

THE INTERNATIONAL AND DOMESTIC LAW OF CLIMATE CHANGE

A Binding International Agreement Without the Senate or Congress?

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The perception of the United States as a laggard or malingerer on climate change is widespread. The reality, however, is largely underappreciated and considerably more nuanced, both in terms of the substance of U.S. domestic action and its engagement with international processes. Unusual if not unique attributes of the United States' domestic political, legal, and constitutional structure have come together on the climate issue in a revealing manner – one that thrusts the United States' difficulties in managing foreign affairs while maintaining the domestic rule of law on heavily regulatory issues such as environment into sharp relief. To that extent, the United States' difficulties in reconciling international and domestic law and policy on this issue are emblematic of larger challenges confronting transnational law: the need simultaneously to grapple with a variety of municipal systems with diverse domestic constitutional processes and constraints.

This presentation proposes that neither Senate advice and consent nor new Congressional legislation is necessarily a condition precedent to the United States' becoming a party to an agreement to be adopted at the 21st Conference of the Parties to the UN Framework Convention on Climate Change to be held in Paris in December 2015. Depending on the form of such an agreement, which is presently under negotiation, the President's Climate Action Plan could provide sufficient domestic legal authority for its domestic implementation, overcoming the legal necessity for interaction with the Congress either before or after its conclusion.

In making this argument, the presentation disaggregates U.S. climate policy as it has developed to the present from a structural point of view. Among the subjects analyzed are (1) the extent of the Executive's (President's) powers in foreign relations on climate and related issues; (2) the strengths and limitations of existing federal legislation; (3) options available under existing legislation, both those that have already been put in place and those in the process of implementation; (4) the extent, if any, of the need for additional legislation, and the transnational implications of the absence of additional legislative authority; (5) the role and powers of sub-federal governmental units, and in particular the states and their actions to date; and (6) the role of the courts. Taken as a whole, the presentation is a case study in challenges and obstacles encountered in reconciling domestic and transnational law in the U.S. constitutional system, as well as the tensions between the Congress and the Executive in a foreign policy context.

For further information:

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