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What Happened to Byrd-Hagel? Its Curious Absence From Evaluations of The Paris Agreement

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COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

**WHAT HAPPENED TO BYRD-HAGEL?
ITS CURIOUS ABSENCE FROM
EVALUATIONS OF THE PARIS AGREEMENT**

By Susan Biniaz

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1. INTRODUCTION

In the midst of the negotiations leading to the Kyoto Protocol in 1997, the U.S. Senate adopted the “Byrd-Hagel Resolution,” co-sponsored by Senators Robert Byrd of West Virginia and Chuck Hagel of Nebraska.¹ Passed by a vote of 95-0, it reflected the Senate’s view that the international climate change agreement then being negotiated by the Clinton Administration was not on the right track. Specifically, it signaled dissatisfaction with an agreement that would contain legally binding greenhouse gas emissions commitments for developed countries without such commitments in the same time period for developing countries.

By its terms, the Byrd-Hagel Resolution applied not only to the Kyoto Protocol but also to any subsequent climate agreement. It influenced the approaches of the Clinton, Bush, and Obama Administrations to the Kyoto Protocol and international climate policy. Curiously, however, it did not appear to play a role in the evaluation, including by the Trump Administration and the Senate, of whether the United States should continue to participate in the Paris Agreement.

¹ See Byrd-Hagel Resolution at <https://www.congress.gov/bill/105th-congress/senate-resolution/98/text>.

2. BACKGROUND ON THE BYRD-HAGEL RESOLUTION

The 1992 UN Framework Convention on Climate Change, which the Senate approved unanimously, contained certain heightened commitments for so-called “Annex I” Parties -- members of the OECD, former Soviet republics, and Eastern Europe. Those Parties were to report on their greenhouse gas emissions, and actions to address them, in greater detail than other Parties. Further, in a non-legally binding manner, they were to “aim” to return their emissions to 1990 levels in the year 2000.²

Although many countries advocated legally binding emissions targets for Annex I Parties, the United States and others successfully opposed them. In part for that reason, it was agreed that the Parties to the Convention would, at their first meeting, “review the adequacy” of the provisions related to Annex I Parties’ emissions.³

At the first meeting, which took place in Berlin under the leadership of Germany’s Environment Minister Angela Merkel, Parties advanced a variety of reasons why the provisions were not “adequate,” including that they did not address the period after 2000 and that the emissions “aim” was not legally binding. In addition, in the view of the United States and certain other Parties, the provisions were inadequate because they did not apply to those developing countries, such as China, whose emissions were growing.

² See UN Framework Convention on Climate Change (Article 4.2) at http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

³ See Article 4.2(d) of the Framework Convention.

The decision in Berlin to negotiate another agreement (the “Berlin Mandate”) did not expressly address *why* the Parties had deemed the provisions to be inadequate.⁴ However, of the three reasons advanced, the text of the Mandate suggests that the only agreed reason was the need to address the post-2000 period:

- The Mandate left open the legal nature of emissions targets under the new agreement.⁵
- With respect to developing countries, the Mandate made clear that emissions targets were to apply only to Annex I Parties. Indeed, the Mandate expressly excluded non-Annex I Parties from any “new commitments.”⁶

After Berlin, during the course of negotiating what was to become the Kyoto Protocol, the United States announced its support for legally binding emissions targets. Most other Parties also expressed support for legally binding targets, which was reflected in the “Geneva Ministerial Declaration,” adopted at the second meeting of the Parties to the Convention.⁷

The adoption of the Berlin Mandate did not, in and of itself, appear to trigger any official reaction from the Senate. However, U.S. support for legally binding targets did. In July 1997, just five months before the completion of the Kyoto Protocol (and after two sets

⁴ See Berlin Mandate (pp. 4-6) at <https://unfccc.int/resource/docs/cop1/07a01.pdf>.

⁵ See paragraph 2(a) of the Berlin Mandate, which called for the setting of quantified limitation and reduction “objectives.”

⁶ See paragraph 2(b) of the Berlin Mandate.

⁷ See paragraph 8 of the Geneva Ministerial Declaration, p. 73, Annex, <http://unfccc.int/resource/docs/cop2/15a01.pdf>.

of hearings the previous month), the Senate adopted S. Res. 98, better known as the Byrd-Hagel Resolution. In its preamble, the Resolution recalled the Administration's support for legally binding targets for Annex I Parties, as well as its proposal that consideration of additional steps to limit emissions of developing countries not begin until after adoption of the Kyoto Protocol.⁸ The Resolution's operative provisions stated that the United States should not sign a climate agreement:

- that included new, mandatory emissions commitments for Annex I Parties without also including such limits for developing countries in the same time period; or
- that would result in "serious harm to the economy of the United States."⁹

Regarding the "serious harm" condition, two points are worth noting:

- The Resolution's preamble suggests that the "serious harm" concern was not independent but one that flowed per se from the exclusion of developing country commitments. However, both the operative provisions of the Resolution and the explanatory Senate Report¹⁰ treat it as an independent condition (i.e., to be considered even if developing countries have emissions commitments).

⁸ See preambular paragraphs 7 and 9.

⁹ See paragraphs (1)(A) and (B).

¹⁰ See p. 3 of Senate Report, <https://www.congress.gov/105/crpt/srpt54/CRPT-105srpt54.pdf>.

- Unlike the developing country prong, the serious harm prong was not triggered by a particular Administration proposal; at the time the Resolution was adopted, the United States had not yet made a proposal regarding its Kyoto target.

3. BYRD-HAGEL’S EFFECT ON THREE ADMINISTRATIONS

The Resolution, perhaps particularly because it was adopted 95-0, influenced Administrations of both parties.

While the Kyoto negotiations were still ongoing, the Clinton Administration sought to mitigate the Senate’s concern by proposing an additional provision to be included in the Protocol.¹¹ It would have provided for non-Annex I Parties (essentially developing countries) to voluntarily take on binding emissions commitments, with the incentive of being able to engage in emissions trading with Annex I Parties. The proposal sought to straddle the seeming inconsistency between the Berlin Mandate and Byrd-Hagel.

- It was arguably consistent with the Berlin Mandate, in that any such developing country commitment would be voluntary (and therefore not a “new” commitment).
- In terms of consistency with Byrd-Hagel, it may or may not have satisfied the Senate, depending upon which Parties, if any, signed up. (While the operative text of the Resolution referred to “developing countries,” not just the major-emitting

¹¹ The proposal, which was inserted between Articles 10 and 11 of the then-version of the negotiating text, was referred to as “Article 10 bis.”

ones, its preamble indicated a particular concern with China, Mexico, India, Brazil, and South Korea.¹² The Senate Report accompanying the Resolution also generally reflected Senators' interest in key developing countries, not all of them.¹³)

In any event, the proposal was not accepted.

The Clinton Administration ultimately signed the Kyoto Protocol but made clear the President's view that Kyoto was a "work in progress" and, invoking a somewhat lighter version of Byrd-Hagel, that it would not be submitted for Senate approval "without the meaningful participation of key developing countries in efforts to address climate change."¹⁴

President Bush, shortly after taking office, expressly invoked Byrd-Hagel in announcing that he opposed Kyoto. In a letter responding to a question from various Senators concerning his stand on the regulation of carbon dioxide under the Clean Air Act, the President wrote:

"... [The Kyoto Protocol] exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy. The Senate's vote, 95-0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns."¹⁵

¹² See preamble paragraph 3.

¹³ See <https://www.congress.gov/105/crpt/srpt54/CRPT-105srpt54.pdf>.

¹⁴ See <https://clintonwhitehouse4.archives.gov/CEQ/19981112-7790.html>.

¹⁵ See <http://www.presidency.ucsb.edu/ws/?pid=45811>.

The basic policy underlying the Byrd-Hagel Resolution also informed U.S. international climate policy during the Obama Administration. From the very beginning, the Obama Administration sought an agreement that reflected what it called “legal symmetry” or “legal parallelism” between developed and developing countries, at least the major emitters. It made clear that the United States would not agree to any instrument that included legally binding emissions commitments for developed country (or Annex I) Parties without such commitments from the major developing country (or non-Annex I) Parties.

The U.S. position on a future climate agreement also took account, at least impliedly, of Byrd-Hagel’s “harm to the U.S. economy” prong. In contrast to the Kyoto Protocol’s internationally agreed targets, the Obama Administration sought an approach under which each Party would determine its own emissions commitment, not have to negotiate it with other countries.

The draft agreement proposed by the United States in 2009, which provided for legally binding, self-determined emissions commitments for all the major economies,¹⁶ proved unacceptable. China in particular strongly opposed the legally binding feature with respect to developing countries. As Denmark, host of the upcoming Copenhagen conference, discovered, the only way to marry the U.S. “legal symmetry” requirement with China’s “no legally binding commitment for us” requirement was to devise an instrument

¹⁶ See U.S. proposal (beginning on p. 106), <http://unfccc.int/resource/docs/2009/awglca6/eng/misc04p02.pdf>.

that was non-legally binding for all. The resulting Copenhagen Accord included self-determined, non-legally binding emissions commitments from over 80 countries, including all the major economies, both developed and developing.¹⁷

The Obama Administration continued to pursue policies evocative of Byrd-Hagel with respect to the development of the Paris Agreement.

- With respect to developing countries, the United States worked to ensure, through the negotiating mandate (the so-called “Durban Platform”) that the new agreement would be applicable to all countries, not just developed countries. This element was particularly important in light of the Durban Platform’s requirement that the new agreement have some type of “legal force.”¹⁸ The United States subsequently supported New Zealand’s proposal for non-legally binding emissions targets for all Parties, well aware that it was otherwise unlikely to achieve “legal symmetry” with the key developing countries.
- The United States also proposed that emissions targets be “nationally determined,” rather than negotiated or formula-based. Each Party could then take into account its own national circumstances in deriving its target or other type of mitigation measure.

¹⁷ See text of the Copenhagen Accord, as well as emissions commitments submitted thereunder, at http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php.

¹⁸ See paragraph 2 of the Durban Platform, p. 2, <https://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf>

The Paris Agreement ultimately reflected these features.¹⁹ The United States joined the Agreement, together with China, in September 2016.²⁰

4. BYRD-HAGEL’S ABSENCE FROM THE EVALUATION OF WHETHER TO STAY IN, OR WITHDRAW FROM, THE PARIS AGREEMENT

Given the central role that Byrd-Hagel played in shaping the policies of three Administrations, including the development of the Paris Agreement, as well as its express applicability to any future climate agreement, it is surprising that it appears to have played no role – even as a starting point -- in assessing whether the United States should stay in or leave the Agreement.

- The Trump Administration appeared to make no mention of it in announcing and subsequently discussing its intention to withdraw the United States from the Agreement. While the President’s June 1st speech focused heavily on the perceived economic impact of the Agreement on the United States – reflecting a key substantive aspect of Byrd-Hagel – it did not invoke the Resolution or expressly analyze Paris in Byrd-Hagel terms.²¹

¹⁹ See the Paris Agreement at https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

²⁰ See http://unfccc.int/paris_agreement/items/9444.php.

²¹ See <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>.

- Senators, to the extent that they weighed in on the issue, did not reference Byrd-Hagel. The twenty-two Senators who wrote to the President to support withdrawal from Paris focused only on their concerns regarding domestic litigation risks of remaining in the Agreement.²² (The fourteen Senators who wrote to Secretary of State John Kerry after the United States joined the Agreement focused only on how other countries should be made aware that the U.S. emissions commitment of 26-28% below 2005 levels in 2025 was unlikely to be durable.²³)
- U.S. NGOs and businesses, which largely favored staying in the Paris Agreement, did not ground their advocacy in Byrd-Hagel.²⁴
- One think tank that advocated withdrawal from Paris referred to Byrd-Hagel (albeit indirectly), but in historic relation to the Kyoto Protocol, not in analyzing the Paris Agreement.²⁵

²² See https://www.epw.senate.gov/public/_cache/files/fe7835f9-4774-43ee-98aa-e4c9bd2802dd/05.25.17-paris-letter-to-trump.pdf.

²³ See https://www.epw.senate.gov/public/_cache/files/2/4/244c9583-e2ec-47cf-a329-28c7c9f64fe3/F973A463A10E2353E3D4F5C33A4045C6.letter-to-unfccc-re-paris-agreement-final.pdf.

²⁴ See, e.g., http://www.usclimatenetwork.org/us_climate_action_network_members_react_to_trump_paris_announcement and <http://www.independent.co.uk/news/world/americas/us-politics/exxon-mobiledonald-trump-paris-agreement-climate-change-us-signatory-global-warming-rex-tillerson-a7655391.html>).

²⁵ See <https://cei.org/sites/default/files/Chris%20Horner%20and%20Marlo%20Lewis%20-%20The%20Legal%20and%20Economic%20Case%20Against%20the%20Paris%20Climate%20Treaty.pdf>.

- Only press articles appear to have drawn a connection between the Resolution and Paris, in one case noting: “Far from being a ‘bad deal’ for the United States, as U.S. Environmental Protection Agency administrator Scott Pruitt has asserted, the Paris agreement is actually the answer to U.S. prayers going back to the U.S. Senate’s bipartisan (95-0) Byrd-Hagel Resolution in 1997, which rejected the Kyoto approach and called for an agreement that would include not only industrialized countries, but the large emerging economies as well. That is precisely what the Paris agreement has finally delivered!”²⁶

It is interesting to speculate on possible reasons for Byrd-Hagel’s absence from “the conversation” about whether to continue U.S. participation in Paris.

- Many people, particularly below a certain age, may simply have been unaware of a Senate Resolution from 1997.
- Some perhaps thought that a Resolution focused on climate negotiations in 1997 was no longer applicable, despite its language.
- Some may have considered it irrelevant (or, by definition, satisfied) because they viewed it as applying only to an agreement with legally binding targets (see

²⁶ See <https://www.pbs.org/newshour/economy/column-u-s-remain-paris-climate-agreement>; See also https://www.huffingtonpost.com/entry/the-senate-story-that-everyone-is-missing_us_58e810a4e4b06f8c18beebd5 (which opines that “Byrd-Hagel’s negotiation parameters were followed scrupulously by the president [sic] and State Department in the negotiation of the 2015 Paris agreement...”)

discussion below). Others may have considered it irrelevant because candidate Trump had already made a campaign promise to “cancel Paris.”

- Those who supported the Kyoto Protocol – or at least thought the Bush Administration should have tried to fix it instead of simply walking away from it – may have continued to think of Byrd-Hagel as the “death knell” of Kyoto and not something they wanted to revive.
- Some may have viewed its conditions as more reflective of what would make an agreement unacceptable than what would make it acceptable.
- Those opposing the Paris Agreement may have considered Byrd-Hagel too forward-leaning to be invoked. Among other things, it reflects no doubts about the climate issue per se, and it implicitly appears to support an even-handed international climate agreement, even one with legally binding targets.
- Those opposed to Paris on the ground that any international climate agreement needed to be approved by the Senate might have wanted to avoid shining a spotlight on a different aspect of the Resolution, namely the Senate’s view that an international climate agreement, presumably even one with legally binding targets, might or might not warrant Senate advice and consent.²⁷

²⁷ See operative paragraph 2.

5. A NOTIONAL BYRD-HAGEL ASSESSMENT OF THE PARIS AGREEMENT

A brief, notional assessment of Paris based on Byrd-Hagel might have looked something like the following:

- There is a threshold question whether the Resolution literally applies to the Paris Agreement.
- Arguably, it does not (or is, by definition, satisfied by Paris), because its conditions appear to apply only to an agreement with legally binding emissions targets.
 - Byrd-Hagel was triggered by the Clinton Administration’s support for legally binding targets partway through the negotiation of Kyoto.
 - The Resolution makes specific reference in its preamble to the Administration’s support for targets of a legally binding nature.
 - The Senate Report’s introduction and section-by-section analysis suggest that the conditions were intended to apply only to legally binding targets.²⁸
 - The operative provision, at least its first prong (related to developing countries), focuses on any agreement that would “mandate” emissions targets and also refers to a “compliance” period.

²⁸ See pp. 2 and 3.

- (It is also noteworthy that the Copenhagen Accord, under which the United States undertook a specific emissions target, did not appear to trigger any reactions related to Byrd-Hagel. This could have been because the targets were not legally binding (the Accord was not technically even an “agreement”)” or perhaps because the major developing countries, including China, also took on emissions commitments.)
- If one nonetheless looks at Paris in light of the conditions that the Senate considered should guide U.S. participation in any international climate agreement, the Agreement appears to meet both.
- Concerning the developing country prong:
 - In sharp contrast to Kyoto, the Paris Agreement’s mitigation commitments apply to developed and developing country Parties alike.
 - The core commitments, i.e., to submit and periodically update a “nationally determined contribution,” contain no exclusion or grace period for developing countries, apart from some flexibility accorded to least developed countries and small island developing states – not the countries that the Senate appeared to be concerned about.
 - In addition, the legal character of commitments is the same for all Parties, e.g., it is a legally binding requirement to submit a contribution, while emissions targets themselves are not legally binding.

- It should be noted that, with respect to the first tranche of nationally determined contributions, some Parties (including the United States) selected 2025 as their target date, while most Parties (including China and the EU) selected 2030. While one might argue that this difference puts Paris at odds with Byrd-Hagel’s reference to developing country emissions commitments being in the “same compliance period” as those of Annex I Parties, this is not the case.
 - The Paris Agreement (again, unlike Kyoto, and consistent with its “nationally determined” approach) does not enshrine or dictate particular timeframes for targets. Thus, it does not “mandate” commitments for all Parties within the same timeframe. At the same time, it does not exclude developing countries from commitments or mandate commitments in *different* timeframes (which, judging from Byrd-Hagel’s preamble, is what the Senate was concerned about).
 - In addition, given the “nationally determined” nature of Paris, the United States has discretion to match the timeframes of its targets with those of other countries of greatest interest.
- Concerning the need to avoid “serious harm to the U.S. economy” prong:
 - As noted, Paris, unlike Kyoto, does not dictate Parties’ emissions targets; rather, each Party decides on its own “contribution” based on its national circumstances. Thus, the Agreement *itself* could not, by definition, have a negative impact on the U.S. economy.

- A nationally determined target submitted under Paris could theoretically have a serious economic impact. However, this is unlikely, given that the Agreement does not legally require a Party to achieve its target, and a Party facing serious harm to its economy would have the discretion not to achieve it.
- In the case of the U.S. target (a 26-28% reduction in GHG emissions below 2005 levels in 2025), various studies conclude that the United States could achieve the target at reasonable cost.²⁹
- At the same time, there is always some uncertainty with respect to the costs of meeting a future target, including, e.g., GDP growth rates, technology cost trends, fuel prices, random shocks from the weather itself, and uncertainty in various estimates (such as the size of forest carbon sinks).
- Were the costs to become unreasonable, the United States would, as noted, have the discretion not to achieve the target.
- Moreover, targets are nationally determined, not immutable elements of the Paris Agreement; they can be adjusted, even after being submitted, including if

²⁹ See, e.g., http://www.wri.org/sites/default/files/Putting_a_Price_on_Carbon_Emissions.pdf; <http://www.rff.org/files/document/file/RFF-DP-16-48.pdf>. See also <http://rhg.com/notes/preliminary-2017-us-emissions>.

at any point the United States determines that achievement of a particular target would be too costly.³⁰

- While not expressly part of the Byrd-Hagel test, the economic costs of climate change in the United States might also be considered.³¹

6. CONCLUSION

Commentators and policymakers considering the issue of continued U.S. participation in the Paris Agreement were, of course, free to decide that the issues flagged in the 1997 Byrd-Hagel Resolution were no longer relevant, that they were implicitly satisfied, or that they reflected necessary but not sufficient conditions for an acceptable international climate agreement. It is striking, however, given the key role that Byrd-Hagel played in U.S. international climate policy across several Administrations, that it was not even a starting point of the discourse regarding continued U.S. participation in the Paris Agreement.

³⁰ While the Agreement encourages any mid-stream adjustment to be in the more ambitious direction, it does not prohibit any type of adjustment. See <https://www.c2es.org/site/assets/uploads/2017/05/legal-issues-related-paris-agreement.pdf>.

³¹ See, e.g., <http://science.sciencemag.org/content/356/6345/1362.full?ijkey=x3wZ8kcgtoMUM&keytype=ref&siteid=sci>.