GAO
GOVERNMENT OVERSIGHT
& ACCOUNTABILITY

Government Accountability & Oversight
724 Bielenberg Drive
Woodbury, MN 55125

Contact info@govoversight.org

EMBARGOED For Release
Until November 4, 2019 8:00 AM

Citing Newly Obtained Paris Climate Treaty Memo, GAO Files Suit against State Dept. Seeking Obama Administration Documents

As President Trump prepares to formally withdraw from Paris a newly obtained Memorandum of Law, if genuine, represents "major political and legal scandal", "unlawful entry" to treaty

WASHINGTON, D.C. – Today the public interest law firm Government Accountability & Oversight, P.C. (GAO) filed suit against the United States Department of State under the Freedom of Information Act, seeking improperly withheld documents relating to the Paris climate treaty. The suit, on behalf of the nonprofit group Energy Policy Advocates (EPA), seeks records requested in June 2019, including the memorandum setting forth State's "working law" claiming that the U.S. could enter Paris – what the Obama White House called "the most ambitious climate agreement in history" – without obtaining Senate approval required of treaties.

The complaint notes that EPA has come into possession of a document purporting to be the Obama State Department's "Circular 175" memo, a required legal justification which State has been improperly hiding from the public. GAO's Chris Horner, co-author of a 2017 paper "The Legal and Economic Case Against the Paris Treaty", notes that:

> If this document EPA has obtained is in fact the actual Circular 175 memo, it represents a major political and legal scandal with significant implications for U.S. participation in Paris, and the effort to bind the U.S. without following the Constitution.
>
> This memo demonstrates the Obama administration's unlawful entry into the Paris treaty.

This 18-page memo bases its argument that Paris need not face Article II, Section 2 "advice and consent" in key part on a gross and material misrepresentation of the history of prior climate agreements supposedly authorizing Pres. Obama's unilateral "ratification" of Paris. The memo falsely asserts that the U.S. Senate, in ratifying the UN Framework Convention in 1992, limited agreements that "would need to be submitted to the Senate for advise and consent (Exec. Rept. 102-55, p. 14)" to those that claim to have "legally binding targets and timetables". This is demonstrably false, and likely related to the secrecy with which State has treated this document.

Damningly, on this one point the advocacy-heavy "Memorandum of Law" curiously avoids quoting the cited page 14 of Exec. Rept. 102-55, "Report to Accompany Treaty Doc. 102-38", which in fact says something very different. There the Senate clearly set forth two, distinct hypothetical agreements requiring Senate approval, one of which is any decision "to adopt targets and timetables" – not just those purporting to be "legally binding" (e.g., Kyoto, Paris).[1]

The mystery since 2015 of how the Obama administration skirted this reality is now solved: the memo legally justifying U.S. participation in the Paris Agreement without Senate approval misrepresents the U.S. Senate position. It did so by sleight-of-hand, in a parenthetical invention: "'targets and timetables' [was] understood in that context to mean legally binding targets"[2].

---

[1] This is confirmed in "Treaties and other International Agreements: The Role of the United States Senate, A Study Prepared for the Committee on Foreign Relations, United States Senate, by the Congressional Research Service, Library of Congress" (see p. 276).
[2] This is not supported in the memo, and is debunked in S. HRG. 102-973 – cited in the memo itself – at p. 119 ("Some targets were meant to be legally binding; others were "goals" or "aims" and included numerous caveats.")

This is unsupported, and in Rept. 102-55 the Senate used both terms deliberately, to describe two distinct scenarios: first, any decision "to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement", which of course describes Paris; "further", any attempt to convert the UNFCCC's non-binding promise then before the Senate into "legally binding targets and timetables …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."

In short, the Obama administration misrepresented the facts to involve the U.S. in Paris, and to avoid a repeat of the Kyoto "accord" which died when the Senate refused to even consider it.

The Obama White House played Paris both ways: acknowledge that Paris was more ambitious than two prior treaties that came before it –requiring ever-tightening emission reductions, every five years, in perpetuity – while denying it was a treaty. The Clinton-Gore administration acknowledged that Kyoto was a treaty, which confronted popular resistance and proved that any such deal is a non-starter in the U.S. Senate, *where it must go*.

This lesson led the Obama administration to opt for a convoluted tale and placing a bet that the Senate would avoid institutional conflict. This new memo affirms that bet's brazenness: although a Senate lawyer decried this "disturbing contempt for the Senate's constitutional rights and responsibilities" by circumventing the body's constitutional treaty role on Paris, as with the Iran "JCPOA" deal the institution shrunk from a constitutional fight. However, as Horner notes:

> This memo affirms the political and constitutional imperative for President Trump to withdraw the U.S. from this unlawfully entered pact. The records EPA seeks in the suit filed by GAO are critical components of the coming, necessary and long overdue debate.

Key excerpts from EPA's complaint include:

> The records requested include and relate to the required "Circular 175" analysis of whether an agreement is a treaty. …
>
> As EPA noted in its request, "These records are of immense public interest. The Obama White House declared the December 2015 Paris agreement the "most ambitious climate change agreement in history", therefore more ambitious than two predecessor climate agreements acknowledged by all parties to be treaties. Most parties have ratified Paris as a treaty under their own systems but, regardless, for U.S. purposes Paris has every appearance of being a treaty under Circular 175, and has been ratified as a treaty by legislatures around the world — if "deemed" into existence by then-heads of government of a small number of outlier countries, including the United States and North Korea."
>
> Plaintiff has come into possession of a document purporting to be the Paris Circular 175 memorandum of law that is responsive to plaintiff's request.
>
> This document materially misstates, while studiously avoids quoting the actual, referenced text of the history of the agreements purportedly enabling the claim that Paris need not be subject to Article II, Section 2 "advice and consent".
>
> As such, if authentic, this document represents a significant legal and political scandal. Records responsive to plaintiff's request would allow the public to evaluate this information and are the only means that would allow the public to do so.

GAO looks forward to the State Department releasing these records the public has a right to see.

Government Accountability & Oversight is a 501(c)3 non-profit organization dedicated to transparency in public officials' dealings on matters of energy, environment and law enforcement