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# The Fate of the Kyoto Protocol Under the Bush Administration

By  
Greg Kahn\*

## I. PREFACE

In August of 2002, the *Times* of London published an article on President George W. Bush's intention to skip the Johannesburg Earth Summit.<sup>1</sup> In the same article, the *Times* also added several statements Bush has made on the environment ("I know that human beings and fish can coexist peacefully") and stated that many have dubbed him "the Toxic Texan."<sup>2</sup> Bush's stance on the environment has not made him popular among Europe's press or its leaders, especially due to his policies on the Kyoto Protocol.

The Kyoto Protocol (hereinafter "Protocol"), an agreement designed to protect the environment by setting targets for reducing greenhouse gas emissions by signatory countries, has been rejected by the Bush administration, prompting criticisms from environmental groups and European politicians.<sup>3</sup> Much of this criticism suggests that Bush is acting unilaterally and ignoring the rest of the international community by not forging ahead with Kyoto. Is this true? Has the new administration altered U.S. policy on Kyoto and climate control, thereby isolating itself from the rest of the world? While many leaders in the European Union would suggest exactly this, the Bush administration's opposition to Kyoto is not so simple to disparage.

This article will assess whether Bush's policies on the Kyoto Protocol have been conducted under a unilateral framework. Unilateralism, as opposed to multilateralism, is defined as the unwillingness to work with other countries in solving a problem, and pursuing independent action instead. Bush has been repeatedly criticized for his unilateral actions in rejecting the Kyoto Protocol, but this does not withstand close examination. The Protocol, as drafted, was a flawed document, and Bush's decision to reject it was justified. Bush is especially reluctant to undertake any action that may harm the U.S. economy, and has instead proposed alternate market-based approaches. His subsequent with-

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1. Katty Kay, 'Toxic Texan' Has Poor Green Record, *TIMES* (LONDON), Aug. 23, 2002, at 19.

2. See *id.*

3. One British Member of Parliament called him "that fool on Capitol Hill." Ben Russell, *Parliament: Environment-Tories Condemn 'Inept' Prescott's Failure on Kyoto*, *INDEPENDENT* (LONDON), Apr. 25, 2001, at 8.

drawal from further negotiations on the Protocol, however, is seen as confirmation that Bush is opposed to working with other countries to solve the problem of climate change. However, this article will demonstrate that President Bush is not opposed to multilateral cooperation, but rather he is opposed to aggressively combating climate change because he does not see it as a significant problem. Bush's actions on Kyoto, therefore, are more accurately described as non-lateral, because he cannot pursue a multilateral or unilateral solution to a problem that he does not believe exists.

## II.

### WHAT IS THE KYOTO PROTOCOL?

Climate change first emerged as a political issue in the 1980's, and soon attracted widespread international attention.<sup>4</sup> In 1988, partially under U.S. leadership, the United Nations established the Intergovernmental Panel on Climate Change to conduct scientific research on the phenomenon of climate change.<sup>5</sup> As a result of these scientific discoveries, debate centered on mandatory reductions of greenhouse gases, including carbon dioxide. The first steps in the creation of a global regime of climate control were taken at the inaugural Earth Summit in 1992 in Rio de Janeiro.<sup>6</sup> At the summit, which was attended by 154 countries, the United Nations Framework Convention on Climate Change (UNFCCC) was signed.<sup>7</sup> Although the agreement contained only hortatory political principles, these principles continue to guide the process of creating an international framework to address global climate change. The UNFCCC urged developed countries to take a leadership role in combating climate change because they held greater accountability for the current problem of global warming.<sup>8</sup> Signatories also agreed that countries should meet regularly at the Conference of the Parties (COP) to discuss the implementation of the objectives.<sup>9</sup> A push was also made to include more specific goals, such as mandatory emission standards, to fight global warming and dangerous emissions, but due in part to the opposition of the United States, the convention did not create legally binding emission targets.<sup>10</sup>

## III.

### THE KYOTO PROTOCOL UNDER CLINTON

Subsequent meetings in Berlin and Geneva focused on addressing the lack of tangible goals. In 1995 the Clinton administration accepted the Berlin Mandate which "called for the negotiation of additional commitments for industrial-

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4. Daniel Bodansky, *Bonn Voyage: Kyoto's Uncertain Revival*, THE NAT'L INT., Fall 2001, at 46.

5. *Id.*

6. *Id.*

7. *History of the Kyoto Protocol*, at <http://www.mapleleafweb.com/features/environment/kyoto/05.html> (last visited Mar. 6, 2003).

8. *Id.*

9. *Id.*

10. Bodansky, *supra* note 4, at 46.

ized countries.”<sup>11</sup> The Kyoto Protocol drafted in 1997 created both long-term goals and short-run emission targets for the years 2008-2012. To take effect, the Protocol must be ratified by at least 55 countries and those 55 countries must also represent at least 55 percent of emissions by all industrialized countries.<sup>12</sup> This renders ratification by large industrial countries like the United States (which is responsible for 25 percent of Annex I emissions) crucial. Without a sufficient number of industrialized countries, it will be difficult for the treaty to take effect. The Protocol was flexible because it did not specify how long-term emission goals were to be achieved. Potential options include emission trading (whereby a limited market for emissions credits, i.e., the right to emit a given level of greenhouse gases, is created to allow countries to buy, sell, and trade credits), new technologies that reduce emissions, and credits for carbon sinks, such as forests, which offset and reduce emissions by collecting excess carbon dioxide. During negotiations, the Clinton administration attempted to designate anything made of wood above one foot to be a forest, and therefore a carbon sink.<sup>13</sup> These efforts failed, but they are indicative of the U.S. position at these negotiations; the Clinton administration foresaw the difficulties in ratifying the Protocol and sought a protocol with more lenient provisions.

In 1997, the Senate preemptively signaled its opposition to the Protocol by overwhelmingly (by a vote of 95-0) passing the Byrd-Hagel resolution, which states that the Senate will not ratify any treaty that:

(A) Mandate(s) new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or (B) would result in serious harm to the economy of the United States.<sup>14</sup>

Paragraph B was drafted in response to the highly divergent estimates of the economic costs of compliance with the Protocol. A report commissioned by the Clinton administration estimated these costs as relatively small, but other studies predicted costs as high as 3 percent of the GDP, which would result in a shock similar to the oil crisis of the 1970s.<sup>15</sup> Despite the Byrd-Hagel resolution,

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11. *Id.* at 46.

12. This means some combination of the 55 countries which ratify the Protocol must account for at least 55 percent of the greenhouse emissions from industrialized countries. For example, if Britain accounts for 15 percent of industrialized emissions, France 15 percent, and the United States 25 percent, and all sign the Protocol, the 55 percent requirement is met. The United States actually produces 36 percent of the emissions of the industrialized countries.

13. Anjana Ahuja, Verona Bennett & Mark Henderson, *Kyoto, Why Care?*, *TIMES* (LONDON), July 9, 2001, available at LEXIS, News Library.

14. S. Res. 98, 105th Cong. (1997).

15. *Hot Air On Global Warming? Kyoto Treaty Inches Ahead*, *INVESTOR'S BUS. DAILY*, Nov. 13, 2001, at 19A. There are suggestions that the economic costs should be offset by the gains demonstrated by cleaner air, but these are highly speculative. Neither the Bush nor the Clinton administrations have attempted to show a number which would represent the financial gains from stopping global warming. See also Ahuja, *supra* note 13; Johnathan Weisman, *Ex-Clinton Aides Admit Kyoto Treaty Flawed, Climate Pact Costlier Than They Thought*, *USA TODAY*, June 12, 2001, at 7A.

Vice President Gore symbolically signed the treaty in 1998.<sup>16</sup> Further talks during Clinton's term in office culminated at the sixth Convention of the Parties at the Hague, where amid general rancor little was decided, and even less was accomplished.<sup>17</sup>

#### IV.

##### THE BUSH ADMINISTRATION'S ACTION ON THE KYOTO PROTOCOL

When the Bush administration came into office in January 2001, the environmentalist community was pessimistic because President Bush and many members of his administration are former energy executives. The administration's first action on the Protocol was a letter by President Bush to four senators (including Chuck Hagel, one of the sponsors of the Byrd-Hagel resolution) in which Bush outlined his views on the Kyoto Protocol and other environmental policies:

As you know I oppose the Kyoto Protocol because it 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.<sup>18</sup>

On the subject of carbon dioxide emissions, Bush wrote, "I do not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a 'pollutant' under the Clean Air Act."<sup>19</sup> As the U.S. State Department webpage notes, Bush's opposition to mandatory emission reductions directly contradicted his pledge during the presidential campaign.<sup>20</sup> This letter was also somewhat embarrassing to the administration, as just days before, Environmental Protection Agency (EPA) Administrator Christine Whitman had stated that the Bush administration was considering mandatory limits.<sup>21</sup>

On March 27, 2001, the Bush administration officially rejected the Protocol when Christine Whitman said that "we have no interest in implementing that treaty,"<sup>22</sup> and Condoleezza Rice, the National Security Advisor, stated that "Kyoto is dead."<sup>23</sup> On March 28, 2001 the Bush administration justified its opposition, and noted that only Romania had ratified the treaty. "It's a signal worldwide that others agree with the President's position on the treaty," said the

16. This signature was symbolic because the Clinton administration never even presented the Protocol to the Senate for ratification.

17. Bodansky, *supra* note 4, at 47.

18. Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37 WEEKLY COMP. PRES. DOC. 444 (Mar. 13, 2001).

19. *Id.*

20. See <http://usinfo.state.gov/topical/global/energy/01031401.htm> (last visited Apr. 14, 2003).

21. *Id.*

22. *U.S. Won't Follow Climate Treaty Provisions, Whitman Says*, N.Y. TIMES, Mar. 28, 2001, at A19.

23. Jeffrey Kluger, *A Climate of Despair*, TIME, Apr. 9, 2001, at 30.

president's Press Secretary Ari Fleischer.<sup>24</sup> Fleischer also stated that the administration was undertaking a cabinet level policy review of the problem of climate change and would decide how to proceed based on those findings.<sup>25</sup>

In June 2001, Secretary of State Colin Powell stated at a press conference that "Kyoto as a process is not dead," although the Protocol itself was deeply flawed.<sup>26</sup> Powell argued that the goals of Kyoto were unrealistic and bound the United States to steeper reduction of emissions than the European Union. He pledged, however, that the United States would continue to work with its allies to develop a solution to the problem of climate change.<sup>27</sup> That same month, as President Bush made his first tour of Europe and reiterated his opposition to the Protocol, he was met with protests at every destination.<sup>28</sup> European leaders reiterated that they disagreed with the president's stance on the Protocol. German Chancellor Gerhard Schroeder told Bush "we agreed on practically everything, except, obviously, for one thing, and that was no surprise . . . the Kyoto Protocol."<sup>29</sup> On June 11, 2001, the White House Working Group on Climate Change published their findings and indicated that the United States was in favor of curtailing climate change by using voluntary corporate standards, research, and tax incentives, instead of implementing strict emission controls.<sup>30</sup>

The sixth Convention of the Parties took place in Bonn in July 2001, where, to the surprise of many, a compromise was reached. Jubilant European delegates declared the Protocol was "not dead" in response to Bush's charge that the Protocol was fatally flawed.<sup>31</sup> "We have saved the Kyoto Protocol!" read one headline.<sup>32</sup> At Bonn, the "umbrella group" of non-EU developed countries that demanded changes in the Protocol (which formerly included the United States) finally extracted sufficient concessions from the European Union. As a result, Russia, Japan, Canada, New Zealand and Australia (the only other non-European countries in Annex I) became far more likely to ratify the treaty, and

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24. *Excerpts: White House Briefing Comments on Kyoto Protocol*, U.S. DEP'T OF STATE, INT'L INFO. PROGRAMS, Mar. 28, 2001, at <http://usinfo.state.gov/topical/global/climate/01032801.htm> (last visited Mar. 6, 2003).

25. *Id.*

26. *Secretary Powell Says Kyoto Process is Not Dead*, U.S. DEP'T OF STATE, INT'L INFO. PROGRAMS, June 17, 2001, at <http://usinfo.state.gov/topical/global/climate/01061801.htm> (last visited Mar. 6, 2003).

27. *Id.*

28. Bill Nichols, *Protesters Interrupt Powell at Summit on Earth*, USA TODAY, Sept. 5, 2002, at 5A.

29. Olivier Knox, *Bush, Schroeder, Agree to Disagree on Environment*, AGENCE FRANCE-PRESSE, Mar. 30, 2001, available at LEXIS, News Library.

30. *Excerpt: White House Working Group Report on Climate Change*, U. S. DEP'T OF STATE, INT'L INFO. PROGRAMS, June 11, 2001, at <http://usinfo.state.gov/topical/global/climate/01061201.htm> (last visited Mar. 6, 2003).

31. Maya Kaneko, *U.N. Conference Chairman Publicly Upbeat on Climate Talks*, JAPAN ECON. NEWswire, July 18, 2001, available at LEXIS, News Library. This Conference of the Parties at Bonn is also numbered sixth, because it is considered as the second part of the conference at the Hague.

32. Richard Ingham and Marie-Pierre Ferey, *More Concessions in Late-Night Rescue for UN's Climate Treaty*, AGENCE FRANCE-PRESSE, Nov. 10, 2001, available at LEXIS, News Library.

some already have.<sup>33</sup> The United States sent negotiators to Bonn, but they stood on the sidelines and did not participate in the negotiations. Under Secretary of State for Global Affairs, Paula Dobriansky, read a statement arguing that "[T]hough we do not believe the Kyoto Protocol is sound public policy for the United States, we do not intend to prevent others from going ahead with the treaty, so long as they do not harm legitimate U.S. interests . . . and we will welcome international views as we develop a science-based, technology-oriented, market-friendly basis to deal with climate change."<sup>34</sup> Later, in November 2001, Ms. Dobriansky led the U.S. delegation at the seventh Conference of the Parties in Marrakech; again, the United States did not participate in the negotiations.<sup>35</sup> This time, however, Ms. Dobriansky's speech did not even mention the Protocol, indicating the lack of U.S. interest in the treaty.<sup>36</sup>

In February 2002 President Bush finally unveiled his long awaited proposal on climate change, which was not well-received. Bush's plan called for reductions in "greenhouse gas intensity" rather than cuts in actual emissions.<sup>37</sup> This would improve the efficiency of emission producing facilities but it would not impose hard emission caps (in fact, the levels of "greenhouse gas intensity" have been decreasing over time as the U.S. economy continues to rely less on the manufacturing sector.<sup>38</sup>). Despite this initiative, it appears likely that U.S. emissions will continue to grow.<sup>39</sup> Bush called for a more market-based approach to the problem, but failed to explain precisely what such a system would entail, instead relying on somewhat nebulous policy statements.<sup>40</sup> The president

33. *Russia Will Ratify Kyoto Protocol in Near Future Says Premier*, GLOBAL NEWS WIRE, Sept. 3, 2002, available at LEXIS, News Library. Certain countries, like Russia, have indicated that they are in favor of ratifying the treaty, but have yet to do so.

34. Paula Dobriansky, Under Secretary of State for Global Affairs, Statement by the United States of America, Resumed Sixth Conference of the Parties (COP-6), United Nations Framework Convention on Climate Change (July 19, 2001) (transcript available at <http://usinfo.state.gov/topical/global/cli%20mate/01071902.htm> (last visited Feb. 27, 2003)).

35. The articles in this volume will deal heavily with the tragic events of September 11, 2001. The Kyoto Protocol, however, was largely unaffected by the attacks, especially since most of the important policy decisions had already been made.

36. *Dobriansky Statement at Climate Change Meeting in Marrakech*, U.S. DEP'T OF STATE, INT'L INFO. PROGRAMS, Nov. 7, 2001 at <http://usinfo.state.gov/topical/global/climate/01110701.htm> (last visited Feb. 27, 2003).

37. Remarks Announcing the Clear Skies and Global Climate Change Initiatives in Silver Spring, Maryland, 38 WEEKLY COMP. PRES. DOC. 232 (Feb. 14, 2002). "Greenhouse gas intensity" is the reduction of emissions per unit of the Gross Domestic Product (GDP), i.e., if emissions remain constant as the economy grows, this measurement decreases. If the GDP grows faster than emissions, emissions per unit of GDP still fall even though emissions themselves are rising.

38. Paul Krugman, *Ersatz Climate Policy*, N.Y. TIMES, Feb. 15, 2002, at A21 ("Because pushing bits around doesn't take as much energy as pushing around large pieces of sheet metal, a dollar of new-economy G.D.P. generally doesn't require burning as much carbon as a dollar of old-economy G.D.P.").

39. See *id.* (The emissions will continue growing because only greenhouse gas intensity will be regulated. The greenhouse gas intensity has been falling over the last decade, even though emissions have risen. Therefore, the current trend is for emissions to rise even though the greenhouse gas intensity falls).

40. *U.S. Official Says Economic Growth Needed to Deal with Climate Change*, U.S. DEP'T OF STATE, INT'L INFO. PROGRAMS, May 14, 2002, at <http://usinfo.state.gov/topical/global/climate/02052101.htm> (last visited Mar. 7, 2003).

summed up this proposal, stating “[W]e need to recognize that economic growth and environmental protection go hand in hand,” and “[W]e can tap the power of economic growth to further protect our environment.”<sup>41</sup> Bush pledged to present this idea of “tapping the power of economic growth” to combat climate change to foreign leaders, but did not initially receive any international support.

In August 2002, the World Summit was held in Johannesburg, although the president chose not to attend. At the Summit, several countries pledged their commitment to ratify the Protocol, making it likely that it will take effect shortly.<sup>42</sup> When Secretary of State Colin Powell spoke at the Summit, he was jeered by environmentalist groups who were angered by the U.S. stance on environmental issues, especially the rejection of the Protocol.<sup>43</sup>

In November 2002, the eighth Conference of the Parties met in New Delhi, India, with the goal of encouraging the ratification of the Protocol, and expanding it to include developing countries.<sup>44</sup> The United States argued that compliance with Kyoto would result in economic sacrifices and received some support from developing countries which fear the economic consequences of joining the Protocol. Environmental leaders were displeased by U.S. tactics at the conference, calling the U.S. delegation “atrocious” and “particularly duplicitous.”<sup>45</sup> These groups argued that the United States is only advocating such measures because it is opposed to the Protocol, and criticized the unsuccessful U.S. attempt to exclude any mention of the Protocol from the final conference declaration. However, some developing countries were sensitive to the U.S. advocacy for market-based alternatives.

Several days before President Bush’s State of the Union Address, *The New York Times* announced that members of the administration were “traveling the country collecting written promises from industries to curb emissions of gases linked to global warming.”<sup>46</sup> The administration insisted on characterizing its efforts as a voluntary program, despite requiring firm written commitments. These “mandatory voluntary” limits, however, apply to greenhouse gas intensity, not absolute emissions levels. During the State of the Union address, Bush outlined multiple environmental initiatives, including a measure to protect forests, funding to develop a viable hydrogen car, and the reduction of gases that harm air quality.<sup>47</sup> These measures were not well received by many observers, including newspapers.<sup>48</sup> *The New York Times* scolded Bush’s environmental

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41. Remarks Announcing the Clear Skies and Global Climate Change Initiatives, *supra* note 37.

42. *Kyoto Still Emission Impossible*, AUSTRALIAN, Sept. 6, 2002, at 10.

43. Barry James, *Summit Ends in Broad Pledge on World Goals*, INT’L HERALD TRIB., Sept. 6, 2002, at 1.

44. *Delhi Declaration Urges Kyoto Ratification*, OXY-FUEL NEWS, Nov. 11, 2002, available at LEXIS, News Library.

45. *Id.*

46. Andrew Revkin, *U.S. is Pressuring Industries to Cut Greenhouse Gases*, N.Y. TIMES, Jan. 20, 2003, at A1.

47. Address Before a Joint Session of Congress on the State of the Union, 39 WEEKLY COMP. PRES. DOC. 109, 111 (Jan. 28, 2003).

48. Bob Herbert, *Bait and Switch*, N.Y. TIMES, Jan. 30, 2003, at A23.



program as inconsistent with the administration's proposal to increase the tax deduction for purchasers of large sports utility vehicles, which have repeatedly been cited as a cause of emissions.<sup>49</sup>

## V.

### BUSH'S REJECTION OF THE PROTOCOL

EPA Administrator Whitman's announcement that the Bush administration would not support the Protocol elicited many questions from the press. From what, if anything, had the United States withdrawn, and why? From an international legal standpoint, there was no effect because the Protocol was never ratified by the Senate and hence was not binding. The previous administration had signed the Protocol, and when President Bush announced he was opposed to the treaty, many asked how the United States planned to unsign the treaty. At a press conference, Ari Fleischer repeated the administration's position that signing the Protocol did not bind the United States to any action, and therefore there was no reason to unsign the treaty.<sup>50</sup> The signature does prohibit the United States from working against the treaty, but statements from the Bush administration have confirmed they will not attempt to undermine the Protocol. The United States is not bound by the Protocol absent Senate ratification, so Bush's opposition has not technically altered the U.S. position.

Under U.S. law, the Senate must ratify all international treaties if they are to go into effect, but many publications criticizing Bush's stance have ignored this requirement and placed blame for the Protocol's rejection squarely on President Bush. The media's tendency to ignore the Byrd-Hagel resolution encourages the perception that the Bush administration alone has impeded the ratification of the Protocol, which is not entirely accurate.<sup>51</sup> Critics have argued that the Bush administration effectively repudiated the Protocol because it did not submit it for ratification, but Al Gore signed the Protocol in 1998 and the Clinton administration did not submit it to the Senate for ratification either. For example, a recent article in the *Ecology Law Quarterly* criticizing Bush's opinion that the Protocol is flawed because developing countries are not bound by it, failed to mention that the Senate unanimously agrees with Bush's view.<sup>52</sup> Further, the article made no mention of the Byrd-Hagel resolution, which precludes the ratification of the Protocol.<sup>53</sup> Even if the Bush administration supported the Protocol in its present form, it is highly unlikely that the Senate would ratify it.

Although the administration gave no official reasons as to why it chose to reject the Protocol, there are serious problems with its provisions. These

49. *Empty Promises*, N.Y. TIMES, Jan. 31, 2003, at A28.

50. *Excerpts: White House Briefing Comments on Kyoto Protocol*, *supra* note 24.

51. Patrice Hill, *Bush Jettisons Kyoto Treaty*, WASH. TIMES, Mar. 29, 2001, at B8. Naturally, political partisanship has contributed to this misperception. After Bush rejected the Protocol, Senator Lieberman called him a "renegade" despite the fact that Lieberman was a member of the Senate which voted 95-0 in favor of the Byrd-Hagel resolution.

52. Matthew Vespa, Note, *Climate Change 2001: Kyoto at Bonn and Marrakech*, 29 *ECOLOGICAL L.Q.* 395 (2002).

53. *Id.*

problems are central to the reasons the Bush administration ultimately chose to abandon the Protocol. First, the Protocol mandates emissions reductions to pre-1990 levels. This results in disparate consequences for countries that have experienced growth over the past decade and those that have been stagnant or recessionary. Between 1990 and 2000, the U.S. economy grew so rapidly, that a reduction to 1990 levels would result in a 30 percent emissions cut.<sup>54</sup> This is a most extreme burden to place upon any signatory of the Protocol.<sup>55</sup> Due to Russia's economic collapse, its current emissions levels are far below 1990 levels, so Russia urged the parties to include unfettered emissions trading in the Protocol.<sup>56</sup> In essence, Russia was using its economic collapse to demand subsidies from other Protocol signatories. Using emission levels fixed in 1990 would create enormous costs for the United States, and windfalls for other countries.

The second major problem is that only countries in Annex I (the developed countries) are bound by the treaty. The administration initially argued that the exclusion of countries such as China and India is fundamentally unfair because it excludes many of the world's major emitters of greenhouse gases from the Protocol.<sup>57</sup> President Bush has since taken a different stance, declaring in recent speeches that he opposes subjecting developing countries to the economic costs of the Protocol and would rather develop a "market-based" approach.<sup>58</sup> Under his approach, no country would be burdened with economic sacrifices and the distinction between developed and developing countries would be eliminated. Bush has, however, pledged to support the UNFCCC, the basis for the Protocol, which presumes that developed countries will take the lead in combating climate change.<sup>59</sup> By taking the lead in urging the use of inexpensive alternatives to the Protocol, Bush can reconcile his policies with his support of the UNFCCC's directive that developed countries assume most of the responsibility for combating climate change. Despite Bush's proposal, the Byrd-Hagel Resolution still specifically opposes any treaty that excludes developing countries, and therefore precludes the ratification of the Protocol.

There are also serious concerns regarding the ability of some signatories to fulfill their emission reduction pledges. While many European countries enthusiastically signed on to the treaty at the sixth Convention of the Parties in Bonn in 2001, some of those countries may not be able to meet its requirements.<sup>60</sup> *The Economist*, for instance, was dismissive of the Protocol because many European countries cannot realistically meet its goals.<sup>61</sup> By agreeing to the Protocol

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54. See *Changing Climate: Reality May Bring Together Those In and Out of Kyoto*, FIN. TIMES (LONDON), Dec. 13, 2002, at 16.

55. Philip Scott, *Let's Clear the Air Over Kyoto—It's Simply Daft Economics and Dubious Science*, TIMES (LONDON), July 19, 2001, available at LEXIS, News Library.

56. *Id.*

57. *Text: Bush Will Not Require Power Plants to Reduce Carbon Emissions*, *supra* note 18.

58. Remarks Announcing the Clear Skies and Global Climate Change Initiatives, *supra* note 37.

59. *Id.*

60. *Kyoto Rescued?*, THE ECONOMIST, July 28, 2001.

61. *Id.*

without the ability to meet its requirements, these countries have jeopardized its effectiveness, and provided ammunition to American critics who argue that the United States should not be bound by a treaty if the other signatories do not intend to fulfill their obligations. For some countries the 1990 levels are easier to reach. For instance, Germany lowered its emissions significantly by closing many inefficient manufacturing plants in former East Germany and England has decreased its coal usage since 1990.<sup>62</sup> However, both England and Germany are phasing out the use of emission-free nuclear power<sup>63</sup> and the EU recently decided to extend coal subsidies for another decade.<sup>64</sup> Also, many other countries are predicted to have serious difficulties reaching their stated goals.<sup>65</sup> Although enforcement mechanisms exist, their use will be impossible if too many members are in violation.

Another critical issue, and perhaps the factor that ultimately ensured Bush's opposition to the Protocol, is the uncertain but potentially prohibitive expense of complying with the Protocol's provisions. Though not conclusive, evidence suggests that drastic cuts in emissions will have serious repercussions on the U.S. economy<sup>66</sup> and the economic sacrifices made by the United States would be greater than that of any other country.<sup>67</sup> This is the current administration's biggest criticism of the Protocol, and one that is likely insurmountable. A Clinton administration study argued that the cost would be a negligible part of the GDP, but most estimates have been far higher.<sup>68</sup> In addition, a study conducted by the Wharton Economic Forecast Associates found that compliance would produce a shock to the economy similar to the oil crisis of the 1970's. Furthermore, some former members of the Clinton economic team have since admitted that the costs are likely to be far higher than originally estimated.<sup>69</sup>

In light of the Protocol's shortcomings, President Bush responded with his own solution to the problem of climate change. President Bush has reiterated his stance that "economic growth" is the answer to climate change.<sup>70</sup> Some members of the Senate even believe that global warming could be a boon to the U.S. economy. Frank Murkowski, a former Republican Senator from Alaska, argued in a law review article that the Protocol may not be necessary because global warming could be advantageous to adequately prepared countries. While

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62. *The Global Warming Gap*, N.Y. TIMES, June 17, 2001, at 14.

63. Daniel Dombey, *Belgian Reactor Law Shows Up EU Divisions*, FIN. TIMES (LONDON), Feb. 22, 2002, at 6.

64. *Kyoto Rescued?*, *supra* note 60.

65. Ahuja, *supra* note 13.

66. Remarks Announcing the Clear Skies and Global Climate Change Initiatives, *supra* note 37.

67. Secretary Powell Says Kyoto Process is Not Dead, *supra* note 26.

68. Bodansky, *supra* note 4, at 54.

69. Weisman, *supra* note 15. The methodology used in the Clinton study was particularly questionable. For instance, it took into account China's compliance, even though China is not part of Annex I, and therefore not bound by the Protocol.

70. Remarks Announcing the Clear Skies and Global Climate Change Initiatives, *supra* note 37.

not the central point of Senator Murkowski's article, it was nevertheless mentioned as a reason to oppose the Protocol.<sup>71</sup>

Finally, a serious criticism of the Protocol is the right of developing countries to negotiate the terms of the Protocol without being bound by it. Daniel Bodansky, a member of the Clinton team that helped negotiate the Protocol, has called this problem "representation without taxation." Although only Annex I parties are bound by the Protocol, in order for the Protocol to go into effect, 55 signatures are required (Annex I consists of fewer than 55 countries). "This has created the odd situation that developing countries have had a significant say in determining rules that would not apply to themselves."<sup>72</sup> For instance, OPEC countries asked for subsidies since implementation of the Protocol would decrease their revenues because of the incentive to find alternative fuels and processes that do not emit as many greenhouse gases.<sup>73</sup> The demands of developing countries decrease the chances that further negotiations could create a Protocol that would satisfy President Bush or the Senate.<sup>74</sup>

Although the merits of Kyoto are debatable, it is clear that the concerns expressed by the United States are justified. In fact, even some of the Protocol's staunchest supporters, including European delegates to the Bonn convention, were disappointed with the final draft of the treaty. Viewed in this light, Bush's rejection of the Protocol itself cannot be seen as unilateral. Opposition to bad treaties cannot make one unilateral, otherwise all those who do not sign disagreeable international treaties would be branded unilateral.<sup>75</sup> Therefore, the examination of whether Bush acted unilaterally turns on whether Bush rejected the Kyoto *process* without offering a realistic alternative. The process is the continuing negotiation regarding the form that the Protocol will take. The United States withdrew from these negotiations at the sixth Convention of the Parties in Bonn, and is no longer involved in negotiating the Protocol.

The Kyoto process and the Protocol are not fully separable, but they are not identical. In December 2001 Colin Powell stated that anything the Protocol produced would be a "dead letter," even though the final draft had yet to be produced.<sup>76</sup> Although Powell claimed that only the Protocol and not the process was dead, he was soon proven wrong.<sup>77</sup> The U.S. delegation to the Bonn Convention of the Parties stood apart from the negotiations, demonstrating that the

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71. Frank H. Murkowski, *The Kyoto Protocol is Not the Answer to Climate Change*, 37 HARV. J. ON LEGIS. 345, 358 (2000).

72. Bodansky, *supra* note 4, at 50.

73. Reino Geyers, *High-level Climate Talks Continue at Bonn*, DEUTSCHE PRESSE-AGENTUR, July 20, 2001, available at LEXIS, News Library.

74. There are many other criticisms of Kyoto—critics attack its structure, enforcement methods and other points. However, these are not germane to the discussion because they were not responsible for the Bush administration's decision to reject the Protocol.

75. A treaty that harms the United States should not become legitimate just because other countries have signed it. It may be "unilateral," but by this definition refusing to sign a treaty that is grossly unjust would be unilateral as well. To extend such logic to an extreme would render the concept of unilateralism useless.

76. *Secretary Powell Says Kyoto Process is Not Dead*, *supra* note 26.

77. *Id.*

United States was not interested in negotiating within the Kyoto process. President Bush has repeatedly stated that he supports the UNFCCC, which is the guiding principle of the Protocol, but he has withdrawn from negotiations of the treaty, especially due to its insistence on strict emission restrictions. Whether this withdrawal was truly unilateral depends on several factors, among them the response of the Europeans, the main proponents of the Protocol.

## VI.

### THE EUROPEAN REACTION AND RESPONSE

As soon as the Bush administration announced its opposition to the Protocol, the European press as well as European politicians pilloried the decision. British members of Parliament called Bush the "Toxic Texan" and the "fool on Capitol Hill," among other things.<sup>78</sup> One German newspaper called him the "Climate Killer."<sup>79</sup> The British press took it one step further; the *Independent* published a photo of Bush on the front page with the headline "Polluter of The World."<sup>80</sup> There was even talk of implementing trade sanctions in response to the American refusal to support the Protocol.<sup>81</sup> British Prime Minister Tony Blair, cognizant of the special relationship between England and the United States, promised to talk to President Bush and attempt to secure his support for the Protocol.<sup>82</sup> Upon Bush's visit to Europe for the 2001 EU-U.S. summit, the EU leaders issued a statement that, "We cannot accept this [rejection of Kyoto]. EU ministers have therefore confirmed that they stand firm behind the Kyoto Protocol."<sup>83</sup> During his visit, Bush was constantly confronted with protesters angry at his rejection of the Protocol.<sup>84</sup> Bush maintained that he would work together with EU leaders on climate change.<sup>85</sup>

Many publications, such as *The Economist*, predicted that Bush's decision not to support the Protocol, or even engage in negotiations, would impede and ultimately doom the meetings at Bonn.<sup>86</sup> Instead, to the surprise of many, Bonn achieved what the Hague meetings failed to—a workable compromise. However, this compromise was not the result the Protocol's proponents envisioned because the Protocol's provisions were weakened. An *Ecology Law Quarterly* article even argued that the negotiations at Bonn resulted in an agreement that

78. Greg Hurst, *MPs' Hostility to Bush Is Ignored*, THE TIMES (LONDON), Apr. 25, 2001, available at LEXIS, News Library.

79. Scott, *supra* note 55.

80. Thom Shanker, *White House Says the U.S. Is Not a Loner, Just Choosy*, N.Y. TIMES, July 31, 2001, at A1.

81. Irwin Stelzer, *Barbarians at the Gate of Free Trade*, SUNDAY TIMES (LONDON), Apr. 1, 2001, available at LEXIS, News Library.

82. *Britain to Lobby US on Opposition to Development Goals at Earth Summit*, AGENCE FRANCE-PRESSE, Aug. 26, 2002, available at LEXIS, News Library.

83. Martin Fletcher, *President Opens Charm Offensive*, THE TIMES (LONDON), June 13, 2001, available at LEXIS, News Library.

84. Alan Rusbridger and Craig Taylor, 2001: *Did the Catastrophe Wreaked By So Many in America on September 11 Mark a Turning Point, Making Tragically Plain a Polarisation Between the West and the Rest of the World?*, THE GUARDIAN (LONDON) Dec. 29, 2001, at 17.

85. Fletcher, *supra* note 83.

86. *Oh no, Kyoto*, THE ECONOMIST, Apr. 7, 2001.

was similar to the lenient version that the United States had sought during previous negotiations.<sup>87</sup> This is not entirely accurate; the Protocol did move in the direction of U.S. goals, but not nearly enough.<sup>88</sup> The definitions of carbon sinks remained less liberal than what the Clinton administration wanted, and the potential costs of compliance remained extremely high because 1990 remained the benchmark year.<sup>89</sup> Although the negotiations at Bonn produced a compromise, they severely weakened the Protocol. Negotiations were facilitated by the U.S. withdrawal, because there was no longer any need to assign credit for carbon sinks to the United States, or negotiate issues that the United States raised.<sup>90</sup> The withdrawal of the United States also left complete power in the hands of the “umbrella group”—Japan, Russia, Canada and Australia, without whom ratification of the treaty would not be possible.<sup>91</sup> Realizing that ratification of the Protocol was in their control, the group imposed its own terms on the Europeans, and won many concessions, most of which eased the Protocol’s requirements.<sup>92</sup>

The negotiations at Bonn weakened the Protocol and created loopholes, such as an over-generous definition of carbon sinks.<sup>93</sup> As Olivier Deleuze, a former President of Greenpeace and Belgium’s Energy Minister said, “We don’t like the paper, we have big problems with it. But if it’s a take-it-or-leave-it paper, in the spirit of flexibility and because we have talked enough about climate change over the last ten years, Europe is ready to accept it.”<sup>94</sup> Further, Mr. Deleuze noted that although the EU did not like his plan, he would accept it as long as everybody else did the same.<sup>95</sup> Presented with such a flawed document, brokered by a “take it or leave it” style of negotiation bordering on the extortionate, one would expect the Europeans to be somewhat subdued about the outcome. The result was just the opposite; the Europeans were jubilant.

“Does this protocol look fatally flawed?” asked Oliver Deleuze, in a retort to President Bush’s claim that the Protocol was dead.<sup>96</sup> However, Mr. Deleuze had just admitted that he was very unhappy with the paper he had signed.<sup>97</sup> Other delegates were elated: “We have rescued the Kyoto Protocol. We can go home, look our children in the eye and feel proud of what we have done.”<sup>98</sup> European delegates reacted to Bush’s gibes that only one country had thus far ratified the Protocol (Romania) by jeering the American stance and praising their recent success. In short, there was a “record breaking display of righteous

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87. Vespa, *supra* note 53, at 418.

88. *Id.*

89. Bodansky, *supra* note 4, at 47.

90. *See id.* at 48.

91. Mark Henderson, *How the Kyoto Compromise Was Struck*, TIMES (LONDON), July 24, 2001, available at LEXIS, News Library.

92. *Id.*

93. *Breakthrough In Bonn: Global Warming*, THE ECONOMIST, July 13, 2001.

94. Henderson, *supra* note 91.

95. *Id.*

96. *Kyoto Rescued*, *supra* note 60 (The Economist’s response to Mr. Deleuze’s statement was “Yes, actually it still does—and only an idiot could fail to notice the flaw in question.”)

97. Henderson, *supra* note 91.

98. Vanessa Houlder, *Leaders Hail Kyoto Rescue Deal*, FIN. TIMES (LONDON), July 24, 2001, at 1.

indignation.”<sup>99</sup> Despite this, it is clear that the Protocol, as it currently stands, is a flawed document. Nevertheless, the EU agreed to this compromise that they had previously rejected at the Hague, which further explains why the current administration refused to support the Protocol—the administration suspected that the Europeans were motivated by a different agenda.

The drafting of the Protocol was complicated by ulterior motives of the European delegates: The EU’s staunch support of the admittedly flawed Protocol is otherwise difficult to explain. The prime motive for the ratification of the Protocol is, of course, combating global warming. However, this fails to explain why the EU would negotiate a treaty that creates multiple problems. The Protocol will leave over 50 percent of the world’s emissions unregulated by the Protocol, but the EU insisted that it remains “the only game in town.”<sup>100</sup> If ratified, the Protocol may be ineffective and could subject European businesses to the additional costs of meeting emission standards that competing businesses in other countries do not face.<sup>101</sup> Also, strict emission standards are laudable, but many commentators, even those in favor of the Protocol, argue that these are not reachable.<sup>102</sup> The Protocol provides a solution to this problem by allowing Russia to serve as an enormous emissions sink, trading its emissions credits for money. But if the EU was motivated by a desire to combat climate change, it makes little sense to subsidize Russia instead of spending money on lowering emissions. The treaty has other flaws, including overgenerous allowances for carbon sinks and credits (without the U.S. demand for these credits, there were far more of them to dole out) which would exempt heavily forested countries, like Canada, from any real enforcement.<sup>103</sup> The demands placed on the United States were clearly harsher than on any other country, yet the EU vowed to press on and insisted the United States follow suit. The image of the Europeans as incredibly environmentally conscious citizens must be viewed critically. On July 25, 2001, simultaneous with the sixth Convention of the Parties in Bonn, the European Commission met to discuss the planned phasing out of coal subsidies in July 2002; instead of ending subsidies of the world’s dirtiest fuel source, the EU renewed them for another ten years.<sup>104</sup> It is clear that the EU was motivated by other considerations beside environmental protection in negotiating the Protocol.

The Europeans may have advocated adoption of the Protocol so strenuously because it would, in fact, impose economic costs on the United States.<sup>105</sup> According to *The Economist*, “Some European ministers made it clear that they wanted Americans to feel some economic pain more than they wanted a worka-

99. *Kyoto Rescued*, *supra* note 60.

100. Douglas Jehl, *U.S. Going Empty-Handed to Meeting on Global Warming*, N.Y. TIMES, Mar. 28, 2001, at 22.

101. *Kyoto Rescued*, *supra* note 60.

102. *Id.*

103. Bodansky, *supra* note 4, at 48.

104. *Kyoto Rescued*, *supra* note 60.

105. Josef Joffe, *Who’s Afraid of Mr. Big*, THE NAT’L INT., Summer 2001, at 49.

ble agreement.”<sup>106</sup> This supports the hypothesis expressed by numerous commentators in the last two years: Europe is taking a contrary position to the United States on international issues as a matter of policy.<sup>107</sup> This is one of the main reasons that the EU was so desperate to forge ahead with the Protocol despite all of the problems described above.

The notion that Europe collectively snubbed the United States to seize the moral high ground is not submitted lightly. After Bush rejected the Protocol, *The Times* of London declared: “It is much easier to criticize the ‘Toxic Texan’ than to leave your car at home. We love to hate America. And this smug, parochial, oil-loving President draws our fire in a way the affable Clinton never did.”<sup>108</sup> Some Europeans stated “how it was left to them ‘to save the world’” after Bush rejected the Protocol.<sup>109</sup> Such feelings prompted the Europeans to regard themselves as champions of the environment, as opposed to the United States. The ratification of the Protocol, therefore, was a victory which prompted such remarks as “we have saved the Kyoto Protocol.”<sup>110</sup> Once Bush spoke out against the Protocol, it became common practice to lambaste him in politics as well as the media. In order to keep the high ground, the EU had to ratify the Protocol, otherwise Bush’s criticism would be correct, as only Romania had thus far ratified the Protocol.

The desire to upstage Bush and the United States on the Protocol was partly motivated by Bush’s statement that the Protocol was dead, but it also stems from a current trend in European politics—frustrating the United States on many international issues. On the subject of the Protocol, one British commentator suggested that by pursuing the treaty without the participation of the United States, the rest of the world was making a healthy political statement.<sup>111</sup> “For the rest of the world to thumb its nose at America . . . is a healthy reaction to the arrogance and unilateralism of President Bush” wrote *The Times* (London).<sup>112</sup> European publications noted that when President Bush decided to take a harder line with North Korea early in his administration, the EU immediately sent a delegation to meet with the North Korean dictator “for no purpose other than to demonstrate that Europe is prepared to challenge America’s foreign policy in the Asia-Pacific region.”<sup>113</sup> There was a similar reaction to the current proposal for a European military force. Although British Prime Minister Tony Blair insists that this new army will be subordinate to the North Atlantic Treaty Organization (NATO), French politicians disagree, and are trying to move ahead in creating a truly autonomous military force despite the fact that military spending is

106. *Oh No, Kyoto*, *supra* note 85.

107. Irwin Stelzer, *Blair Should Keep a Closer Eye on America*, SUNDAY TIMES (LONDON), May 6, 2001, available at LEXIS, News Library.

108. Ahuja, *supra* note 13.

109. Bjorn Lomborg, *The Environmentalists Are Wrong*, N.Y. TIMES, Aug. 26, 2002, at A15.

110. Ingham, *supra* note 32.

111. Anatole Kaletsky, *Our Planet Will Now Stop Waiting for America*, TIMES (LONDON), Sept. 5, 2002, at 24.

112. *Id.*

113. Stelzer, *supra* note 107.



decreasing in most EU countries.<sup>114</sup> This geopolitical situation has become even more evident in the recent crisis regarding the invasion of Iraq, which countries like France and Germany oppose vociferously. In a recent editorial regarding European opposition to military action in Iraq, Thomas Friedman opined somewhat provocatively that "Being weak after being powerful is a terrible thing. It can make you stupid."<sup>115</sup>

The Protocol is another arena in which the EU can counteract the United States; the EU ratified a treaty it knows is flawed because it casts the United States in a negative light. There were certainly other considerations at Bonn, but the desire of the Europeans to "save the world" and shame the Americans was an important factor.<sup>116</sup> The Europeans were desperate to ratify the Protocol because they needed to do so after they criticized Bush for his refusal to ratify. If Bonn had not resulted in a compromise, President Bush would have been completely vindicated in his assessment of the Protocol—no EU member had yet ratified it. But Bush challenged Europe, and Europe responded by passing a flawed document. Many saw Bush's brusque rejection of the Protocol as a political mistake, because it allowed Europe to portray him negatively. As a former Clinton economic advisor stated in 2001, "by simply walking away from [the Protocol], [President Bush] is letting the Europeans portray the United States as the villain, even though they privately admit that they, too, may be unable to comply with the treaty. 'George Bush has done all the work for the Europeans.'"<sup>117</sup>

The EU's motivations for ratifying the Protocol are important because they affected President Bush's decision to withdraw from the Kyoto process. The EU faction supported the Protocol for several reasons; it needed to ratify the Protocol as fast as possible to claim the moral high ground, but its opposition to the United States was a goal in itself. Although at the Convention of the Parties in Bonn President Bush was already on the sidelines of the negotiations (his chief delegate to Bonn, Paula Dobriansky, did not participate), the European insistence on passing an admittedly flawed treaty ended any hope of further U.S. cooperation. Thus, the EU's intentions in ratifying the Protocol must be factored into any analysis that seeks to determine whether President Bush acted unilaterally.

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114. *Id.*

115. Thomas Friedman, *Ah, Those Principled Europeans*, N.Y. TIMES, Feb. 2, 2003, at A15. Friedman proceeded to write:

It can make you reject U.S. policies simply to differentiate yourself from the world's only superpower. Or, in the case of Mr. Chirac, it can even prompt you to invite Zimbabwean President Robert Mugabe—a terrible tyrant—to visit Paris just to spite Tony Blair. Ah, those principled French. There is now a structural gap between America and Europe, which derives from the yawning power gap, and this produces all sorts of resentments, insecurities and diverging attitudes as to what constitutes the legitimate exercise of force. I can live with this difference. But Europe's cynicism and insecurity, masquerading as moral superiority, is insufferable.

*Id.*

116. See generally *Kyoto Rescued*, *supra* note 60.

117. Weisman, *supra* note 15.

ally in withdrawing from the Protocol. Given the EU's less than pure motives, it is much harder to pejoratively dismiss Bush's actions as merely "unilateral."

## VII.

### ANALYSIS OF BUSH'S DECISION

In light of the international furor of the last two years, and the likely entry into force of the Protocol, how should Bush's decision be viewed? Although French President Jacques Chirac has called Bush's approach "not so much isolationist as unilateralist," Bush's opposition to the Protocol has not really been unilateral, despite his withdrawal from the actual Kyoto process.<sup>118</sup> Instead, President Bush has pursued a realistic policy. From the start of his administration it was clear that the Protocol, in its current form, would not be ratified by the Senate. Rather than negotiate for the sole reason of mollifying the EU, Bush chose to act practically and withdraw from the treaty entirely.

Whether or not President Chirac's accusation that Bush acted unilaterally is correct cannot be determined without first examining his actions vis-à-vis President Clinton. Bush made his opposition to the Protocol known during his presidential campaign (although he did claim to support national mandatory emission levels) and his letter to Senator Hagel confirmed this stance.<sup>119</sup> When Christine Whitman officially declared the Protocol a "dead letter" in March of 2001, it came as no surprise. As Vice President Dick Cheney said in an interview, "Kyoto was a dead proposition before we ever arrived in Washington, all we did was to make it clear that the U.S. would not be bound by it."<sup>120</sup> Although Clinton remains popular among Europeans (Clinton's appearance in Berlin in November 2002, was greeted with wild applause, despite Gerhard Schroeder's recent campaign stance of opposing U.S. policy),<sup>121</sup> he could not ratify the treaty without Senate approval. In contrast to Bush, Clinton was a believer in the Kyoto process, and continued negotiation up to the end of his presidency hoping for a more amenable agreement.

But the chances of reaching an accord were always poor. In its preemptive strike (the Byrd-Hagel resolution), the Senate opposed two fundamental aspects of the Protocol: the high economic costs and the absence of developing nations. Clinton attempted to work around the first issue by suggesting that adherence to the Protocol would be relatively inexpensive. However, even the Department of Energy claimed that the costs of compliance would be very high. Moreover, former Clinton economic staffers recently agreed that the White House estimates were too low.<sup>122</sup> Lowering emissions below 1990 levels would be too drastic for the United States, but renegotiating this key aspect of the treaty would neces-

118. Adam Sage, *Jospin Plays on Anti-US Feeling*, TIMES (LONDON), Apr. 5, 2001, available at LEXIS, News Library.

119. Letter to Members of the Senate on the Kyoto Protocol on Climate Change, *supra* note 18.

120. Julian Borger, *New Proposal to Revive Kyoto Treaty*, GUARDIAN (LONDON), Apr. 9, 2001, at 2.

121. Thomas L. Friedman, *The American Idol*, N.Y. TIMES, Nov. 6, 2002, at A27.

122. Weisman, *supra* note 15, at 7A.

sitate a new Protocol, since countries like Russia (loss of emissions credits) and Germany (1990 levels are extraordinarily beneficial to Germany) would protest. Clinton attempted to solve this problem by creating as many loopholes as possible, but too many qualifications would have rendered the Protocol meaningless.<sup>123</sup> Further, creating a Protocol that binds developing countries is even more difficult because it is unlikely that countries like China would voluntarily agree to the steep economic costs of compliance. Even though Clinton was an ardent supporter, he was unable to reach a deal on a Protocol that would be acceptable to the Senate and never even submitted it for ratification.<sup>124</sup> In light of Clinton's failure, Bush's chances of ratifying the Protocol were even worse, especially since he was opposed to certain parts of the protocol.

When Bush stated that he had no intention of ratifying the Protocol or continuing negotiations, he was not speaking as a unilateralist, but rather as a realist—the Senate was never going to ratify the Protocol, so there was little to be gained from continued negotiations. Since Bush was never in favor of the Protocol, he adopted the Senate's position. The Byrd-Hagel resolution ensured that the U.S. Senate would not ratify the Protocol, and Bush took the 95-0 vote as proof. That Bush's personal beliefs run counter to the Protocol (as will be seen below) made his decision even easier.

The rejection of the Protocol itself does not make Bush unilateral, since his opinion is that the Protocol is fundamentally at odds with U.S. interests. However Bush has been criticized for abandoning the Kyoto process because he withdrew the United States from the only multilateral treaty designed to stop global warming. Repudiating the only available process and thereby foregoing multilateral action for indeterminate domestic goals is the most serious criticism that can be leveled at Bush because it implies that he is completely uninterested in working with other countries. Even if the Protocol is deeply flawed, a flat rejection appears to be a unilateral gesture if it is not accompanied by an alternative plan. There are several responses to this claim. It has been argued that a domestic initiative on emissions in the United States is preferable to a broad international treaty that lacks popular support in the United States.<sup>125</sup> Also, the rejection of the Kyoto process is not unilateral if another proposal is put in its place.

Some have argued that Bush's decision to abandon an international framework to battle climate change may be a good idea. Daniel Bodansky, who was a member of the Clinton team that negotiated the Protocol under President Clinton, recently wrote that "the decision by the Bush administration to abandon the Kyoto Protocol and go its own way on climate change is not necessarily the disaster for climate policy often portrayed by environmentalists."<sup>126</sup> He sug-

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123. Ahuja, *supra* note 13.

124. *Myopia, Mischief and a Little Madness Steer the Politics of Global Warming*, TAMPA TRIB., June 18, 2001, at 6.

125. Daniel Bodansky, *U.S. Climate Policy After Kyoto: Elements for Success* (Carnegie Endowment for International Peace, Washington D.C.) Apr. 15, 2002, at 1.

126. *Id.*

gests that a domestic initiative is the correct method; first one must begin a program that has wide support in the United States and then expand it internationally. Bodansky believes that the reason Clinton supported the Protocol was to pressure the Senate to accede to popular demand and ratify the Protocol.<sup>127</sup> However, Bodansky argues that Clinton misjudged public opinion, which was not strongly in favor of the Protocol. This lack of public opinion is demonstrated by the 95-0 vote on the Byrd-Hagel resolution, which implies that none of the Senators had constituencies that favored the Protocol. The reason for this lack of support, continues Bodansky, is its imposition on the United States from a foreign source.<sup>128</sup> Because the Protocol is not a domestic initiative, it does not enjoy the grassroots support that might be expected from an environmental law. The European citizenry supports the Protocol, which is made evident by the appointment of a former Green Peace leader as the environmental minister of Belgium. If Belgian citizens did not favor environmental measures, Mr. Deleuze would probably not have been appointed to his position. In contrast, the current administrator of the EPA, Christine Whitman, is the former governor of New Jersey.

Bodansky therefore argues that a domestic program with popular support would prove far more workable.<sup>129</sup> Such a program would be tailored to U.S. requirements, which would eliminate many of the criticisms of the Protocol. The domestic initiative would, in theory, command popular support, which would put pressure on elected officials to appease their constituencies and vote in favor of the proposal. Once such a program is in place, it could be used as a basis for the creation of a new multilateral regime, or it could be synthesized with an existing international agreement.<sup>130</sup> Either way, argues Bodansky, a domestic initiative has a much better chance of success than an internationally imposed treaty.

While much of the foreign press and many foreign leaders attacked Bush's actions, the reality is not so dire. Bush was honest about his views, and about the views of the United States: The Senate was not going to ratify the Protocol in its current format and the Kyoto process was not likely to produce a treaty that the United States would be willing to ratify. His mistake, however, was to state it in such categorical terms, which allowed the Europeans to paint him as "the villain," even though they expected that the United States would reject the Protocol.<sup>131</sup> Instead of detailing the Protocol's shortcomings, the Bush administration simply dismissed it with a brusque statement which naturally angered the European states that supported it. An energy executive said "the manner and tone of how all this has been handled: it was inexperienced and immature."<sup>132</sup> Others characterized it as "clumsy."<sup>133</sup> This was one of the administration's

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127. *Id.*

128. *Id.*

129. *Id.* at 5.

130. *Id.* at 6.

131. Weisman, *supra* note 15.; See also *Oh no, Kyoto*, *supra* note 85.

132. *Oh No, Kyoto*, *supra* note 85.

133. *Id.*

first international acts, and subsequently its tone has been more conciliatory on climate change, even though Bush has remained opposed to the Protocol. The rejection of the Protocol was handled poorly, but this political gaffe does not validate President Chirac's claim that Bush acted unilaterally.

## VIII. BUSH'S PROPOSAL?

"Perhaps Kyoto's leading virtue is that it exists," wrote Daniel Bodansky, a member of the Clinton team that negotiated the Protocol.<sup>134</sup> The Protocol is still the only international climate control treaty ever created, and for various reasons, including the determination of the EU, it remains the only viable alternative. By withdrawing from both the Protocol and from further negotiations, Bush withdrew the United States from any multilateral dialogue on climate control, which in itself can be viewed as a unilateral act. The administration cannot categorically reject a proposal without proffering an alternative. In order to vindicate his decision to reject the Protocol, President Bush needs to present a new international framework for combating climate change.

At the 2001 meeting of the G8 in Genoa, many foreign leaders were awaiting Bush's alternate proposal on climate change, especially because many countries had not yet ratified the Protocol.<sup>135</sup> Bush's first such proposal was mostly comprised of exhortations to industry groups to reduce emissions voluntarily.<sup>136</sup> In February 2002, however, Bush unveiled his most serious proposal to date, which aimed to lower emissions per economic unit of output (emissions per unit of GDP), to increase efficiency.<sup>137</sup> However, this plan will likely lead to higher overall emissions, because the GDP is forecasted to grow by 30 percent or more in the same period.<sup>138</sup> Bush maintained that climate change must be fought with economic efficiency and market-based approaches, and insisted that the American economy must come first. In his speeches, Bush also indicated that he opposes subjecting any country to the strict requirements of the Protocol. However, Bush has been extremely vague as to the specifics of his plan. He has mentioned using new technology that would allow countries to adapt to climate change, but has given few further details.

Not surprisingly, the international community reacted to Bush's proposal with contempt, arguing that it had no substance. *The Economist*, a staunch opponent of Kyoto, was critical of the president:

What a sham. As Eileen Claussen of the Pew Centre says, "This is just an effort to cloak 'business as usual' in some finery. Emissions will continue to grow." Mr Bush was right to reject the prohibitively expensive Kyoto pact, but he promised a

134. Bodansky, *supra* note 123, at 1.

135. Takeshi Sato, *G-8 Leaders to Discuss Kyoto Protocol, Economy in Italy*, JAPAN ECON. NEWswire, June 19, 2001, available at LEXIS, News Library.

136. Excerpt: *White House Working Group Report of Climate Change*, *supra* note 30.

137. Remarks Announcing the Clear Skies and Global Climate Change Initiatives, *supra* note 37.

138. Krugman, *supra* note 38.

substantial and cost-effective domestic policy to take its place. This is not it. As the president himself might say, his proposal is all hat and no cattle.<sup>139</sup>

Others were also dismissive of the new plan. In the *New York Times*, Paul Krugman wrote, "So what does the Bush administration propose to do? Nothing much."<sup>140</sup> A Japanese newspaper opined that the administration's new plan would do nothing to curtail emissions: "It is committed as well. A wholehearted commitment to carbon-based business-as-usual."<sup>141</sup>

Bush's plan has two advantages. First, it allows Bush to claim that he has produced an alternative to the Protocol, despite the fact that this alternative plan is to do practically nothing (emissions per unit of GDP will probably fall on their own).<sup>142</sup> By persuading other countries to follow this plan, Bush appears multilateral despite the odd consequence of encouraging others to join him in a plan whose aim is to do almost nothing. Second, the President appears to sincerely believe in his plan, which makes it easier to advocate. This is not a surprise, given Bush's past as a former oil executive, who has stated that he is not sure that global warming exists.<sup>143</sup> Therefore, there is no reason to sacrifice the United States economy in order to fight it. Further, Bush's domestic record indicates that he places the economy above the environment; for example, he attempted to increase the minimum levels of arsenic in drinking water, reversed his campaign pledge to institute mandatory emission limits, and supports drilling in the Arctic National Wildlife Refuge.<sup>144</sup> Recently, Bush also announced the easing of clean air regulations to promote economic efficiency.<sup>145</sup> In sum, Bush's policies demonstrate that he is more committed to economic growth than environmental protection.

Ironically, Bush's proposal has found allies in unlikely places. At a recent summit in New Delhi, India, some developing countries endorsed the U.S. position on adaptation and efficiency. Complaining that Japan and the EU were using "aggression" to persuade developing countries to join the Protocol, India argued that the developing countries were not responsible for the problem of global warming, and therefore should not be asked to fight it (India is not bound by the Protocol, but has been pressured to lower its emission levels.). Developing countries appear to have found a convenient ally in their fight against the economic costs of lowering emissions, and have made it more difficult for the EU to get universal support for the Protocol.<sup>146</sup> Although developing nations

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139. *Blowing Smoke*, THE ECONOMIST, Feb. 16, 2002.

140. Krugman, *supra* note 38.

141. Stephen Hesse, *Bush Fiddles Figures as the Globe Warms Up*, JAPAN TIMES, Feb. 28, 2002, available at LEXIS, News Library.

142. Krugman, *supra* note 38.

143. *Pollution Curb Splits Gore, Bush*, PITTSBURGH POST-GAZETTE, Sept. 24, 2002 at A12.

144. Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1.

145. David Arnold, *Easing of Air Quality Leaves Suit in Doubt*, BOSTON GLOBE, Dec. 1, 2002, at B1.

146. The argument that the United States is using its rejection of the Protocol as a negotiating ploy to exact greater concessions is hard to reconcile with Bush's recent proposals for efficiency based solutions, which appear to be in line with the policies of his administration. Bush's withdrawal from the Kyoto negotiations appear final and sincere.

would not be bound by the Protocol, universal acceptance might force reticent parties (some of which are industrialized nations) to join as a result of overwhelming public opinion, and would lend strength to the EU's cause. However, at the New Delhi conference many countries resisted creating an official document that encouraged ratification of the Protocol, instead siding with the United States.

Bush's most recent action was a pledge to collect voluntary commitments (these commitments are firm, and in writing) from large corporations to lower the levels of certain pollutants. Setting aside the constant criticism that this will only set limits on emissions per unit of GNP, this appears to be a strange policy, since something cannot be voluntary yet mandatory at the same time, but it fits Bush's ideological stance. "Voluntary mandatory limits" is a paradox, and simply admitting that this is a mandatory limit would probably elicit a positive response from the public, and not unduly upset corporations (which must cooperate regardless of what the measure is called). However, Bush came into office with the ideological platform of decreasing government regulation, and he has shown that he is faithful to this principle by lowering practically every single rate of any sort he has encountered—emission levels, tax rates, clean air regulations, even the levels of arsenic in water.<sup>147</sup> It is possible that Bush is simply opposed to firm regulatory limits, which could explain this unusual "mandatory voluntary" doctrine, and further explain his opposition to the Protocol. President Bush has demonstrated that he will not endorse anything that may damage the economy, so his new proposals will not contain mandatory emission levels (even his most recent clean air regulations call for the largest cuts to be made in 15 years, long after he is out of office). Most countries in the EU have already ratified the Protocol, and they will not seriously consider any plan that proposes vague solutions through "economic growth". Bush has put forward an alternative proposal, but his proposal illustrates his opposition to emission controls. Bush is not necessarily opposed to working with other countries on the solution, but he has been vocal about his desire to minimize the effects of any environmental initiatives on the U.S. economy.

## IX.

### WHITHER MULTILATERALISM?

Many critics of President Bush have been quick to count his rejection of the Protocol among his many unilateralist crimes. However, on close examination, this charge does not stand up to scrutiny. The Protocol was not proposed for ratification by President Clinton, and without Senate support it was not going to be ratified in the near future anyway. Bush simply stated the present U.S. position on the Protocol. This ignited outrage, and accusations that Bush was unwilling to negotiate the way Clinton had. However, Clinton's negotiations were fruitless, and would have accomplished nothing in light of the Byrd-Hagel reso-

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147. The philosophy of decreasing government is hardly novel, and is commonly adopted by many political candidates.

lution. The real contrast between the two administrations is the unwillingness of Bush to play along in negotiating a treaty he could not hope to ratify.

The difference between the Bush and Clinton approach is cosmetic. Although Clinton was more willing to continue negotiating with the Europeans, he knew the Protocol would not be ratified, and never submitted it to the Senate. Perhaps the only thing distinguishing multilateralism and unilateralism is rhetoric. If Bush agreed to continue negotiations on the Protocol knowing it would never be ratified by the Senate, it is unlikely he would be accused of unilateralism. The result, however, would be exactly the same—the Senate would overwhelmingly reject the Protocol if it was presented for ratification. In rejecting the Protocol, Bush acted neither unilaterally nor multilaterally; he merely chose to officially announce his position on a treaty the United States will not ratify in its present form. The EU has called Bush unilateral, but their participation in Kyoto was not a model of multilateralism; the EU used the ratification of the Protocol to seize the moral high ground. By its actions, the EU created a weaker Protocol and at the same time ensured that the United States will not join it in the near future.

Where a charge of unilateralism can be more accurately leveled is in Bush's apparent lack of an alternative proposal. By presenting no clear substitute, argue his critics, Bush's rejection of the Protocol becomes unilateral. There are several good answers, among them the contention that since the U.S. populace showed no support for an international treaty, a domestic program appears to be the only answer. However, there is a more fundamental problem with labeling Bush's actions on climate change unilateral.

By definition, unilateral and multilateral must apply to goals, strategies, and actions. There must be a unilateral *strategy* on an issue, or a multilateral *approach* to some problem. But what if there is no perceived problem? Can these terms still apply? The lack of genuine approach is exactly what is occurring in the Bush administration. With their voluntary decrease in emissions per level of GDP initiatives, Bush is making it clear that he has little interest in aggressively pursuing solutions to the problem of climate change.<sup>148</sup> During the election Bush claimed he was unsure if global warming even exists. In addition, some members of his own party argued that global warming might be a boon to the United States rather than a disaster.<sup>149</sup> In short, Bush does not really see a problem.

If there is no problem, Bush cannot adopt a multilateral approach. Even when other countries agree with Bush, as India did recently, it was an agreement in principle (and likely an excuse to avoid lowering emissions). It appears that Bush's position on climate change and the Protocol is not unilateral, but rather non-lateral. The President is not interested in pursuing any plan that threatens economic growth, eliminating the possibility of any realistic proposal with which other countries would agree. Some countries have indicated an interest in

148. It should be noted that there is support for environmental legislation in the United States, but the Protocol has not enjoyed a similar measure of popularity.

149. Murkowski, *supra* note 71, at 358.



joining with the United States in their goal not to have a climate control treaty that carries economic repercussions. This agreement, however, is not systematic or structured; it merely provides encouragement for countries to adopt their own market friendly approaches. By definition, there can be no international regime that calls for individual countries to take no action and to do so independently. The problem for any potential international agreements on climate change, therefore, is not Bush's unilateralism, but rather his failure to see a real problem. And if there is no problem, how can one possibly take a multilateral, or a unilateral approach to it?

## X.

### CONCLUSION

Bush incurred an enormous amount of undeserved criticism for his decision to abandon the Kyoto Protocol. After the Senate's passage of the Byrd-Hagel resolution, any President's hands would have been tied. What drew the most ire was Bush's callous way of announcing his policy. Brusquely opposing a treaty that purports to save the planet inevitably results in a public relations fiasco. Also, it is quite clear that the United States has serious and justified problems with the Protocol's current structure; it imposes higher costs on the United States than any other country. While clumsy, Bush's rejection of the Protocol was reasonable under the circumstances, especially after the Senate's action.

The charge that Bush's rejection of the Kyoto process was unilateral is far more poignant, because by rejecting a process yet failing to propose an alternative, Bush could be viewed as unwilling to work with other countries. However, it is apparent that Bush will not implement any solution that could hurt the U.S. economy and therefore cannot put forward an alternative that the EU would seriously consider. With economic efficiency as the guiding principle, Bush is unlikely to create an international regime that would interest any country attempting to arrest global warming. President Bush is not unwilling to work with other countries to solve the problem; he appears to be opposed to solving the problem using the methods in the Protocol.

Ultimately Bush has appeared unilateral while being non-lateral. He has little interest in curtailing global warming, especially since he may not even believe that global warming exists. Whatever Bush's shortcomings on the environment are, a unilateral rejection of the Protocol is not one of them. In order to adopt a multilateral posture, Bush would need to share a common goal with other countries. In this situation, however, his only goal is to take as little action as possible, and his interest in cooperating with other countries to do so cannot brand him a unilateralist. Bush's attempt at creating an agreement which avoids any serious solution is not unilateral, because he is willing to work with other countries. It is not multilateral, however, because it is impossible to construct a regime that encourages an independent lack of action. Bush's clear lack of interest in solving the problem of climate change through an international treaty, therefore, is non-lateral, because in his view it is not a problem that needs to be aggressively addressed at all.