

YES, HE CAN:
PRESIDENT OBAMA'S POWER TO MAKE AN
INTERNATIONAL CLIMATE COMMITMENT
WITHOUT WAITING FOR CONGRESS



Climate Law Institute Working Paper Number 2

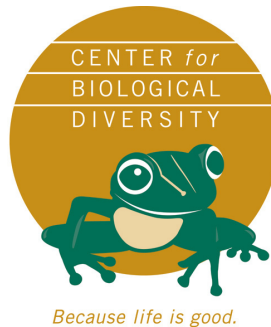
A CENTER FOR BIOLOGICAL DIVERSITY REPORT

YES, HE CAN: PRESIDENT OBAMA'S POWER TO MAKE AN INTERNATIONAL CLIMATE COMMITMENT WITHOUT WAITING FOR CONGRESS

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The Center for Biological Diversity is a national nonprofit conservation organization with more than 240,000 members and online activists dedicated to the protection of endangered species and wild places.

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Executive Summary

The Copenhagen conference on climate change opens against an ominous backdrop. Global greenhouse gas emissions and temperatures are rising at an alarming and unanticipated pace. The impacts of climate change are now readily apparent, with temperatures climbing, Arctic sea ice disappearing, and sea levels already rising at rates beyond even the worst-case estimates of the Intergovernmental Panel on Climate Change. Scientists are telling us that global greenhouse gas emissions must peak within the next decade, and decline steeply thereafter, if the world is to have even a chance of avoiding catastrophic climate change.

In Copenhagen, however, expectations have been low. Many believe that the stage is set largely for further international disagreement and inaction, largely because the United States has been unable—or, more accurately, unwilling—to commit to reducing its own greenhouse gas emissions.

After a long period of deliberation on how to approach an international agreement, President Obama has finally announced plans to attend part of the Copenhagen conference. He also has offered an emissions reduction target for the United States. His target, however, falls far short of the reductions scientists believe are necessary to avoid catastrophic consequences.

The President apparently believes that he cannot act on the international stage without a green light from Congress, and cannot propose any measures stronger than those Congress might one day approve. The most common excuse for this view is that any agreement in Copenhagen would have to be in the form of a treaty, which under U.S. law must be ratified by two-thirds of the Senate to take effect.

But this view is incorrect as a matter of law. The U.S. Supreme Court has repeatedly held that the President has legal authority to bind the country internationally, by way of an “executive agreement,” without submitting a treaty to the Senate for supermajority approval. In fact, Congress already has given the President specific authority to negotiate international agreements to reduce greenhouse gas emissions.

The President also could make an international commitment grounded in his power—and indeed, his duty—to enforce existing U.S. environmental laws. Powerful and effective statutes like the Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Policy Act provide ample and readily available tools for addressing America’s contributions to the climate crisis. These laws could be implemented more quickly, and with far greater scientific credibility, than any compromise “cap-and-trade” system that Congress might (or might not) someday enact. All President Obama has to do is promise the international community that he will use his power as the Chief Executive to enforce existing laws in a manner that effectively reduces the country’s greenhouse gas emissions.

In short, any one of these sources of authority would allow President Obama to make a binding, meaningful commitment to the international community. Together, these congressional enactments and environmental statutes give President Obama a very strong hand—strong enough to do what the science demands, and not just what a divided and rancorous Congress might someday allow.

Can President Obama contribute meaningfully to a global solution in Copenhagen? As this paper demonstrates, the answer is clearly, “yes, he can.” It only remains to be seen whether he will.

I. Introduction

The fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) began this week in Copenhagen, Denmark. The Conference opens against an ominous backdrop: the “Copenhagen Diagnosis,” a summary of recent, peer-reviewed scientific climate research, confirms that the actual, observed impacts of climate change continue to outstrip worst-case projections made only two years ago by leading international climate scientists.¹ Arctic sea ice is melting at a rate 40% faster than predicted, while global sea level rise is outstripping projections by 80%.² In the meantime, global emissions of carbon dioxide from fossil fuel combustion continue to surge.³

For the world to have even a fighting chance of averting the most catastrophic impacts of climate change, emissions must peak within the next decade and drop dramatically thereafter.⁴ Yet the Copenhagen conference, like so many others before it, is getting underway without a firm, binding commitment from the United States to reduce its greenhouse gas emissions. In the face of continued American reluctance to commit to meaningful emissions reductions, many world leaders have begun to express doubt that Copenhagen will produce a binding successor agreement to the Kyoto Protocol.⁵ Instead, leaders are hoping to reach some kind of “political” deal—essentially an agreement to keep trying to reach an agreement.

President Obama has announced that he will arrive in Copenhagen with a set of proposed emissions reduction targets, but the targets he has proposed thus far are scientifically inadequate. Recent climate science warns that atmospheric levels of greenhouse gases must be reduced to the equivalent of 350 parts per million (ppm) of CO₂—well below today’s current concentrations of 385 ppm—if the world is to avoid the

¹ See IAN ALLISON, ET AL., THE COPENHAGEN DIAGNOSIS, 2009: UPDATING THE WORLD ON THE LATEST CLIMATE SCIENCE 9, available at <http://copenhagendiagnosis.org/> (last visited Nov. 30, 2009) (hereafter “*Copenhagen Diagnosis*”). The report, produced by the Climate Change Research Centre at the University of New South Wales, is intended to update policy makers on scientific research published since the cut-off date for the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (“IPCC”), last published in 2007. *Id.* at 7.

² *Id.* at 9.

³ *Id.* (finding 2008 emissions to be nearly 40% higher than 1990 levels).

⁴ *Id.* (“If global warming is to be limited to a maximum of 2 °C above pre-industrial values, global emissions need to peak between 2015 and 2020 and then decline rapidly. To stabilize climate, a decarbonized global society—with near-zero emissions of CO₂ and other long-lived greenhouse gases—needs to be reached well within this century.”)

⁵ See, e.g., Peter Spotts, *Copenhagen Climate Change Talks Stall as CO₂ Emissions Rise*, THE CHRISTIAN SCIENCE MONITOR (Nov. 17, 2009), available at <http://www.csmonitor.com/2009/1118/p06s01-wogi.html> (last visited Nov. 23, 2009).

worst impacts of climate change.⁶ To have even a fifty-fifty chance of keeping global temperatures from rising more than 2°C—a level at which millions of people would be displaced due to sea level rise, summer Arctic sea ice would likely disappear, and billions would suffer from water shortages⁷—atmospheric concentrations of greenhouse gases would have to peak at the equivalent of 450 ppm CO₂.⁸ Even reaching this higher target would require developed countries to reduce their emissions to 25-40% below 1990 levels by 2020.⁹ The President’s proposal, in contrast, translates into a reduction of just 3% below 1990 levels by 2020. The modest reductions proposed by Congress and President Obama thus far would leave the world on a path toward irreversible and cataclysmic climate change.

The conventional wisdom holds that President Obama cannot offer more than Congress might one day deliver. Indeed, President Obama has made clear that his proposed emissions reduction targets will not be final until Congress takes action on a comprehensive climate bill.¹⁰ Yet, President Obama need not be constrained by Congress’s failure to propose or adopt scientifically credible emissions reductions. Under the Constitution, applicable statutes, and prevailing case law, President Obama has the power to commit to scientifically sound and legally binding emissions reductions by executive agreement—*without* waiting for Congress to pass a climate bill. This is hardly a radical notion. As many mainstream legal scholars have pointed out in recent years, major trade and foreign relations commitments have been made by executive agreement for decades, if not centuries, and the Supreme Court has repeatedly confirmed the President’s authority to make such agreements on the nation’s behalf.

⁶ James Hansen et al., *Target Atmospheric CO₂: Where Should Humanity Aim?* 2 OPEN ATMOSPHERIC SCI. J. 217 (2008); *see also* U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 23 (2009) (finding that “atmospheric concentration of carbon dioxide would need to be stabilized in the long term at around today’s levels” to have a “good chance (but not a guarantee)” of avoiding severe, widespread, and irreversible impacts).

⁷ *See* Rachel Warren, *Impacts of Global Climate Change at Different Annual Mean Global Temperature Increases*, in AVOIDING DANGEROUS CLIMATE CHANGE 95, 98 (2006).

⁸ UNION OF CONCERNED SCIENTISTS, HOW TO AVOID DANGEROUS CLIMATE CHANGE: A TARGET FOR U.S. EMISSIONS REDUCTIONS 5 (2008).

⁹ S. Gupta et al., *Policies, Instruments and Cooperative Arrangements*, in CLIMATE CHANGE 2007: MITIGATION, CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERNATIONAL PANEL ON CLIMATE CHANGE 776 (2007).

¹⁰ Office of the Press Secretary, The White House, *President to Attend Copenhagen Climate Talks* (Nov. 25, 2009), available at <http://www.whitehouse.gov/the-press-office/president-attend-copenhagen-climate-talks> (last visited Nov. 30, 2009); *see also* Peter N. Spotts, *U.S. to Specify Target for Emissions Cuts, at Talks on Global Warming*, CHRISTIAN SCIENCE MONITOR (Nov. 23, 2009), available at <http://features.csmonitor.com/politics/2009/11/23/us-to-specify-target-for-emissions-cuts-at-talks-on-global-warming/> (last visited Nov. 30, 2009) (quoting unnamed administration official as stating that “whatever number we put on the table will be with reference to what we think can come out of the legislative process”).

Nor would a new climate bill be needed to enforce such a commitment domestically. The United States already has a robust framework of existing laws and regulations—foremost among them the Clean Air Act—that offer a wide range of tools for controlling greenhouse gas emissions. Indeed, the Environmental Protection Agency (“EPA”) is already moving some of the machinery necessary for regulation of greenhouse gases into place, though it can and should be doing more. Other federal statutes, including the Clean Water Act and the Endangered Species Act, confer additional authority to address greenhouse gas emissions and climate change impacts.¹¹

In an ideal world, Congress would be supporting the President in seeking a strong, binding, international commitment to addressing the global climate change problem. But Congress as a whole has yet to take leadership on this issue. In fact, Congress has been delaying action on climate change for more than a decade now, ever since the Senate adopted a resolution essentially killing any chance that the Kyoto Protocol would be ratified.¹² Twelve years and countless millions of tons of carbon emissions later,¹³ Congress continues to postpone meaningful action. Despite Congress’s failures, the world needs strong action from the United States—action that the Obama Administration can and must take in Copenhagen.

II. The President Has the Power to Make an International Commitment.

When most people think of international agreements, they think of treaties.¹⁴ The Constitution authorizes the President to “make Treaties” with the “Advice and Consent” of the Senate, provided that “two thirds of the Senators present concur.”¹⁵ Securing 67 votes, especially in today’s rancorous and divided Senate, is exceedingly difficult,

¹¹ One scholar recently called for nations engaged in climate discussions to focus on agreements implementing a “portfolio of domestic commitments”—an international compact among nations to pursue greenhouse gas reductions under their own laws and regulations—rather than more politically difficult “targets and timetables.” Robert N. Stavins, Harvard Project on International Climate Agreements, *A Portfolio of Domestic Commitments: Implementing Common but Differentiated Responsibilities*, VIEWPOINTS (Oct. 19, 2009), available at http://belfercenter.ksg.harvard.edu/project/56/harvard_project_on_international_climate_agreements.html.

¹² See S. Res. 98, 105th Cong. (1997) (enacted).

¹³ See Seth Borenstein, *Warming’s Impacts Sped Up, Worsened Since Kyoto* (AP Nov. 23, 2009), available at <http://abcnews.go.com/Technology/wireStory?id=9151251> (last visited Nov. 30, 2009).

¹⁴ The term “treaty” is defined differently under international and domestic law. Internationally, any binding, specific, and important agreement between nations can be considered a “treaty.” Domestically, however, only those international agreements that have been ratified by the Senate are considered “treaties.” See Cong. Research Serv., Comm. on Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 3-5 (Comm. Print 2001). This paper uses the more restrictive U.S. definition of the term.

¹⁵ U.S. CONST. art. II, § 2.

meaning that treaties are very difficult to ratify.¹⁶ Very few countries impose such a high bar for international agreements.¹⁷ Indeed, the Kyoto Protocol itself—negotiated as a treaty under the previously ratified UNFCCC—was never even submitted to the Senate for ratification because of concerns that it could not have cleared this bar.¹⁸

Yet negotiation of a full treaty, duly ratified by the Senate, is only one way to reach an international agreement. Indeed, much of the modern work of international relations is conducted instead by various types of “executive agreement.”¹⁹ Scholars have identified three basic types, and various subspecies, of executive agreement, and there is much academic debate concerning precise scope of the President’s power to enter into such agreements.²⁰ Scholarly disagreements notwithstanding, many observers of the international climate change debate have suggested that one or more of these types of executive agreements could provide President Obama with the authority to make some kind of commitment on behalf of the United States in Copenhagen.²¹

These commentators are correct. Existing statutes and the President’s own constitutional powers would support a binding, international commitment to meaningful

¹⁶ See, e.g., Nigel Purvis, *The Case for Climate Protection Authority*, 49 VA. J. INT’L L. 1007, 1018 (2009). Purvis points out that “[t]he treaty clause has never worked as the Framers of the Constitution intended” for several reasons. For example, the Framers erroneously assumed that international agreements would be rare, while in reality they are a staple of modern governance; the Senate has become too large (double the size of the original House of Representatives) to provide meaningful “advice and consent”; and the Senate has developed arcane procedures allowing even a single Senator to block consideration of a treaty, raising daunting roadblocks to the nation’s ability to join in multilateral agreements supported by nearly all other nations. *Id.* at 1018-20.

¹⁷ *Id.* at 1020-21, citing Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1271-74 (2008)

¹⁸ Purvis, *supra* note 16, at 1019.

¹⁹ *Id.* at 1021 (noting that nearly 90 percent of international agreements since World War II have been approved as executive agreements rather than as treaties, and that the United States is now party to roughly 15,000 executive agreements).

²⁰ See, e.g., Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 134 (1998); Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

²¹ See, e.g., Hannah Chang, *International Executive Agreements on Climate Change*, Columbia Law School Center for Climate Change Law Working Paper (Nov. 2009), available at <http://www.law.columbia.edu/centers/climatechange> (last visited Dec. 1, 2009); Stavins, *supra* note 11, at 3; Inimai M. Chettiar and Jason A. Schwarz, *The Road Ahead: EPA’s Options and Obligations for Regulating Greenhouse Gases*, New York University School of Law, Institute for Policy Integrity (April 2009) at 68-70; Nigel Purvis, *Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority*, Resources for the Future Foundation Discussion Paper No. RFF DP 08-09 (April 2008).

greenhouse gas reductions. The President could reach a so-called “Congressional-Executive” agreement based on existing statutory grants of authority to develop and implement the nation’s climate change policy in the international arena. Even aside from such express authorization, however, the President has the independent constitutional authority to enter into a “sole executive agreement” that could be enforced domestically under existing environmental laws.

Although President Obama’s legal authority to take independent executive action is clear, there may be political risks. That said, Congress cannot be allowed to hold up international agreement forever by simply refusing to act. This would be both an intrusion on the President’s executive authority—including the power to conduct foreign relations and the duty to take care that domestic laws are faithfully enforced—as well as a potential disaster for global efforts to combat climate change. Congress’s failure to act need not undermine the ability of nations attending the Copenhagen conference—including the United States—to put the world on a constructive path forward.

A. President Obama Could Enter Into a “Congressional-Executive” Agreement Under Existing, Express Statutory Authority.

A “congressional-executive” or “legislative-executive” agreement is made by the President under authority granted by statute—i.e., by a majority in both houses of Congress, rather than a supermajority in the Senate.²² Congressional approval can be given either ahead of time, in the form of express authority to negotiate and make international commitments, or after the fact, in the form of subsequent approval of such agreements by majorities in both legislative houses.²³ Indeed, congressional-executive agreements, not treaties, have been used to approve numerous high-profile and important international arrangements, including the United States’ participation in the North American Free Trade Agreement (“NAFTA”) and the World Trade Organization.²⁴

Some observers have pointed out that existing domestic environmental laws, including the Clean Air Act and Endangered Species Act, contain express provisions authorizing negotiation of international agreements that may help address some of the impacts of climate change.²⁵ Aside from these provisions, moreover, Congress has

²² See Cong. Research Serv., *supra* note 14, at 5.

²³ See *id.* at 79-80.

²⁴ Purvis, *supra* note 21, at 1031-32.

²⁵ See Chettiar and Schwarz, *supra* note 21, at 73-74 (discussing section 617 of the Clean Air Act); Chang, *supra* note 21, at 19 (discussing section 8 of the Endangered Species Act). Section 617 of the Clean Air Act directs the President to “undertake to enter into international agreements” to “protect the stratosphere” consistent with domestic law. 42 U.S.C. § 7671p(a). As Chettiar and Schwarz point out elsewhere, however, this section was developed in response to ozone depletion; most of the known impacts of climate change are occurring due to greenhouse gas concentrations in the troposphere, and scientific understanding of greenhouse gas impacts on the stratosphere is not presently well-developed. Chettiar and Schwarz, *supra* note 21, at 55-57. Section 8 of the Endangered Species Act directs the Secretary of the Interior, through the Secretary of

already passed a law explicitly granting the executive branch broad authority to negotiate international climate agreements.

In the Global Climate Protection Act, Congress directed that United States climate policy should “identify technologies and activities to limit mankind’s adverse effect on the global climate” by “slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term” and “stabilizing or reducing” those concentrations over the long term.²⁶ Congress also declared not only that the “global nature” of the climate problem “will require vigorous efforts to achieve international cooperation,” but also that “such international cooperation will be greatly enhanced by United States leadership.”²⁷ To this end, Congress stated that the United States should “work toward multilateral agreements” on climate change.²⁸

Congress did not stop with such general declarations of policy. Rather, it proceeded to grant the Secretary of State explicit authority to take international action:

The Secretary of State shall be responsible to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy, including the United Nations Environment Program and other international organizations. In the formulation of these elements of United States policy, the Secretary of State shall, under the direction of the President, work jointly with the Administrator of the Environmental Protection Agency and other United States agencies concerned with environmental protection, consistent with applicable Federal law.²⁹

Taken together, these declarations of policy and express directions to executive officials unmistakably authorize the President, acting through the Secretary of State, to enter into international agreements necessary to implement climate policy in a manner consistent with existing domestic environmental laws that already require climate action.³⁰

The president needs no more express authority than this to bind the United States to meaningful emissions reduction targets. As Justice Jackson observed in a leading Supreme Court case more than fifty years ago, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In

State, to “encourage . . . the entering into of bilateral or multilateral agreements with foreign countries to provide for” conservation of listed species. 16 U.S.C. § 1537(b)(2). Chang notes that more than 500 species listed under the ESA, some of which presumably suffer from the effects of climate change, live outside the United States and could be subject to this provision. Chang, *supra* note 21, at 19 n.139.

²⁶ Global Climate Protection Act, Pub. L. No. 100-204, § 1103(a)(3) , 101 Stat. 1407-09 (1987).

²⁷ Global Climate Protection Act, § 1102(5).

²⁸ Global Climate Protection Act, § 1103(a)(4).

²⁹ Global Climate Protection Act, § 1103(c).

³⁰ See Part III, *infra*.

these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.”³¹ President Obama thus arrives in Copenhagen with his international power at its zenith.

Of course, in the current political climate, any executive international agreement—especially a strong agreement to reduce domestic emissions—would almost certainly anger some members of Congress. The Senate Foreign Relations Committee has expressed a preference for negotiating international climate change agreements through the Article II treaty process.³² The Senate’s resolution concerning the Kyoto Protocol also could be read as an assertion of authority over international agreements to reduce emissions. That resolution, however, concerns only agreements “which would require the advice and consent of the Senate to ratification,” and thus by its terms does not apply to executive agreements.³³ In any event, neither a Senate Foreign Relations Committee Report nor a “sense of the Senate” resolution is binding federal law. The Global Climate Protection Act remains in force, and would provide a sound and sufficient legal basis for a strong international agreement in Copenhagen.

B. President Obama Could Enter Into a “Sole Executive” Agreement, Enforceable Under Existing Domestic Environmental Laws.

A “sole executive agreement” is created under the President’s own constitutional authority, without explicit congressional participation.³⁴ Most scholars locate the source of this authority in a variety of constitutional provisions, including the general vesting of executive power in the office of the President,³⁵ the President’s duty to “take care” that the nation’s laws be faithfully enforced,³⁶ and the amalgamation of responsibilities that are usually denominated the President’s “foreign affairs” power.³⁷ Sole executive

³¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-637 (1952) (Jackson, J., concurring). The Supreme Court continues to use Justice Jackson’s account of the balance of presidential and congressional authority in evaluating the scope of executive power today. *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 1368 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.”).

³² See Purvis, *supra* note 16, at 1049, citing S. Exec. Rep. No. 102-55, at 14 (1992).

³³ S. Res. 98, 105th Cong., § 1(2) (1997) (enacted).

³⁴ Purvis, *supra* note 16, at 1022.

³⁵ U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”)

³⁶ U.S. CONST. art. II, § 3; see Cong. Research Serv., *supra* note 14, at 92 (collecting articles and cases supporting reliance on “take care” clause in international context). The Supreme Court, however, recently concluded that the President cannot rely on the “take care” clause to give effect to an international legal judgment under a non-self-executing treaty; this holding effectively limits the reach of the “take care” clause to enforcement of existing domestic law. *Medellin*, 128 S. Ct. at 1372.

³⁷ Purvis, *supra* note 16, at 1022-23, citing U.S. CONST. art. II, §§ 1, 2, 3; see also Ramsey, *supra* note 20, at 216-18 (examining original understanding and historical context of president’s “foreign affairs” power); 11 Foreign Affairs Manual § 723.2-2(C).

agreements are rarer than congressional-executive agreements; nonetheless, they have been used to effectuate several very important international compacts, including the recognition of the Soviet Union in 1933, the transfer of destroyers to Great Britain in advance of World War II, the Yalta Agreement of 1945, the Vietnam Peace Agreement of 1973, and the Iran Hostage Agreement of 1981.³⁸

There is no real dispute that a sole executive agreement is legally binding as a matter of international law.³⁹ A sole executive agreement's effect under domestic law, in contrast, is the subject of much academic debate.⁴⁰ The president's power to enter into a sole executive agreement is less expansive than it is in the context of a congressional-executive agreement.⁴¹ Nonetheless, the Supreme Court has long recognized the President's power to enter into binding executive agreements and has given those agreements full domestic legal effect, even in the absence of congressional authorization.⁴² In short, the President acting alone may bind the United States as a

³⁸ Cong. Research Serv., *supra* note 14, at 88; *see also* Purvis, *supra* note 16, at 1023.

³⁹ Chang, *supra* note 21, at 5 (“executive agreements are recognized under international law as *equally binding* as Article II treaties”), citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a), 1155 U.N.T.S. 311; *see also* Cong. Research Serv., *supra* note 14, at 43, 50 (if intended to be binding and cast in the proper form, a significant and specific “executive agreement” would be considered a “treaty” under international law).

⁴⁰ *Compare, e.g.*, Ramsey, *supra* note 20, at 218-35 (arguing from the constitutional text that non-treaty agreements have no domestic effect), *with* Purvis, *supra* note 16, at 1028 (“valid executive agreements (including those made solely by the President) carry the same force as a federal statute”); *see also* Cong. Research Serv., *supra* note 14, at 93-95 (noting inconsistencies in case law regarding ability of sole executive agreement to override prior, contrary federal statute).

⁴¹ *See* Chang, *supra* note 21, at 6. Under the three-part framework devised by Justice Jackson in his *Youngstown* concurrence, sole executive agreements operate at best in the “zone of twilight” where the President and Congress share certain overlapping powers. *Id.*; *see Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). More recently, however, the Supreme Court struck down a unilateral attempt by President Bush to give effect to a judgment of the International Court of Justice under a non-self-executing treaty. *Medellin*, 128 S. Ct. at 1369. Because the President's action conflicted with the “implicit understanding of the ratifying Senate” that the treaty was non-self-executing, it fell within Justice Jackson's third category of actions incompatible with the express or implied will of Congress, an arena where presidential power is “at its lowest ebb.” *Id.*; *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁴² Indeed, in a line of cases extending over several decades, the Supreme Court has consistently held that sole executive agreements prevail over contrary state laws. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *U.S. v. Pink*, 315 U.S. 203 (1942); *U.S. v. Belmont*, 301 U.S. 324 (1937); *but see Medellin*, 128 S. Ct. at 1371-72 (suggesting that the effect of these cases may be limited to the international claims settlement context, where presidential power is “supported by a particularly longstanding practice of congressional acquiescence”) (internal quotation omitted).

matter of international law, and may even go some way toward creating enforceable domestic legal obligations, by way of a sole executive agreement.⁴³

President Obama's power to make a binding international commitment in Copenhagen, even as a sole executive agreement, is not limited by these uncertainties. This is so because the President has clear authority under existing domestic law to regulate greenhouse gas emissions in a meaningful and binding way. There is no need to create additional domestic law by way of an international agreement. Accordingly, the President's constitutional duty to "take care" that domestic laws are clearly applied, combined with his clear authority to bind the United States to a comprehensive international emissions reduction framework, together provide ample legal support for a meaningful and binding agreement in Copenhagen.

Of course, Congress would not be left entirely out of the discussion. Under the Case Act, for example, President Obama still would have to submit any specific, significant, and legally binding agreement negotiated in Copenhagen to Congress within 60 days of execution.⁴⁴ Moreover, under the State Department's Foreign Affairs Manual, the official negotiating an international agreement "keeps in mind" that appropriate congressional committees should be "advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement."⁴⁵ Congress could even conceivably attempt to pass a statute abrogating a sole executive agreement after the fact, but it would probably have to do so with enough votes to override a presidential veto.⁴⁶

In short, all that President Obama has to do in Copenhagen is to promise to do everything in his power to enforce existing federal laws in a manner that achieves meaningful, science-based reductions in greenhouse gas emissions. He need not wait for Congress to do so—nor need he be bound by the inadequate emissions reduction targets proposed by Congress thus far. President Obama simply needs to carry out his clear constitutional duty to "take care" that existing domestic laws are "faithfully" enforced.⁴⁷ Part III of this paper details how these existing federal environmental laws can provide a solid basis for controlling American greenhouse gas emissions.

⁴³ Although it did not decide the issue, *Medellin* seems to cast some doubt upon the latter proposition, and may signal that the Court is turning away from the more pragmatic view of presidential authority expressed in the *Belmont* line of cases.

⁴⁴ See 1 U.S.C. § 112b; 22 C.F.R. §§ 181.2, 181.3.

⁴⁵ 11 Foreign Affairs Manual § 725.1(5). The Foreign Affairs Manual also sets forth a list of criteria to be considered in determining whether a proposed international compact should be drafted as a treaty or an executive agreement. See 11 Foreign Affairs Manual § 723.3. These factors, however, are not binding on either the President or Congress, but rather are "merely indicators of conformity with historical practice and guideposts for avoiding political conflict with Congress." Purvis, *supra* note 16, at 1032.

⁴⁶ See *id.* at 1027.

⁴⁷ U.S. CONST. art. II, § 3; see *Medellin*, 128 S. Ct. at 1372.

III. Existing Domestic Laws Provide a Basis for Enforceable International Commitments.

The United States already has a strong suite of environmental laws that provide effective and comprehensive tools for limiting greenhouse gas emissions and addressing climate change. The Clean Air Act is the most obvious example, but the Clean Water Act, Endangered Species Act, and National Environmental Policy Act provide important supplemental authority.

A. The Clean Air Act

The Clean Air Act, one of the nation's and the world's most important and successful environmental laws, uses a variety of complementary pollution control mechanisms to reduce pollution from all sectors of the U.S. economy.⁴⁸ Studies have shown that the substantial improvements in air quality achieved through the Act have resulted in enormous public health, ecological, and other benefits, the economic value of which is *42 times greater* than the cost of regulation.⁴⁹

Among existing domestic laws, the Clean Air Act is the preeminent choice for regulation of domestic greenhouse gas emissions within the context of an international executive agreement.⁵⁰ In fact, comprehensive greenhouse gas reductions could be implemented much more quickly, and with far greater scientific credibility, under the Clean Air Act's well-established regulatory framework than under the "cap-and-trade" system contemplated in existing legislative proposals. Indeed, in light of a recent landmark Supreme Court decision, the EPA is now legally obligated to use its authority under the Clean Air Act for this purpose, and already has begun to take regulatory steps in this direction.

⁴⁸ For a comprehensive discussion of the Clean Air Act's effective and immediately available tools for addressing climate change, see KASSIE SIEGEL, BILL SNAPE, AND MATT VESPA, *NO REASON TO WAIT: REDUCING GREENHOUSE GAS EMISSIONS THROUGH THE CLEAN AIR ACT* (June 2009), available at <http://www.biologicaldiversity.org/publications/papers/index.html>.

⁴⁹ See generally ENVTL. PROT. AGENCY, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1970 TO 1990* (1997), available at <http://www.epa.gov/air/sect812/> (finding the economic value of the Act's benefits to be 42 times greater than its costs); see also Chettiar & Schwarz, *supra* note 21, at 10 ("Historically, regulations under the [Clean Air Act] have proven to be effective, flexible, and cost efficient. . . . The Act sets up a public and transparent process, and it fosters coordination between federal agencies and with the states.").

⁵⁰ Purvis, *supra* note 16, at 1041-44 (arguing that the existing Clean Air Act provides an adequate basis for an executive agreement); Chettiar & Schwarz, *supra* note 21, at 69 (same); but see Chang, *supra* note 21, at 15-16 (questioning whether president may commit EPA to particular course of regulation).

1. The EPA's Long-Awaited "Endangerment Finding"

In 2007, the Supreme Court ruled in *Massachusetts v. EPA* that greenhouse gases meet the definition of "air pollutants" under the Clean Air Act.⁵¹ As a result, EPA must determine whether greenhouse gases "may reasonably be anticipated to endanger public health or welfare."⁵² The Supreme Court directed the EPA to consider whether the Clean Air Act required this determination, known as an "endangerment finding," for greenhouse gases emitted by automobiles.⁵³

After reviewing applicable science and taking extensive public comment, EPA finalized its endangerment finding on December 7, 2009, concluding that "the evidence provides compelling support for finding that greenhouse gas air pollution endangers the public welfare of both current and future generations. . . . [T]here is good reason to act now given the urgency of the threat of climate change and the compelling scientific evidence."⁵⁴

EPA's endangerment finding has enormous legal and political significance. The finding required in the context of automobile emissions is similar or identical to findings in other sections of the Clean Air Act that trigger regulation of greenhouse gas emissions from ships, aircraft, power plants, factories, and other sources. Such a finding also compels the issuance of nationwide pollution caps for greenhouse gases.

2. Criteria Air Pollutant Designation, National Ambient Air Quality Standards, and State Implementation Plans for Greenhouse Gases

The "criteria air pollutant" program is in many ways the heart of the modern Clean Air Act.⁵⁵ For each air pollutant emitted by a wide variety of sources that can reasonably be anticipated to endanger public health and welfare, EPA must establish air quality "criteria" and set a national pollution cap—known technically as a "national ambient air quality standard" or "NAAQS"—to address the pollutant's impacts.⁵⁶ Such

⁵¹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁵² *Id.* at 532-33.

⁵³ *Id.* at 534-35.

⁵⁴ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202 of the Clean Air Act at 17, 27 (Dec. 7, 2009); *see also* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202 of the Clean Air Act, 74 Fed. Reg. 18,886 (Apr. 24, 2009) ("the case for finding that greenhouse gases in the atmosphere endanger public health and welfare is compelling and, indeed, overwhelming. . . . The evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions, that climate changes are already occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action.").

⁵⁵ *See* Clean Air Act §§ 108-110; 42 U.S.C. §§ 7408-7410.

⁵⁶ To date the EPA has designated six criteria pollutants: particulate matter (PM), ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead.

caps take the form of national standards specifying the total amount of pollution allowed in the ambient air (as opposed to the total amount of pollution that may be emitted from a given facility), and are set at a level sufficient to protect the public health and welfare. Each state then must do its part to meet the national pollution cap by developing and implementing a “state implementation plan” or “SIP.”

Criteria air pollutant designation for greenhouse gases would fully activate the Clean Air Act’s tools and, combined with other provisions of the statute, provide a comprehensive system with a proven track record of success in pollution reduction. On December 2, 2009, the Center for Biological Diversity and 350.org filed a petition with the EPA seeking the designation of several greenhouse gases as “criteria” air pollutants and the imposition of national caps for those pollutants.⁵⁷ Based on current science, the petition requests that EPA set a cap of no more than 350 ppm for CO₂ and appropriate limits for the other greenhouse gases as necessary to protect public health and welfare. This petition asks EPA to make use of one of the most powerful tools in the Clean Air Act tool box—one that would allow the agency to impose a science-based national cap on greenhouse gas emissions.

Using national pollution caps to control greenhouse gases is controversial, but ultimately could be highly effective. For example, national pollution caps for greenhouse gases would provide a strong basis for immediate action to reduce emissions, unlike the untested (and still largely hypothetical) market-based “cap-and-trade” systems under consideration in Congress. There is great risk that the scientific rigor of the Clean Air Act will not be replicated in new legislation, where a cap could simply be set by Congress according to political calculations, then further diluted by free emission allowances and offsets pursuant to industry pressures. That said, there is no fundamental inconsistency between a national pollution cap and a “cap-and-trade” system.⁵⁸ Indeed, NAAQS could provide a protective, science-based “cap” for greenhouse gas emissions while also serving as a potent regulatory backstop in case “trading” failed to produce results.

Under the SIP process, moreover, all fifty state governments would be enlisted in the effort to meet national greenhouse gas targets. Important reductions could be achieved by changes in land use, utility regulation, transportation, and forestry—areas traditionally regulated by state and local governments.⁵⁹ States also could incorporate

⁵⁷ Center for Biological Diversity and 350.org, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (filed Dec. 2, 2009), available at http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

⁵⁸ See, e.g., Clean Air Act § 110(a)(2); 42 U.S.C. § 7410(a)(2) (recognizing that states may use economic incentives such as fees, marketable permits, and auctions of emission rights to achieve NAAQS); Chettiar & Schwartz, *supra* note 21, at 78-81 (discussing implementation of a cap-and-trade program using existing Clean Air Act authority).

⁵⁹ Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater, Why the Clean Air Act’s Cooperative Federalism Framework Is Useful for Addressing Global Warming*,

their existing climate efforts into SIPs. As of August 2009, at least forty-seven states had completed or were completing greenhouse gas inventories, thirty-eight were drafting or had drafted climate action plans, and twenty-three states had adopted emissions reduction targets.⁶⁰

Finally, the federal government, the states, and emitters already know and use the NAAQS and SIP framework—an existing system that has served the public well for decades. Like other key provisions of the Clean Air Act, the criteria air pollutant program gives the President powerful tools that could serve as the basis of an agreement on international greenhouse gas reductions.

3. Reducing Pollution from Mobile Sources

Title II of the Clean Air Act regulates mobile sources of air pollution (such as cars, trucks, airplanes, and ships). Section 202(a) of the Act authorizes EPA to regulate emissions of air pollutants from new motor vehicles.⁶¹ On September 28, 2009, the Obama administration issued a proposal to reduce greenhouse gas emissions from automobiles under the Clean Air Act in conjunction with increasing fuel economy standards (so-called “CAFE” standards).⁶² This proposal would raise the average fuel economy of new cars, SUVs and pickup trucks to about 34 mpg in 2016, with accompanying reductions in greenhouse gas emissions due to decreases in gasoline consumption and other measures.⁶³

50 ARIZ. L. REV. 799, 827-28 (2008); Alice Kaswan, *A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System*, 95 DENV. U. L. REV. 791, 829 (2008). For example, one study found that residential and commercial buildings—structures that fit squarely within a state’s jurisdiction—account for one-third of U.S. carbon emissions. MARILYN A. BROWN ET AL., *SHRINKING THE CARBON FOOTPRINT OF METROPOLITAN AMERICA* (May 2008), available at http://www.brookings.edu/reports/2008/05_carbon_footprint_sarzynski.aspx. Another study concluded that compact development can reduce vehicle miles traveled, and associated carbon emissions, by as much as 20-40 percent. REID EWING ET AL., *GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE*, 10-11 (2007).

⁶⁰ ENVTL. PROT. AGENCY, STATE AND LOCAL GOVERNMENTS, STATE PLANNING AND MEASUREMENT, available at http://www.epa.gov/climatechange/wyacd/stateandlocalgov/state_planning.html#three (last visited Nov. 25, 2009); Pew Ctr. On Global Climate Change, *U.S. Climate Policy Maps*, available at http://www.pewclimate.org/what_s_being_done/in_the_states/state_action_maps.cfm (last visited Nov. 25, 2009).

⁶¹ 42 U.S.C. § 7521(a)(1).

⁶² See Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (Sept. 28, 2009).

⁶³ See *id.* at 49468. Even with these improvements, U.S. fuel economy in 2016 would still be slightly lower than what China achieves today (35.8 mpg) and far lower than the currently effective European and Japanese standards (43.3 and 42.6 mpg, respectively).

Petitions asking the EPA to regulate greenhouse gas pollution from ocean-going vessels and other types of non-road vehicles under Section 213, as well as from airplanes under Section 231, are currently pending. Because the transportation sector accounts for about a third of total U.S. greenhouse gas emissions, expeditious adoption of greenhouse gas reduction measures for automobiles and other mobile sources would represent substantial and meaningful progress towards achieving the emissions reductions that are necessary to avoid dangerous climate change.

4. Reducing Pollution from Stationary Sources

Emissions from stationary sources such as power plants and industrial facilities are controlled under the complementary programs of Titles I and V of the Clean Air Act. Under Title I's new source performance standards ("NSPS") program, the EPA sets baseline pollution limits for about 80 different types of emissions sources, so that each type of facility must meet the same minimum standards nationwide.⁶⁴ The new source review ("NSR") program in Title I complements these national rules by requiring permits and additional site-specific pollution control measures for new major sources of air pollution. Title V establishes an "operating permit" program for major sources that consolidates all Clean Air Act requirements into a single document, facilitating agency and public review of compliance with the Act's provisions.

The NSR program consists of two sub-programs, "prevention of significant deterioration" ("PSD") and "non-attainment new source review" ("NNSR"). The PSD program applies to non-criteria air pollutants, and to criteria air pollutants in areas currently meeting the national pollution caps set for each pollutant. NNSR applies to emissions of criteria pollutants in areas where concentrations exceed national caps. The two subprograms are structurally similar, although the NNSR program contains more ambitious pollution reduction measures. Because greenhouse gases are not yet designated as criteria air pollutants, they are currently subject only to the PSD program. If and when the EPA designates greenhouse gases as criteria air pollutants and sets national pollution caps at levels below current greenhouse gas concentrations, the more stringent NNSR measures will apply.

EPA recently proposed a regulation that would initially subject only the largest of "major" stationary sources of greenhouse gases—generally those emitting the equivalent of 25,000 tons of CO₂ per year—to the PSD and Title V operating permit programs.⁶⁵ EPA believes that this "tailoring rule" is necessary because strict adherence to the pollutant thresholds set forth in the Clean Air Act—100 to 250 tons per year—would subject thousands upon thousands of smaller sources to burdensome regulatory requirements. EPA claims that by "tailoring" the PSD and Title V programs to only the largest stationary sources of greenhouse gases, it would be able to regulate about 70% of

⁶⁴ Clean Air Act § 111(a)(1); 42 U.S.C. § 7411(a)(1) (2006).

⁶⁵ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

these emissions.⁶⁶ While the proposal can and should be improved, the approach represents a feasible first step.

In sum, the Clean Air Act offers a wealth of proven, effective tools for controlling greenhouse gas emissions. These existing tools could form the basis of an international commitment in Copenhagen without any further action from Congress.

B. The Clean Water Act

Excessive CO₂ emissions not only warm the Earth's atmosphere and surface but also pollute its oceans. Atmospheric CO₂ pollution and water quality are closely linked. Indeed, most of the CO₂ released into the atmosphere through fossil fuel combustion will at some point be absorbed into the Earth's oceans.⁶⁷ Ocean absorption of CO₂, which varies directly with the rate of atmospheric CO₂ emissions, is making the oceans more acidic.⁶⁸ Recent scientific evidence is mounting that increasingly acidic ocean water poses an immediate threat to marine life, including coral, economically valuable shellfish, and even calciferous phytoplankton—literally the foundation of the ocean food chain.⁶⁹

The Clean Water Act can help address these problems. The purpose of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”⁷⁰ To this end, the statute requires states to promulgate water quality standards sufficient “for the protection and propagation of fish, shellfish and wildlife and for recreation.”⁷¹

The EPA adopted a standard for seawater acidity in 1976,⁷² which needs to be updated in light of current ocean acidification research. Two years ago, the Center for Biological Diversity filed a petition with EPA seeking to strengthen the seawater

⁶⁶ See *id.* at 55,332-33.

⁶⁷ Ken Caldeira and Michael E. Wickett, *Anthropogenic Carbon and Ocean pH: The Coming Centuries May See More Ocean Acidification than the Past 300 Million Years*, 425 NATURE 365, 365 (2003).

⁶⁸ Antarctic Climate & Ecosystems Cooperative Research Centre, Position Analysis, *CO₂ Emissions and Climate Change: Ocean Impacts and Adaptation Issues* 3 (2008).

⁶⁹ See, e.g., Glenn De'ath, Janice M. Lough & Katharina E. Fabricius, *Declining Coral Calcification on the Great Barrier Reef*, 323 SCIENCE 116, 116 (2009); A. Whitman Miller et al., *Shellfish Face Uncertain Future in High CO₂ World: Influence of Acidification on Oyster Larvae Calcification and Growth in Estuaries*, 4(5) PLOS ONE e5661, e5661 (2009); Ove Hoegh-Guldberg et al., *Coral Reefs Under Rapid Climate Change and Ocean Acidification*, 318 SCIENCE 1737, 1740-41 (2007); James C. Orr et al., *Anthropogenic Ocean Acidification over the Twenty-first Century and Its Impact on Calcifying Organisms*, 437 NATURE 681, 681 (2005).

⁷⁰ 33 U.S.C. § 1251(a).

⁷¹ See 33 U.S.C. § 1313; 40 C.F.R. § 130.3.

⁷² ENVTL. PROT. AGENCY, QUALITY CRITERIA FOR WATER 342-43 (1976), available at <http://www.epa.gov/waterscience/criteria/library/redbook.pdf>.

standard.⁷³ In response, EPA has begun to solicit information and data with the goal of accounting for ocean acidification in its water quality standards for seawater.⁷⁴

Once EPA finalizes its standard, the states must either revise their water quality plans to conform to federal criteria or demonstrate a scientifically credible alternative.⁷⁵ The states also must identify and list as “impaired” any waters within their boundaries that exceed the standard.⁷⁶ The states or EPA must then establish “total maximum daily loads” of pollutants that can be added to impaired waters without violating water quality standards, and must incorporate those limitations into their water quality management plans.⁷⁷

The Clean Water Act thus provides another strong legal basis for controlling CO₂ emissions, one that could lend domestically enforceable substance to an executive climate agreement. In fact, the Clean Water Act expressly declares that “the President, acting through the Secretary of State and such national and international organizations as he deems appropriate, shall take such action as may be necessary” to ensure that foreign countries meaningfully control pollution in national and international waters “to at least the same extent as the United States does under its laws.”⁷⁸ In light of the emerging research on ocean acidification and EPA’s current consideration of stronger water quality standards, this declaration seems tailor-made for Copenhagen.

C. The Endangered Species Act

Climate change threatens not only human welfare but also the very existence of numerous other species. Climate change is happening so quickly that few creatures are able to adapt to shifts in their habitat, altered weather and rainfall patterns, and increased predation. The polar bear—threatened with extinction due to the rapid melting of the Arctic sea ice from which it forages and feeds—has become the international icon of the climate crisis. Unfortunately, the polar bear is far from alone; countless other plant and animal species are facing a similar fate.⁷⁹

⁷³ Center for Biological Diversity, *Petition for Revised pH Water Quality Criteria under Section 304 of the Clean Water Act, 33 U.S.C. § 1314, to Address Ocean Acidification 1* (Dec. 18, 2007), *available at* <http://www.biologicaldiversity.org/programs/oceans/pdfs/section-304-petition-12-18-07.pdf>.

⁷⁴ *Ocean Acidification and Marine pH Water Quality Criteria*, 74 Fed. Reg. 17,484 (Apr. 15, 2009).

⁷⁵ 40 C.F.R. § 131.11(b).

⁷⁶ 33 U.S.C. § 1313(d).

⁷⁷ *See* 33 U.S.C. § 1313(d), (e); 40 C.F.R. §§ 130.6, 130.7(d)(2).

⁷⁸ 33 U.S.C. § 1251(c).

⁷⁹ *See, e.g.*, Andreas Fischlin, et al., *Ecosystems, their Properties, Goods, and Services*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2007); Camille Parmesan, *Ecological and Evolutionary*

The Endangered Species Act (“ESA”) offers the nation’s most powerful defense against climate-related extinctions. Depending upon the gravity of its situation, a species may be listed as either “threatened” or “endangered” because of habitat loss, disease, the inadequacy of existing legal protections, or “other natural or manmade factors affecting its continued existence.”⁸⁰ All federal agencies must use their authority to “carry out programs for the conservation” of listed species—“conservation” meaning recovery to the point where the ESA’s protections are no longer necessary.⁸¹ Federal agencies also must consult with the Secretary of the Interior concerning actions they carry out, approve, or fund to ensure that these activities do not jeopardize the continued existence of listed species or modify their designated critical habitat.⁸² Finally, the ESA expressly prohibits the “take” of endangered species—a prohibition that encompasses not only direct killing or injury, but also all other forms of harm, harassment, and habitat destruction.⁸³

Efforts to protect listed species threatened by climate change are underway, although the Obama Administration has not yet chosen to use the conservation tools provided by the ESA to their full effect. For example, although the administration recently proposed vast areas of the Arctic as critical habitat for the polar bear, it has disavowed any intent to use the ESA to address the causes of climate change.⁸⁴ Meanwhile, conservation advocates, including the Center for Biological Diversity, continue to seek meaningful protection for the numerous creatures imperiled by a warming planet and its increasingly acidic oceans.

The well-mixed nature of many greenhouse gases requires the concerted action of multiple nations to reduce atmospheric levels so that widespread extinction can be

Responses to Recent Climate Change, 37 ANNU. REV. ECOL. EVOL. SYST. 637 (2006); Chris D. Thomas, et al., *Extinction Risk from Climate Change*, 427 NATURE 145 (2004). For profiles of species imperiled by climate change, see ENDANGERED SPECIES COALITION, AMERICA’S HOTTEST SPECIES: TEN ENDANGERED WILDLIFE, FISH, AND PLANTS IMPACTED BY CLIMATE CHANGE (Dec. 2009); Center for Biological Diversity, 350 Reasons We Need to Get to 350: 350 Species Threatened by Global Warming, at http://www.biologicaldiversity.org/programs/climate_law_institute/350_reasons/index.html (last visited Dec. 2, 2009).

⁸⁰ 16 U.S.C. § 1533(a)(1).

⁸¹ 16 U.S.C. §§ 1532(3) (defining “conservation”), 1536(a)(1) (directing federal agencies to pursue conservation programs).

⁸² See generally 16 U.S.C. § 1536.

⁸³ 16 U.S.C. §§ 1532(19) (defining “take”); 1533(d) (authorizing regulation prohibiting “take” of threatened species); 1538(a)(1)(B) (prohibiting take of endangered species); see also *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) (upholding regulation defining “harm” as including a significant modification of habitat that leads to injury).

⁸⁴ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States; Proposed Rule, 74 Fed. Reg. 56,058 (Oct. 29, 2009); see *id.* at 56,070 (declaring without analysis that “the underlying causes of climate change are complex global issues that are beyond the scope of the Act”).

avoided. President Obama can and should join in this effort by making an international commitment to strong enforcement of the ESA in the climate change context.

D. The National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) among other things seeks to promote “efforts which will prevent or eliminate damage to the environment and biosphere.”⁸⁵ To this end, NEPA requires the preparation of a “detailed statement”—commonly known as an Environmental Impact Statement, or “EIS”—for proposed legislation and “other major Federal actions significantly affecting the quality of the human environment.”⁸⁶ Although the courts have interpreted NEPA as predominantly a procedural and informational statute,⁸⁷ it nonetheless provides the public and federal decision-makers with important information about the environmental impacts of federal actions, as well as possible alternatives and mitigation measures that could help alleviate those impacts. U.S. courts have squarely held that NEPA requires federal agencies to analyze climate change impacts.⁸⁸

Although many federal agencies have their own NEPA regulations, the President’s Council on Environmental Quality (“CEQ”)—a body established by NEPA itself—is the key source of regulatory guidance on implementation of the statute. Twelve major environmental organizations recently submitted a formal request to CEQ seeking the adoption of regulations governing the analysis of climate change impacts under NEPA.⁸⁹ Information concerning the impacts of major federal actions on the global climate is critical to implementation of emissions reduction and mitigation strategies. Once again, President Obama can and should commit to use his existing authority under NEPA to assist in addressing the climate crisis.

IV. Conclusion

As this paper makes clear, President Obama is not arriving in Copenhagen with his hands tied by a recalcitrant Congress. Under both international and domestic law, he has the power to bind the United States to a formal, meaningful agreement to reduce emissions. In short, the answer to questions regarding President Obama’s ability to contribute meaningfully to a global solution in Copenhagen is clearly “yes, he can.” It remains to be seen whether he will.

⁸⁵ 42 U.S.C. § 4321.

⁸⁶ 42 U.S.C. § 4332(C).

⁸⁷ *See generally* Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

⁸⁸ *See, e.g.*, Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007).

⁸⁹ American Rivers, Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, Earthjustice, International Center for Technology Assessment, Marine Fish Conservation Network, Natural Resources Defense Council, National Wildlife Federation, Ocean Conservancy, Southern Environmental Law Center, The Wilderness Society, Letter to the Hon. Nancy Sutley, Chair, Council on Environmental Quality, Nov. 24, 2009.