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# The Obama Administration's Clean Air Act Legacy and the UNFCCC

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# THE OBAMA ADMINISTRATION’S CLEAN AIR ACT LEGACY AND THE UNFCCC

*Uma Outka\**

*In the face of a gridlock Congress, hopes for comprehensive climate legislation were dashed early in President Obama’s first term. U.S. leadership in international climate policy had been seriously undermined in ways, he soon learned, were not easily repaired. The President’s engagement with climate issues, to many observers, seemed slow and inconsistent, but deepened rhetorically and substantively in the second term with a decisive focus on existing statutory authority, looking most importantly to the Clean Air Act as a vehicle for greenhouse gas regulation. This essay situates the Obama Administration’s Clean Air Act regulatory agenda in the context of longstanding domestic obligations of signatories to the United Nations Framework Convention on Climate Change as well as positioning for the 2015 Conference of the Parties in Paris.*

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In the early days of the Obama Administration, comprehensive climate change legislation was taking shape on the horizon. Years of inaction on greenhouse gas emissions by the United States was, many hoped, nearing an end. Yet the new President Obama soon found himself facing a Congress quick to oppose his initiatives across a spectrum of issues, and climate change seemed to take a back seat to other important concerns. In the second term, however, the Administration renewed its focus on climate change. In June of 2013, the President announced a new Climate Action Plan at Georgetown University – “a plan to cut carbon pollution; a plan to protect our country from the impacts of climate change; and a plan to lead the

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world in a coordinated assault on a changing climate.”<sup>1</sup> As the “world’s largest economy and second largest carbon emitter,” the President acknowledged, the U.S. has “a unique responsibility.”<sup>2</sup>

A single statute—the Clean Air Act—provides critical executive authority for advancing the President’s climate change goals. The Clean Air Act of 1970 was the first comprehensive federal environmental regulatory program.<sup>3</sup> Today, it remains the primary federal environmental law that controls air pollution from mobile sources, like cars and trucks, and from stationary sources, like factories, refineries, and power plants.

The pressure of growing climate concerns worldwide, and continued congressional gridlock at home, escalated the importance of the Clean Air Act’s potential for controlling greenhouse gas emissions. Under the Obama Administration, the Environmental Protection Agency (EPA) proposed a suite of regulations that implement the Clean Air Act for this purpose.<sup>4</sup> As this essay will explain, these regulations are significant in both domestic and international registers. Under the United Nations Framework Convention on Climate Change, the United States and nearly every other nation in the world has declared a common goal and shared commitment to averting catastrophic climate change. The complicated history of the U.S. role in this treaty and its implementation forms an important backdrop to the Administration’s second-term approach to domestic climate action. This approach has been multi-faceted, combining regulatory action by federal agencies with executive orders and bilateral talks, but it is the Clean Air Act—my focus here—that hinges the domestic and international aspects of the Administration’s climate mitigation strategy. Understanding the Clean Air Act’s role is especially important now that all eyes are on the U.S. and other major emitting countries to achieve the goals outlined in a new international agreement penned at the close of 2015 in Paris, France

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1. President Barack Obama, Remarks by the President on Climate Change (June 25, 2013, 1:45 PM) (transcript available at <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change> [<https://perma.cc/5879-JQ48>]).
  2. *Id.* Although the U.S. is currently the second largest annual carbon emitter, behind China, the US is still the largest historical emitter in the world. *See generally*, NATIONAL CLIMATE ASSESSMENT, GLOBAL CARBON ATLAS, available at <http://nca2014.globalchange.gov/report> [<http://perma.cc/Q5XN-XJQB>] (summarizing the impact of climate change of the United States).
  3. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).
  4. *EPA Greenhouse Gas Regulation FAQ*, CTR. CLIMATE & ENERGY SOLUTIONS, available at <http://www.c2es.org/federal/executive/epa/greenhouse-gas-regulation-faq> [<http://perma.cc/DBM9-T589>].

by the 21<sup>st</sup> Conference of the Parties (COP21) to the Framework Convention.<sup>5</sup>

In what follows, this essay situates the Administration's ambitious Clean Air Act regulatory agenda in the context of domestic obligations of signatories to the Framework Convention and in relation to positioning for COP21. The essay closes with some early perspectives on the Administration's legacy for the Clean Air Act and climate change policy.

## I. THE UNFCCC, DOMESTIC OBLIGATIONS, AND THE EARLY OBAMA ADMINISTRATION

The U.S. was among the first nations to sign the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, marking a landmark international agreement to reduce greenhouse gas (GHG) emissions to mitigate global climate change.<sup>6</sup> For every U.S. president following President George H.W. Bush, who signed the Convention, the UNFCCC has provided the formal structure for international dialogue and policy negotiations on climate change.

The UNFCCC reflects the common recognition "that change in the Earth's climate and its adverse effects are a common concern of humankind."<sup>7</sup> Parties to the Convention agreed in broad terms to the objective of achieving "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."<sup>8</sup> As a signatory, the U.S. committed to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs."<sup>9</sup>

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5. See Adoption of the Paris Agreement, Draft decision-Annex /CP.21, FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015), *available at* <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> [<https://perma.cc/BHH5-6WNM>].
  6. The UNFCCC is a near-universal treaty with 195 Parties. See *Status of Ratification of the Convention*, UNITED NATIONS FRAMEWORK CONVENTION CLIMATE CHANGE, *available at* [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php) [<http://perma.cc/22MB-KGLP>] (listing the latest information concerning dates of signature and receipt of instruments of ratification by the Secretary-General of the United Nations).
  7. U.N. Framework Convention on Climate Change pmbl., *opened for signature* May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].
  8. *Id.* at art. 2.
  9. *Id.* at art. 4.2(a).

Coordinating individual national commitments for effective implementation remains extremely challenging. In the first major instrument developed by the Parties for this purpose, the Kyoto Protocol, binding emissions reductions applied only to developed nations.<sup>10</sup> Although climate stabilization ultimately will require emissions reductions in fast-growing developing countries as well, Kyoto's contrasting obligations for developed and developing nations sought to capture the UNFCCC's central tenet of common but differentiated responsibilities.<sup>11</sup> The text of the treaty establishes this as a foremost principle for agreement:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.<sup>12</sup>

The Kyoto Protocol's structural emphasis on developed nations' obligations became politically divisive in the U.S. Despite significant involvement with the Protocol's design under the Clinton Administration, the U.S. ultimately declined to ratify it under President George W. Bush, due to fears that the U.S. would suffer economically if targets did not apply to polluting developing countries, namely China and India.<sup>13</sup> This was seen as a major setback to the success of the Kyoto Protocol. The Protocol eventually went into effect after a struggle to secure sufficient signatories to account for the U.S.'s absence, and as a result the U.S. leadership position in climate change negotiations was seriously undercut.<sup>14</sup> Throughout the second Bush Administration, although the U.S. maintained its official posture of commitment to the shared aims of the UNFCCC, the U.S. was widely regarded as a blocking agent, no longer a facilitator, of international climate progress.<sup>15</sup>

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10. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).
  11. *See id.* at arts. 10(c), 10(e), 11.2(a), 11.2(b).
  12. UNFCCC, *supra* note 7, at art. 3.1.
  13. *See* CINNAMON PINON CARLARNE, CLIMATE CHANGE LAW AND POLICY: EU AND US APPROACHES 35-36 (2010) (discussing the United States' role in early years of the Kyoto Protocols).
  14. *See id.* at 8-9 (explaining the effects of the U.S. not ratifying the Kyoto Protocol, had on its leadership role on environmental issues).
  15. *See id.* at 36-37 (discussing the Bush Administration's policy on climate change).

When Barack Obama was elected, a renewed commitment to climate change mitigation was among his stated priorities. Domestically, many thought that nationwide climate change legislation would be imminently forthcoming in his first term after the House of Representatives passed a comprehensive climate bill; but it did not pass in the Senate.<sup>16</sup> In 2009, on the international stage, President Obama pledged the U.S. would cut GHG emissions by 17 percent below 2005 levels by the year 2020.<sup>17</sup> Yet his first major public foray into climate change negotiations, at the 2009 Conference of the Parties in Copenhagen, Denmark, ended in frustration, protests, and few notable successes.<sup>18</sup> The Obama Administration's subsequent role internationally on climate issues, at least for the remainder of his first term, had a lower profile.

Facing intense political opposition on a range of other priorities, the congressional gridlock on domestic climate change policy did not speak well for the Administration's prospects with new international commitments. The experience of the Clinton-Gore White House during the Kyoto Protocol negotiations was a cautionary tale.<sup>19</sup> Seeing no near-term potential for meaningful climate legislation, President Obama turned his attention to the potential for climate progress under existing statutory authority.<sup>20</sup> Reflecting this reorientation toward executive action, the Clean Air Act (CAA) has been the focal point of the Obama Administration's efforts to achieve climate change mitigation goals, particularly in the second term.<sup>21</sup>

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16. *See generally id.* at 54-56 (describing the Obama administration's attempt to pass a bill addressing climate change).
  17. EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 6 (JUNE 2013), <http://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf> [<http://perma.cc/3HA6-WNCK>]; *see also* UNFCCC, Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention (June 7, 2011), <https://unfccc.int/resource/docs/2011/sb/eng/inf01r01.pdf> [[perma.cc/9VLL-7MLM](http://perma.cc/9VLL-7MLM)] (providing a summary of the United States' goals in reducing its greenhouse gas emissions).
  18. *See generally* Leslie G. Fields & Royce G. Brooks, *President Obama and the New Politics of Inclusion in the Climate Change Debate*, 9 FLA. A & M U. L. REV. 441, 449-451 (2014) (explaining the disappointment that climate change advocates felt in regard to the 2009 Conference).
  19. *See* Cass R. Sunstein, *Montreal versus Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 27-28 (2007) (discussing the Clinton-Gore White House's ambivalent approach after the Kyoto Protocol negotiations).
  20. Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 244 (2007).
  21. Justin Gillis, *Obama Puts Legacy at Stake With Clean-Air Act*, N.Y. TIMES (June 26, 2013),

However, the origins of the CAA's centrality to domestic climate mitigation traces to before President Obama's election to the 2007 landmark Supreme Court decision, *Massachusetts v. EPA*.<sup>22</sup> In that case, the EPA under the second Bush Administration rejected petitions to regulate carbon dioxide emissions from motor vehicles. In its 5-4 decision, however, the Court held that the EPA *did* have statutory authority to regulate GHGs under § 202 of the CAA and that the EPA's avoidance of GHG regulation was arbitrary.<sup>23</sup> According to the Court, the statute required the agency to justify its position, if it could, with a reasoned Endangerment Finding—essentially, a determination of whether GHGs endanger public health and welfare.<sup>24</sup>

The authority recognized by the case provided the foundation for the Obama Administration's substantive CAA regulatory agenda pertaining to GHGs. It was President Obama's new EPA Administrator Lisa Jackson who issued the affirmative Endangerment Finding for GHGs from mobile sources.<sup>25</sup> The Administration followed this Finding, as the CAA requires, with new regulations of vehicle emissions and fuel economy standards; but soon after, its regulatory focus expanded to include an even more significant source of GHGs within the energy sector: electric power plants.

## II. THE CLEAN AIR ACT, OBAMA'S CLIMATE CHANGE LEGACY, AND COP21

The only U.S. economic sector that emits more GHGs than transportation is the electric power industry, at thirty-one percent of total emissions (contrasted with twenty-seven percent for transportation by most recent data).<sup>26</sup> The CAA addresses both sectors, under separate titles, and the post-*Mass. v. EPA* rule for vehicle emissions—the so-called Tailpipe Rule—raised questions about

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[http://www.nytimes.com/2013/06/26/science/earth/clean-air-act-reinterpreted-would-focus-on-flexibility-and-state-level-efforts.html?\\_r=1](http://www.nytimes.com/2013/06/26/science/earth/clean-air-act-reinterpreted-would-focus-on-flexibility-and-state-level-efforts.html?_r=1) [<http://perma.cc/22Y9-BAZ9>].

22. *Massachusetts v. EPA*, 549 U.S. 497, 532-33 (2007) (holding that the CAA could be applied to the regulation of greenhouse gases).
23. *Id.*
24. *Id.*
25. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66496, 66537 (Dec. 15, 2009).
26. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2013, 24 (2015), <http://www3.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2015-Main-Text.pdf> [<http://perma.cc/VYC5-Q56T>].

whether and how that regulation affected stationary sources of GHGs.<sup>27</sup>

This became a point of controversy over statutory interpretation. The EPA read the statute to require that once GHGs were “regulated pollutants” under the mobile source sections of the Act, they must be regulated under the stationary source permitting programs. In other words, the agency saw the effective date of the Tailpipe Rule as a *trigger* for stationary source regulation, affecting power plants and more. The problem with this reading, by the EPA’s own admission, was practical in nature; its literal effect was to significantly expand the EPA’s regulatory reach to include many more stationary sources than had been previously subject to Clean Air Act permitting obligations.<sup>28</sup> To preserve administrative feasibility in the stationary source context, the EPA crafted a so-called Triggering Rule, explaining the perceived trigger effect of mobile source regulation of GHGs into the stationary source context,<sup>29</sup> and a Tailoring Rule that limited this expansion by tailoring GHG regulation of stationary sources to the largest emitters.<sup>30</sup>

When this trio of related rules was challenged in court, the D.C. Circuit upheld them all,<sup>31</sup> but the Supreme Court delivered a mixed opinion in 2014’s *Utility Air Regulatory Group v. EPA*, rejecting the Triggering and Tailoring Rules as impermissible statutory revision by the agency, while also reinforcing the EPA’s authority to regulate GHGs.<sup>32</sup>

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27. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324, 25401 (May 7, 2010).
  28. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31514, 31601 (June 3, 2010) [hereinafter Prevention of Significant Deterioration] (explaining that some believe that EPA failed to take into effect the impact of its decision).
  29. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting; Final Rule, 75 Fed. Reg. 17004, 17023 (Apr. 2, 2010) (explaining how Title V comes into effect on a stationary source).
  30. Prevention of Significant Deterioration, *supra* note 28, at 31516.
  31. *See* Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 113 (D.C. Cir. 2012) (holding the EPA acted in a proper manner in regulating greenhouse gases through the CAA).
  32. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2438 (2014). Six petitions for certiorari were granted together to answer a single question presented: “Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.”



From a climate perspective, several aspects of the opinion are especially noteworthy. First, the Court chose not to revisit the Endangerment Finding or the Tailpipe Rule, declining to reconsider whether GHG regulation under § 202 was justified, thus letting that key decision stand.<sup>33</sup> Second, despite a forceful rebuke of EPA's reading of the statute, the Court's interpretation allowed EPA to proceed in regulating most large emitters.<sup>34</sup> In rejecting the Trigger Rule, the Court disallowed stationary source regulation based solely on GHG emissions. Critically, nothing in the opinion precludes the EPA from imposing limits on GHGs emitted from stationary sources that are subject to permitting requirements *anyway* for other air pollutants: in the Court's shorthand, "anyway" sources.<sup>35</sup> With "anyway" sources accounting for over eighty percent of emitters covered by the Tailoring Rule, this was largely a victory for CAA regulation of GHGs, despite the opinion's ring of bruising defeat.<sup>36</sup>

Critical subsequent developments have utilized additional sources of regulatory authority under the CAA. Turning from the mobile source provisions to the stationary source permitting provisions, the EPA moved to regulate GHGs using § 111 New Source Performance Standards (NSPS). In contrast to the permitting provisions, which direct the EPA to apply a "best available control technology" standard to high-emitting sources on a facility-specific, case-by-case basis, § 111 sets national standards for categories of sources as a minimum, uniform threshold of performance.<sup>37</sup> Under § 111(b), the EPA developed the first NSPS for carbon pollution from new power plants<sup>38</sup> and the first NSPS for methane, a potent GHG, from new sources in the oil and gas industry.<sup>39</sup> The rules will apply uniform

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33. Amanda C. Leiter, *Utility Air Regulatory Group v. EPA: A Shot Across the Bow of the Administrative State*, 10 DUKE J. CONST. L. & PUB. POLICY 59, 69-70 (2014).

34. "We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445.

35. *Id.* at 2447-48 (holding it permissible for the EPA to apply BACT standards to "anyway" sources).

36. *Id.* at 2438-39.

37. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64510, 64527 (Oct. 23, 2015).

38. *Id.* at 64512.

39. Emission Standards for New and Modified Sources, 80 Fed. Reg. 56593 (proposed Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 60) (prior NSPS covered volatile organic compounds and sulfur dioxide emissions).

national standards for control of these pollutants to any new sources within these categories. The limitation of *new source* regulation of this kind is that it does nothing to address the level of air pollution from existing sources, which are responsible for energy's status as the highest emitting sector. To address this, the EPA developed an ambitious rule under the less commonly used § 111(d) to set carbon pollution guidelines for existing power plants.<sup>40</sup> The new rule, known as the Clean Power Plan, is controversial because it sets state-specific goals for reducing carbon emissions in the power sector, using carbon emission performance rates for existing "fossil-fuel fired electric generating units."<sup>41</sup> The rule provides guidelines for implementation by the states, but a federal implementation plan will go into effect in states that fail to develop an approvable plan of their own.<sup>42</sup> The EPA projects that "[w]hen the Clean Power Plan is fully in place in 2030, carbon pollution from the power sector will be 32 percent below 2005 levels, securing progress and making sure it continues."<sup>43</sup>

This rulemaking is an essential component of the broader Climate Action Plan the President announced in 2013.<sup>44</sup> The Climate Action Plan outlined three overarching goals: (1) to continue to accelerate the reduction of carbon emissions in the U.S.; (2) to help state and local governments prepare for the impacts of climate change; and (3)

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40. U.S. EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 40 C.F.R. pt. 60 (released Aug. 3, 2015, not yet published in the Federal Register), <http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf> [<http://perma.cc/KVC7-BEFK>].
41. *Id.* at 9.
42. Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, 80 Fed. Reg. 64965 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, 78) available at <https://federalregister.gov/a/2015-22848> [<https://perma.cc/WJQ9-2MQ9>].
43. *Fact Sheet: Overview of the Clean Power Plan*, EPA, available at <http://www2.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan> [<http://perma.cc/C6WX-HBJ4>]; see also *Clean Power Plan: Taking Action on Climate Change*, EPA, available at <http://www2.epa.gov/cleanpowerplan> [<http://perma.cc/L2SV-ACMC>] (giving more details about the rule and the legal issues that it raises); see also Megan Herzog, *Resource on the Clean Power Plan and EPA's Other Rulemakings under Clean Air Act §111*, LEGAL PLANET, available at <http://legal-planet.org/2015/09/11/resources-on-the-clean-power-plan/> [<http://perma.cc/6JM9-HNEA>].
44. See generally EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 17 (explaining the new rules that are being put in place and the effects that they will have).

to lead international efforts in globally reducing greenhouse gas emissions and prepare for climate impacts.<sup>45</sup>

The first and third goals have proven integrally connected by the Administration's regulatory agenda under the CAA. Assessing that connection affords an opportunity to consider how this agenda intersects (1) with the UNFCCC's existing framework, (2) with the new international agreement penned at COP21, and (3) with other factors that complicate the formulation of a climate change legacy for the Obama Administration.

From at least the 2011 Conference in Durban, South Africa, to the 20<sup>th</sup> Conference of the Parties in Lima, Peru, in 2014, Parties to the UNFCCC have turned their attention to models for international cooperation that avoid the stark categories employed in the Kyoto Protocol.<sup>46</sup> In Lima, the Parties confirmed the intention to adopt a new protocol at COP21 in Paris: "another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties."<sup>47</sup> The Conference further signaled the move away from categorical national roles under a future agreement by underscoring "its commitment to reaching an ambitious agreement in 2015 that reflects that principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances."<sup>48</sup> In anticipation of meeting this goal at COP21, Parties submitted Intended Nationally Determined Contributions

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45. *Id.*

46. See generally Daniel Bodansky, "The Durban Platform Negotiations: Goals and Options" 2-3 (2012) [http://belfercenter.ksg.harvard.edu/files/bodansky\\_durban2\\_vp.pdf](http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf) [<https://perma.cc/XR48-DBUL>] (analyzing the elements of the Durban Platform and the possible role that a new instrument might play) Bodansky highlights the "dramatic departure" in Durban "from the Kyoto Protocol negotiating mandate, which had categorically excluded any new commitments for developing countries," and notes that the negotiated Durban Platform made "no reference to the principle of equity or the principle of common but differentiated responsibilities and respective capabilities (CBDRRC)," nor repeated "the Convention's language that developed countries should 'take the lead' in combating climate change." *Id.* at 2-3.

47. See United Nations Framework Convention on Climate Change, Dec. 1-14, 2014, *Lima Call for Climate Action*, ¶ 1, U.N. Doc. FCCC/CP/2014/10/Add.1 (Feb. 2, 2015) [hereinafter *Lima Call for Climate Action*]. This reiterated an intention already articulated in the Durban Platform, which had called for development of "a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all parties." United Nations Framework Convention on Climate Change, Nov. 28-Dec. 11, 2011, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, ¶ 2, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012).

48. *Lima Call for Climate Action*, supra note 47, at ¶ 3.

(INDC) toward achieving the Convention's core objective: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."<sup>49</sup> The Conference in Paris concluded with an agreement among all Parties to hold "the increase in the global average temperature to well below 2 [degrees Celsius] above pre-industrial levels" or lower. To achieve this, Parties agreed "to undertake and communicate ambitious efforts" through domestic policy, agreeing that "efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for effective implementation" of the Agreement.<sup>50</sup>

Increased emphasis on national autonomy leading up to the Conference, combined with inclusiveness across all Parties' capabilities, represented a shift buoyed by momentum for an universal agreement. The regulatory agenda under the CAA in the U.S. helped build that momentum by demonstrating national effort and commitment. Early in 2015, the Administration reported to the Convention Secretariat that, "the United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%."<sup>51</sup> CAA rules, including the Clean Power Plan, comprise six out of the eight regulatory measures identified in the U.S.'s INDC submission as completed or underway.<sup>52</sup>

Although it is too soon to chart the contours of the President's climate legacy, some impacts of the CAA agenda are already cognizable and worth noting at this early stage. Foremost among these is the solidification of GHG regulation under the CAA. Whether the Clean Power Plan sustains legal challenge will not change that

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49. UNFCCC, *supra* note 7, at art. 2.

50. Adoption of the Paris Agreement arts. 2 & 3, Draft decision-Annex: Paris Agreement /CP.21, FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> [<https://perma.cc/BHH5-6WNM>].

51. US Cover Note INDC and Supporting Documents, INDC, <http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> [<https://perma.cc/ES52-ATBZ>].

52. Reported CAA regulatory actions include fuel economy standards for light-duty vehicles for model years 2012-2025 and for heavy-duty vehicles for model years 2014-2018, with post-2018 in progress; approved alternatives for and reductions in the use of high-GWP HFCs; carbon pollution standards for new and existing power plants; standards for methane emissions from landfills and the oil and gas sector. Non-CAA measures reported include energy conservation standards for buildings, appliances, and equipment under the Energy Policy Act and the Energy Independence and Security Act. *Id.*

fundamental point. To be sure, the outcome of pending litigation will bear on the President's climate change legacy – a rejection of the rule by the courts would likely compromise the U.S. ability to meet its international commitments on the pledged timeline. For this and many other reasons, the legal proceedings are being closely watched by opponents and proponents alike.<sup>53</sup> After the D.C. Circuit denied requests to stay the rule and fast-tracked the case for oral argument in June 2016, the Supreme Court surprised observers by granting the stay pending disposition of the petitions for review.<sup>54</sup>

The Administration's CAA work is significant in several other key respects, however, separate and apart from how the Clean Power Plan litigation resolves. First, the CAA rulemaking eroded the perception that congressional gridlock was an impervious barrier to climate progress. There are indications now across the economy that a low-carbon turn is increasingly being seen as inevitable.<sup>55</sup> In the months leading up to COP21, major companies across a range of industries made public statements in support of a binding climate agreement in Paris.<sup>56</sup> These rules are undoubtedly a shift that can be a powerful force behind the technological innovation some have argued for as a primary response to climate change.<sup>57</sup>

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53. See *West Virginia et al. v. EPA*, No. 15-1363 (D.C. Cir. 2015); Keith Goldman, *Energy Cases to Watch in 2016*, LAW360 (Dec. 24, 2015), <https://www.crowell.com/files/20151224-Energy-Cases-To-Watch-In-2016-Eisenstat.pdf> [<https://perma.cc/4MK9-NAMC>] (listing the Clean Power Plan litigation first among “six cases that energy attorneys are going to be watching closely in 2016).
54. Order (Document #1594951), *West Virginia et al. v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016); Order in Pending Case (Document #15A773), *West Virginia et al. v. EPA*, 577 U.S. \_\_\_ (U.S. Feb. 9, 2016).
55. We Mean Business Coalition, *Investors Call Upon Governments to Secure a Clear, Long-Term Goal at COP21*, WE MEAN BUSINESS (Oct. 11, 2015), available at <http://www.wemeanbusinesscoalition.org/blog/investors-call-upon-governments-secure-clear-long-term-goal-cop21> [<http://perma.cc/MJN6-JM2M>].
56. See *Oil and gas CEOs jointly declare action on climate change*, OIL & GAS CLIMATE INITIATIVE, available at <http://www.oilandgasclimateinitiative.com/news/oil-and-gas-ceos-jointly-declare-action-on-climate-change/> [<http://perma.cc/5H8R-T895>] (explaining that ten of the world's largest oil and gas companies have declared their support for an effective climate change agreement.); *A Call for Climate Action in Paris*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, available at <http://www.c2es.org/international/paris-statement> [<http://perma.cc/Q376-8UKJ>]; We Mean Business Coalition, *supra* note 55.
57. See Jonathan Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421, 450-51 (2011) (arguing against the use of the

Second, proceeding with rulemaking for greenhouse gases under the CAA avoided a gap that might have been created post-*Mass. v. EPA* in the absence of agency action. The 2011 Supreme Court case *American Electric Power v. Connecticut* made clear that the effect of *Mass. v. EPA* was to preempt federal common law litigation relating to greenhouse gas emissions.<sup>58</sup> In *American Electric Power*, a case initiated before the ruling in *Mass. v. EPA*, a coalition of eight states, New York City, and three land trusts sued the nation's biggest utilities under public nuisance theories, seeking to enjoin emissions reductions. There, the Supreme Court ruled unanimously that although the EPA had not yet exercised its authority to regulate greenhouse gases, recognition of that authority by the Court in *Mass. v. EPA* was sufficient to preempt the claims.<sup>59</sup> Without the Administration's subsequent rulemaking, the impact of *American Electric Power's* preemption ruling would have been a more consequential limitation on common law in the climate context.

Third, the Administration's CAA agenda carried significance in the Framework Convention context and for the U.S. posture approaching COP21. This is reflected in the preamble to the Clean Power Plan final rule, released within months of the Conference, which explains that the "rule establishes...the foundation for longer term GHG emission reduction strategies necessary to address climate change and, in so doing, confirms the international leadership of the U.S. in the global effort to address climate change."<sup>60</sup> Taken together, the CAA rules are central to the President's effort to reassert an effective and credible leadership role for the U.S. in international climate negotiations. Further, this work provided a basis for the President to pursue bilateral climate agreements with China, India, and Brazil, widely viewed as important to shifting the dynamic that prevented U.S. participation in the Kyoto Protocol.

The statement in the Clean Power Plan preamble also reflects recognition that climate change will require further decarbonization than this rule alone can achieve. Policy critiques of this centerpiece regulation range, predictably, from assertions that the rule is too aggressive, to worries the rule does not do enough. Among those arguing the Clean Power Plan is too aggressive are coal companies and states who filed lawsuits challenging the rule even before it was final, hoping for (but failing to obtain) preliminary injunctions on the

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Clean Air Act to regulate greenhouse gases and favoring approaches that focus on fostering on technological innovation).

58. *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2537 (2011).

59. *Id.*

60. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

rulemaking.<sup>61</sup> Among those scrutinizing the efficacy of the Clean Power Plan as a climate change mitigation measure are climate policy advocates tracking the prospects for climate stabilization.<sup>62</sup> The World Resources Institute, for instance, projects that “to get on track... [for the] 2025 target of 26–28 percent below 2005 levels, the United States will need to go beyond actions taken to date.”<sup>63</sup> Although the Administration still projects confidence in these numbers, some estimates show these approaches falling short of the INDC, in the range of 16-23 percent.<sup>64</sup> Sources evaluating the ambitions of INDCs have rated the U.S. as “medium,” suggesting it should be higher.<sup>65</sup> There may be additional possibilities for further GHG reductions using existing legal authority. Recent legal analyses, for example, suggest there is alternative authority under CAA § 115 for a nationwide carbon emissions reduction plan like the Clean Power Plan, developed under § 111, but this has not yet been pursued.<sup>66</sup> Likewise, a promising source of additional reductions would be methane standards for existing oil and gas wells, but to date there is no certain indication that the EPA will develop these rules.

The force of the Administration's CAA agenda will be an important aspect of Obama's climate legacy, but it will not be the only factor shaping perspectives on the President's commitment to the UNFCCC's core aspiration. Seemingly mixed messages from the Administration have been hard for observers to reconcile with the commitment that seems to underlie the CAA rules. Three controversial issues in particular have troubled advocates of strong climate policy during the Obama Presidency, and only in recent months have they begun to resolve.

The highest profile and most contentious among these has been the Keystone XL pipeline. This infrastructure project was

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61. *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).
  62. *USA*, CLIMATE ACTION TRACKER (Sept. 4, 2015), *available at* <http://climateactiontracker.org/countries/usa.html> [<http://perma.cc/3UM9-Q94Z>].
  63. Karl Hausker et al., *Delivering on the U.S. Climate Commitment: A 10-Point Plan Toward a Low-Carbon Future 2* (World Res. Institute, Working Paper, 2015).
  64. *Id.* at 4.
  65. *See Tracking INDCs*, CLIMATE ACTION TRACKER, *available at* <http://climateactiontracker.org/indcs.html> [<http://perma.cc/ZBV5-DNNT>] (providing an assessment of mitigation contributions to the Paris Agreement.).
  66. *See* Michael Burger, et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under § 115 of the Clean Air Act* (Jan. 2016), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal\\_pathways\\_to\\_reducing\\_ghg\\_emissions\\_under\\_section\\_115\\_of\\_the\\_caa.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal_pathways_to_reducing_ghg_emissions_under_section_115_of_the_caa.pdf) [<https://perma.cc/GG9V-4H9J>].

controversial because it is designed to transport oil from Canadian tar sands, known to be highly carbon-intensive, to the Texas coast for export.<sup>67</sup> Some climate activists regarded it as a sort of litmus test on the President's commitment to climate mitigation.<sup>68</sup> Initially, the State Department reported the environmental impact of the Keystone pipeline would not be significant, and the Administration's seeming openness to project approval prompted grassroots organizations to rally tens of thousands to the Capitol in protest.<sup>69</sup> President Obama vetoed a bill that would have approved the Keystone XL pipeline, but the project was still officially under State Department review.<sup>70</sup> Ultimately, toward the end of 2015, the President ended the multi-year controversy by rejecting the permit application.<sup>71</sup> The Record of Decision (ROD) shows the Administration considered the pipeline to have international symbolic importance, noting "it is strategically important for the U.S. to continue to play a leadership role in the worldwide fight against climate change."<sup>72</sup> The ROD acknowledged that "many will see it as a test of U.S. willingness to take significant and difficult decisions as part of a broader effort to address climate change."<sup>73</sup>

A second example of what has been widely seen as mixed messaging from the President is his stance on Arctic oil and gas exploration. The Administration's approvals of exploratory oil drilling

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67. See generally *New Keystone XL Pipeline Application*, U.S. DEP'T STATE, available at <http://keystonepipeline-xl.state.gov> [<http://perma.cc/3QVM-59TP>] (providing information about the Keystone XL Pipeline).

68. Scott Horsley, *Keystone Greens See Pipeline Test For Obama*, NPR (Feb. 20, 2014, 4:00 PM), available at <http://www.npr.org/2014/02/20/280255167/keystone-greens-see-pipeline-as-crucial-test-for-obama> [<http://perma.cc/Q37P-AGEN>].

69. Kristine Delkus & James White, *Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border*, U.S. DEP'T STATE 2 (May 4, 2012), <http://keystonepipeline-xl.state.gov/documents/organization/189504.pdf> [<http://perma.cc/F8KP-Z84P>].

70. Juliet Eilperin & Katie Zezima, *Obama vetoes Keystone XL bill*, WASH. POST (Feb. 24, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/02/24/keystone-xl-bill-a-k-a-veto-bait-heads-to-presidents-desk/> [<https://perma.cc/8UBG-Z5J7>].

71. Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, U.S. DEP'T STATE (Nov. 3, 2015), available at <https://keystonepipeline-xl.state.gov/nid/249254.htm> [<https://perma.cc/5GWE-G6EG>].

72. *Id.* at 27.

73. *Id.*



permits in the Chukchi Seas were confusing at best, and environmental groups have been in litigation against the Department of the Interior for years.<sup>74</sup> At a time when the President seemed keen to reduce GHG emissions via the CAA why would the Administration encourage new exploitation of fossil fuels better left in place?<sup>75</sup>

A third point of inconsistency has been the Administration's failure to revisit decades-old policies for coal leasing on federal public lands—the source of roughly forty percent of the nation's coal production. Coal leasing on federal lands has seemed at clear cross-purposes with the goals of CAA regulations curbing emissions from coal-fired power plants. In the final year of the second term, this conflict is receiving the Administration's attention—in January 2016, the Department of the Interior announced a moratorium on new coal leasing and the launch of a comprehensive review of the federal coal program.<sup>76</sup>

Alongside these controversies, there have been clear areas of achievement apart from the CAA rulemaking that demonstrate the President's commitments to domestic climate action, such as support for renewable energy and energy efficiency. The Climate Action Plan states a goal of doubling renewable energy and increasing energy efficiency by twenty percent in commercial and industrial buildings by 2020.<sup>77</sup> The Bureau of Land management in the Department of the Interior, for example, has developed Solar Energy Zones on public land that will be able to support infrastructure to power over seven

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74. See generally Earthjustice, Focus Area: The Arctic, available at <http://earthjustice.org/the-wild/arctic> [https://perma.cc/W94N-64SD] (detailing federal litigation and related advocacy).

75. See Coral Davenport, *Alaska's Tricky Intersection of Obama's Energy and Climate Legacies*, N.Y. TIMES (May 12, 2015), [http://www.nytimes.com/2015/05/13/us/politics/alaskas-tricky-intersection-of-obamas-energy-and-climate-legacies.html?\\_r=0](http://www.nytimes.com/2015/05/13/us/politics/alaskas-tricky-intersection-of-obamas-energy-and-climate-legacies.html?_r=0) [https://perma.cc/S9F8-FEAM] (discussing the “uneasy balance between Mr. Obama's leadership on climate change and his efforts to ensure that the United States benefits from newfound oil and gas wealth.”).

76. See Sec'y Interior, Order No. 3338, *Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program* (Jan. 15, 2016), available at [http://www.blm.gov/style/medialib/blm/wo/Communications\\_Director\\_ate/public\\_affairs/news\\_release\\_attachments.Par.4909.File.dat/SO%203338%20Coal.pdf](http://www.blm.gov/style/medialib/blm/wo/Communications_Director_ate/public_affairs/news_release_attachments.Par.4909.File.dat/SO%203338%20Coal.pdf) [https://perma.cc/SW5G-L8CT]; see also *Fact Sheet: Modernizing the Federal Coal Program* (Jan. 16, 2016), [http://www.blm.gov/style/medialib/blm/wo/Communications\\_Director\\_ate/public\\_affairs/news\\_release\\_attachments.Par.47489.File.dat/Coal%20Reform%20Fact%20Sheet%20Final.pdf](http://www.blm.gov/style/medialib/blm/wo/Communications_Director_ate/public_affairs/news_release_attachments.Par.47489.File.dat/Coal%20Reform%20Fact%20Sheet%20Final.pdf) [https://perma.cc/K87H-X6M6].

77. Executive Office of the President, *supra* note 17.

million homes.<sup>78</sup> Time will tell how the Administration's decisions across varied contexts will be judged together as a climate legacy.

### III. CONCLUSION

The President's domestic climate action uses existing law and does, at minimum, two things relative to the international law context. First, it fulfills the longstanding obligation for "national policies" under the Convention, and second, it makes U.S. efforts to lead on the international stage more credible. A third function, particularly applicable to the CAA regulatory agenda, may be to provide a basis for the President to enter in a new binding climate agreement. According to international law Professor David Wirth, laws "already in place domestically," including those "undertaken by the executive branch unilaterally," provide "sufficiently firm legal footing that the President can confidently make parallel legally binding international commitments that track those domestic undertakings."<sup>79</sup> Likewise, Professor Daniel Bodansky concludes that, "depending on its contents, the president might be able to join the Paris agreement on the basis of existing constitutional, statutory, and/or treaty authority, without submitting it to the Senate or Congress for approval."<sup>80</sup> In these ways, the Obama Administration's Clean Air Act rulemaking is central to the climate change legacy that will emerge in time, as well as to the present and future U.S. negotiating posture and ability to meet international obligations for climate change mitigation.

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78. *BLM Fact Sheet: Renewable Energy: Solar*, U.S. DEP'T INTERIOR (May 2015), [http://www.blm.gov/style/medialib/blm/wo/MINERALS\\_\\_REALTY\\_\\_AND\\_RESOURCE\\_PROTECTION\\_/energy/solar\\_and\\_wind.Par.99571.File.dat/fact\\_Solar.pdf](http://www.blm.gov/style/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/solar_and_wind.Par.99571.File.dat/fact_Solar.pdf) [<http://perma.cc/THJ6-8UZY>]. For more on the Administration's actions to implement the 2013 Climate Action Plan, see *Fact Sheet: Timeline of Progress Made in President Obama's Climate Action Plan*, ENVTL. & ENERGY STUDY INST. (Aug. 5, 2015), <http://www.eesi.org/papers/view/fact-sheet-timeline-progress-of-president-obama-climate-action-plan> [<https://perma.cc/4A7X-S9FH>].
79. David Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HARV. ENVTL. L. REV. 515, 566 (2015).
80. Daniel Bodansky, *Legal Options for U.S. Acceptance of a New Climate Change Agreement*, CTR. CLIMATE & ENERGY SOLUTIONS, 14 (2015), <http://www.c2es.org/docUploads/legal-options-us-acceptance-new-climate-change-agreement.pdf> [<https://perma.cc/2T9N-49AH>].