

## ARTICLES

# MEASURING ENVIRONMENTAL JUSTICE: ANALYSIS OF PROGRESS UNDER PRESIDENTS BUSH, OBAMA, AND TRUMP

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## SUMMARY

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President Donald Trump’s environmental policies appear detrimental to the environmental justice (EJ) movement, but little work has been done to test their true impact on EJ. This Article offers a method for evaluating progress (or lack thereof) across the last three presidential administrations, proposing three metrics for progress: access to legal recourse, consideration of climate change as an EJ issue, and signaling actions. Using Robert Kuehn’s taxonomy of EJ, it concludes that while not much may be said to have actually been gained or lost in terms of distributive or corrective justice, significant progress was made toward procedural and social justice under President Barack Obama and lost under President Trump. This comparison helps to resolve competing narratives and provides a framework to encourage further comparisons across additional metrics.

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Since taking office in January 2017, President Donald Trump has proposed or completed rollbacks of nearly 100 environmental regulations, repeatedly rejected calls for action on climate change, and continuously sought to cut funding for the U.S. Environmental Protection Agency (EPA) and particularly for environmental justice (EJ).<sup>1</sup> Given that poor and minority communities have historically borne a disproportionate amount of environmental burden<sup>2</sup> and are expected to be most severely impacted by climate change,<sup>3</sup> these regressive policies seem likely to harm these same communities most, especially as they followed what many saw as promising EJ progress under President Barack Obama.<sup>4</sup> But since many of the climate regulations enacted under President Obama were

rescinded before they had a chance to create any measurable impact,<sup>5</sup> and the U.S. Congress has largely ignored the president’s calls for cuts to funding,<sup>6</sup> how are these policy changes actually impacting the cause of EJ? How can we assess actual progress toward the multifaceted goals of EJ over the past 20 years?

While others have evaluated the progress and setbacks made by individual administrations toward achieving EJ,<sup>7</sup> the absence of a universal understanding of the goals of the movement<sup>8</sup> and clear, reported metrics across administrations<sup>9</sup> have made an assessment of progress across adminis-

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1. See *infra* Sections II.B.3, II.C.3.

2. See *infra* Section I.A.

3. See *infra* Section I.B.

4. See, e.g., Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393 (2019) (arguing that the Trump Administration has set back the cause of EJ); Brie D. Sherwin, *The Upside Down: A New Reality for Science at the EPA and Its Impact on Environmental Justice*, 27 N.Y.U. ENV’T L.J. 57 (2019) (arguing that the Trump Administration’s attack on science and reduced enforcement of environmental laws have particular consequences for communities already impacted by environmental injustice).

5. See *infra* Section II.B.3.

6. See *infra* note 209.

7. See, e.g., Maurie Cohen, *George W. Bush and the Environmental Protection Agency: A Midterm Appraisal*, 17 SOC’Y & NAT. RESOURCES 69 (2004) (evaluating progress made during the George W. Bush Administration); Benjamin Wilson et al., *The State of Environmental Justice: An Obama Administration Retrospective*, 47 ELR 10385 (May 2017) (examining progress made during the Obama Administration); Jeanne Zokovitch Paben, *Plan EJ 2014: Fact or Fiction? A Critique of the Obama Administration’s Efforts on Environmental Justice*, 41 WM. & MARY ENV’T L. & POL’Y REV. 1 (2016) (same); Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281, 301-06 (2019) (critiquing the “measured steps forward during the Obama administration” as “too little, too late”); Outka & Warner, *supra* note 4 (examining the reversal of progress under President Trump); Sherwin, *supra* note 4 (same).

8. See *infra* Part I.

9. See *infra* Part II.

trations difficult. This Article builds on previous literature by proposing three alternative metrics for progress, and evaluating the actions of the George W. Bush, Obama, and Trump Administrations on each using Robert Kuehn's influential four-part taxonomy of EJ.<sup>10</sup> By identifying specific metrics for comparison and applying a comprehensive framework for evaluation, the Article helps to reconcile competing narratives: that the Trump Administration has completely destroyed the progress made toward EJ under the Obama Administration; and that there was no real substantive progress there to reverse.

As the analysis below shows, whether EJ has been advanced or hindered by recent administrations depends in part on the notion of justice (distributive, procedural, corrective, or social) considered. Throughout all three administrations, actual progress toward distributive and corrective justice, best embodied here by the metric of access to legal recourse, has remained fairly limited. Thus, the Trump Administration has had little impact on these limited EJ gains. The most apparent EJ progress during the three administrations was made under President Obama, in the form of procedural and social justice, embodied here by consideration of climate change as an EJ issue and public signaling of a commitment to EJ. It was these advances, which were primarily procedural and social, that were lost by the reversal of course under President Trump.

The Article proceeds as follows: Part I provides a basic history of the EJ movement and an introduction to Kuehn's four-part taxonomy of EJ. Part II begins with an explanation of the difficulties encountered when comparing EJ efforts across administrations, then identifies the three alternative metrics examined here, assessing each in light of Kuehn's taxonomy: Section II.A compares availability of legal recourse for EJ claims; Section II.B compares each administration's consideration of climate change and its impacts on EJ communities; and Section II.C compares administrative actions that functionally signal the importance of the issues, such as proposed funding for EJ, involvement in the Environmental Justice Interagency Working Group (EJ IWG), and consideration of EJ in rulemaking. Part III summarizes the impacts of executive actions by the Bush, Obama, and Trump Administrations, concluding that the most significant setbacks under the Trump Administration are to the procedural and social aspects of EJ.

Where the Obama Administration demonstrated an increased commitment to the EJ movement, publicly recognizing the underlying social and economic inequities that drive environmental injustice and seeking to actively involve affected communities in implementing changes, the Trump Administration has actively backed away from this commitment and disavowed this recognition. Such actions represent a loss in their own right, and also a loss toward achieving more substantive distributive and corrective justice in the future.

10. See generally Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ELR 10681 (Sept. 2000).

## I. Background

What has become known as the EJ movement has addressed a broad range of concerns over the years and has never had one universally agreed-upon meaning, but has instead been said to mean “many things to many people.”<sup>11</sup> Given the movement's broad and diverse roots, explained in brief below, this Article adopts Kuehn's taxonomy of EJ as a framework for understanding the movement's goals and assessing the impacts of federal government actions across the Bush, Obama, and Trump Administrations.

### A. History and Meaning of EJ

At its most basic, the term “environmental justice” refers to a set of concerns that examine “the relationship of environmental quality to race and class.”<sup>12</sup> More specifically, EJ is often described as addressing the unequal distribution of environmental benefits and burdens, where the burden is disproportionately borne by poor communities and communities of color, while the benefits are disproportionately enjoyed by wealthier, whiter communities.<sup>13</sup> Importantly, however, the EJ movement is at its heart a grassroots one, in which progress has most often been driven by affected communities themselves,<sup>14</sup> and is thus not only concerned with a fair outcome, but also with fair participation and treatment.<sup>15</sup>

11. *Id.* at 10681.

12. *Id.*

13. See generally Exec. Order No. 12898, 3 C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. §4321 (1994 & Supp. VI 1998) [hereinafter Exec. Order No. 12898] (identifying “an agency-wide environmental justice strategy” as one that “identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”); see also Wilson et al., *supra* note 7, at 10388 (explaining that “while EJ is absolutely about reducing and minimizing the risk of exposure to pollution and those bad impacts, it's also about equal access to the good, to services and amenities”).

14. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and Justice*, 47 AM. U. L. REV. 221, 226 (1997) (describing “most of the participants in the environmental justice movement [as] community groups engaging in local action within their communities”); see also Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L L. 319, 329 (1993) (crediting grassroots groups not only for the pressure they put on EPA, but also for direct action that has forced changes in policy).

15. See, e.g., EJnet.org, *Principles of Environmental Justice*, <http://www.ejnet.org/ej/principles.html> (last modified Apr. 6, 1996) [hereinafter *Principles of Environmental Justice*] (developed at the first National People of Color Environmental Leadership Summit and affirming, among other things, “the fundamental right to political, economic, cultural and environmental self-determination of all peoples” and demanding, among other things, “the right to participate as equal partners at every level of decision-making”); see also Kuehn, *supra* note 10, at 10688 (identifying “procedural justice,” or “focus[ing] on the fairness of the decision-making process, rather than on its outcome,” as one of the four dimensions of justice the EJ movement seeks to address); Kaswan, *supra* note 14, at 223 (identifying “political justice,” or “justice in the decision-making processes that determine the distribution of environmental benefits and burdens,” as one of the two forms of justice raised by the EJ movement); ROBERT D. BULLARD, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, ENVIRONMENT, AND MORALITY: CONFRONTING ENVIRONMENTAL RACISM IN THE UNITED STATES 6 (2014) (identifying “procedural equity,” defined as “the extent to which governing rules, regulations, evaluation criteria and enforcement are applied uniformly and in a non-discriminatory way,” as one of the three equities inherent in EJ); David Schlosberg, *Reconceiving Environmental Justice:*

One common view of the EJ movement is that it was grounded in the civil rights movement.<sup>16</sup> During the 1960s, “individuals, primarily people of color, who sought to address the inequity of environmental protection in their communities . . . sounded the alarm about the public health dangers for their families, their communities and themselves.”<sup>17</sup> Early awareness primarily focused on the disproportionate siting of locally undesirable land uses, such as waste facilities, in poor and minority communities.<sup>18</sup> In 1982, a nonviolent action protesting the siting of a toxic waste landfill in the predominantly African-American community of Warren County, North Carolina, was one of the first cases to gain national attention.<sup>19</sup> While unsuccessful in stopping construction of the landfill, the protest sparked national conversation about the unequal distribution of environmental burdens and prompted the U.S. General Accounting Office (now the U.S. Government Accountability Office (GAO)) to study environmental racism for the first time.<sup>20</sup>

The GAO report and a subsequent report by the United Church of Christ Commission on Racial Justice established for the first time a clear correlation between race and the siting of hazardous waste facilities.<sup>21</sup> Though such studies did not necessarily prove causality, they were viewed as evidence “that siting decisions were at worst discriminatory, [or] at best disproportionate.”<sup>22</sup> In either case, advocates argued that “[t]he result of these patterns is that minorities pay the pollution costs of industrial production, while the benefits accrue to society in general.”<sup>23</sup>

Some scholars have also credited “a variety of other social movements,” such as the anti-toxics movement, the movement for Native American sovereignty, and the labor movement, for helping to shape the EJ movement.<sup>24</sup> The anti-toxics movement, for example, “came to view discrete toxic assaults as part of an economic structure” that favored corporate power and lent its vision for dismantling such structures to the EJ movement<sup>25</sup>; while Native American

struggles for sovereignty and the labor movement, particularly the fight for farmworkers’ rights, “helped define one of [the movement’s] central philosophies, the concept of self-determination.”<sup>26</sup>

By the late 1980s, various citizen groups were springing up around the country in response to EJ issues. West Harlem Environmental Action (WE ACT) was founded in 1987 to improve environmental and health quality in communities of color.<sup>27</sup> In 1990, “the Indigenous Environmental Network (IEN) was formed by grassroots Indigenous peoples and individuals to address environmental and economic justice issues by building economically sustainable communities”; and the Southwest Network for Environmental and Economic Justice was formed to “empower communities and workers to impact local, state, regional, national, and international policy on environmental and economic justice issues.”<sup>28</sup>

In 1990, the Congressional Black Caucus met with EPA to discuss disproportionate environmental risks to Black communities, and the federal government took its first steps to address the issues: creating the Environmental Equity Working Group and two years later establishing the Office of Environmental Equity.<sup>29</sup> Also of pivotal importance was the first National People of Color Environmental Leadership Summit held in Washington, D.C., in October 1991 and attended by more than 1,000 delegates from around the world.<sup>30</sup> At this summit, the delegates drafted and adopted 17 “Principles of Environmental Justice,” which embody a comprehensive notion of EJ and which continue to serve as a defining document for the movement.<sup>31</sup>

Though Congress rejected federal EJ legislation in the early 1990s,<sup>32</sup> the movement was finally recognized in federal policy in 1995 when President Bill Clinton signed Executive Order No. 12898, directing federal agencies to consider EJ issues in decisionmaking.<sup>33</sup> The Executive Order requires each agency to “make achieving environmental justice part of its mission,” and to “develop an agency-wide environmental justice strategy.”<sup>34</sup> It also ordered the creation of the EJ IWG to help guide and coordinate governmentwide EJ efforts.<sup>35</sup>

Given the diverse roots of EJ and the different goals it encompasses, federal recognition has struggled to fully capture the complexity of the movement. The term “environmental justice” was not explicitly defined in President Clinton’s Executive Order itself, but the problem was described therein as “the disproportionately high and adverse human health or environmental effects . . .

*Global Movements and Political Theories*, 13 ENV’T POL. 517, 528 (2004) (identifying “participation” as a key element of EJ).

16. CLIFFORD J. VILLA, ENVIRONMENTAL JUSTICE FOR A NEW ERA 8 (2020) (unpublished manuscript) (on file with author); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523, 530 (1994); U.S. EPA, *Environmental Justice*, <https://www.epa.gov/environmentaljustice> (last updated Oct. 22, 2020).
17. U.S. EPA, *supra* note 16. See also BULLARD, *supra* note 15, at 21 (“The environmental justice movement emerged in response to environmental inequities, threats to public health, unequal protection, differential enforcement and disparate treatment received by the poor and people of colour.”).
18. U.S. EPA, *supra* note 16.
19. *Id.* See also VILLA, *supra* note 16, at 4-5.
20. U.S. EPA, *supra* note 16; GAO, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).
21. See generally GAO, *supra* note 20 (one of the first studies establishing this connection); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES xiii (1987) (finding “race to be the most significant among variables tested in association with the location of commercial hazardous waste facilities”).
22. FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW §9.10 (2019).
23. Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 273 (1992).
24. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 19-30 (2001).
25. *Id.* at 23.

26. *Id.* at 27-28.

27. U.S. EPA, *supra* note 16.

28. *Id.*

29. Renamed the Office of Environmental Justice (OEJ) in 1994. *Id.*

30. BULLARD, *supra* note 15, at 5.

31. *Principles of Environmental Justice*, *supra* note 15.

32. See, e.g., Environmental Justice Act, H.R. 2105, 103d Cong. (1993). Notably, federal EJ legislation has been proposed and rejected every year since 1992. Wilson et al., *supra* note 7, at 10389.

33. Outka & Warner, *supra* note 4, at 394 (citing Exec. Order No. 12898, *supra* note 13).

34. Exec. Order No. 12898, *supra* note 13, at §§1-101, 1-103.

35. *Id.* at §1-102.



on minority populations and low-income populations.”<sup>36</sup> Notable here is the focus primarily on the distributive aspects of EJ as well as the addition of “low-income populations” to the definition of those affected, which broadened the focus beyond race.<sup>37</sup> Also notable was President Clinton’s embrace of the term “environmental justice,” replacing the term used by EPA at the time, “environmental equity,” and avoiding use of the potentially more controversial term, “environmental racism.”<sup>38</sup>

In the time since, the government has further broadened its definition of “environmental justice” to include impacts on “all people,” rather than focusing on the impacts on poor and minority populations, and to consider not only the disproportionate distribution of environmental burdens, but also unequal representation in environmental decisionmaking processes.<sup>39</sup> As such, EPA now defines “environmental justice” in the following way:

The fair treatment and *meaningful involvement* of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys: the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.<sup>40</sup>

Under President Bush, EPA’s approach to EJ has been described as embodying this more race-neutral definition, consistently “de-emphasizing minority and low-income populations and emphasizing the concept of environmental justice for everyone.”<sup>41</sup> According to a 2004 report from the Office of Inspector General (OIG), “[t]he interpretation that environmental justice is for everyone, while consistent with the Agency’s overall mission, moved the Agency’s environmental justice focus away from minority and low-income populations,” even though “the Executive Order was issued in an attempt to draw more attention to this specific part of the population.”<sup>42</sup> While EPA agreed that the intent of the Executive Order “is to address environmental justice concerns in minority and/or low-income populations,” the Agency also “assert[ed] its firm belief that

‘environmental justice belongs to all people.’”<sup>43</sup> Notably, although the Obama Administration has generally been credited for refocusing efforts on EJ, EPA’s definition has retained not only the dual focus on meaningful involvement and fair distribution of environmental risks and benefits, but also the “all people” language.<sup>44</sup>

## B. Kuehn’s Taxonomy of EJ

In order then to evaluate progress toward EJ, we must first define what we mean by “justice.” Numerous EJ activists and scholars have sought to identify the interconnected conceptions of justice “embodied in the concept of environmental justice,” and there is no shortage of frameworks to choose from.<sup>45</sup> This Article adopts Kuehn’s four-part taxonomy of EJ, which builds on the work of philosophers and scholars before him to create the most comprehensive framework, identifying four traditional notions of justice implicated by EJ claims: distributive, procedural, corrective, and social justice.<sup>46</sup>

“Distributive justice” is the element of justice most commonly considered in the EJ context,<sup>47</sup> and can be defined as “the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given.”<sup>48</sup> Kuehn describes this notion of justice as focused on a fair distribution of outcomes, not necessarily a fair process.<sup>49</sup>

The EJ movement, however, has always been about more than just fair outcomes.<sup>50</sup> Like some other EJ frameworks,<sup>51</sup> Kuehn’s taxonomy accounts for the broad range of goals sought by the movement<sup>52</sup> by requiring not only fair outcomes (distributive justice), but also fairness in decision-making—what Kuehn calls procedural justice<sup>53</sup>—and a

43. VILLA, *supra* note 16, at 24 (quoting U.S. EPA, AGENCY STATEMENT ON THE INSPECTOR GENERAL’S REPORT ON EPA’S ENVIRONMENTAL JUSTICE IMPLEMENTATION 1 (2004)).

44. *Id.* at 28.

45. Kuehn, *supra* note 10, at 10682; *see also* BULLARD, *supra* note 15, at 6 (distilling equity into three broad categories: procedural, geographic, and social); Kaswan, *supra* note 14, at 223 (distinguishing between “the two forms of justice raised by the movement: (1) justice in the existing distribution of environmental benefits and burdens (‘distributive justice’), and (2) justice in the decisionmaking processes that determine the distribution of environmental benefits and burdens (‘political justice’)”); Schlosberg, *supra* note 15, at 528 (identifying three “intricately linked” elements of justice: distribution, participation, and recognition).

46. Kuehn, *supra* note 10, at 10681.

47. *Id.* at 10683 (“Of the four aspects of justice implicated by the use of the term environmental justice, distributive justice concerns have received the most attention from government officials, scholars, and communities.”); Schlosberg, *supra* note 15, at 517-18 (describing the majority of existing EJ frameworks as incomplete for their exclusive emphasis on distributive justice).

48. Kuehn, *supra* note 10, at 10683 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977)).

49. *Id.* at 10684.

50. *See supra* note 15.

51. *See supra* note 45 (describing other prominent frameworks).

52. These goals are best encapsulated by the 17 Principles of Environmental Justice developed during the first National People of Color Environmental Leadership Summit. *See supra* note 15.

53. “Procedural justice has been defined as ‘the right to treatment as an equal. That is the right, not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.’” Kuehn, *supra* note 10, at 10688 (quoting DWORKIN, *supra* note 48).

36. *Id.* at §§1-101, 1-102(b), 1-103(a), 3-302(a).

37. VILLA, *supra* note 16, at 4.

38. *Id.* at 13-14 (suggesting several reasons for the shift away from use of the term “environmental racism” despite the fact that clearly “race still matters” today); Kuehn, *supra* note 10, at 10682 (explaining the disagreement over whether the term “environmental racism” requires intentional conduct or also embraces disproportionate impacts and the “desire to encompass class concerns” as well as race).

39. U.S. EPA, *supra* note 16.

40. *Id.* (emphasis added).

41. VILLA, *supra* note 16, at 23 (citing OFFICE OF INSPECTOR GENERAL, U.S. EPA, REPORT NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE 10 (2004) [hereinafter OIG 2004] (citing Memorandum from Christine Todd Whitman, Administrator, U.S. EPA, to Assistant Administrators et al., U.S. EPA, EPA’s Commitment to Environmental Justice (Aug. 9, 2001))).

42. OIG 2004, *supra* note 41, at 10-11.

recognition of the underlying systemic issues driving inequity—what Kuehn refers to as social justice.<sup>54</sup> Where Kuehn’s taxonomy differs from other prominent frameworks is that it also accounts for a fourth conception of justice: corrective justice, which can be likened to “retributive justice,” “compensatory justice,” “restorative justice,” and “commutative justice.”<sup>55</sup> “Corrective justice,” also embodied in the 17 Principles of Environmental Justice,<sup>56</sup> focuses not just on equal treatment moving forward, but also on the “duty to repair the losses for which one is responsible.”<sup>57</sup>

Like other prominent EJ frameworks,<sup>58</sup> Kuehn views these elements of justice as inherently interconnected and asserts that all four must be addressed to truly achieve EJ.<sup>59</sup> So while distributive justice requires fair distribution of environmental risks and resources, procedural justice requires involving affected communities in processes that are designed to be fair, social justice requires recognizing the broader social context in which these issues arise and positioning EJ as part of larger racial and economic struggles, and corrective justice requires also redressing past harms.

This maximal view of justice may be seen as setting a remarkably high bar, however, and this Article does not posit that anything short of success on all three fronts is a failure. Instead, these notions of justice stand roughly for the multifaceted goals of the EJ movement, and are used as a framework for evaluating progress across administrations.

## II. Measuring Progress Across Administrations

Even once settling upon Kuehn’s framework for understanding EJ, measuring governmental progress toward the goals of distributive, procedural, social, and corrective justice remains challenging for at least two reasons: a lack of specific performance metrics, and shifting priorities and reporting over time. Given the apparent decreased importance placed on EJ during the Bush Administration, it comes as little surprise that EJ reporting is hard to come by prior to the Obama Administration. A 2004 report from the OIG criticized the Bush EPA for its lack of EJ integration and reporting, noting that “[a]lthough the Agency ha[d] been actively involved in implementing Executive Order 12,898 for 10 years, it ha[d] not devel-

oped a clear vision or a comprehensive strategic plan, and ha[d] not established values, goals, expectations, and performance measurements.”<sup>60</sup>

Even once the Obama Administration brought a renewed focus to EJ, EPA was still criticized for not “developing and using performance measures to track agency progress on its EJ goals.”<sup>61</sup> In a 2011 report to Congress, GAO concluded the following:

EPA’s renewed commitment to environmental justice has led to a number of actions, including revitalizing stakeholders’ involvement and developing agencywide implementation plans. . . . [But *w*ithout performance measures that align with EPA’s Plan EJ 2014 goals, the agency will lack the information it needs . . . to effectively assess how the agency is performing relative to its environmental justice goals and the effect of its overall environmental justice efforts on intended communities.<sup>62</sup>

Eight years later, when GAO again evaluated federal EJ strategies, it found similar problems with measurement.<sup>63</sup> EPA had largely implemented its recommendations from 2011, including the recommendation to “include milestones and measures for implementation in its 2020 environmental justice action agenda.”<sup>64</sup> Of the 15 other agencies involved in the EJ IWG, however, only three agencies—the U.S. Department of the Interior, U.S. Department of Health and Human Services (HHS), and U.S. Department of Agriculture—established performance measures or milestones for their EJ efforts.<sup>65</sup> Of these three agencies, only one—HHS—reported on its progress toward achieving the performance measures or milestones established.<sup>66</sup>

Additionally, although 14 of the signatory agencies initially developed EJ strategic plans in 2011, as required by the memorandum of understanding (MOU) signed by the agencies, and “all have issued at least one annual progress report on the implementation of these plans, . . . most have not issued such reports every year, as they agreed to do in the 2011 MOU.”<sup>67</sup> As a result, many agencies can identify specific accomplishments they have made in promoting EJ but are unable to determine how much progress they have made overall.<sup>68</sup>

Even within EPA itself, which did lay out milestones and performance measurements in its EJ 2020 Action Agenda, the focus and format of progress reports has changed between administrations, making it more difficult to draw clear comparisons between the Obama and

54. “A social justice perspective presents environmental justice as part of larger problems of racial, social, and economic justice.” *Id.* at 10699 (citations omitted).

55. *Id.* at 10693-94 (citations omitted).

56. *Principles of Environmental Justice*, *supra* note 15 (including the demand “that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production”; and protection of “the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care”).

57. Kuehn, *supra* note 10, at 10693 (citing Jules L. Coleman, *The Practice of Corrective Justice*, 27 ARIZ. L. REV. 15, 30 (1995)).

58. *See, e.g.*, Schlosberg, *supra* note 15, at 521 (“Justice demands a focus on recognition, distribution, and participation. They are three interlinking, overlapping circles of concern.”); BULLARD, *supra* note 15, at 7 (“The environmental justice framework rests on developing tools, strategies and policies to eliminate the myriad types of unfair, unjust and inequitable conditions and policies.”).

59. Kuehn, *supra* note 10, at 10703.

60. OIG 2004, *supra* note 41, at i.

61. GAO, GAO-12-77, ENVIRONMENTAL JUSTICE: EPA NEEDS TO TAKE ADDITIONAL ACTIONS TO HELP ENSURE EFFECTIVE IMPLEMENTATION 19-31 (2011).

62. *Id.* at 31-32 (emphasis added).

63. GAO, GAO-19-543, ENVIRONMENTAL JUSTICE: FEDERAL EFFORTS NEED BETTER PLANNING, COORDINATION, AND METHODS TO ASSESS PROGRESS (2019).

64. *Id.* at 3-4.

65. *Id.* at 22.

66. *Id.*

67. *Id.* at 19.

68. *Id.* at 31.

Trump Administrations' efforts.<sup>69</sup> Given this lack of clearly reported metrics, this Article proposes and evaluates three alternative metrics for progress: (1) the availability of legal recourse for environmental injustice; (2) consideration of climate change as an EJ issue; and (3) actions that serve as signaling functions, such as proposed funding and consideration of EJ in rulemakings. In addition to being measurable, these specific metrics were chosen because they reflect the diversity of the movement's goals and allow us to examine progress, or reversal thereof, across all four dimensions of justice identified by Kuehn.

### A. Availability of Legal Recourse

While legal action may not always be an appropriate response to EJ “struggles[, which] are at heart political and economic, not legal,”<sup>70</sup> it is one important way to correct past injustices and to prevent further distributional injustice. Understanding whether and how the availability of legal recourse has shifted from administration to administration then can provide some insight into the progress made toward correctional and distributional EJ.

EJ litigation to date has generally been founded on one of three grounds: traditional environmental laws, equal protection, or civil rights laws such as Title VI.<sup>71</sup> Unfortunately, all three types of claims have been largely unsuccessful, leaving communities without a promising basis for bringing an EJ claim in federal court.<sup>72</sup> As a result, Title VI administrative claims may offer the best current hope for legal recourse for EJ claims and are used here as a comparative metric across administrations.

#### 1. Limited Availability of Recourse Through Federal Courts

In some cases, traditional environmental laws have proven successful in addressing environmental harm generally, but “[i]n the decades since [their enactment], it became clear that [they] have a critical flaw—they fail to address the ways that environmental harms disproportionately affect low-income people, especially low-income people of color.”<sup>73</sup> The major environmental statutes “do not address the prospect that their benefits and burdens might turn out to be unequally distributed in ways that add to cumulative disadvantage[, and t]hey do not provide measures to avert disparate impact.”<sup>74</sup> While these failures may or may not be the result of ignorance of distributional concerns,<sup>75</sup> they functionally prevent affected communities from bringing

actionable disparate impact claims on the basis of traditional environmental law violations. Some scholars have even argued that these laws have unintentionally made things worse for affected communities, by excluding the average citizen from decisionmaking through the “creat[ion of] complex administrative processes that exclude most people who do not have training in the field and necessitate specific technical expertise.”<sup>76</sup>

The Equal Protection Clause of the Fourteenth Amendment has historically provided another legal hook for EJ claims, but they too have been unsuccessful.<sup>77</sup> This widespread failure is due largely to the U.S. Supreme Court's 1976 holding in *Washington v. Davis*<sup>78</sup> that a showing of discriminatory impact alone is not enough to prove an equal rights violation under the Fourteenth Amendment.<sup>79</sup> Instead, the Court held that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”<sup>80</sup> “This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination.”<sup>81</sup>

Invidious discrimination may, in some cases, be inferred from disproportionate impact, particularly in circumstances when “the discrimination is very difficult to explain on nonracial grounds,”<sup>82</sup> “but [disproportionate impact] is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”<sup>83</sup> As described above, most EJ studies have focused on the correlation between environmental harms and race or class, both illustrating and resulting in difficulty proving intentional discrimination.<sup>84</sup> Another approach,

Section 1983 of the Civil Rights Act of 1866, particularly Title VI, has been the other primary vehicle environmental justice advocates have attempted to use to fight environmental racism. Challenging environmental racial discrimination through use of Section 1983 has been largely unsuccessful, however, for the same reasons discussed above with respect to equal protection.<sup>85</sup>

The provision most often cited in this context, §601 of Title VI, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>86</sup> Problematically

69. See, e.g., U.S. EPA, *Annual Environmental Justice Progress Reports*, <https://www.epa.gov/environmentaljustice/annual-environmental-justice-progress-reports> (last updated Feb. 19, 2020) (comparing progress reports from fiscal years (FYs) 2015, 2017, and 2019); see also Engelman Lado, *supra* note 7, at 302 (noting EPA's “short-lived” initiative to maintain a web-based docket of all Title VI cases).

70. Cole, *supra* note 16, at 524.

71. GRAD, *supra* note 22, §9.10(4)(b)(i).

72. *Id.*

73. Outka & Warner, *supra* note 4, at 394.

74. Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGICAL* L.Q. 809, 825 (2018).

75. *Id.* at 835 (noting the debate about whether such omissions were intentional).

76. COLE & FOSTER, *supra* note 24, at 30.

77. Cole, *supra* note 16, at 538 n.73 (collecting cases as of 1994).

78. 426 U.S. 229 (1976).

79. *Id.* at 239 (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

80. *Id.* at 240.

81. *Id.* at 241.

82. *Id.* at 240.

83. *Id.* at 242.

84. See *supra* Section I.A.

85. GRAD, *supra* note 22, §9.10(4)(B)(iii).

86. 42 U.S.C. §2000d.



for those wishing to bring a disproportionate impact claim, the Supreme Court has also long interpreted this provision to prohibit only intentional discrimination.<sup>87</sup>

Advocates once hoped that successful claims might instead be brought under §602, which authorizes federal agencies “to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability.”<sup>88</sup> “While litigants under Title VI itself must prove that a defendant intentionally discriminated, the regulations implementing Title VI across the federal government generally state that discriminatory effect (or disparate impact) alone is enough to show unlawful discrimination.”<sup>89</sup> These hopes, however, were largely quashed by the Supreme Court’s 2001 holding in *Alexander v. Sandoval*.<sup>90</sup>

There, the Court addressed the question of “whether private individuals may sue to enforce disparate-impact regulations promulgated under [§602 of] Title VI of the Civil Rights Act of 1964.”<sup>91</sup> Finding that Title VI did not “display an intent to create a freestanding private right of action to enforce regulations promulgated under §602,” the Court held that “no such right of action exists.”<sup>92</sup> Thus, at this point in time,<sup>93</sup> a successful individual right-of-action must be filed under §601 and would require the same difficult showing of intentional discrimination as required under the Equal Protection Clause.

## 2. Title VI Administrative Claims as a Potential Pathway

Unlike a Title VI claim brought in federal court, Title VI administrative claims filed with the federal funding agency may include claims of discriminatory effect.<sup>94</sup> Under Title VI, federal agencies have the authority to conduct periodic compliance reviews of funding recipients and the duty to enforce regulations promulgated under §602.<sup>95</sup> EPA’s regulations, enacted in 1973, specifically prohibit EPA-funded agencies “from taking acts, including permitting actions, that are intentionally discriminatory *or have a discriminatory effect* based on race, color, or national origin.”<sup>96</sup>

Within EPA, the External Civil Rights Compliance Office (ECRCO, previously the Office of Civil Rights (OCR)) is charged with the Agency’s administration of Title VI, including with conducting prompt investiga-

tions of alleged Title VI violations.<sup>97</sup> Complaints must be filed in writing, and describe the allegedly discriminatory acts within 180 days of the acts, unless the ECRCO waives the time limit for good cause.<sup>98</sup> The ECRCO will alert the complainant and recipient of receipt of the complaint within five calendar days and immediately initiate complaint processing procedures.<sup>99</sup> Within 20 calendar days of acknowledgment of the complaint, the ECRCO will complete its preliminary investigation and determine whether to accept, reject, or refer the complaint to another appropriate federal agency.<sup>100</sup> If the ECRCO accepts the complaint, the office will notify the “applicant or recipient complained against of the allegations and give the applicant or recipient opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.”<sup>101</sup>

Within 180 days of the start of the complaint investigation, the ECRCO will then complete preliminary findings and recommendations for voluntary compliance, which the recipient may then choose to comply with or challenge.<sup>102</sup> Alternatively, if the office’s preliminary investigation reveals no violation, it will dismiss the complaint and notify the parties.<sup>103</sup> Whenever possible, “[the ECRCO] shall attempt to resolve complaints informally,”<sup>104</sup> but if compliance with this part cannot be assured by informal means, EPA has a number of other tools at its disposal, including the authority to “terminate or refuse to award or to continue assistance [or] . . . any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.”<sup>105</sup> In measuring availability of recourse under Title VI claims, this Article considers the Agency’s record in accepting cases for investigation and issuing findings of discrimination across administrations.

□ *Bush era.* Historically, EPA’s adjudication of alleged Title VI violations is widely believed to have been inadequate.<sup>106</sup> An independent review of the OCR conducted in 2011 revealed that while EPA’s regulations clearly allow the Agency 20 days to decide whether to investigate a formal complaint under the federal rules, and another 180 days to complete an investigation and issue possible findings of civil rights violations, only 6% of the 247 Title VI complaints received between 1993 and October 2010 were accepted or dismissed within the 20-day time limit.<sup>107</sup>

In fact, EPA took more than one year to accept or dismiss half of these complaints.<sup>108</sup> One complaint was

87. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

88. 42 U.S.C. §2000d-1.

89. Cole, *supra* note 16, at 531.

90. 532 U.S. 275, 278 (2001).

91. *Id.*

92. *Id.* at 293.

93. Lawmakers continue to propose legislation that would allow for claims based on discriminatory impact, including most recently the Environmental Justice Act of 2017, S. 1996, 115th Cong. §10 (2017) (proposing to amend the Civil Rights Act of 1964 to create a private right-of-action to bring a claim under §602).

94. OEJ, U.S. EPA, TITLE VI AND EXECUTIVE ORDER 12898 COMPARISON (2014), <https://www.epa.gov/sites/production/files/2015-02/documents/title-vi-ej-comparison.pdf>.

95. *Id.*

96. U.S. EPA, *Title VI Laws and Regulations* (emphasis added), <https://www.epa.gov/ocr/title-vi-laws-and-regulations> (last updated Oct. 30, 2019).

97. 40 C.F.R. §7.120 (2020).

98. *Id.* §7.120(b).

99. *Id.* §7.120(c)-(d).

100. *Id.* §7.120(d)(1)(i).

101. *Id.* §7.120(d)(1)(ii).

102. *Id.* §7.115(c)-(d).

103. *Id.* §7.120(g).

104. *Id.* §7.120(d)(2)(i).

105. *Id.* §7.130(a).

106. See, e.g., DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS FINAL REPORT 1 (2011).

107. This report was commissioned by EPA during President Obama’s first term and reflects findings from the terms of Presidents Clinton, Bush, and Obama (first two years). It is used here to exemplify the Office’s long track record of inadequate response. *Id.* at 19.

108. *Id.* at 25.

accepted a full *nine* years after being received, and another was accepted after *10 years*.<sup>109</sup> Among the reasons suggested for this poor performance, the report observed that EPA did not provide Title VI compliance guidance to funding recipients, and the OCR had no tracking system to monitor investigations and complaints.<sup>110</sup>

□ *Obama era.* Despite the continued poor track record during the first few years of Obama's presidency, the Administration is credited for acknowledging the Agency's failures in resolving Title VI claims and making some improvements to the system of enforcing and ensuring compliance after commissioning the independent review discussed above.<sup>111</sup> Such improvements included developing a case resolution manual to provide procedural guidance to "ensure EPA's prompt, effective, and efficient resolution of civil rights cases"; releasing the External Compliance and Complaints Program Strategic Plan for fiscal years (FYs) 2015-2020; identifying 23 deputy civil rights officials across the Agency to "support the civil rights mission and ensure its success throughout EPA"; and moving enforcement of Title VI claims from the OCR to the ECRCO, which is located in EPA's Office of General Counsel.<sup>112</sup> EPA under Obama was also recognized for beginning to clean up the substantial backlog of Title VI cases and for making the first ever findings of discrimination in the Title VI context, both made on the last day of the Obama Administration.<sup>113</sup>

At the same time, a 2016 report by the U.S. Commission on Civil Rights (USCCR) still criticized EPA as unsuccessful "in utilizing its Title VI authority to ensure that states and other entities that receive EPA financial assistance comply with EPA's Title VI nondiscrimination mandates."<sup>114</sup> According to data the ECRCO shared with USCCR, the office received a decreasing number of new complaints from 2016-2018: 31 in FY 2016, 25 in FY 2017, and 15 in FY 2018.<sup>115</sup> During FY 2016, which was entirely within the Obama Administration, the office accepted eight complaints for investigation and rejected three.<sup>116</sup> By contrast, during FY 2017, which included roughly the final quarter of the Obama Administration and the first nine months of the Trump Administration, the office accepted 10 complaints for investigation and rejected 23.<sup>117</sup>

109. *Id.*

110. *Id.*

111. U.S. COMMISSION ON CIVIL RIGHTS (USCCR), ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898, at 50 (2016) [hereinafter USCCR 2016]. *But see* Engelman Lado, *supra* note 7, at 301-06 (describing steps taken under the Obama Administration as "an incremental approach to reform" and also as "too little, too late").

112. USCCR 2016, *supra* note 111, at 49-50.

113. Engelman Lado, *supra* note 7, at 303-04; USCCR, ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 399-400 (2019) [hereinafter USCCR 2019].

114. USCCR 2016, *supra* note 111, at 22.

115. USCCR 2019, *supra* note 113, at 394-95.

116. *Id.* at 395. The federal government FY runs from October through September, such that FY 2016 ran from October 2015 through September 2016, FY 2017 ran from October 2016 through September 2017, and FY 2018 ran from October 2017 through September 2018.

117. *Id.*

□ *Trump era.* This apparent trend toward rejecting an increasing percentage of complaints continued in FY 2018, when the office accepted just two complaints for investigation and rejected 31.<sup>118</sup> These numbers are an admittedly small sample, representing roughly one-and-one-half years of the Trump Administration, but updated case resolution info is not readily available through EPA's website, and this data alone shows a marked decrease in the percentage of complaints accepted for investigation: from eight to 10 to two; and a marked increase in the percentage of complaints rejected: from three to 23 to 31.<sup>119</sup> Together, these numbers could be interpreted as a notable decrease in access to legal recourse through the Title VI administrative claims process.

□ *Comparison.* The major progress in resolving Title VI claims between the Bush and Obama Administrations is largely seen not in the number of claims resolved, but in the Agency's recognition of its long-standing failings and its attempts—through training, guidance, and reorganization—to improve the process. The first ever findings of discrimination were also seen at the time as "represent[ing] an uptick in activity by a civil-rights office . . . long criticized for failing to act on complaints alleging Title VI violations."<sup>120</sup> These findings, however, were both made on the last day of the Administration.<sup>121</sup>

Can two actions taken on the very last day really be said to represent much in the way of progress? This "uptick" in findings and in general emphasis on claim resolution does not seem to have continued into the Trump Administration. If anything, the decreasing number of claims accepted and increasing number of claims rejected may be said to signal a reversal of course. But with so few resulting formal findings of discrimination, does it really make a difference whether complaints are accepted or rejected in the first instance?

□ *Applying Kuehn's taxonomy.* The answer to these questions may depend in part upon the notion of justice considered here. Kuehn himself described Title VI claims of disproportionate impact as reflecting distributional justice concerns, as they seek to remedy the "'disproportionate burden' or 'disparate impact'" on a racial class.<sup>122</sup> It could be argued that solely accepting a larger number of claims (as under the Obama Administration) did not constitute much of a gain in the way of distributional justice outcomes when just two formal findings of discrimination were made. It would follow then that not much was lost in terms of distributional justice when a smaller number were accepted under President Trump.

118. *Id.*

119. *Id.* Complaints accepted and rejected were not necessarily initiated in the same FY, so these numbers cannot accurately be expressed as a percentage of the overall claims filed in a given year.

120. *Id.* (citing Talia Buford, *Rare Discrimination Finding by EPA Civil Rights Office*, CENTER FOR PUB. INTEGRITY, Jan. 25, 2017, <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/>).

121. *Id.* at 399-400. The findings were also criticized by some advocates for the Agency's "failure to require effective remedies." Engelman Lado, *supra* note 7, at 303.

122. Kuehn, *supra* note 10, at 10684.



Alternatively, we could extrapolate from the greater action (more investigations and actual formal findings of discrimination) taken under President Obama that some greater substantive outcome would have resulted, had the progress continued, so some degree of distributional justice, and perhaps even the possibility for corrective justice, was foregone as a result of the change in administrations.

From a procedural justice perspective, there may also be more to be said for the benefit of fully investigating a larger percentage of claims in that it may indicate greater consideration and involvement in decisionmaking: fairer treatment and respect under the law. From a social justice perspective, the issuance of the first two formal findings of discrimination, even if largely symbolic, could be seen as an important validation of the broader social, racial, and economic justice struggles inherent in EJ. So too could the recognition that the Agency was failing in its duties and the steps taken to improve the process. Symbols matter from a social justice perspective and may therefore represent important steps toward justice in and of themselves.

## B. Consideration of Climate Change as an EJ Issue

Climate change is the existential environmental threat of our lifetimes, “transforming where and how we live and present[ing] growing challenges to human health and quality of life, the economy, and the natural systems that support us.”<sup>123</sup> Because the impacts are expected to, and in fact already do, hit lower-income communities and communities of color hardest,<sup>124</sup> climate change is also inescapably an issue of EJ. There is no longer a question that increased temperatures are leading to rising sea levels, increased extreme weather events, and resulting disruption and damage to critical infrastructure, ecosystem services, air and water quality, agricultural productivity, and the overall vitality of our communities.<sup>125</sup>

No less real is the well-established fact that the “[i]mpacts within and across regions will not be distributed equally. People who are already vulnerable, including lower-income and otherwise marginalized communities, have less capacity to prepare for and cope with extreme weather and climate-related events and are expected to experience greater impacts.”<sup>126</sup> Poor communities have also tended to contrib-

ute least to and benefit least from the industrial “progress” that has driven human-centered global warming, resulting in what some have called an “ecological debt.”<sup>127</sup>

In this line of thinking, the disproportionate use of natural resources by wealthier communities to the disproportionate detriment of poorer communities and communities of color<sup>128</sup> requires a corrective scheme of differentiated responsibility, in which “the countries which have benefitted from a high degree of industrialization, at the cost of enormous emissions of greenhouse gases, have a greater responsibility providing a solution to the problems they have caused.”<sup>129</sup> For these reasons, an administration’s response to climate change, including the degree to which it embraces the idea of differentiated responsibility, may be used as another barometer of progress toward EJ.

### 1. Bush Era

President Bush’s “financial interests in the oil industry and his weak environmental record as governor of Texas did not inspire optimism” about his approach to climate change, so environmental advocates were pleasantly surprised when his EPA Administrator, Christine Todd Whitman, “began to stake out a resolute position on climate change” early in his Administration.<sup>130</sup> However, shortly after a “now infamous speech at a G-8 conference of environment ministers,” in which Whitman “proclaimed that the Bush administration would support an internationally coordinated response to climate change,”<sup>131</sup> Bush reversed course and formally withdrew the United States from the Kyoto Protocol to the United Nations Framework Convention on Climate Change, which “outlined legally binding emissions reductions for developed countries to specified amounts below 1990 levels.”<sup>132</sup> In so doing, Bush cited “incompat[ibility] with domestic energy production goals” and the economic harm that the United States would suffer because of a lack of mandatory reduction targets for developing countries,<sup>133</sup> thus directly rejecting the notion of differentiated responsibility for climate change.

On April 19, 2001, leaders of the EJ movement from around the world sent a letter to President Bush, expressing their “profound concern with [Bush’s] new climate change policies with respect to their impacts on poor people and people of color in the United States and around the

123. U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: REPORT-IN-BRIEF 26 (2018) [hereinafter FOURTH NATIONAL CLIMATE ASSESSMENT], [https://nca2018.globalchange.gov/downloads/NCA4\\_Report-in-Brief.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Report-in-Brief.pdf).

124. See *infra* note 126.

125. FOURTH NATIONAL CLIMATE ASSESSMENT, *supra* note 123, at 12-19.

126. *Id.* at 12. See also Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 20(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66498 (Dec. 15, 2009) (noting that “the Administrator places weight on the fact that certain groups, including children, the elderly, and the poor are most vulnerable to . . . climate-related health effects”); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY. PART A: GLOBAL AND SECTORAL ASPECTS (Christopher B. Field et al. eds., Cambridge Univ. Press 2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf) (finding that “[c]limate-related hazards exacerbate other stressors,

often with negative outcomes for livelihoods, especially for people living in poverty”); POPE FRANCIS, LAUDATO SI’: ON CARE FOR OUR COMMON HOME 20 (2015) (asserting that the poor will feel the impacts of climate change most in part because “[t]hey have no other financial activities or resources which can enable them to adapt to climate change or to face natural disasters, and their access to social services and protection is very limited”).

127. POPE FRANCIS, *supra* note 126, at 36-37.

128. *Id.*

129. *Id.* at 34 (quoting Bolivian Bishops’ Conference, Pastoral Letter on the Environment and Human Development in Bolivia *El Universo, Don de Dios Para la Vida* 86 (Mar. 23, 2012)).

130. Cohen, *supra* note 7, at 70-71.

131. *Id.* at 72.

132. CONGRESSIONAL RESEARCH SERVICE, RL31931, CLIMATE CHANGE: FEDERAL LAWS AND POLICIES RELATED TO GREENHOUSE GAS REDUCTIONS 4 (2008).

133. Cohen, *supra* note 7, at 71-72.

world.”<sup>134</sup> In it, they accused Bush of siding with oil companies over the poor, allowing poor communities to “face a ‘double whammy’—suffering oil’s acute toxic impacts first and then its long-term effects in the form of the harsh hand of global warming”; and described the Administration’s “failure to follow through on campaign promises to reduce carbon dioxide emissions and [the] abandonment of the Kyoto Protocol” as “border[ing] on nothing short of gross global negligence.”<sup>135</sup>

The leaders urged President Bush to “reconsider [his] position on climate change,” and “severely curb U.S. carbon emissions and support the Kyoto Protocol.”<sup>136</sup> Instead, Bush, like his father and President Clinton before him, “largely relied on voluntary initiatives to reduce the growth of greenhouse gas emissions”<sup>137</sup> and continued to reject mandatory reduction targets throughout his presidency.<sup>138</sup> Greenhouse gas (GHG) emissions continued to rise, the effects of climate change intensified, and the federal government continued not to recognize that the impact would disproportionately be felt by poor and minority communities.

## 2. Obama Era

The bulk of President Obama’s efforts to fight climate change were realized during his second term, at which point the president also openly embraced the United States’ global responsibility for reducing GHG emissions by signing on to the Paris Agreement.<sup>139</sup> On November 1, 2013, President Obama issued Executive Order No. 13653, Preparing the United States for the Impacts of Climate Change, in which the president explicitly recognized that the “impacts [of climate change] are often most significant for communities that already face economic or health-related challenges,” and the need for “deliberate preparation, close cooperation, and coordinated planning by the Federal Government, as well as by stakeholders” to mitigate such effects and increase the resilience of vulnerable communities.<sup>140</sup>

President Obama’s Climate Action Plan put forward a “broad-based plan to cut the carbon pollution that causes climate change and affects public health” and to “prepare the United States for the Impacts of Climate Change.”<sup>141</sup> The promulgation of the final Clean Power Plan (CPP) rule was one “important step in [this] essential series of long-term actions . . . to achieve the GHG emission reductions

needed to address the serious threat of climate change.”<sup>142</sup> Citing reports from EPA and the Intergovernmental Panel on Climate Change, the CPP rule identified “CO<sub>2</sub> [carbon dioxide] [as] the primary GHG pollutant, accounting for nearly three-quarters of global GHG emissions and 82% of U.S. GHG emissions,” highlighting “the urgency of addressing the rising concentration of CO<sub>2</sub> in the atmosphere.”<sup>143</sup> The CPP specifically targeted reductions in CO<sub>2</sub> emissions from electric generating units (power plants),<sup>144</sup> while other directives and regulations focused on increasing fuel economy standards, providing incentives for continued growth in the renewable energy sector, cutting energy waste, reducing other GHGs, and leading international efforts to address global climate change.<sup>145</sup>

The CPP rule itself presented climate change as a clear EJ issue, and articulated goals to particularly benefit EJ communities:

Low-income communities and communities of color already overburdened by pollution are disproportionately affected by climate change and are less resilient than others to adapt to or recover from climate-change impacts. While this rule will provide broad benefits to communities across the nation by reducing GHG emissions, it will be particularly beneficial to populations that are disproportionately vulnerable to the impacts of climate change and air pollution.<sup>146</sup>

The CPP also explicitly directed states to consider impacts on vulnerable communities, required that states document their engagement with these communities, and encouraged states to consider how best “to help low-income communities share in the investments in infrastructure, job creation, and other benefits that [renewable energy] and demand-side [energy-efficiency] programs provide, have access to financial assistance programs, and minimize any adverse impacts that their plans could have on communities.”<sup>147</sup> Rules such as the CPP then were not only intended to achieve distributional justice by reducing the disproportionate burdens on poor and minority communities, but also to achieve procedural justice by involving these communities in decisionmaking processes.

## 3. Trump Era

From his time on the campaign trail, however, President Trump made rolling back regulations a priority, “explicitly and implicitly revers[ing] course on environmental policies to the detriment of low-income communities of color,” in part through a retreat from climate mitigation and adaptation strategies.<sup>148</sup> Since taking office, the Trump Adminis-

134. Letter from Global EJ Leaders to President George W. Bush (Apr. 19, 2001), <https://corpwatch.org/article/environmental-justice-appeal-bush-climate-change>.

135. *Id.*

136. *Id.*

137. CONGRESSIONAL RESEARCH SERVICE, *supra* note 132, at summary page.

138. *See, e.g., id.* at 9 (noting that the United States described reduction goals discussed at the Major Economies Meeting on Energy Security and Climate Change in September 2007 as “aspirational” rather than binding).

139. Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE, Sept. 3, 2016, <https://obama.whitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>.

140. Exec. Order No. 13653, 3 C.F.R. 330 (2013) (since repealed).

141. EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 5 (2013) [hereinafter CLIMATE ACTION PLAN].

142. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64677 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60 and since repealed).

143. *Id.*

144. *Id.*

145. *See generally* CLIMATE ACTION PLAN, *supra* note 141.

146. 80 Fed. Reg. at 64670.

147. *Id.*

148. Outka & Warner, *supra* note 4, at 396-97.

tration has proposed or completed rollbacks of nearly 100 environmental rules, many of which were implemented with direct or indirect goals of reducing GHG emissions and slowing the speed of climate change.<sup>149</sup> President Trump further retreated from climate protection by announcing his intention to withdraw the United States from the Paris Climate Accord, which he criticized precisely for its embrace of differentiated responsibility.<sup>150</sup>

During his first few months in office, President Trump issued a series of Executive Orders that clearly signaled a move away from the regulatory protections implemented during the Obama Administration. In his second week in office, President Trump issued Executive Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, directing “that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”<sup>151</sup> Less than one month later, he issued an Executive Order, Enforcing the Regulatory Reform Agenda, directing each agency to create a Regulatory Reform Task Force to “evaluate existing regulations . . . and make recommendations to the agency head regarding their repeal, replacement, or modification.”<sup>152</sup>

Soon thereafter, the president issued yet another Executive Order in the same vein, aimed specifically at the energy industry.<sup>153</sup> The Order declared a national interest in “promot[ing] clean and safe development of our Nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation”; and directed the heads of agencies to immediately “review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.”<sup>154</sup>

The Executive Order immediately revoked “Certain Energy and Climate-Related Presidential and Regulatory Actions,”<sup>155</sup> rescinded President Obama’s Climate Action Plan and Climate Action Plan Strategy to Reduce Methane Emissions, directed the Council on Environmental Quality

(CEQ) to rescind its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,<sup>156</sup> disbanded the Interagency Working Group on the Social Cost of Greenhouse Gases, withdrew the IWG’s technical support documents on the social cost of carbon for regulatory impact analysis “as no longer representative of governmental policy” and redefined the social cost of carbon more narrowly, and directed EPA to immediately review the CPP and related rules and Agency actions for possible suspension, reversal, or repeal.<sup>157</sup>

On July 8, 2019, EPA subsequently published “three separate and distinct rulemakings”: (1) repealing the CPP “because the Agency has determined that the CPP exceeded the EPA’s statutory authority under the Clean Air Act (CAA)”; (2) finalizing the Administration’s replacement emission guidelines for existing power plants, the Affordable Clean Energy (ACE) rule; and (3) “finalizing new regulations for the EPA and state implementation of ACE and any future emission guidelines issued under CAA section 111(d).”<sup>158</sup>

President Trump often characterizes government regulation as unnecessary and excessive,<sup>159</sup> and the final rule repealing and replacing the CPP makes just this point, emphasizing that the new, more limited, ACE guidelines are sufficient to protect vulnerable communities:

The EPA believes that this action will achieve CO<sub>2</sub> emission reductions resulting from implementation of these final guidelines, as well as ozone and PM<sub>2.5</sub> [fine particulate matter] emission reductions as a co-benefit, and will further improve environmental justice communities’ health. . . .

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

*Id.* at 16094.

156. This guidance was not a regulation itself but presented “CEQ’s interpretation of what is appropriate under NEPA [the National Environmental Policy Act] and the CEQ Regulations for Implementing the Procedural Provisions of NEPA.” The guidance recommended, *inter alia*, that agencies use projected GHG emissions as a proxy for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action; . . . that agencies quantify projected direct and indirect GHG emissions; . . . [and] counsel[ed] agencies to use information developed during the NEPA review to consider alternatives that would make the actions and affected communities more resilient to the effects of a changing climate.

Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51866 (Aug. 5, 2016).

157. Exec. Order No. 13783, *supra* note 153.

158. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019) (codified at 40 C.F.R. pt. 60); 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

159. COUNCIL OF ECONOMIC ADVISERS, THE GROWTH POTENTIAL OF DEREGULATION 1 (2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/The%20Growth%20Potential%20of%20Deregulation\\_1.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/The%20Growth%20Potential%20of%20Deregulation_1.pdf).

149. See Nadja Popovich et al., *The Trump Administration Is Reversing Nearly 100 Environmental Rules. Here’s the Full List.*, N.Y. TIMES, Oct. 15, 2020, <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> (listing rollbacks).

150. Statement by President Trump on the Paris Climate Accord (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> (referring to the Accord as “the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers—who I love—and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production”).

151. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

152. Exec. Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

153. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

154. *Id.* (emphasis added).

155. The presidential actions revoked include the following:

- (i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);
- (ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);



With regards to the repeal, . . . the EPA believes that the power sector is already on path to achieve the CO<sub>2</sub> reductions required by the CPP, therefore the EPA does not believe it would have any significant impact on EJ effected communities.

. . .

Moreover, this action does not affect the level of public health and environmental protection already being provided by existing NAAQS [national ambient air quality standards], including ozone and PM<sub>2.5</sub>, and other mechanisms in the CAA.<sup>160</sup>

These words were, in fact, the only reference to EJ throughout the 64-page rule.<sup>161</sup>

In addition to arguing that the CPP and related climate policies were unnecessary to achieve emission reductions, the Administration has at times argued in the alternative that global warming may not be man-made,<sup>162</sup> and that, even if it were, any emissions reductions made by the United States would be virtually meaningless when held up against the vast emissions from growing economies like China.<sup>163</sup> More generally, the Administration argues that government “[r]egulations serve as an additional tax on the U.S. economy, often making beneficial economic transactions more expensive or preventing them outright.”<sup>164</sup> Thus, the argument goes, regulations make the United States less competitive globally, prove especially costly for small businesses and entrepreneurs, and perpetuate inequality by impacting the most vulnerable the most:

Across households, the burden of government regulation falls most heavily on low-income Americans, who spend a larger proportion of their income on heavily regulated goods including transportation, gasoline, utilities, food, and health care. [A] 10 percent increase in total regulations leads to a 0.687 percent increase in consumer prices, with the poorest households experiencing the highest overall levels of inflation and price volatility. Low-income households also experience a disproportionate burden of the health and safety regulations, a large proportion of which protect against low-probability events.<sup>165</sup>

According to the regulatory impact analysis for the repeal of the CPP and promulgation of the ACE rule,<sup>166</sup> however, even when using the modified domestic social

cost of carbon (SC-CO<sub>2</sub>)<sup>167</sup> adopted under President Trump, which only accounts for direct impacts of climate change anticipated to occur within the contiguous United States, “each of the four illustrative scenarios yield [millions of dollars of] forgone climate benefits and [billions of dollars of] forgone ancillary health co-benefits relative to . . . the CPP.”<sup>168</sup> Other estimates indicate that rollbacks of just six environmental rules that “provide the largest and best near-term opportunities to reduce climate pollution” are estimated to result in foregoing more than 200 million metric tons of GHG reductions.<sup>169</sup> It may follow, then, that “[w]here exposure to environmental harms disproportionately tracks racial and income lines, cutting programs addressing those harms risks exacerbating them for those already most burdened.”<sup>170</sup>

#### 4. Comparison

From President Bush to President Obama and from President Obama to President Trump, we see a marked change in the approach to climate change. President Bush refused to recognize the country’s global responsibility as a leading GHG emitter and refused to sign the Kyoto Protocol; while President Obama embraced the principle of differentiated responsibility, signed on to the Paris Agreement, and explicitly recognized the disproportionate impacts of climate change on poor and minority communities. President Trump, on the other hand, expressly rejects the notion of differentiated responsibility and sees no reason to correct the unequal distribution of benefits and burdens. We also see a difference in the way EJ drives climate policy between the Obama and Trump Administrations—whereas President Obama’s policies devote significant consideration to the disparate impacts on EJ communities<sup>171</sup> and aim to specifically raise up EJ communities, President Trump’s policies pay only lip service to EJ concerns<sup>172</sup> and seek to minimally raise up “all people,” essentially maintaining the status quo.

160. 84 Fed. Reg. at 32574.

161. The final rule repealing the CPP and establishing replacement emission guidelines for power plants used the term “environmental justice” just once apart from the table of contents. See generally 84 Fed. Reg. 32520.

162. See, e.g., *Trump: Climate Change Scientists Have “Political Agenda,”* BBC NEWS, Oct. 15, 2018, <https://www.bbc.com/news/world-us-canada-45859325>.

163. Statement by President Trump on the Paris Climate Accord, *supra* note 150.

164. COUNCIL OF ECONOMIC ADVISERS, *supra* note 159.

165. *Id.* at 6-8 (internal citations omitted).

166. OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. EPA, REGULATORY IMPACT ANALYSIS FOR THE REPEAL OF THE CLEAN POWER PLAN, AND THE EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS (2019) (EPA-452/R-19-003).

167. “The SC-CO<sub>2</sub> is a metric that estimates the monetary value of impacts associated with marginal changes in CO<sub>2</sub> emissions in each year.” *Id.* at ES-10.

168. *Id.* at ES-12 to ES-13. It is notable that the accountings in the regulatory impact analysis do not even account for adverse health effects associated with sulfur dioxide, nitrogen oxide, or other hazardous air pollutants. *Id.* at 4-47 to 4-51.

169. STATE ENERGY AND ENVIRONMENTAL IMPACT LAW CENTER, NEW YORK UNIVERSITY SCHOOL OF LAW, CLIMATE AND HEALTH SHOWDOWN IN THE COURTS: STATE ATTORNEYS GENERAL PREPARE TO FIGHT 3, 5 (2019).

170. See, e.g., Outka & Warner, *supra* note 4, at 402, arguing that [a]t a global scale, the Trump Administration’s rejection of climate science and repudiation of the Paris Agreement represents a conscious refusal to take steps to prevent and—equally important—protect against climate change impacts. This stance directly harms low-income communities of color in the United States and around the globe, which are expected to experience the worst environmental, economic, and health effects of climate change.

171. In the CPP, for example, the term “environmental justice” was mentioned 46 times. See generally 80 Fed. Reg. 64662.

172. See, e.g., the repeal of the CPP rule and implementation of the ACE rule, *supra* note 161.

## 5. Applying Kuehn's Taxonomy

Assuming for the moment that the CPP and other Obama-era climate policies would have resulted in increased protections for EJ communities, most of these policies (like the CPP) never actually went into effect and therefore resulted in no measurable impact. The most that might be said then in terms of distributional or corrective outcomes between the Bush and Obama Administrations is that these policies may have eventually resulted in such substantive progress. It follows then that their rollback under the Trump Administration, like the rejection of an increasing percentage of Title VI claims, can be said to have resulted in foregone distributional and corrective justice. There are, however, clearer ramifications for procedural and social justice at play.

Implementing regulations such as the CPP that carefully incorporated considerations of disproportionate impacts on particularly vulnerable communities and involving such communities in decisionmaking, like the improvements made to the Title VI process, constituted procedural and social justice progress in and of themselves. These actions recognized the underlying inequities and provided for fairer processes. In the same way, replacing such regulations with rules such as the ACE rule, which pay little attention to EJ, stripped EJ communities of procedural justice and stripped the environmental impacts of their broader racial, social, and economic contexts. Add to this the rejection, embrace, and repeated rejection of differentiated responsibility embodied by the Kyoto Protocol and the Paris Accord, and from a procedural or social justice perspective, current climate policies may very well be said to be reversing course on EJ.<sup>173</sup>

### C. Actions That Serve Signaling Functions

Other actions by the Office of Environmental Justice (OEJ) and administrations more broadly might best be described as “signaling” the importance of EJ issues. Such functions both serve social and procedural justice in and of themselves by validating the cause and signaling a commitment to addressing the issues, while also potentially driving future substantive change that might result in distributive and/or corrective justice.<sup>174</sup> President Clinton's Executive Order on EJ might be seen as one such example, in that it acknowledged the “disproportionately high and adverse human health or environmental effects of [gov-

ernment] programs, policies, and activities on minority populations and low-income populations” and directed federal agencies to develop EJ strategies.<sup>175</sup> The Order officially validated community concerns and signaled a desire to involve affected communities in addressing those concerns, but itself did not actually change the distribution of benefits and burdens, nor did it create any judicially enforceable rights.<sup>176</sup>

The actions that serve signaling functions examined here across administrations were chosen to reflect how extensively EJ has (or has not) been incorporated into the day-to-day operations at EPA and include activity in the OEJ, involvement in the EJ IWG, proposed funding for EJ, and consideration of EJ in rulemaking. On the surface, there are some signals that EJ work has continued much the same across administrations, while other signals indicate a more variable commitment from administration to administration, with particular implications for social justice.

#### 1. Bush Era

Throughout the Bush Administration, EPA was criticized by investigators from GAO and the OIG for a “flagging dedication to environmental justice.”<sup>177</sup> The EJ IWG, established under Executive Order No. 12898 to provide guidance to federal agencies,<sup>178</sup> lay dormant<sup>179</sup>; and the president sought to decrease funding for EJ enforcement in all but two of his proposed budgets between 2002 and 2008, even when Congress twice significantly increased the budget appropriated for EJ enforcement.<sup>180</sup>

175. Exec. Order No. 12898, *supra* note 13.

176. The Executive Order stated:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

*Id.* §6-609.

177. VILLA, *supra* note 16, at 27.

178. Exec. Order No. 12898, *supra* note 13, at §1-102.

179. See Wilson et al., *supra* note 7, at 10388 (stating that the Obama Administration reconvened the IWG for the first time in more than a decade, thus indicating it had not met during the Bush Administration); EJ IWG, Memorandum of Understanding on Environmental Justice and Executive Order 12898, at 2 (Aug. 4, 2011) [hereinafter MOU] (indicating a lapse in activity by describing the MOU's purposes as “renew[ing] the process under Executive Order 12898 for agencies to provide environmental justice strategies and implementation progress reports” and “establish[ing] structures and procedures to ensure that the Interagency Working Group operates effectively and efficiently”).

180. “There is no specific environmental justice statute to fund environmental justice activities in EPA. Consequently, the Office of Environmental Justice performs activities using a general Environmental Program Management appropriation budget line item; in Fiscal Year 2002, this amounted to approximately \$4.4 million.” OIG 2004, *supra* note 41, at 4. For FY 2003, the president sought to increase funding to \$4.98 million. U.S. EPA, SUMMARY OF THE 2003 BUDGET VII-8 (2002) (EPA-205-S-02-001). For FY 2004, the president sought to reduce the budget to \$4.73 million. U.S. EPA, SUMMARY OF THE 2004 BUDGET D-5 (2003) (EPA-205-S-03-001). For FY 2005, he sought to increase the budget from the \$5.04 million enacted for FY 2004 to \$5.13 million. U.S. EPA, SUMMARY OF EPA'S 2005 BUDGET D-5 (2004) (EPA-205-S-04-001). For FY 2006, he sought to reduce it to \$4.82 million from the \$5.03 million enacted for FY 2005. U.S. EPA, SUMMARY OF EPA'S 2006 BUDGET D-5 (2005) (EPA-S-05-001). For FY 2007,

173. Credit for this term goes to Uma Outka and Elizabeth Kronk Warner, whose article of this name (cited throughout this Article) considers in-depth how the Trump Administration has “explicitly and implicitly reversed course on environmental policies to the detriment of low-income communities of color,” using transitions at EPA, the Dakota Access Pipeline, and the Paris Climate Accord to illustrate this point. Outka & Warner, *supra* note 4, at 396-97.

174. “Signaling theory” offers one such explanation for how individual signals can drive substantive change through the development of norms. See, e.g., Kristin Madison, *Government, Signaling, and Social Norms*, 2001 U. ILL. L. REV. 867, 871 (2001) (reviewing Eric Posner's book, explaining his argument “that social norms are created through the aggregation of the actions of individuals. . . . As more people send a particular signal, it becomes a social norm.”).

Several independent reports from the time help to further paint the picture. In 2006, the OIG credited EPA with “integrating environmental justice into its programs, policies, and activities through developing action plans from each of the program and regional offices,” while also criticizing the Agency for failing to provide any agencywide guidance on EJ program or policy review and not consistently performing such reviews, despite the clear directive of Executive Order No. 12898.<sup>181</sup> And in a 2005 report to Congress, GAO highlighted the Bush EPA’s failure to consider EJ in rulemaking, finding that “EPA generally devoted little attention to environmental justice” in clean air rulemakings between 2000 and 2004.<sup>182</sup> “[O]f the 19 clean air rules finalized during this period that met [GAO’s] criteria, only 3 even included the terms ‘environmental justice’ or ‘Executive Order 12,898’ in the final rule.”<sup>183</sup>

Of these three rules, GAO found minimal attention paid to EJ in all four phases of rule drafting:

[F]irst, initial reports used to flag potential issues for senior management did not address environmental justice. Second, although EPA guidance suggests that workgroups should consider ways to build in environmental justice provisions early in the rulemaking process, there is reason to question whether this occurred for the three rules . . . Third, although EPA officials told [GAO] that for the proposed rules, their economic reviews—which are intended to inform decision makers of the social consequences of the rules—considered environmental justice, [GAO] found that the reviews for [two of the] rules did not include environmental justice analyses. Moreover, EPA has not identified all of the types of data necessary to perform such an analysis. Finally, in publishing the proposed rules (an opportunity for EPA to explain how it considered environmental justice), EPA mentioned environmental justice in all three cases, but the discussion was contradictory in one case.<sup>184</sup>

Overall, a rather dismal attempt to comply with Executive Order No. 12898, and a possible further signal that EPA was not prioritizing EJ.

## 2. Obama Era

By contrast, the Obama Administration has been credited with integrating EJ into the day-to-day work of EPA and other federal agencies<sup>185</sup> and sending clear signals that EJ was an important focus for the Administration.<sup>186</sup> Such actions included issuing guidance for incorporating EJ into rulemaking and encouraging communities to participate in permitting processes<sup>187</sup>; reconvening the EJ IWG for the first time in more than a decade and obtaining a commitment from participating federal agencies to develop and implement EJ strategies<sup>188</sup>; developing and releasing EJSCREEN, “an environmental justice mapping and screening tool”<sup>189</sup>; and creating comprehensive EJ strategies, including Plan EJ 2014, “a roadmap to assist EPA in integrating environmental justice into all of the Agency’s programs, policies, and activities,” and the subsequent EJ 2020 Action Agenda.<sup>190</sup> The Agency not only issued guidance related to EJ, but also followed it, including extensively considering EJ in rulemakings.<sup>191</sup> The CPP, for example, used the term “environmental justice” 46 times.<sup>192</sup>

In contrast with President Bush’s attempts to decrease funding for EJ, President Obama sought to slightly increase funding for EJ enforcement in each of his first six proposed presidential budgets and then sought to roughly double funding for FY 2016 and FY 2017, sending a clear signal that he intended to invest heavily in EJ.<sup>193</sup>

185. Wilson et al., *supra* note 7, at 10390.

186. *See, e.g.*, Memorandum from Lisa P. Jackson, Administrator, U.S. EPA, to All EPA Employees (Jan. 12, 2010), [https://archive.epa.gov/epapages/newsroom\\_archive/newsreleases/bb39e443097b5df5852576a9006a5a86.html](https://archive.epa.gov/epapages/newsroom_archive/newsreleases/bb39e443097b5df5852576a9006a5a86.html).

187. Wilson et al., *supra* note 7, at 10387 (crediting the Obama Administration for these actions) (citing U.S. EPA, GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF REGULATORY ACTIONS (2015); EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27220 (May 9, 2013)).

188. *Id.* at 10388 (citing MOU, *supra* note 179).

189. U.S. EPA, *What Is EJSCREEN?*, <https://www.epa.gov/ejscreen/what-ejscreen> (last updated Oct. 28, 2019).

190. U.S. EPA, *supra* note 16.

191. *See supra* Section II.B.2.

192. *See supra* note 171.

193. The proposed presidential budget for FY 2010 was \$8.02 million compared to the \$7.8 million enacted for FY 2009. U.S. EPA, FY 2010 BUDGET IN BRIEF 58-60 (2009) (EPA-205-S-09-001). For FY 2011, the proposed presidential budget called for \$8.12 million compared to the \$7.1 million enacted for 2010. U.S. EPA, FY 2011 BUDGET IN BRIEF 64-65 (2010) (EPA-205-S-10-001). For FY 2012, \$8 million was proposed compared to the \$7.6 million annualized under the continuing resolution in FY 2011. U.S. EPA, FY 2012 BUDGET IN BRIEF 80-84 (2011) (EPA-190-S-11-001). For FY 2013, \$8.01 million was proposed compared to the \$7.48 million enacted for 2012. U.S. EPA, FY 2013 BUDGET IN BRIEF 84-89 (2012) (EPA-190-S-12-001). For FY 2014, \$7.55 million was proposed compared to the \$7.48 million annualized under the continuing resolution in FY 2013. U.S. EPA, FY 2014 BUDGET IN BRIEF 93-97 (2013) (EPA-190-S-13-001). For FY 2015, the reporting format changed, and no enacted or annualized budget was reported for FY 2014, but \$8.5 million was proposed. U.S. EPA, FY 2015 BUDGET IN BRIEF 40 (2014) (EPA-190-S-14-001). For FY 2016, \$14.58 million was proposed, compared to the \$7.32 million enacted for FY 2015. U.S. EPA, FY 2016 BUDGET IN BRIEF 75-78 (2015) (EPA-190-S-15-001). For FY 2017, \$15.9 million was proposed, compared to the \$7.3 million enacted in 2016. U.S. EPA, FY 2017 BUDGET IN BRIEF 78-81, 114 (2016) (EPA-190-K-16-002).

he sought to reduce it to \$4.62 million from the \$6.40 million enacted for FY 2006. U.S. EPA, BUDGET 2007 D-4 (2006) (EPA-205-S-06-001). For FY 2008, he sought to reduce it to \$4.58 million from the \$4.62 million enacted for FY 2007. U.S. EPA, FY 2008 EPA BUDGET IN BRIEF D-4 (2007) (EPA-205-S-07-001). For FY 2009, the format of reporting changed, and EJ enforcement began to be listed as two separate line items under Environmental Program & Management Enforcement and Hazardous Substance Superfund Enforcement. For FY 2009, the president proposed reducing the total EJ budget to \$4.57 million from the \$7.14 million enacted in FY 2008. U.S. EPA, FY 2009 EPA BUDGET IN BRIEF D4 & D6 (2008) (EPA-205-S-08-001).

181. VILLA, *supra* note 16, at 27-28 (citing OIG, U.S. EPA, 2006-P-00034, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES 5-7 (2006)).

182. *Id.* at 27 (citing GAO, GAO-05-289, ENVIRONMENTAL JUSTICE: EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES 3 (2005)).

183. GAO, *supra* note 182, at 3.

184. *Id.* at 3-4.



### 3. Trump Era

Under President Trump, certain EJ functions appear to function in much the same way: the ECRCO continues to report “new developments” in Title VI complaints,<sup>194</sup> a mobile version of the EJSCREEN tool was rolled out in 2018, and the National Environmental Justice Advisory Council continues to meet as regularly as it ever did.<sup>195</sup> The EJ IWG, revived under President Obama, also continues to convene monthly meetings, “though four agencies—DOD [U.S. Department of Defense], DOE [U.S. Department of Energy], SBA [U.S. Small Business Administration] and VA [U.S. Department of Veterans Affairs]—did not attend any of the monthly meetings during FY 2018, nor did they participate in any working group committees”; and two of the agencies—DOD and SBA—did not have a designated representative at all as of March 2019.<sup>196</sup> The agencies had various reasons for not maintaining involvement in the IWG, and according to EPA officials, “it is difficult to characterize what specific opportunities are missed from the lack of representation by an agency.”<sup>197</sup>

EPA officials recognized, however, “that the limiting factor for the working group in its efforts to address the executive order on environmental justice has always been the will of leadership across federal government to make clear, measurable commitments of those priorities and to adequately resource the attainment of those commitments.”<sup>198</sup> This drop-off in the participation of several agencies may or may not have a measurable effect on immediate outcomes, but it looks like a signal of a decreased focus on EJ.

At the same time, President Trump has consistently sought to impose draconian budget cuts on EJ enforcement specifically, and enforcement generally,<sup>199</sup> despite the fact that “[e]nforcement ensures the same level of protections across the country, undergirds a credible state enforcement program, drives compliance and innovation, pays for itself, saves lives, ensures health and prosperity, and creates jobs.”<sup>200</sup> Given that polluting facilities tend to be sited in or near communities of color and low-income communities, these communities are most likely to be affected not only by cuts to EJ enforcement, but also to enforcement generally.<sup>201</sup> The president’s first proposed budget sought to cut the overall enforcement budget by 24%,<sup>202</sup> and to com-

pletely eliminate the budget for EJ enforcement.<sup>203</sup> Each year since, the president’s proposed budget has sought to reduce the EJ enforcement budget by at least 70%.<sup>204</sup>

President Trump has also sought to reduce the total enforcement budget for environmental programs and management by 17%, 12%, and 6% for FYs 2019-2021, respectively,<sup>205</sup> even though EPA was already drastically reducing enforcement and penalties even without budget cuts.<sup>206</sup> The Environmental Protection Network, a group of former EPA officials who study the impacts of proposed budget cuts, claimed that the proposed cuts to “programs that provide environmental protection to low income, minority and other vulnerable or overburdened communities . . . so disproportionately affect those communities that there appears to be a conscious decision that they do not warrant EPA’s attention.”<sup>207</sup> Though Congress has notably ignored these recommended cuts, choosing instead to keep the enforcement budget roughly level since 2016,<sup>208</sup> repeated attempts to cripple EPA’s budget for EJ represents “a pattern that may reflect a deliberate effort to reduce support for those communities.”<sup>209</sup>

### 4. Comparison

This may be the metric by which the Obama Administration’s commitment to EJ is most visible when compared to both the Bush and Trump Administrations. Not only did President Obama’s budgets seek to increase, rather than decrease, spending on EJ enforcement, but EPA during this time undertook new initiatives to bring increased attention to issues of EJ by implementing tools such as EJSCREEN and creating the EJ 2014 and EJ 2020 strate-

PROTECTION AGENCY 48 (2017) [hereinafter EPN FY2018], <https://www.environmentalprotectionnetwork.org/wp-content/uploads/PDF/Analysis-of-Trump-Administration-Proposals-for-FY2018-Budget-for-the-Environmental-Protection-Agency.pdf>.

203. From \$7.27 million in FY 2017 to \$0 for FY 2018. U.S. EPA, FY 2018 BUDGET IN BRIEF 33-36 (2017) (EPA-190-K-17-001).

204. In FY 2018, the annualized budget for EJ enforcement under a continuing resolution was \$7.24 million, and President Trump proposed cutting it to \$2 million for FY 2019. U.S. EPA, FY 2019 BUDGET IN BRIEF 49-52 (2018) (EPA-190-R-18-002) [hereinafter EPA-190-R-18-002]. In FY 2019, the annualized budget was \$7.49 million (again under a continuing resolution), and President Trump proposed cutting it to \$2.74 million for FY 2020. U.S. EPA, FY 2020 EPA BUDGET IN BRIEF 59-62 (2019) (EPA-190-R-19-001) [hereinafter EPA-190-R-19-001]. In 2020, the EJ enforcement budget enacted by Congress increased to \$10.19 million, and Trump proposed cutting it to \$2.73 million for FY 2021. U.S. EPA, FY 2021 BUDGET IN BRIEF 77-80 (2020) (EPA-190-S-20-002) [hereinafter EPA-190-S-20-002].

205. From \$239 million to \$197.28 million for FY 2019, EPA-190-R-18-002, *supra* note 204, at 49; from \$240.64 million to \$211.57 million for FY 2020, EPA-190-R-19-001, *supra* note 204, at 59; and from \$240.64 million to \$225.11 million for FY 2021, EPA-190-S-20-002, *supra* note 204, at 77.

206. In its analysis of Trump’s proposed budget for FY 2020, the EPN noted that under Trump, EPA was pursuing “80% fewer civil investigations and the lowest fines and fewest criminal enforcement cases in a quarter century.” EPN FY2020, *supra* note 200, at 12-16.

207. EPN FY2018, *supra* note 202, at 42.

208. *See supra* notes 193, 203, and 204 (noting that Congress enacted \$7.3 million for FY 2016, \$7.27 million for FY 2017, \$7.24 million for FY 2018, \$7.49 million for FY 2019, and actually increased the EJ enforcement budget to \$10.19 million for FY 2020). As of the time of writing, Congress had not yet passed a budget for FY 2021 and was instead operating under a continuing resolution through December 11, 2020. Continuing Appropriations Act, 2021, Pub. L. No. 116-159, 134 Stat. 709 (2020).

209. EPN FY2020, *supra* note 200, at 10.

194. U.S. EPA, *External Civil Rights Compliance Office—New Developments!*, <https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments> (last updated Nov. 6, 2020).

195. U.S. EPA, *National Environmental Justice Advisory Council Meetings*, <https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council-meetings> (last updated Oct. 22, 2020).

196. GAO, *supra* note 63, at 41.

197. *Id.* at 42.

198. *Id.*

199. ENVIRONMENTAL PROTECTION NETWORK, ENVIRONMENTAL JUSTICE: THE FAIR TREATMENT AND MEANINGFUL INVOLVEMENT OF ALL 2-3 (2017), <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2017/03/Environmental-Justice-Fact-Sheet-519.pdf>.

200. ENVIRONMENTAL PROTECTION NETWORK, UNDERSTANDING THE FULL IMPACTS OF THE PROPOSED FY2020 EPA BUDGET 12 (2019) [hereinafter EPN FY2020], <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2019/03/FY2020-Budget-19-pg-Analysis-4.pdf>.

201. Outka & Warner, *supra* note 4, at 406.

202. ENVIRONMENTAL PROTECTION NETWORK, ANALYSIS OF TRUMP ADMINISTRATION PROPOSALS FOR FY2018 BUDGET FOR THE ENVIRONMENTAL

gic plans. The Administration also demonstrated its commitment to EJ by implementing guidance to help agencies incorporate EJ in rulemakings and clearly doing so in EPA's own rulemakings like the CPP. Some of these signaling actions have continued unchanged during the Trump Administration,<sup>210</sup> but others, such as consideration of EJ in rulemakings and proposed budgets for EJ enforcement, have taken a clear U-turn.

### 5. Applying Kuehn's Taxonomy

What then do these signals mean for justice? Again, the answer may depend on the notion of justice invoked. Signaling functions themselves may not be said to achieve much in the way of substantive outcomes that would advance distributional or corrective justice, but especially when invoked by people or entities in power, they can lead to the development of new norms that would advance substantive changes.<sup>211</sup> Thus, when such signaling functions are decreased or abandoned, we might say that distributional and/or corrective justice have been set back, though not necessarily reversed or destroyed. To comprehensively evaluate these actions, however, we must also consider what the implications are for procedural and social justice.

Signals such as involvement in the IWG or consideration of EJ in rulemakings may to some degree indicate the degree of attention EJ issues are given, such that less involvement or lesser consideration may represent less procedural justice. Actions that signal a lesser commitment to EJ may also, in turn, discourage community participation in decisionmaking. If the government is not projecting concern for the issues or explicitly offering seats at the table, affected communities may be less likely to believe they will find a place. From a social justice perspective, actions that signal a lagging commitment to EJ may invoke a heavy cost. A lagging commitment may be seen as a failure to recognize the importance of the issues at hand and an inherent rejection of the economic, racial, and social contexts in which environmental harms occur. In this light, the cause of EJ has been

severely harmed by the change in signals from President Obama to President Trump.

### III. Conclusion

As the analysis above demonstrates, whether EJ has been advanced or hindered by the policies of the last three administrations depends in part on the notion of justice considered. Over the past 20 years, we have gone from an administration that paid little attention to Title VI administrative claims, ignored the disproportionate impacts of climate change on low-income communities and communities of color, rejected the principle of differentiated responsibility for climate change, and signaled no real commitment to EJ; to an administration that recognized the failings of the Title VI program and sought to remedy them, explicitly identified climate change as an EJ issue, embraced the principle of differentiated responsibility, and generally signaled a clear commitment to advancing EJ; and then back to an administration that has failed to carry forward the momentum built around the Title VI process, prefers to think of climate change as impacting "all people" rather than any particular group(s), explicitly rejects the principle of differentiated responsibility, and signals a flagging commitment to EJ overall.

Applying Kuehn's taxonomy to the three metrics above allows a clearer picture to emerge of where progress was made and lost between the Obama and Trump Administrations, and where things have remained roughly the same. While it might be said that little was achieved or lost in the way of actual distributive or corrective justice, much was gained and lost by way of procedural and social justice.

Viewed in this light, President Trump's policies might only have stalled, rather than reversed, progress toward distributive and corrective justice, but they have more clearly reversed procedural and social justice. Recognizing that EJ has always been about more than just distributive justice, the importance of such progress and setbacks is not only that they move us toward or away from distributive and corrective justice, but that they reflect forms of justice themselves. How difficult this damage is to undo remains to be seen.

210. *E.g.*, new developments in Title VI enforcement and the release of the mobile version of EJSCREEN. An EJ 2024 strategic plan had not been released at the time of writing, but given that the EJ 2020 Action Agenda was not released until August 2016, an EJ 2024 plan may still be forthcoming.

211. *See* Madison, *supra* note 174.