

Testimony of
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“Examining the International Climate Negotiations”
Hearing Before the Environment and Public Works Committee
United States Senate
November 18, 2015

Introduction and summary

I would like to thank the Chairman, the Ranking Member, and the distinguished members of this Committee for inviting me to participate in today’s hearing.

My name is Julian Ku. I am a professor of law at Hofstra University in New York teaching both constitutional and international law subjects. Much of my academic research has focused on the relationship between international agreements and the U.S. Constitution.

My testimony today will consider requirements and limitations under the Constitution for an agreement relating to climate change arising out of next month’s climate change conference in Paris.

My testimony today has four parts.

First, I will review the different ways that the United States can enter into international agreements under the U.S. Constitution. Second, I will consider whether and under what circumstances the Paris Agreement must be approved by two-thirds of the U.S. Senate under Article II of the Constitution. Third, I will consider whether and under what circumstances the Paris Agreement can be concluded as an executive agreement. Finally, I will consider the implications of concluding the Paris Agreement as a political commitment rather than as a legally binding international agreement.

To briefly summarize my conclusions:

I conclude that if the Paris Agreement contains legally binding emissions targets binding, the agreement should be submitted to the Senate for approval as a treaty. I also conclude that if the Paris Agreement is merely a political commitment that is not binding under international law, the Senate and Congress do not have to approve such a commitment. However, it is crucial that the United States government declare which parts of the Paris Agreement are legally binding, and which parts are not. This is necessary in order to make clear to the world that a future U.S.

president is not legally bound by the Paris Agreement, or at least by those particular provisions of the Paris Agreement which are merely political commitments. The Senate can play an important role by forcing clarity and transparency from the Administration on the legal nature of the promises it has made.

I. Background: The Constitution and International Agreements

The text of the U.S. Constitution identifies only one method for concluding international agreements. In Article II, the President has the power to “to make Treaties, provided two thirds of the Senators present concur.” Many important international agreements, such as the United Nations Charter, have been concluded by the United States as treaties pursuant to Article II.

The text of the Constitution also refers to international agreements that are not treaties,¹ and as a matter of historical practice, the U.S. government has frequently made international agreements outside of the Article II process. Sometimes, this occurs when Congress pre-authorizes the President to make executive agreements pursuant to its domestic constitutional authority, and then reserves the right to approve such agreements afterward. The most recent example of this process occurred when Congress granted trade promotion authority to President Obama before he concluded the Trans Pacific Partnership trade agreement.²

In other situations, the President will conclude international agreements without getting any authorization from Congress, or without seeking any Congressional approval. These “sole” executive agreements have been quite common as a matter of historical practice. One of the most famous sole executive agreements was the “Algiers Accords” between the U.S. and Iran that resolved the Iran Hostage crisis.

There is little doubt today that all three forms of international agreements – treaties, congressional-executive agreements, and sole executive agreements – are constitutional. But there remains wide disagreement on the degree to which these three forms of international agreements are interchangeable. In other words, could the President choose to conclude an arms control treaty pursuant to a sole executive agreement? Do trade agreements like the Agreement creating the World Trade Organization have to receive approval from two-thirds of the Senate? This debate over interchangeability intersects directly with the legal form that the Paris Climate Change Agreement must take. In general, scholars and courts have agreed that treaties and congressional-executive agreements can be interchangeable in many circumstances, but that sole executive agreements can only be used in much more narrow and limited circumstances.

¹ See U.S. Const. art. I, § 10 (“No State shall enter into any Treaty, Alliance, or Confederation...”)

² See Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 129 STAT. 320, §103(b) (June 29, 2015).

It is also worth noting that in some circumstances, the President may make a “political commitment” to another country. Such a commitment has no legal force, either under international or U.S. law. Such commitments are also common through U.S. history. Most recently, the U.S., Iran, and five other countries entered into a “Joint Comprehensive Plan of Action” to with respect to Iran’s nuclear program. The JCPOA is a political commitment that does not by itself bind the U.S. under international law.

II. Climate Change and Article II Treaties

While it has not been finalized, we can already say that the Paris Agreement will be a multilateral international agreement that will include almost every country in the world. The Paris Agreement will be the final outcome of a process set in motion by the Conference of State Parties to the United Nations Framework Convention on Climate Change. The UNFCCC parties (of which the United States is one) agreed in 2011 “to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”³ This “protocol, another legal instrument, or agreed outcome with legal force” is the pending Paris Agreement.

It is likely that the Paris Agreement will require states to make promises to reduce greenhouse gas emissions in the form of “nationally determined mitigation contributions.” Press reports suggest that many other parties to the Paris Agreement, especially in Europe, would like to make these obligations legally binding.⁴ If the outcome of the Paris Conference is to make these promises to reduce emissions legally binding, it is my view that the Paris Agreement must be submitted to the Senate for approval as a treaty under Article II.

Although the Constitution does not require that every international agreement be approved under the Article II process, historical practice and precedents should guide the President and Senate in determining what form an international agreement addressing climate change should take. From the outset of international efforts to create agreements to tackle climate change in the 1980s, various U.S. presidents and the Senate have used the Article II process.

The UNFCCC itself was approved under Article II, setting an important precedent for all future climate change-related international agreements. Most importantly, during the Senate’s consideration of the UNFCCC, the Senate Foreign Relations Committee specifically asked the then-Bush Administration whether subsequent agreements concluded under the UNFCCC containing “targets and timetables to limit emissions” would be submitted to the Senate. The Bush Administration responded:

³ <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf#page=2>

⁴ *See, e.g.*, “Paris climate talks not just hot air, France tells U.S.,” Reuters (November 11, 2015) (quoting France’s President as saying “If the agreement is not legally binding, there won’t be an agreement, because that would mean it would be impossible to verify or control the undertakings that are made.”)

If such a protocol were negotiated and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate.⁵

The report by the Senate Foreign Relations Committee recommending approval of the UNFCCC made clear that it had the same expectation.⁶ Thus, we can say that the Senate's approval of the UNFCCC was made with an assurance that the protocols and agreements made pursuant to the UNFCCC, especially those with targets and timetables for reduction in emissions, would be submitted to the Senate under Article II. The Paris Agreement would qualify as an agreement made pursuant to the UNFCCC.

To be sure, this inter-branch interaction from 1992 involved a different president and a different Congress. But brushing aside decades of executive branch practice and assurances would undermine the ability of the two branches to cooperate in the process of making international agreements in the future. For this reason, the 1992 assurances as well as the general practice with respect to multilateral environmental agreements, leads me to conclude that a Paris Agreement with legally binding emissions reduction "targets or timetables" should be submitted to the Senate as an Article II treaty.

III. Climate Change and Executive Agreements

Some scholars and advocates have argued that a climate change agreement in Paris can be concluded as an executive agreement instead of as an Article II treaty.⁷ It is important to distinguish between the two types of executive agreements when considering this view.

A. Congressional-Executive Agreement

First, some scholars argue that an agreement, including one with legally binding emissions reductions, can be concluded as a congressional-executive agreement.⁸ In other words, Congress as a whole (and not just the Senate) could pass new legislation to authorize such an agreement or to approve the agreement after the fact. As I explained above, I believe that if the Paris Agreement contains legally binding emissions reduction "targets or timetables," the Agreement should be submitted to the Senate under Article II due to past practice and historical precedents.

⁵ Hearing, *U.N. Framework Convention on Climate Change (Treaty Doc. 102-38)*, Committee on Foreign Relations, U.S. Senate, 102nd Cong., 2d Sess., September 18, 1992, pp. 105–106.

⁶ S. Exec. Rept. 102-55, 102d Cong., 2d Sess., 1992, p. 14.

⁷ See, e.g., Daniel Bodansky, "Legal Options for U.S. Acceptance of A New Climate Change Agreement," Center for Climate and Energy Solutions, May 2015; David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?* 39 HARV. ENV'T'L L. REV. 515 (2015).

⁸ See, e.g., Daniel Bodansky, "Legal Options for U.S. Acceptance of A New Climate Change Agreement," Center for Climate and Energy Solutions, May 2015; David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?* 39 HARV. ENV'T'L L. REV. 515 (2015).

But the line between treaties and congressional-executive agreements remains contested. Thus, it is possible that the Administration could adopt legally binding emissions targets through a congressional-executive agreement. This process would require a new Act of Congress to approve the Paris Agreement. I stress, however, that this method is rarely used in the environmental agreement context, and use of this method for the Paris Agreement would breach the 1992 assurance that binding emissions targets would be submitted under Article II to the Senate. But if the Administration chose not to use a treaty, a congressional-executive agreement is the option with the strongest claim to constitutionality.

B. Sole Executive Agreements

Some scholars have gone further and argued the President can enter into the Paris Agreement as a “sole” executive agreement as long as he possesses the domestic legal authority to implement that agreement.⁹ In this view, if the United States can fulfill all of the Paris Agreement’s obligations pursuant to regulatory initiatives like the Clean Power Plan, then neither the Senate nor Congress needs to give approval for the President to join the Paris Agreement.

I agree that in some limited circumstances the President has the authority to make a binding international legal obligation through a sole executive agreement. But the Supreme Court has emphasized that the constitutionality of such sole executive agreements will depend greatly on past historical practice and congressional acquiescence.¹⁰ For instance, when the Court upheld the Algiers Accords resolving the Iran Hostage Crisis, a sole executive agreement, the Court emphasized that it was “[c]rucial” to its decision that “Congress has implicitly approved the practice of claim settlement by executive agreement.”¹¹

In this case, there is much less historical practice or congressional acquiescence in the use of sole executive agreements to make climate change agreements with foreign countries. The 2013 Minamata Convention on Mercury is the most prominent example of an environmental agreement concluded in this way.¹² But this recent example must be considered against a practice of submitting multilateral environmental agreements, and climate change agreements in particular, to the Senate. Not only was the UNFCCC submitted to the Senate, but the Kyoto Protocol was also thought to require Senate approval as well. Many key international environmental agreements have been submitted to the Senate as treaties rather than having been concluded as sole executive agreements.¹³

⁹ David A. Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?* 39 HARV. ENV'T L. REV. 515 (2015).

¹⁰ *Dames & Moore v. Regan*, 453 U.S. 654, 680-83 (1981) (discussing congressional acquiescence in sole executive agreements for settling claims or normalizing relations).

¹¹ *Id.* at 680.

¹² Minamata Convention on Mercury, Oct. 10, 2013

¹³ *See, e.g.*, Convention on International Trade in Endangered Species of Flora and Fauna (CITES), Mar. 3, 1973, 27 U.N.T.S. 243 (entered into force July 1, 1975);

Moreover, unlike in the case of the Minamata Convention, there are serious doubts about whether the President has the domestic legal authority to reduce greenhouse gas emissions by the level sought in the Paris Agreement. The centerpiece of the President's domestic authority to reduce emissions is the Clean Power Plan. But the viability of the Clean Power Plan is under review as 24 states recently filed a lawsuit challenging its legality.¹⁴ Even the possibility that the CPP will be invalidated leads me to conclude that a sole executive agreement should not be used for the Paris Agreement. Otherwise, the possibility remains that the President will unilaterally bind the U.S. to international legal obligations that he does not have the legal authority to carry out. Constitutional practice and prudence strongly weigh against using a sole executive agreement in this circumstance.

IV. Climate Change and Political Commitments

In response to a letter from Senator Bob Corker, the State Department has recently indicated that the United States is not “seeking an agreement in which Parties take on legally binding emissions targets.”¹⁵ This response means that the heart of the Paris Agreement, the emissions targets, will not be legally binding if the U.S. gets its way in Paris. Instead, the “intended nationally determined contribution” will be a voluntary nonbinding “political commitment.” The U.S. may be legally bound only with respect to procedural requirements to submit reports on U.S. progress in reducing emissions.

As I explained earlier, political commitments are not legally binding international agreements. Presidents have typically used them to make political statements of goals or aspirations jointly with foreign governments. They also have a long constitutional pedigree and it is generally accepted that the President has wide powers to make political commitments to foreign countries without getting Congress or the Senate to approve it.

I do not have any constitutional objection to the use of a political commitment in the manner described by the State Department in their recent letter to Senator Corker as long as all parties understand what a political commitment is. By making a mere political commitment, the United States would not owe any obligations to foreign countries under international law to reach particular emissions reduction targets. Moreover, as a mere political commitment, no future President or Congress would be bound under U.S. law to reach these emission targets. As a matter of law, the Paris Agreement would be no different than the President giving a speech, or stating at a news conference, that he will make reductions in emissions.

International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973 1340 UNTS 184 (1973); Vienna Convention for the Protection of the Ozone Layer, March 27, 1985, UNEP/IG.53/5; Montreal Protocol on Substances that Deplete the Ozone Layer (U.N. Doc. UNEP/002565 (1987);

¹⁴ “Two dozen states file lawsuits against the Clean Power Plan”, *The Washington Times* (October 23, 2015); *See, e.g.*, Laurence Tribe, “The Clean Power Plan is Unconstitutional,” *The Wall Street Journal* (December 22, 2014).

¹⁵ Letter from Assistant Secretary of State for Legislative Affairs Julia Frifield to Senator Bob Corker, at 2 (October 19, 2015).

However, as I have also noted earlier, press reports indicate that other countries expect the COP in Paris to result in a legally binding agreement. For example, France's president Francois Hollande recently declared:

If the [Paris] agreement is not legally binding, there won't be an agreement, because that would mean it would be impossible to verify or control the undertakings that are made.¹⁶

Sentiments like this among members of the COP will make it tempting for US negotiators to call the Paris Agreement legally binding in front of its treaty partners, while at the same time assuring Congress it is not legally binding. This type of deception is troubling because it either results in misleading foreign governments, or it results in the President violating the Constitution by using a sole executive agreement. As I stated before, the Constitution does not permit the President to use a sole executive agreement to legally bind the United States to particular greenhouse gas emissions targets. Moreover, a lack of clarity on the legal nature of the Paris Agreement could spur future litigation where, for instance, a plaintiff might sue to demand U.S. compliance with the Paris Agreement.

For this reason, if the Paris Agreement is finalized with "political commitments", I recommend that the Senate demand that the Administration identify publicly which particular provisions of the Paris Agreement (if any) are legally binding and which ones are merely non-binding political commitments. Such an explanation should take the form of a public statement from the State Department, ideally made by Secretary Kerry himself, that reviews each provision of the Paris Agreement in detail.

Such a statement would make it clear that the Paris Agreement does not bind the United States, under either domestic or international law, to reduce greenhouse gas emissions by a particular amount or by a particular time. Such a statement would also make clear that no future U.S. president is bound to fulfill the substantive commitments in the Paris Agreement, and would shield a future president from litigation on this question.

Conclusion

The Senate can and should play an important role in U.S. efforts to use international cooperation to deal with the problem of climate change. If the Paris Conference results in an international agreement to impose legally binding "targets or timetables" for reductions in emissions, I believe such an agreement must be submitted to the U.S. Senate for approval. I do not believe the Constitution would permit the President to conclude such an agreement as a sole executive agreement.

If the Paris Conference results in a mere political commitment to reduce greenhouse gas emissions, it is important that the United States make clear to its foreign partners that this

¹⁶ "Paris climate talks not just hot air, France tells U.S.," Reuters (November 11, 2015).

commitment is not binding under either international or domestic law. The Senate can and should require the Administration to go “on the record” and declare the non-binding nature of this commitment.

Biography

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Professor Ku's primary research interest is the relationship of international law to constitutional law. He has also conducted academic research on a wide range of topics including international dispute resolution, international criminal law, and China's relationship with international law. He teaches courses such as U.S. constitutional law, U.S. foreign affairs law, transnational law, and international trade and business law. Since 2012, he has served as the faculty director of international programs, overseeing Hofstra Law's study abroad, exchange and LL.M. programs. He has also been selected as the John DeWitt Gregory Research Scholar and as a Hofstra Law Research Fellow. He is a member of the American Law Institute and the New York Bar. He is a graduate of Yale College and Yale Law School.

He is the co-author, with John Yoo, of *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (Oxford University Press 2012). He also has published more than 40 law review articles, book chapters, symposia contributions, and essays. He has given dozens of academic lectures and workshops at major universities and conferences in the United States, Europe and Asia.

He co-founded the leading international law blog *Opinio Juris*, which is read daily by thousands worldwide. His essays and op-eds have been published in major news publications such as *The Wall Street Journal*, the *Los Angeles Times* and NYTimes.com. He has been frequently interviewed for television news programs and quoted in print and electronic media. He has also signed or submitted amicus briefs to national and international courts and served as an expert witness in both domestic and international proceedings.

Before joining the Hofstra Law faculty, Professor Ku served as a law clerk to the Honorable Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit and as an Olin Fellow and Lecturer in Law at the University of Virginia Law School. Professor Ku also practiced as an associate at the New York City law firm of Debevoise & Plimpton, specializing in litigation and arbitration arising out of international disputes. He has been a visiting professor at the College of William & Mary Marshall-Wythe School of Law in Williamsburg, Virginia; a Fulbright Distinguished Lecturer in Law at East China University of Political Science and Law in Shanghai, China; and a Taiwan Fellow at National Taiwan University in Taipei, Taiwan.