

INTERNATIONAL EXECUTIVE AGREEMENTS ON CLIMATE CHANGE

Hannah Chang
November 2009

I. Alternatives to the Article II treaty	1
A. The Possibility of an Ex Post Congressional-Executive Agreement	3
B. A Note on the Binding Nature of Executive Agreements	4
C. The <i>Youngstown</i> Framework	6
II. The Scope of Presidential Power to Enter Executive Agreements	7
A. The President's Enumerated Powers	8
B. Historical Practice	10
III. Possible Grounds for Treaty-Executive Agreements	12
A. The United Nations Framework Convention on Climate Change	12
B. The Convention on International Civil Aviation	13
IV. Possible Grounds for Ex Ante Congressional-Executive Agreements	15
A. The Clean Air Act	15
B. Science and Technology Cooperation	16
C. Development Assistance	18
D. Other Possible Authorizations and Considerations	19
V. Conclusion	20

Executive Summary

The difficulty of ratifying any future climate change agreement through the Article II treaty process calls for an understanding of the scope of the President's independent power to enter into internationally binding commitments related to climate change. This power is necessarily limited, but as this paper shows, the President's foreign affairs powers, together with authority derived from existing treaty obligations and federal statutes, provide legal authority for the President to enter executive agreements relating to measurement, reporting, and verification; aviation emissions; cooperative research and development in science and technology; and capacity-building for developing countries.

Expectations for comprehensive binding commitments at the upcoming fifteenth Conference of the Parties under the United Nations' Framework Convention on Climate Change ("UNFCCC") in Copenhagen have evaporated. President Obama recently expressed support for a proposal that would have the nations convening at Copenhagen commit to a non-binding agreement that would serve as a framework for future negotiations of a legally binding agreement.

One stumbling block that has caused substantial delay in international climate negotiations has been the reluctance of the United States, one of the largest greenhouse gas ("GHG") emitters in the world, to sign on to internationally binding commitments that are not in conformity with domestic legislation. This wariness stems in large part from the Treaty Clause of the U.S. Constitution, which requires a two-thirds vote of the Senate for treaty ratification,¹ and from U.S. experience with the Senate's repudiation of the 1997 Kyoto Protocol.² Concern about the Senate's unwillingness to approve an international climate agreement supports an approach that grounds an international agreement in existing domestic legislation. Even if domestic legislation, passed with at least 60 votes in the Senate for cloture, was the basis of an international agreement, however, genuine concern remains that the international agreement would nevertheless fail to garner the 67 votes in the Senate required under the Article II Treaty Clause process.

One question worth exploring, then, is the extent to which the President can bind the nation internationally without the advice and consent of Senate. As this paper explains, an international climate agreement can likely be submitted to both houses of Congress as an ex post congressional-executive agreement for approval by a majority vote, rather than to the Senate as an Article II treaty for approval by a two-thirds vote. For political reasons, however, the likelihood of success in taking this ex post congressional-executive route may be slim. This paper therefore identifies areas in which executive agreements – some that will require no congressional action to take effect domestically and others that will require congressional cooperation in the form of appropriations – might be entered into with strong legal authority. The President likely cannot rely on his independent powers alone to enter into international climate agreements, but his foreign affairs powers together with existing treaties and congressional delegations do provide legal authority for entering into executive agreements relating, at least, to measurement, reporting, and verification ("MRV"), aviation emissions, cooperation in research and development of science and technology, and capacity-building for developing countries.

I. Alternatives to the Article II treaty

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 Senate, internationally binding agreements are frequently made via three different types of

¹ U.S. CONST. art. II, § 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 . . .").

² The Byrd-Hagel resolution, which passed with a vote of 95-0, 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). See David Victor, *Plan B for Copenhagen*, 461(17) NATURE 342, 343 (Sept. 2009) (noting that "[t]he diplomats preparing for Copenhagen, especially from the United States, are keen not to repeat the mistake of promising what they can't deliver.").

executive agreements, none of which require a supermajority Senate vote. Indeed, the United States is party to five times more executive agreements than treaties,³ and between 1939 and 1993, more than 90% of the international agreements concluded were executive agreements.⁴

Sole executive, or presidential executive, agreements are entered into by the President alone under his independent constitutional powers.⁵ Sole executive agreements include agreements that are not intended to be legally binding, like the one that may be made at Copenhagen. 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 obligations.

The key unknown with respect to sole executive agreements is the precise scope of the President's independent foreign affairs powers – although there is consensus that these powers are limited, the “limits are difficult to determine and to state.”⁶ The President is likely on strongest legal footing in using his independent powers to enter agreements relating to the military, to recognition of a foreign government, and to settle international claims.⁷ 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 would therefore be more difficult to sustain against legal challenge. Even so, the President's independent powers can be quite powerful in the climate arena when exercised in conjunction with other authority, as it is in the other forms of executive agreements.

Treaty executive agreements are entered into by the President alone pursuant to an express authorization in or a reasonable inference from an existing Article II treaty.⁸ In these agreements, the President derives authority from three sources: his power to enter into treaties; his duty to “take care” that the laws, including treaties, are faithfully executed; and the Senate's consent in the pre-existing treaty.⁹ As discussed below, the UNFCCC and Convention on International Civil Aviation are two existing Article II treaties that may provide support for an executive agreement relating to climate change.

Congressional-executive agreements, dealing with any matter within the combined powers of Congress and the President,¹⁰ are entered into by the President pursuant to legislation authorizing such an agreement (ex ante congressional-executive agreements)¹¹ or are

³ See United States Senate, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (“The United States is currently a party to nearly nine hundred treaties and more than five thousand executive agreements.”).

⁴ See S. Doc. 108-17, CONG. RESEARCH SERV., 108th Cong., THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION (2002 ed.) 516-17 [hereinafter ANALYSIS AND INTERPRETATION], available at <http://www.gpoaccess.gov/constitution/browse2002.html#2002> (noting that “the executive agreement has surpassed in number and perhaps in international influence the treaty . . .”).

⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) [hereinafter RESTATEMENT].

⁶ 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.”).

⁷ *Id.* at 221, 229.

⁸ RESTATEMENT, *supra* note 5, § 303(3); CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE THE UNITED STATES SENATE 86 (Comm. Print 2001) [hereinafter CRS].

⁹ HENKIN, *supra* note 6, at 498 n.167; CRS, *supra* note 8, at 87; see also *Wilson v. Girard*, 354 U.S. 524 (1957) (giving effect to a treaty executive agreement entered into pursuant to a ratified treaty).

¹⁰ RESTATEMENT, *supra* note 5, § 303(2).

¹¹ *E.g.*, Int'l Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 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 . . .”).

congressionally approved as a matter of domestic law after the agreement is negotiated (ex post congressional-executive agreements).¹² Ex ante congressional-executive agreements are likely the most common of all the executive agreements, and as will be seen below, Congress has already delegated substantial power to the President via authorizing legislation.¹³

A. The Possibility of an Ex Post Congressional-Executive Agreement

With respect to ex post congressional-executive agreements, a central question is whether the President can submit a climate agreement to both houses of Congress for majority approval as an ex post congressional-executive agreement¹⁴ rather than to the Senate as an Article II treaty.¹⁵ As a matter of law, the President can likely submit an agreement as either a congressional-executive agreement or an Article II treaty, because the two are regarded as legally interchangeable in nearly all instances.¹⁶ Even a recent critique of interchangeability concludes that congressional-executive agreements can replace treaties in virtually all instances, except in those rare cases where an agreement exceeds the sum of the respective powers of Congress and the President, including in the cession of territory, extradition, and disabilities of aliens.¹⁷

As a matter of practice, ex post congressional-executive agreements have not entirely replaced the treaty for political reasons, however.¹⁸ 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

¹² E.g., An Act to provide congressional approval of the Governing International Fishery Agreement between the United States and Japan, Pub. L. No. 100-220, 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.”).

¹³ See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance* 15 (forthcoming YALE L.J.) (exploring the “troubling reality” of the vast number of ex ante authorizations that relinquish Congress’s power to the President).

¹⁴ 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 to a 60 vote requirement. See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1311-12 (2008).

¹⁵ The State Department’s Office of 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 Dep’t of State Circular No. 175, Dec. 13, 1955, 22 C.F.R. § 181.4 (2007); Office of the Legal Adviser, Treaty Affairs, Circular 175 Procedure, at <http://www.state.gov/s/l/treaty/c175/>; see also Hathaway, *Treaties’ End*, *supra* note 14, at 1249-52.

¹⁶ See, e.g., RESTATEMENT, *supra* note 5, § 303 cmt. e (“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 6, at 217 (noting that congressional-executive agreements are “available for wide use, even general use, and is 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”); CRS, *supra* note 8, at 86; Hathaway, *Treaties’ End*, *supra* note 14, 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.”); Bruce Ackerman & David Golove, *Is NAFTA Constitutional*, 108 HARV. L. REV. 801 (1995).

¹⁷ Hathaway, *Treaties’ End*, *supra* note 14, at 1338-45.

¹⁸ HENKIN, *supra* note 6, at 218.

agreement, insisting that the President submit the agreement as a treaty.”¹⁹ Notably, 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.²⁰ Although not legally binding, this resolution strongly suggests that the Senate will jealously guard its Article II prerogatives in ensuring that a future climate agreement is approved under the Treaty Clause rather than as an ex post congressional-executive agreement.²¹

Although the President has the legal option of implementing an international climate agreement as an ex post congressional-executive agreement, then, the success of this avenue will turn on 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.

B. A Note on the Binding Nature of Executive Agreements

Notwithstanding the distinction between the sole executive, treaty executive, and ex ante congressional-executive agreements, the line between these various types of executive agreements is not always clear.²² All three take effect solely upon the President’s action,²³ and all three rely on the President’s foreign affairs power. Yet, while the President’s independent 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 ex ante congressional-executive agreements have the additional authority of a congressional delegation.²⁴

Another difference lies in these agreements’ effects on domestic law. All override inconsistent state law.²⁵ Treaty executive agreements also supersede earlier inconsistent federal law.²⁶ Sole executive agreements, on the other hand, have no effect if contrary to earlier federal legislation.²⁷ The prevailing view is that ex ante congressional-executive agreements, like treaty

¹⁹ RESTATEMENT, *supra* note 5, § 303 cmt e; *see also* HENKIN, *supra* note 6, at 497 n.164 (identifying instances where the Senate has objected to a particular agreement not being submitted as an Article II treaty).

²⁰ S. Exec. Rep. 102-55, 102d Cong. (1992), at 14.

²¹ *See also* Nigel Purvis, *The Case for Climate Protection Authority*, 49 VA. INT’L L.J. 1007, 1049-50 (2009).

²² *See* Hathaway, *Treaties’ End*, *supra* note 14, at 1254. Executive agreements rarely identify the source of authority under which the President acts. 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. It may be an ex ante congressional-executive agreement, for instance – 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 and Appendix A.

²³ *See* Hathaway, *Presidential Power*, *supra* note 13, at 14. Ex post congressional-executive agreements, on the other hand, do not take effect without a majority vote in both houses of Congress.

²⁴ *Id.*

²⁵ *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (sole executive agreement preempted state statute); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (same); RESTATEMENT, *supra* note 5, § 303 cmt. j. 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).

²⁶ RESTATEMENT, *supra* note 5, § 115 reporters’ n.5 & cmt. c.

²⁷ *See United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953). This modern understanding of the

executive agreements, prevail in a conflict with earlier federal legislation, but this issue is not settled.²⁸ With respect to their relationship to *later* inconsistent federal law, all are subject to the last-in-time rule, so that later inconsistent federal statutes are given primacy.²⁹ In other words, Congress can pass legislation that would invalidate an earlier executive agreement, reflecting the importance of congressional support in any executive agreement entered by the President.

Regardless of these variations in their effect as domestic law, executive agreements are recognized under international law as *equally binding* as Article II treaties.³⁰ Popular notions of a “binding” international instrument conflate the binding nature of the legal obligation with self-execution. A self-executing treaty requires no new legislation to enable the United States to carry out its obligations. Upon ratification, the treaty immediately takes effect as law of the United States, supreme over state law and judicially enforceable.³¹ On the other hand, a non-self-executing treaty requires 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).³² In other words, whereas a self-executing treaty is “itself law,” a non-self-executing treaty is a binding “promis[e] to enact law.”³³ The same notions of execution apply in the context of non-treaty international agreements.³⁴

A country may be bound as a matter of international law without being bound as a matter of domestic law because international agreements are considered binding on parties when the agreement enters into force, regardless of the nature of execution.³⁵ In other words, whether an international agreement is self-executing or not, it is legally binding on the United States as a matter of international law, so that a failure to enact domestic legislation to implement a non-self-executing agreement renders the U.S. in default of its international obligations.³⁶ For many,

inability of sole executive agreements to supersede earlier federal legislation has evolved over time. *See, e.g.*, RESTATEMENT, *supra* note 5, § 303 cmt. j (noting in 1987 that the status of sole executive agreements in relation to earlier Congressional legislation “has not been authoritatively determined”); HENKIN, *supra* note 6, at 228 (noting in 1996 that whether a sole executive agreement prevails in the face of earlier Congressional legislation remains unresolved); ANALYSIS AND INTERPRETATION 93-95 (noting in 2002 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.”).

²⁸ Compare RESTATEMENT, *supra* note 5, § 115 reporters’ n.5 & cmt. c (1987) with Hathaway, *Presidential Power*, *supra* note 13, at 59-60 n.239.

²⁹ RESTATEMENT, *supra* note 5, § 115; HENKIN, *supra* note 6, at 228.

³⁰ 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* Hathaway, *Treaties’ End*, *supra* note 14, at 1255; Myres S. MacDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 196 (1945).

³¹ RESTATEMENT, *supra* note 5, § 111, Introductory Note, at 41; § 111(3); Hathaway, *Treaties’ End*, *supra* note 14, at 1318.

³² *See* RESTATEMENT, *supra* note 5, § 111, reporters’ n.5.

³³ HENKIN, *supra* note 6, at 201.

³⁴ *See generally* RESTATEMENT, *supra* note 5, § 111.

³⁵ RESTATEMENT, *supra* note 5, § 111, cmt. h & reporters’ n.5; § 115(1); § 301 cmt. a (noting that terminology used for international agreements is varied, and include treaty, convention, agreement, protocol, 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 6, at 203.

³⁶ *See generally* Hathaway, *Treaties’ End*, *supra* note 14, at 1317-19 (noting that to avoid placing the United States

this reality means little. Discussions of enforceability have consequently focused 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”³⁷ – in other words, if the international obligation is self-executing or when domestic lawmaking implements a non-self-executing international obligation.

That the President has the power to create binding international obligations is noteworthy in its own right, however, and should not be hastily dismissed. As will be discussed below, where the President validly exercises his powers to create international obligations, these obligations have been treated by the Supreme Court as self-executing, taking on the force of domestic law noted above (superseding state law, and superseding earlier federal legislation depending on the type of executive agreement).³⁸ Thus, as executive agreements have evolved in American jurisprudence, the distinct powers to (1) enter into an international obligation and (2) implement the obligation with the force of domestic law have become deeply intertwined.³⁹ Where the President enters an internationally binding agreement beyond his independent powers, the agreements remain no less internationally binding, but is simply non-self-executing and requires congressional action to implement.

C. The *Youngstown* Framework

Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁰ delineating three spheres of presidential power, is the framework within which to assess 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.”⁴¹ Ex ante congressional-executive agreements fall under this category.

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.⁴² 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.”⁴³

Sole executive agreements fall under the “zone of twilight” in which the President acts with congressional silence.⁴⁴ Assessing the President’s authority to enter a sole executive

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).

³⁷ *Id.* at 1317.

³⁸ See MacDougal & Lans, *supra* note 30, 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.”).

³⁹ See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 143-44 (distinguishing between these two powers and criticizing the way in which the Supreme Court has conflated the two in giving preemptive effect to sole executive agreements).

⁴⁰ 343 U.S. 579 (1952) (Jackson, J. concurring).

⁴¹ *Id.* at 635-36.

⁴² *Id.* at 637.

⁴³ *Id.*

⁴⁴ See RESTATEMENT, *supra* note 5, § 303 reporters’ notes 11; Curtis A. Bradley, *Unratified Treaties, Domestic*

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*.⁴⁵ 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.⁴⁶

If this seems contrary to the earlier explanation that the President may internationally bind the nation to commitments that are non-self-executing, it is worth noting that a country may invoke “manifest” violations of “a provision of its internal law regarding competence to conclude treaties” as invalidating the consent necessary to establish an internationally binding agreement.⁴⁷ So, an executive agreement that clearly reaches beyond the President’s powers in manifest violation of the separation of powers would violate U.S. “internal law” and therefore arguably not be internationally binding upon the United States. To avoid this result, non-self-executing executive agreements are typically self-consciously so, containing provisions indicating that their terms are subject to the availability of funds or domestic regulation.⁴⁸ These agreements do not purport to exercise powers the President lacks, and are internationally binding, non-self-executing commitments.

II. The Scope of Presidential Power to Enter Executive Agreements

Presidents have “achieved and legitimated an undisputed, extensive, predominant, in some respects exclusive, ‘foreign affairs power,’” but the scope and content of this power are unclear.⁴⁹ The power arises from the President’s enumerated Article II powers:⁵⁰ (1) as chief executive, (2) as Commander in Chief, (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 implemented.⁵¹ Whatever the extent of these powers, one clear limit is that all executive agreements are subject to the Constitution itself, and may not, for instance, violate the Bill of Rights.⁵²

This Part traces the contours of each of the enumerated powers as a starting point for understanding the scope of the President’s power to enter into executive agreements.⁵³ As has

Politics, and the U.S. Constitution, 48 HARV. INT’L L.J. 307, 322 (2007).

⁴⁵ See Hathaway, *Presidential Power*, *supra* note 13, at 58.

⁴⁶ 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 6, at 229; Hathaway, *Presidential Power*, *supra* note 13, at 58 (phrasing the limitation on the President’s power to enter sole executive agreements as follows: “the 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.”).

⁴⁷ Vienna Convention on the Law of Treaties, *supra* note 30, art. 46, § 1.

⁴⁸ *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. 12025 (“Implementation of this Agreement will be subject to the availability of appropriated funds and to the applicable laws and regulations of each country.”).

⁴⁹ HENKIN, *supra* note 6, at 41.

⁵⁰ See CRS, *supra* note 8, 89-92; HENKIN, *supra* note 6, at 36-45.

⁵¹ U.S. CONST. art. II, §§ 1-3.

⁵² See *Garamendi*, 539 U.S. at 417 n.9; RESTATEMENT, *supra* note 5, § 111 cmt. a; § 302; MacDougal & Lans, *supra* note 30, at 315-316.

⁵³ 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 paper 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

been observed, however, the enumerated powers “do not seem to convey anything approaching even the minimum powers everyone assumes the President to enjoy.”⁵⁴ What power the President does exercise – that is, the actual practice of executive agreements – will therefore be explored as well, particularly in light of the modern Supreme Court emphasis on “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution.”⁵⁵ This exploration concludes that although amorphous, the President’s independent constitutional power *alone* is unlikely to strongly support executive agreements relevant to climate change.

A. The President’s Enumerated Powers

The extent to which the President’s “take care” duty provides authority for executive agreements is somewhat controversial.⁵⁶ That the clause supports presidential authority to enter treaty executive agreements to ensure faithful execution of treaties is generally accepted, but there is a lack of clarity as to how far this duty extends. 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.⁵⁷

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.⁵⁸ The majority view takes an expansive reading of the President’s authority to take care that international laws are faithfully executed and finds that the clause sanctions agreements necessary to implement even non-self-executing treaties and to fulfill international obligations more generally,⁵⁹ but these conclusions are hotly contested by critics.⁶⁰

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.⁶¹ *Watts v. United States*, 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.⁶² 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

President’s authority to conclude sole executive agreements pursuant to this power.

⁵⁴ Prakash & Ramsey, *supra* note 25, 111 YALE L.J. at 233.

⁵⁵ 539 U.S. at 414.

⁵⁶ CRS, *supra* note 8, at 92; see Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 359-60 (2008); Van Alstine, *supra* note 25.

⁵⁷ *In re Neagle*, 135 U.S. 1 (1890); see CRS, *supra* note 8, at 92.

⁵⁸ See HENKIN, *supra* note 6, at 347 n.54.

⁵⁹ See RESTATEMENT, *supra* note 5, § 111 cmt. c; HENKIN, *supra* note 6, 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 30, at 248.

⁶⁰ See Swaine, *supra* note 56.

⁶¹ CRS, *supra* note 8, at 90-91; ANALYSIS AND INTERPRETATION, *supra* note 4, at 522; Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1, 13 (2003).

⁶² 1 Wash. Terr. 288 (1870); see also CRS, *supra* note 8, at 89.

agreements.⁶³

The President's executive power, which enjoys no benefit of textual detail in the Constitution,⁶⁴ 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 affairs⁶⁵ – merely to include the power to “make and enforce [] a temporary convention respecting [] territory,” this amorphous executive power in foreign affairs was later famously and broadly described in *United States v. Curtiss-Wright Export Corp.*, as “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”⁶⁶

The President's authority as “sole organ” of communications in foreign affairs derives in part from his power to receive ambassadors,⁶⁷ which impliedly incorporates the more expansive power to recognize (and accordingly, refuse to recognize, maintain or terminate relations with, and express neutrality towards) foreign governments.⁶⁸ This power as “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.”⁶⁹

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, but as the following discussion shows, these cases may not pave the way for as expansive a presidential power to enter sole executive agreements having status as U.S. law as many critics have assumed. In *United States v. Belmont* and *United States v. Pink*, the Court found preemptive over state law 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 establishment of normal diplomatic relations between the two countries.⁷⁰ 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 agreement that recognized another country, established diplomatic relations, and settled claims “may not be doubted.”⁷¹ The *Pink* Court confirmed, citing *Curtiss-Wright* in noting that “[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

⁶³ See Bradley, *supra* note 44, at 323 n.71; Ramsey, *supra* note 39, at 205-06.

⁶⁴ See Prakash & Ramsey, *supra* note 25, at 233 (noting the failure of scholarship to ground the foreign affairs powers in constitutional text).

⁶⁵ 1 Wash. Terr. 288 (1870); see also CRS, *supra* note 8, at 89.

⁶⁶ 299 U.S. 304, 320 (1936). That the President is “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 6, at 41.

⁶⁷ See HENKIN, *supra* note 6, 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).

⁶⁸ HENKIN, *supra* note 6, at 43, 220; CRS, *supra* note 8, 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); RESTATEMENT, *supra* note 5, § 303 cmt. g.

⁶⁹ See Prakash & Ramsey, *supra* note 25, at 242, 323.

⁷⁰ *United States v. Belmont*, 301 U.S. 324, 327 (1937) (“[N]o state policy can prevail against the international compact involved here.”); *United States v. Pink*, 315 U.S. 203, 231 (1942) (same).

⁷¹ 301 U.S. at 330.

relations.”⁷²

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*⁷³ and *American Insurance Ass'n v. Garamendi*.⁷⁴ These modern 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.⁷⁵ 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, and found “crucial” to its decision that Congress “implicitly approved the practice of claim settlement by executive agreement.”⁷⁶ 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.⁷⁷ The Court pointed to *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 “that the President's control of foreign relations includes the settlement of claims is indisputable.”⁷⁸

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.”⁷⁹ Read conservatively in the interest of assessing a strong legal foundation for presidential action, these cases do not suggest that the President's independent foreign affairs power alone supports executive agreements in areas relevant to climate change. All four cases addressed sole executive agreements regarding claims settlement specifically. *Belmont* and *Pink*, decided before the modern *Youngstown* understanding of presidential power, relied not only on the “sole organ” executive power described in *Curtiss-Wright*, but additionally on the presidential power to recognize foreign governments.⁸⁰ *Dames & Moore* and *Garamendi* move away from *Curtiss-Wright*'s broad grant of inherent power in favor of the *Youngstown* framework, and, critically, both rely on the historical practice of claims settlement through sole executive agreement as evidence of congressional acquiescence elevating the sole executive agreements at issue into the zone of greatest presidential power. This reliance on historical practice as grounds for legality calls for a review of the practice in executive agreements.

B. Historical Practice

As noted by the *Dames & Moore* Court, a “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II. Past practice does not, by

⁷² 315 U.S. at 229 (citation omitted).

⁷³ 453 U.S. 654 (1981).

⁷⁴ 539 U.S. 396 (2003)

⁷⁵ 453 U.S. at 664-65.

⁷⁶ *Id.* at 679-80.

⁷⁷ 539 U.S. at 405-06.

⁷⁸ *Id.* at 415 (quoting *Pink*).

⁷⁹ HENKIN, *supra* note 6, at 222.

⁸⁰ *See* CRS, *supra* note 8, at 91.

itself, create power, but 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.”⁸¹ This section therefore outlines the practice in executive agreements because, in effect, “in the area of foreign affairs, prior practice by the executive branch is itself one measure of constitutionality.”⁸²

Congressional-executive agreements make up the vast majority of executive agreements. Between 1990 and 2000, roughly 80% of all executive agreements were ex ante congressional-executive agreements.⁸³ Sole executive agreements, on the other hand, are relatively uncommon. Between 1946 and 1972, only 5.5% of the international agreements entered by the United States were based solely on the President’s authority.⁸⁴ From the Founding until the early 1900s, only two types of sole executive agreements were concluded, both grounded in the President’s executive and Commander in Chief powers: claims settlements and temporary agreements.⁸⁵ In the twentieth century, sole executive agreements have been used most commonly in military and foreign relations matters, ranging from minor formalities to more sweeping agreements, such as the 1945 Yalta agreement regarding post-war political reorganization.⁸⁶

The 1972 Case Act requires the President to report the text of any non-Article II international agreement to Congress within 60 days of the agreement’s entry into force.⁸⁷ A review of the State Department’s compilation of international agreements reported under the Case Act (which includes all types of executive agreements) 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%).⁸⁸ A more thorough empirical survey of executive agreements that cross-references multiple databases, largely corroborates these findings.⁸⁹ Professor Hathaway’s study reveals the following most common areas of executive agreements: defense (14%), trade (9%), scientific cooperation (6%), postal matters (6%), and debts (6%).⁹⁰

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 as 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 relating to climate change. The authority conveyed by existing Article II treaties and congressional authorizations will be important in providing support for such agreements.

⁸¹ 453 U.S. at 686 (internal quotation marks omitted)

⁸² Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1, 3 (2003). Such lack of textual and doctrinal support has stimulated intense criticism of the modern executive agreement power as “a bit of a constitutional embarrassment.” Ramsey, *supra* note 39, at 235.

⁸³ Hathaway, *Presidential Power*, *supra* note 13, at 14.

⁸⁴ ANALYSIS AND INTERPRETATION, *supra* note 4, at 517.

⁸⁵ Hathaway, *Presidential Power*, *supra* note 13, at 25 n.90.

⁸⁶ RESTATEMENT, *supra* note 5, § 303 reporters’ n.11; CRS, *supra* note 8, at 88; Clark, *supra* note 25, at 1581-82.

⁸⁷ 1 U.S.C. § 112b(b).

⁸⁸ Based on the author’s calculation of the 1360+ agreements reported by the State Department between 1982 and 2008. Office of the Legal Adviser, U.S. Department of State, Int’l Agreements Other than Treaties Reported to Congress under Case Act, <http://www.state.gov/s/l/treaty/caseact/>.

⁸⁹ Hathaway, *Presidential Power*, *supra* note 13, at 12 Table 1.

⁹⁰ *Id.*

III. Possible Grounds for Treaty-Executive Agreements

Having outlined the President's power to enter executive agreements and finding them likely insufficient to independently support executive agreements relevant to climate change, this part and the next outline possible grounds for executive agreements that rely on the additional legal support of Article II treaties and federal legislation. In 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 its existing treaty obligations. Although the UNFCCC is not considered self-executing, it, along with the domestic legislation under which its reporting requirements have been met, may support an executive agreement regarding MRV.

The U.S. is internationally bound by the Convention, but no new domestic legislation was implemented after the UNFCCC's ratification to give it domestic effect. As a ratified treaty, the UNFCCC is supreme law of the land, but as a non-self-executing treaty, it cannot be judicially enforced without implementing federal legislation.⁹¹ The single commentator that has analyzed the issue in the climate change context 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," the President may not "point to [the UNFCCC] as authority to implement new executive agreements on climate change under domestic law."⁹²

The UNFCCC should not be so lightly dismissed, however. The authority the treaty lends to "enter into a new international obligation" is important. It can be relied on, together with the President's foreign affairs powers and his role as sole organ of communications between the U.S. and the international community, as convincing legal authority to *enter* into an executive agreement pursuant to UNFCCC obligations. As for *execution*, MRV is one area in which domestic implementation of an international obligation under existing laws is possible.

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," and a description of the country's mitigation actions and plans to implement the Convention.⁹³ Specifically citing the requirements of Articles 4 and 12 of the UNFCCC, the U.S. has regularly submitted Climate Action Reports that include the requisite GHG inventory and description of U.S. mitigation actions.⁹⁴ The U.S. has also complied with revised technical methodologies and guidelines adopted in subsequent UNFCCC meetings.⁹⁵

⁹¹ See HENKIN, *supra* note 6, at 203.

⁹² Purvis, *supra* note 20, at 1048-49.

⁹³ U.N. Framework Convention on Climate Change arts. 4, 12, May 9, 1992, 1771 U.N.T.S. 164.

⁹⁴ E.g., Dep't of State, Fourth Climate Action Report to the U.N. Framework Convention on Climate Change (July 2007), available at <http://www.state.gov/g/oes/rls/rpts/car/>.

⁹⁵ See *id.* at 18 (noting that the greenhouse gas inventory was calculated using 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); Dep't of State Notice, Preparation of Second U.S. Climate Action

U.S. compliance with the UNFCCC's reporting obligations, despite the non-self-executing nature of the treaty, suggests that existing domestic legislation was adequate to implement these obligations. 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.⁹⁶ With respect to reporting, the Act ordered the Energy Information Administration in consultation with the Environmental Protection Agency to develop an inventory of GHG emissions, and to annually update and analyze the inventory using available data.⁹⁷ 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."⁹⁸

The Act was signed into law on October 24, 1992, shortly after the Senate's October 7 ratification of the UNFCCC. 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. Therefore, 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.⁹⁹

B. The Convention on International Civil Aviation

A sectoral approach to emissions reductions would implement targets or harmonized standards for specific sectors as a supplement to nationally binding economy-wide emissions targets.¹⁰⁰ Aviation is one sector in which the President can probably enter an executive agreement committing the country to such emissions reduction measures.

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.¹⁰¹ Most notably,

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).

⁹⁶ See, e.g., Energy Policy Act, 42 U.S.C. § 13388 (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); *Id.* § 13381(6).

⁹⁷ *Id.* § 13385(a).

⁹⁸ 42 U.S.C. § 13382(a)(2).

⁹⁹ 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 Secretariat. 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 (World Resources Institute June 2009). What's more, 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. Along the same lines, whether the President can internationally bind the U.S. to emissions reduction targets established through its own domestic legislation is an area that requires exploration in future work.

¹⁰⁰ See, e.g., Rob Bradley et al., *Slicing the Pie: Sector-based Approaches to International Climate Agreements* (World Resources Institute 2007), available at <http://pdf.wri.org/slicing-the-pie.pdf>.

¹⁰¹ E.g., Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. TREATY DOC. NO. 106-45; see also Hathaway, *Treaties' End*, *supra* note 14, at 1261-62 n.57.

the U.S. 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.¹⁰² 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, standards, procedures”¹⁰³

Multiple treaty executive agreements have been entered pursuant to the Aviation Convention, its annexes, and ICAO resolutions.¹⁰⁴ For instance, the U.S., 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.¹⁰⁵ At the level of domestic implementation, federal agencies, principally the Federal Aviation Administration, have routinely promulgated regulations pursuant to U.S. international obligations to harmonize domestic standards with the international standards issued by ICAO.¹⁰⁶

The ICAO’s Committee on Aircraft Engine Emissions is charged with developing specific standards for emissions. 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,”¹⁰⁷ 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 standards, the *U.S. now has an obligation [footnote: Based on the Chicago Convention on International Aviation December 7, 1944, to which the United States is one of the signatory nations] 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.*¹⁰⁸

The status of the Convention on International Civil Aviation as an Article II treaty and the practice of entering executive agreements pursuant to this treaty, which are then domestically implemented by agencies with existing authority, provide fairly safe legal grounds for the

¹⁰² Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

¹⁰³ *Id.* at art. 37.

¹⁰⁴ *E.g.*, Agreement for Promotion of Aviation Safety, U.S.-Ireland, Feb. 5, 1997, T.I.A.S. No. 12831.

¹⁰⁵ Agreement to ban smoking on international passenger flights, U.S.-Canada-Australia, Nov. 1, 1994, T.I.A.S. No. 12578. *See* Order on Discussion Authority Regarding a Smoking Ban on Transatlantic Flights, 60 Fed. Reg. 6343-04 (Feb. 1, 1995).

¹⁰⁶ *See, e.g.*, Airspace Reclassification, 56 Fed. Reg. 65638 (Dec. 17, 1991) (rule 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, 71 Fed. Reg. 78596-01 (Dec. 29, 2006); Pilot, Flight Instructor, and Pilot School Certification, 74 Fed. Reg. 42500-01 (Aug. 21, 2009).

¹⁰⁷ Clean Air Act § 231, 42 U.S.C. 7571(a)(2)(A).

¹⁰⁸ Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 47 Fed. Reg. 58462, 58464 (Dec. 30, 1982) (emphasis added).

President in the aviation sector. It would be well within precedent for the President, pursuant to U.S. obligations under the Aviation Convention, to internationally bind the U.S. to aviation emissions standards and for the EPA, pursuant to its Clean Air Act authority, to regulate based on this obligation.

IV. Possible Grounds for Ex Ante Congressional-Executive Agreements

Several pieces of legislation may 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 in some instances, these agreements will require congressional cooperation to implement.

A. The Clean Air Act

The Clean Air Act ("CAA") likely does not delegate any authority to the President to enter international agreements relating to climate change, although the EPA's existing authority under the CAA 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-depleting substances,¹⁰⁹ 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 the regulations applicable within the United States."¹¹⁰ It is clear from the structure and language of the CAA that Congress intended Title VI for protection of the stratosphere in the context of the ozone layer problem addressed by the Montreal Protocol. Accordingly, any attempt to enter into a climate change executive agreement citing authorization under this section would rest on weak legal ground.¹¹¹

The Title VI language aside, there has been some suggestion that because EPA now has authority to regulate greenhouse gases under the CAA,¹¹² 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.¹¹³ 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 and uncertain – particularly where the President relies on generally-worded, implicit authorizations. A more legally sound approach would rely on any implicit authorization from the Clean Air Act as mere ancillary authority for executive agreements that rest on other more sound legal bases.

¹⁰⁹ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989).

¹¹⁰ Clean Air Act § 617, 42 U.S.C. 76761p(a).

¹¹¹ Compare Purvis, *supra* note 20, at 1042 (noting that whether this provision authorizes international climate agreements "rest[s] on whether authority to enter negotiations to 'protect the stratosphere' includes the authority to negotiate agreements that protect the stratosphere and other parts of the atmosphere equally").

¹¹² Following *Massachusetts v. EPA*, 549 U.S. 497 (2007), and EPA's proposed, and nearly finalized, endangerment finding for greenhouse gases.

¹¹³ See Purvis, *supra* note 20, at 1043-44.

Although beyond the present scope of this paper, it seems likely that the Clean Air Act's coverage of greenhouse gases 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 Clean Air Act 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 activity¹¹⁴ or to a view that resists presidential control of agency rulemakings.¹¹⁵ The more legally safe view in this case, however, should acknowledge the lack of congressional authorization for such presidential action and the general deference shown to an agency's broad rulemaking discretion¹¹⁶ as reasons for concluding that the President probably 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. Many agreements with the same country are usually made pursuant to a single umbrella agreement, itself an executive agreement, that establishes general principles for the cooperative relationship. 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 foreign countries," and charges the Secretary of State with coordination and oversight of international science and technology agreements.¹¹⁷ 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."¹¹⁸ To carry out the purposes of the Institute, the President is directed to "make and perform contracts and other agreements with any individual, institution, . . . and with governments or government agencies, domestic or foreign."¹¹⁹ These broad statutory authorizations would likely apply to cooperative research relating to adaptation and renewable energy technology, among other potentially relevant areas.

A 1988 umbrella agreement with Japan on cooperation in research and development in science and technology cited the legislative delegation in the Foreign Relations Authorization Act, 22 U.S.C. § 2656d, along with the "President's constitutional powers," as its legal authority. The agreement established a "policy framework" for the cooperative relationship, a management mechanism to oversee cooperation, and provided for the conclusion of future "implementing

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

¹¹⁵ 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).

¹¹⁶ See, e.g., *Bargmann v. Helms*, 715 F.2d 638 (D.C. Cir. 1983).

¹¹⁷ 22 U.S.C. §§ 2656c(a), 2656d.

¹¹⁸ 22 U.S.C. §§ 3502-03.

¹¹⁹ *Id.* §3504.

arrangements” under the Agreement “to determine the specific terms of cooperation.”¹²⁰ The agreement identified global environment and joint database development as areas for cooperation and information exchange as a form of cooperation.¹²¹ More than fifteen executive agreements have been entered pursuant to this umbrella agreement.¹²²

Another example of an umbrella agreement on scientific cooperation – this one not citing any legal authority, only noting the President’s joint communiqué on the establishment of diplomatic relations with China – is one between U.S. and China, signed and entered into force on January 31, 1979. The agreement states broad principles of cooperation, establishes a U.S.-China Joint Commission on Scientific and Technological Cooperation, and provides for “[s]pecific accords implementing this Agreement [that] may cover the subjects of cooperation, procedures to be followed, treatment of intellectual property, funding, and other appropriate matters.”¹²³ A whole 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,¹²⁴ 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,¹²⁵ 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.¹²⁶

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 in science and technology cooperation. The umbrella agreements, 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 in climate change negotiations, 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 sequestration¹²⁷ and geo-engineering, for instance.

¹²⁰ Agreement on Cooperation in Research and Development in Science and Technology Art. VIII, U.S.-Japan, June 20, 1988, T.I.A.S. No. 12025.

¹²¹ *Id.* Annex 1.

¹²² Based on author’s calculation from Oceana database.

¹²³ Agreement on Cooperation in Science and Technology, U.S.-China, Jan. 31, 1979, 30 U.S.T. 35, 1150 U.N.T.S. 349.

¹²⁴ 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.

¹²⁵ 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.

¹²⁶ Protocol concerning scientific and technical cooperation in the earthquake and volcano sciences, U.S.-China, Oct. 16, 2009.

¹²⁷ Mass. Inst. of Tech., *Retrofitting of Coal-Fired Power Plants for CO₂ Emissions Reductions* 18 (Mar. 23, 2009) (noting that “necessary emissions reductions cannot be achieved without emissions reductions from existing coal-fired power plants and recommending joint research programs between U.S. and China to research and develop carbon capture and sequestration technology.”).

C. Development Assistance

As explained above, the President may not usurp Congress's unique spending power by legally binding the United States to the commitment of funds.¹²⁸ As a result, many executive agreements provide that activities under the agreement are contingent upon available 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 are solely about 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 noting several provisions of the International Development and Food Assistance Act of 1977 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."¹²⁹ The President is also authorized to "utilize the resources and abilities of all relevant [federal] agencies" in providing assistance to developing countries to:

"support 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."¹³⁰

On the subject of energy resources, Congress delegated to the President authority 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.¹³¹ 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.¹³²

These provisions relating to natural resources, reforestation, energy conservation, and renewable energy, and authorizing assistance to build capacity, strengthen institutions, and engage in scientific exchange are broadly-worded and 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 future 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.¹³³

¹²⁸ See *supra* Part I.C.

¹²⁹ 22 U.S.C. § 2151p(b).

¹³⁰ *Id.* § 2151p-1(c)

¹³¹ *Id.* § 2151d(b)(1).

¹³² *Id.* § 2151d(b)(2).

¹³³ Congress's spending power aside, the Secretary of the Treasury is authorized by statute to designate officials

D. Other Possible Authorizations and Considerations

This section makes a few observations that may guide decisions on whether and how to enter into executive climate change agreements. First, framework or umbrella agreements appear to be a common form for executive agreements, as evidenced in the discussion of scientific and technological cooperation agreements. This may reflect a presumption that the President's broad executive powers as "sole organ" of the nation allow him to paint with broad strokes the foreign policy of a particular area.

One notable example is a 1987 agreement with Iraq on commercial, economic, and technical cooperation. The State Department explanation accompanying the agreement describes the agreement as a "broad, non-specific 'umbrella' agreement which can be the basis for additional agreements" and further explains that the agreement "does not commit either side to specific actions but provides a structure for commercial contacts between entities within the two countries."¹³⁴ For authority, the agreement simply cited (1) the President's Article II powers and (2) the Department of Commerce's statutory authority under 15 U.S.C. 1512,¹³⁵ which merely states that "it is the province and duty of [the Department of Commerce] to foster, promote, and develop the foreign and domestic commerce . . . of the United States."¹³⁶

Second, most, perhaps all, executive agreements limit the agreement's life, typically to five years, with provisions for renewal thereafter. Although this self-limitation does not arise from any constitutional directive, the practice appears to be uniform and may arise in part from a notion that a "temporary" agreement is a more limited, and hence more acceptable, use of presidential power. Interestingly, many of these agreements provide that expiration or termination does not affect the implementation of projects or programs undertaken pursuant to the agreement.¹³⁷

Third, the Endangered Species Act 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."¹³⁸ Although it is not clear how far this 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.¹³⁹

Finally, although far from obvious, the National Environmental Policy Act ("NEPA") may provide ancillary support for some executive climate change agreements. In an executive agreement with Canada concluded to regulate transboundary movement of hazardous waste

within the Treasury Department to "disburse public money available for expenditure by an executive agency." 31 U.S.C. § 3321(a). 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. It is possible, then, that 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, including possibly disbursing those funds in executive agreements.

¹³⁴ Commercial, economic, and technical cooperation agreement, U.S.-Iraq, Aug. 26, 1987, T.I.A.S. No. 12020. The Oceana database shows no later agreements entered pursuant to this one.

¹³⁵ *Id.*

¹³⁶ 15 U.S.C. 1512.

¹³⁷ *E.g.*, Agreement on Cooperation in Research and Development in Science and Technology Arts. IX, X, U.S.-Japan, June 20, 1988, T.I.A.S. No. 12025.

¹³⁸ Endangered Species Act, 16 U.S.C. § 1537(b)(2).

¹³⁹ More than 500 species living in foreign countries are listed by the Endangered Species Act as endangered or threatened. Some of these will surely be detrimentally affected by climate change. *See* Fish & Wildlife Service, Species Report, at http://ecos.fws.gov/tess_public/SpeciesReport.do?lead=10&listingType=L.

pursuant to the Resource Conservation and Recovery Act (“RCRA“), the legal authority cited for concluding the agreement, aside from RCRA itself, was: (1) the President’s constitutional power “to conduct foreign regulations,” (2) the Secretary of State’s statutory authority to manage foreign affairs under 22 U.S.C. 2656,¹⁴⁰ and (3) NEPA, in particular its provision directing all federal agencies to:

“recognize 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.”¹⁴¹

The strength of this provision as ex ante authorizing legislation is questionable due to its vagueness, but it is nevertheless worth noting as ancillary evidence of congressional acquiescence in “international cooperation” for GHG emissions mitigation.

V. Conclusion

Subject to political considerations, the President can probably submit any climate agreement reached at Copenhagen and beyond as an ex post congressional-executive agreement for majority vote of both houses of Congress, rather than as an Article II treaty. The possibility of political backlash if a comprehensive climate agreement is submitted outside of the Article II process, however, invites exploration of other avenues to move the ball forward.

The President’s foreign affairs powers are the starting point. The broad executive power, and the related power as sole organ of communications in foreign relations are relevant and persuasive authority for action in areas where the exchange of information is important. In addition to these inherent constitutional powers, the President may also 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 ancillary support from the Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act, as legal authority for entering into a variety of executive agreements. Some of these agreements may need funding to become implemented, while others will be self-executing pursuant to the Clean Air Act and the Energy Policy Act.

Together, this suite of legal support may sustain executive agreements relating to MRV and information sharing, aviation emissions, cooperation in research and development, and capacity-building for developing countries. This survey identifies some of the key areas most relevant to climate negotiations and is by no means comprehensive, or intended to present treaty executive and ex ante congressional-executive agreements as the sole or ideal means of making international commitments in climate change. In light of the potential difficulty of getting an international climate agreement approved under the Article II process, however, these avenues for making binding international commitments may be helpful as interim or supplemental measures demonstrating U.S. willingness to take action in the climate change arena.

¹⁴⁰ 22 U.S.C. § 2656 (“The Secretary of State shall perform such duties as shall . . . [be] intrusted 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.”).

¹⁴¹ National Environmental Policy Act, 42 U.S.C. 4322(2)(F).