

AVOIDING GRIDLOCK THROUGH UNILATERAL EXECUTIVE ACTION: THE OBAMA ADMINISTRATION'S CLEAN POWER PLAN

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I. INTRODUCTION

When President Obama assumed office in January 2009, there was universal agreement among the supporters of government action that the best way to reduce emissions of the greenhouse gases (“GHGs”) that contribute to climate disruption was through legislation.¹ Although a cap-and-trade bill passed the House of Representatives by the end of that year,² a bipartisan climate disruption bill encountered gridlock in the Senate,³ and the best opportunity to pass legislation in a generation was lost. When the 2010 elections placed the House under the control of a Tea Party-influenced Republican Party,⁴ gridlock was assured for the indefinite future.

Faced with the prospect of continuing gridlock in Congress, the Obama Administration seized the initiative. Relying on an ambitious interpretation of its existing authorities under the Clean Air Act, the Environmental Protection Agency (“EPA”) promulgated three sets of regulations to reduce GHG emissions from fossil fuel-fired power plants: forcing fossil fuel-fired power plants to employ the best available control technology for

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1. See Tora Skodvin & Steinar Andresen, *An Agenda for Change in U.S. Climate Policies? Presidential Ambitions and Congressional Powers*, 9 INT’L ENVTL. AGREEMENTS (SPECIAL ISSUE) 263, 264 (2009) (examining how best to pursue climate change regulation).

2. Daniel J. Weiss, *Anatomy of a Senate Climate Bill Death*, CTR. FOR AM. PROGRESS (Oct. 12, 2010), <https://www.americanprogress.org/issues/green/news/2010/10/12/8569/anatomy-of-a-senate-climate-bill-death>.

3. *Id.*

4. Russell Berman, *The Class of 2010 Heads Home*, THE ATLANTIC (Feb. 22, 2016), <http://www.theatlantic.com/politics/archive/2016/02/house-republican-tea-party-class-2010-leaves-congress/463227>.

reducing GHG emissions when they modified existing sources; establishing GHG emissions limitations for new fossil fuel-fired power plants; and establishing guidelines and requirements for state programs to reduce GHG emissions from nearly all existing fossil fuel-fired power plants.⁵ Determined to make GHG emissions reduction a signature accomplishment of his administration, President Obama participated in the COP21 international conference in Paris, which adopted GHG reduction goals that,⁶ while not legally binding on the United States, will nevertheless be difficult to abandon without serious diplomatic repercussions. The President's unilateral actions generated bitter complaints from Republican leaders that he was exceeding his powers, but their legislative attempts to overturn the regulations failed.⁷

Using the battles in Congress over climate disruption regulation as a case study, this article will describe the gridlock that has prevented Congress from having a say on that critically important issue and the Obama Administration's response to the gridlock. Federal health, safety, and environmental regulation—which has always been highly polarizing between advocates of strong regulation and the regulated industries—has become highly politicized as the Republican Party, which, driven by a Tea Party faction funded by interests strongly opposed to regulation, has moved away from its once-benign, if not somewhat favorable, stance on health, safety, and environmental regulation to a position of adamant opposition to any environmental regulation of any kind. This unyielding stance has mystified some members of the regulated industries who prefer the certainty that comes with compromise. Congressional gridlock has ensued. This article will analyze the benefits and detriments of partisan gridlock, explore the pros and cons of executive branch circumvention of the legislative process to avoid policymaking gridlock, and draw some rather pessimistic conclusions about the prospects of suggestions to end congressional gridlock in the context of critical environmental issues like climate disruption.

5. See *infra* notes 210–15 and accompanying text.

6. John D. Sutter et al., *Obama: Climate Agreement 'Best Chance We Have' to Save the Planet*, CNN (Dec. 14, 2015, 1:02 AM), <http://www.cnn.com/2015/12/12/world/global-climate-change-conference-vote>.

7. *Id.*

II. CLIMATE POLICYMAKING AND GRIDLOCK

A. Climate Disruption Legislation in the 111th Congress

As the 111th Congress convened in 2009, the prospects for comprehensive climate disruption legislation had never been better.⁸ With a Democrat in the Oval Office, a Democratic majority in the House of Representatives, and a filibuster-proof majority of sixty Democrats in the Senate,⁹ the electric power industry assumed that Congress would pass a bill that would change the way that it did business.¹⁰ The debate would shift from whether GHG emissions cause global warming to how much the nation should spend on reducing GHG emissions and who would pay for it.¹¹ Sensing that the time was ripe for change, a broad coalition of thirty-two environmental groups, large manufacturing companies, and six energy and electric utility companies, called the Climate Action Partnership, prepared a “Blueprint for Legislation” that advocated a nationwide cap-and-trade program with the goal of reducing GHG emissions forty-two percent from 2005 levels by 2030 and eighty percent by 2050.¹²

i. The Waxman-Markey Bill Passes the House

President Obama’s proposed budget for fiscal year 2010 contained a broad description of a cap-and-trade climate disruption bill with a goal of a fourteen percent reduction in GHG emissions below the 2005 level by 2020 and an eighty-three percent reduction by 2050.¹³ The chairman of the House Energy and Commerce Committee, Henry Waxman (D-Cal.), and Speaker

8. See generally Thomas O. McGarity, *The Disruptive Politics of Climate Disruption*, 38 NOVA L. REV. 393, 423–57 (2014) (describing a more detailed description of congressional consideration of climate disruption legislation during the 111th Congress).

9. Margaret Kriz, *Changed Climate for Global Warming Law*, NAT’L J., Feb. 4, 2009, 2009 WLNR 27497260; *Obama Team Seen Bringing Cohesion to Administration Response on Warming*, 15 *Env’tl. Compliance Bull. (BNA)* 403, 15 BECB 403 (BL) (Dec. 29, 2008).

10. Cathy Cash, *Obama Election Steers Industry Straight to Cap on Carbon, but How and When Remain Unknown*, *ELECTRIC UTIL. WK.*, Nov. 10, 2008, 2008 WLNR 22425719.

11. Juliet Eilperin, *Economics of Climate Change Move to the Fore*, *WASH. POST* (Oct. 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/27/AR2009102701772.html>.

12. Kriz, *supra* note 9; Steven Mufson, *Coalition Agrees on Emissions Cuts*, *WASH. POST*, Jan. 15, 2009, at D1.

13. Jim Tankersley, *Cap-and-Trade System to Raise Research Funds*, *L.A. TIMES* (Feb. 27, 2009), <http://articles.latimes.com/2009/feb/27/nation/na-elements-energy27>.

of the House Nancy Pelosi (D-Cal.) agreed that his committee should report out a bill by Memorial Day in anticipation of enactment by the end of 2009.¹⁴ In a meeting with White House staff and Senate Environment and Public Works Chairwoman Barbara Boxer (D-Cal.), Waxman agreed to move forward with a cap-and-trade climate disruption bill in both houses.¹⁵ Because Boxer had the votes to report out virtually any bill, the House would move forward during 2009 to pass a bill to which the Senate could react.¹⁶

Waxman and Representative Ed Markey (D-Mass.) introduced a 648-page discussion draft in March 2009 that capped GHG emissions at twenty percent below 2005 levels by 2020, at forty-two percent in 2030, and at eighty-three percent in 2050.¹⁷ A renewable energy mandate required electrical power generators to derive at least twenty-five percent of their production from renewable energy by 2025.¹⁸ Although the electric power industry supported cap-and-trade in principle, it objected to many aspects of the bill, especially the renewable energy mandate and the fact that it did not distribute the allowances (each entitling sources to emit one ton of GHGs) to emitters based on their historical emissions.¹⁹ The U.S. Chamber of Commerce, the Heritage Foundation, and the Competitive Enterprise Institute strongly

14. Cathy Cash, *Shift from Dingell to Waxman Signals New Era for Energy Interests; Climate Agenda Toughens*, ELECTRIC UTIL. WK., Nov. 24, 2008, 2008 WLNR 23557519; *Hearings Draw Out the Climate Change, Clean Coal, Practical Sides of Appointees*, PLATTS COAL OUTLOOK, Jan. 19, 2009, 2009 WLNR 1963512.

15. Darren Goode, *Climate Discussions Intensify Across Capitol*, CONGRESSDAILY, Mar. 20, 2009, 2009 WLNR 5333544.

16. *Id.*

17. Joanna Franco, *House Committee Unveils Broad Climate Change Draft Legislation*, OCTANE WK., Apr. 6, 2009, ProQuest ID 236438380; Kathleen Hart, *House Energy, Climate Change Bill Cuts Carbon Emissions 20% by 2020*, SNL ENERGY COAL REP., Apr. 6, 2009, ProQuest ID 879644684.

18. John M. Broder, *2 Democrats Introduce Far-Reaching Bill on Energy and Warming*, N.Y. TIMES, Apr. 1, 2009, at A19; Ian Talley & Stephen Power, *House Emissions Bill Postpones Decisions on Cost*, WALL STREET J. (Apr. 1, 2009, 12:01 AM), <http://www.wsj.com/articles/SB123851502766874087>.

19. Cathy Cash, *Moderates Try to Tone Down Stringent Climate Bill*, INSIDE ENERGY WITH FED. LANDS, Apr. 27, 2009, at 1, 2009 WLNR 8941907; Juliet Eilperin, *House Panel Begins Debate on Climate Bill*, WASH. POST (Apr. 23, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/22/AR2009042202006.html>.

opposed the draft because they were not convinced that human activities contributed to climate disruption.²⁰

All of the Energy and Commerce Committee's Republican members objected to any bill that adopted a cap-and-trade approach.²¹ Waxman and Markey also had to deal with Democrats on the committee from coal- and gas-producing states, who wanted to protect their local industries, and from midwestern states who worried about the forced retirement of electric power plants that powered manufacturers.²² After a considerable amount of horse-trading, the Democrats on the committee agreed on a 932-page bill that lowered the 2020 target from twenty percent to seventeen percent below 2005 levels and reduced the renewable energy mandate from twenty-five percent to twenty percent.²³ Railing against the "astronomical" cost of the bill and the threat of "environmental socialism,"²⁴ Republican committee members came to the markup session with more than four hundred proposed amendments, most of which carried the message that the bill would destroy jobs, raise electricity rates, and damage the economy with little beneficial effect on the environment.²⁵ The

20. Julie Kosterlitz, *The Chamber's Summer Offensive*, NAT'L J., July 4, 2009, at 46, 46-47; Ben Lieberman, *Proposed Global Warming Bills and Regulations Will Do More Harm than Good*, HERITAGE FOUND. (Oct. 23, 2009), <http://www.heritage.org/research/reports/2009/10/proposed-global-warming-bills-and-regulations-will-do-more-harm-than-good>; Fred L. Smith, Jr. & William Yeatman, *Cap and Traitors*, WASH. TIMES (July 9, 2009), <http://www.washingtontimes.com/news/2009/jul/05/cap-and-traitors>; see Anne C. Mulkern, *Coal Industry Sees Life or Death in Senate Climate Debate*, N.Y. TIMES (July 6, 2009), <http://www.nytimes.com/gwire/2009/07/06/06greenwire-coal-industry-sees-life-or-death-in-senate-climate-debate-49519.html?pagewanted=all> (describing details of the drafts of the bills).

21. See *Backers of CO2 Cap See Immediate Financing from Future Trading*, INSIDE THE EPA, Jan. 16, 2009, 2009 WLNR 790578.

22. Cash, *supra* note 14; John M. Broder, *Geography is Dividing Democrats over Energy*, N.Y. TIMES, Jan. 27, 2009, at A1.

23. Dean Scott, *Energy Committee Democrats Reach Deal on Key Issues, Setting Stage for Markup*, 40 ENV'T REP. (BNA) 1103, 40 ENR 1103 (May 15, 2009); Darren Goode, *Dems, Industry Groups Press Cap-and-Trade Concerns*, CONGRESSDAILY, June 9, 2009, at 14, EBSCOhost 41550890; *Cap and Trade, with Handouts and Loopholes*, THE ECONOMIST (May 21, 2009), <http://www.economist.com/node/13702826>.

24. Darren Goode, *EPA: Revised Panel Draft Less Costly to Firms, Consumers*, CONGRESSDAILY, May 19, 2009, at 17, EBSCOhost 40091372; Kathleen Hart, *Waxman Opens Weeklong Debate of Landmark House Cap-and-Trade Bill*, SNL ELECTRIC UTIL. REP., May 25, 2009, LexisNexis.

25. Cathy Cash & Jean Chemnick, *Waxman Touts US Democrats' Energy Bill*, 87 PLATTS OILGRAM NEWS 9 (2009), 2009 WLNR 10538640; Hart, *supra* note 24; Stephen Power & Siobhan Hughes, *House Democrats Reach Accord on a Climate Bill*, WORLD NEWS BLOG (May 9, 2013), <http://worldblog.eu/2009/05/13/house-democrats-reach-accord-on-a-climate-bill>.

committee voted out the bill with the support of one Republican and without the support of four Democrats.²⁶

After more horse-trading with the chairman of the Agriculture Committee, who wanted to protect rural electric companies and municipal utilities,²⁷ the bill ballooned to a 1400-page behemoth that contained a little something for every special interest. It capped GHG emissions at seventeen percent below 2005 levels by 2020, forty-two percent below those levels by 2040, and eighty-three percent below those levels in 2050, and it had no renewable energy mandate.²⁸ Environmental groups were not pleased with the reductions in the goals, the loss of the renewable energy mandate, or the giveaways, but they nevertheless supported the bill.²⁹ Several of the interest groups expressed support for the bill but planned to press the Senate for more attractive provisions.³⁰ The National Mining Association, the Chamber of Commerce, and the National Association of Manufacturers opposed the bill.³¹ It passed by a 219–212 margin with forty-four Democrats and all but eight Republicans voting against it.³²

ii. Climate Disruption Legislation in the Senate

To ensure that she had the sixty votes necessary to stop a certain Republican filibuster, Senator Boxer needed to make deals

26. Darren Goode, *Panel Completes Climate Marathon*, CONGRESSDAILY, May 22, 2009, at 18, EBSCOhost 41024172.

27. Darren Goode, *Waxman, Peterson Have Climate Deal*, CONGRESSDAILY, June 24, 2009, at 21, EBSCOhost 42833166; Dean Scott, *Climate Bill Slated for House Floor Vote; Waxman, Other Chairmen Reach Agreements*, 40 Env't Rep. (BNA) 26, 40 ENR 1489 (June 26, 2009).

28. Greg Hitt & Naftali Bendavid, *U.S. News: Obama Wary of Tariff Provision—Trade Proposal in Climate Bill a Potential Problem as Action Moves to Senate*, WALL STREET J., June 29, 2009, at A3.

29. *To Move House Climate Bill, Activists Soften Push for GHG Standards*, INSIDE EPA WKLY. REP., June 26, 2009, LexisNexis.

30. Cathy Cash & Lisa Weinzimer, *House Leaders Make Dozens of Deals to Draw Votes for Groundbreaking Climate-Energy Bill*, ELECTRIC UTIL. WK., June 29, 2009, LexisNexis; Michael Lustig, *Utility Industry Leaders Declare Waxman-Markey Bill 'Greatly Improved'*, SNL ELECTRIC UTIL. REP., June 29, 2009, LexisNexis.

31. *House-Passed Climate Bill Will Promote Renewable Energy and Create Jobs, Says Majority*, FOSTER NAT. GAS REP., July 3, 2009, at 1, LexisNexis; Hitt & Bendavid, *supra* note 28.

32. *H.R.2454 (111th): American Clean Energy and Security Act of 2009*, GOVTRACK, <http://www.govtrack.us/congress/votes/111-2009/h477> (last visited Oct. 11, 2016).

with sixteen Democratic senators from the same states that Waxman had to accommodate.³³ Another strategic problem for supporters was that Senator Max Baucus (D-Mont.), who was from a major coal-producing state, claimed that the Finance Committee that he chaired had jurisdiction over any cap-and-trade bill.³⁴ The 2009 summer recess witnessed massive public relations efforts costing millions of dollars by various industries, business groups like the Chamber of Commerce, the National Manufacturers Association, and conservative think tanks, in an attempt to move public opinion in states with Democratic senators.³⁵ A new group called Americans for Prosperity, created and funded by the Koch brothers and other oil and gas interests in response to a call by a television commentator for another Boston Tea Party, organized protests at town hall meetings held by members of Congress and grassroots events at which speakers excoriated the House bill.³⁶ Environmental groups responded with advertising, phone banks, grassroots organizing, and a “Made in America” tour to demonstrate how climate disruption legislation would create thousands of green jobs.³⁷

After Senators Barbara Boxer and John Kerry (D-Mass.) failed to come up with a bill that satisfied Democratic senators from coal-producing, farm-belt, oil-patch, and rust-belt states,³⁸ Senator Kerry reached out to Senators Lindsey Graham (R-S.C.) and Joe Lieberman (I-Conn.) to come up with a less stringent bipartisan bill that could attract sixty affirmative votes.³⁹ As they

33. *Senate Democrats Take Steps to Build Support for Climate Bill*, INSIDE EPA WKLY. REP., July 17, 2009, LexisNexis; Broder, *supra* note 22.

34. Cathy Cash, *Baucus Claims Key Aspect of Senate Climate Bill*, INSIDE ENERGY WITH FED. LANDS, July 27, 2009, at 1, LexisNexis.

35. Cathy Cash, *EPA’s “Endangerment Finding” Could Spur Senate to Act on Climate Legislation*, INSIDE ENERGY WITH FED. LANDS, Aug. 31, 2009, LexisNexis; Darren Goode, *Climate Bill Backers Unveil Large-Scale Effort for 28 States*, CONGRESSDAILY AM, Sept. 9, 2009, EBSCOhost 44181349; David A. Fahrenthold, *Environmentalists Slow to Adjust in Climate Debate*, WASH. POST (Aug. 31, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/30/AR2009083002606.html>.

36. Jane Mayer, *Covert Operations*, NEW YORKER (Aug. 30, 2010), <http://www.newyorker.com/magazine/2010/08/30/covert-operations>.

37. Cathy Cash, *Unions, Enviro Pressure Congress on Climate Bill*, PLATTS COAL OUTLOOK, Aug. 24, 2009, at 1, LexisNexis.

38. McGarity, *supra* note 8, at 444–45.

39. Jean Chemnick, *Kerry-Graham-Lieberman Talks Form New Power Axis for Senate Climate Bill*, INSIDE ENERGY WITH FED. LANDS, Nov. 9, 2009, at 3, LexisNexis; John Kerry & Lindsey Graham, *Yes We Can (Pass Climate Change Legislation)*, N.Y. TIMES, Oct. 11, 2009, at

added elements like expedited licensing of nuclear power plants and access to more offshore areas for oil and gas drilling to attract Republican votes,⁴⁰ the Chamber of Commerce signaled that it might support the bill they were drafting.⁴¹ Deeply concerned that the effort might bear fruit, the American Energy Alliance, a group supported by the coal industry,⁴² aired a series of advertisements in South Carolina urging voters to oppose Senator Graham's "national energy tax called cap-and-trade."⁴³ At dozens of rallies in the spring of 2010, Tea Party activists, who made defeating climate disruption legislation one of their top priorities, decried "cap and tax" and the alleged Democrats' war on coal.⁴⁴

Senate Majority Leader Harry Reid (D-Nev.) roiled the waters in April when he announced that the Senate would be taking up immigration reform ahead of climate disruption legislation.⁴⁵ Senator Graham regarded this as a partisan move to attract Hispanic votes in the upcoming election, which was inconsistent with the bipartisan atmosphere that had surrounded negotiations over the climate disruption bill.⁴⁶ He announced that he would no longer sponsor the bill if immigration reform remained on the Senate's agenda.⁴⁷ Graham may also have been looking for a way out of sponsorship in the wake of the American Energy Alliance's advertising campaign and strong criticism from

WK11. See generally Margaret Kriz Hobson, *Skies Still Cloudy for Climate Bill*, NAT'L J., Mar. 6, 2009, at 9, EBSCOhost 48477472.

40. Darren Goode, *Boxer Mulls Exit Strategy for Moving Bill*, CONGRESSDAILY, Nov. 4, 2009, at 14, EBSCOhost 45026862; Juliet Eilperin, *Democrats Move on Emissions Bill*, WASH. POST (Nov. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/05/AR2009110502195.html>.

41. Darren Samuelsohn, *Kerry, Lieberman to End the Suspense with Climate Bill Rollout Today*, N.Y. TIMES (May 12, 2010), <http://www.nytimes.com/cwire/2010/05/12/12climatewire-kerry-lieberman-to-end-the-suspense-with-cli-19936.html?pagewanted=all>.

42. Juliet Eilperin, *Climate Bill Faces Hurdles in Senate*, WASH. POST (Nov. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/01/AR2009110102593.html>.

43. *Id.*

44. John M. Broder, *'Cap and Trade' Loses Its Standing as Energy Policy Choice*, N.Y. TIMES, Mar. 25, 2010, at A13.

45. Laura Meckler, *Democrats Revive Immigration Push*, WALL STREET J. (Apr. 22, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703404004575198601410995496>.

46. Jim Tankersley, *Climate Bill Abruptly Put on Hold*, L.A. TIMES (Apr. 24, 2010), <http://articles.latimes.com/2010/apr/24/nation/la-na-climate-graham-20100425>.

47. Darren Goode & Chris Strohm, *Graham Wants Immigration Off Table for Year or He Bolts*, CONGRESSDAILY AM, Apr. 27, 2010, at 12, EBSCOhost 50135454.

local Tea Party activists.⁴⁸ Although Senator Reid quickly backtracked on immigration, Graham withdrew his support for the bill.⁴⁹ In late July, Senator Reid announced that since no bill could command the support of the sixty senators needed to overturn a Republican filibuster, he was removing climate disruption from the legislative agenda.⁵⁰

Climate disruption became a partisan issue for one of the two major parties. No matter how much supporters of a climate disruption bill were willing to concede to the various industries, Republican members of Congress were not prepared to support any climate disruption legislation. Hard-line climate deniers remained steadfast in their opposition to any climate disruption bill.⁵¹ Moderate Republicans, like Senator Graham, who might have been persuaded to vote for climate disruption legislation that had the support of affected industries, now had to fear retaliation, and even the possibility of being “primaried”⁵² by Tea Party activists.

B. Obama Administration Activity During the 111th Congress

President Obama’s EPA Administrator, Lisa Jackson, made climate disruption a high priority. In April 2007, the Supreme Court in *Massachusetts v. EPA* held that the EPA had authority to regulate GHGs from automobiles because they easily came within the statute’s “capacious” definition of “air pollutant.”⁵³ During the remainder of the George W. Bush Administration, the EPA

48. See Jim Tankersley & Richard Simon, *Sen. Lindsey Graham’s Bipartisan Efforts Bog Down*, L.A. TIMES (Apr. 28, 2010), <http://articles.latimes.com/2010/apr/28/nation/la-na-graham-20100428>.

49. Dean Scott, *Climate Bill Suffers Setback as Senator Graham Withdraws Support over Scheduling Dispute*, 41 ENV’T REP. (BNA) 928, 41 ENR 928 (Apr. 30, 2010).

50. Amy Harder, *Pending EPA Emission Regulations Move Front and Center*, CONGRESSDAILY AM, July 23, 2010, at 13, EBSCOhost 52547276; Stephen Power, *Senate Halts Effort to Cap CO2 Emissions*, WALL STREET J. (July 23, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703467304575383373600358634>.

51. Brad Johnson, *GOP Senate Candidates Oppose Climate Science and Policy*, THINKPROGRESS (Sept. 13, 2010), <https://thinkprogress.org/gop-senate-candidates-oppose-climate-science-and-policy-f06293d0e3d4#.facjic8kx>.

52. Robert G. Boatright, *Getting Primaried: The Growth and Consequences of Ideological Primaries 1* (Oct. 14–16, 2009) (unpublished conference paper) (on file with the University of Akron).

53. *Massachusetts v. EPA*, 549 U.S. 497, 500 (2007).

declined to “rush to judgment” on the remaining issue of whether emissions of GHGs from automobiles may reasonably be anticipated to endanger human health or the environment.⁵⁴ Administrator Jackson quickly made the necessary “endangerment” finding,⁵⁵ and the agency staff worked with the National Highway Traffic Safety Administration to promulgate joint regulations reducing GHG emissions from automobiles.⁵⁶

The affected industries sought help from their allies in Congress. Senator Lisa Murkowski (R-Alaska) offered an appropriations bill rider that would have prevented the EPA from regulating GHGs, and a joint resolution of disapproval that would have overturned the endangerment finding under the Congressional Review Act (“CRAAct”).⁵⁷ Representative Joe Barton (R-Tex.) introduced the CRAAct resolution in the House.⁵⁸ The Republican leadership in both houses strongly supported the CRAAct resolution,⁵⁹ but the Obama Administration urged Democrats to support the EPA’s finding.⁶⁰ Both Republican efforts failed in the Democrat-controlled Congress.⁶¹ Several other attempts to pass riders to appropriations and defense bills to prevent the EPA from regulating GHG emissions also failed.⁶² But the effort attracted sufficient support from Democrats to force the

54. Ian Talley, *Politics & Economics: EPA Delays CO2 Ruling, Angering Bush Critics*, WALL STREET J., Mar. 28, 2008, at A6.

55. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

56. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2436–37 (2014).

57. Doug Obey & Kate Winston, *GOP Rider Poses Key Test for Senate Democrats on EPA’s GHG Powers*, INSIDE EPA WKLY. REP., Sept. 25, 2009, at 7, LexisNexis; *Senator Murkowski and Colleagues Will Try to Stop EPA from Regulating Climate Under Clean Air Act*, FOSTER NAT. GAS REP., Dec. 25, 2009, at 1, LexisNexis; Juliet Eilperin, *Senators Try to Thwart EPA Efforts to Curb Emissions*, WASH. POST (Jan. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104512.html>.

58. Amy Harder, *GOP Seeks to “Rein In” EPA on Finding*, CONGRESSDAILY PM, Dec. 17, 2009, ProQuest ID 207634994.

59. *Id.*; Kathleen Hart, *APPA Urges Senators to Support Resolution to Stop EPA from Regulating Carbon*, SNL POWER DAILY, Feb. 24, 2010, LexisNexis.

60. Darren Goode, *White House Steps Up Effort to Kill Murkowski Resolution*, CONGRESSDAILY AM, June 10, 2010, ProQuest ID 366418462.

61. Steven D. Cook, *Senate Rejects Murkowski Resolution Aimed at Halting Greenhouse Gas Rules*, 41 ENV’T REP. (BNA) 1291, 41 ENR 1291 (June 11, 2010).

62. Dean Scott, *Showdown over EPA Emissions Rules Avoided as Senate Halts Consideration of Defense Bill*, 41 ENV’T REP. (BNA) 2116, 41 ENR 2116 (Sept. 24, 2010); Herman Wang & Brian Hansen, *House Republicans Fail to Stop EPA Effort on GHGs*, 88 PLATTS OILGRAM NEWS 8, 8 (2010), LexisNexis.

leadership to abandon the appropriations bill for fiscal year 2011 and pass a continuing resolution to fund the EPA through December 2010 without the Murkowski rider.⁶³

i. The Tailoring and Triggering Rules

Administrator Jackson recognized that once she made the endangerment finding, she would have to address the Clean Air Act's "new source review" ("NSR") requirement that new or modified stationary sources install the best available control technology ("BACT") if they had the potential to emit 250 tons per year ("tpy") (or, in the case of modified sources, increased emissions by more than de minimis amounts) of any pollutant "subject to regulation" under the statute.⁶⁴ This presented a two-fold dilemma. First, the agency had to determine what actions "triggered" the NSR program's obligation to determine BACT for carbon dioxide ("CO₂").⁶⁵ Second, the agency had to decide whether to apply the 250 tpy threshold literally to sources of CO₂, in which case the number of NSR permits would jump from 800 to 82,000.⁶⁶

The triggering rule that the EPA unveiled on April 2, 2010, provided that the BACT requirement for GHGs would kick in on January 2, 2011.⁶⁷ The "tailoring rule" that the EPA promulgated in May 2010 to address the second problem set the thresholds at 100,000 tpy for brand new (greenfield) sources beginning in July 2011.⁶⁸ For modifications of existing sources, the rule established a threshold for the BACT requirement of 75,000 tpy for changes that resulted in an increase of emissions of other pollutants that exceeded the prescribed de minimis amounts (typically forty tpy) beginning in January 2011 (so-called "anyway sources").⁶⁹ The modification threshold for GHG emissions from sources that did

63. Wang & Hansen, *supra* note 62.

64. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2431, 2457 (2014).

65. *Id.* at 2437.

66. *Id.* at 2442–43.

67. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 52, 70, 71).

68. Steven D. Cook, *EPA Restricts Emissions Control Rules to Largest Greenhouse Gas Sources*, 41 *Env't Rep. (BNA)* 1049, 41 *ENR* 1049 (May 14, 2010).

69. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,516 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70).

not exceed the threshold for other pollutants was 100,000 tpy beginning in July 2011.⁷⁰

ii. Rockefeller-Boucher Bill to Delay the Rules for Two Years

Senator Jay Rockefeller (D-W. Va.) offered a bill in March 2010 that would have delayed the EPA's GHG regulations for two years while Congress considered climate change legislation.⁷¹ Representatives Nick Rahall (D-W. Va.), Alan Mollohan (D-W. Va.), and Rick Boucher (D-Va.) introduced an identical bill in the House.⁷² When it became clear in the summer of 2010 that legislation to reduce GHG emissions was going nowhere in the Senate, the Rockefeller bill was the last hope for companies that wanted to stop the EPA in its tracks.⁷³ Although the White House said that President Obama would veto the bill,⁷⁴ Majority Leader Harry Reid said he would allow the Senate to vote on the bill before the end of the session in December.⁷⁵ A June 2010 public opinion poll sponsored by the National Science Foundation found that seventy-five percent of the one thousand respondents agreed that human behavior was substantially responsible for global warming, and seventy-six percent favored government-required limitations on GHG emissions.⁷⁶ Only fourteen percent said that the United States should not take action to reduce GHG emissions until countries like China and India took similar action.⁷⁷ With that, Senator Thomas Carper (D-Del.) said that he might ask for consideration of an amendment to codify the EPA's tailoring rule at the same time, thereby eliminating lengthy legal challenges to

70. *Id.*; Cook, *supra* note 68.

71. Dean Scott, *House, Senate Bills Call for Two-Year Delay of EPA Greenhouse Gas Emissions Rules*, 41 Env't Rep. (BNA) 465, 41ENR 465 (Mar. 5, 2010).

72. *Activists Wrestle over Impact of Senate Bill to Delay EPA Climate Rules*, INSIDE EPA WKLY. REP., Mar. 12, 2010, LexisNexis.

73. Catherine Cash, *Pressure Mounts from Stakeholders to Block EPA's GHG Rules*, 34 PLATTS COAL OUTLOOK, Sept. 20, 2010, at 1, LexisNexis; Kathleen Hart, *Rockefeller Pushes Bill to Suspend EPA Rules on Carbon Emissions*, SNL GENERATION MKTS. WK., July 27, 2010, LexisNexis.

74. Steven D. Cook & Dean Scott, *Obama Would Veto Bill to Delay EPA Limits on Greenhouse Gas*, *White House Aide Says*, 41 Env't Rep. (BNA) 1692, 41 ENR 1692 (July 30, 2010).

75. Cash, *supra* note 73.

76. Jon A. Krosnick, *The Climate Majority*, N.Y. TIMES, June 9, 2010, at A25.

77. *Id.*

the rule.⁷⁸ The Rockefeller-Boucher bill did not make it to the Senate floor before the 2010 elections.⁷⁹

C. The 2010 Election

GHG regulation became an issue in the 2010 off-year elections as candidates put forward by the Tea Party faction of the Republican Party blamed many of the nation's ills on environmental regulation.⁸⁰ Many Tea Party candidates were firm climate change deniers.⁸¹ The mining and electric power industries contributed tens of millions of dollars to Tea Party candidates and other Republicans who took an anti-regulatory stance.⁸² Americans for Prosperity and Freedom Works, groups created and funded by fossil fuel magnates Charles and David Koch,⁸³ purchased millions of dollars worth of advertising, launched social media campaigns, and held town hall rallies that featured a color-coded timeline for upcoming EPA regulations prepared by coal industry lobbyists called the "train wreck."⁸⁴ Advertisements were "laser targeted" at Democrats in coal-producing states that voted for the Waxman-Markey bill, claiming that they had supported a "national energy tax."⁸⁵ An advertisement run by Representative Nick Rahall's opponent in

78. *Rockefeller Bid to Delay EPA Regulation Could Offer Opening for Alternative Bill*, INSIDE ENERGY WITH FED. LANDS, Aug. 9, 2010, 2010 WLNR 16787050.

79. Wayne Barber, *Rockefeller Temporarily Halts Fight for Moratorium on EPA Greenhouse Gas Rules*, SNL POWER DAILY, Dec. 21, 2010.

80. Stephen Power, *Environment Chief Caught in the Campaign Crossfire*, WALL STREET J. (Oct. 8, 2010), <http://www.wsj.com/articles/SB10001424052748704847104575532243548950392>.

81. Juliet Eilperin, *More Signs of Warming, but Legislative Climate Still Cold*, WASH. POST (Sept. 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092306312.html>.

82. Frank Rich, *The Billionaires Bankrolling the Tea Party*, N.Y. TIMES (Aug. 28, 2010), <http://www.nytimes.com/2010/08/29/opinion/29rich.html>.

83. Felicia Sonmez, *Who is "Americans for Prosperity"?*, WASH. POST: THE FIX (Aug. 26, 2010, 12:21 PM), <http://voices.washingtonpost.com/thefix/senate/who-is-americans-for-prosperit.html>.

84. John M. Broder, *Skepticism on Climate Change Is Article of Faith for Tea Party*, N.Y. TIMES, Oct. 21, 2010, at A1, A4; Coral Davenport, *EPA: The World in Microcosm*, NAT'L J., Sept. 24, 2011, at 1, EBSCOhost 65930335; Sonmez, *supra* note 83.

85. Kimberley A. Strassel, *The Cap-and-Trade Crackup*, WALL STREET J., Oct. 8, 2010, at A17.

West Virginia referred to the “Obama-Rahall-Pelosi war on coal,” even though Rahall had voted against the Waxman-Markey bill.⁸⁶

A *New York Times* poll found that only fourteen percent of Tea Party supporters believed that global warming was an environmental effect that was having an immediate impact, compared to forty-nine percent of the rest of the American public.⁸⁷ When asked for the sources for his conclusion, an Indiana Tea Party activist responded that he got his information from Rush Limbaugh and his Bible.⁸⁸ A common denominator was a visceral distrust of the federal government.⁸⁹ They were convinced by the likes of Limbaugh that the EPA’s ultimate goal was to exert control over homes, schools, churches, farms, and commercial buildings.⁹⁰

On November 3, 2010, the Republican Party captured 242 seats to the Democrats’ 193 seats in the House⁹¹ and picked up five seats in the Senate to leave the Democrats with a 53–47 majority.⁹² President Obama conceded that the Democrats took a “shellacking.”⁹³ The electorate turned control of the House of Representatives to a Republican Party with a vocal Tea Party faction that was determined to prevent the EPA from promulgating more GHG regulations.⁹⁴ One-half of the eighty-seven newly arrived House freshmen questioned whether human activities were in fact contributing to global warming.⁹⁵ The presumptive Speaker of the House, John Boehner (R-Ohio), was a

86. Jean Chemnick, *As Elections Loom, West Virginia Pols Court Coal*, INSIDE ENERGY WITH FED. LANDS, Sept. 6, 2010, at 1, 2010 WLNR 18656694.

87. Broder, *supra* note 84.

88. *Id.*

89. *Id.*

90. Coral Davenport, *EPA’s Power Struggle*, NAT’L J., Sept. 5, 2010, at 19, EBSCOhost 53987630.

91. *Election 2010: House Map*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/house> (last visited Oct. 9, 2016).

92. *Election 2010: Senate Map*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/senate> (last visited Oct. 9, 2016).

93. Jonathan Weisman & Laura Meckler, *Obama Concedes “Shellacking.”* WALL STREET J., Nov. 4, 2010, at A1.

94. John M. Broder, *Coal Industry Spending to Sway Next Congress*, N.Y. TIMES, Oct. 30, 2010, at A12.

95. Margaret Kriz Hobson, *Political Tidal Wave Turns EPA Strategy*, C.Q. WKLY., Feb. 14, 2011, at 335.

climate change denier who strongly opposed the Waxman-Markey bill as a job-killing energy tax.⁹⁶

D. The Obama Administration Soldiers On

With a Tea Party-dominated Republican Party firmly in control of the House of Representatives, President Obama recognized that there was little chance that Congress would enact cap-and-trade climate disruption legislation.⁹⁷ In fact, 156 members of Congress had signed a “No Climate Tax” pledge created by Americans for Prosperity to ensure that Congress did not pass climate disruption legislation.⁹⁸ On the day after the election, the President observed that “[c]ap and trade was just one way of skinning the cat; it was not the only way.”⁹⁹ He was going “to be looking for other means to address this problem.”¹⁰⁰ One of the other means was to de-emphasize climate disruption as an environmental problem and emphasize the job creation and money saving possibilities of green technology and energy innovation.¹⁰¹ Another was for the EPA to promulgate more climate disruption regulations.¹⁰²

Soon after they arrived in Washington, D.C., the Tea Party freshmen announced to the House leadership that they had three goals: blow up Obamacare, balance the budget, and stop the EPA from killing jobs.¹⁰³ Speaker Boehner and Majority Leader Eric Cantor (R-Va.) agreed to allow bills defunding the EPA and reversing its regulations to come to the floor early and often.¹⁰⁴ Although they were likely to die in the Democrat-controlled Senate, they would be useful as political ammunition.¹⁰⁵ The

96. John M. Broder, *Obama to Face New Foes in Global Warming Fight*, N.Y. TIMES, Nov. 4, 2010, at B5.

97. Kathleen Hart, *Leading House Republican on Energy Calls for End to Climate Focus, New EPA Rules*, SNL CAN. ENERGYWK., Oct. 25, 2010.

98. JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 273–74 (2016).

99. Broder, *supra* note 96.

100. *Id.*

101. *See id.*

102. See Brad Plumer, *Can Obama Tackle Climate Change in His Second Term?*, WASH. POST (July 5, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/21/can-obama-tackle-climate-change-in-his-second-term>.

103. Davenport, *supra* note 84.

104. *Id.*

105. *Id.*

chairpersons of the committees with jurisdiction over the EPA planned to hold many messaging hearings at which EPA officials would have to defend regulations, and they carefully selected witnesses who could challenge the science underlying EPA initiatives and make frightening predictions about how they would affect jobs and the economy.¹⁰⁶

Fossil fuel interests carefully targeted political contributions toward members of Congress who were in a position to be helpful. During the first nine months of 2011, coal mining interests donated more than \$2.8 million to federal candidates, and the electric utility industry contributed more than \$5.9 million.¹⁰⁷ The top recipients were Speaker Boehner and Representative Fred Upton (R-Mich.), the new chairman of the House Energy and Commerce Committee.¹⁰⁸ The coal industry poured \$1.5 million into Speaker Boehner's political operations.¹⁰⁹ Other top donors to Boehner's fund included American Electric Power Company and FirstEnergy Corporation, two large Ohio utility companies.¹¹⁰ By contrast, environmental groups and affiliated officials donated a total of \$356,000 to Democratic members.¹¹¹

EPA Administrator Jackson remained stoic as the agency proceeded ahead with the most controversial of all of its regulations: the new source performance standard ("NSPS") for GHG emissions from power plants and the existing source performance standard ("ESPS") that section 111(d) of the Clean Air Act required the agency to promulgate upon completion of the NSPS.¹¹² But it was not clear that the White House would support her, as the White House initiated an outreach program to business leaders to hear their concerns about federal

106. Coral Davenport, *Heads in the Sand*, NAT'L J., Dec. 1, 2011, ProQuest ID 1418430281.

107. Manuel Quinones, *Coal Industry Deploys Donations, Lobbying as Its Issues Gain Prominence*, N.Y. TIMES (Oct. 13, 2011), <http://www.nytimes.com/gwire/2011/10/13/13g reenwire-coal-industry-deploys-donations-lobbying-as-it-45582.html?pagewanted=all>.

108. *Id.*

109. Brody Mullins, *Coal Industry Backs Boehner; Donations of \$1.5 Million this Year Show Effort to Limit Environmental Rules*, WALL STREET J. (Sept. 13, 2011), <http://www.wsj.com/articles/SB10001424053111904103404576556871267990448>.

110. *Id.*

111. Quinones, *supra* note 107.

112. John M. Broder, *E.P.A. Chief Stands Firm as Tough Rules Loom*, N.Y. TIMES, July 6, 2011, at A13.

regulations.¹¹³ One senior Obama Administration official noted that “[i]f the administration gets it wrong, we’re looking at years of litigation, legislation and public and business outcry,” but “[i]f we get it right, we’re facing the same thing.”¹¹⁴

E. Attempts to Stymie Climate Disruption Regulation in the 112th Congress

The coal industry and coal burning power companies hoped that the Republican gains in Congress would result in more critical oversight of the EPA and legislation limiting or overturning the climate disruption regulations.¹¹⁵ They were prepared to spend millions of dollars in lobbying fees and campaign contributions to persuade members to waylay the EPA’s regulatory onslaught.¹¹⁶ They launched a massive lobbying blitz directed at the EPA and the committees in Congress that had the power to influence or reverse the EPA’s decisions. During the first nine months of 2011, mining interests spent \$16.5 million and electric utility interests spent \$78.4 million on lobbying the EPA and Congress.¹¹⁷ They also spent millions of dollars on public relations initiatives aimed at generating “false scientific uncertainty” and promoting “synthetic experts” to belittle the risks posed by GHG emissions.¹¹⁸ They were not disappointed.

Prominent Republican members of Congress denied human responsibility for climate disruption.¹¹⁹ House Science, Space, and Technology Committee Chairman Ralph Hall (R-Tex.) was convinced that human activities were not affecting the climate because humans were incapable of “control[ling] what God controls.”¹²⁰ Most of the remaining Republican members were simply unwilling to discuss the issue out of respect for the power of

113. Bridget DiCosmo, *Jackson Urges Industry to Be ‘Honest’ with GOP About EPA Rules’ Effects*, INSIDEEPA.COM (Jan. 21, 2011), <http://iwpnews.com/EPA-Daily-News/Daily-News/feed/rss/menu-id-1046/Page-562.html>.

114. John M. Broder, *Partisan Clashes Loom as E.P.A. Moves on Gases*, N.Y. TIMES, Dec. 31, 2010, at A15.

115. Broder, *supra* note 94.

116. *Id.*

117. Quinones, *supra* note 107.

118. Jonathan Crawford, *Corporate Influence in Climate Debate Spurs Need for Disclosure*, *Activists Say*, SNL ELECTRIC UTIL. REP., June 4, 2012.

119. *See, e.g.*, Davenport, *supra* note 106.

120. *Id.*

the Tea Party faction of the party and the coal and electric power industries.¹²¹ Representative Darrell Issa (R-Cal.), chairman of the House Oversight and Government Reform Committee, reluctantly acknowledged that increased CO₂ emissions were causing the Earth to become warmer, but that did not stop him from attacking the EPA's "job killing" regulations.¹²²

Soon after the election, Representative Fred Upton, the chairman of the House Energy and Commerce Committee, teamed up with Americans for Prosperity President Tim Phillips to write an op-ed in the *Wall Street Journal* setting forth the Tea Party agenda for addressing the EPA's GHG NSR regulations, which they characterized as "an unconstitutional power grab that will kill millions of jobs."¹²³ Erroneously claiming that the EPA might soon be regulating "emissions by hospitals, small businesses, schools, churches and perhaps even single-family homes,"¹²⁴ they urged Congress to delay the new regulations' effective date until after the courts ruled on the EPA's endangerment finding.¹²⁵ After the 2010 elections, Upton deleted an entry on his website characterizing climate disruption as a "serious problem."¹²⁶ Phillips claimed that the Tea Party was responsible for a "dramatic turnaround" in the positions of Republican politicians on the issue of climate disruption.¹²⁷ In the Senate, which was still controlled by the Democrats,¹²⁸ the Ranking Minority Member of the Environment and Public Works Committee, Senator James Inhofe (R-Okla.), was promoting his recently published book, entitled *The Greatest Hoax: How the Global Warming Conspiracy Threatens Your Future*, on Fox News and other media outlets that regularly provided a platform to climate skeptics.¹²⁹ Senator Inhofe now found himself in the mainstream of a Republican

121. *Id.*

122. *Id.*

123. Fred Upton & Tim Phillips, *How Congress Can Stop the EPA's Power Grab*, WALL STREET J., Dec. 28, 2010, at A15.

124. *Id.*

125. *Id.*

126. Davenport, *supra* note 106.

127. *Id.*

128. Jeff Zeleny, *Setback for Obama; Democrats Hold Senate; Cuomo Wins Easily; Mixed Start by Tea Party*, N.Y. TIMES, Nov. 2, 2010, at A1, P2.

129. Amy Harder, *Climate-Change Fight Is Back in Hill Spotlight*, NAT'L J. DAILY AM, Feb. 27, 2012, at 2, EBSCOhost 72268684.

Party that had moved rapidly toward his and the Tea Party's position on climate disruption.¹³⁰

Despite the confident assertions of the climate change skeptics, public opinion strongly backed the climate disruption activists. A February 2011 Greenberg Quinlan Rosner Poll found that seventy-seven percent of respondents supported stricter limits on CO₂ emissions, and sixty-four percent opposed efforts in Congress to stop the EPA from regulating CO₂ emissions.¹³¹ A targeted poll in Representative Upton's district found that sixty-seven percent of voters (sixty percent of Republican voters) believed that Congress should let the EPA determine what action should be taken to address GHG emissions.¹³² A Pew survey conducted in the spring of 2011 found that fifty-nine percent of respondents believed that there was solid evidence that global warming was taking place.¹³³

i. Stand-Alone Bills Aimed at Overturning or Disrupting EPA GHG Regulations

On January 6, 2011, then-Representative, now Senator Shelley Moore Capito (R-W. Va.) introduced a bill to delay the effective date of the EPA's triggering and tailoring rules for two years.¹³⁴ Democratic Senator Jay Rockefeller introduced a similar bill in the Senate in the hope that it would undercut efforts in the House to pass more radical bills.¹³⁵ Examples of radical bills abounded. Representative Ted Poe (R-Tex.) introduced a bill to cut off federal funding for implementing or enforcing any

130. Amy Harder, *GOP's 'New Normal,'* NAT'L J. DAILY AM, June 14, 2012, at 8, EBSCOhost 77240402.

131. David Roberts, *New Poll: The Public Trusts EPA, Loves the Clean Air Act, and Wants Congress to Butt Out*, GRIST CLIMATE & ENERGY (Feb. 17, 2011), <http://grist.org/climate-policy/2011-02-16-public-trusts-epa-loves-clean-air-act-wants-congress-to-butt-out>.

132. Memorandum from David Di Martino, Review of Polling Data on Clean Air (June 21, 2012), <http://www.usclimatenetwork.org/resource-database/review-of-polling-data-on-clean-air>.

133. Davenport, *supra* note 106.

134. *Rockefeller Wants Vote to Stall EPA GHG Rules Before Spending Law Ends*, INSIDE EPA WKLY. REP., Jan. 14, 2011, ProQuest ID 920123037.

135. *Id.*; see *All Bill Information (Except Text) for S.231-EPA Stationary Source Regulations Suspension Act*, CONGRESS.GOV, <http://www.congress.gov/bill/112th-congress/senate-bill/231/all-info> (last visited Oct. 9, 2016).

regulation pertaining to GHG emissions from stationary sources.¹³⁶ Representative Marsha Blackburn (R-Tenn.) introduced a bill to amend the Clean Air Act to provide that GHGs were not pollutants subject to EPA regulation.¹³⁷ Although the Rockefeller bill was co-sponsored by a few Democrats, it failed to attract the sixty supporters necessary to overcome a filibuster in the deeply divided Senate.¹³⁸

In early March 2011, Representative Upton and Senator Inhofe introduced identical bills called the “Energy Tax Prevention Act of 2011” to prohibit the EPA from promulgating any regulation, taking any action, or even taking into consideration the emission of a GHG to address climate change.¹³⁹ It also retroactively repealed the EPA’s original endangerment finding and all of the regulations that it had promulgated to implement its GHG reduction program.¹⁴⁰ The Upton-Inhofe bill became the primary focal point for the battle over stand-alone bills because several Democrats from fossil fuel-producing states supported the bill.¹⁴¹ The House passed it on April 7, 2011, but it died in the Senate.¹⁴²

ii. Riders to Must-Pass Bills

After gridlock prevented Congress from enacting a fiscal year 2011 appropriations bill in the normal course of business, the House, in mid-February 2011, took up a continuing resolution to keep the government’s doors open for the remainder of the fiscal

136. *Rockefeller Wants Vote to Stall EPA GHG Rules Before Spending Law Ends*, *supra* note 134.

137. *Id.*

138. *Senate Disagreements Dim Prospects for Delaying EPA’s Climate Rules*, *INSIDE EPA WKLY. REP.*, Feb. 4, 2011, ProQuest ID 920624846.

139. Peter Appel, *Courting Trouble: Why Congressional Efforts to Hobble the EPA May Result in a Lot More Environmental Regulation*, *SLATE* (Feb. 10, 2011, 5:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/02/courting_trouble.html.

140. H.R. 910, 112th Cong. (2011); S. 482, 112th Cong. (2011). The bill made an exception for the EPA’s regulation of automobile emissions and for two fuel economy standards that the National Highway Traffic Safety Administration promulgated in May 2010. H.R. 910; S. 482.

141. Dean Scott, *Bill Introduced to Bar EPA Emissions Rules; Upton Locks Down Some Democratic Support*, 42 *Env’t Rep.* (BNA) 427, 42 *ER* 427 (Mar. 4, 2011).

142. *Senate Definitively Beats Back Efforts to Restrict EPA Climate Rules*, *INSIDE EPA WKLY. REP.*, Apr. 8, 2011, ProQuest ID 921588216.

year.¹⁴³ The bill contained a rider preventing the EPA from expending any appropriated funds for the “purposes of enforcing or promulgating any regulation . . . or denying approval of state implementation plans or permits because of the emissions of greenhouse gases due to concerns regarding possible climate change.”¹⁴⁴ Differences over that and the other environmental riders became a major sticking point in the Senate as the clock wound down toward a government shutdown.¹⁴⁵ At the last possible moment, the House leadership agreed to drop the environmental riders from the bill.¹⁴⁶

House Republicans attached similar riders to the 2012 appropriations bill for the Department of Interior and the EPA that was introduced in the House in July 2011.¹⁴⁷ A coalition of more than forty business organizations strongly supported the riders.¹⁴⁸ An attorney for the Natural Resources Defense Council, however, complained that appropriations riders were “like cockroaches; once they get into your house, it’s damn hard to get them out.”¹⁴⁹ The rider-laden bill ran into considerable opposition from Senate Democrats who refused to vote for the bill if the environmental riders remained.¹⁵⁰ Worried about being blamed for shutting down the government, the House Republicans relented, and Congress passed a bill that made deep cuts in spending for the EPA’s climate disruption program but contained none of the environmental riders.¹⁵¹

143. See Nick Juliano, *Senate Democrats Vow to Drop EPA Policy Measures from FY11 Budget Bill*, INSIDE EPA WKLY. REP., Feb. 25, 2011, ProQuest ID 920624667.

144. H.R. 1, 112th Cong. § 1746 (2011).

145. Carl Hulse, *Policy Takes Center Stage as Shutdown Nears*, N.Y. TIMES, Apr. 8, 2011, at A1.

146. Amena H. Saiyid, *EPA Riders Are Out of Spending Bill, but Analysts Say Battle Is Far from Over*, 35 Chem. Reg. Rep. (BNA) 414, 35 CRR 414 (Apr. 18, 2011).

147. Marie Diamond, *With Default Seven Days Away, House GOP Fixates on Repealing Environmental Regulations*, THINKPROGRESS (July 26, 2011), <https://thinkprogress.org/wit-h-default-seven-days-away-house-gop-fixates-on-repealing-environmental-regulations-ccac1519435e#.e31g084xu>.

148. *Groups Lining Up Behind Congressional Plan to Slow Down EPA Regulations*, U.S. COAL REV., Aug. 1, 2011.

149. Cathy Cash, *Utilities’ Investors’ Viewpoints Differ on Consequences of House Delaying GHG Rules*, 35 PLATTS COAL OUTLOOK 30, July 25, 2011, at 1, LexisNexis.

150. *Senate Democrats Delay FY12 Bill over Riders Blocking Key EPA Policies*, INSIDE EPA WKLY. REP., Dec. 16, 2011, ProQuest ID 913051851.

151. Aaron Lovell, *Congress’ FY12 Bill Blocks Handful of EPA Policies, Cuts Agency Budget*, INSIDE EPA WKLY. REP., Dec. 23, 2011, ProQuest ID 913047803.

The Senate also rejected attempts to attach the text of the Upton-Inhofe and Caputo-Rockefeller bills and a rider exempting the agricultural sector from the EPA's GHG regulations to the reauthorization act for the Small Business Innovation Research and Small Business Technology Transfer programs administered by the federal government.¹⁵²

While the House was noisily stripping the EPA of its authorities through appropriations riders, President Obama remained curiously silent, rarely mentioning climate disruption in his energy addresses and focusing instead on green technologies, "clean coal," domestic oil and gas production, and nuclear power development.¹⁵³ In an article in *Rolling Stone*, former Vice President Al Gore chastised the President for failing to "[present] to the American people the magnitude of the climate crisis" and for failing to "[defend] the science against the ongoing, withering and dishonest attacks."¹⁵⁴

iii. House Messaging Hearings

The new leadership of the House Energy and Commerce Committee and the Science, Space, and Technology Committee scheduled a series of messaging hearings in which Administrator Jackson served as target practice for opponents of EPA regulations.¹⁵⁵ At a lengthy hearing on the Upton-Inhofe bill, Republican members spent over two hours brow-beating Administrator Jackson, asserting that the science underpinning her finding was a hoax and accusing the Obama Administration of killing jobs in a quixotic quest to address a non-problem.¹⁵⁶ At another hearing, Assistant Administrator Gina McCarthy rebutted the persistent urban legend circulating in the conservative media that the agency was planning to impose a "cow tax" on methane

152. Ari Natter, *Senate Rejects Amendments Blocking EPA Climate Authority; Critics Vow Retry*, 42 Env't Rep. (BNA) 737, 42 ENR 737 (Apr. 8, 2011).

153. John M. Broder, *Panel Votes to Limit E.P.A. Power*, N.Y. TIMES, Mar. 16, 2011, at A20.

154. John M. Broder, *Gore Criticizes Obama for Record on Climate*, N.Y. TIMES, June 23, 2011, at A14.

155. Broder, *supra* note 112.

156. John M. Broder, *House Republicans Take E.P.A. Chief to Task*, N.Y. TIMES, Feb. 10, 2011, at A16; Hobson, *supra* note 95.

emissions from farm animals.¹⁵⁷ Republican committee members occasionally mocked Jackson by proclaiming that their exhaled air was what pollution looked like to the EPA.¹⁵⁸ A frequently heard refrain was that the EPA was attempting to create a cap-and-trade regime just like the one that the 111th Congress soundly rejected.¹⁵⁹

F. *The First NSPS NPRM*

On April 13, 2012, the EPA announced its long-awaited proposal for an NSPS for GHG emissions from new (greenfield) fossil fuel-fired power plants.¹⁶⁰ The EPA proposed to limit CO₂ emissions to 1000 pounds per megawatt hour (lb/MWh), about one-half the rate of a typical coal-fired unit, averaged over a thirty-year period.¹⁶¹ The agency based the standard on the performance of a well-operated, gas-fired, combined cycle (“GFCC”) power plant, which could easily comply with the limitation.¹⁶² Because the proposal did not create separate categories for gas- and coal-fired power plants, this meant that a new coal-fired plant could only meet the standard by capturing at least fifty percent of its CO₂ emissions over a thirty-year period.¹⁶³ Given that none of the five currently existing carbon capture and sequestration (“CCS”) demonstration plants could meet the standard,¹⁶⁴ the proposal

157. *Assessing the Impact of Greenhouse Gas Regulations on Small Business: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov't Spending of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 130 (2011) (statement of Regina McCarthy, Assistant Administrator of Air and Radiation, Environmental Protection Agency).

158. Patrick Michels, *Toxic Avenger: In the War Between the Feds and Texas, EPA Chief Al Armendariz Has Science on His Side. Is That Enough?*, DALL. OBSERVER (Mar. 10, 2011, 4:00 AM), <http://www.dallasobserver.com/news/toxic-avenger-in-the-war-between-the-feds-and-texas-epa-chief-al-armendariz-has-science-on-his-side-is-that-enough-6421008>.

159. *See, e.g., Climate Science and EPA's Greenhouse Gas Regulations: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. 2 (2011) (statement of Ed Whitfield, Chairman, Subcomm. on Energy & Power).

160. Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

161. Amy Harder, *EPA Proposes First-Ever Climate Rules*, NAT'L J. DAILY, Mar. 27, 2012, at 4, EBSCOhost 74181079.

162. Juliet Eilperin, *EPA's Greenhouse Gas Limits Affect Only New Power Plants*, WASH. POST, Mar. 28, 2012, at A16.

163. Arnold W. Reitze, Jr., *Federal Regulation of Coal-Fired Electric Power Plants to Reduce Greenhouse Gas Emissions*, 32 UTAH ENVTL. L. REV. 391, 404 (2012).

164. Amy Harder, *Coal's Future Hinges on Unproven Technology*, NAT'L J. DAILY, Mar. 28, 2012, at 7, EBSCOhost 74181092.

appeared to have “effectively ban[ned] new coal-fired plants.”¹⁶⁵ The thirty-year time horizon, however, allowed a company to build a carbon capture-ready plant on the assumption that CCS technology would be available in time to meet the thirty-year average.¹⁶⁶ A Brookings Institute poll concluded that a large percentage of the public believed that the EPA’s proposed regulations would have a positive impact on public health and the environment,¹⁶⁷ and a Republican pollster concluded that there was “broad support across partisan lines for new carbon regulations on power plants.”¹⁶⁸

G. Legislative Responses to the NSPS NPRM

i. The Stop the War on Coal Act

Representative David McKinley (R-W. Va.) introduced a bill to prevent the EPA from completing the ongoing NSPS rulemaking¹⁶⁹ until named officials from the Departments of Energy and Commerce and the Comptroller General certified that carbon capture and storage was economically and technologically feasible.¹⁷⁰ The House spent the last day before the 2012 election voting for a political messaging bill called the “Stop the War on Coal Act of 2012,” a package of bills that combined five deregulatory bills, including the Upton-Inhofe bill (but not the McKinley bill).¹⁷¹ The Republican leadership hoped that the floor debates on the “avalanche of environmental rules” would help undermine support for Democrats in the battleground states of Ohio, Pennsylvania, Virginia, and Montana.¹⁷² The White House

165. Andrew Childers, *EPA Publishes Proposed Emissions Limits on Carbon Dioxide for New Power Plants*, 43 Env’t Rep. (BNA) 1008, 43 ENR 1008 (Apr. 20, 2012).

166. *Id.*

167. *The American Energy Initiative: A Focus on EPA’s Greenhouse Gas Regulations: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. 66–67 (2012) [hereinafter Weiss] (testimony of Daniel Weiss, Senior Fellow and Director of Climate Strategy, Center for American Progress Action Fund).

168. *Id.*

169. H.R. 2127, 113th Cong. (2013).

170. *House Bill Would Block Power Plant Rule Until Carbon Capture Systems Are Feasible*, 20 Env’t. Compliance Bull. (BNA) 179, 20 BECB 179 (June 10, 2013).

171. Dean Scott, *Floor Debate Begins on Deregulatory Bill for Coal, Greenhouse Gases; Veto Threatened*, 43 Env’t Rep. (BNA) 2423, 43 ENR 2423 (Sept. 21, 2012).

172. Olga Belogolova & Elahe Izadi, *Republican Attack on Coal Regulations Heats Up*, NAT’L J. DAILY AM, Sept. 20, 2012, ProQuest ID 1055480553; Scott, *supra* note 171.

threatened to veto the bill because it would “undermine landmark environmental laws and adversely affect public health, the economy, and the environment.”¹⁷³ The House passed the bill by a vote of 233–175, but the Senate did not even take it up during the lame duck session following the election.¹⁷⁴ Riders halting the EPA’s GHG regulatory efforts offered to the fiscal year 2013 appropriations bill in the House and to the omnibus energy bill in the Senate also failed.¹⁷⁵

ii. More Messaging Hearings

The House leadership filled the remainder of the 112th Congress with more messaging hearings with titles like *American Energy Initiative, Part 2: EPA’s Proposed Greenhouse Gas New Source Performance Standard for Utilities and the Impact this Regulation Will Have on Jobs*,¹⁷⁶ *The Green Agenda and the War on Coal: Perspectives from the Ohio Valley*,¹⁷⁷ and *Rhetoric vs. Reality: Does President Obama Really Support an All-of-the-Above Energy Strategy?*¹⁷⁸

iii. Summary

As the 112th Congress drew to a close, the full House of Representatives had cast thirty-seven votes to block or inhibit the EPA’s efforts to reduce GHG emissions.¹⁷⁹ Some electric power companies were worried that the attacks would create regulatory uncertainty that would, in turn, disrupt long-range planning.¹⁸⁰

173. Scott, *supra* note 171.

174. Dean Scott, *House Passes Measure to Block EPA on Greenhouse Gases, Other Rules*, 43 Env’t Rep. (BNA) 2486, 43 ENR 2486 (Sept. 28, 2012).

175. Patrick Ambrosio, *House Appropriations Committee Votes to Cut EPA Funding, Restrict Regulatory Authority*, 36 Chem. Reg. Rep. (BNA) 716, 36 CRR 716 (July 2, 2012); Doug Obe, *Energy Agenda Trapped as Lawmakers Slip into Message Mode*, INSIDE EPA’S CLEAN ENERGY REP., Apr. 2, 2012, ProQuest ID 963494398.

176. *The American Energy Initiative, Part 25: EPA’s Proposed Greenhouse Gas New Source Performance Standards for Utilities and the Impact this Regulation Will Have on Jobs: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. 1 (2012).

177. *The Green Agenda & the War on Coal: Perspectives from the Ohio Valley: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov’t Spending of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. 1 (2012).

178. *Rhetoric vs. Reality: Does President Obama Really Support an “All-of-the-Above” Energy Strategy?: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2012).

179. Weiss, *supra* note 167, at 67.

180. Nick Juliano, *Industry Desire for Regulatory Certainty May Blunt GOP Assault on EPA*, INSIDE EPA WKLY. REP., Jan. 7, 2011, ProQuest ID 920626060.

Others strongly disagreed with the Republican strategy of attacking the science underlying climate disruption and worried that it could hinder investment in the electric power sector.¹⁸¹

H. The 2012 Election

Environmental regulation of coal became a major topic of debate during the 2012 campaigns as a proxy for a larger debate over the role of government in the economy.¹⁸² The main target of Republican attacks was the EPA's attempts to use the Clean Air Act to regulate GHG emissions.¹⁸³ Republicans once again employed the highly successful "job killing regulations" and "cap and tax" mantras in energy-producing states.¹⁸⁴ Compared to global warming deniers Governor Rick Perry (R-Tex.) and then-Representative Michele Bachmann (R-Minn.), Governor Mitt Romney (R-Mass.) seemed to be a rare moderate Republican candidate on environmental issues.¹⁸⁵ But by mid-campaign, Romney had turned into a climate disruption skeptic, and he promised to support abolishing the EPA's authority to regulate GHG emissions.¹⁸⁶ The initially wary Tea Party faction of the party jumped aboard the Romney bandwagon once he clinched the Republican nomination.¹⁸⁷ His running mate, Representative Paul Ryan (R-Wis.), was a Tea Party favorite who had always been a climate disruption skeptic.¹⁸⁸ Not surprisingly, fossil fuel interests

181. *Id.*

182. Coral Davenport, *Energy: A Proxy Fight over Government's Role*, NAT'L J., Sept. 2, 2012, ProQuest ID 1418408357; Keith Johnson, *Campaigns Clash over the Future of Coal*, WALL STREET J., Oct. 19, 2012, at A4.

183. David Roberts, *The End of the EPA as We Know It*, WASH. MONTHLY, Jan.–Feb., 2012, at 23.

184. Olga Belogolova, *Insiders: Extreme Weather Won't Spur Action on Climate Change*, NAT'L J. DAILY, July 11, 2012, ProQuest ID 1030416406; Davenport, *supra* note 84.

185. Dean Scott, *EPA Critics Among Top Candidates Seeking Republican Presidential Nomination*, 42 Env't Rep. (BNA) 1901, 42 ENR 1901 (Aug. 19, 2011).

186. Harder, *supra* note 130; *Romney Would Kill EPA's GHG Authority, Bolster Energy Production*, INSIDE EPA'S CLEAN ENERGY REP., Sept. 12, 2011, ProQuest ID 911968386.

187. Amy Harder, *Romney Urged to Weigh in on Power-Plant Regulations*, NAT'L J. DAILY AM, June 18, 2012, ProQuest ID 1021197522.

188. Nicholas Confessore, *Ryan Has Kept Close Ties to Donors on the Right*, N.Y. TIMES, Aug. 14, 2012, at A9.

backed Romney once he became the party's presumptive nominee.¹⁸⁹

President Obama attempted to avoid confrontation on climate disruption.¹⁹⁰ Early in the election season, the White House began to slow down regulations that were likely to give Republicans ammunition in the campaign.¹⁹¹ The President did not mention coal at all in his 2012 State of the Union address or in his February 2012 energy speech.¹⁹² Instead, he focused on the jobs that new investments in clean energy would create.¹⁹³ Reaffirming the reality of climate disruption, the Democratic platform offered to meet the challenge “by driving smart policies that lead to greater growth in clean energy generation and result in a range of economic and social benefits.”¹⁹⁴

Two weeks before the election, House Republicans published two reports accusing President Obama of abusing his executive powers through regulations that were not authorized by legislation. A report prepared by the Republican staff of the House Committee on Energy and Commerce accused the EPA of “freelancing beyond the bounds of existing laws.”¹⁹⁵ A report entitled “The Imperial Presidency” published by House Majority Leader Cantor claimed that regulatory agencies under President Obama had “gone further than ever before in overturning

189. Neela Banerjee, *Energy Rift on the Campaign Trail; Romney Embraces Fossil Fuels; Obama Sees More of a Future in Renewable Sources*, L.A. TIMES, Sept. 29, 2012, at A10, ProQuest ID 1081003014.

190. Amy Harder, *MIA on Climate Change*, NAT'L J. DAILY AM, Aug. 1, 2012, ProQuest ID 1033485995; Coral Davenport, *So Far, Obama Is Ducking Romney's Climate-Change Jab*, YAHOO (Sept. 4, 2012), <https://www.yahoo.com/news/far-obama-ducking-romney-climate-chang-e-jab-215130068-politics.html>.

191. Juliet Eilperin, *Obama Administration Slows Environmental Rules as It Weighs Political Costs*, WASH. POST (Feb. 13, 2012), https://www.washingtonpost.com/national/health-science/obama-administration-weighs-political-cost-of-environmental-rules/2012/02/07/gIQAvJzx8Q_story.html; Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST (Dec. 14, 2013), https://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html.

192. Kathleen Hart, *Obama Seen Marginalizing Coal in Domestic Energy Policy*, SNL FERC POWER REP., Feb. 29, 2012, ProQuest ID 926218673; Bill Reilly, *Coal Is Orphan Fuel in Obama's State of the Union Address*, SNL ENERGY COAL REP., Jan. 30, 2012, ProQuest ID 919570792.

193. Reilly, *supra* note 192; Davenport, *supra* note 190.

194. *Democratic Platform Omits EPA*, INSIDE EPA'S CLEAN ENERGY REP., Sept. 10, 2012, ProQuest ID 1095240714.

195. Kathleen Hart, *Whitfield Charges EPA 'Freelancing' Beyond Its Legal Authority*, SNL COAL REP., Oct. 22, 2012, ProQuest ID 1115018808.

decades of regulatory precedent, acting without statutory authorization, and otherwise abusing the rulemaking process to create de facto laws without going through Congress.”¹⁹⁶

On Election Day, voters returned Barack Obama to office by a lopsided 303–206 electoral vote margin.¹⁹⁷ Several Democratic Senate candidates from coal-dependent states were also re-elected.¹⁹⁸ In his 2013 State of the Union speech, the President said that addressing climate disruption rapidly was at the top of his domestic agenda.¹⁹⁹ Although he preferred cap-and-trade legislation, he promised once again to take forceful executive branch action if Congress failed to pass effective legislation.²⁰⁰ With the Republican Party still controlling the House by a substantial margin, however, the prospects for legislation remained quite low.²⁰¹ Executive branch action apparently had public support. A poll commissioned by the Natural Resources Defense Council found that fifty percent of voters supported the EPA while only twenty-seven percent opposed the agency.²⁰²

I. Legislative Responses to the 2012 Election

After the election, the coal and electric power industries decided to soften the harshness of their criticisms of the EPA.²⁰³ The CEO of Alpha Natural Resources, a large coal mining company, urged the industry to stop using the phrase “war on coal” and sit down with the EPA to “work together as adults.”²⁰⁴ That instinct was apparently not shared by the Republican

196. *GOP Targets ‘Imperial’ EPA Actions*, INSIDE EPA’S CLEAN ENERGY REP., Oct. 29, 2012, ProQuest ID 1115471758.

197. Bobby McMahon, *Obama Win Boosts Environmentalists as Industry Fights ‘Overregulation,’* INSIDE EPA WKLY. REP., Nov. 9, 2012, ProQuest ID 1141427372.

198. *Id.*

199. Juliet Eilperin, *A Vow to Confront Warming*, WASH. POST, Feb. 13, 2013, at A12.

200. *Id.*; Lauren O’Neil, *Obama Reignites Climate Debate, Says Executive Action on Table*, NAT. GAS WK., Feb. 18, 2013, LexisNexis.

201. Dean Scott, *Re-Election Greenlights Host of EPA Rules, Solidifies Regulation of Greenhouse Gases*, 216 Daily Env’t Rep. (BNA) A-1, 216 DEN A-1 (Nov. 8, 2012).

202. Dawn Reeves, *Environmentalists Outline Ambitious Agenda for Second Obama Term*, INSIDE EPA’S CLEAN ENERGY REP., Nov. 12, 2012, ProQuest ID 1151028180.

203. Jim Efstathiou Jr. & Mark Drajem, *Power Industry Wants Role in Setting EPA Rules to Curb Greenhouse Gases*, WASH. POST, Feb. 4, 2013, at A11; Dawn Reeves, *Obama Win Spurs Industry Debate over Softer Stance on EPA Regulations*, INSIDE EPA WKLY. REP., Nov. 16, 2012, LexisNexis.

204. Darren Epps, *Was ‘War on Coal’ the Right Message?*, SNL GENERATION MKTS. WK., Nov. 13, 2012, ProQuest ID 1154808598.

leadership in Congress. Representative Barton, the Chairman Emeritus of the Energy and Commerce Committee, advised his colleagues to fight the Obama Administration’s climate disruption initiatives and “wait four more years and see if we get a new president.”²⁰⁵ One option that remained open for Republican opponents of EPA regulations was “rifle shot” bills and riders aimed at particular rulemaking initiatives.²⁰⁶ There would be many opportunities for messaging hearings to broadcast criticism of the EPA’s environmental initiatives, to advance rifle shot legislation, and to extract commitments from EPA officials.²⁰⁷ To apply counter-pressure on the Administration and to highlight Republican obstruction of climate disruption legislation and regulation, a group of Democratic congresspersons formed the “Safe Climate Caucus” to organize daily speeches on the Senate floor about the risks that climate disruption posed to public health and welfare and the need to pass legislation to address those risks.²⁰⁸

J. President Obama’s Climate Action Plan

President Obama, on June 25, 2013, announced an ambitious “Climate Action Plan” setting out in some detail the steps that his administration would take to address climate disruption on the assumption that Congress remained gridlocked.²⁰⁹ Referring to the “overwhelming judgment of science” that “the planet is warming and human activity is contributing to it,” the President vowed to honor his pledge to reduce GHG emissions by seventeen percent from 2005 levels by 2020.²¹⁰ Because climate change was “a challenge that does not

205. Stuart Parker & Doug Obey, *Seeing Impasse Until 2016, Barton Doubts Major Air, Energy Bills in 2013*, INSIDE EPA’S CLEAN ENERGY REP., Dec. 10, 2012, ProQuest ID 1223810029.

206. Bridget DiCosmo, *GOP House Eyes ‘Rifle Shot’ Efforts to Revise Key Environmental Laws*, INSIDE EPA’S CLEAN ENERGY REP., Nov. 19, 2012, ProQuest ID 1170445233.

207. See, e.g., *id.*; Bobby McMahon, *Whitfield Push for Power Sector Reform May Include Focus on EPA Rules*, INSIDE EPA’S CLEAN ENERGY REP., Jan. 28, 2013, ProQuest ID 1282049993.

208. Chris Knight & Doug Obey, *Key House Panel Agrees to Hearings on Fiscal Impacts of Climate Change*, INSIDE EPA’S CLEAN ENERGY REP., Feb. 25, 2013, ProQuest ID 1312178808.

209. Barack Obama, Remarks by the President on Climate Change at Georgetown University (June 25, 2013), <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>.

210. *Id.*

pause for partisan gridlock,” his administration would take unilateral action to meet that goal.²¹¹ In a memorandum issued the same day, President Obama ordered the EPA to publish a new notice of proposed rulemaking under section 111(a) of the Clean Air Act by September 20, 2013, establishing emissions limitations for new power plants and to finalize the rule “in a timely fashion.”²¹² He further ordered the EPA to issue proposed regulations under section 111(d) for existing plants by June 1, 2014, and to finalize them by June 1, 2015.²¹³ To the extent possible, the agency should “tailor regulations and guidelines to reduce costs,” employ market-based tools, ensure grid reliability, and provide for reliance on “a range of energy sources and technologies.”²¹⁴

K. Legislative Responses to the Climate Action Plan

The morning after the President’s speech, then-Senate Minority Leader Mitch McConnell (R-Ky.) told the chamber that the President’s “national energy tax” would “almost assuredly raise the cost of doing business—and that it would likely put jobs, growth, and the future of American manufacturing at risk.”²¹⁵ The war on coal imagery re-emerged when the press reported that a low-level White House aide stated that, in the current climate disruption crisis, a war on coal was exactly what the country needed.²¹⁶ The broader point that the Republicans hoped to raise by the war on coal rhetoric was that President Obama was abusing his executive powers, a message that they hoped would resonate with conservatives in states that were not coal-dependent.²¹⁷ Viewing the President’s action as an unexpected gift, the National Republican Senatorial Committee immediately began to target

211. *Id.*

212. Memorandum from President Barack Obama on Power Sector Carbon Emission Standards for EPA, 3 C.F.R. 404–05 (2013).

213. *Id.*

214. *Id.*

215. Amy Harder, *Obama’s Climate Speech Reflects Washington’s Gap*, NAT’L J. DAILY AM, June 25, 2013, ProQuest ID 1416917937.

216. Dan Lowry, *‘War on Coal’ Comment Drives Bigger Wedge Between Industry, Obama Administration*, SNL DAILY COAL REP., June 28, 2013, LexisNexis.

217. Coral Davenport, *Why the ‘War on Coal’ Campaign Will Likely Fall Flat—Again*, NAT’L J. DAILY AM, July 2, 2013, ProQuest ID 1416917237.

vulnerable Democrats with negative advertisements in anticipation of the 2014 off-year elections.²¹⁸

i. Bills and Riders

Representative Moore Capito introduced a bill to block the EPA from promulgating GHG regulations until countries accounting for eighty percent of global CO₂ emissions enacted standards at least as stringent as the EPA's standards.²¹⁹ It failed to pass the House.²²⁰ In the Senate, Senators David Vitter (R-La.) and Inhofe introduced a bill to prevent the EPA from regulating CO₂ emissions from any source until China, India, and Russia agreed to bring about similar emissions reductions.²²¹ Senate Minority Leader McConnell introduced a bill called the "Saving Coal Jobs Act," which required congressional approval of any EPA regulations governing GHG emissions.²²² Senate Majority Leader Reid, however, ensured that the bills did not make it to the Senate floor.²²³

The greater legislative threat to the EPA's GHG rulemakings came from riders. For example, in March 2013, Senator Joe Manchin (D-W. Va.) offered an amendment to the fiscal year 2014 appropriations bill to block funding for all EPA rulemaking initiatives directed toward GHG emissions from power plants.²²⁴ The full Senate rejected Manchin's rider,²²⁵ but it did pass a rider that required all EPA rules promulgated under future

218. Trip Gabriel, *G.O.P. Sees Opportunity for Election Gains in Obama's Climate Change Policy*, N.Y. TIMES, July 2, 2013, at A10.

219. Anthony Adragna, *House Bill Would Limit EPA's Ability to Regulate Power Plant Emissions*, 44 ENV'T REP. (BNA) 2860, 44 ENR 2860 (Sept. 27, 2013).

220. *H.R. 3140 (113th): Ensure Reliable and Affordable American Energy Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr3140> (last visited Sept. 23, 2016); see *All Bill Information for H.R.3140—Ensure Reliable and Affordable American Energy Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/3140/all-info> (last visited Sept. 23, 2016) (noting that the last congressional action occurred in September 2013).

221. *Vitter Seeks to Delay GHG Rules*, INSIDE EPA'S CLEAN ENERGY REP., Feb. 4, 2013, ProQuest ID 1283679719.

222. Ari Natter, *Reid Says He Will Work with McConnell on Power Plant Carbon Rules*, 183 DAILY ENV'T REP. (BNA) A-4, 183 DEN A-4 (Sept. 20, 2013).

223. *Id.*

224. Jonathan Crawford, *W.Va. Senator Introduces Amendment to Starve EPA of Funding for Greenhouse Gas Regs*, SNL DAILY COAL REP., Mar. 25, 2013, LexisNexis.

225. David LaRoss, *Senate FY14 Budget Resolution Sets 'Cost-Effective' Test for GHG Policies*, INSIDE EPA WKLY. REP., Mar. 29, 2013, ProQuest ID 1321122937.

congressional statutes to be cost-effective.²²⁶ Senators Joe Donnelly (D-Ind.) and Roy Blunt (R-Mo.) introduced a rider to an energy bill to limit the EPA's power plant NSPS to "commercially available technology" and required the agency to categorize power plants according to fuel type.²²⁷ The rider-laden energy bill, however, failed to pass the Senate.²²⁸ The House Republican leadership attached a rider to debt ceiling legislation that would have blocked any NSPS for GHG emissions for power plants.²²⁹ That rider, along with several others, precipitated a combined debt ceiling and appropriations crisis late in the year that resulted in a brief government shutdown and a great deal of partisan turmoil until Congress passed a "clean" debt ceiling bill in February 2014.²³⁰

ii. Messaging Hearings

On July 25, 2013, a subcommittee of the House Committee on Science, Space, and Technology held hearings on the future of coal at which Republican committee members pilloried the Obama Administration for a suggestion by a member of the President's Council of Advisers on Science and Technology that a war on coal was exactly what the country needed to address climate disruption.²³¹ In anticipation of the 2014 off-year elections, a subcommittee of the House Energy and Commerce Committee held "mega-hearings" in September 2013 on *The Obama*

226. *Id.*

227. Dawn Reeves & Chris Knight, *On Eve of NSPS, EPA Reaffirms Support for Carbon Capture in GHG Policy*, INSIDE EPA'S CLEAN ENERGY REP., Sept. 22, 2013, ProQuest ID 1435435885.

228. *S. 1392 (113th): Energy Savings and Industrial Competitiveness Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/s1392> (last visited Sept. 23, 2016) (stating that the Energy Savings and Industrial Competitiveness Act of 2013 died in Congress); *see also S.1392—Energy Savings and Competitiveness Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1392> (last visited Sept. 23, 2016) (documenting that 120 amendments were proposed and that the last congressional action occurred in 2013).

229. Anthony Adragna & Ari Natter, *EPA Carbon Standards Among Rules Targeted in Debt Ceiling Bill, Analysis Says*, 44 *Env't Rep. (BNA)* 2841, 2888–89 (Sept. 27, 2013).

230. *Id.*; Chris Cillizza, *Does Boehner Still Want to Be House Speaker?*, WASH. POST, Feb. 17, 2014, at A2.

231. Darren Epps, *DOE Official Acknowledges Challenges to CCS Development at House Hearing*, SNL DAILY COAL REP., July 26, 2013, LexisNexis.

*Administration's Climate Change Policies and Activities*²³² to criticize the Administration's climate disruption initiatives as a power grab by the executive branch.²³³ Administrator McCarthy and Energy Secretary Ernest Moniz, however, seized the initiative at the hearings. Moniz stressed the perils to the planet posed by unconstrained emissions of GHGs while McCarthy asserted that the Clean Air Act clearly authorized the agency to regulate those emissions and that CCS technology was available to address them.²³⁴ Committee Republicans insisted that climate disruption had slowed in recent years, prompting members of the environmental group Greenpeace to don tin foil tri-corner hats symbolizing Tea Party belief in pseudo-science.²³⁵

L. *The Second NSPS NPRM*

The revised proposal ordered by the President set separate standards for gas-fired plants (1000 lb/MWh) and coal-fired plants (1100 lb/MWh).²³⁶ Since the standard for coal-fired plants was about 700 lb/MWh lower than emissions from the average top-of-the-line plant, new plants would have to rely partially (thirty to fifty percent) on CCS.²³⁷ The preamble pointed to four power plants with CCS that were undergoing construction, or soon would be, as proof that the industry was capable of meeting a standard that did not require full-time reliance on that technology.²³⁸ The new proposal eliminated the thirty-year averaging period, but it allowed a new coal-fired plant to average emissions over a seven-

232. *The Obama Administration's Climate Change Policies and Activities: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 113th Cong. 1–2 (2013); Amy Harder, *House GOP Plans Mega-Hearing on Climate Change*, NAT'L J. DAILY AM, Aug. 21, 2013, ProQuest ID 1427361883.

233. Coral Davenport, *Republicans Voice Climate-Change Doubts in Advance of EPA Regs*, NAT'L J. DAILY AM, Sept. 18, 2013, ProQuest ID 1434150901.

234. *The Obama Administration's Climate Change Policies and Activities*, *supra* note 232, at 30, 133; Davenport, *supra* note 233.

235. Davenport, *supra* note 233.

236. Andrew Childers & Anthony Adragna, *EPA Proposal to Limit Greenhouse Gases Allows Options for Power Plant Compliance*, 184 Daily Env't Rep. (BNA) A-1, 184 DEN A-1 (Sept. 23, 2013).

237. Brian Hansen, *Market Trends Shaped CO2 Rule: EPA Chief*, MEGAWATT DAILY, Sept. 24, 2013, at 11, LexisNexis; Keith Johnson & Tennille Tracy, *Plan to Curb New Coal Plants—EPA Ready to Require Costly, Novel Equipment to Capture*, WALL STREET J., Sept. 12, 2013, at A1.

238. Hansen, *supra* note 237.

year period if it agreed to an emissions limitation of 1050 lb/mWh.²³⁹

As with the earlier proposal, the EPA's regulatory impact assessment predicted that the standard would not result in any additional costs to the electric power industry because it was not building new coal-fired plants.²⁴⁰ For the same reason, it predicted that the proposal would have no benefits.²⁴¹ To the extent that companies did invest in new coal-fired capacity, the EPA estimated that the cost of complying with the standard would be in the \$92 to \$110 per megawatt hour range, not significantly above the \$80 to \$130 range for non-integrated gasification combined cycle ("IGCC") baseload gas-fired plants.²⁴² Since the proposal was not published in the Federal Register until January 8, 2014, the new standard would only apply to plants that commenced construction after that date.²⁴³

M. Legislative Responses to the Revised NPRM

Republican Party operatives saw the re-proposal and the prospect of section 111(d) restrictions on existing plants as a gift from the President that Republican candidates could use in the 2014 off-year elections to seal the party's majority in the House and win control of the Senate.²⁴⁴ They planned to tie Democratic candidates to a president that bypassed Congress to impose wholly unwarranted restrictions on the coal and electric power industries.²⁴⁵ This time, however, the focus would not be on the scientific issues, where Republican climate change deniers had given the party a black eye, but on the threat that the EPA's regulations posed to jobs and the economy.²⁴⁶ An hour after

239. Childers & Adragna, *supra* note 236.

240. *Id.*

241. *Scrapped Coal Plants Spur EPA to Drop NSPS Transitional Unit Exemption*, INSIDE EPA DAILY NEWS (Sept. 21, 2013), <https://insideepa.com/daily-news/scrapped-coal-plants-spur-epa-drop-nsps-transitional-unit-exemption>.

242. *Review of the President's Climate Action Plan: Hearing Before the S. Comm. on Env't & Pub. Works*, 113th Cong. 159 (2014) (statement of Daniel Lashof, Director, Natural Resource Defense Council).

243. Dawn Reeves, *EPA to Formally Propose Revised Climate NSPS for New Power Plants*, INSIDE EPA'S CLEAN ENERGY REP., Jan. 12, 2014, ProQuest ID 1476822901.

244. Coral Davenport, *Republicans Pounce on Obama's Global-Warming Regulations for Political Fodder*, NAT'L J. DAILY AM, Sept. 22, 2013, ProQuest ID 1435631052.

245. *Id.*

246. *Id.*

Administrator McCarthy released the re-proposal, Republican operatives sent out an email to voters in the home states of seven vulnerable Democrats entitled “Democrats Side with Obama’s Radical EPA over Local Workers, Business and Industry.”²⁴⁷ House Republican leaders predicted that the proposal would cause massive job losses, undermine grid reliability, and compromise energy security.²⁴⁸ They were determined to block the NSPS regulations with all available legislative tools.²⁴⁹

i. Resolutions and Bills

In September 2013, Representative McKinley introduced a joint resolution to overturn the re-proposal under the CRA.²⁵⁰ Senator McConnell and thirty-nine Republican co-sponsors filed a companion resolution in mid-January 2014.²⁵¹ In late-May 2014, the Government Accountability Office published a report concluding that the resolution was premature because the CRA was only applicable to final regulations.²⁵² McConnell was disappointed but promised “to use every possible tool at his disposal” to stop the Obama Administration’s war on coal.²⁵³

In October 2014, Representative Ed Whitfield (R-W. Va.) and Senator Manchin introduced a bill to require the EPA to write separate NSPSs for coal- and gas-fired power plants and base them on technologies that were demonstrated at six or more different commercial power plants for at least a year.²⁵⁴ The bill also prevented any regulations addressing GHG emissions from existing power plants from going into effect until Congress had enacted legislation establishing the effective date for those

247. *Id.*

248. Anthony Aragna, *Republicans Prepared to Battle EPA Rule on Power Plant Emissions with Legislation*, 184 Daily Env’t Rep. (BNA) A-3, 184 DEN A-3 (Sept. 23, 2013).

249. Corbin Hiar, *EPA’s Rules for New Plants Prompt Questions About Carbon Capture, Climate Plan*, SNL ENERGY FERC POWER REP., Sept. 25, 2013, ProQuest ID 1437670887.

250. Chris Knight, *Environmentalists, GOP Spar over Validity of Bill to Scrap Climate NSPS*, INSIDE EPA’S CLEAN ENERGY REP., Oct. 6, 2013, ProQuest ID 1439785763.

251. *Senate Republicans Seek to Nullify EPA Coal Emissions Rule*, CONG. Q. NEWS, Jan. 16, 2014, LexisNexis.

252. Darren Epps, *GAO Rejects McConnell’s Attempt to Overturn EPA’s Greenhouse Gas Rules*, SNL POWER DAILY WITH MKT. REP., June 2, 2014, LexisNexis.

253. *Id.*

254. Anthony Adragna, *Whitfield, Manchin Release Draft Legislation that Would Guide EPA Power Plant Rules*, 209 Daily Env’t Rep. (BNA) A-10, 209 DEN A-10 (Oct. 29, 2013).

regulations.²⁵⁵ The bill's sponsors timed its release to correspond with a large, pro-coal rally in Washington, D.C., organized by a group called Count on Coal.²⁵⁶ When the Energy and Commerce Committee approved the bill by a 29–19 vote,²⁵⁷ Representative John Dingell (D-Mich.) criticized the committee leadership for wasting the committee's scarce resources on a bill that had no chance of becoming law just to make "more partisan talking points."²⁵⁸ The full House passed the bill in early March by a 229–183, mostly party-line vote, despite the President's veto threat.²⁵⁹ It then disappeared from sight in the Senate.²⁶⁰

ii. Messaging Hearings

The House Committees on Energy and Commerce; Science, Space, and Technology; and Oversight and Government Reform held seven hearings on the new proposal and related issues during the fall, winter, and spring of 2013–2014 with titles like *EPA Power Plant Regulations: Is the Technology Ready?*; *EPA's Regulatory Threat to Affordable, Reliable Energy*; *A Factual Look at the Relationship Between Climate and Weather*; and *Examining the Science of EPA Overreach*.²⁶¹ At the same time, polls revealed that public

255. Corbin Hiar, *Rep. Whitfield Releases Bipartisan Draft Bill to Block Power Plant Carbon Limits*, SNL DAILY COAL REP., Oct. 31, 2013, LexisNexis.

256. Clare Foran & Alex Brown, *New Battle in 'War on Coal' with Bill to Block Power-Plant Rules*, NAT'L J. DAILY AM, Oct. 28, 2013, ProQuest ID 1447016571.

257. *House Committee Advances Bills to Curb EPA Power Plant Rules, Boost Building Efficiency*, 21 *Env'tl. Compliance Bull.* (BNA) No. 4, at 51 (Feb. 17, 2014).

258. Corbin Hiar, *Long-Shot Legislation to Block Power Plant Carbon Limits Heads to House Floor*, SNL DAILY COAL REP., Jan. 30, 2014, LexisNexis.

259. Corbin Hiar, *House Passes Bill to Block EPA Power Plant Carbon Emissions Limits*, SNL ENERGYFERC POWER REP., Mar. 12, 2014, ProQuest ID 1507902814.

260. *H.R. 3862 (113th): Electric Security and Affordability Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr3826> (last visited Oct. 11, 2016).

261. *Science of Capture and Storage: Understanding EPA's Carbon Rules: Hearing Before the Subcomm. on Env't & Subcomm. on Energy of the H. Comm. on Sci., Space & Tech.*, 113th Cong. (2014); *Benefits of and Challenges to Energy Access in the 21st Century: Electricity: Hearing Before the Subcomm. on Energy & Power of the H. Energy & Commerce Comm.*, 113th Cong. (2014); *Examining the Science of EPA Overreach: A Case Study in Texas: Hearing Before the H. Comm. on Sci., Space & Tech.*, 113th Cong. (2014); *A Factual Look at the Relationship Between Climate and Weather: Hearing Before the Subcomm. on Env't of the H. Comm. on Sci., Space & Tech.*, 113th Cong. (2013); *EPA's Proposed GHG Standards for New Power Plants and H.R. __, Whitfield-Manchin Legislation: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 113th Cong. (2013); *EPA Power Plant Regulations: Is the Technology Ready?: Hearing Before the Subcomm. on Env't & Subcomm. on Energy of the H. Comm. on Sci., Space & Tech.*, 113th Cong. (2013); *EPA's Regulatory Threat to Affordable, Reliable Energy: The*

opinion strongly backed the EPA. A February 2014 poll found that eighty-three percent of Americans believed that the government should “make an effort to reduce global warming, even if it has economic costs,” and sixty percent thought the United States should reduce GHG emissions whether or not other countries did the same.²⁶² A June *Washington Post/ABC* poll found that seventy percent of respondents believed that the federal government should limit GHG emissions from existing power plants, and seventy percent believed that states should limit GHGs within their borders.²⁶³ These results were consistent with results for every year since 2009.²⁶⁴

N. The ESPS NPRM for Existing Sources

Section 111(d) of the Clean Air Act required states to submit plans containing performance standards for GHG emissions from existing sources in categories for which it had promulgated NSPS, reflecting the “best system of emission reduction which . . . the Administrator determines has been adequately demonstrated” for pollutants addressed by the NSPS but not otherwise regulated under the statute.²⁶⁵ On June 2, 2014, Administrator McCarthy proposed ESPS for power plants under section 111(d), which the EPA referred to as the “Clean Power Plan.”²⁶⁶ Instead of suggesting emission reduction technologies for classes of electricity generating units (“EGUs”),²⁶⁷ the Agency

Perspective of Coal Communities: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 113th Cong. (2013).

262. Alan Neuhauser, *Study: 83 Percent Want Action on Global Warming, Even with Economic Costs*, U.S. NEWS & WORLD REP. (Feb. 12, 2014, 3:28 PM), <http://www.usnews.com/news/articles/2014/02/12/study-83-percent-want-action-on-global-warming-even-with-economic-costs>.

263. Scott Clement & Peyton M. Craighill, *A Huge Majority of Americans Support Regulating Carbon from Power Plants. And They're Even Willing to Pay for It*, WASH. POST: THE FIX (June 2, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/a-huge-majority-of-americans-support-regulating-carbon-from-power-plants-and-theyre-even-willing-to-pay-for-it>.

264. *Id.*

265. 42 U.S.C. § 7411(a) (2012).

266. ENTVL. PROT. AGENCY, FACT SHEET: CLEAN POWER PLAN OVERVIEW (Apr. 11, 2016), <https://www.epa.gov/sites/production/files/2014-05/documents/20140602fs-overview.pdf>.

267. *See* ENTVL. PROT. AGENCY, FACT SHEET: CLEAN POWER PLAN NATIONAL FRAMEWORK FOR STATES (Apr. 11, 2016), <https://www.epa.gov/sites/production/files/2014-05/documents/20140602fs-setting-goals.pdf>.

established a broad performance standard. This was articulated as “state-specific” GHG emission reduction goals that reflected the EPA’s calculation of the overall emission limitation that each state could achieve through the application of the “best system of emission reduction” (“BSER”).²⁶⁸ The state would then have the option of adopting the EPA’s suggested rate-based emission reduction goal or translating that rate-based goal into a mass-based goal that might be more adaptable to a cap-and-trade regime.²⁶⁹

In setting goals for individual states, the EPA determined the BSER as “the combination of emission rate improvements and limitations on overall emissions at affected EGUs that can be accomplished through any combination of one or more measures” from four sets of building blocks—only one of which resembled a traditional emission limitation on an EGU.²⁷⁰ The other three assumed that the owners of EGUs would shift generating load from coal-fired plants to existing gas-fired plants, substitute generation from renewable sources for generation from coal-fired EGUs, or reduce emissions by reducing demand through end-use efficiency programs.²⁷¹ The Agency determined that CCS was not the BSER for existing power plants because it had not been adequately demonstrated in existing plants.²⁷²

The agency proposed an interim goal for each state to be phased in between 2020 and 2029 as well as a final goal to be in place by 2030.²⁷³ The proposed guidelines for the implementation plans that states would promulgate to achieve those goals were meant to give states “considerable flexibility” in coming up with plans.²⁷⁴ If a state failed to submit a plan or if the EPA disapproved of a state’s plan, the EPA would promulgate a plan for the state.²⁷⁵

268. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,834 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

269. *Id.* at 34,851.

270. *Id.*

271. *Id.*

272. *Id.* at 34,836.

273. *Id.* at 34,851.

274. *Id.* at 34,833.

275. *Id.* at 34,852.

The agency predicted that the regulations would bring about a thirty percent reduction in power sector CO₂ emissions by 2030.²⁷⁶

O. Legislative Responses to the Clean Power Plan NPRM

The reaction of congressional Republicans was a predictably strident opposition to the plan.²⁷⁷ Speaker Boehner called the proposal “nuts.”²⁷⁸ Senate Minority Leader McConnell called the proposal “a dagger in the heart of the American middle class, and to representative Democracy itself.”²⁷⁹ The day after the proposal’s release, the National Republican Senatorial Committee began a series of robo-calls to voters in states represented by vulnerable Democratic senators erroneously linking the proposal to higher gasoline prices and calling the proposal part of President Obama’s “radical energy plan” that would “make electricity rates skyrocket.”²⁸⁰

i. Bills and Riders

In early June 2014, Senate Minority Leader McConnell introduced a stand-alone bill called the Coal Country Protection Act that prevented the EPA from finalizing its proposals for new and existing power plants until the Secretary of Labor certified that the regulations would cause no loss of employment; the Director of the Congressional Budget Office certified that they would not cause any loss in the United States’ gross domestic product; the Administrator of the Energy Information Administration certified that they would not increase electricity rates; and the Chairman of the Federal Energy Regulatory Commission and the President of the North American Electric Reliability Corporation certified that the national grid would

276. *Id.* at 34,832.

277. *See, e.g.*, Steven T. Dennis, *A Spectacular Math Fail on EPA Rule Costs*, CONG. Q. NEWS, June 2, 2014, LexisNexis.

278. Matt Fuller, *Boehner Calls Obama Power Plant Rule ‘Nuts,’* CONG. Q. NEWS, June 2, 2014, LexisNexis.

279. Press Release, Mitch McConnell, Senator, EPA Overreach ‘a Dagger in the Heart of the American Middle Class’ (June 2, 2014), <http://www.mcconnell.senate.gov/public/index.cfm/2014/6/mcconnell-epa-overreach-a-dagger-in-the-heart-of-the-american-middle-class>.

280. Juliet Eilperin & Steven Mufson, *EPA’s Proposal Prompts Backlash*, WASH. POST, June 3, 2014, at A1.

remain reliable.²⁸¹ The bill went nowhere in the Democrat-controlled Senate.²⁸²

Later that month, Senate Minority Leader McConnell crafted a rider that would have required the EPA to certify that the section 111(d) rule would not result in an increase of unemployment or electricity prices.²⁸³ McConnell's aides tailored the rider so that it would be germane to the appropriations bills for several agencies and departments.²⁸⁴ He first attempted to attach it to the Department of Energy appropriations bill, but the appropriations subcommittee chairman removed the bill from the mark-up agenda to avoid a subcommittee vote that might have proved embarrassing to coal-state Democrats.²⁸⁵ McConnell then demanded that the Democratic leadership allow a simple majority vote of the entire Senate on his rider to a different appropriations bill that had already been reported out of committee.²⁸⁶ Majority Leader Reid refused because the Republicans had refused a similar demand for a simple majority vote on the Democrats' jobs bill.²⁸⁷

The impasse over McConnell's riders in the Senate halted what had been the best opportunity in years to pass multiple appropriations bills prior to the October 1 beginning of the fiscal year.²⁸⁸ After Congress passed continuing resolutions to fund the government at current levels through the end of the year, the final opportunity to pass an omnibus appropriations bill came in December as the 113th Congress came to an end, but McConnell continued to insist that his rider remain in the bill.²⁸⁹ With

281. Press Release, Mitch McConnell, Senator, Top Senate Democrat, Harry Reid, Blocks McConnell's "Coal Country Protection Act" (June 4, 2014), <http://www.mcconnell.senate.gov/public/index.cfm/2014/6/top-senate-democrat-harry-reid-blocks-mcconnell-s-coal-country-protection-act>.

282. *Id.*

283. Tamar Hallerman & Niels Lesniewski, *White House Threatened Veto of Spending Bill over McConnell Amendment*, CONG. Q. NEWS, June 19, 2014, LexisNexis.

284. *EPA Fight Jeopardizes Multiple Spending Bills*, CONG. Q. NEWS, June 25, 2014, LexisNexis.

285. Hallerman & Lesniewski, *supra* note 283.

286. Humberto Sanchez, *Reid Fumes at McConnell's New Fondness for Majority Rules*, ROLL CALL (June 23, 2014, 4:32 PM), <http://www.rollcall.com/news/home/reid-fumes-at-mcconnells-carbon-emissions-amendment>.

287. *Id.*

288. *EPA Fight Jeopardizes Multiple Spending Bills*, *supra* note 284.

289. Tamar Hallerman et al., *Policy Riders Loom Large for Fate of 'Cromnibus'*, CONG. Q. NEWS, Dec. 4, 2014, LexisNexis.

another highly unpopular government shutdown looming, both sides agreed on an appropriations bill that cut the EPA's budget and retained a few riders but omitted the climate disruption rider.²⁹⁰

ii. Messaging Hearings

The two House committees responded to the Clean Power Plan with six more messaging hearings at which Republican members and their invited witnesses criticized the plan and its costs.²⁹¹ At a hearing on *EPA's Carbon Plan: Failure by Design*, Subcommittee Chairman Cynthia Lummis (R-Wyo.) accused the Obama Administration of "continuing its regulation rampage, attempting to take control of our nation's electric system without any legal or scientific justification" based on "black box models and untested assumptions."²⁹² The witness who stole the show, however, was Massachusetts Department of Environmental Quality Commissioner David Cash, who boasted about how his state's aggressive GHG reduction program had resulted in a forty percent reduction in GHG emissions at the same time that electricity rates dropped eight percent and the state's economy grew by seventy percent.²⁹³

Perhaps because it was an election year, the Senate Committee on Environment and Public Works responded with three messaging hearings that largely supported the Clean Power

290. Emily Ethridge & Rob Margetta, *Compromise Spending Package Yields Victories for Both Parties*, CONG. Q. NEWS, Dec. 9, 2014, LexisNexis.

291. *The Administration's Climate Plan: Failure by Design: Hearing Before the H. Comm. on Sci., Space & Tech.*, 113th Cong. 11–12 (2014); *State Perspectives: Questions Concerning EPA's Proposed Clean Power Plan: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 113th Cong. 3 (2014); *EPA's Carbon Plan: Failure by Design: Hearing Before the H. Comm. on Sci., Space & Tech.*, 113th Cong. 9 (2014); *FERC Perspectives: Questions Concerning EPA's Proposed Clean Power Plan and Other Grid Reliability Challenges: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 113th Cong. 3 (2014); *Laboratories of Democracy: The Economic Impacts of State Energy Policies: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 113th Cong. 93 (2014); *EPA's Proposed Carbon Dioxide Regulations for Power Plants: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 113th Cong. 70 (2014).

292. *EPA's Carbon Plan: Failure by Design*, *supra* note 291, at 10 (introductory remarks of Rep. Cynthia Lummis).

293. *Id.* at 78 (statement of Comm'r David Cash, Massachusetts Department of Environmental Quality).

Plan.²⁹⁴ In one of those hearings, entitled *Climate Change: The Need to Act Now*, the committee received the testimony of four former Republican EPA administrators in support of rapid government action to reduce GHG emissions.²⁹⁵ However, they also gave Republican senators an opportunity to criticize the plan. At one hearing, Senator Inhofe accused the agency of plotting the “takeover of the entire electricity market in the black-box confines of the comment period.”²⁹⁶

P. The 2014 Elections

The 2014 election was another disaster for the Obama Administration. In the House, the Republican Party picked up thirteen seats to give it a 247–188 majority.²⁹⁷ In the Senate, the Republicans picked up eight seats to gain a majority of 54–46.²⁹⁸ It was a stunning victory for the electric power and fossil fuel industries, which contributed \$84 million to candidates, the vast majority of whom were Republicans.²⁹⁹ As the results came in, the price of shares of coal companies soared.³⁰⁰ The head of the West Virginia Coal Association hoped that the Senate could “become more of a nuisance” for the EPA.³⁰¹ Environmental groups and their supporters had also invested heavily in the elections, and they were deeply disappointed with the results.³⁰²

294. *Costs of Inaction: The Economic and Budgetary Consequences of Climate Change: Hearing Before the S. Budget Comm.*, 113th Cong. (2014); *Examining the Threats Posed by Climate Change: Hearing Before the Subcomm. on Clean Air & Nuclear Safety of the S. Comm. on Env't & Pub. Works*, 113th Cong. (2014); *EPA's Proposed Carbon Pollution Standards for Existing Power Plants: Hearing Before the S. Comm. on Env't & Pub. Works*, 113th Cong. (2014); *Climate Change: The Need to Act Now: Hearing Before the Subcomm. on Clean Air & Nuclear Safety of the S. Comm. on Env't & Pub. Works*, 113th Cong. (2014).

295. *Climate Change: The Need to Act Now*, *supra* note 294, at 11.

296. *EPA's Proposed Carbon Pollution Standards for Existing Power Plants*, *supra* note 294, at 17 (statement of Sen. Jim Inhofe).

297. *House Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), <http://elections.nytimes.com/2014/results/house>.

298. *Senate Election Results*, N.Y. TIMES (Dec. 17, 2014, 12:28 PM), <http://elections.nytimes.com/2014/results/senate>.

299. Christopher Coats, *Coal Industry Preps for New Congress with Big Spending, but Less than Before*, SNL ENERGY DAILY COAL REP., Dec. 23, 2014, ProQuest ID 1640522895.

300. Darren Epps, *Following Months of Negativity, Election Night Sends Coal Equities Skyrocketing*, SNL ENERGY DAILY COAL REP., Nov. 6, 2014, ProQuest ID 1622569803.

301. Christopher Coats, *Coal Country Bolstered by GOP Victories in Congress, but Uphill Battle Ahead*, SNL DAILY COAL REP., Nov. 6, 2014, ProQuest ID 1622570147.

302. See, e.g., Jason Plautz, *Tom Steyer Spent \$74 Million on the Election. He Didn't Get Much to Show for It.*, NAT'L J. DAILY AM, Nov. 5, 2014, at 1, EBSCOhost 99279015.

Q. Legislative Responses to EPA's Proposed NSPS and ESPS in the 114th Congress

After the 2014 elections turned the Senate over to the Republican Party, Congress remained utterly gridlocked on climate disruption issues with no prospect for legislation aimed at reducing GHG emissions and little prospect for legislation aimed at stymieing the EPA's efforts to reduce those emissions.³⁰³ To a large extent, the gridlock stemmed from refusal by Republican members of Congress to engage in a dialogue about how best to reduce GHG emissions, and this was in turn attributable to the party's Tea Party wing that continued to insist that human activities did not cause changes in climate.³⁰⁴ Heavily financed by fossil fuel interests, the Tea Party faction made it clear that any Republican politician who supported government action to address climate disruption would face opposition from within the party during the next election cycle.³⁰⁵

The Obama Administration's climate disruption regulations became a major battleground in a constant war between the administration and the Republican-controlled Congress.³⁰⁶ The incoming chairman of the Senate Environment and Public Works Committee, James Inhofe, announced that he would make every effort to block the EPA's climate disruption regulations.³⁰⁷ Blocking those regulations was also high on the to-do list of the new Senate Majority Leader McConnell.³⁰⁸ EPA Administrator McCarthy dismissed threats that Congress would pass legislation undermining the agency's climate disruption

303. *Energy Issues Still Divide Congress Along Party Lines*, FOSTER NAT. GAS/OIL REP., Nov. 25, 2015, at 46, LexisNexis; Amber Philips, *Congress's Long History of Doing Nothing on Climate Change, in 6 Acts*, WASH. POST: THE FIX (Dec. 1, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congress-long-history-of-inaction-on-climate-change-in-6-parts>.

304. Eduardo Porter, *Bringing Republicans to the Talks on Climate*, N.Y. TIMES, Oct. 14, 2015, at B1, B6.

305. *Id.*

306. Kenneth T. Walsh, *Environment is New Battleground for Obama, GOP*, U.S. NEWS (Nov. 14, 2014, 7:22 AM), <http://www.usnews.com/news/blogs/ken-walshs-washington/2014/11/14/environment-is-new-battleground-for-obama-gop>.

307. David LaRoss, *Inhofe Plans Disapproval Resolutions to Block EPA Climate Rules*, INSIDE EPA, Jan. 8, 2015, LexisNexis.

308. Neela Banerjee, *GOP Primed to Blunt Environmental Rules*, L.A. TIMES, Nov. 8, 2014, at A10.

regulations and vowed to press on, confident that the agency had the President's full support.³⁰⁹

i. Bills and Riders

Early in the 114th Congress, several bills were introduced in both houses of Congress to nullify or restrict the EPA's NSPS and ESPS proposals. Senator Vitter introduced a bill to prevent the EPA from finalizing or enforcing any of its climate disruption rules until China, India, and Russia implemented "similar reductions."³¹⁰ Senator Bill Cassidy (R-La.) introduced a bill to prevent the EPA from finalizing the climate disruption regulations if the Department of Energy did not conclude that they would cause no harm to the economy.³¹¹ Senator Jeff Flake (R-Ariz.) introduced a novel bill that would have required the EPA to offset the cost to industry of any of its regulations with reductions in its budget, unless Congress specifically approved the regulation.³¹² Representative Mike Kelly (R-Pa.) introduced a bill that was almost identical to the bill that Senator McConnell had introduced the previous year requiring various agency certifications.³¹³

The bill with the greatest prospect for enactment was the Whitfield-Capito Ratepayer Protection Act, which suspended compliance with the Clean Power Plan until challengers had exhausted all opportunities for judicial review.³¹⁴ It also exempted a state from meeting its emissions goal if its governor determined that compliance would have "significant adverse effects" on electricity rates or system reliability in the state.³¹⁵ Despite President Obama's threat to veto the bill,³¹⁶ the House passed it

309. Joby Warrick, *EPA Chief Vows to Push Priorities Despite Threats*, WASH. POST, Nov. 18, 2014, at A6.

310. Logan Lee, *Vitter Offers First in Expected Flood of GOP Bills to Block EPA's GHG Rules*, INSIDE EPA, Jan. 12, 2015, ProQuest ID 1651822228.

311. Geoff Koss, *GOP Fires More Shots in Energy Battle Before Retreat*, CONG. Q. NEWS, Jan. 15, 2015, LexisNexis.

312. Anthony Lacey, *Senate Republicans' Bills Aim to Overhaul Key EPA Air, Climate Programs*, CLEAN ENERGY REP., Mar. 8, 2015, LexisNexis.

313. Doug Obey, *As Vote Nears, GOP Lawmakers Offer Broad Bill Targeting EPA GHG Rules*, INSIDE EPA, June 8, 2015, LexisNexis.

314. H.R. REP. NO. 114-171, at 2 (2015).

315. *Delay Sought in States' Carbon Rule Compliance*, CONG. Q. NEWS, Mar. 23, 2015, LexisNexis.

316. *House Endorses State Delay, Opt-Out for Carbon Rule*, CONG. Q. NEWS, June 24, 2015, LexisNexis.

by a vote of 247–180.³¹⁷ The companion bill that Senator Shelley Moore Capito introduced in the Senate included an additional provision preventing the EPA from promulgating the NSPS for power plants unless it demonstrated that the standard had been attained by several different plants in the United States.³¹⁸ The Committee on Environment and Public Works forwarded the bill to the floor on a hurried party-line vote in mid-August 2015.³¹⁹ The bill remains on the Senate calendar.³²⁰

The proposed fiscal year 2016 federal budget that President Obama sent to Congress in February 2015 provided for “\$8.6 billion, a \$500 million increase from FY15 enacted level of \$8.1 billion” in the EPA’s budget.³²¹ Almost \$240 million would be devoted to writing climate disruption standards and overseeing state plans, and \$25 million would go to grants to assist states in drafting their plans.³²² It also included a \$20 million fund to assist workers that were laid off at coal mines and power plants due to the “rapid energy transformation” that the country was experiencing.³²³ The chairwoman of the Senate Appropriations Committee, Lisa Murkowski, promised not to allow the appropriations bill to become a vehicle for riders aimed at rolling back the EPA’s climate disruption regulations, a promise that she failed to fulfill after Majority Leader McConnell announced that he would serve as a member of her committee.³²⁴

The appropriations bill that the House Appropriations Committee approved cut the EPA’s current budget for regulatory programs by \$141 million to force the agency to “focus its activities

317. *Id.*

318. Doug Obey, *Senate Bill to Block ESPS Takes Tougher Approach than House Measure*, INSIDE EPA, May 14, 2015, LexisNexis.

319. Esther Whieldon, *Senate Environment Panel Advances Anti-EPA Bill Despite Democrats’ Delay Tactics*, SNL RENEWABLE ENERGY WKLY., Aug. 14, 2015, LexisNexis.

320. *S.1324—Affordable Reliable Electricity Now Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1324> (last visited Oct. 10, 2016).

321. *Obama Proposes \$4 Billion Incentive Fund for States to Exceed ESPS Goals*, INSIDE EPA, Feb. 3, 2015, LexisNexis.

322. *Id.*

323. Darren Epps, *Obama Proposes Millions in Aid for Reeling Appalachian Coal Communities*, SNL DAILY COAL REP., Feb. 3, 2015, LexisNexis.

324. Lauren Gardner, *Energy’s Murkowski Extends a Hand to Democrats*, CONG. Q. NEWS, Feb. 5, 2015, LexisNexis.

on core duties, rather than unnecessary regulatory expansion.”³²⁵ The bill also contained riders prohibiting the EPA from relying on any federally-funded or subsidized project in establishing the NSPS for power plants and from promulgating any regulations or guidance related to CO₂ emissions from modified or existing power plants.³²⁶ The committee, by a 32–19 vote, rejected a Democratic amendment to strip the riders from the bill.³²⁷ House Republican leaders then dared President Obama to veto the bill.³²⁸ When the bill came to the floor of the House, Republicans defeated attempts by Democrats to remove the EPA riders.³²⁹ The Senate Appropriations subcommittee reported out a bill with a rider prohibiting the EPA from writing federal implementation plans for states that decided not to submit plans under the Clean Power Plan.³³⁰ The full committee rejected attempts by Democratic members to remove the riders from the bill.³³¹

As the leadership of both houses began serious negotiations over the omnibus appropriations bill that contained all of the individual agency and departmental bills, the EPA riders were front and center.³³² President Obama reiterated his threat to veto any omnibus bill that contained those riders.³³³ Republican negotiators finally agreed to strip the riders from the omnibus bill in return for Democrats’ acceptance of a repeal of a statutory ban on oil exports.³³⁴ The bill also left the EPA’s budget at the fiscal year 2015 level and did not prevent the EPA from reprogramming

325. Jeremy Bernstein, *House GOP Seeks to Block EPA’s Climate Agenda but Backs Biomass Policy*, INSIDE EPA, June 10, 2015, ProQuest ID 1687048688; see also *House Appropriators OK Bill to Cut EPA Budget, Power*, CONG. Q. NEWS, June 16, 2015, LexisNexis.

326. Bernstein, *supra* note 325.

327. *House Appropriators OK Bill to Cut EPA Budget, Power*, *supra* note 325.

328. David LaRoss, *House GOP, Democrats Spar over ‘Dare’ for Obama to Veto EPA FY16 Bill*, INSIDE EPA’S RISK POL’Y REP., June 16, 2015, ProQuest ID1688470860.

329. *GOP Defeats Efforts to Remove EPA Spending Bill Policy Riders*, CONG. Q. NEWS, July 8, 2015, LexisNexis.

330. Jason Plautz, *How Mitch McConnell Is Attacking Obama’s EPA*, NAT’L J. DAILY AM, June 16, 2015, ProQuest ID 1689438086.

331. Esther Whieldon, *Senate Spending Bill Blocks EPA from Crafting State CO₂ Rule Implementation Plans*, SNL GENERATION MKTS. WK., June 23, 2015, LexisNexis.

332. Ed Felker, *Dozens of Environmental Riders Bound to Tangle Spending Talks*, CONG. Q. NEWS, Nov. 19, 2015, LexisNexis.

333. *Id.*

334. *Oil, Greens and Money: Winners and Losers in the Omnibus*, CONG. Q. NEWS, Dec. 16, 2015, LexisNexis; *Omnibus Spending Bill Lands at Last, with Oil Export Ban Lifted*, CONG. Q. NEWS, Dec. 16, 2015, LexisNexis.

funds to pay for additional employees to work on the Clean Power Plan and to make grants to states to assist in preparing their plans.³³⁵

ii. Messaging Hearings

With the Republican Party in control of both houses of Congress, committees held messaging hearings on the EPA's climate disruption regulations two or three times a month during the first half of 2015.³³⁶ The hearings afforded Republican committee members an opportunity to grill EPA officials on the details of the regulations;³³⁷ complain about the asserted lack of authority to promulgate them;³³⁸ hear complaints from state officials, industries, and miners;³³⁹ observe debates between prominent law professors over the legality of the regulations;³⁴⁰ and hear esoteric debates over the accuracy of the EPA's estimates

335. Doug Obey, *Budget Drops Climate Policy Riders, Raising Doubts About GOP's 2016 Push*, INSIDE EPA, Dec. 17, 2015, ProQuest ID 1749591864.

336. See, e.g., *An Analysis of the Obama Administration's Social Cost of Carbon: Hearing Before the H. Comm. on Nat. Res.*, 114th Cong. (2015); *Examining EPA's Regulatory Overreach: Hearing Before the H. Comm. on Sci., Space & Tech.*, 114th Cong. (2015); *U.S. Energy Information Administration Report: Analysis of the Impacts of the EPA's Clean Power Plan: Hearing Before the Subcomm. on Env't & Subcomm. on Energy of the H. Comm. on Sci., Space & Tech.*, 114th Cong. (2015); *The Impacts of the EPA's Proposed Carbon Regulations on Electricity Costs for American Businesses, Rural Communities and Families: Hearing Before the Subcomm. on Clean Air & Nuclear Safety of the S. Comm. on Env't & Pub. Works*, 114th Cong. (2015); *Legal Implications of the Clean Power Plan: Hearing Before the Subcomm. on Clean Air & Nuclear Safety of the S. Comm. on Env't & Pub. Works*, 114th Cong. (2015); *EPA's Proposed 111(d) Rule for Existing Power Plants and H.R. __, Ratepayer Protection Act: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 114th Cong. (2015); *The Impact of EPA Carbon Regulations in Coal-Dependent West Virginia: Hearing Before the S. Comm. on Env't & Pub. Works*, 114th Cong. (2015); *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 114th Cong. (2015); *Examining State Perspectives of the EPA's Proposed Carbon Dioxide Emissions Rule for Existing Power Plants: Hearing Before the S. Comm. on Env't & Pub. Works*, 114th Cong. (2015); *EPA's Proposed Carbon Dioxide Emissions Rules from New, Modified, and Existing Power Plants: Hearing Before the S. Comm. on Env't & Pub. Works*, 114th Cong. (2015).

337. Lee Logan, *GOP Senators' Attacks on EPA Climate Rules Could Aid Future Challenges*, INSIDE EPA, Feb. 12, 2015, ProQuest ID 1654600678.

338. *Id.*

339. See *The Impact of EPA Carbon Regulations in Coal-Dependent West Virginia*, *supra* note 336; *Examining State Perspectives of the EPA's Proposed Carbon Dioxide Emissions Rule for Existing Power Plants*, *supra* note 336.

340. See *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues*, *supra* note 336.

of the social cost of GHG emissions.³⁴¹ At the same time, a poll conducted by a Stanford University group for the *New York Times* and Resources for the Future found that eighty-two percent of respondents believed that global warming was happening, and seventy-nine percent supported government action limiting GHG emissions from power plants.³⁴²

R. *The Final NSPS and ESPS*

The EPA finalized both the NSPS and the ESPS in October 2015.³⁴³ The NSPS for newly constructed coal-fired EGUs was 1400 lb/MWh based on an “efficient new supercritical pulverized coal utility boiler implementing partial carbon capture and storage.”³⁴⁴ The standard was considerably less stringent than the 1100 lb/MWh proposal, but it still assumed that CCS technology was available for coal-fired power plants.³⁴⁵

The final performance standard and guidelines for existing sources was considerably more complex. The EPA divided the affected EGUs into two subcategories—coal-fired, steam-generating units and gas-fired combustion turbines.³⁴⁶ The core of the standard was still EPA-mandated individual state goals, now expressed as both rates and mass to facilitate trading options.³⁴⁷ But the agency dropped the end-use efficiency building block after receiving much criticism from the coal and electric power industry that the agency lacked authority to look beyond the

341. See *An Analysis of the Obama Administration's Social Cost of Carbon*, *supra* note 336.

342. Eric Wolff, *Stanford Poll: High Public Concern About Global Warming Has Not Changed for Decades*, SNL DAILY COAL REP., Apr. 17, 2015, LexisNexis.

343. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

344. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. at 64,512.

345. *Id.* at 64,513.

346. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. at 64,662.

347. ENVTL. PROT. AGENCY, FACTSHEET: THE CLEAN POWER PLAN: THE ROLE OF STATES 1–2 (2015), <https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-states-decide.pdf>.

“fence line” of the power plant for emission reductions.³⁴⁸ It also reduced the stringency of the three remaining building blocks, the result of which was less stringent goals for most states but more stringent goals for several coal-dependent states.³⁴⁹ The EPA backed away from the 2020 starting deadline for the plans.³⁵⁰ It decided that the plans could require generating units to begin making reductions by no later than 2022, so long as they met the final goals by 2030.³⁵¹ The final guidelines provided a lengthy menu of options for achieving the goals.³⁵²

S. Legislative Reactions to the Final Clean Power Plan

i. Bills and Riders

Soon after the final EPA regulations were published in the Federal Register, Republicans introduced disapproval resolutions under the CRA for both rules in both houses of Congress.³⁵³ Recognizing that President Obama would not sign the joint resolutions, they planned to vote them out of both houses before an upcoming international summit on climate disruption in Paris to send a strong message to other nations that Congress did not support the Administration’s initiatives.³⁵⁴ The resolutions passed the Senate by identical 52–46 votes, and they passed the House in early December while the President was negotiating in Paris by votes of 242–180 for the ESPS and 235–188 for the NSPS.³⁵⁵ Upon his return, President Obama vetoed the resolutions.³⁵⁶

348. Lee Logan, *EPA Uses Uniform Standards to Preserve Overall Stringency in Final ESPS*, INSIDE EPA/CLIMATE (Aug. 3, 2015), <http://insideepaclimate.com/climate-daily-news/epa-uses-uniform-standards-preserve-overall-stringency-final-esps>.

349. *Id.*

350. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. at 64,669.

351. *Id.*

352. *Id.* at 64,724.

353. Esther Whieldon, *Lawmakers Seek to Undo EPA Carbon Rules*, SNL GENERATION MKTS. WK., Nov. 3, 2015, LexisNexis.

354. Jason Plautz, *Republicans Attack Climate Rules to Send Message to UN*, NAT’L J. DAILY (Oct. 26, 2015), <https://www.nationaljournal.com/daily/print/2015/10/27>.

355. *Senate Passes Anti-Carbon Resolution*, CONG. Q. NEWS, Nov. 17, 2015, LexisNexis; David M. Herszenhorn, *Votes in Congress Move to Undercut Climate Pledge*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/politics/as-obama-pushes-block-climate-deal-republicans-move-to-block-emissions-rules.html?_r=0.

356. Memorandum of Disapproval Concerning Legislation Regarding Congressional Disapproval of an Environmental Protection Agency Rule on Carbon Pollution Emission

ii. Messaging Hearings

The EPA's promulgation of the final regulations was another occasion for a round of messaging hearings with titles like *How EPA's Power Plan Will Shut Down Power Plants*; *EPA's CO2 Regulations for New and Existing Power Plants*; and *Data or Dogma? Promoting Open Inquiry in the Debate over the Magnitude of Human Impact on Earth's Climate*.³⁵⁷ Republican members and the witnesses they selected complained that the regulations would “cost billions of dollars, place a heavy burden on American families and diminish the competitiveness of American industry around the world.”³⁵⁸ At one of the House hearings, a frustrated Democratic member complained that the committee was examining the EPA's Clean Power Plan “for the exceedingly umpteenth time” for no obvious purpose.³⁵⁹

III. CLIMATE DISRUPTION AND GRIDLOCK

The history of efforts in the United States to address climate disruption is a story of congressional inaction and executive branch action. Over the years, Congress has proven incapable of taking action to reduce the risk of global warming.³⁶⁰ At the outset of the Obama Administration, the President—and much of the electric power industry—strongly believed that the best solution was a cap-and-trade regime created by Congress and

Guidelines, 2015 DAILY COMP. PRES. DOC. 1 (Dec. 18, 2015); Jeremy Diller & Ed Felker, *Obama Vetoes GOP Measures to Block Power Plant Rules*, CONG. Q. NEWS, Dec. 19, 2015, LexisNexis.

357. See, e.g., *Data or Dogma? Promoting Open Inquiry in the Debate over the Magnitude of Human Impact on Earth's Climate: Hearing Before the Subcomm. on Space, Sci. & Competitiveness of the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. (2015); *EPA's CO2 Regulations for New and Existing Power Plants: Legal Perspectives: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 114th Cong. (2015); *EPA's CO2 Regulations for New and Existing Power Plants: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 114th Cong. (2015); *State Perspectives: How EPA's Power Plan Will Shut Down Power Plants: Hearing Before the Subcomm. on Env't of the H. Comm. on Sci., Space & Tech.*, 114th Cong. (2015).

358. *State Perspectives: How EPA's Power Plan Will Shut Down Power Plants*, *supra* note 357 (opening statement of Rep. Lamar Smith, Chairman, H. Comm. on Sci., Space & Tech.).

359. Esther Whieldon, *McCabe: EPA Not Using Clean Power Plan to Create Cap-and-Trade Program*, SNL ELECTRIC UTIL. REP., Oct. 12, 2015, LexisNexis.

360. See, e.g., Ronald Brownstein, *Miami Will Likely Be Underwater Before Congress Acts on Climate Change*, NAT'L J., May 15, 2014, at 1, EBSCOhost 96112142.

administered by the EPA.³⁶¹ Even though his party held a majority of House seats and a potentially filibuster-proof majority in the Senate, Congress could not find a way to resolve differences and make the compromises necessary to enact legislation.³⁶² Frustrated by a gridlocked Congress, President Obama decided to go it alone and ordered the EPA to promulgate regulations limiting GHG emissions from power plants under its existing authority.³⁶³ With changes in the composition of Congress, legislative efforts turned toward preventing the EPA from promulgating those regulations.³⁶⁴ Yet, even with the opposing party in control of both the House and the Senate, only two resolutions to halt the EPA's NSPS and ESPS passed both houses of Congress.³⁶⁵ That effort relied on special procedures established by the CRA to speed such resolutions through Congress.³⁶⁶ The resolutions were predictably vetoed by the President.³⁶⁷ Congressional gridlock thus worked both ways. It prevented Congress from taking action to reduce GHG emissions, and it prevented Congress from taking action to prevent the EPA from reducing GHG emissions.

The electric power industry has taken the position that the Obama Administration should not have unilaterally taken action to address climate disruption, but it should have “approach[ed] Congress with sensible proposals, just as was done with ozone-depleting substances years ago.”³⁶⁸ But Congress is not the same place that it was many years ago when the environment was not a partisan issue. When a Democratic Congress enacted and a Republican President (Richard Nixon) signed the original Clean Air Act in 1970, both parties “claimed the mantle of

361. Coral Davenport, *President Said to Be Planning Executive Authority on Carbon Rule*, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/us/politics/obama-to-offer-rules-to-sharply-curb-power-plants-carbon-emissions.html?_r=0.

362. *See id.*

363. Peter Baker & Coral Davenport, *Using Executive Powers, Obama Begins His Last Big Push on Climate Policy*, N.Y. TIMES (May 31, 2014), <http://www.nytimes.com/2014/06/01/us/politics/obama-sets-the-stage-for-curbing-emissions.html>.

364. *See supra* notes 353–56 and accompanying text.

365. *See supra* notes 354–56 and accompanying text.

366. *See supra* notes 354–56 and accompanying text.

367. *See supra* notes 354–56 and accompanying text.

368. Scott Segal, *Lots of Pain with Questionable Benefits*, U.S. NEWS (Aug. 5, 2015, 9:40 AM), <http://www.usnews.com/debate-club/is-obamas-clean-power-plan-a-good-idea/lots-of-pain-with-questionable-benefits>.

environmental leadership.”³⁶⁹ That statute was extensively amended in 1990 when President George H.W. Bush, who proudly called himself the “environmental president,” worked closely with Democrats and Republicans in Congress to pass much needed reforms.³⁷⁰ Even as late as 2009, prominent Republican members of Congress were willing to co-sponsor climate disruption legislation.³⁷¹

With the rise of the Tea Party in mid-2009, however, any Republican who was willing to compromise with Democrats was likely to encounter negative advertisements and even a challenger in the next primary.³⁷² A good example is Senator Mark Kirk (R-Ill.), who, as a congressman in 2010, received a seventy percent favorable rating from the League of Conservation Voters³⁷³ but became a climate change denier after being pilloried by Tea Party constituents and the local coal industry for voting in favor of the Waxman-Markey bill.³⁷⁴ This is not to say that there are not some prominent Republicans who support government action to address climate disruption. In addition to the four former Republican administrators of the EPA who testified in favor of the EPA’s efforts, former Treasury Secretary Henry Paulson and former South Carolina Representative Bob Inglis are both strong advocates for government action.³⁷⁵ However, the operative word is former. Inglis lost his 2010 primary race to a Tea Party candidate in part because of his willingness to acknowledge human activities

369. David B. Spence, *Regulation, “Republican Moments,” and Energy Policy Reform*, 2011 BYU L. REV. 1561, 1615 (2011).

370. *Id.*

371. Rick Piltz, *Why Is There No US Climate Policy*, CLIMATE SCI. WATCH (Nov. 5, 2009), <http://www.climate-science-watch.org/2009/11/05/%E2%80%9Cwhy-is-there-no-us-climate-policy%E2%80%9D> (discussing the shift in legislative strategy of Republicans in anticipation of the 2010 general election).

372. See Katie Valentine, *These 4 Republican Senators Are Forming a Group to Tackle Climate Change*, THINKPROGRESS (Oct. 30, 2015), <https://thinkprogress.org/these-4-republican-senators-are-forming-a-group-to-tackle-climate-change-dc667e9f8eb5#.mytiii4iu>.

373. Juliet Eilperin, *Sen. Mark Kirk (R-Ill.) Describes Global Warming as Natural Phenomenon*, WASH. POST (Jan. 8, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/01/08/sen-mark-kirk-r-ill-describes-global-warming-as-natural-phenomenon>.

374. *Id.*

375. Ben Geman, *Republicans Are Screaming for Action on Global Warming, but Only from the Stands*, THE ATLANTIC (June 23, 2014), <http://www.theatlantic.com/politics/archive/2014/06/republicans-are-screaming-for-action-on-global-warming-but-only-from-the-stands/447057>.

as a cause of global warming.³⁷⁶ Very few current Republican members of Congress openly favor mandatory programs to reduce GHG emissions. Of all 107 Republicans running for the Senate in the 2014 primaries, only one mentioned climate change on his website.³⁷⁷ The party's presidential nominee in 2016, Donald Trump, is "not a believer" in anthropogenic climate disruption.³⁷⁸

The Democratic Party has not been nearly as monolithic in its approach to climate disruption. Although very few Democratic politicians are global warming deniers,³⁷⁹ Democratic politicians from energy-rich states are not reluctant to oppose climate disruption legislation on economic grounds. For example, a Democratic senator and three Democratic representatives from Virginia and West Virginia introduced a bill that would have delayed the triggering and tailoring rules for two years.³⁸⁰ This difference reflects a general trend over the past decade of the Republican Party shifting further to the right than the Democratic Party has shifted to the left.³⁸¹ Still, a sufficient number of Democrats in Congress are concerned about climate disruption enough to consistently disrupt efforts by Republicans to halt the EPA's efforts to address the problem.³⁸²

Surprisingly, this radical difference between Republican and Democratic politicians does not accurately reflect the opinions of ordinary Republican and Democratic voters. A September 2015 poll conducted by three prominent Republican pollsters concluded that seventy-three percent of all probable

376. Davenport, *supra* note 106.

377. Jaime Fuller, *Environmental Policy Is Partisan. It Wasn't Always.*, WASH. POST: THE FIX (June 2, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/sup-port-for-the-clean-air-act-has-changed-a-lot-since-1970>.

378. Brady Dennis, *Trump: 'I'm Not a Big Believer in Man-Made Climate Change'*, WASH. POST (Mar. 22, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/03/22/this-is-the-only-type-of-climate-change-donald-trump-believes-in>.

379. See, e.g., Reynard Loki, *How Republicans Made Climate Change America's Most Divisive Political Issue*, ALTERNET (Sept. 15, 2015), <http://www.alternet.org/environment/climate-change-more-divisive-abortion-blame-republicans> (characterizing the movement as led largely by Republicans who deny global warming).

380. See *supra* notes 71–72 and accompanying text.

381. E.W., *Unprecedentedly Dysfunctional*, THE ECONOMIST (Sept. 22, 2014, 4:52 PM), <http://www.economist.com/blogs/democracynamerica/2014/09/political-gridlock>.

382. See Laurence Lewis, *Climate Denial: The GOP War on Science Should Be the Democrats' Greatest Political Weapon*, DAILY KOS (June 10, 2012), <http://www.dailykos.com/story/2012/06/10/1096940/-Climate-denial-The-GOP-war-on-science-should-be-the-Democrats-great-political-weapon>.

voters surveyed and fifty-six percent of Republicans believed that human activities were causing climate change.³⁸³ A January 2015 poll concluded that eighty-eight percent of Democrats, eighty-three percent of Independents, and seventy-one percent of Republicans believed that climate change “was caused at least in part by human activities.”³⁸⁴ In addition, ninety-one percent of Democrats, seventy-eight percent of Independents, and fifty-one percent of Republicans thought that the government should be taking action to address climate change.³⁸⁵ The difference may, however, reflect the opinions of Republicans who are sufficiently motivated to vote in primaries. So long as the congressional leaders of the Republican Party remain convinced (or act as if they are convinced) that human activities do not cause climate disruption, there is little hope for compromise on that issue.

IV. THE DETRIMENTS AND BENEFITS OF PARTISAN GRIDLOCK

Most observers of partisan gridlock of the sort that has dominated congressional attempts to address climate disruption view it as generally undesirable.³⁸⁶ As control of the houses of Congress swings back and forth, the leaders of the party that is out of power adopt a strategy of obstructing and waiting until their party is back in power.³⁸⁷ As a result, very little legislation of any significance is enacted.

Gridlock prevents Congress from addressing serious national problems that demand governmental solutions. As related above, a large majority of the citizenry, and even a majority of Republicans, believes that government should limit GHG emissions,³⁸⁸ but partisan gridlock has prevented Congress from

383. Coral Davenport, *Many Conservative Republicans Believe Climate Change Is a Real Threat*, N.Y. TIMES (Sept. 29, 2015), http://www.nytimes.com/2015/09/29/us/politics/survey-of-republican-voters-shows-a-majority-believe-in-climate-change.html?_r=0.

384. Coral Davenport & Marjorie Connelly, *Most Republicans Say They Back Climate Action, Poll Finds*, N.Y. TIMES (Jan. 31, 2015), <http://www.nytimes.com/2015/01/31/us/politics/most-americans-support-government-action-on-climate-change-poll-finds.html>.

385. *Id.*

386. *See, e.g.*, Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES, July 8, 2013, at A3; Dave Helfert, *It's a MAD, MAD, MAD World*, HUFFINGTON POST (Oct. 23, 2014, 1:41 PM), http://www.huffingtonpost.com/dave-helfert/its-a-mad-mad-mad-world_b_6031408.html.

387. E.W., *supra* note 381.

388. Davenport, *supra* note 383.

creating a new program to address that problem.³⁸⁹ Most of the relevant interest groups agree that a cap-and-trade program or a carbon tax would be the most efficient and effective approach to reducing GHG emissions, but gridlock prevented Congress from adopting that option.³⁹⁰ Instead, the EPA has had to use the rather limited tools available to it in section 111(d) of the Clean Air Act to establish an emissions rate for individual power plants that, through a creative (some would say expansive) interpretation of the word “system,” has allowed states to convert into trading programs.³⁹¹ Few believe that the EPA’s Clean Power Plan is the optimal solution,³⁹² but gridlock prevented Congress from adopting a better program.³⁹³ Gridlock has also prevented the Tea Party wing of the Republican Party from enacting legislation designed to prevent the Obama Administration from moving forward with climate disruption regulations.

Gridlock in Congress prevents the natural evolution of statutes to meet new problems as they arise. The Clean Air Act is a good example. Congress amended the 1970 statute in 1977 to address the failure of state implementation plans to reduce several pollutants to the levels required by the ambient air quality standards by the deadlines in the original statute and to limit significant deterioration of air quality in areas that did meet the standards.³⁹⁴ It amended the statute again in 1990 to address, *inter alia*, the continued failure to meet all of the standards and to address the serious problem of acid rain.³⁹⁵ The next step in the natural evolution of the statute would have been a cap-and-trade program modeled on the acid rain program to address GHG emissions, but that did not happen in 2009,³⁹⁶ and it is not likely to happen any time in the foreseeable future.

389. David Gelles, *We Have a Climate Pact. Now We Need Laws.*, N.Y. TIMES, Dec. 20, 2015, at BU13.

390. *Id.*

391. James M. Van Nostrand & Eugene M. Trisko, *Two Views on the EPA Clean Power Plan*, W. VA. U. C. OF L., <http://www.law.wvu.edu/feature-stories/two-views-on-the-epa-clean-power-plan> (last visited Sept. 29, 2016).

392. *Id.*

393. *Id.*

394. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 687 (1977).

395. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2404 (1990).

396. John M. Broder, *‘Cap and Trade’ Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES, Mar. 25, 2016, at A13.

Gridlock reduces public respect for Congress. Citizens go to the trouble to vote in the expectation that their elected representatives will do their jobs. When gridlock prevents elected legislators from advancing virtually any policy agenda, voters across the political spectrum become frustrated and blame Congress. In a June 2013 Gallup poll, seventy-eight percent of respondents disapproved of the way Congress was performing, and the primary reason for their disapproval was “party gridlock/bickering/not compromising.”³⁹⁷ That the institution that is supposed to be the great engine of American democracy has lost the respect of the people it is supposed to be serving is a modern-day tragedy. To the extent that loss of respect for Congress bleeds over into loss of respect for the federal government in general, however, this consequence of gridlock is not necessarily a detriment to some, like the Tea Party advocates of small government, because it will tend to make the public less inclined to support any governmental programs.

Special interests can take advantage of gridlock to advance their preferences to the detriment of the overall public interest. The vast majority of scientists and even many large electric power companies understand that GHG emissions cause climate disruption, and the problem will grow worse if government does not require sources to reduce GHG emissions.³⁹⁸ Many electric power companies supported the Waxman-Markey cap-and-trade bill.³⁹⁹ But, fossil fuel production interests and think tanks receiving substantial funding from fossil fuel production interests took advantage of gridlock to prevent Congress from enacting that legislation. From the perspective of opponents of the EPA’s climate disruption regulations, environmental interests took advantage of gridlock to stop Congress from advancing the broader public interest in cheap and reliable electricity by enacting legislation preventing the EPA from moving forward with those regulations.

Gridlock may not be an entirely bad thing. The ease with which a minority can frustrate the will of the majority, especially in

397. Lydia Saad, *Gridlock Is Top Reason Americans Are Critical of Congress*, GALLUP (June 12, 2013), <http://www.gallup.com/poll/163031/gridlock-top-reason-americans-critical-congress.aspx>.

398. Coral Davenport, *Why Republicans Keep Telling Everyone They’re Not Scientists*, N.Y. TIMES, Oct. 31, 2014, at A18.

399. Broder, *supra* note 396.

the Senate, acts to some extent as a brake on bad legislation passed at the spur of the moment in response to a crisis. Environmental groups took advantage of the supermajority required to pass most bills in the Senate during the 104th Congress when a Republican-dominated House, inspired by the Contract with America, passed many bills aimed at slowing down and changing the direction of federal health, safety, and environmental regulations.⁴⁰⁰ Opponents of climate disruption legislation in the 111th Congress could certainly argue that sauce for the goose is sauce for the gander. But that Congress did not remain entirely powerless to enact legislation. It passed the Unfunded Mandates Reform Act and the Small Business Regulatory Enforcement Fairness Act to force agencies to analyze the effects of their regulations on states, the private sector, and small businesses.⁴⁰¹ The past three Congresses have been unable to do anything to address GHG emissions.⁴⁰² The polls cited above suggest that this policy outcome is supported by only a tiny minority of the citizenry.

V. THE BENEFITS AND DETRIMENTS OF UNILATERAL EXECUTIVE BRANCH POLICYMAKING

One of the most consistent Republican criticisms of the EPA's attempts to regulate GHG emissions was that the EPA unilaterally employed a strained interpretation of an aging federal statute to achieve a result that Congress specifically rejected in 2009 when it failed to pass the Waxman-Markey bill.⁴⁰³ The criticism is part of a larger, ongoing debate over the unilateral exercise of executive power in a representative democracy.⁴⁰⁴ Like

400. See Thomas O. McGarity, *Deflecting the Assault: How EPA Survived a "Disorganized Revolution" by "Reinventing" Itself a Bit*, 31 ENVTL. L. REP. 11,249, 11,249 (2001).

401. *Id.* at 11,252, 11,258.

402. *But see* Darryl Fears, *EPA Gains Power to Block Harmful Chemicals in Products*, WASH. POST, June 23, 2016, at A3; Michael Hawthorne, *EPA Gets New Powers to Regulate Toxic Chemicals, but Progress Takes Time*, CHI. TRIB. (June 21, 2016, 5:36 AM), <http://www.chicagotribune.com/news/watchdog/ct-toxic-chemicals-epa-met-20160620-story.html> (discussing Congress's recent amendments to the Toxic Substances and Control Act, illustrating its ability to regulate).

403. Gelles, *supra* note 389.

404. See, e.g., Ross Douthat, *The Making of an Imperial President*, N.Y. TIMES, Nov. 22, 2014, at SR11.

gridlock, unilateral Executive Branch action has benefits and detriments.

A. Benefits

Unilateral executive action has the undeniable benefit of allowing the federal government to make policy when Congress is incapable of addressing important social problems because of gridlock. The strong public support for mandatory limits on GHG emissions combined with the demonstrable inability of Congress to pass legislation addressing climate disruption,⁴⁰⁵ and the extreme reluctance of the courts to take it on,⁴⁰⁶ meant that the only institutional actor capable of advancing the public interest at the federal level was the President.⁴⁰⁷ President Obama recognized from the outset that legislation was preferable to regulating GHG emissions under the existing Clean Air Act, but he also made it clear that the EPA had a responsibility, indeed a legal obligation, to take action under that statute if Congress did not act.⁴⁰⁸ Although not all of the EPA's initiatives have been implemented, it is at least doing something to address a problem that will only get worse to the extent that it remains unaddressed.

To some degree, executive action that fills a policy vacuum created by congressional gridlock should alleviate the public frustration with gridlock. The beneficiaries of federal action no doubt appreciate the fact that a federal agency is attempting to address the problem, even if Congress is powerless to do so.

Executive branch action can circumvent efforts by special interests and their allied think tanks and political action groups to exploit gridlock to prevent Congress from addressing important problems in ways that harm their economic interests. The polls throughout the EPA's climate disruption rulemaking exercise

405. Gelles, *supra* note 389; Lydia Saad & Jeffery M. Jones, *U.S. Concern About Global Warming at Eight-Year High*, GALLUP (Mar. 16, 2016), <http://www.gallup.com/poll/190010/concern-global-warming-eight-year-high.aspx?version=print>.

406. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 411 (2011); *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012); *Comer v. Murphy Oil U.S.A.*, 585 F.3d 855, 860 (5th Cir. 2009).

407. Brownstein, *supra* note 360; James Oliphant, *Mad at Obama? Blame Republicans*, NAT'L J. DAILY AM, June 4, 2014, ProQuest ID 1532838165.

408. Brownstein, *supra* note 360.

demonstrated strong support for regulating GHG emissions.⁴⁰⁹ Yet, Congress could not address this strongly expressed public need because of the efforts of fossil fuel production interests,⁴¹⁰ think tanks like the Competitive Enterprise Institute,⁴¹¹ and Tea Party activist organizations like Americans for Prosperity.⁴¹² Environmental groups were able to avoid the gridlock by petitioning a sympathetic EPA to promulgate regulations requiring power plants to reduce GHG emissions.⁴¹³

B. Detriments

As the President fills the policy vacuum left by gridlock in Congress on climate disruption and many other important issues, there is a real risk of a fundamental shift of institutional power from the legislature to the executive that is inconsistent with the allocation of power that the Framers envisioned in Articles I and II of the Constitution.⁴¹⁴ Soon after the EPA proposed the Clean Power Plan, Professor Laurence Tribe joined several prominent Republicans, industry attorneys, and conservative pundits in claiming that the Clean Power Plan was an unconstitutional attempt by the President to enhance executive power at the expense of Congress.⁴¹⁵ Many of the same groups that are praising

409. *New National Survey—7 in 10 Voters Support Strong Carbon Pollution Limits on Power Plants*, SIERRA CLUB NAT'L (Feb. 4, 2014), <http://content.sierraclub.org/press-releases/2014/02/new-national-survey-7-10-voters-support-strong-carbon-pollution-limits-power>.

410. See Jennifer B. Lee, *Exxon Backs Groups that Question Global Warming*, N.Y. TIMES, May 28, 2003, at C5 (noting that fossil fuel giant Exxon funds interest groups that deny climate change); Jeffrey Kluger, *Why the Government Is Right to Investigate Oil Industry Ads*, TIME (Apr. 26, 2016), <http://time.com/4307669/oil-industry-ads-investigation> (noting the lobbying efforts of Frontiers of Freedom, one of the groups funded by Exxon, to stall climate change regulation).

411. See *EPA Case for Regulating Greenhouse Gas Emissions—Torn Apart by New Study*, COMPETITIVE ENTERPRISE INST. (Mar. 21, 2011), <https://cei.org/print/56960>.

412. See Suzanne Goldenberg, *US Ultra-Conservatives Target Carbon Tax in Online Advertising Campaign*, THE GUARDIAN (June 6, 2013), <https://www.theguardian.com/environment/2013/jun/06/americans-for-prosperity-carbon-tax>.

413. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

414. Oliphant, *supra* note 407.

415. Editorial, *Professor Tribe Takes Obama to School*, WALL STREET J., Dec. 6, 2014, at A12; see Steven F. Hayward, *Calling Obama's Bluff on Climate Change*, WALL STREET J., Apr. 7, 2015, at A13; Charles Krauthammer, *The Crisis of Executive Overreach*, WASH. POST, June 27, 2014, at A23; David B. Rivkin, Jr. & Elizabeth Price Foley, *The Case for Suing the President*, WALL STREET J., July 31, 2014, at A13.

President Obama's unilateral action on climate disruption were distressed by President George W. Bush's unilateral promulgation of a weak cap-and-trade program to reduce mercury emissions from power plants after a gridlocked Congress failed to pass a "four-pollutant" bill that they favored to address mercury, sulfur dioxide, nitrogen oxide, and carbon dioxide emissions.⁴¹⁶ Although neither action posed a serious threat to constitutional governance, the dangers of an "imperial presidency" should not be taken lightly.

i. May Backfire by Deepening the Resolve of
Congressional Opponents

One tactical disadvantage of unilateral executive action is the risk that the strategy will backfire and deepen the resolve of opponents to defeat the initiative. President Obama's insistence on pressing ahead with climate disruption regulations undoubtedly raised the ire of Senator Inhofe and Representative Whitfield and probably increased their commitment to defeat that initiative by attaching riders to must-pass legislation. The riders were more difficult for supporters of the EPA in Congress to stop, and they wound up consuming a great deal of their energy and time in addition to forcing the President to veto, or threaten to veto, the underlying legislation.⁴¹⁷

ii. Encourages Agencies to Press the Outer
Limits of Their Authority

Finally, unilateral executive action to address congressional vacuums encourages agencies to press the outer limits of their authority in ways that call on the courts to decide whether government can solve the underlying problem. The Chamber of Commerce and many affected industries challenged the EPA's endangerment finding and its triggering and tailoring rules in a case that was ultimately decided by the Supreme Court.⁴¹⁸ In *Utility Air Regulatory Group v. EPA*, the Court upheld the EPA's GHG

416. Eric Pianin, *EPA Announces "Cap and Trade" Plan to Cut Mercury Pollution*, WASH. POST, Dec. 16, 2003, at A35; see Andrew M. Ballard, *Witnesses in North Carolina Tell EPA to Scrap Mercury, Interstate Air Rules*, 35 Env't Rep. (BNA) 415, 35 ENR 415 (Feb. 27, 2004).

417. NAT. RES. DEF. COUNCIL, 2015 ANTI-ENVIRONMENTAL BUDGET RIDERS (2016), <https://www.nrdc.org/resources/2015-anti-environmental-budget-riders>.

418. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2437 (2014).

regulations in part and reversed them in part.⁴¹⁹ The Court first examined whether the EPA permissibly interpreted the statute to conclude that a source would have to undergo NSR solely on the basis of its potential to emit GHGs.⁴²⁰ It held that the EPA's interpretation of the words "any air pollutant" to include GHGs was unreasonable, even under the "deferential framework" that the Court had established for judicial review of agency statutory interpretation in its seminal 1984 opinion, *Chevron, USA v. Natural Resources Defense Council, Inc.*⁴²¹ The Court noted that in explaining the tailoring rule, the EPA acknowledged that applying NSR requirements to emissions of GHGs would have "calamitous consequences" if it interpreted the 100 and 250 tpy thresholds in those provisions literally.⁴²² The Court had "no doubt" that the NSR program was "designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens."⁴²³ Accepting the EPA's interpretation of "air pollutant" in the NSR context to include all of the pollutants in the broad statutory definition of air pollutant would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."⁴²⁴ Because the statute did not compel that interpretation, "it would be patently unreasonable—not to say outrageous—for the EPA to insist on seizing expansive power that it admits the statute is not designed to grant."⁴²⁵

The agency's tailoring rule did not make the agency's interpretation of air pollutant in the NSR context any less unreasonable because it represented an impermissible interpretation of the statute.⁴²⁶ In short, an agency had "no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."⁴²⁷ The Court noted that it would be "hard to imagine a statutory term less ambiguous than the

419. *Id.* at 2449.

420. *Id.* at 2439.

421. *Id.* at 2442; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

422. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

423. *Id.* at 2443.

424. *Id.* at 2444.

425. *Id.*

426. *Id.* at 2445.

427. *Id.*

precise numerical thresholds at which the Act requires [Prevention of Significant Deterioration] . . . permitting.”⁴²⁸ In the Court’s view, “the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.”⁴²⁹

Turning its attention to sources that crossed the statutory thresholds for regulated pollutants like sulfur dioxide and particulate matter (the so-called “anyway” sources), the Court held that the EPA had reasonably interpreted the statute to require permitting officials to include GHGs in determining the BACT for those sources.⁴³⁰ The court rejected the industry argument that BACT was “fundamentally unsuited” to GHG regulation because the only way to reduce GHG emissions from a source is to regulate energy production and use.⁴³¹ The BACT requirement was limited to pollutants “subject to regulation” under the statute, a phrase that, unlike the term “any air pollutant,” placed clear limits on the agency’s discretion.⁴³² GHGs were now subject to regulation after the EPA promulgated regulations governing GHG emissions from motor vehicles.⁴³³ The Court nevertheless recognized “the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation,” and it warned that its decision “should not be taken as an endorsement of all aspects of EPA’s current approach.”⁴³⁴

Since about eighty-three percent of stationary source GHG emissions came from anyway sources,⁴³⁵ the opinion was by no means a resounding defeat for the EPA, but it definitely clipped the agency’s wings. The Court’s concern that the EPA’s interpretation of “any air pollutant” “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization”⁴³⁶ suggested that the Court would skeptically view expansive interpretations of

428. *Id.*

429. *Id.* at 2446.

430. *Id.* at 2449.

431. *Id.* at 2447.

432. *Id.* at 2448.

433. *Id.* at 2431.

434. *Id.* at 2449.

435. *Id.* at 2438.

436. *Id.* at 2444.

old statutes to meet new problems.⁴³⁷ This could usher in a new era of judicial activism in which courts play a greater role in restraining executive branch attempts to fill the policy voids left when public demand for government action runs up against gridlock in Congress, a development that would no doubt be greeted by Tea Party Republicans with enthusiasm. Indeed, the House of Representatives recently attempted to speed up the process by passing a bill that would instruct reviewing courts to ignore *Chevron* and review all questions of statutory interpretation de novo.⁴³⁸ Ironically, the bill will probably not survive the gridlock that currently paralyzes Congress.⁴³⁹

VI. CONCLUSIONS

Assuming that the current degree of gridlock on environmental issues is undesirable, it is not easy to identify pathways out of the current morass to a less dysfunctional state of governance. One suggestion is for the congressional leadership of both parties to conduct more of its business behind closed doors away from the twenty-four-seven media coverage that thrives on controversy, raw-meat talking points, and name-calling.⁴⁴⁰ This approach was attempted without much success in 2009 when Representative Waxman met behind closed doors with various business groups and with Republican members to craft a massive bill that passed the House but died in the Senate.⁴⁴¹ Its lack of transparency and corresponding loss of accountability make it unattractive to advocates of open governmental decision-making, but it may be preferable to no governmental decision-making at all.

Some have suggested that a charismatic leader like Theodore Roosevelt might stimulate the public to reward civility and penalize partisan one-upmanship on the part of their elected representatives.⁴⁴² One might have thought that a personable and

437. *Id.* at 2428.

438. H.R. REP. NO. 114-622, at 2 (2016).

439. *See H.R. 4768—Separation of Powers Restoration Act of 2016*, CONGRESS.GOV, <http://www.congress.gov/bill/114th-congress/house-bill/4768> (last visited Oct. 11, 2016).

440. E.W., *supra* note 381.

441. Cathy Cash, *Co-Ops Make the Coal-State Allowance Issue a Key One in Climate Bill's Push to House Vote*, PLATTS ELECTRIC UTIL. WK., June 22, 2009, LexisNexis.

442. E.W., *supra* note 381.

articulate former president of the *Harvard Law Review*,⁴⁴³ who promised during the presidential campaign to reach out across party lines to find common ground,⁴⁴⁴ would be exactly the sort of charismatic leader that those observers had in mind. But the election of a president only one generation removed from Africa⁴⁴⁵ who favored active governmental approaches to problems like healthcare and climate disruption⁴⁴⁶ inspired nativist American devotees of Rush Limbaugh and Glenn Beck to form the nucleus of a Tea Party movement⁴⁴⁷ that has now been embraced by a large majority of Republican primary voters and resulted in the nomination of another charismatic leader who has embraced partisan one-upmanship and eschewed civil political discourse.⁴⁴⁸

One likely cause of gridlock in the House of Representatives is gerrymandering by state legislatures that has, in recent years, resulted in “safe” seats for so many members of Congress. In the 2012 elections, ninety percent of the members of the House who ran for re-election won.⁴⁴⁹ The holders of safe seats need not worry much about losing the next election if they adopt extreme and uncompromising positions on issues like climate disruption.⁴⁵⁰ Indeed, since the greatest risk to the holders of safe seats is that someone with a more extreme position will upset them in party primaries, they are driven toward the extreme positions of each party. The result is that the two parties in the House are highly polarized on important issues and not inclined

443. Fox Butterfield, *First Black Elected to Head Harvard's Law Review*, N.Y. TIMES (Feb. 6, 1990), <http://www.nytimes.com/1990/02/406/us/first-black-elected-to-head-harvard-law-review.html>.

444. Jonathan Allen & Carrie Budoff Brown, *Partisan D.C.: Obama's Broken Promise*, POLITICO (Jan. 17, 2012, 5:04 AM), <http://www.politico.com/story/2012/01/the-obama-congress-breakup-071511>.

445. *President Barack Obama*, THE WHITE HOUSE, <https://www.whitehouse.gov/administration/president-obama> (last visited Oct. 11, 2016).

446. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2017, at 25, 58 (2016).

447. Broder, *supra* note 84.

448. Molly Ball, *Is the Tea Party Responsible for Donald Trump?*, THE ATLANTIC (May 10, 2016), <http://www.theatlantic.com/politics/archive/2016/05/did-the-tea-party-create-donald-trump/482004>.

449. *Angry About Partisan Gridlock in Washington? Blame the States*, POTOMAC CHRON. (Dec. 2013), <http://www.governing.com/columns/potomac-chronicle/gov-redistricting-gov-one-mad.html>.

450. *Id.*

toward negotiation and compromise. It is highly unlikely, however, that the political process alone will dampen down gerrymandering because the politicians who have the power to address the issue benefit greatly from the status quo. The courts could become more active in policing gerrymandering, but that is a topic that goes far beyond the scope of this essay.

A change in the relationship between money and politics might reduce the partisan gridlock that currently disables Congress. The committed populist activists that form the core of the Tea Party would no doubt have had an influence on the 2010 and 2014 elections in the absence of the tens of millions of dollars that the Koch brothers and fossil fuel industries contributed to their cause.⁴⁵¹ But without the money, their influence would not have been nearly as great.⁴⁵² If the sources of the money that support dozens of groups with high-minded names like Americans for Prosperity and the money that finances opposition advertising were clearly visible during the election campaigns, it is possible that voters would take their messages with a grain of salt. But it is equally possible that voters would remain oblivious to greater information on who is funding political attack groups and financing opposition advertising and continue to pull the lever for the candidate who most successfully appeals to their economic self-interest, beliefs, and prejudices.

So long as the United States remains a two-party representative democracy and so long as one of those parties is dominated by a faction that is so ideologically committed to reducing government and disempowering executive branch agencies that it is unwilling to accept new regulatory programs designed to protect health, safety, and the environment, gridlock in Congress will probably continue until one side or the other overwhelmingly wins and either repeals the statutes upon which the executive branch has been relying or enacts major new regulatory programs designed to address the serious problems, like climate disruption, that have been festering for the past twenty years.

451. Mayer, *supra* note 36.

452. See generally MAYER, *supra* note 98, at 159–64 (arguing that money is the main factor in having political influence).