

# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

November 3, 2016

The Honorable John Kerry  
Secretary of State  
U.S. Department of State  
2201 C Street NW  
Washington, DC 20520

Dear Secretary Kerry:

With respect to the upcoming United Nations Convention on Climate Change 22<sup>nd</sup> Conference of the Parties (COP-22) in Marrakech, Morocco, we write to provide important context to the United States' commitment to the Paris Agreement and clarify its meaning for involved parties. We are concerned the administration has not been forthright in acknowledging the legal limitations of the president's domestic climate actions, primarily the Clean Power Plan, and the pathway the administration has taken to join the Agreement. We urge you to be candid with parties to the Agreement to preserve the diplomatic credibility of the United States.

It is well documented that Paris Agreement drafters sought to produce an agreement that would not trigger involvement of the United States Senate under Article II of the U.S. Constitution. In the lead up to the final negotiations, French President Francois Hollande stated, "We must find a formula which is valuable for everybody and valuable for the U.S. without going to the Congress."<sup>1</sup> Whether or not the final Agreement achieved this outcome, there is no disagreement that bypassing the U.S. Congress for convenience has consequences. Given the United States' central role to the durability of this Agreement, these consequences warrant a clear understanding by invested parties.

On September 3, 2016, President Obama deposited an instrument of acceptance of the Paris Agreement on behalf of the United States. His acceptance was formalized using limited authority referred to as "sole executive agreement" authority resulting in nothing more than a non-legally binding, political commitment.<sup>2</sup> This form of acquiescence is one of the lowest forms of commitment the United States can make and still be considered a party to an agreement. Expert witness testimony before the United States Senate Committee on Environment and Public Works explained that as a matter of law political commitments are "no different than the

---

<sup>1</sup> The Guardian, "Climate deal must avoid US Congress approval, French minister says" (June 1, 2015), available at <https://www.theguardian.com/world/2015/jun/01/un-climate-talks-deal-us-congress>.

<sup>2</sup> Paris Agreement, "Status of Ratification" (see United States of America ratification acceptance), available at [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php).

President giving a speech, or stating at a news conference,” he will take certain actions.<sup>3</sup> The Congressional Research Service, has also explained that such “non-legal arrangements do not have the effect of modifying participants’ existing legal obligations under domestic statutes and international legal agreements.”<sup>4</sup>

Most importantly, joining international agreements using “sole executive agreement authority” leaves the door open for any future administration to alter its course. Previous administrations have typically reserved this type of commitment for less controversial subjects with a narrow application.<sup>5</sup> Understanding this is especially important in the context of climate change policies, because congress’s unwillingness to support the president’s international efforts is not the result of gridlock – it is the result of explicit opposition.

The administration’s awareness of these vulnerabilities is why the first course of action was through legislative mandate. As you know, in 2009, the administration enjoyed a Democrat majority in both the U.S. House and the U.S. Senate. Despite that political advantage, efforts to control carbon dioxide emissions through cap and trade legislation failed when then-Democrat Majority Leader Harry Reid decided to not take up the legislation for consideration.<sup>6</sup>

This Congress has been very clear in opposing the president’s climate change policies that have taken the form of administrative regulations and are centered on the Clean Power Plan. Leading up to the 21st Conference of the Parties (COP-21) meeting in Paris, Senate staff met with numerous embassy representatives, informing them of congressional opposition and discussing legal vulnerabilities of the president’s regulatory-based plan.<sup>7</sup> Three resolutions were introduced in the Senate formalizing opposition to the Paris Agreement if it was not submitted to the Senate for advice and consent.<sup>8</sup> In December, bipartisan majorities in both the U.S. Senate and the U.S. House passed a Resolution of Disapproval that rejected the Clean Power Plan.<sup>9</sup>

---

<sup>3</sup> Professor Julian Ku, U.S. Senate Environment and Public Works Committee hearing, “Examining the International Climate Negotiations,” November, 18, 2015, available at: [http://www.epw.senate.gov/public/\\_cache/files/29525f03-9fc4-4112-9488-701f3dc1e8d1/ku-testimony.pdf](http://www.epw.senate.gov/public/_cache/files/29525f03-9fc4-4112-9488-701f3dc1e8d1/ku-testimony.pdf).

<sup>4</sup>Jane Leggett, “International Climate Change Negotiations: What to Expect in Paris, December 2015,” Congressional Research Service (November 27, 2015), available at:

<http://www.crs.gov/Reports/R44288?source=search&guid=09c12915ba014ac3acd541aa18c3bf12&index=4>

<sup>5</sup> Memorandum from Susan Chesser, Information Research Specialist, to Hon. Earl Blumenauer, U.S. Representative, “Multilateral Executive Agreements 1985-2014” (January 30, 2015).

<sup>6</sup>Steven Power, “Senate Halts Effort to Cap CO2 Emissions”, Wall Street Journal (July 23, 2010), available at: <http://www.wsj.com/articles/SB10001424052748703467304575383373600358634>.

<sup>7</sup> Jean Chemnick, “Capitol Hill messaging foreign embassies ahead of Paris talks”, E&E News (August 25, 2015), available at: <http://www.eenews.net/stories/1060023880>.

<sup>8</sup>S. Res. 290, 114<sup>th</sup> Cong. (2015), available at: <https://www.congress.gov/bill/114th-congress/senate-resolution/290>,

S. Res. 329, 114<sup>th</sup> Cong. (2015), available at: <https://www.congress.gov/bill/114th-congress/senate-resolution/329?q=%7B%22search%22%3A%5B%22resolution+climate+change%22%5D%7D&resultIndex=6>,

S. Con. Res. 25, 114<sup>th</sup> Cong. (2015), available at: <https://www.congress.gov/bill/114th-congress/senate-concurrent-resolution/25?q=%7B%22search%22%3A%5B%22resolution+climate+change%22%5D%7D&resultIndex=7>.

<sup>9</sup> S.J. Res. 23, 114<sup>th</sup> Cong. (2016), available at: <https://www.congress.gov/bill/114th-congress/senate-joint-resolution/23>,

S.J. Res. 24, 114<sup>th</sup> Cong. (2016), available at: <https://www.congress.gov/bill/114th-congress/senate-joint-resolution/24>.

In February, the Supreme Court of the United States issued a stay against the Clean Power Plan indicating that the Court too questions whether the president has the authority to implement the Clean Power Plan.<sup>10</sup> Administrative officials have tried to downplay the significance of the Court's action, but leading up to the COP-21 lead U.S. State Department negotiator Todd Stern was candid in describing the importance of the Clean Power Plan. In a Declaration to the United States Court of Appeals for the District of Columbia he stated:

I believe that the ambition and implementation of many other countries' current and future emission control actions depends significantly on the understanding by their leaders of the seriousness of the US commitment to address emissions. For many countries, willingness to take action depends on collective trust that the major emitters are taking action. If a stay of the Clean Power Plan is granted, there is a real threat that some other countries, including major emitters, might reduce the intensity or pace of their actions or even fail to achieve their commitments.<sup>11</sup>

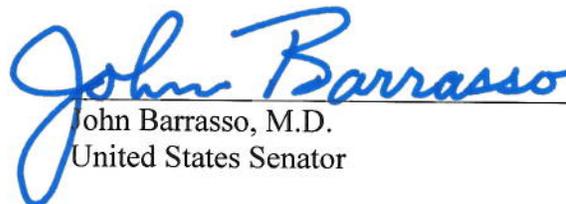
Paris Agreement parties relying on fulfillment of promised U.S. climate actions should be fully aware that the administration's "commitment" is opposed by the majority of congress, its legal soundness is questioned by the U.S. Supreme Court, and, under the best of circumstances, the country will fall short of meeting the 26 to 28 percent reduction by a range of forty-five to sixty percent.<sup>12</sup> Most importantly, any future administration will have numerous options to forego President Obama's political commitments under the Paris Agreement and the fact that it will soon be in force is of no consequence.

The UNFCCC's rush to ratification leaves the final Paris Agreement and any associated actions vulnerable to a host of legal challenges and political shifts from parties who are critical of the Agreement today or may become critical of the Agreement moving forward. Negotiators have clearly prioritized making an agreement for the sake of an agreement, which may ultimately undermine the durability of their actions. This is especially true for the commitments made on behalf of the United States.

Sincerely,



James M. Inhofe  
United States Senator



John Barrasso, M.D.  
United States Senator

---

<sup>10</sup>Order in pending case, Chamber of Commerce, Et Al. V. EPA, Et Al. (Sup. Ct. 2016), available at: [https://www.supremecourt.gov/orders/courtorders/020916zr3\\_hf5m.pdf](https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf).

<sup>11</sup>Declaration of Todd Stern, State of West Virginia, Et Al. V. EPA, Et Al. (App. Ct. DC CC) available at <http://www.globalwarming.org/wp-content/uploads/2015/12/TS-BS.pdf>.

<sup>12</sup>Chamber of Commerce, "Mind the Gap: The Obama Administration's International Climate Pledge Doesn't Add Up (August 10, 2015), available at: <http://www.energyxxi.org/mind-gap-obama-administrations-international-climate-pledge-doesnt-add>.



David Vitter  
United States Senator



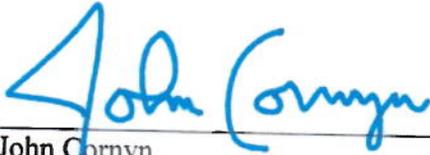
Shelley Moore Capito  
United States Senator



Michael Enzi  
United States Senator



Roger Wicker  
United States Senator



John Cornyn  
United States Senator



Rand Paul  
United States Senator



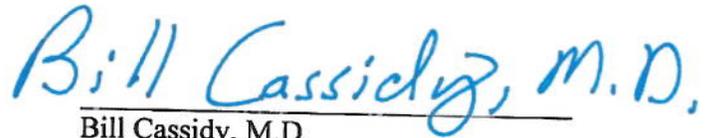
John Boozman  
United States Senator



Deb Fischer  
United States Senator



M. Michael Rounds  
United States Senator



Bill Cassidy, M.D.  
United States Senator



Orrin Hatch  
United States Senator



Mike Lee  
United States Senator

CC: The Honorable Gina McCarthy  
Environmental Protection Agency

Christy Goldfuss  
Council on Environmental Quality

Dr. Jonathan Pershing  
United States Department of State