



Factsheet

Yes, He Can: President Obama's Power to Enter a Legally Binding Agreement Without Waiting for Congress

For over two decades, civil society has worked for a “fair, ambitious, and legally binding” international climate agreement. One of the concerns for the outcome of COP21 is the perception that the United States is unable to enter into a legally binding agreement because it would require ratification by two-thirds of the U.S. Senate, and such ratification would not be achieved in today’s political climate. In fact, Senate ratification is not necessary for the Obama administration to commit the U.S. to a legally binding form, including an agreement that encompasses binding INDCs or that requires financial contributions for mitigation, adaptation and loss and damage. In fact, due to the extraordinarily high bar for Senate ratification in the U.S., about ninety percent of international treaties executed by the U.S. in the last sixty years have taken the form of executive agreements. The Obama administration has more than ample authority to negotiate and execute an international agreement that is fair, ambitious, and legally binding and should not allow a minority of Senators to continue blocking action that is desperately needed.

I. There Are Two Options for Making International Agreements Under U.S. Domestic Law

- a) The Constitution authorizes the President to “make Treaties” with the “Advice and Consent” of the Senate, provided that “two thirds of the Senators present concur.” (U.S. Constitution, Art. II, § 2).
- b) The President can enter into an executive agreement (which can include a treaty as that term is used in international law). This can be:
 - a. A “Congressional-Executive” or “legislative-executive” agreement, made by the President under authority granted by Congress under an existing statute; or
 - b. A “sole executive agreement,” created under the President’s own constitutional authority to “take care” that the United States’ laws be faithfully enforced (U.S. Constitution, Art II, § 3) and under the bundle of Constitutional responsibilities collectively referred to as the President’s foreign affairs power (See U.S. Constitution, Art. II, §§ 1, 2, 3; United States 11 Foreign Affairs Manual § 723.2-2(C)).

In the current political climate, it is extremely unlikely that an international climate agreement could be made with the consent of the Senate. However, agreements made with the consent of the Senate are historically rare. Nearly 90 percent of international agreements (approximately

15,000 agreements) that the U.S. has entered since World War II have been approved as executive agreements.¹

II. President Obama Has Existing Congressional Authority to Enter into a Legally Binding Agreement

A “Congressional-Executive” or “legislative-executive” agreement is made by the President under authority granted by a statute (a law passed by both houses of Congress). Relevant to COP21, Congressional approval can be given ahead of time, in the form of express authority to negotiate and make international commitments.

The United States has existing domestic environmental laws that contain express provisions authorizing negotiation of international agreements that address the impacts of climate change. Section 1103(a)(4) of the Global Climate Protection Act (titled “Mandate for action on the Global Climate”) directs the United States to “work toward multilateral agreements” on climate change. It directs that United States climate policy should “identify technologies and activities to limit mankind’s adverse effect on the global climate,” by “slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term” and “stabilizing or reducing” those concentrations over the long term (Global Climate Protection Act, § 1103(a)(3)). Congress further declared that the “global nature” of climate change “will require vigorous efforts to achieve international cooperation,” and that “such international cooperation will be greatly enhanced by United States Leadership,” (Global Climate Protection Act, § 1102(5)). The Act explicitly authorizes the Secretary of State to take international action consistent with United States domestic law (Global Climate Protection Act, § 1103(c)).

Further, Section 617 of the Clean Air Act directs the President to “undertake to enter into international agreements” to “protect the stratosphere” consistent with domestic law. Section 8 of the Endangered Species Act directs the Secretary of the Interior, through the Secretary of State, to enter into “bilateral or multilateral agreements to foreign countries” to provide for the conservation of fish or wildlife and plants, including endangered species and threatened species. It is established scientific knowledge that climate change poses a threat to the survival of marine life, wildlife and plants.

Taken together, these domestic statutory declarations of policy and express directions to the Executive office unmistakably authorize President Obama, acting through the Secretary of State, to enter into a legally binding international agreement addressing climate change. The President needs no more express authority than this to bind the United States under international law to meaningful emissions reduction targets and an obligation to contribute funds for mitigation, adaptation, loss and damage.

III. President Obama’s Executive Power Allows Him to Enter into a “Sole Executive” Agreement

¹ Nigel Purvis, *The Case for Climate Protection Authority*, 49 Virginia Journal of International Law 1007, 1018 (2009).

A “sole executive” agreement is binding under international law (*see* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a), Cong. Research Serv., Comm. on Foreign Relations, 106th Cong., Treaties and Other International Agreements: The Role of the United States Senate 3-5 (Comm. Print 2001). The President may then seek to enforce the obligations under that agreement by exercising his powers under existing domestic law.

Because President Obama has clear authority under existing domestic law to regulate greenhouse gas emissions in a meaningful way, there is no need to create additional domestic law to support implementation of a sole executive agreement domestically. The President’s power to enter into a Sole Executive agreement depends upon Congress having granted the power to implement obligations under international law. It does not matter that President Obama has not yet exercised the powers granted to him by various environmental statutes to their full extent.

IV. Existing United States Law Authorizes Regulation of Greenhouse Gases

The United States already has a strong suite of environmental laws, including the Clean Air Act, that provide effective and comprehensive tools for limiting greenhouse gas emissions and addressing climate change, and which therefore support a Sole Executive Agreement.

The Clean Air Act gives the President, through the Environmental Protection Agency (“EPA”) the power to establish national pollution caps for air pollutants that may endanger public health and safety (Clean Air Act, §§ 108-110), to limit air pollutant emissions from buildings and facilities (§ 111), motor vehicles (§ 202(a)), ships and vessels (§ 213) and airplanes (§ 231).

V. Congress’s Role Should President Obama Enter Into a Congressional-Executive Agreement or Sole-Executive Agreement

President Obama must submit any specific, significant, and legally binding agreement negotiated in Paris to Congress within 60 days of execution (Case Act § 112b, 22 C.F.R. §§ 181.2, 181.3). Submission to Congress has no legal effect; it is merely a procedural requirement.

Congress could attempt to pass a statute invalidating a sole executive agreement after it is entered into. However, the President possesses the power to veto any bill passed by Congress. (U.S. Constitution, Art 1, § 7). A veto may only be overcome if there is a two-thirds majority in the House of Representatives and the Senate (U.S. Constitution, Art. 1, § 7). In the current domestic political climate, it is extremely unlikely that a Presidential veto could be overcome.

It is possible that Congress may seek to block a budget bill that appropriates funds for contributions to mitigation, adaptation or loss and damage. However, the blocking of budget bills is a domestic political matter that does not pose a legal barrier to President Obama entering into a binding international legal agreement that requires fund contribution.