legislation*, http://www.ucsusa.org/global_warming/solutions/big_picture_solutions/international-climate-and-US-legislation.html (last visited Apr. 23, 2010) (“It is crucial that the legislation developed by Congress is strong enough to provide the U.S. delegation a robust foundation from which to negotiate [an international agreement on climate change].”).

12. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . .”).

13. Then-Vice President Gore symbolically signed the Kyoto Protocol in late 1998, but the Protocol was never submitted to the Senate for ratification in light of the Byrd-Hagel Resolution, which passed with a vote of 95–0 and expressed the sense of the Senate that the United States should not sign any protocol to the UNFCCC that would subject developed countries, but not developing countries, to binding emissions limits. S. Res. 98, 105th Cong., 143 CONG. REC. S8138 (1997) (enacted).

14. *See* David Victor, *Plan B for Copenhagen*, 461 NATURE 342, 343 (2009) (“The diplomats preparing for Copenhagen, especially from the United States, are keen not to repeat the mistake of promising what they can’t deliver.”).

advice and consent of the Senate. The President can rely on his independent foreign affairs powers, together with authority derived from existing treaties and congressional delegations, to enter into binding international agreements that could address certain aspects of the climate change problem even as the United States waits for domestic climate legislation to be enacted.

Part I discusses the three legal alternatives for entering binding international commitments outside of the Article II process—the sole executive agreement, the treaty executive agreement, and the ex ante and ex post congressional-executive agreement—and in this context, clarifies the meaning of “binding,” a term often used in different and confusing ways. Part II establishes the framework for assessing the scope of executive power to enter these various agreements, which includes the principles of Presidential power set forth in Justice Jackson’s opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁵ the relevant enumerated executive powers, and the historical practice of executive agreements. In Part II, the Article concludes that the President’s independent powers alone are insufficient to enter executive agreements relating to climate change and consequently dismisses sole executive agreements as an option for a climate agreement. Parts III and IV focus on existing treaties and congressional authorizations as grounds for entering treaty-executive agreements and ex ante congressional-executive agreements, respectively. Ultimately, the Article concludes that congressional delay in enacting climate legislation need not prevent the United States from acting to address climate change. As the world awaits Congress’ action, the President may pursue multiple legal avenues for driving progress in international climate negotiations, including entering agreements relating to measurement, reporting, and verification (“MRV”), aviation emissions, cooperation in research and development of science and technology, and capacity-building for developing countries.

I. MAKING BINDING INTERNATIONAL AGREEMENTS WITHOUT THE ADVICE AND CONSENT OF THE SENATE

Although the Treaty Clause dominates discussion on international instruments and the term “treaty” under domestic law refers to agreements ratified with the “advice and consent” of the

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J. concurring).

Senate, internationally binding agreements are made via three different types of executive agreements, none of which require a supermajority vote in the Senate, and all of which are recognized under international law to be as *equally binding* as Article II treaties.¹⁶ These executive agreements, moreover, are neither a rarity nor an obscure exception in U.S. foreign affairs practice. In fact, the United States is currently party to five times more executive agreements than treaties,¹⁷ and between 1939 and 1993, more than ninety percent of the international agreements concluded were executive agreements.¹⁸

Part I provides an overview of the sources of authority for and the domestic legal effect of each of the three types of executive agreements, and clarifies what is meant by a “binding” international agreement. It then explains why one particular type of executive agreement—the *ex post* congressional-executive agreement—is an unlikely option in the realm of climate change.

A. Executive Agreements as Alternatives to the Article II Treaty

The President may enter into three types of executive agreements without the advice and consent of the Senate. Sole executive agreements, or presidential executive agreements, are entered into by the President alone under his independent constitutional powers.¹⁹ The key unknown with respect to sole

16. Vienna Convention on the Law of Treaties art. 2.1(a), May 23, 1969, 1155 U.N.T.S. 311 (defining “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”); *see also* Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1255 (2008) [hereinafter Hathaway, *Treaties’ End*]; Myres S. MacDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 1), 54 YALE L.J. 181, 196–97 (1945).

17. *See* U.S. Senate, Powers & Procedures: Treaties, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited Apr. 10, 2010) (“The United States is currently a party to nearly nine hundred treaties and more than five thousand executive agreements.”).

18. *See* CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 517 (2002) [hereinafter CRS, ANALYSIS AND INTERPRETATION] (“The executive agreement has surpassed in number and perhaps in international influence the treaty . . .”), *available at* <http://www.gpoaccess.gov/constitution/pdf2002/012.pdf>.

19. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) cmt. g (1987). Sole executive agreements may include political agreements that are not intended to be legally binding. Such explicitly non-binding agreements do not create legal obligations, either internationally or domestically, and are not the focus of this paper, which will address those sole executive agreements that are intended to create binding

executive agreements is the precise scope of the President's independent power in foreign affairs. Although there is consensus that the independent foreign affairs powers are limited, the "limits are difficult to determine and to state."²⁰ The President's power to enter into sole executive agreements is likely on its strongest legal footing when those agreements relate to the military, recognition of a foreign government, or settlement of international claims.²¹ Sole executive agreements outside of these areas—including in areas actually relevant to climate change—are less strongly grounded in the President's independent powers and, therefore, may not survive legal challenge.²² The President's independent powers can be deployed effectively in the climate arena, however, if they are exercised *in conjunction with* other authority, as demonstrated by the other two types of executive agreements.

The President may enter treaty executive agreements pursuant to an express or reasonably inferred authorization in an existing Article II treaty.²³ In these agreements, the President derives authority from his power to enter into treaties; his duty to "take care" that the laws, including treaties, are faithfully executed; and the Senate's consent to the pre-existing treaty.²⁴ As discussed below, the UNFCCC and Convention on International Civil Aviation are two existing Article II treaties that may provide support for executive agreements relating to climate change.

Congressional-executive agreements, dealing with any matter within the combined powers of Congress and the President,²⁵ are entered into by the President pursuant to legislation authorizing such an agreement (ex ante congressional-executive agreements)²⁶

obligations.

20. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 222, 224 (2d ed. 1996) ("The reaches of the President's power to make executive agreements remain highly uncertain as a matter of constitutional law.")

21. *Id.* at 221, 229.

22. *See infra* Part II.

23. CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 86 (2001) [hereinafter CRS, INTERNATIONAL AGREEMENTS], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(3) (1987).

24. CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 87; HENKIN, *supra* note 20, at 498 n.167. *See also* Wilson v. Girard, 354 U.S. 524 (1957) (giving effect to a treaty executive agreement entered into pursuant to a ratified treaty).

25. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2) (1987).

26. *See, e.g.*, International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106

or are congressionally approved as a matter of domestic law after the agreement is negotiated (ex post congressional-executive agreements).²⁷ Ex ante congressional-executive agreements are likely the most common executive agreement and, as discussed in Part IV, Congress has already delegated substantial power to the President via authorizing legislation.²⁸

Notwithstanding the distinction among the sole executive, treaty executive, and congressional-executive agreements, the lines between these various types of executive agreements are not always clear because executive agreements rarely identify the source of authority under which the President acts.²⁹ All three executive agreements take effect solely upon the President's action, and all three rely on the President's foreign affairs power.³⁰ Yet, while the President's foreign affairs power is the *only* legal authority for sole executive agreements, treaty executive agreements have the additional authority arising from an Article II treaty obligation, and congressional-executive agreements have the additional authority of a congressional delegation (in the case of ex ante agreements) or congressional approval (in the case of ex post agreements).

With respect to their effect on domestic law, all three types of executive agreements override inconsistent state law³¹ and are

Stat. 3425 (1992) ("An Act to amend the Marine Mammal Protection Act of 1972 to authorize the Secretary of State to enter into international agreements to establish a global moratorium to prohibit harvesting of tuna through the use of purse seine nets . . .").

27. See, e.g., United States-Japan Fishery Agreement Approval Act of 1987, Pub. L. No. 100-220, § 1001, 101 Stat. 1458 (1987) ("[T]he governing international fishery agreement between the Government of the United States of America and the Government of Japan Concerning Fisheries Off the Coasts of the United States, as contained in the message to Congress from the President of the United States, dated November 17, 1987 is approved by Congress as a governing international fishery agreement . . . and (2) shall enter into force and effect with respect to the United States on the date of the enactment of this Act.").

28. See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 155 (2009) [hereinafter Hathaway, *Presidential Power*] (exploring the "troubling reality" of the vast number of ex ante authorizations that relinquish Congress's power to the President).

29. Hathaway, *Treaties' End*, *supra* note 16, at 1254. A non-treaty international agreement signed and entered into force on the same day without any identifying source of authority is not necessarily a sole executive agreement. For instance, it may be an ex ante congressional-executive agreement. The only way to tell is to search the Statutes at Large for legislation that might have authorized the President to enter into that agreement. See *generally id.* at 1259, 1358 app. A.

30. See Hathaway, *Presidential Power*, *supra* note 28, at 260. Ex post congressional-executive agreements, on the other hand, do not take effect without approval by majority votes in both houses of Congress.

31. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that the sole executive agreement at issue preempted a state statute); *Dames & Moore v. Regan*, 453 U.S. 654 (1981)

subject to the last-in-time rule so as to be subordinate to later inconsistent federal statutes.³² Treaty executive agreements supersede earlier inconsistent federal law,³³ whereas sole executive agreements have no effect if contrary to earlier federal legislation.³⁴ Ex ante congressional-executive agreements would probably prevail in a conflict with earlier federal legislation, but this issue is not settled.³⁵

B. The Binding Nature of International Agreements

Before further exploring these non-Article II avenues for making binding international commitments, it is helpful to clarify first what is meant by “binding.” Popular notions of a binding international agreement conflate the binding nature of the international obligation with self-execution at the domestic level. But as the following section makes clear, the United States can have an international legal obligation for which there is no means of domestic implementation due to the absence of domestic legislation—in effect, a binding obligation can exist at the

(holding that the sole executive agreement at issue preempted a state statute); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. j (1987). The Court’s interpretation of the preemptive effect of sole executive agreements on state law has been the subject of a great deal of scholarly criticism. See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L.R. 1573 (2007); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 U.C.L.A. L. REV. 309 (2006); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

32. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987); HENKIN, *supra* note 20, at 228.

33. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporter’s note 5 & cmt. c (1987).

34. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (holding the executive agreement between the United States and Canada unenforceable because it directly contradicted a statute passed by Congress). This modern understanding of the inability of sole executive agreements to supersede earlier federal legislation has evolved over time. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. j (1987) (noting in 1987 that the status of sole executive agreements in relation to earlier Congressional legislation “has not been authoritatively determined”); HENKIN, *supra* note 20, at 228 (noting in 1996 that whether a sole executive agreement prevails in the face of earlier Congressional legislation remains unresolved); CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 93–95 (noting in 2001 that “courts have been reluctant to enforce [sole executive] agreements in the face of prior congressional enactments,” but that “the law on this point may yet be in the course of further development”); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1244 (2007) (concluding in 2007 that courts have “consistently held that [sole executive agreements] do not supersede inconsistent acts of Congress”).

35. See Hathaway, *Presidential Power*, *supra* note 28, at 213–14 n.237; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. c (1987).

international level that has little practical legal meaning at the domestic level. This section then explains why, despite such a bifurcation between domestic and international lawmaking, presidential efforts to enter international agreements outside of the Article II process are not necessarily ineffectual.

Self-execution refers to a treaty's ability to take immediate effect as law of the United States, supreme over state law and judicially enforceable upon ratification.³⁶ A self-executing treaty requires no new legislation to enable the United States to carry out its obligations. On the other hand, a non-self-executing treaty requires the enactment of domestic law to give effect to its terms and cannot be enforced by the courts (although courts can enforce the implementing legislation once it is enacted).³⁷ In other words, whereas a self-executing treaty is "itself law," a non-self-executing treaty is a binding "promis[e] to enact law."³⁸

These same notions of execution apply to the various non-treaty international agreements that are the subject of this Article.³⁹ International agreements are considered binding on parties when the agreement enters into force, regardless of the nature of execution.⁴⁰ Whether an international agreement is self-executing or not, then, it is legally binding on the United States as a matter of international law, and a failure to enact domestic legislation to implement a non-self-executing agreement renders the United States in default of its international obligations.⁴¹ Because there is no genuine threat of "punishment" or enforcement of legal obligations at the international level, however, discussions of the

36. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I ch. 2 introductory note at 41 & § 111(3) (1987); Hathaway, *Treaties' End*, *supra* note 16, at 1318.

37. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1987).

38. HENKIN, *supra* note 20, at 201.

39. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

40. *Id.* § 111 cmt. h & reporter's note 5, § 115(1), § 301 cmt. a (noting that terminology used for international agreements is varied, and includes terms such as treaty, convention, agreement, protocol, and memorandum of understanding, but that "[w]hatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise"); HENKIN, *supra* note 20, at 203.

41. *See generally* Hathaway, *Treaties' End*, *supra* note 16, at 1317–19 (noting that to avoid placing the United States in violation of its international obligations for failing to enact necessary implementing legislation, the Senate usually postpones its advice and consent to a non-self-executing treaty until implementing legislation can be enacted, or the Senate might give its advice and consent contingent upon subsequent enactment of implementing legislation).

enforceability of international agreements tend to focus on domestic execution rather than international obligation under the belief that “[i]nternational law truly binds only when there is a way to enforce a state’s obligation under international law in domestic courts”⁴²—that is, if an international obligation is self-executing or if domestic legislation implements a non-self-executing international obligation.⁴³ With that in mind, this Article makes a point to identify, where relevant, legislation that may enable domestic implementation of an international obligation.

Notwithstanding the gap between domestic and international lawmaking that makes possible an international legal obligation without corresponding domestic legal effect, the President’s ability to enter internationally binding agreements outside of the Article II process is noteworthy for several reasons. First, the Supreme Court has, in four cases discussed below, treated sole executive agreements as self-executing and taking on the force of domestic law.⁴⁴ As Part II concludes, however, this jurisprudence is quite narrow and almost certainly offers the President no legal grounds to enter self-executing sole executive agreements in areas relevant to climate change. This possibility aside, the President can still make international agreements that are implemented domestically with his own powers—whether through executive orders or existing legislation, as described in Parts III and IV. Finally, the President’s ability to enter international legal obligations outside of Article II offers the advantage of enabling Congress’s cooperation to carry forth those obligations through sixty votes in the Senate for cloture rather than the sixty-seven votes required for treaty ratification.

C. The Possibility of an Ex Post Congressional-Executive Climate

42. *Id.* at 1317.

43. The Supreme Court’s recent decision in *Medellin v. Texas*, 552 U.S. 491 (2008), which found all of the treaty obligations at issue in that case to be non-self-executing and hence unenforceable in federal courts without the enactment of implementing legislation, may have acted to narrow the interpretation of what constitutes self-execution. *See, e.g.*, Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 547–48 (2008).

44. *See* MacDougal & Lans, *supra* note 16, at 311 (“In both the *Belmont* and *Pink* cases it was squarely held that agreements made under the President’s independent constitutional authority were binding on all courts under the supremacy clause, and were superior to contrary state law or judicial doctrine, to the same extent as treaties.”); *see also* Michael D. Ramsey, *Executive Agreements and the (Non-)Treaty Power*, 77 N.C. L. REV. 133, 143–44 (1998) (distinguishing between the power to enter into an international obligation and the power to implement the obligation with the force of domestic law and criticizing the Supreme Court for conflating the two in giving preemptive effect to sole executive agreements).

Agreement

In the climate change context, the possibility of domestically implementing an international agreement outside of Article II means that the President could in theory negotiate an international climate agreement and submit it as an ex post congressional-executive agreement to both houses of Congress for majority approval⁴⁵ rather than as an Article II treaty for a supermajority vote in the Senate.⁴⁶ The “interchangeability thesis,” the notion that congressional-executive agreements and Article II treaties can be used interchangeably as a means of entering international agreements, has received substantial scholarly attention over the years.⁴⁷ The pervasive majority view, grounded in structural, historical, and practical arguments, is that the congressional-executive agreement and the Article II treaty are legally interchangeable in nearly all instances of international lawmaking.⁴⁸

45. Passage of an ex post congressional-executive agreement is subject to the same procedures as passage of federal legislation generally, so in fact, the possibility of a filibuster in the Senate raises the majority vote requirement to a sixty vote threshold. See Hathaway, *Treaties' End*, *supra* note 16, at 1311–12.

46. The State Department's Office of the Legal Adviser plays the key role in determining the form of an international agreement by reference to the Circular 175 procedure, which identifies eight factors to be considered in deciding what form an international agreement should take. See 22 C.F.R. § 181.4 (2009); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 11 § 723.3 (2006), available at <http://www.state.gov/documents/organization/88317.pdf> (listing the eight factors that must be considered “[i]n determining a question as to the procedure which should be followed for any particular international agreement”); U.S. Dep't of State, Office of the Legal Adviser, Treaty Affairs, Circular 175 Procedure, <http://www.state.gov/s/1/treaty/c175/> (last visited Apr. 10, 2010); see also Hathaway, *Treaties' End*, *supra* note 16, at 1249–52.

47. See, e.g., Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

48. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) (“The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”); HENKIN, *supra* note 20, at 217 (noting that congressional-executive agreements are “available for wide use, even general use, and [are] a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress rather than by two-thirds of the Senate”) (internal citations omitted); CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 86; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995); EDWARD S. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 40–43 (1944). Even a recent critique of the complete interchangeability thesis concludes that

In practice, however, ex post congressional-executive agreements have not entirely replaced the treaty for political reasons.⁴⁹ The determination of whether to submit an international agreement to both houses of Congress for majority approval or to the Senate for a two-thirds vote is “a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.”⁵⁰ In the context of climate change, the Senate Foreign Relations Committee Report on the resolution of ratification for the UNFCCC noted the Committee’s expectation that any future decision that would apply legally binding targets and timetables for emissions reductions under the UNFCCC would require the Senate’s advice and consent.⁵¹ Although not legally binding, this resolution suggests that the Senate will jealously guard its Article II prerogative by ensuring that a future comprehensive climate agreement is approved under the Treaty Clause rather than as an ex post congressional-executive agreement.⁵²

The President may have the legal option of implementing a comprehensive climate agreement as an ex post congressional-executive agreement, then, but the success of this avenue will probably turn on purely political considerations. This paper therefore focuses on sole executive, treaty executive, and ex ante congressional-executive agreements (referring to them collectively as “executive agreements”) as instruments that can in some instances take effect domestically without congressional action.

II. THE SCOPE OF PRESIDENTIAL POWER TO ENTER EXECUTIVE AGREEMENTS

This Part traces the contours of the President’s power to enter

congressional-executive agreements can replace treaties in virtually all instances, except those involving cession of territory, extradition, and disabilities of aliens. Hathaway, *Treaties’ End*, *supra* note 16, at 1338 (“From a constitutional standpoint, nearly every agreement that can be entered through the Article II treaty process can also be concluded by means of a congressional-executive agreement.”).

49. HENKIN, *supra* note 20, at 218.

50. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987); *see also* HENKIN, *supra* note 20, at 497 n.164 (identifying instances where the Senate has objected to a particular agreement not being submitted as an Article II treaty).

51. S. Exec. Rep. 102-55, 102d Cong., 2d Sess. at 14 (1992).

52. *See* Nigel Purvis, *The Case for Climate Protection Authority*, 49 VA. J. INT’L L. 1007, 1049–50 (2009).

executive agreements to illustrate the sorts of international climate agreements the President has authority to enter. The following discussion begins with a brief outline of the tripartite scheme of Presidential power delineated in *Youngstown*⁵³ and then focuses on the President's power in the realm of foreign affairs through an examination of the President's enumerated powers. Finally, because Supreme Court jurisprudence has treated a pervasive history of congressional acquiescence as a "gloss on Executive Power vested in the President,"⁵⁴ this Part sketches the actual practice of entering executive agreements in order to glean the extent of congressional acquiescence to executive agreements in areas relevant to climate change.

A. The *Youngstown* Framework

Justice Jackson's concurrence in *Youngstown* setting forth three spheres of presidential power is the framework for assessing the validity of independent presidential action. The President's authority is "at its maximum" when he "acts pursuant to an express or implied authorization of Congress, . . . for it includes all that he possesses in his own right plus all that Congress can delegate."⁵⁵ When the President acts in the midst of congressional silence, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain" and depends largely on prudential concerns.⁵⁶ The President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress, . . . for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁵⁷

Ex ante congressional-executive agreements fall under the first *Youngstown* category because they rest in part on authority derived from congressional authorization. Sole executive agreements, by contrast, fall under the "zone of twilight" in which the President acts against a backdrop of congressional silence.⁵⁸ Assessing the

53. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

54. *Medellín v. Texas*, 552 U.S. 491, 531 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

55. *Youngstown*, 343 U.S. at 635.

56. *Id.* at 637.

57. *Id.*

58. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporter's note 11 (1987); Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the*

President's authority to enter a sole executive agreement, therefore, requires an analysis of the constitutional allocation of powers between the President and Congress to determine whether an agreement truly rests on presidential power *alone*.⁵⁹ It is clear, for instance, that the President may not commit the United States to an international agreement that would usurp powers constitutionally reserved for Congress, such as appropriating funds or declaring war.⁶⁰

If this seems contrary to the earlier explanation that the President may bind the nation to international commitments that are non-self-executing, it is worth noting that under the Vienna Convention on the Law of Treaties, "manifest" violations of domestic law "regarding competence to conclude treaties" may invalidate the consent necessary to establish an internationally binding agreement.⁶¹ Therefore, an executive agreement that clearly reaches beyond the President's powers in "manifest" violation of the separation of powers would violate U.S. law and, therefore, would not be binding upon the United States. To avoid this result, non-self-executing executive agreements do not purport to require the exercise of powers that the President lacks and typically contain provisions explicitly indicating that their terms are subject to the availability of funds or domestic regulation.⁶²

B. The President's Enumerated Powers

An examination of the President's enumerated powers is a starting point for understanding the scope of his authority to enter executive agreements relating to climate change. Presidents have

U.S. Constitution, 48 HARV. INT'L L.J. 307, 322 (2007) [hereinafter Bradley, *Unratified Treaties*].

59. Hathaway, *Presidential Power*, *supra* note 28, at 211.

60. The Constitution grants Congress the federal spending power, U.S. CONST. art. I, §§ 7-8, and the power to declare war, *id.* art. I, § 8. See HENKIN, *supra* note 20, at 229; Hathaway, *Presidential Power*, *supra* note 28, at 212 ("[T]he President may not commit the United States to an international agreement on his own if he would be unable to carry out the obligations created by the agreement on his own in the absence of an agreement. . . . The President may not use a sole executive agreement with another nation, in other words, to expand his powers beyond those granted to him in the Constitution.").

61. Vienna Convention on the Law of Treaties, *supra* note 16, art. 46, §§ 1, 2. Article 46, § 2 defines a violation as "manifest" if "it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." *Id.* § 2.

62. See, e.g., Agreement on Cooperation in Research and Development in Science and Technology Art. VIII, U.S.-Japan, June 20, 1988, T.I.A.S. No. 12,025 ("Implementation of this Agreement will be subject to the availability of appropriated funds and to the applicable laws and regulations of each country.").

“achieved and legitimated an undisputed, extensive, predominant, in some respects exclusive, ‘foreign affairs power’”⁶³ that arises from the President’s enumerated Article II powers:⁶⁴ (1) as chief executive, (2) as commander in chief,⁶⁵ (3) to receive ambassadors, (4) to make treaties with the advice and consent of the Senate, and (5) to take care that the laws are faithfully executed.⁶⁶ These enumerated powers are merely a starting point, however, and “do not seem to convey anything approaching even the minimum powers everyone assumes the President to enjoy.”⁶⁷ Whatever the extent of these powers, one clear limit upon their exercise is that all executive agreements are subject to the Constitution itself, and may not, for instance, violate the Bill of Rights.⁶⁸

The extent to which the President’s “take care” duty provides authority for executive agreements is somewhat controversial.⁶⁹ No case has ever held the “take care” clause to be specific authority for sole executive agreements, although the Supreme Court has suggested in dicta that the President’s responsibilities under this clause include the enforcement of “rights, duties, and obligations growing out of” the country’s international relations.⁷⁰ Scholarship generally fails to distinguish among the President’s authority to carry out obligations under a treaty, the authority to exercise rights or pursue general policies established by international law, the authority to domestically implement international agreements and law other than treaties, and the authority to compel other states to carry out their international obligations to the United States.⁷¹ The majority view has traditionally taken an expansive reading of the

63. HENKIN, *supra* note 20, at 41.

64. See CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, 89–92; HENKIN, *supra* note 20, at 36–45.

65. See *infra* Part II.C. The President’s commander-in-chief powers are unlikely to provide the basis for any sole executive agreement in the climate change arena, so this Article will not explore the breadth of this power except to note that actual presidential practice over the decades has expanded substantially upon the narrow judicial acceptance of the President’s authority to conclude sole executive agreements pursuant to this power.

66. U.S. CONST. art. II, §§ 1–3.

67. Prakash & Ramsey, *supra* note 31, at 233.

68. See *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 417 n.9 (2003); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a, § 302 (1987); MacDougal & Lans, *supra* note 16, at 315–16.

69. CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 92. See also Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 359–60 (2008); Van Alstine, *supra* note 31, at 331–37.

70. *In re Neagle*, 135 U.S. 1, 1 (1890). See also CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 92.

71. See HENKIN, *supra* note 20, at 347 n.54.

President's authority to take care that international laws are faithfully executed,⁷² but the validity of these conclusions is questionable after the Supreme Court's recent opinion in *Medellín v. Texas*, in which the Court found that the President cannot rely on the "take care" clause to "unilaterally convert[] a non-self-executing treaty into a self-executing one."⁷³

The Treaty Clause, together with the President's general executive power, is grounds for "ancillary authority to make agreements necessary for the conclusion of treaties," such as temporary measures pending the conclusion of a treaty.⁷⁴ *Watts v. United States*,⁷⁵ for instance, upheld a sole executive agreement between the United States and Great Britain to jointly occupy San Juan Island pending a final determination by the parties of the international boundary.⁷⁶ Subsequent historical practice confirms that such provisional measures, intended to be replaced by later more permanent and detailed arrangements, are an accepted form for sole executive agreements.⁷⁷

The President's executive power, which enjoys no benefit of textual detail in the Constitution,⁷⁸ is the key source of vagueness, and hence potential breadth, in the President's foreign affairs powers. Found in *Watts*—likely the first judicial recognition of the executive power in foreign affairs—to include merely the power to "make and enforce . . . a temporary convention respecting . . . territory,"⁷⁹ this amorphous executive power in foreign affairs was later famously and broadly described in *United States v. Curtiss-Wright Export Corp.*⁸⁰ as "the very delicate, plenary[,] and exclusive power of the President as the sole organ of the federal government

72. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (1987); HENKIN, *supra* note 20, at 203–04; Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 402–05 (1987); MacDougal & Lans, *supra* note 16, at 248.

73. *Medellín v. Texas*, 552 U.S. 491, 525 (2008).

74. CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 90–91; CRS, ANALYSIS AND INTERPRETATION, *supra* note 18, at 522; Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 13 (2003).

75. *Watts v. United States*, 1 Wash. Terr. 288 (Wash. 1870).

76. See also CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 89.

77. See Bradley, *Unratified Treaties*, *supra* note 58, at 323 n.71; Ramsey, *supra* note 44, at 205–06.

78. See Prakash & Ramsey, *supra* note 31, at 233 (noting the failure of scholarship to ground the foreign affairs powers in constitutional text).

79. *Watts*, 1 Wash. Terr. at 294. See also CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 89.

80. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

in the field of international relations.”⁸¹

The President’s authority as “the sole organ” of communications in foreign affairs derives in part from his power to receive ambassadors,⁸² which impliedly incorporates the more expansive power to recognize (and accordingly, express neutrality towards, refuse to recognize, and maintain or terminate relations with) foreign governments.⁸³ This power as the sole organ of communications, which is relevant to the exchange and sharing of information in the context of MRV and science and technology cooperation in climate change mitigation, has developed “well beyond any penumbras that might emanate from the reception [i.e., recognition] power or the power to make treaties.”⁸⁴

The four Supreme Court cases that have upheld the constitutionality and preemptive nature of sole executive agreements point to the President’s executive powers and his role as the sole organ. As the following discussion shows, however, these cases do not pave the way for as expansive a presidential power to enter sole executive agreements with status as U.S. law as many have assumed. In *United States v. Belmont*⁸⁵ and *United States v. Pink*,⁸⁶ the Court found state law to be preempted by a sole executive agreement in which the United States and Soviet Union settled claims as part of the United States’ recognition of the Soviet Union and the establishment of normal diplomatic relations between the two countries. The *Belmont* court found that the President “had authority to speak as the sole organ” of the national government, and that his authority to enter a sole executive

81. *Id.* at 320. That the President is “the sole organ of the nation in its external relations, and its sole representative with foreign relations” was first noted by John Marshall. See HENKIN, *supra* note 20, at 41.

82. See HENKIN, *supra* note 20, at 41–42 (describing the President’s “monopoly of communication with foreign governments” as largely a result of his control of the foreign relations apparatus through the filling of State Department positions, foreign service offices, and receiving of ambassadors and other foreign officials).

83. HENKIN, *supra* note 20, at 43, 220; CRS, ANALYSIS AND INTERPRETATION, *supra* note 18, at 91, 567–68 (noting that history has “ratified” the notion that the power to receive foreign agents extends to a power to recognize new states, and citing examples of such sole executive agreements); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. g (1987).

84. See Prakash & Ramsey, *supra* note 31, at 242, 323.

85. *United States v. Belmont*, 301 U.S. 324, 327 (1937) (“[N]o state policy can prevail against the international compact here involved.”).

86. *United States v. Pink*, 315 U.S. 203, 231 (1942) (noting that state policy, like the one at issue, “must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement”).

agreement that recognized another country, established diplomatic relations, and settled claims “may not be doubted.”⁸⁷ The *Pink* court confirmed, noting that the “[p]ower to remove such obstacles to full recognition as settlements of claims of our nationals certainly is a modest implied power of the President who is the ‘sole organ of the federal government in the field of international relations.’”⁸⁸

The *Youngstown* framework, which undermined *Curtiss-Wright’s* expansive view of presidential power, was set forth after *Belmont* and *Pink* and before the next two cases on sole executive agreements: *Dames & Moore v. Regan*⁸⁹ and *American Insurance Ass’n v. Garamendi*.⁹⁰ These two more recent cases accordingly emphasized congressional acquiescence as an important element bolstering the President’s authority to enter the executive agreements at issue. In *Dames & Moore*, the Court found preemptive of state law a sole executive agreement that resolved to settle claims between the United States and Iran as part of negotiations to resolve the Iran hostage crisis.⁹¹ Relying only lightly on *Belmont* and *Pink*, the Court pointed to the “longstanding practice” of settling claims of nationals against foreign countries by sole executive agreement,⁹² and found “crucial” to its decision the fact that Congress “implicitly approved the practice of claim settlement by executive agreement.”⁹³ Similarly, in *Garamendi*, the Court found a state statute preempted by a sole executive agreement in which the federal government pledged to discourage certain claims against German companies in American courts.⁹⁴ The Court cited *Pink*, *Belmont*, and *Dames & Moore* as recognition of presidential authority to enter sole executive agreements, repeated recitations of the “longstanding practice” of claims settlement through sole executive agreement, and concluded: “[the fact] that the President’s control of foreign relations includes the settlement of claims is indisputable.”⁹⁵

87. *Belmont*, 301 U.S. at 330.

88. *Pink*, 315 U.S. at 229 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)) (internal citations omitted).

89. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

90. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

91. *Dames & Moore*, 453 U.S. at 664–65, 686.

92. *Id.* at 679.

93. *Id.* at 680.

94. *Garamendi*, 539 U.S. at 405–06.

95. *Id.* at 415 (quoting *United States v. Pink*, 315 U.S. 203, 240 (1942)).

The Supreme Court has never found a sole executive agreement *ultra vires*, but neither has it set forth in these four cases “principles or . . . general guidance to define the President’s power to act alone.”⁹⁶ What appears clear, however, is that the President’s independent foreign affairs power alone likely does not permit his entry into sole executive agreements relevant to climate change. *Belmont* and *Pink*, after all, relied not only on the sole organ executive power described in *Curtiss-Wright*, but also on the presidential power to recognize foreign governments⁹⁷—a power that is not relevant in matters relating to climate change. *Dames & Moore* and *Garamendi* move away from *Curtiss-Wright*’s broad grant of inherent power in favor of the *Youngstown* framework, and both rely on the historical practice of claims settlement through sole executive agreement as evidence of congressional quiescence. Most importantly, the Supreme Court’s most recent application of the *Youngstown* framework in the foreign affairs context in *Medellín* read these cases narrowly as “claims-settlement cases” that merely support Presidential authority to make “executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.”⁹⁸

What can be inferred from these cases is the Court’s reliance on historical practice when assessing the legality of the type of executive agreement that can be made. Although “past practice does not, by itself, create power, . . . long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent.”⁹⁹ The following section therefore outlines the practice in executive agreements in order to examine whether history might support executive agreements on climate change.

C. Historical Practice

Sole executive agreements are relatively uncommon. From the Founding until the early 1900s, only two types of sole executive

96. HENKIN, *supra* note 20, at 222.

97. See CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 91.

98. *Medellín v. Texas*, 552 U.S. 491, 531 (2008).

99. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (internal quotations omitted) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). The consideration of the executive branch’s prior practice in the area of foreign affairs, noted tongue in cheek, as “itself one measure of constitutionality,” Wuerth, *supra* note 74, at 3, has stimulated intense criticism of the modern executive agreement power as “a bit of a constitutional embarrassment.” Ramsey, *supra* note 44, at 235.

agreements were concluded, both grounded in the President's executive and commander-in-chief powers: claims settlements and temporary agreements.¹⁰⁰ In the twentieth century, sole executive agreements have been used most commonly in military and foreign relations matters,¹⁰¹ and then only sparingly—between 1946 and 1972, only 5.5% of the international agreements entered by the United States were based solely on the President's authority.¹⁰² Congressional-executive agreements make up the vast majority of executive agreements. Between 1990 and 2000, roughly eighty percent of all executive agreements were congressional-executive agreements, and the majority of these were *ex ante* congressional-executive agreements.¹⁰³

The 1972 Case Act requires the Secretary of State to report the text of any non-Article II international agreement to Congress within sixty days of the agreement's entry into force.¹⁰⁴ A review of the State Department's compilation of international agreements reported under the Case Act, which includes all types of executive agreements and does not distinguish among the types,¹⁰⁵ reveals the following most common subjects of reported agreements from 1982 to 2008: military (27%); assistance, mostly through the U.S. Agency for International Development (18%); atomic energy and nuclear safety (9%); aviation (6%); and scientific cooperation (6%).¹⁰⁶ A more thorough empirical survey of executive agreements that cross-references multiple databases largely corroborates these findings.¹⁰⁷ Professor Hathaway's study reveals

100. Hathaway, *Presidential Power*, *supra* note 28, at 171 n.90.

101. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporter's n.11 (1987); CRS, INTERNATIONAL AGREEMENTS, *supra* note 23, at 88; Clark, *supra* note 31, at 1581–82.

102. CRS, ANALYSIS AND INTERPRETATION, *supra* note 18, at 517 n.394 (citing CONG. RESEARCH SERV., 95TH CONG., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES, SENATE COMMITTEE ON FOREIGN RELATIONS 22 (Comm. Print 1977)).

103. Hathaway, *Presidential Power*, *supra* note 28, at 155.

104. 1 U.S.C. § 112b(a) (2006).

105. See U.S. Dep't of State, Reporting International Agreements to Congress under Case Act (Text of Agreements), <http://www.state.gov/s/1/treaty/caseact/> (last visited Apr. 10, 2010) (follow "Freedom of Information Act Document Collections search page" hyperlink; then select the hyperlinks corresponding to years between "1982" and "2006" and select documents that correspond to the listed month and year; then repeat with years "2007" and "2008").

106. These figures are based on the author's calculation after reviewing and categorizing by subject matter each of the over 1360 agreements reported by the State Department between 1982 and 2008 and identified on the State Department website.

107. Hathaway, *Presidential Power*, *supra* note 28, at 12 tbl.1.

the following most common areas of executive agreements: defense (14%), trade (9%), scientific cooperation (6%), postal matters (6%), and debts (6%).¹⁰⁸

The prominence of executive agreements in aviation, cooperation in science and technology, and development assistance is noteworthy for those interested in the climate change context. That these agreements are all treaty executive or ex ante congressional-executive agreements suggests that the President's relevant foreign affairs powers—the executive power and the power to operate as the sole organ of communication, together with the treaty power and duty to take care of the laws—are necessary, but probably not sufficient, for a strong legal foundation to enter an executive agreement related to climate change. The authority conveyed by existing Article II treaties and congressional authorizations are important in providing support for such agreements.

III. POSSIBLE GROUNDS FOR TREATY-EXECUTIVE AGREEMENTS ON CLIMATE CHANGE

Having outlined the President's power to enter executive agreements and finding them insufficient to independently support executive agreements relevant to climate change, this Part and Part IV outline possible grounds for executive agreements that rely on the additional legal support of Article II treaties and federal legislation. While reading these Parts, it will be helpful to bear in mind the distinct, but related, powers to enter an internationally binding executive agreement and to execute that agreement domestically.

A. The United Nations Framework Convention on Climate Change

The UNFCCC, ratified by the U.S. Senate in October 1992 and entered into force in March 1994, is the most obvious instrument to look to in ascertaining whether the President may enter a treaty executive agreement pursuant to existing treaty obligations. Although the UNFCCC is not considered self-executing, it, along with the domestic legislation executing its reporting requirements, may support an executive agreement regarding MRV.

As a ratified treaty the UNFCCC is supreme law of the land; but

108. *Id.*

as a non-self-executing treaty it cannot be judicially enforced without implementing federal legislation.¹⁰⁹ The single commentator who has analyzed the authority to enter executive agreements pursuant to the UNFCCC has largely dismissed the UNFCCC because its non-self-executing nature means that although the President “may look to the treaty for authority to enter into a new international obligation under the parent treaty,”¹¹⁰ the President may not “point to [the UNFCCC] as authority to implement new executive agreements on climate change under domestic law.”¹¹¹ The UNFCCC should not be dismissed so hastily, however. The authority the treaty lends to “enter into a new international obligation” can be relied on, together with the President’s foreign affairs powers and his role as the sole organ of communications between the United States and the international community,¹¹² as convincing legal authority to *enter* an executive agreement pursuant to UNFCCC obligations.¹¹³ As for *execution*, the domestic legislation under which the UNFCCC’s MRV obligations have been implemented may well enable execution of other MRV agreements.

The UNFCCC established a MRV framework for national communications that required parties to develop, update, and report “national inventories of anthropogenic emissions . . . of all greenhouse gases . . . using comparable methodologies to be agreed upon by the Conference of the Parties,”¹¹⁴ and a description of the country’s mitigation actions and plans to implement the Convention.¹¹⁵ Specifically citing the requirements of Articles 4 and 12 of the UNFCCC, the United States has regularly submitted Climate Action Reports that include the requisite GHG inventory and description of U.S. mitigation actions.¹¹⁶ The United States has also complied with revised technical methodologies and guidelines adopted in subsequent UNFCCC meetings.¹¹⁷

109. See HENKIN, *supra* note 20, at 203.

110. Purvis, *supra* note 52, at 1030.

111. *Id.* at 1050.

112. See *supra* Part II.

113. Purvis, *supra* note 52, at 1030.

114. U.N. Framework Convention on Climate Change, U.N. Doc. A/AC.237/18 (1992), reprinted in 31 I.L.M. 849 (1992), at art. 4, ¶ 1(a) [hereinafter UNFCCC].

115. *Id.* at 12.

116. See, e.g., DEP’T OF STATE, FOURTH CLIMATE ACTION REPORT TO THE U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (2007), available at <http://www.state.gov/g/oes/rls/rpts/car/>.

117. See *id.* at 18 (noting that the greenhouse gas inventory was calculated using

Congressional drafting of the Energy Policy Act of 1992 overlapped with UNFCCC negotiations, and provisions of the Act refer to the UNFCCC and provide for certain actions to be taken pending its ratification.¹¹⁸ The Act was signed into law on October 24, 1992, shortly after the Senate's October 7 ratification of the UNFCCC. With respect to reporting, the Act ordered the Energy Information Administration to develop an inventory of GHG emissions in consultation with the Environmental Protection Agency, and to "annually update and analyze [the] inventory using available data."¹¹⁹ The Act also mandated the preparation of a low-cost energy strategy that would achieve, among other things, "stabilization and eventual reduction in the generation of greenhouse gases."¹²⁰ No legislation was enacted to execute the UNFCCC presumably in part because the Energy Policy Act already authorized actions appropriate for implementing the UNFCCC's reporting requirements.

Although MRV was one of the most contentious subjects at the Copenhagen negotiations, the Accord itself reveals little about the mechanism of future MRV, other than to indicate that the "[d]elivery of reductions and financing by developed countries will be measured, reported and verified in accordance with existing and any further guidelines adopted by the Conference of the Parties, and will ensure that accounting of such targets and finance is rigorous, robust and transparent."¹²¹ To the extent provisions of the Energy Policy Act have been construed as domestic authorization for the UNFCCC's reporting requirements, the Act may also be a means for domestic implementation of an international agreement crafting a more robust MRV system.¹²²

methodologies consistent with those recommended by the IPCC and the IPCC good practice guidances, and that the structure of the inventory is consistent with UNFCCC reporting guidelines); *see also* Dep't of State, Preparation of Second U.S. Climate Action Report, 62 Fed. Reg. 25988-03 (May 12, 1997) (noting compliance with the revised methodologies to inventory greenhouse gas emissions approved by the UNFCCC's Subsidiary Body for Scientific and Technological Advice).

118. *See, e.g.*, Energy Policy Act of 1992 § 1609, 42 U.S.C. § 13388 (2006) (establishing a Global Climate Change Response Fund, but providing that no deposits be made in the fund until the United States has ratified the UNFCCC); *see also* 42 U.S.C. § 13381(6) (2006).

119. 42 U.S.C. § 13385(a) (2006).

120. 42 U.S.C. § 13382(a)(2) (2006).

121. Copenhagen Accord, *supra* note 1, ¶ 4.

122. The extent to which the President can internationally bind the U.S. to certain variations of MRV is unclear. Current UNFCCC guidelines for submission of national communications provide standardized metrics and reporting formats and subject Annex I national communications to an independent expert review coordinated by the UNFCCC

B. The Convention on International Civil Aviation

A sectoral approach to emissions reductions would implement emission targets or harmonized standards for specific sectors.¹²³ International aviation has long been discussed as a sector whose emissions ought to be controlled under the UNFCCC framework. Indeed, the parties at Copenhagen discussed the subject but made no commitments.¹²⁴ As this Section shows, the President has the authority to enter an executive agreement committing the country to aviation emissions reduction measures *and* the means to implement such an obligation domestically.

A majority of the international agreements in the aviation sector are treaty executive agreements entered pursuant to Article II treaties on air safety and transport.¹²⁵ Most notably, the United States signed and ratified the Convention on International Civil Aviation (“Aviation Convention”), which entered into force on April 4, 1947 and established the International Civil Aviation Organization (“ICAO”) as an U.N. agency for the coordination and regulation of international air travel.¹²⁶ Parties to the Convention agreed to “collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways”¹²⁷

Multiple treaty executive agreements have been entered pursuant

Secretariat. See UNFCCC, *supra* note 114, arts. 4, 12; *UNFCCC Guidelines on Reporting and Review*, U.N. Doc. FCCC/CP/2002/8 (Mar. 28, 2003), available at <http://unfccc.int/resource/docs/cop8/08.pdf>. The expert review process falls short of actual verification, however, because it “assesses the document’s adherence to reporting guidelines, rather than the reliability of reported information.” Taryn Fransen, *Enhancing Today’s MRV Framework to Meet Tomorrow’s Needs: The Role of National Communications and Inventories* 12 (June 2009) (World Resources Institute Working Paper), available at http://pdf.wri.org/working_papers/national_communications_mrv.pdf. In addition, the current MRV framework focuses on national GHG inventories and does not verify national commitments. Whether the President acting alone can internationally bind the U.S. to verification of its commitments to reduce GHG emissions, particularly if such verification is accompanied by international enforcement consequences if a country is found not to be in compliance with its commitments, is an area for further research.

123. See, e.g., ROB BRADLEY ET AL., WORLD RESOURCES INSTITUTE, *SLICING THE PIE: SECTOR-BASED APPROACHES TO INTERNATIONAL CLIMATE AGREEMENTS* (2007), available at <http://pdf.wri.org/slicing-the-pie.pdf>.

124. *ENB Summary*, *supra* note 4, at 15, 22.

125. See, e.g., Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. NO. 13,038, 2242 U.N.T.S. 309; see also Hathaway, *Treaties’ End*, *supra* note 16, at 1261–62 n.57.

126. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

127. *Id.* at art. 37.

to the Aviation Convention, its annexes, and ICAO resolutions.¹²⁸ For instance, the United States, Canada, and Australia cited an ICAO resolution urging members to ban smoking on international passenger flights in signing an executive agreement in which the three countries agreed to prohibit smoking on all passenger flights between their territories.¹²⁹ At the level of domestic implementation, federal agencies, principally the Federal Aviation Administration, have routinely promulgated regulations pursuant to the United States' international obligations to harmonize domestic standards with the international standards issued by ICAO.¹³⁰

The ICAO's Committee on Aircraft Engine Emissions is charged with developing specific standards for emissions.¹³¹ The Environmental Protection Agency ("EPA"), which has authority under the Clean Air Act to "issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in [its] judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare,"¹³² has relied on this authority to harmonize U.S. aviation emissions standards with ICAO standards. In initiating a rulemaking in one instance, the EPA noted:

On June 30, 1981, the ICAO issued engine emission standards which apply to many (but not all) of the same types of engines to which the U.S. standards apply. With the establishment of the international

128. *See, e.g.*, Agreement for Promotion of Aviation Safety, U.S.-Ir., Feb. 5, 1997, T.I.A.S. No. 12831.

129. Agreement to Ban Smoking on International Passenger Flights, U.S.-Can.-Austl., Nov. 1, 1994, T.I.A.S. No. 12578. *See also* Order on Discussion Authority Regarding a Smoking Ban on Transatlantic Flights, 60 Fed. Reg. 6343-04 (Feb. 1, 1995) (indicating that the multilateral agreement with Canada and Australia follows the ICAO resolution and would help to achieve the resolution's goals).

130. *See, e.g.*, Airspace Reclassification, 14 C.F.R. §§ 1, 11, 45, 61, 65, 71, 75, 91, 93, 101, 103, 105, 121, 127, 135, 137, 139, 171 (1991) (harmonizing U.S. airspace classifications with the terminology used by the ICAO); Hazardous Materials: Harmonization with U.N. Recommendations, Int'l Maritime Dangerous Goods Code, and Int'l Civil Aviation Organization's Technical Instructions, 49 C.F.R. §§ 171, 172, 173, 175, 176, 178, 180 (2006) (revising hazardous materials regulations to "maintain alignment with international standards," including changes to the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air); Pilot, Flight Instructor, and Pilot School Certification, 14 C.F.R. §§ 61, 91, 141 (2009) (revising training, qualification, certification, and operating requirements for pilots to conform with ICAO requirements).

131. Convention on International Civil Aviation, *supra* note 126, Annex 16, *available at* http://www.icao.int/eshop/pub/anx_info/an16_info_en.pdf.

132. Clean Air Act § 231, 42 U.S.C. § 7571(a)(2)(A) (2006).

standards, the U.S. now has an obligation¹³³ to frame national standards to be as compatible as possible with the ICAO standards, consistent with U.S. environmental goals and with EPA's responsibilities under Section 231 of the Clean Air Act.¹³⁴

The status of the Convention on International Civil Aviation as an Article II treaty along with the historical practice of entering into executive agreements pursuant to this treaty, which are then domestically implemented by agencies with existing authority, provide safe legal grounds for presidential action in the aviation sector. It would be well within precedent and legal authority for the President to internationally bind the United States to aviation emission standards pursuant to U.S. obligations under the Aviation Convention and for the EPA to regulate based on this obligation pursuant to its Clean Air Act authority.

IV. POSSIBLE GROUNDS FOR EX ANTE CONGRESSIONAL-EXECUTIVE AGREEMENTS ON CLIMATE CHANGE

Several pieces of legislation may also give the President authority to enter congressional-executive agreements to cooperate in technology and research and to provide assistance for development. Together with the President's foreign affairs powers, such authorization should provide strong legal authority for entering into executive agreements, although these agreements may, in some instances, require congressional cooperation to implement.

A. The Clean Air Act

The Clean Air Act¹³⁵ ("CAA") likely does not delegate any authority to the President to enter international agreements relating to climate change. The EPA's existing authority under the CAA, however, is an avenue for domestic implementation of an executive agreement properly entered under other authority.

Title VI of the CAA, which was added after the U.S. ratification of the 1987 Montreal Protocol to phase out the use of ozone-

133. A footnote in the text of the rulemaking states that the obligation is "[b]ased on the Chicago Convention on International Aviation December 7, 1944, to which the United States is one of the signatory nations." Control of Air Pollution from Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 40 C.F.R. § 87 n.1 (1982) (emphasis added).

134. *Id.* at 58, 464.

135. Clean Air Act, 42 U.S.C. § 7401-7671(q) (2006).

depleting substances,¹³⁶ authorizes the President to “undertake to enter into international agreements to foster cooperative research . . . and to develop standards and regulations which protect the stratosphere consistent with regulations applicable within the United States.”¹³⁷ The structure and language of the CAA makes clear that Congress intended Title VI for protection of the stratosphere in the context of the ozone layer problem addressed by the Montreal Protocol.¹³⁸ Accordingly, any attempt to enter an executive climate agreement citing authorization under this section would be unlikely to withstand a legal challenge.¹³⁹

The language of Title VI aside, there has been some suggestion that because EPA now has authority to regulate greenhouse gases under the CAA,¹⁴⁰ the President may exercise his duty to “take care” that the laws are faithfully executed and rely on implicit “general authority provided by the Clean Air Act,” as legal grounds for entering executive agreements relating to climate change.¹⁴¹ This approach is probably not well-supported, however. As noted earlier, the extent to which the “take care” clause authorizes entrance into and domestic enforcement of executive agreements is controversial—particularly where the President relies on generally-worded, implicit authorizations.¹⁴² A more legally sound approach would rely on any implicit authorization from the CAA as mere ancillary authority for executive agreements that rest on other more sound legal bases.

Although beyond the scope of this Article, it seems likely that the

136. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989), available at http://ozone.unep.org/Ratification_status/montreal_protocol.shtml.

137. Clean Air Act § 617, 42 U.S.C. § 7671(p)(a) (2006).

138. See, e.g., *id.* at § 7671m(b) (“This subchapter as added by the Clean Air Act Amendments of 1990 shall be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol . . .”).

139. Cf. Purvis, *supra* note 52, at 1042 (noting that whether this provision authorizes international climate agreements “may rest on whether authority to negotiate agreements to ‘protect the stratosphere’ includes the authority to negotiate agreements that protect the stratosphere and other parts of the atmosphere equally”).

140. See *Mass. v. EPA*, 549 U.S. 497 (2007) (holding that the Clean Air Act authorizes EPA to regulate greenhouse gases from new motor vehicles if EPA finds such emissions to cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I) (finding that greenhouse gases from new motor vehicles contribute to pollution that endangers public health and welfare).

141. See Purvis, *supra* note 52, at 1043–44.

142. See *supra* notes 69–73 and accompanying text.

CAA's coverage of GHGs also does not provide authority for the President to internationally commit to binding emissions targets that would be achievable by the EPA under its existing CAA authority. Where the EPA itself has not yet promulgated regulations that produce emissions targets, the President's binding international commitment that the EPA will effectuate some specified target may impermissibly overstep the agency's mandate. This view may differ depending on whether one subscribes to a presidentialist theory of administration that understands the President to be in full control of administrative activity¹⁴³ or to a view that resists presidential control of agency rulemakings.¹⁴⁴ The more legally prudent view, however, should acknowledge the lack of congressional authorization for such presidential action and the general deference shown to an agency's broad rulemaking discretion¹⁴⁵ as reasons for concluding that the President cannot internationally bind the EPA in advance of the EPA's own rulemaking on an emissions reduction target.

B. Science and Technology Cooperation

Cooperation agreements in science and technology research and development tend to be bilateral. The United States typically enters multiple agreements with the same country pursuant to a single umbrella agreement, itself an executive agreement, which establishes general principles for the cooperative relationship between the two countries.¹⁴⁶ Two key congressional authorizations regarding international scientific cooperation may explain the multiplicity of executive agreements in this area.

The 1979 Foreign Relations Authorization Act directs the President to "assess and initiate appropriate international scientific and technological activities which are based upon domestic scientific and technological activities of the United States Government and which are beneficial to the United States and

143. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

144. See, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

145. See, e.g., *Bargmann v. Helms*, 715 F.2d 638, 639, 643 (D.C. Cir. 1983) (taking care to note that the decision "hold[s] only that the agency has the power of decision" and that the agency has discretion whether to exercise that power).

146. Two such agreements, one with Japan and one with China, are discussed below. See *infra* notes 151, 155 and accompanying text.

foreign countries,”¹⁴⁷ and charges the Secretary of State with coordination and oversight of international science and technology agreements.¹⁴⁸ The 1979 International Development Cooperation Act also authorizes the President to establish an Institute for Scientific and Technological Cooperation, which is subject to the foreign policy guidance of the Secretary of State and whose task is to “assist developing countries to strengthen their own scientific and technological capacity.”¹⁴⁹ To carry out the purposes of the Institute, the President is directed to “make and perform contracts and other agreements with any individual, institution . . . governments or government agencies, domestic or foreign.”¹⁵⁰ These broad statutory authorizations would likely apply to cooperative research relating to adaptation and renewable energy technology, among other areas potentially relevant to climate regulation.

A 1988 umbrella agreement with Japan on cooperation in research and development in science and technology¹⁵¹ cited the legislative delegation in the Foreign Relations Authorization Act, along with the “President’s constitutional powers,” as its legal authority.¹⁵² The agreement identified global environment and joint database development as areas for cooperation and information exchange as a form of cooperation.¹⁵³ More than fifteen executive agreements have been entered pursuant to this umbrella agreement.¹⁵⁴

147. 22 U.S.C. § 2656c(a) (2006).

148. 22 U.S.C. § 2656d (2006).

149. 22 U.S.C. § 3503 (2006).

150. 22 U.S.C. § 3504 (2006).

151. Agreement on Cooperation in Research and Development in Science and Technology, U.S.-Japan, June 20, 1988, T.I.A.S. No. 12025 [hereinafter U.S.-Japan Agreement] (on file with author).

152. *Id.* (“Legal authority to conclude this agreement derives from the President’s constitutional powers, including those in Article II, section 1 of the Constitution. Additional authority is contained in 22 USC [sic] 2656d, which gives the Secretary of State primary responsibility for all major S & T agreements and activities between the U.S. and foreign countries.”).

153. U.S.-Japan Agreement, *supra* note 151, art. VIII.

154. This figure is based on the author’s calculation from the Treaties and International Agreements Online database. See Oceana Online Services Homepage, www.oceanalaw.com (last visited Apr. 10, 2010). Unlike the State Department’s online compilation of international agreements referenced in note 109, the Oceana database is indexed and searchable and contains over 17,000 international agreements in over 40 topical categories. See *id.*; see also Hathaway, *Treaties’ End*, *supra* note 16, at 1358 app. A (comparing the coverage of various compilations of U.S. international agreements, including the Oceana database). An advanced search on the Oceana database that limits the search to agreements entered

Another example of an umbrella agreement on scientific cooperation is one between the United States and China, signed and entered into force on January 31, 1979.¹⁵⁵ The agreement cites no legal authority; it only notes the President's joint communiqué on the establishment of diplomatic relations with China, states broad principles of cooperation, establishes a U.S.-China Joint Commission on Scientific and Technological Cooperation, and states that "[s]pecific accords implementing this Agreement may cover the subjects of cooperation, procedures to be followed, treatment of intellectual property, funding, and other appropriate matters."¹⁵⁶ A host of executive agreements have been implemented under this agreement, including: a protocol between the Commerce Department and its Chinese counterpart on cooperation in the fields of metrology and standards,¹⁵⁷ a protocol between the Department of Energy and its Chinese counterpart for cooperation in the fields of energy efficiency and renewable energy technology development and utilization,¹⁵⁸ and a protocol signed by the U.S. Geological Survey, the National Science Foundation, and the National Institute of Standards and Technology for cooperation on earthquake and volcano sciences.¹⁵⁹

As these agreements show, the congressional delegations in the Foreign Relations Authorization and International Development Cooperation Acts, along with the President's independent foreign affairs powers, are grounds for an extensive network of agreements on science and technology cooperation. The umbrella agreements,

into with Japan and searches for the terms "Cooperation in Research and Development in Science and Technology" and "June 20, 1988" in the text of an agreement pulls up thirty separate agreements that fulfill these criteria. A review of these agreements reveals that at least fifteen are executive agreements implemented pursuant to the provisions of the original June 20, 1988 umbrella agreement. *See, e.g.*, Implementing Arrangement for Cooperation in the Fields of Metrology and Measurement Standards, U.S.-Japan, Nov. 2, 1999 (on file with author).

155. Agreement on Cooperation in Science and Technology, U.S.-China, Jan. 31, 1979, 30 U.S.T. 35, 1150 U.N.T.S. 349.

156. *Id.* art. 5.

157. Protocol between the Department of Commerce and the General Administration of Quality Supervision, Inspection and Quarantine on Cooperation in the Fields of Metrology and Standards, U.S.-China, Dec. 9, 2003, available at http://www.nist.gov/oiaa/doc_aqsiq.pdf.

158. Protocol for Cooperation in the Fields of Energy Efficiency and Renewable Energy Technology Development and Utilization under the Umbrella Agreement, U.S.-China, Feb. 23, 1995 (on file with author).

159. Protocol Concerning Scientific and Technical Cooperation in the Earthquake and Volcano Sciences, U.S.-China, Oct. 16, 2009, available at <http://www.nist.gov/oiaa/CEAprotocol.pdf>.

pursuant to which many later agreements are entered, are broadly worded and provide for implementing arrangements in a wide range of research areas involving an array of federal agencies. This practice leaves little doubt that the President can enter an executive agreement for cooperation in science and technology relating to climate change, whether pursuant to existing bilateral agreements or as a new agreement delineating areas for future cooperation and information exchange. Such agreements may be imperative for cooperative research on carbon capture and sequestration¹⁶⁰ and geo-engineering, for instance.

C. Development Assistance

As explained in Part II, the President may not usurp Congress's exclusive spending power by legally binding the United States to the commitment of funds.¹⁶¹ As a result, many executive agreements provide that activities under the agreement are contingent upon the availability of funding. In many instances, such a contingency does not necessarily diminish the impact of the agreement, which may, as we have seen, establish commissions, announce general principles for future arrangements, and otherwise set forth policies that need no funding to take effect. Where the agreements solely address funding, of course, the constitutional constraint on the President's power requires collaboration with Congress to implement the agreement.

In this context, it is worth emphasizing several provisions of the International Development and Food Assistance Act of 1977¹⁶² that confer upon the President authority highly relevant to the climate change negotiations, but which will likely require funding to take effect. For instance, Congress has authorized the President "to furnish assistance . . . for developing and strengthening the capacity of developing countries to protect and manage their environment and natural resources."¹⁶³ The President is also authorized to "utilize the resources and abilities of all relevant

160. *See, e.g.*, MASS. INST. OF TECH. ENERGY INITIATIVE, RETROFITTING OF COAL-FIRED POWER PLANTS FOR CO₂ EMISSIONS REDUCTIONS 18 (2009) (noting that necessary emissions reductions cannot be achieved without emissions reductions from existing coal-fired power plants and recommending joint U.S.-China research programs to develop carbon capture and sequestration technology), *available at* <http://web.mit.edu/mitei/docs/reports/meeting-report.pdf>.

161. *See supra* note 60.

162. 22 U.S.C. § 2151p(b) (2006).

163. *Id.*

[federal] agencies” in providing assistance to developing countries to:

[S]upport training programs, . . . and the establishment or strengthening of institutions which increase the capacity of developing countries to formulate forest policies [and] engage in relevant land-use planning,” and to “support training, research, and other actions which lead to sustainable and more environmentally sound practices for timber harvesting . . . including reforestation, soil conservation, and other activities to rehabilitate degraded forest lands.¹⁶⁴

On the subject of energy resources, Congress delegated authority to the President to furnish assistance, including data collection and analysis, training, and research and development, “on such terms and conditions as he may determine, to enable [developing] countries” to develop their energy resources.¹⁶⁵ The President is further authorized to furnish assistance “for cooperative programs with developing countries in energy production and conservation, through research on and development and use of . . . renewable energy sources for rural areas,” training, institutional development, and scientific exchange.¹⁶⁶

These broadly worded provisions relating to natural resources, reforestation, energy conservation, and renewable energy—as well as those enabling assistance to build capacity, strengthen institutions, and engage in scientific exchange—may well authorize a wide range of *ex ante* congressional-executive agreements relevant to the climate change context. Although these executive agreements will be internationally binding, they are likely non-self-executing and subject to the availability of congressional appropriations. Without the support of Congress and some certainty of funding, the President’s authority under these provisions, although potentially quite broad, may have limited meaning in international negotiations.¹⁶⁷

164. 22 U.S.C. § 2151p-1(c) (2006).

165. 22 U.S.C. § 2151d(b)(1) (2006).

166. 22 U.S.C. § 2151d(b)(2) (2006).

167. Congress’s spending power aside, the Secretary of the Treasury is authorized by statute to designate officials within the Treasury Department to “disburse public money available for expenditure by an executive agency.” 31 U.S.C. § 3321(a) (2006). Moreover, where an appropriation is “available for obligation for a definite period” to an executive agency, the President is authorized by statute to apportion the funds by time period or activity. *Id.* §§ 1512–13. Thus, depending on how future climate change legislation is worded, the President, through the Secretary of the Treasury, may have authority to apportion and disburse funds generated in a domestic emissions trading system; this may include disbursing those funds pursuant to executive agreements.

D. Other Possible Authorizations

The Endangered Species Act (“ESA”) authorizes the Secretary of State to “encourage the entering into of bilateral or multilateral agreements with foreign countries to provide for” the conservation of listed species.¹⁶⁸ The ESA lists more than 500 species living in foreign countries as endangered or threatened,¹⁶⁹ some of which are or will be detrimentally affected by climate change. Although it is not clear how far this language actually authorizes executive agreements, it may be helpful to support evidence of congressional acquiescence in international agreements that address the protection of endangered and threatened species.

Additionally, although far from obvious, the National Environmental Policy Act (“NEPA”) may provide ancillary support for executive climate agreements. In an executive agreement with Canada to regulate transboundary movement of hazardous waste pursuant to the Resource Conservation and Recovery Act (“RCRA”),¹⁷⁰ the legal authority cited for the agreement, aside from RCRA itself, was: (1) the President’s constitutional power “to conduct foreign regulations,”¹⁷¹ (2) the Secretary of State’s statutory authority to manage foreign affairs under 22 U.S.C. § 2656,¹⁷² and (3) NEPA, in particular its provision directing all federal agencies to:

[R]ecognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, [to] lend support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.¹⁷³

The provision’s vagueness makes the strength of this as *ex ante* authorizing legislation questionable, but it is nevertheless worth

168. Endangered Species Act of 1973, 16 U.S.C. § 1537(b)(2) (2006).

169. U.S. Fish & Wildlife Serv., Species Reports, http://ecos.fws.gov/tess_public/SpeciesReport.do?lead=10&listingType=L (last visited Apr. 24, 2010) (identifying species currently listed as endangered and threatened, and species similar in appearance to those endangered and threatened, worldwide).

170. Agreement Concerning the Transboundary Movement of Hazardous Waste, U.S.-Can., Nov. 8, 1986, T.I.A.S. No. 11,099 (on file with author).

171. *Id.*

172. 22 U.S.C. § 2656 (2006) (“The Secretary of State shall perform such duties as shall . . . [be] intrusted [sic] to him by the President relative to . . . such [] matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct.”).

173. National Environmental Policy Act of 1969, 42 U.S.C. 4332(F) (2006).

noting as ancillary evidence of congressional acquiescence in “international cooperation” for GHG emissions mitigation.

V. CONCLUSION

Gloomy forecasts abound for prospects of congressional enactment of comprehensive climate legislation. But the President need not sit idle. Several different avenues are available to demonstrate U.S. leadership in international climate negotiations without requiring the advice and consent of the Senate.

The President could submit a climate agreement as an ex post congressional-executive agreement for a majority vote of both houses of Congress, rather than as an Article II treaty. Others have touted the advantages of the congressional-executive agreement over the treaty, including stronger democratic legitimacy because of the inclusion of the House of Representatives and more reliable commitment because of effectuation by both houses of Congress.¹⁷⁴ Whether this avenue is politically feasible, however, given the difficulties that have arisen in reaching even the sixty vote threshold for passage of domestic legislation, is questionable. Moreover, whether the Senate will be willing to surrender its Article II prerogative and allow a climate agreement to take effect outside of its Treaty Clause authority is a political question, and the President’s willingness to test the Senate will be a political calculation.

Short of asking Congress to approve a climate agreement as an ex post congressional-executive agreement, the President could also take limited, but meaningful, steps within his own constitutional and statutory powers to advance the international agenda. In addition to his inherent constitutional powers, the President can rely on the UNFCCC and the Convention on International Civil Aviation; congressional delegations relating to science and technology cooperation and assistance to developing countries; and supplementary support from the Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act as legal authority to enter into a variety of executive agreements. To the extent any of these agreements need funding for implementation, they will require congressional support and can therefore avoid criticisms of a democratic deficit. To the extent others are among a long lineage of similar executive

174. Hathaway, *Treaties’ End*, *supra* note 16, at 1307–23.

agreements and can be implemented pursuant to existing legislation, such as the Clean Air Act and the Energy Policy Act, Congress's acquiescence is assumed and the President acts with strong legal support.

The Brookings Institution issued a report shortly after Copenhagen that urged climate negotiators to pursue "quick wins" in the aftermath of the somewhat dispiriting Copenhagen Accord by passing "confidence-building measures" structured as building blocks that can act as a springboard for, and be retrofitted into, a future comprehensive climate deal.¹⁷⁵ It is well within the President's authority to do precisely this. By entering executive agreements on MRV and information sharing, aviation emissions, cooperation in research and development, and capacity-building for developing countries, the President could take the world a long way towards building a comprehensive climate agreement even as domestic legislation languishes in the Senate.

175. ALEX EVANS & DAVID STEVEN, BROOKINGS INST., HITTING REBOOT: WHERE NEXT FOR CLIMATE AFTER COPENHAGEN? 10 (2009), *available at* http://www.brookings.edu/~media/Files/rc/papers/2009/12_climate_evans_steven/12_climate_evans_steven.pdf.