Kyoto II as Congressional-Executive Agreement: The Emerging Strategy?

*By Christopher C. Horner**

The new Obama administration generated great expectations, not least among those seeking to craft a successor treaty to the 1997 Kyoto Protocol on "global warming." Yet early signals that an Obama administration had no plans to join Europe in agreeing to a successor pact next December, as expected, indicated that this issue would instead prove a stunning disappointment to its champions. Now, however, it appears that Kyoto will be the subject of a controversial effort to sharply revise U.S. environmental treaty practice.

Those parties with high hopes include a broad array of interests: rent-seeking companies, countries, pressure groups and supranational organizations. European Union countries, for example, seek to maintain certain treaty advantages similar to those in the original pact, offering possible avoidance of pain and even financial reward. These included artifices such as the 1990 baseline year against which performance is measured, to give them credit for Kyoto-based greenhouse gas (GHG) emission reductions actually resulting from the post-1990 economic collapse in Central and Eastern Europe. Combined with the ability to pool emissions, this set provided the EU a less onerous path to complying with Kyoto's terms.

Others include exempt, major emitting parties such as China, India, Mexico, Indonesia, Brazil and South Korea. And, of course, Russia hopes to perpetuate wealth transfers helping them modernize their energy infrastructure in the name of combating what remains the subject of a scientifically controversial theory. All of these factors contributed to the Bush administration declining to pursue Kyoto ratification.

Kyoto covers GHG emissions among 37 countries, from 2008-2012. To avoid a gap between regimes, it is generally agreed that a new pact must be adopted at the scheduled meeting in Copenhagen, December 2009. That event was expected to serve as the platform for Kyoto II symbolizing Obama's break with the Bush foreign policy.

The long held presumption was that whomever succeeded Bush would accept U.S. participation in a "binding" pact, even one which still selectively covers only a handful of wealthy nations. This, the story went, would remove the one remaining obstacle to a successful international regime, namely U.S. oppostion. The latter assumption is largely a myth, given that the U.S. signed the 1997 Kyoto treaty but neither the Clinton nor Bush administration sought ratification. Also, there is nothing in the Constitution or statute requiring a president to formally ask the Senate to ratify a signed agreement, only tradition. No senator has showed any interest in forcing matters, likely due to the absence of the two-thirds vote necessary for such an agreement under Article II, Section 2 of the Constitution.

EU officials readily admit a commitment to the issue of "climate change" as a means to establish a "European" political identity. As such, their self-described "world leadership" is at stake, and the tremendous "loss of face" that Europe risks in the event that no new treaty is agreed is an express consideration. Unwelcome realities—such as the initial treaty's failure to reduce emissions, even with great costs, including massive wealth transfers and capital flight ("carbon leakage" to exempt nations)—rarely intrude.

So, the narrative has thrived—Bush "rejected" or "withdrew from" Kyoto in some stark contrast to the Clinton administration—and set the stage for a dramatic gesture by his successor. U.S acceptance of Kyoto's successor was to revive Kyoto as a viable international political and legal enterprise, even if the U.S. was the sole additional country to volunteer to bind its economic fortunes under this pact since it was hatched more than a decade ago.

U.S. Politics

Agence France Press reported the day after Obama's electoral victory:

> One of Barack Obama's first tasks will be to lead the United States back into the heart of the global debate on climate change, ending the country's years of isolation and scepticism. His victory will spark intense relief among negotiators in Europe and Asia.… He would not wait for China and India to act, but insist they must not be far behind making their own binding commitments, Obama aides told *Nature*, the British science journal, last month.

China, India and the rest of the G-77 firmly reject any meaningful commitments under a Kyoto regime. This refusal more than a decade ago doomed U.S. involvement, given that similar treatment among nations was one of two key conditions in the Article II "advice" regarding Kyoto. This took the form of S. Res. 98 ("Byrd-Hagel," July 25, 1997), which had 64 cosponsors and was unanimously adopted by the 105th Congress. The Clinton administration nonetheless verbally agreed to Kyoto five months later, and signed it eleven months after that.

The certain failure of Kyoto or any similar pact to attract two-thirds Senate approval is behind an emerging gambit advocated for the incoming Obama team: inure the world to the idea that U.S. participation in any Kyoto II will not come quickly but instead necessarily faces delay, while negotiating similar commitments to be styled as a congressional-executive agreement(s) that can be tied to the Kyoto regime. Upon gaining permission to negotiate by a simple majority of both houses, in the same manner as employed with the North American Free Trade Agreement, the Obama administration would return to Congress with an agreed pact that also requires only simple majorities in both houses, but with no amendments and no

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filibuster allowed as part of the deliberations.

At first blush, it seems inconceivable that as president Obama would even flirt with the negative fallout from eschewing the earliest opportunity to make this highly symbolic gesture of breaking with a very high profile position associated—however rightly or wrongly—with the Bush administration, particularly given his narrative of "healing" our relationships and improving the U.S.'s international standing.

Yet the few relevant statements made by aides during the campaign and since indicate that this is likely the plan. For example, chief campaign adviser on energy Jason Grumet revealed a schedule of legislating (or, in the absence of congressional action, regulating), domestically before agreeing to a new international pact in order to then "have a meaningful impact in the international discussion." His timeline was for a policy representing that consensus to be developed late in 2010, well after Copenhagen. Success therefore requires bringing the Kyoto community around to understand, accept, and support this approach as the best way to bind the U.S. in the Kyoto scheme.

Europe's costly failure to date and struggles with adopting a substantive internal position going forward surely leave them receptive to such a "game-changing" strategy.

The Obama campaign telegraphed a desire to reverse the Clinton approach of negotiating a "global warming" treaty, then using it to pressure Congress, instead vowing to first agree to something domestically for the purposes of then "meaningfully impact[ing] the international debate." The timeline, on its face, makes plain that the U.S. could not expect to come to Copenhagen ready to sign on to the likely deal, a position already accepted by officials from key pressure groups such as the Pew Center on Global Climate Change.

Therefore President Obama's road to Kyoto II requires first obtaining congressional approval of a domestic law requiring some sub-Kyoto reduction in U.S. GHG emissions (either compared to current levels, or simply returning to 1990 levels, by 2020). Although the economic crisis should rightly give pause, it is instead brazenly invoked as an excuse to impose the Kyoto global warming agenda. This legislation would also, however, provide non-binding negotiating guidelines and authorize the administration to completely rework the U.S.'s international approach. In short, this would include waiving the Constitution's requirement of Senate ratification by reclassifying the product of talks as a congressional-Executive agreement, not a treaty.

UN officials are also already making excuses for why, suddenly, the U.S. should no longer be expected to do that which has been demanded ever since March 2001, when President Bush indicated that he, like President Clinton, would not seek to formalize U.S. participation in Kyoto. For example, Yvo de Boer, executive secretary of Kyoto's implementing organization, the UNFCCC—so titled after Kyoto's parent treaty, the 1992 U.N. Framework Convention on Climate Change[1]—deflected the idea of holding Obama to the same reasoning, "What we've got, through everything that Senator Obama has said so far, we've got pretty much the signal we need. I don't think it makes any sense to unrealistically try and force the pace."

That is a remarkable shift of position. In other words, it is now perfectly acceptable for the U.S. to go through its policy development as it sees fit, because the signal has somehow been received that Obama's approach will nonetheless lead to U.S. inclusion in the extant international process. We see, in calls to radically revise the manner in which we develop our "climate" foreign policy, context for this unannounced change of heart among Kyoto's champions.

The Plan: Kyoto as Congressional-Executive Agreement

Obama aide Grumet's comments combined with private remarks by Democratic Senate aides indicate that the Obama camp is considering a plan advocated by former Clinton State Department official Nigel Purvis. It is in a paper for Resources for the Future, a center-left think tank, titled "Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority."[2] It explores "whether some international agreements are inherently treaties under the Constitution, or whether the President and Congress have discretion to treat an international agreement as a congressional-executive agreement instead of a treaty."[3]

The author concludes, "The United States should classify new international treaties to protect the Earth's climate system as executive agreements rather than treaties," executive agreements being "complete and equally valid substitutes for virtually all treaties." He assures us that "the courts would be highly likely to uphold the agreement," despite the obvious purpose of circumventing longstanding Senate opposition to the agreement in its original treaty form.[4] He dismisses this mere "historical tendenc[y]" of pursuing the treaty form, though offers no precedent—or "historical tendency"—of simply reclassifying a failed regime as executive agreement to circumvent Senate opposition.[5]

If the Obama administration does pursue the recommended path toward a congressional-executive agreement in lieu of a treaty for a successor to Kyoto, it does not seem that this is to impact the international debate, as is the stated intention, so much as it is to tweak the domestic landscape, significantly altering Congress' role as a way to commit the U.S. to the existing template or framework envisioned for Kyoto II.

Under what Purvis calls CPA ("Climate Protection Authority"), Congress abdicates Article II advice and consent in favor of bicameral, simple-majority up-or-down votes—with Congress also agreeing in advance to set "no international preconditions" but instead offering non-binding negotiating guidance.

This is of course patterned after trade promotion authority (TPA), regularly used in that way over recent decades. TPA was an affirmative gesture to keep special pleaders out of the minutiae. There is no demonstrated need for concentration of negotiating power in the Kyoto context. An even more critical distinction, however, is that TPA was not designed to circumvent a decade of proven inability to gain the necessary two-thirds support in the Senate, as is clearly the present situation.

It is true that the Supreme Court has yet to directly confront constitutional issues surrounding congressional-

executive agreements and the Court seems likely to strive to avoid the matter entirely, as a "political question."[6] But it appears equally likely the Court would look with disfavor on an instance so obviously designed to circumvent Senate opposition (which makes the Senate vote-count in support of any authorization to enter such a pact of great importance).[7]

The desire to preempt congressional "preconditions" is transparently a reaction to the unanimous Byrd-Hagel resolution warning the executive away from any pact significantly harming the U.S. economy or which does not require similar commitments of developing countries, which account for the bulk of recent and projected growth in GHG emissions (particularly the world's first- and third-largest emitters China and India, plus other economies experiencing rapid growth in recent years). Oddly, Purvis expressly offers this in the name of *enhancing* Congress's say in the matter.

In keeping with the theme of harmonizing U.S. policy with Kyoto, effectively entering us in its scheme, Purvis also suggests that the same legislation include agreement to accept a "more stringent emissions target" in the agreement negotiated under this authority. That would occur only once the rest of the top five emitters have ratified it, which notably does not actually require them to commit to anything. That this same exemption was Kyoto's original downfall in the Senate reaffirms the objective is simply to circumvent Article II's super-majority requirement.

Distillation of Pro-EA Arguments

Nigel Purvis argues that, with limitations, the new administration can enter and implement executive agreements of all three types to succeed the Kyoto treaty: sole executive agreements, treaty-executive agreements and congressional-executive agreements. This article focuses on his recommendation of the latter option for a Kyoto successor.

Purvis does not offer examples of EAs, of any sort, encompassing 180+ nations. Such agreements *have* been multilateral if involving a fairly limited number of parties, and relatively far less extensive in terms of obligations imposed upon the U.S. (e.g., the congressional-executive agreement NAFTA, or other forms found in the 1945 Yalta and Potsdam agreements, the 1973 Vietnam peace agreement, and the 1975 Sinai agreements. All still fall short of the dozen major nations required to bring the suggested pact into effect (ratification by countries representing two-thirds of global GHG emissions).

The claim that President Reagan used EAs nearly 3,000 times in fact proves too much, revealing that EAs are as generally used for far more mundane matters than "the greatest threat facing Mankind," not for committing us to energy taxes (either direct or regulatory) and otherwise enormous economic consequences.

In comparing treaties versus executive agreements Purvis shows his purpose, arguing how "[u]nder international law, those two types of instruments are indistinguishable…'the supreme law of the land'…Very importantly, however, *the domestic processes the United States uses to negotiate, review, and approve treaties and executive agreements are quite different*… The United States may deem an international agreement as an 'executive agreement' for purposes of its domestic review, even though the international community may decide to call the pact a 'treaty.'"[8]

This ignores that Kyoto was originally pursued as a treaty for very good reasons, none of which have diminished. The only change prompting this call for reclassification is the demonstrated Senate opposition. Of course, under this approach a Kyoto successor requires 50 Senate votes—not 60 let alone 67, because it will be filibuster-proof—in addition to the easily attained simple House majority.

Purvis offers three principal rationales for pursuing this course: 1) speeding up U.S. entrance into an international global warming treaty, despite that such outcome is by no means a certainty that must simply be expedited; 2) "enhancing the role of Congress in setting climate foreign policy";[9] and 3) ensuring a strong bipartisan climate policy.

Haste Makes Waste

Relevant to the "speed" argument, Purvis does not conceal his hope to eliminate the ratification function altogether, given that satisfying it has proven "a daunting task" which "allows ideological or regional interests to frustrate the will of the majority."[10] Other complaints are that lone senators have held up agreements even, much to his disdain, some which were widely adopted by other nations (this is consistent with the complaint elsewhere that U.S. treaty procedure is unusual compared to other nations, which apparently militates against maintaining the ratification requirement).[11]

Despite citing no evidence that such factions have impeded Kyoto in the Senate or that they are that which the proposed course is designed to remedy—implausible given that the sole Article II "advice" regarding Kyoto was unanimous—Purvis then states "[t]he treaty clause has never worked as the framers of the Constitution intended."[12]

Later he clarifies his position, arguing how the treaty clause has simply become an anachronistic, time-consuming impediment. "The treaty process created by the framers of the Constitution requires an exceptional degree of national consensus that is no longer reasonable given the frequency and importance of international cooperation today."[13] Elsewhere Purvis affirms that his argument is not so much with how the Senate applies Article II ratification authority, but with the authority itself. For example, "We must not cling to preconceived notions of how our country negotiates and reviews international climate agreements."[14]

Revising (Legislative) History

This leaves the risible arguments that circumventing Article II ratification for a Kyoto successor treaty finally ensures a strong bipartisan climate policy, and "[e]nhances the role of Congress in setting climate foreign policy". Both are grounded in the claim, in defiance of all available evidence, that U.S. "climate foreign policy" has "lack[ed] bipartisan negotiating objectives," such that other nations do not know what to expect from us.[15] The preferred, alternative approach ostensibly would ensure that "[o]ther nations understand very clearly what the agreement must look like to secure Congress' blessing."[16]

Nowhere does this recognize that the Senate clearly articulated the U.S. Kyoto position, which other nations sought to subvert, circumvent and otherwise disregard.

This argument for reclassifying Kyoto serially recasts past Senate dealings with the Kyoto issue and otherwise ignores the relevant history. Purvis claims that "[t]he treaty process has harmed the credibility of the United States: in the eyes of the world, we are an unreliable treaty partner."[17] Yet the purportedly reputation-harming obstacle to the U.S. joining an international "global warming" treaty was not any absence of Senate involvement or of a clearly delineated strong bipartisan position. Instead, as even the UN's de Boer now admits, it was that the U.S. executive *ignored* the Senate's advice, encouraging our negotiating partners to follow suit.

Further, Purvis admits on several occasions that, for example, "It is the longstanding practice of the Executive Branch not to take the final steps necessary to bind the United States internationally to treaties duly approved by the Senate unless both houses of Congress have approved needed implementing legislation."[18] In practice, the House of Representatives also conducts hearings on treaties despite the absence of involvement in the ratification function and regularly consults on several levels with the Senate on such matters. There is no support for the notion, therefore, that abrogating the ratification function ensures both houses of Congress are granted a say.

Finally, that Purvis does not propose that the congressional-executive Kyoto agreement be self-executing makes this argument wholly unpersuasive on its face.

Purvis also dismisses the clear Senate record regarding such binding "climate" commitments as mere "inquirie[s] about the domestic process the United States would follow to review amendments and Protocols to the Convention."[19] He graciously volunteers that "the Senate's advice and consent to the "UNFCCC, the treaty which Kyoto and its successor would both purport to amend] may provide no additional basis for the President to implement any executive agreements domestically."[20]

Yet the UNFCCC not only offers no such support, but the Senate made quite plain when ratifying that pact that any efforts to bind the U.S. to further commitments surely would require ratification. The Senate Foreign Relations Committee revisited this history in its authoritative "Treaties and Other International Agreements." The Committee noted its earlier instruction, when reporting UNFCCC to the full Senate in 1992, was that "decisions by the parties to adopt targets and timetables for limiting emissions would have [to be] submitted to the Senate for advice and consent. It noted further [at the time]: that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the 'shared understanding' of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent."[21]

The Congressional Research Service also undermines Purvis' quest in its report "Global Climate Change: Selected Legal Questions about the Kyoto Protocol." Noting how the Bush 41 administration responded agreed that the intention inherent in UNFCCC was that binding commitments specifically required ratification, CRS states:

> The committee made clear, in other words, its view that '[t]he final framework convention contains no legally binding commitments to reduce greenhouse gas emissions' and its intent that any future agreement containing legally binding targets and timetables for reducing such emissions would have to be submitted to the Senate. The first Bush Administration concurred with that view and agreed to submit any such agreement. That commitment was cited during Senate debate on the resolution of ratification as an important element of the Senate's consent. While these statements may not be as legally binding as a formal condition to the Senate's resolution of ratification for the 1992 Convention, it is doubtful that any administration could ignore them.[22]

While this history seems sufficient that no administration might ignore them, Purvis expressly dismisses them as indicating a desire for "Senate approval,"[23] which he indicates did not mean ratification but possibly contemplated a Senate vote as part of more generic bicameral enactment. Further damaging Purvis' argument, CRS also states:

> While the full scope of the President's authority to conclude and implement executive agreements remains a subject of scholarly and political debate, the Senate appears to have anticipated the question when it gave its advice and consent to the Framework Convention on Climate Change in 1992. During the hearing on the Convention, the Senate Foreign Relations Committee propounded to the Administration the general question of whether protocols and amendments to the Convention and to the Convention's Annexes would be submitted to the Senate for its advice and consent.[24]

Purvis euphemizes this legislative history that facially undermines his argument with "[t]he international debate made the Senate attuned to the prospect that the parties to the Convention might agree in the future to legally binding emissions targets."[25]

Also, Purvis argues that the President is fully able to complete such an agreement under existing authorities.[26] Yet, he admits,"[a]lthough legally permissible, this approach would prove politically controversial, vulnerable to changes in political power, and a poor basis for a durable U.S. climate foreign policy."[27] Having said that, he intones, "unilateral Presidential leadership may prove necessary if Congress refuses to act," specifically "unless Congress provides an alternative to the treaty form" by going along with the congressional-executive agreement.[28]

With a final dismissal of U.S. treaty practice and precedent, Purvis concludes about congressional reaction to this approach, "The greatest obstacle to Senate concurrence may be the expectations created by the tendency (albeit inconsistent and not legally binding) of the President and the Senate to use the treaty form for certain types of agreements, including multilateral environmental accords."[29]

CONCLUSION

In 2009 President Obama may ask Congress to sharply revise U.S. environmental treaty practice and precedent, in the context of a successor to the Kyoto "global warming" treaty. The arguments advanced in support of such a course do not withstand scrutiny. The objective is transparently to circumvent demonstrated Senate opposition to such a pact, specifically by using simple majority votes to enter an international agreement

ultimately of the same variety that the Senate will not ratify and a domestic equivalent of which Congress has serially rejected. This precedent must be avoided.

Endnotes

1 Treaty Doc. 102–38. Adopted May 9, 1992, and signed June 12, 1992. Submitted to the Senate September 8, 1992. Approved by the Senate October 7, 1992.

2 Nigel Purvis, "Paving the Way for U.S. Climate Leadership: *The Case for Executive Agreements and Climate Protection Authority,*" Discussion Paper 08-09, April 2008, Resources for the Future, Washington, DC, *available at* http://www.rff.org/RFF/Documents/RFF-DP-08-09.pdf.

3 *Id*. at 21.

4 *Id*. at 39.

5 *Id*. at 24.

6 Purvis does note that "The U.S. Supreme Court has, for more than a century, consistently rejected or sidestepped claims that specific congressional–executive agreements should have been deemed treaties." *Id*. at 22, citing *Field v. Clark*, 143 U.S. 649, 651 (1892)(upholding congressional delegation of authority to the President to approve certain trade and tariffs agreements), and *Made in USA Foundation v. United States*, 56 F. Supp.2d 1226 (1999), *vacated*, 242 F.3f 1300, *cert. denied*, 534 U.S. 1039 (2001)(finding that the President and Congress had the power to conclude NAFTA as a congressional–executive agreement).

7 The Court has ruled against the executive usurping powers reserved by the Constitution to Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This article does not address the constitutional questions surrounding executive agreements but instead the implications and arguments surrounding their use for a successor to the Kyoto treaty.

8 Purvis at 9 (italics original).

9 *Id*. at 5.

10 *Id*. at 10.

11 *Id*. at 11-12.

12 *Id*. at 10.

13 *Id*. at 45.

14 *Id*. at 7.

15 *Id*. at 5.

16 *Id*. at 17.

17 *Id*. at 12.

18 *Id*. at 10.

19 *Id*. at 37.

20 *Id*. at 36.

21 Senate Foreign Relations Committee, "Treaties and Other International Agreements: The Role of the United States Senate," S.Rpt. 106-71, 276, citing Exec. Rept. 102–55, 14.

22 CRS Report for Congress, Updated October 1, 2002, "Global Climate Change: Selected Legal Questions About the Kyoto Protocol," 5 (referencing 138 CONG. REC. 33521 (Oct. 7, 1992) (statement of Sen. McConnell)).

23 Purvis at 38.

24 CRS at 3

25 Purvis at 37, fn. 101.

26 *See, e.g., id*. at 32-33, 45 and 50.

27 *Id*. at 45.

28 *Id*. at 50.

29 *Id*. at 47.