

No. 15-1363 (and consolidated cases)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and REGINA A. MCCARTHY, ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petitions for Review of Final Agency Action of the United States
Environmental Protection Agency, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

**BRIEF FOR *AMICI CURIAE* MADELEINE K. ALBRIGHT,
LEON E. PANETTA, AND WILLIAM J. BURNS
IN SUPPORT OF RESPONDENTS**

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April 1, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing in this case are listed in the brief for Respondent EPA and the lead docket sheet for these consolidated petitions.

Rulings Under Review

The final agency action under review is *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

Related Cases

Amici adopt the statement of related cases set forth in the brief for Respondent EPA.

SEPARATE AMICI CURIAE BRIEF

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici* Madeleine K.

Albright, Leon E. Panetta, and William J. Burns, former officials of the United States Departments of State and Defense, certify that a separate brief is necessary for their presentation to this Court due to the specialized nature of their distinct expertise. None of the other *amici* of which we are aware will be in a position to interpret and address the impact of the Clean Power Plan in the same way as the above *amici*.

Accordingly, *amici*, through counsel, certify that filing a joint brief would not be practicable.

/s/ David C. Frederick
David C. Frederick

April 1, 2016

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GLOSSARY OF ABBREVIATIONS

| Term | Definition |
|---------------------------------------|--|
| Clean Air Act | 42 U.S.C. § 7401 <i>et seq.</i> (1970) |
| Clean Power Plan or Rule | EPA, <i>Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units</i> , Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) |
| Climate Action Plan | Executive Office of the President of the United States, <i>The President's Climate Action Plan</i> (June 2013), www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf |
| CO ₂ | Carbon Dioxide |
| EPA | United States Environmental Protection Agency |
| FCCC | Framework Convention on Climate Change |
| INDC | Intended Nationally Determined Contribution |
| Kyoto Protocol | Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. FCCC/CP/1997/7 Add. 1, 37 ILM 22 |
| National Security Implications Report | United States Dep't of Defense, <i>National Security Implications of Climate-Related Risks and a Changing Climate</i> (July 23, 2015), http://archive.defense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf?source=govdelivery |
| Paris Agreement | Adoption of the Paris Agreement, Dec. 12, 2015, 21st Sess., U.N. FCCC/CP/2015/L.9, https://unfccc.int/resource/docs/2015/cop21/eng/109.pdf |

Paris Conference

21st Conference of the Parties of the United Nations
Framework Convention on Climate Change, Paris,
France (Nov. 30-Dec. 11, 2015)

STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici are former officials of the United States Departments of State and Defense. Madeleine K. Albright served as the 64th Secretary of State for the United States from 1997 to 2001. She was the United States' permanent representative to the United Nations from 1993 to 1997. Leon E. Panetta served as the 23rd Secretary of Defense for the United States from 2011 to 2013. In addition, Secretary Panetta has been a longtime statesman with significant experience in the field of foreign policy, including as congressman (1977 to 1993), chief of staff to President Bill Clinton (1994 to 1997), and director of the Central Intelligence Agency (2009 to 2011). William J. Burns retired from the U.S. Foreign Service in 2014 after a thirty-three-year diplomatic career, which included tenures as Deputy Secretary of State (2011 to 2014) and United States Ambassador to Russia (2005 to 2008). He holds the rank of Career Ambassador, the highest in the Foreign Service.

Secretaries Albright and Panetta and Ambassador Burns submit this brief to inform the Court of the broader context within which the EPA exercises its discretion under Section 111 of the Clean Air Act, and to offer their perspective on

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person — other than *amici* or its counsel — contributed money that was intended to fund preparing or submitting this brief.

the interrelationship between the Clean Power Plan and critical foreign policy and national security goals.

As one of the United States' leading diplomatic voices for over a generation, Secretary Albright is uniquely positioned to assess the importance of the Clean Power Plan to the broader efforts of the United States and other global leaders to secure a lasting and comprehensive commitment to address climate change.

Secretary Albright consistently called for action on climate change because she understands that its effects extend far beyond the environment. In particular, Secretary Albright has testified before Congress that climate change represents the biggest threat to United States national security. Similarly, Secretary Panetta has spoken out on the national security implications of climate change, including how rising temperatures will imperil already vulnerable populations, deplete natural resources, and lead to conflict over access to basic necessities, such as water.

During his tenure at both the Defense Department and the CIA, Secretary Panetta established offices to address the security implications of global warming, which increase the demand on the United States to provide humanitarian and disaster relief around the world. Ambassador Burns served five presidents and ten Secretaries of State during a time when climate change rose to the top of the United States' diplomatic agenda. He spearheaded the relationship with a number

of significant actors in global climate change negotiations, including China and India.

Secretaries Albright and Panetta and Ambassador Burns therefore have a significant interest in the proper interpretation of the EPA's authority under Section 111 of the Clean Air Act.

SUMMARY OF ARGUMENT

The Clean Power Plan is an important part of the United States' successful efforts toward achieving a worldwide consensus to combat global warming. In particular, the United States' announcement of its ambitious climate action goals was a significant force in building momentum toward the historic Paris Agreement of December 2015. In that agreement, 195 nations committed to curbing greenhouse gas emissions. But continued global action is not guaranteed. Just as the Clean Power Plan helped to convince other countries to take the significant first step of agreeing to curb emissions, its successful implementation will support U.S. efforts to ensure that others follow through on those commitments.

The stakes are high. Not only is climate change of paramount importance for public health and welfare, but the Department of Defense has recognized that the problems created by a warming planet — from rising sea levels to severe weather events to the spread of disease — represent a critical and growing national security threat.

ARGUMENT

I. THE CLEAN POWER PLAN DEMONSTRATES UNITED STATES LEADERSHIP IN THE GLOBAL EFFORT TO FIGHT CLIMATE CHANGE

A broad, worldwide consensus exists that dramatic reductions in emissions are both necessary and achievable. One hundred and ninety-five nations agreed as much in the Paris Agreement of December 2015, which established a framework for arresting or limiting the rise in global temperature to an amount “well below” 2 degrees Celsius.² The United States’ pre-Paris commitment to climate action was a driving force in reaching this historic agreement.³ Moving forward, the successful implementation of the Clean Power Plan will help to fulfill the United States’ targets under this agreement, to continue to inspire other countries to take action,

² See U.N., FCCC, *Historic Paris Agreement on Climate Change* (Dec. 12, 2015), <http://newsroom.unfccc.int/unfccc-newsroom/finale-cop21/>; see also Adoption of the Paris Agreement, Dec. 12, 2015, 21st Sess., U.N. FCCC/CP/2015/L.9, art. 2 (“Paris Agreement”), <https://unfccc.int/resource/docs/2015/cop21/eng/109.pdf>.

³ See Declaration of Todd Stern ¶ 20 (Dec. 3, 2015) (“Stern Decl.”), ECF Doc. No. 1586661.

and to maintain the United States' leadership in a world that is already transitioning to a low-carbon future.

A. The United States' Leadership Inspired Global Commitments To Reduce Emissions

Climate change is a threat of global dimensions, and addressing it requires global action. Although many countries have recognized that the threat of climate change demands action, even bold action by one country can be undermined if too many others fail to act. Accordingly, the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change, held in Paris in November and December 2015 ("Paris Conference"), had as its goal the adoption of an ambitious agreement that — unlike the Kyoto Protocol that preceded it — applies to all countries, both developed and developing. Because developing countries were unlikely to accept negotiated targets, the central feature of the regime was voluntary, nationally determined post-2020 targets called Intended Nationally Determined Contributions ("INDC"), which countries were encouraged to submit well in advance of the Paris Conference to foster enthusiasm and

collective trust. Particularly closely watched were the actions of major emitters like the United States.⁴

With the world watching, the United States took a number of steps prior to the Paris Conference to demonstrate its commitment to climate action and to build momentum. First, in June 2013, President Barack Obama announced a Climate Action Plan aiming to reduce carbon pollution through promoting renewable energy, modernizing the electric grid, improving vehicle fuel economy standards, promoting energy efficiency, and other policies.⁵ The plan was intended not only to reduce U.S. emissions but to “send a strong signal to the world” and to “lead by the power of our example.”⁶ One component of the plan directed the EPA to use its rulemaking authority under the Clean Air Act⁷ to address emissions from existing power plants, which the EPA did through the Clean Power Plan Rule it finalized in August 2015.⁸

⁴ *Id.* ¶¶ 13-20.

⁵ See Executive Office of the President of the United States, *The President’s Climate Action Plan* (June 2013), www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

⁶ See The White House, Office of the Press Sec’y, *Remarks by the President on Climate Change* (Georgetown Univ. June 25, 2013), www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change.

⁷ 42 U.S.C. § 7401 *et seq.* (1970).

⁸ See EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Final Rule, 80 Fed. Reg. 64,662, at 64,665 (Oct. 23, 2015) (“Clean Power Plan”).

The United States sent another strong signal when, in November 2014, China and the United States — the world’s first- and second-largest emitters of greenhouse gases, respectively — jointly announced ambitious climate goals.⁹ Notably, China announced its intention to halt the growth of its CO₂ emissions around 2030,¹⁰ which marked the first time China had ever agreed to stop its ever-increasing CO₂ emissions.¹¹ Both countries later formalized their goals as part of the INDCs each submitted in advance of the Paris Conference.

Announced in March 2015, the United States’ INDC contains a target of a 26%-28% reduction in greenhouse gas emissions in 2025, compared to 2005.¹² China submitted its INDC in June 2015, pledging to transform its energy sector by increasing the efficiency of coal-fired power plants, expanding the use of natural

⁹ See The White House, Office of the Press Sec’y, *U.S.-China Joint Announcement on Climate Change* (Nov. 12, 2014), www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change.

¹⁰ *Id.* ¶ 3.

¹¹ See The White House, Office of the Press Sec’y, *Fact Sheet: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation* (Nov. 11, 2014), www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c.

¹² See *U.S. Cover Note, INDC, and Accompanying Information* (Mar. 31, 2015), www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.

gas, and generating 20% of its energy from non-fossil-fuel sources by 2030.¹³ It also announced plans to install 200 gigawatts of solar power and 100 gigawatts of wind power by 2020.¹⁴

The Clean Power Plan, which was finalized in August 2015, further cemented the U.S. commitment to action. It is projected to reduce emissions from the utility power sector 32% below 2005 levels by 2030.¹⁵

America's leadership on climate change quickly bore fruit. By October 1, 2015, 147 parties had submitted INDCs to the United Nations.¹⁶ By December 2015, on the eve of the Paris meeting, the number topped 180,¹⁷ vividly demonstrating the world's commitment to a post-carbon future and to transformation of the electricity sector.

¹³ Dep't of Climate Change, Nat'l Dev. & Reform Comm'n of China, *Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions* at 5-7 (June 30, 2015) (unofficial translation), www4.unfccc.int/submissions/INDC/Published%20Documents/China/1/China's%20INDC%20-%20on%2030%20June%202015.pdf.

¹⁴ *Id.* at 7.

¹⁵ Clean Power Plan, 80 Fed. Reg. at 64,665.

¹⁶ See U.N., FCCC, *Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions* at 3, ¶ 2, FCCC/CP/2015/7 (Oct. 30, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/07.pdf>.

¹⁷ See Stern Decl. ¶ 26.

The European Union, for example, committed to reducing its member states' emissions 40% below 1990 levels by 2030.¹⁸ Large, fast-growing countries in the developing world also made ambitious commitments. India agreed to reduce the emissions intensity of its GDP by at least 33% from 2005 levels by 2030.¹⁹ It also pledged to generate 40% of its electricity from non-fossil-fuel resources by 2030,²⁰ and announced policies to modernize its electric grid, promote energy conservation, and develop other strategies.²¹ Brazil committed to reduce emissions by at least 37% below 2005 levels, including by increasing its use of renewable energy sources.²² And Mexico promised to reduce its emissions 22% by 2030, and

¹⁸ See Latvian Presidency of the Council of the European Union, *Submission by Latvia and the European Commission on Behalf of the European Union and its Member States* ¶ 3 (Mar. 6, 2015), www4.unfccc.int/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf.

¹⁹ Government of India, *India's Intended Nationally Determined Contribution* at 29 (Oct. 1, 2015), www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf.

²⁰ *Id.*

²¹ *Id.* at 35-36.

²² See Federative Republic of Brazil, *Intended Nationally Determined Contribution Towards Achieving the Objective of the United Nations Framework Convention on Climate Change* at 2 n.1 (Sept. 28, 2015), www4.unfccc.int/submissions/INDC/Published%20Documents/Brazil/1/BRAZIL%20iNDC%20english%20FINAL.pdf.

by 50% from 2000 levels by 2050.²³ The commitments of these and more than 180 other countries demonstrate the power of the United States' leadership to inspire ambitious action on climate change.

B. The Clean Power Plan Is Integral to Continued U.S. Leadership in the Fight Against Climate Change

Although the Paris Agreement represents a historic achievement, the agreement is only the beginning. The plan will take effect in 2020.²⁴ After that, each country will update its commitments every five years.²⁵ Countries will also put domestic policies in place to achieve their nationally determined emissions reduction targets. The framework is designed to ensure transparency, and to maintain the trust that was built in anticipation of the Paris Conference.²⁶

As the commitments prior to the Paris Conference evidence, nations will continue to watch each other's actions moving forward. And just as the United States' actions helped to lead to the Paris Agreement, the steps taken by the United States takes to fulfill its targets will shape other countries' willingness to meet their

²³ See Government of Mexico, *Intended Nationally Determined Contribution* at 2, 4 (Mar. 30, 2015), www4.unfccc.int/submissions/INDC/Published%20Documents/Mexico/1/MEXICO%20INDC%2003.30.2015.pdf.

²⁴ See Stern Decl. ¶ 18.

²⁵ See Paris Agreement art. 4, ¶ 9.

²⁶ Declaration of Madeleine K. Albright ¶ 8 (Dec. 8, 2015), ECF Doc. No. 1587530.

own goals. The successful implementation of the Clean Power Plan will show the world that addressing climate change is both necessary and achievable, and that the United States will continue to lead the global fight against climate change.

II. GLOBAL WARMING IS A NATIONAL SECURITY ISSUE, NOT JUST AN ENVIRONMENTAL ISSUE

The Clean Power Plan is not only important to the United States' leadership role in global efforts to combat climate change. The Department of Defense has recognized that, far from a purely environmental issue, climate change presents an "urgent and growing threat to our national security, contributing to increased natural disasters, refugee flows, and conflicts over basic resources such as food and water."²⁷ In short, global warming makes the world more volatile and less safe — which provides another reason why concerted, persistent action by the United States is of paramount importance.

Over the past decade, American military leaders consistently have highlighted the national security implications of global warming — warnings that far predate the Obama Administration.²⁸ In 2010, the Defense Department

²⁷ United States Dep't of Defense, *National Security Implications of Climate-Related Risks and a Changing Climate* at 3 (July 23, 2015) ("National Security Implications Report"), <http://archive.defense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf?source=govdelivery>.

²⁸ See, e.g., Juliet Eilperin, *Military Sharpens Focus on Climate Change*, Wash. Post, Apr. 15, 2007, www.washingtonpost.com/wp-

declared that climate change “may spark or exacerbate future conflicts” when combined with other factors, such as rising demand for resources, the emergence of new strains of disease, and the “profound cultural and demographic tensions” that persist in many parts of the world.²⁹ And, in the July 2015 National Security Implications Report, the Department of Defense reiterated that a “[a] changing climate increases the risk of instability and conflict overseas and has implications” for both the Department’s operations abroad and the “human security of other nations.”³⁰

Specifically, “[g]lobal climate change will have wide-ranging implications for U.S. national security interests over the foreseeable future because it will aggravate existing problems — such as poverty, social tensions, environmental degradation, ineffectual leadership, and weak political institutions — that threaten domestic stability in a number of countries.”³¹ Climate change increases the frequency and severity of drought, flooding, and high temperatures, which have

dyn/content/article/2007/04/14/AR2007041401209.html (discussing military assessments of global warming from as early as 2000 and 2004).

²⁹ United States Dep’t of Defense, *Quadrennial Defense Review Report* at 7 (Feb. 2010), www.defense.gov/Portals/1/features/defenseReviews/QDR/QDR_as_of_29JAN10_1600.pdf.

³⁰ National Security Implications Report at 3.

³¹ *Id.*

ripple effects across the globe, from the Arctic to sub-Saharan Africa.

Significantly, those effects are likely to be most pronounced in already-fragile countries and populations.³² From 2006 to 2011, for example, a multi-year drought in Syria “contributed to massive agriculture failures and population displacements,” adding to the instability that already existed in Syria’s urban centers.³³ The Defense Department also noted that the 2010 flooding in Pakistan, the worst in the country’s history, prompted large-scale Defense Department relief efforts — as did Super Storm Sandy here in the United States.³⁴ If global warming is left unchecked, severe weather events will become increasingly common, undermining peace and stability and requiring the Defense Department to direct personnel and resources toward humanitarian aid.

Indeed, the Defense Department describes climate change as a “threat multiplier,” because it “will have the greatest impact on areas and environments already prone to instability,” which could in turn contribute to “systemic breakdowns.”³⁵ Populations already riven by conflict over water shortages, including in Africa and the Middle East, will face “heightened competition” for

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 8.

water and other limited natural resources.³⁶ Furthermore, the Defense Department and its affiliated global organizations link climate change to the spread of disease, which again particularly affects “vulnerable populations and . . . state stability in places already struggling with fragility and conflict.”³⁷ To address these issues, the Defense Department has instituted or plans to institute climate-related mitigation and relief programs around the world.³⁸ The Defense Department added, “[a]lthough climate-related stress will disproportionately affect fragile and conflict-affected states, even resilient, well-developed countries are subject to the effects of climate change in significant and consequential ways.”³⁹

CONCLUSION

The United States’ efforts to curb carbon emissions and lead a global battle against rising temperatures is of critical importance to American foreign policy and national security. The successful implementation of the Clean Power Plan is central to these efforts.

³⁶ *Id.*

³⁷ *Id.* at 7.

³⁸ *Id.* at 9-13 (describing climate-risk management and relief programs).

³⁹ *Id.* at 14.

Respectfully submitted,

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April 1, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), D.C. Circuit Rule 32(a), and the Court's order of January 28, 2016, the undersigned certifies that this brief complies with the applicable type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C), D.C. Circuit Rule 32, and the Court's order. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 2,742 words. The word count was calculated using Microsoft Office Word 2013.

/s/ David C. Frederick

David C. Frederick

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of April, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ David C. Frederick _____

David C. Frederick