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4 EPA'S PROPOSED 111(d) RULE FOR EXISTING POWER PLANTS: LEGAL

5 AND COST ISSUES

6 TUESDAY, MARCH 17, 2015

7 House of Representatives,

8 Subcommittee on Energy and Power

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The Subcommittee met, pursuant to call, at 10:00 a.m.,  
12 in Room 2123 of the Rayburn House Office Building, Hon. Ed  
13 Whitfield [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Whitfield, Olson,  
15 Barton, Shimkus, Pitts, Latta, Harper, McKinley, Pompeo,  
16 Kinzinger, Griffith, Johnson, Long, Elmers, Flores, Mullin,

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17 Upton (ex officio), McNerney, Tonko, Engel, Green, Capps,  
18 Castor, Sarbanes, Yarmuth, Loeb sack, and Pallone (ex  
19 officio).

20 Staff present: Nick Abraham, Legislative Clerk;  
21 Charlotte Baker, Deputy Communications Director; Leighton  
22 Brown, Press Assistance; Allison Busbee, Policy Coordinator,  
23 Energy and Power; Patrick Currier, Counsel, Energy and Power;  
24 Tom Hassenboehler, Chief Counsel, Energy and Power; Mary  
25 Neumayr, Senior Energy Counsel; Chris Sarley, Policy  
26 Coordinator, Environment and Economy; Peter Spencer,  
27 Professional Staff Member, Oversight; Jean Woodrow, Director,  
28 Information Technology; Christine Brennan, Democratic Press  
29 Secretary; Jeff Carroll, Democratic Staff Director; Michael  
30 Goo, Democratic Senior Counsel, Energy and Environment;  
31 Caitlin Haberman, Democratic Professional Staff Member;  
32 Ashley Jones, Democratic Director, Outreach and Member  
33 Services; Rick Kessler, Democratic Senior Advisor and Staff  
34 Director, Energy and Environment; and John Marshall,  
35 Democratic Policy Coordinator.

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36           Mr. {Whitfield.} I would like to call our hearing to  
37 order this morning, and today's title is EPA's Proposed  
38 111(d) Rule for Existing Power Plants: Legal and Cost  
39 Issues. And we have two panels of witnesses this morning,  
40 and I want to thank those of you on the first panel. I will  
41 be introducing each one of you before you give your opening  
42 statement, and you will be given 5 minutes at that time, but  
43 before we are able to listen to your marvelous opening  
44 statements, you have to listen to our opening statements,  
45 which sometimes is not quite as exciting, people.

46           At this time, I would like to recognize myself for a 5-  
47 minute opening statement.

48           As I said, this morning our subcommittee will hold its  
49 first hearing this year on the EPA's proposed Clean Power  
50 Plan. We will examine specifically the circuitous and  
51 tortured rationale, in my opinion, of EPA that Section 111(d)  
52 of the Clean Air Act grants them the authority to regulate  
53 CO2 emissions from electric generating units that are already  
54 regulated under Section 112. We are also going to look  
55 closely at the impact on states and consumers.

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56           It appears that EPA is--excuse me just 1 minute. Given  
57 the stringency of this EPA proposed rule regarding CO2  
58 emissions that exist in coal plants, states are going to be  
59 forced to adopt state implementation plans within 1 year.  
60 And this regulation is so onerous for coal generation that,  
61 according to EPA's own projections, the amount of coal for  
62 electric generation in America would be--would decline by 40  
63 percent from the 2009 levels. The well-respected economic  
64 consulting firm, MERA, concluded that the proposal is the  
65 most expensive environmental regulation ever imposed on the  
66 electric power sector, costing between \$41 to \$73 billion per  
67 year, with 14 states facing peak year electricity price  
68 increases that are likely to exceed 20 percent. Regional  
69 grid reliability coordinators have begun warning that the  
70 rule will cost portions of the grid to suffer cascading  
71 outages and voltage collapse.

72           The North American Electricity Reliability Corporation  
73 recently produced an initial analysis that questions the  
74 validity of the basic assumptions underlying the rule, and  
75 raised a multiple--a multitude of concerns as to how the rule  
76 will affect the grid. This proposed rule has been described

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77 as a power grab, extreme, radical, unprecedented, and a  
78 violation of existing law. I agree with those  
79 characterizations. Even EPA has acknowledged that a literal  
80 application of Section 111(d) would likely preclude its  
81 proposal because the electric generating units are already  
82 regulated under Section 112. This proposed regulation would  
83 create turmoil in the generation, transmission and  
84 distribution of electricity. It is being proposed because  
85 the President was unable to convince Congress to adopt a cap  
86 and trade legislation, and he has made international  
87 commitments without input or advice and consent from  
88 Congress, and in his Georgetown speech, he committed the U.S.  
89 to an extreme policy. It appears that EPA is trying to find  
90 a way to implement the President's plan pursuant to his  
91 international commitments, even though EPA has readily  
92 acknowledged that this proposal would not make a measurable  
93 difference in addressing climate change.

94 So this is a significant issue that is going to have a  
95 dramatic impact on everything relating to electricity  
96 generation in America, and it is our responsibility to make  
97 all of this transparent to give the American people the

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98 opportunity to be aware of how extreme this is, and what a  
99 fundamental change it would make, and to address the question  
100 is it really legal. And that is what we intend to do today.  
101 That is why we are thrilled with the panel of witnesses that  
102 we have.

103 [The prepared statement of Mr. Whitfield follows:]

104 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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|

105           Mr. {Whitfield.} And with that, I would like to  
106 recognize the gentleman from California for his 5-minute  
107 opening statement.

108           Mr. {McNerney.} Thank you, Mr. Chairman.

109           You mentioned this is the first hearing on this issue  
110 this year, but it is our fourth hearing on this issue in the  
111 last few years. So climate change is here. I mean it is  
112 happening. It is not a matter of speculation. We need to  
113 take action; we need to take it now. The longer we wait to  
114 take action on climate change, the more expensive it is going  
115 to be, the more damaging the effects of climate change are  
116 going to be, so it is incumbent upon us to do something about  
117 it. But the good news is that if the United States takes the  
118 lead, then we are going to be able to develop the technology,  
119 we are going to be able to export jobs, I mean we are going  
120 to be able to export materials, it is going to be a win for  
121 the United States, so we might as well embrace this now.  
122 Taking steps to curb carbon emission will have beneficial  
123 impacts such as repairing and replacing aging infrastructure  
124 with very high efficiency infrastructure.

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125           Now, I know that the coal producers are worried about  
126 this, but my advice to them is embrace carbon sequestration.  
127 Embrace it, because coal is going to be reduced whether we  
128 like it or not, but if we embrace carbon sequestration, then  
129 we will be able to continue to use coal and keep those  
130 important American jobs. So that is my advice to the coal  
131 producers. But we are going to be able to increase our clean  
132 energy sources, renewable energy, energy efficiency and so  
133 on. So I think this is an opportunity for us.

134           Now, the Clean Air Act does give the EPA administrator  
135 the authority to put in place measures to reduce carbon  
136 dioxide production, and this is--authority has been upheld in  
137 the courts. Now, I think we are going to hear some opinions  
138 about that this morning, but it has already been upheld in  
139 the courts.

140           Now, the administration's--the EPA's proposal, in my  
141 opinion, is reasonable. It includes energy efficiency, it  
142 includes looking for new, more efficient sources of energy,  
143 and using demand issues to help us reduce our carbon  
144 emissions. Now, the administration does have the  
145 responsibility to take action to protect us from the effects

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146 of climate change, so that is exactly what the Clean Power  
147 Plan does. Fourteen states in the United States, including  
148 my home state of California, have embraced this proposal. In  
149 a letter to the EPA, they wrote that even greater levels of  
150 cost-effective carbon pollution reductions from the power  
151 sector are achievable in this time frame, using the system  
152 described by the EPA. The EPA found that the power sector  
153 could reduce its emissions by 26 percent below the 2005  
154 levels under this initiative. That is a lot. Twenty-six  
155 percent reduction of the 2005 levels. That is significant,  
156 and that has put us in a leadership position. It has given  
157 other state--other countries like China a motive to start  
158 reducing their carbon emissions, which is absolutely critical  
159 if we want to reduce carbon emissions in time to prevent the  
160 worst impacts of climate change. So this is really a win-  
161 win. But another thing that is really important is that the  
162 level of the amount of outreach that was done with this  
163 proposal was really unprecedented. The rule that we have in  
164 front of us is not final, so it is important for us to  
165 continue examining this issue, and to hear from all the  
166 stakeholders, and work together to find something that is

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167 going to benefit our Nation, put is in a leadership position,  
168 increase the economy, economic growth, and help stop climate  
169 change before the worst impacts are felt throughout the  
170 United States and throughout the world.

171 So with that, I am going to yield back, Mr. Chairman.

172 [The prepared statement of Mr. McNerney follows:]

173 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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174           Mr. {Whitfield.} Thank you, Mr. McNerney.

175           At this time, I would like to recognize the chairman of  
176 the full committee, Mr. Upton, for 5 minutes.

177           The {Chairman.} Thank you, Mr. Chairman.

178           You know, today we continue our examination of what many  
179 folks believe is the most problematic of all the global  
180 warming-related regulations being churned out by the--this  
181 Administration; the proposed Clean Power Plan by EPA. And I  
182 welcome our witnesses who are going to be discussing both the  
183 legal and cost concerns with this proposed rule, as well as  
184 the looming compliance difficulties at the state level.

185           The Clean Air Act has been around since 1970, and we  
186 know from experience that it works best when implemented in  
187 the spirit of cooperative federalism. We have proven that we  
188 can accomplish a great deal to improve air quality when  
189 federal and state governments work together as partners.  
190 However, this proposed rule yanks the rug out from underneath  
191 the states with EPA dictating to the states, and effectively  
192 micromanaging intrastate electricity policy decisions to a  
193 degree even the agency admits is unprecedented. This raises

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194 a broad array of legal issues, not to mention that it is bad  
195 policy.

196 As a result, many states are sounding the alarm about  
197 the legality of the rule and the implications for their  
198 citizens and their ratepayers. In addition to significant  
199 constitutional and other legal questions, states have  
200 expressed concerns about the feasibility of EPA's proposed  
201 requirements and the likely impacts on electricity costs and  
202 reliability. The risks to ratepayers are especially serious  
203 in states that rely on coal for a substantial part of their  
204 electricity generation. Under the Clean Power Plan, states  
205 would be forced to redesign their electricity generation,  
206 transmission, and distribution systems and related laws and  
207 policies, and to do so over a short time frame. Longstanding  
208 policies would be essentially wiped clean, and jobs and  
209 family budgets could suffer as a result, particularly for the  
210 most vulnerable.

211 Today, we are going to hear several perspectives from  
212 both legal experts and state environmental and energy  
213 regulators. I am particularly concerned about the impacts on  
214 states, such as Michigan, which have a significant

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215 manufacturing sector. American manufacturers have shown that  
216 they can compete with anyone in the world, unless they face  
217 an uneven playing field caused by unilateral regulations like  
218 the EPA's proposed plan.

219 Other EPA regulations like the Utility MACT rules have  
220 already contributed to rising electric rates and growing  
221 concerns about reliability. With the economy still far from  
222 fully recovered, the last thing job creators need is another  
223 expensive regulation likely to drive up energy prices. And  
224 the last thing struggling families need is to see their  
225 electric bills go up as well.

226 So I hope that today's hearing will inform our efforts  
227 to develop commonsense policies that will ensure that  
228 electricity remains affordable and reliable in the coming  
229 decades. Jobs and the economy certainly are very important,  
230 and they remain our focus, and we will continue to work to  
231 keep the lights on and the electricity bills affordable.

232 And I yield to other republicans wishing to speak. If--  
233 seeing none, I yield back the balance of my time.

234 [The prepared statement of Mr. Upton follows:]

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235 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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236           Mr. {Whitfield.} Gentleman yields back.

237           At this time, I would like to recognize the gentleman  
238 from New Jersey, Mr. Pallone, the ranking member on the  
239 committee, 5 minutes.

240           Mr. {Pallone.} Thank you, Chairman Whitfield.

241           As we sit here today, unchecked climate change continues  
242 to reshape our world. According to NOAA, 2014 was the  
243 warmest year ever recorded, and 9 of the 10 hottest years  
244 have occurred since 2000. We know this warming is due to  
245 carbon pollution from fossil fuels accumulating in the  
246 atmosphere, trapping more heat and changing our climate. We  
247 can already see the effects of this warming in rapidly-  
248 melting ice sheets and glaciers, extreme droughts and  
249 wildfires, increased storm damages, shrinking coral reefs,  
250 and beyond. Globally, the cost of these impacts easily reach  
251 into billions of dollars each year, and that trend shows no  
252 sign of slowing down.

253           To that end, EPA has proposed a workable plan to reduce  
254 emissions of carbon pollution from power plants, which are  
255 the largest uncontrolled source of manmade greenhouse gases

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256 in the U.S. Today, we will hear more about the Clean Power  
257 Plan, but there are few features that merit emphasizing in  
258 advance. First, the Clean Power Plan is not a one-size-fits-  
259 all proposal for reducing emissions. It uses a flexible  
260 state-based approach that takes account of each individual  
261 state's unique capacity to reduce emissions from its  
262 electricity sector. Second, EPA is not proposing that states  
263 act overnight. States have until 2030 to meet their final  
264 goals, and the plan's interim goals don't begin until 2020.  
265 Third, the Clean Power Plan falls well within the legal  
266 authority and responsibility of EPA to address carbon  
267 pollution from power plants. This system-wide approach is  
268 based on the plain language of the Clean Air Act. And  
269 finally, and perhaps most importantly, the Clean Power Plan  
270 is just a proposal and is not yet finalized.

271 EPA received over 3-1/2 million public comments on the  
272 Clean Power Plan, and is reviewing these comments as we  
273 speak. EPA can and will make adjustments to its proposal.  
274 EPA is looking hard at a range of issues relating to timing,  
275 reliability, technical and legal issues, and EPA is working  
276 in close coordination with states, utilities, grid operators,

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277 and other federal agencies like DOE and FERC to make sure the  
278 plan is done right.

279 And there are those who deny science. We--they claim  
280 that climate change is not real or manmade, that it is caused  
281 by natural cycles or sunspots, and that simply is untrue.  
282 The world's leading scientists have told us that climate  
283 change is happening, is caused by humans, and will have  
284 extremely serious impacts. The republican-led Congress has  
285 not listened to the scientists, and has yet to take action to  
286 address these serious climate threats. And just saying no  
287 isn't an option anymore. We must reduce our carbon  
288 emissions, and the Clean Power Plan is a reasonable first  
289 step.

290 So those who have concerns with EPA's plan have a  
291 responsibility, in my opinion, to not just criticize it, but  
292 also to propose alternative ways to achieve the same goal.  
293 There are always those who are willing to make absurd  
294 arguments on behalf of companies that profit from the status  
295 quo, and we will hear today from some of that--some of these  
296 that EPA's plan is not legal, that it is unworkable, that  
297 some states may refuse to participate, but I think that those

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298 making those arguments aren't really interested in finding  
299 solutions to our carbon pollution problem. They are not  
300 interested in developing a plan to help us reduce emissions,  
301 while still maintaining a safe, reasonably-priced electricity  
302 system. To quote the words of EPA Administrator McCarthy,  
303 they are just trying to put their heads in the sand. They  
304 are more than welcome to do that but history will not treat  
305 them kindly. Keep this in mind as we listen today and during  
306 future hearings and debates on the Clean Power Plan. I think  
307 you will be able to recognize those who are simply arguing  
308 for inaction on behalf of entrenched fossil fuel interests,  
309 and compare them to those who want to act on climate change,  
310 and also want the development of our path forward to be  
311 thoughtful, sensible, and effective.

312       So for my part, I am in the Latta camp, and I urge all  
313 of my colleagues to join me. And I look forward to hearing  
314 from the witnesses.

315       I don't think anybody on my side wanted time, is that  
316 correct? So I will just yield back my time. Thank you, Mr.  
317 Chairman.

318       [The prepared statement of Mr. Pallone follows:]

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320           Mr. {Whitfield.} Gentleman yields back. Thank you very  
321 much.

322           And that concludes our opening statements. So now we  
323 will turn to our panel of witnesses, and I am going to  
324 introduce each one of you individually before you give your  
325 opening statements.

326           So our first opening statement will be given by Mr.  
327 Laurence Tribe, who is the Carl M. Loeb University Professor  
328 and Professor of Constitutional Law Harvard. Professor  
329 Tribe, welcome, and we look forward to your testimony. You  
330 are recognized for 5 minutes, and be sure to turn the  
331 microphone on because it is not on automatically. So thank  
332 you.

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333 ^STATEMENTS OF LAURENCE H. TRIBE, CARL M. LOEB UNIVERSITY  
334 PROFESSOR AND PROFESSOR CONSTITUTIONAL LAW, HARVARD LAW  
335 SCHOOL; ALLISON D. WOOD, PARTNER, HUNTON AND WILLIAMS LLP;  
336 AND RICHARD L. REVESZ, LAWRENCE KING PROFESSOR OF LAW, DEAN  
337 EMERITUS, DIRECTOR, INSTITUTE FOR POLICY INTEGRITY, NEW YORK  
338 UNIVERSITY SCHOOL OF LAW

|

339 ^STATEMENT OF LAURENCE H. TRIBE

340 } Mr. {Tribe.} Mr. Chairman, members of the committee, I  
341 am honored to testify about EPA's proposed CO2 power plant  
342 regulations. I have submitted my full written statement for  
343 the record.

344 EPA's proposal raises grave constitutional questions,  
345 exceeds EPA's statutory authority, and violates the Clean Air  
346 Act.

347 First, the plan conflicts with settled principles of  
348 federalism and Supreme Court precedent because it would  
349 commandeer state governments, treating them more like  
350 marionettes, dancing to the tune of a federal puppeteer, than

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351 like laboratories of democracy. It would dictate the CO2  
352 emissions target that each state must adopt within a year,  
353 commanding every state to enact an EPA-approved package of  
354 laws meeting that target by requiring power plants to shut  
355 down or reduce operations, consumers and businesses to use  
356 less electricity and pay more for it, and utilities to shift  
357 from coal to natural gas and other energy sources; a total  
358 overhaul of the states' way of life.

359 Now, reducing states to this submissive role would  
360 confound the political accountability that the Tenth  
361 Amendment guarantees. EPA's plan would increase energy costs  
362 over local opposition, while cloaking that increase in the  
363 Emperor's garb of state choice, with state governments taking  
364 the blame for policies actually dictated and necessitated by  
365 EPA. A state that submits no plan meeting EPA's approval by  
366 2016 confronts a centrally-planned and administered federal  
367 scheme of uncertain scope, burdening the state of its  
368 citizens backed by draconian sanctions like the loss of  
369 federal funds under preexisting antipollution programs.  
370 Prominent defenders of the EPA's proposal necessarily concede  
371 that noncomplying states gambling on whatever unpredictable

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372 backup plan EPA might impose would be at a huge disadvantage.

373 EPA's proposal also presents serious Fifth Amendment  
374 problems. We are all CO2 emitters, and atmospheric CO2 is  
375 the intermingled result of all human activity, but EPA would  
376 impose costs, that ought to be borne equitably by everyone,  
377 on a small group of power plants and companies after  
378 requiring those same companies to invest billions of dollars  
379 to reduce their non-CO2 pollutants over the past 25 years.  
380 The Constitution demands just compensation to rectify that  
381 bait and switch.

382 Now, courts would never assume a congressional design to  
383 confer such revolutionary and constitutionally dubious power  
384 on EPA unless Congress clearly said so. But far from it,  
385 under the very Clean Air Act provision that EPA invokes,  
386 Section 111(d), Congress expressly prohibited EPA from doing  
387 exactly what it proposes to do here: regulate emissions from  
388 coal-fired power plants under Section 111(d), when those same  
389 power plants are already being regulated in costly ways under  
390 Section 112. In 1995, EPA itself read the Clean Air Act to  
391 prohibit such duplication, as did the D.C. Circuit Court of  
392 Common Pleas Appeals in 2008, and the U.S. Supreme Court in

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393 2011.

394           If the Clean Air Act's meaning were ambiguous, and it  
395 isn't, settled principles of statutory interpretation would  
396 mean that EPA and any reviewing court would have to interpret  
397 the Act to avoid the constitutional difficulties that EPA's  
398 interpretation raises under the Fifth and Tenth Amendments.  
399 Now, to circumvent that avoidance, principle EPA resorts to  
400 sheer fantasy. It claims that Congress enacted a law in 1990  
401 that never made it into the U.S. Code, and that everybody has  
402 been using the wrong version of the statute for the past  
403 quarter century. Really? Crediting that story would call  
404 into question dozens of similar statutory provisions  
405 throughout the U.S. Code. The tale is pure fiction. There  
406 is no mistake in the U.S. Code, but even if Congress had  
407 truly tossed two different bills in the air and told EPA to  
408 decide which one to catch and run with, that would be a power  
409 Congress could not give away, and EPA could not recognize and  
410 exercise. It is a law-making power that belongs only to you,  
411 backed by a judicial power that belongs only to the courts.

412           EPA is attempting an unconstitutional trifecta; usurping  
413 the prerogatives of the states, Congress and the federal

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414 courts all at once. Much is up for grabs in this complex  
415 area, but burning the Constitution of the United States,  
416 about which I care deeply, cannot be part of our national  
417 energy policy to deal with the problems of climate change.

418 Thank you very much.

419 [The prepared statement of Mr. Tribe follows:]

420 \*\*\*\*\* INSERT 1 \*\*\*\*\*

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421           Mr. {Whitfield.} Thank you, Professor Tribe.

422           At this time, our next witness is Allison Wood, who is a  
423 partner at Hunton and Williams. And welcome. We appreciate  
424 you being here, and you are recognized for 5 minutes.

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425 ^STATEMENT OF ALLISON D. WOOD

426 } Ms. {Wood.} Good morning. It is an honor to appear  
427 before this subcommittee to offer testimony on EPA's proposed  
428 Section 111(d) rule.

429 I have practiced--

430 Mr. {Whitfield.} Ms. Wood, if you--excuse me one  
431 minute. Would you just move the microphone a little closer?

432 Ms. {Wood.} Absolutely.

433 Mr. {Whitfield.} Thank you.

434 Ms. {Wood.} Thank you. I have practiced environmental  
435 law for over 16 years, and for the past decade, my practice  
436 has focused almost exclusively on climate change.

437 EPA's proposed rule suffers from a great many legal  
438 infirmities, and I will focus on two of those today. The  
439 first defect is that EPA is prohibited from regulating  
440 electric generating units under Section 111(d) because those  
441 units are already subject to regulation under a different  
442 provision of the Clean Air Act, Section 112, which regulates  
443 sources of hazardous air pollutants.

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444           Section 111(d) has always been a little-used provision  
445 of the Clean Air Act that was designed to catch the handful  
446 of sources that were not regulated under the Act's other  
447 major provisions. Indeed, this provision has been used to  
448 regulate sources only five times since 1970. The confusion  
449 over this point comes from two amendments that were made to  
450 Section 111(d) during the 1990 amendments to the Clean Air  
451 Act, both of which appear in the statutes at large. EPA  
452 claims this leads to ambiguity, but in fact, the codifiers  
453 properly included in the United States Code only the House  
454 amendment; the amendment that clearly precludes regulation  
455 under Section 111(d) of source categories that are regulated  
456 under Section 112. This was appropriate, given that the  
457 managers of the Senate bill had expressly receded to the  
458 House amendment.

459           The second legal defect involves EPA's overbroad  
460 interpretation of the term system of emission reduction in  
461 Section 111. In every other rulemaking under Section 111(d),  
462 EPA looked at existing sources to see what technology and  
463 processes were in place to limit pollution. EPA then based  
464 its determination of the best system of emission reduction

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465 for those types of existing sources on the known and  
466 demonstrated technologies and processes that were in use.  
467 States then applied the system of emission reduction to  
468 existing sources within their borders that did not yet have  
469 these pollution controls, while taking into account several  
470 factors including the source's remaining useful life.

471 In this rulemaking, EPA turns this established procedure  
472 on its head and proposes for the first time a standard of  
473 performance that is based on not operating the source. EPA  
474 claims for the first time, based on the dictionary definition  
475 of the word system, that it can regulate any set of things  
476 that leads to reduced emissions from the source category  
477 overall, even if those things go beyond the fence line of the  
478 plan. EPA's new interpretation is fundamentally flawed. A  
479 system of emission reduction must begin and end at the source  
480 itself. EPA's interpretation would allow the agency endless  
481 regulation over all manner of things that are completely  
482 outside its purview. To use an illustration that may help  
483 people better understand what EPA is proposing to do here, it  
484 is as if EPA were requiring car owners not only to have  
485 catalytic converters on their cars, but also to travel a

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486 certain amount of days per week by bus, purchase a certain  
487 number of electric vehicles, and work from home one day a  
488 week. All of these things would reduce overall car  
489 emissions, but they do nothing to reduce the rate at which  
490 those cars emit pollutants per mile, and most people would  
491 surely agree that the Clean Air Act would not allow EPA to  
492 require these types of things from car owners, yet, this type  
493 of regulation is exactly what EPA is trying to do to power  
494 plants in the Section 111(d) rule.

495 Finally, it should be noted that litigation over this  
496 rule will absolutely occur when it is finalized.  
497 Unfortunately, litigation takes time, and states are going to  
498 be forced to act before courts determine whether the Section  
499 111(d) rule is lawful. State plans must be submitted within  
500 1 year after the rule is finalized, unless a partial plan is  
501 submitted and EPA grants an extension. These plans will be  
502 very complex, and states have never before had to submit a  
503 plan under Section 111(d) of this magnitude. Many states  
504 will need to pass legislation as part of their plan  
505 preparation. Regulations will need to be promulgated.  
506 Litigation will not be resolved before these things happen.

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507 Under this timing, any victory the states achieve will end up  
508 being hollow. A victory will not be able to give the states  
509 back the resources that were expended in plan development,  
510 nor will it solve the issue of states having to go through  
511 the time-consuming and uncertain process of unwinding  
512 legislation and regulations that were passed to put the plan  
513 in place.

514 Thank you again for the opportunity to testify today.

515 [The prepared statement of Ms. Wood follows:]

516 \*\*\*\*\* INSERT 2 \*\*\*\*\*

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|

517           Mr. {Whitfield.} Thank you, Ms. Wood.

518           At this time, our third witness is Professor Richard

519 Revesz, who is the Lawrence King Professor of Law, Dean

520 Emeritus, Director of Institute for Policy Integrity at the

521 New York University School of Law. And thank you very much

522 for being with us today, Professor, and you are recognized

523 for 5 minutes.

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|

524 ^STATEMENT OF RICHARD L. REVESZ

525 } Mr. {Revesz.} Thank you, Mr. Chairman, and thank you  
526 for inviting me to testify before the committee.

527 My written testimony covers four main points. First,  
528 the Clean Power Plan is a natural extension of previous EPA  
529 policies stretching back decades, and promulgated under both  
530 republican and democratic administrations, that use flexible  
531 compliance mechanisms to address the environmental harms of  
532 power production. Second, the Clean Power Plan does not give  
533 rise to any constitutional problems. Third, EPA has clear  
534 authority to implement the Clean Power Plan under Section  
535 111(d) of the Clean Air Act. And fourth, EPA's proposed  
536 guidelines in Section 111(d) are authorized by the statute  
537 and based upon demonstrated approaches that some utilities  
538 and states have already taken to reduce greenhouse gas  
539 emissions.

540 On the first point, for the past quarter of a century,  
541 each President has taken measures to regulate the emissions  
542 of existing power plants because they are the Nation's

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543 largest sources of many harmful air pollutants, including  
544 mercury, sulfur dioxide, and carbon dioxide. Under the  
545 Administration of President George H. W. Bush, Congress  
546 enacted a 1990 amendment which capped sulfur dioxide  
547 emissions from existing power plants, and established an  
548 innovative trade mechanism to achieve reductions as cheaply  
549 as possible. Later, the Administrations of President Bill  
550 Clinton, George W. Bush, and Barack Obama each promulgated  
551 important regulations requiring existing power plants to  
552 reduce emissions of smog and particulate precursors that  
553 negative affect the air quality in downwind states, again  
554 using cost-effective flexible trading mechanisms. And  
555 finally, the Administrations of both President George W. Bush  
556 and Barack Obama issued rules limiting emissions of mercury  
557 from existing plants.

558       Like these earlier programs, EPA's Clean Power Plan will  
559 cost-effectively reduce pollution from existing power plants  
560 through a flexible program that enables states to rely on  
561 traditional regulation, emissions trading, or any other tool  
562 that they may prefer.

563       My second point on the constitutional issues. The first

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564 claim made by opponents is there is a problem with the way  
565 Congress delegated regulatory power to EPA under Section  
566 111(d) because the House and Senate passed arguably  
567 inconsistent amendments to the provision in 1990. Both the  
568 House and Senate versions were then included in a conference  
569 bill that was passed by each chamber and signed by President  
570 George H. W. Bush. In all of our history, the Supreme Court  
571 has struck down only two statutory provisions as  
572 constitutionally impermissible delegations to an  
573 administrative agency, both in the mid-1930's, during its  
574 skirmishes with President Franklin Roosevelt over the New  
575 Deal. Supreme Court has never invalidated a federal statute  
576 on non-delegation grounds on the basis of the argument that  
577 opponents of the Clean Power Plan now advance: that a  
578 statute has arguably inconsistent provisions. Instead, the  
579 courts have consistently dealt with this problem by finding  
580 ways to develop a workable interpretation of the statute.

581 Opponents of the Clean Power Plan make a similarly  
582 farfetched argument the plan violates the Takings Clause of  
583 the Fifth Amendment, which protects private property rights.  
584 A regulation leads to a Takings violation only if it deprives

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585 an owner of essentially all of the value of his or her  
586 property, which is not the case here. And even if it were,  
587 the appropriate remedy is a subsequent suit for compensation,  
588 not the invalidation of a nationwide rule.

589 Finally, opponents claim that the Clean Power Plan runs  
590 afoul of the Tenth Amendment's prohibition against the  
591 commandeering of state institutions by the Federal  
592 Government. This extreme and unsupported interpretation of  
593 the Tenth Amendment would invalidate many of the core  
594 provisions of the Clean Air Act, not only Section 111(d), in  
595 fact, it is the basis for how the National Ambient Air  
596 Quality Standards under the Clean Air Act, which are the  
597 centerpiece of the statute, and have been its centerpiece  
598 since 1970, are administered. And nothing here is  
599 commandeered anyway. The states are merely given the option  
600 to submit plans if they choose to do so. If they do not, the  
601 Federal Government has the authority to impose federal  
602 implementation plans that give rise to no constitutional  
603 problem at all because they do not involve state  
604 institutions.

605 The third point, the statutory point. Congress passed 2

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606 amendments, the House Amendment and the Senate Amendment.  
607 The opponents of the Clean Power Plan would like us to ignore  
608 the Senate Amendment because it was not included in the U.S.  
609 Code by the Office of Law Revision Counsel, but everyone  
610 knows that a mere functionary cannot supplant the will of  
611 Congress. To do so would violate the principles of  
612 bicameralism and presentment. And in any event, even the  
613 House Amendment, which the opponents of the Clean Power Plan  
614 would like to credit, is not subject to a single  
615 interpretation; it is subject to multiple interpretations,  
616 and under traditional principles of statutory construction,  
617 the interpretation by the agency, by EPA, is entitled to  
618 deference in the courts.

619       And finally, on the claim that the Clean Power Plan  
620 violates some provision of the Clean Air Act because it  
621 regulates beyond the fence line, the product here is  
622 electricity, not electricity produced by coal, and EPA has  
623 the authority to define the system in that way, and has done  
624 so.

625       Thank you very much, and I would be delighted to answer  
626 questions.

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627 [The prepared statement of Mr. Revesz follows:]

628 \*\*\*\*\* INSERT 3 \*\*\*\*\*

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|

629           Mr. {Whitfield.} Thank you, Professor Revesz. And  
630 thank all of you for your statements.

631           At this time, the members have an opportunity to ask  
632 questions, and I would like to recognize myself for 5 minutes  
633 at this time.

634           Ms. Wood, we have heard a lot of discussion about inside  
635 the fence and outside the fence, and as I said in my opening  
636 statement, this regulation has been characterized in a lot of  
637 different ways; extreme, radical, power grab. Would you  
638 explain from your perspective of why this is so significantly  
639 different in that it allows outside-the-fence solutions?

640           Ms. {Wood.} Outside the--

641           Mr. {Whitfield.} Turn your microphone on.

642           Ms. {Wood.} Yes, thank you. The outside-the-fence line  
643 nomenclature has been--is being used a lot. Indeed, you  
644 can't even go beyond the source itself. So here we are  
645 talking about the actual electric generating unit. And the  
646 reason why people talk a lot about going beyond the fence  
647 line with this rule is that, of the four building blocks that  
648 are set forth in the rule, only one of them actually gets any

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649 kind of emission reduction at the source itself, and that is  
650 building block one that has to do with energy efficiency  
651 improvements that can be made.

652 All of the other building blocks take place somewhere  
653 else beyond the source, outside the fence line. This has  
654 never been the case with any other rulemaking under Section  
655 111(d).

656 Mr. {Whitfield.} Never been the case before?

657 Ms. {Wood.} No.

658 Mr. {Whitfield.} I take it that a state would even be  
659 able to mandate the type of material used in a building under  
660 this regulation if it is adopted. Would that be correct?

661 Ms. {Wood.} It--I--

662 Mr. {Whitfield.} In order to meet the overall emission  
663 cap.

664 Ms. {Wood.} Right. I--exactly. You could, you know,  
665 add building block five that would say you have to have  
666 Energy Star buildings to try to reduce--

667 Mr. {Whitfield.} Right.

668 Ms. {Wood.} --energy consumption. I mean that could  
669 also arguably fall within the building block four, which is

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670 designed to have consumers use less electricity.

671           Mr. {Whitfield.} I mean I think--I thought your  
672 illustration was very good about the--driving to work. You  
673 could be mandated to take a bus, you could be mandated to  
674 this vehicle or ride a bicycle certain days, whatever, but it  
675 doesn't do anything about reducing the emission of your  
676 automobile.

677           Ms. {Wood.} Right, and that is exactly the point of  
678 beyond the source or beyond the fence line.

679           Mr. {Whitfield.} Yeah.

680           Ms. {Wood.} The emission reductions that you would get--  
681 -

682           Mr. {Whitfield.} Yeah.

683           Ms. {Wood.} --you know, from not driving your car one  
684 day a week have nothing to do with--

685           Mr. {Whitfield.} Yeah.

686           Ms. {Wood.} --the car running and getting--

687           Mr. {Whitfield.} Yeah.

688           Ms. {Wood.} --and emitting less pollution--

689           Mr. {Whitfield.} Yeah.

690           Ms. {Wood.} --it has to do with the car not running.

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691           Mr. {Whitfield.} And so, Professor Tribe, do you agree  
692 that this inside the fence, outside the fence is a radical  
693 change for EPA?

694           Mr. {Tribe.} Mr. Chairman, I agree very much that it is  
695 a radical change, and it is a radical change that bears on  
696 what this committee needs to think about in several ways.  
697 First of all, I think it shows how unrealistic is the claim  
698 that, you know, there is nothing going on here, just move  
699 along, don't bother, which is, I think, the essence of  
700 Professor Revesz's testimony. No constitutional problem,  
701 nothing new. But it is radically new. I mean we should all,  
702 I think, be honest with ourselves. Yes, many people think  
703 that there are severe problems that need to be addressed, but  
704 the question is do we care about the rule of law and how we  
705 go about addressing them.

706           Mr. {Whitfield.} Right.

707           Mr. {Tribe.} Now, the way that a court, if a court gets  
708 its hands on this, would look at the outside-the-fence issue  
709 isn't just as a technical matter, inside, outside, it would  
710 look at it in terms of no limiting principle.

711           Mr. {Whitfield.} Right.

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712           Mr. {Tribe.} As a number of state attorneys general  
713 have said, if you--if the EPA can do this, it can tell you  
714 how often to use your electric toothbrush.

715           Mr. {Whitfield.} And EPA is--and the EPA has even had  
716 legal memorandums themselves saying that they didn't think  
717 they had the authority to regulate under 111(d).

718           Mr. {Tribe.} Yeah, that is right. In 1995, they didn't  
719 think they had the authority. They were told in 2008 by the  
720 D.C. Circuit they didn't have the authority. In 2011, the  
721 U.S. Supreme Court told them they didn't have the authority,  
722 and they say never mind.

723           Mr. {Whitfield.} Yeah. Well, why wouldn't they  
724 regulate under Section 108?

725           Mr. {Tribe.} Well, 108 to 110, with respect to the  
726 National Ambient Air Quality Standards, really don't fit this  
727 very well or else you could be sure that they would go that  
728 route. The reason they don't fit is that they are really  
729 based on state designation of geographical areas within the  
730 state as attainment, non-attainment or unclassifiable.

731           Mr. {Whitfield.} Right.

732           Mr. {Tribe.} I would hate to live in an unclassifiable

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733 area. But the point is that CO2 comes along with everything  
734 uniformly throughout the global atmosphere--

735 Mr. {Whitfield.} Right.

736 Mr. {Tribe.} --and so you really couldn't approach it  
737 by making the findings. And besides the findings that you  
738 would have to make under 108 to 110 would be very difficult  
739 to make, and would require a procedure that they haven't gone  
740 through.

741 Mr. {Whitfield.} And they can't do it under 112 because  
742 CO2 is not a listed hazardous air pollutant.

743 Mr. {Tribe.} Right, under 112, there are 188 hazardous  
744 air pollutants listed by Congress. Nobody claims that CO2,  
745 which is essential for life, is hazardous in that sense.  
746 They try to--

747 Mr. {Whitfield.} Yeah.

748 Mr. {Tribe.} --split hairs by saying, well, it may not  
749 be hazardous but it is dangerous. But we are not writing a  
750 novel here, but we are talking about a law passed by this  
751 body, and I am concerned that the--you know, I have cared  
752 about the environment ever since, you know, I was a kid, and  
753 I taught the first environmental law course in this country,

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754 and I have won major victories for environmental causes, but  
755 I am committed to doing it within the law. And there is a  
756 legal way to address these problems. They tried to get cap  
757 and trade with this Administration, didn't work. And I guess  
758 the EPA is now following a kind of marching order saying,  
759 well, if you can't do it through the lawful way, just take an  
760 agency and tell it to bend and twist and tear and rip the  
761 law.

762 I really--when I use the metaphor that burning the  
763 Constitution is not a good source of fuel for dealing with  
764 these problems, I was being metaphorical only in part. When  
765 you tear the Constitution apart bit by bit, and give it the,  
766 you know, death by 1,000 cuts, what else will we sacrifice  
767 the Constitution for?

768 Mr. {Whitfield.} Thank you, Professor Tribe. My time  
769 has expired.

770 I--at this time, I recognize the gentleman from  
771 California for 5 minutes.

772 Mr. {McNerney.} Thank you, Mr. Chairman.

773 Mr. Revesz or Professor, would you describe what the  
774 Supreme Court actions have been thus far with regard to the

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775 EPA that is applicable to this--to the Clean Air Plan?

776 Mr. {Revesz.} Sure. The Supreme Court has never said  
777 any--

778 Mr. {McNerney.} Your speaker.

779 Mr. {Revesz.} Sorry. The Supreme Court has never said  
780 anything that raises any questions about the legality of the  
781 Clean Power Plan. In fact, the case that Professor Tribe  
782 mentioned from 2011, the American Electric Power case,  
783 actually stands for exactly the opposite proposition. I mean  
784 the Supreme Court decided to preempt federal common-law  
785 claims because it said that EPA had the authority to regulate  
786 the emissions of--the carbon dioxide emissions of plants  
787 under Section 111(d). And so the Supreme Court has not stood  
788 in the way of this kind of regulation. There isn't a single  
789 Supreme Court case that raises any constitutional question.  
790 As I indicated, non-delegation claim is not a serious one.  
791 The Supreme Court has never struck any federal statute down  
792 on these grounds since the mid-1930's, and here all we have  
793 are 2 different conflicting approaches to a provision, and  
794 that is exactly where the agency gets the first crack at  
795 interpreting, and then the courts review the agency's

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796 interpretation. And that is actually already going on.  
797 There has been a challenge to the proposed rule that is now  
798 pending in the D.C. Circuit, it is going to be argued on April  
799 16, and then the standard way that these things are going to  
800 happen, the D.C. Circuit will decide whether the agency's  
801 interpretation is right or is wrong, but there is no real  
802 constitutional issue there.

803         The Takings claim, again, the Supreme Court--there isn't  
804 a single case that would support holding this to be a  
805 Takings. If some firm thinks that it has been deprived of  
806 the whole value of its property through this regulation,  
807 which seems extremely unlikely, it can bring an Action for  
808 Compensation. If it, in fact, has been deprived of the value  
809 of its property, it would presumably prevail, but that is not  
810 a reason for striking down a nationwide rule.

811         And on the Tenth Amendment point, and I wanted to stress  
812 something that was very important, the cooperative federalism  
813 model that is the core of the Clean Air Act provides for  
814 federal standards, gives the states an opportunity to come up  
815 with state implementation plans, and if they don't, the  
816 Federal Government can act and impose a federal

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817 implementation plan. This is the scheme under Section 108  
818 through 110 that the chairman mentioned. It is the way  
819 National Ambient Air Quality Standards are done in this  
820 country. These are the standards that have saved hundreds of  
821 thousands of lives. They are the most successful federal  
822 environmental program ever. And if Section 111(d) has the  
823 Tenth Amendment problem, as Professor Tribe ascribes to it,  
824 Section 109 would have exactly the same problem because it is  
825 exactly the same cooperative federalism model. And, in fact,  
826 it--Section 111(d) uses pretty much the same language as  
827 Section 109.

828       These are programs that have been around for 45 years,  
829 that were passed through a bipartisan consensus, they form  
830 the fabric of our environmental laws, and there is nothing  
831 different here than there is under Section 109.

832       Mr. {McNerney.} Well, I was going to ask you about the  
833 Tenth Amendment, but you sort of wondered into that so I  
834 don't need to ask that question.

835       So with that, I will yield back the--

836       Mr. {Revesz.} Could--if I could say something about the  
837 unprecedented nature of this regulation that Professor Tribe

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838 and Ms. Wood alluded to. There is nothing of that sort. I  
839 mean just last term, the Supreme Court upheld an important  
840 EPA rule that regulates the interstate emissions where the  
841 statute says that it prohibits any source from emitting any  
842 air pollutant that will significantly contribute to  
843 environmental problems in downwind states. And EPA  
844 authorized states to adopt trading mechanism that go beyond  
845 imposing controls on particular sources. This issue was  
846 litigated before the Supreme Court. Its opponents argued EPA  
847 didn't have the authority to do that because the statute said  
848 refer to any source, and in the end, the Supreme Court upheld  
849 that regulation on a 6-2 vote with Justices Scalia and Thomas  
850 dissenting.

851 So that is a very comparable program. It is also part  
852 of the same effort to control the emissions of existing power  
853 plants because they are such important contributors to  
854 pollution in this country.

855 Mr. {McNerney.} Thank you, Mr. Chairman.

856 Mr. {Whitfield.} Gentleman yields back.

857 At this time, recognize the gentleman from Texas, Mr.  
858 Barton, for 5 minutes.

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859           Mr. {Barton.} Thank you, Mr. Chairman.

860           I don't normally reread parts of testimony, but I am  
861 going to in this case read the first--second--some of the  
862 paragraphs of Professor Tribe because I think he lays out  
863 pretty explicitly and clearly what this is all about. This  
864 is at least his executive summary of his testimony today, and  
865 I quote, ``EPA lacks the statutory and constitutional  
866 authority to adopt its plan. The obscure section of the  
867 Clean Air Act that EPA invokes to support its breathtaking  
868 exercise of power in fact authorizes only regulating  
869 individual plants and, far from giving EPA the green light it  
870 claims, actually forbids what it seeks to do. Even if the  
871 Act could be stretched to usurp state sovereignty and  
872 confiscate business investments the EPA had previously  
873 encouraged and in some cases mandated, as this plan does, the  
874 duty to avoid clashing with the Tenth and Fifth Amendments  
875 would prohibit such stretching. EPA possesses only the  
876 authority granted to it by the Congress. It lacks implied or  
877 inherent powers. Its gambit here raises serious questions  
878 under the separation of powers Article I and Article III  
879 because EPA is attempting to exercise lawmaking power that

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880 belongs to Congress, and judicial power that belongs to the  
881 federal courts. The absence of EPA legal authority in this  
882 case makes the Clean Power Plan quite literally a power grab.  
883 EPA is attempting an unconstitutional trifecta: usurping the  
884 prerogatives of the states, Congress and the federal courts  
885 all at once. Burning the Constitution should not become part  
886 of our national energy policy.''

887 Now, that is pretty straightforward. Professor Tribe, I  
888 assume that we would stipulate that you are an expert in the  
889 Constitution, is that fair to say?

890 Mr. {Tribe.} Some people have said that.

891 Mr. {Barton.} Some people have said that, okay. I  
892 would also assume that the committee can stipulate that you  
893 are an expert in regulatory authority or environmental  
894 issues, is that also fair to say?

895 Mr. {Tribe.} Again--

896 Mr. {Barton.} Some people say that?

897 Mr. {Tribe.} Some people say it, right.

898 Mr. {Barton.} Some people say that.

899 Mr. {Tribe.} Um-hum.

900 Mr. {Barton.} Well, would you say, and again I want to

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901 quote from another Supreme Court case, this is in the Supreme  
902 Court case back in 2001, Whitman v. the American Trucking  
903 Association, that Congress does not alter the fundamental  
904 details of a regulatory scheme in vague terms. It does not,  
905 one might say, hide elephants in a mouse hole. Would you say  
906 this is an attempt to hide an elephant in a mouse hole?

907 Mr. {Tribe.} I would say, Mr. Chairman, that it is an  
908 attempt to hide a very large constitutionally-troubled  
909 elephant in a very tiny mouse hole, and not a mouse hole that  
910 was accurately described, I might add, by Professor Revesz.  
911 I mean let me give you, if I might, just one example. He--

912 Mr. {Barton.} Be quick because--

913 Mr. {Tribe.} --talked about--

914 Mr. {Barton.} --I only have a minute and a half left.

915 Mr. {Tribe.} Well, he just misdescribed the cases. The  
916 case of AEP v. Connecticut, he said Congress--the Supreme  
917 Court said that the EPA has this power, except the majority  
918 opinion in footnote 7 said there is an exception under  
919 111(d), you can't use this power to regulate a source that is  
920 already being regulated under 112. Professor Revesz  
921 conveniently left out the only part of this case that is

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922 relevant.

923 He also says that--well, I shouldn't take your time.

924 Mr. {Barton.} Well, let me just reclaim my time.

925 I was on the committee in 1990. I don't think Mr. Green  
926 was. I am not sure anybody else currently here was on the  
927 committee. Mr. Pallone may have been, I am not sure, but I  
928 participated in these debates. I did not--I was not on the  
929 Conference Committee between the House and the Senate so I  
930 can't claim personal knowledge, but I was on the committee  
931 and I was actively engaged in a bipartisan fashion in  
932 crafting this law, and we had a coalition of conservative  
933 democrats, like Billy Tauzin and Ralph Hall and Mike Synar on  
934 the democrat side with the republicans, and Mr. Dingell, who  
935 was chairman at the time, kind of played us back and forth,  
936 but there was never a debate in the committee that would  
937 interpret the Clean Air Act amendments as the proponents of  
938 the Clean Power rule. Never. It was never. Just the  
939 opposite. Just the opposite.

940 And, Mr. Chairman, I hope after the conclusion of these  
941 hearings, that we move legislation on a bipartisan basis that  
942 explicitly clarifies this point. The EPA has a right to set

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943 a national standard in interstate commerce to protect public  
944 health. It does not have the right to go in and micromanage  
945 how a state complies with a national standard which, as I  
946 understand it, is exactly what this Clean Air--Clean Power  
947 Plan does.

948 And with that, I yield back.

949 Mr. {Whitfield.} Thank you, Mr. Barton.

950 At this time, recognize the gentleman from New Jersey,  
951 Mr. Pallone, for 5 minutes.

952 Mr. {Pallone.} Thank you, Mr. Chairman.

953 I am a little surprised by some of the legal arguments  
954 we are hearing against the Clean Power Plan, but I guess I  
955 have been around long enough to know that you can get  
956 constitutional lawyers and professors to say anything on both  
957 sides, just like you can get lawyers, you know, at home to  
958 say anything on both sides. So I just wanted to give  
959 Professor Revesz some time to comment on some of the comments  
960 that have been made by Professor Tribe. For instance, we are  
961 hearing that the Clean Air Act actually prohibits EPA from  
962 issuing the Clean Power Plan, however, the Supreme Court  
963 disagrees, citing American Electric Power v. the Connecticut

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964 case, if need be. An argument is also being made that since  
965 EPA acted to regulate mercury pollution from power plants,  
966 EPA does not have the authority to issue the Clean Power  
967 Plan. So, Professor Revesz, is this argument a reasonable  
968 interpretation of the law?

969 Mr. {Revesz.} No. Several things. First, on the  
970 American Electric Power case that we have now been arguing,  
971 there is footnote 7. I am very familiar with it. Footnote 7  
972 is subject to more than one interpretation. In fact, I am  
973 holding the Brief of the Federal Government in the D.C.  
974 Circuit case, and the Federal Government is interpreting this  
975 differently--the footnote differently. It is interpreting  
976 the footnote not to stand in the way of exactly what EPA is  
977 doing on the Clean Power Plan. On the standard techniques of  
978 statute interpretation, EPA, as the agency empowered by  
979 Congress to administer the statute, deserves deference. This  
980 is EPA's interpretation. EPA's interpretation is consistent  
981 with the argument I made, not with the argument Professor  
982 Tribe made.

983 Now, Professor Tribe may, in fact, be ultimately right.  
984 That is for a court to decide. I believe that he is wrong.

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985 EPA believes that he is wrong. And we will find out, this  
986 issue will be argued extensively on April 16 before the D.C.  
987 Circuit.

988 On the question about whether EPA cannot regulate under  
989 Section 111(d) because it has regulated mercury emissions  
990 under Section 112, that is wrong as well. There are two  
991 amendments. There is a House Amendment and a Senate  
992 Amendment. They were both passed. Now, it turns out that  
993 only one of them was included in the U.S. Code. That was a  
994 decision made by a mere functionary. This is the Office of  
995 Law--of--something or other. Of Legislative Counsel. That  
996 person cannot supplant the will of Congress, and that is well  
997 established. So EPA has, for 25 years, under Administrations  
998 of both parties, sought to give meaning to both the House  
999 Amendment and the Senate Amendment.

1000 The opponents would like us to ignore the Senate  
1001 Amendment entirely, and they would like to give the House  
1002 Amendment a particular gloss, and it is a gloss that involves  
1003 rewriting the statute. The statute uses two--twice the word  
1004 or, and they would like us to instead supplant the word and.  
1005 The word and would be more convenient for them, but actually,

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1006 the statute has the word or. So not only would we have to  
1007 ignore the Senate Amendment, which there is no basis for  
1008 doing, but we also would have to rewrite the House Amendment,  
1009 and we would have to go through an additional hurdle which is  
1010 not giving EPA the deference that it is due under traditional  
1011 principles of statute interpretation as embodied in the  
1012 Chevron case.

1013 If I can make one related point. On this analogy to  
1014 cars, I don't think that the analogy to cars really works  
1015 here because in the car example that Ms. Wood referred to,  
1016 the product is the car, and if EPA wants to regulate cars it  
1017 can regulate cars, and regulate the emissions of cars, as it  
1018 does and has done since the early 1970s. Here, the product  
1019 is electricity. It is not electricity produced by coal-fired  
1020 power plants, it is electricity. And as you know, we have an  
1021 integrated system for delivering usable electricity to  
1022 consumers, and EPA can figure out what the best system of  
1023 emission reduction for delivering usable electricity to  
1024 consumers is.

1025 Let me give you an example. When I was growing up in  
1026 Argentina, where I was born, when I had a fever my mother

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1027 would give me a mercury thermometer. These things aren't  
1028 sold in this country because they are dangerous, and instead,  
1029 we use digital thermometers. If using the logic of the  
1030 opponents of the Clean Power Plan, the product would be a  
1031 mercury thermometer as opposed to a thermometer and,  
1032 therefore, a regulation that might actually bring mercury  
1033 thermometers out of business might be considered suspect, but  
1034 we have never used a principle like this for regulation in  
1035 this country, for good reason, because doing so entrenches  
1036 bad technologies and stands in the way of innovation. The  
1037 product here is not electricity produced by coal-fired power  
1038 plants, it is usable electricity delivered to the consumers'  
1039 home.

1040 Mr. {Pallone.} Thank you, Mr. Chairman.

1041 Mr. {Whitfield.} Thank you.

1042 At this time, recognize the gentleman from Texas, Mr.  
1043 Olson, for 5 minutes.

1044 Mr. {Olson.} I thank the chair. And welcome, Professor  
1045 Tribe, Ms. Wood, and Professor Revesz.

1046 This hearing is about one document; this Constitution.  
1047 I have had this in my pocket for over 2 decades now. It is

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1048 kind of worn, comes out by pages, but it is still is very  
1049 much alive.

1050 And my first question is to you, Ms. Wood. Under EPA's  
1051 proposed Clean Power Plan, states would have only 13 months  
1052 to develop their state plans. Is that 13 months by statute?  
1053 If not, where does that mandate come from?

1054 Ms. {Wood.} No, the 13 months is not from statute. The  
1055 13 months is just a deadline that EPA has come up with in  
1056 this proposed rule. Under the applicable regulations, the  
1057 deadline is actually 9 months for a state to submit its plan,  
1058 but the regulations are very clear that EPA can extend that  
1059 deadline as it sees fit, so it has wide discretion there. So  
1060 it has actually extended it from 9 months to 13.

1061 Mr. {Olson.} Wow, 4 more months. Now correct me if I  
1062 am wrong, but under less complex programs don't they allow  
1063 usually 3 years to determine these standards, 3 years as  
1064 opposed to 9 months or 13 months, is that true?

1065 Ms. {Wood.} Typically, for state implementation plans,  
1066 which are often called SIPs under the Section 110, the NAAQS  
1067 Program, states do get 3 years.

1068 Mr. {Olson.} And this is for you, Mr. Tribe, as well as

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1069 Ms. Wood. In light of the typical period for developing  
1070 state implementation plans under the NAAQS Programs, does  
1071 EPA's accelerated timeline in the Clean Power Plan for  
1072 submitted state plans raise concerns? Constitutional  
1073 concerns, can you do it, yes, no, reliable, whatever?

1074 Mr. {Tribe.} Are you asking whether the--

1075 Mr. {Olson.} What are your concerns, sir? What raises  
1076 these concerns in all this accelerated development going down  
1077 from 3 years to 9 months to 13 months, what--

1078 Mr. {Tribe.} Well--

1079 Mr. {Olson.} --are your concerns? How about--

1080 Mr. {Tribe.} Frankly, I don't know that the time change  
1081 raises a big constitutional concern, but if I could, without  
1082 cutting too much into your time, verify--

1083 Mr. {Olson.} No, it is your time, sir.

1084 Mr. {Tribe.} --one point which I think is absolutely  
1085 crucial to that little document that you are holding, and  
1086 that is the suggestion that we should defer to EPA on which  
1087 of the 2 versions of this law, are really the law of the  
1088 land. Let me be absolutely clear, it was not some  
1089 functionary, it was the Senate conferees on October 27, 1990,

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1090 who said we recede to the House version. The Senate version  
1091 couldn't be implemented because it was just a clerical thing  
1092 that referred to something that no longer existed. So that  
1093 is absolutely clear. This ghost version of the law that  
1094 Professor Revesz wants to resurrect, and I don't know why he  
1095 would bother if the law as it really is in the books  
1096 supported what they are doing, but I don't have time to go  
1097 through the grammar to show why it doesn't, this ghost  
1098 version doesn't exist. There may be ghosts, but this ghost  
1099 is a nonexistent one. And now what he is saying is that  
1100 because courts generally defer to agencies like EPA, when  
1101 they take a statute that is ambiguous and interpret it one  
1102 way or another, it should also somehow follow that when  
1103 Congress tosses a law into the air, and there is another  
1104 ghost competing with it, it is okay for the EPA to grab the  
1105 ghost and run with it. What kind of version of the  
1106 Constitution is he reading? Certainly not the one you have  
1107 in your pocket.

1108 Mr. {Olson.} Yes, sir. I mean I am looking through  
1109 this document. It has also the Declaration of Independence  
1110 and the Constitution, 27 amendments, I don't see a ghost

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1111 version anywhere in this document. So that is great insight.

1112 My final question is for all three witnesses. EPA has  
1113 announced they will finalize this proposed Clean Power Plan  
1114 for existing power plants this summer. Do you expect that  
1115 will be challenged in the courts, and will be that be struck  
1116 down or vacated in your humble opinion?

1117 Mr. {Tribe.} Well, it is being challenged already in a  
1118 particular case in the D.C. Circuit, but the problem is that  
1119 that court might not reach the merits. It might say it is  
1120 premature because, after all, we don't have a final rule yet,  
1121 but the real dilemma is that states are confronted with not a  
1122 ghost but a phantom. They are confronted with some federal  
1123 alternative that they can't yet see, and so they are under  
1124 enormous pressure, which is what makes this a violation of  
1125 the Tenth Amendment, under enormous pressure to revise their  
1126 whole economy. And by the time that has happened, it might  
1127 be too late for a court to unwind everything that has gone  
1128 on. And, you know, maybe if that would have solved the whole  
1129 climate problem, one would say, well, what is a little legal  
1130 violation, but when you look at what the EPA itself says, it  
1131 says that if this proposal were perfectly implemented and

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1132 were not offset by what goes on abroad, what it would achieve  
1133 by the year 2100 is, at most, reducing the rise of sea levels  
1134 by 3/10 of a centimeter, which is two or three sheets of  
1135 paper, and reducing global mean temperature by under 1/100 of  
1136 1 degree centigrade. And I ask you, even if we could get all  
1137 of that, is it worth that little document you are holding--

1138 Mr. {Olson.} Thank you, sir.

1139 Mr. {Tribe.} --and I would say no.

1140 Mr. {Olson.} I am out of my time. Thank you for being  
1141 a ghostbuster.

1142 Mr. {Whitfield.} Gentleman's time has expired.

1143 At this time, I will recognize the gentlelady from  
1144 Florida, Ms. Castor, for 5 minutes.

1145 Ms. {Castor.} Thank you, Mr. Chairman. And thank you  
1146 to our esteemed panelists today. It has been very  
1147 insightful.

1148 Professor Revesz, you have cited the Whitman v. American  
1149 Trucking Association opinion as one of the most important  
1150 environmental decisions overall in the history of the Supreme  
1151 Court, and you say it has particular import for the Clean  
1152 Power Plan. That was a case--who was the author of that

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1153 case?

1154 Mr. {Revesz.} Justice Scalia.

1155 Ms. {Castor.} Justice Scalia. The central issue was  
1156 the delegation of authority, whether it was constitutional or  
1157 unconstitutional, is that right?

1158 Mr. {Revesz.} That is correct.

1159 Ms. {Castor.} So what did Justice Scalia say in that  
1160 case that you think is quite analogous here, and that might  
1161 be an issue--

1162 Mr. {Revesz.} Right.

1163 Ms. {Castor.} --in future court cases?

1164 Mr. {Revesz.} Right. Thank you. So that was a case in  
1165 which Professor Tribe wrote a Brief, arguing that the Clean  
1166 Air Act was--involved an unconstitutional delegation of  
1167 legislative power to the administrative agency. Justice  
1168 Scalia was widely regarded at the time, and still is, as the  
1169 greatest friend of non-delegation doctrine in the Supreme  
1170 Court, and Justice Scalia writing for unanimous court  
1171 rejected the non-delegation argument. It was rejected  
1172 unanimously by a vote of 9 to 0. And that case is relevant  
1173 to this situation because that was the last time that a broad

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1174 non-delegation argument was made challenging a major  
1175 environmental provision. It was a provision of the--

1176 Ms. {Castor.} And that is the Clean Air Act too--

1177 Mr. {Revesz.} --very same statute.

1178 Ms. {Castor.} --is that right?

1179 Mr. {Revesz.} It is the Clean Air Act as well, the very  
1180 same statute. And Professor Tribe made his argument, just  
1181 like he is making it now, and it was unanimously rejected by  
1182 the Supreme Court.

1183 If I can take just a moment to say something about  
1184 ghosts. You know, I never knew that laws came in ghost and  
1185 non-ghost versions. I mean they are either laws or they are  
1186 not laws. If they are passed by both chambers and signed by  
1187 the President, they are laws. If they are not passed by both  
1188 chambers and not signed by the President, they are not laws.  
1189 Here, there was a House Amendment and there was a Senate  
1190 Amendment. Both the House Amendment and the Senate Amendment  
1191 were passed by both chambers and they were signed by the  
1192 President of the United States. That makes them a law.

1193 What the Senate manager said about receding would have  
1194 been really interesting and very important if, in fact, they

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1195 had carried out what they said and withdrawn the language,  
1196 but the language was not withdrawn, it was passed by both  
1197 bodies and, therefore, it became a law. Not a ghost law, a  
1198 real law. And what EPA is asked to do here is not, as  
1199 Professor Tribe said, to pick whether it likes the House  
1200 Amendment better than the Senate Amendment, the question is  
1201 whether these conflicting provisions of the federal statute  
1202 can be properly reconciled. That is the business of an  
1203 administrative agency, and an agency takes a first crack at  
1204 doing that. EPA is not going to say we like the Senate  
1205 Amendment better, it is going to say we think we can give  
1206 both meaning to both the House Amendment and the Senate  
1207 Amendment. And if they do it appropriately, the courts will  
1208 defer to their interpretation. And if they don't do it  
1209 appropriately, the courts will strike it down. And that  
1210 issue is now being litigated, as Professor Tribe noted,  
1211 before the D.C. Circuit, and it is going to get argued on  
1212 April 16, but certainly, that is the standard tool of statute  
1213 interpretation. That cannot, under any plausible guise,  
1214 become a constitutional problem.

1215 Ms. {Castor.} And if it was unconstitutional, what

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1216 would happen to a whole range of environmental protection  
1217 laws in America?

1218 Mr. {Revesz.} Well, I mean if a court said that there  
1219 was an unconstitutional delegation here because there was--  
1220 there were separate House and Senate Amendments, and again,  
1221 this would be--it is hard to even imagine how that could be  
1222 the case, given the history of the non-delegation doctrine in  
1223 this country, arguably both provisions would be invalid, and  
1224 arguably we would go back to the preexisting law which would  
1225 be the 111(d) provision that was in the books before 1990,  
1226 which would, I think quite clearly, give EPA the power to do  
1227 exactly what it is doing here.

1228 So even if this was all right, it is not clear the  
1229 remedy would help opponents of the Clean Power Plan at all.

1230 Ms. {Castor.} Okay, thank you.

1231 I yield back my time.

1232 Mr. {Whitfield.} The gentlelady yields back.

1233 At this time, recognize the gentleman from Illinois, Mr.  
1234 Shimkus, for 5 minutes.

1235 Mr. {Shimkus.} Thank you for all you smart people for  
1236 being here. This has really be educational and enlightening,

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1237 and unfortunately, it is going to have real consequences.

1238           So first, I was involved in a Conference Committee, the  
1239 2005 Energy Act, which was done here, open amendment,  
1240 debated, and we don't do Conference Committees very much  
1241 anymore, and so I think that is why there is confusion. So  
1242 the first question is, if one chamber recedes to the other  
1243 one, then the conference report has the language of the  
1244 amendment that was accepted. There is no second amendment,  
1245 is that true, Mr.--Professor Tribe?

1246           Mr. {Tribe.} Yeah, here--

1247           Mr. {Shimkus.} Briefly.

1248           Mr. {Tribe.} No.

1249           Mr. {Shimkus.} Thank you. Ms. Wood?

1250           Ms. {Wood.} No.

1251           Mr. {Shimkus.} Professor Revesz, you seem to think  
1252 there is. How can there be two amendments when there--when  
1253 you vote on a conference bill with language that has been  
1254 given up by the Senate?

1255           Mr. {Revesz.} Because they both happen to--at large.

1256           Mr. {Shimkus.} If--typically, if a chamber withdraws  
1257 its amendment, would you--

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1258 Mr. {Revesz.} It is not--

1259 Mr. {Shimkus.} --but the chamber did withdraw the  
1260 amendment.

1261 Mr. {Revesz.} It did not--

1262 Mr. {Shimkus.} Receded to it. Receded to the House  
1263 language.

1264 Mr. {Revesz.} The House manager said--

1265 Mr. {Shimkus.} All right.

1266 Mr. {Revesz.} --that they were receding--

1267 Mr. {Shimkus.} All right.

1268 Mr. {Revesz.} --but both amendments were passed by both  
1269 chambers, and both amendments were signed by the President.

1270 That is not the standard situation where a manager--

1271 Mr. {Tribe.} But it is standard. Excuse me, I don't  
1272 mean to interrupt. It happens all the time. If Professor  
1273 Revesz's view were accepted, there would be sheer chaos  
1274 because this kind of situation--

1275 Mr. {Shimkus.} You would have multiple definitions of  
1276 the language that was supposedly passed by the Legislative  
1277 Branch.

1278 Mr. {Tribe.} Right, and I am not--

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1279 Mr. {Shimkus.} Okay.

1280 Mr. {Tribe.} I am not making a delegation argument here  
1281 at all.

1282 Mr. {Shimkus.} All right, thank you. I want to go to  
1283 my second question.

1284 To Ms. Wood, Professor Revesz talked about electricity  
1285 in the interstate commerce and the regulated entity where it  
1286 is really--what is it, you tell me? I think I know what it  
1287 is but you tell me.

1288 Ms. {Wood.} The confusion that you are rightfully  
1289 experiencing is because he is convoluting that somehow the  
1290 Clean Air Act regulates the product that is being sold, and  
1291 that is absolutely not the case. What--

1292 Mr. {Shimkus.} And the product in this case would be?

1293 Ms. {Wood.} The product is electricity.

1294 Mr. {Shimkus.} And what should they be doing?

1295 Ms. {Wood.} But what is being regulated, and what needs  
1296 to be regulated, is the electric generating unit, the piece  
1297 of equipment that is generating electricity. And in my car  
1298 example, the fact that the car, which is what is the emitting  
1299 source, and the product is the same thing, just happens to be

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1300 a coincidence, but what the Clean Air Act regulates are  
1301 sources of air pollution.

1302 Mr. {Shimkus.} Yeah, thank you. And I was following up  
1303 on Congressman Olson's discussion on the 9 plus 4 equals 13  
1304 months. Were--how long would judicial review take in a case  
1305 like this? This is to Mrs. Wood--Ms. Wood.

1306 Ms. {Wood.} Typically, in the D.C. Circuit you would be  
1307 looking at 1-1/2 to 2 years before you would get a decision.

1308 Mr. {Shimkus.} So before we have--so that is the  
1309 problem that a lot of us have. Okay, there is a  
1310 constitutional debate and conflicting views, I think we have  
1311 established that, but we are going to enforce standards on  
1312 not just the utilities but the ratepayers before this  
1313 decision gets rendered.

1314 Ms. {Wood.} Indeed, and that is a very real problem,  
1315 and you can see a very real-world example of it right now  
1316 with the Mercury and Air Toxics Standards. That case is  
1317 being argued next week before the Supreme Court, and a  
1318 victory in that case is probably going to be hollow for many,  
1319 many electric utilities because they have already installed  
1320 the pollution controls under that rule.

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1321           Mr. {Shimkus.} And as we have had discussions here, the  
1322 real-world implications are trying to comply financially.

1323 The difference between the Clean--some of the Clean Air Act  
1324 and sulfur dioxide was that we had technology to do it.

1325           Ms. {Wood.} Yes. There were scrubbers that would  
1326 remove the--

1327           Mr. {Shimkus.} We knew the cost--

1328           Ms. {Wood.} --sulfur dioxide.

1329           Mr. {Shimkus.} --they were--and this committee has been  
1330 clear in our hearings that every process except for advanced  
1331 oil recovery in a small facility in Canada is not financially  
1332 doable, and the government has invested and actually pulled  
1333 out of the FutureGen 2.0 because it is too expensive. This  
1334 government has made a decision they can't do a carbon  
1335 sequestration.

1336           Ms. {Wood.} There is another critical difference  
1337 between this and the Acid Rain Program that I think needs to  
1338 be pointed out. The Acid Rain Program was enacted by  
1339 Congress.

1340           Mr. {Shimkus.} Um-hum.

1341           Ms. {Wood.} It was not done in a rulemaking by EPA.

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1342           Mr. {Shimkus.} Well, thank you. And I will just end on  
1343 this. Mercury thermometers are not dangerous, but breaking  
1344 the thermometers and drinking the mercury might be hazardous  
1345 to your health because I think everyone here, based upon our  
1346 age, probably used mercury thermometers.

1347           And I yield back.

1348           Mr. {Whitfield.} Thank you.

1349           At this time, recognize the gentleman from Iowa, Mr.  
1350 Loeb sack, for 5 minutes.

1351           Mr. {Loeb sack.} Well, thank you, Mr. Chair.

1352           I am a former college professor, I have really enjoyed  
1353 this a lot, but I am not a constitutional law scholar. I did  
1354 comparative politics and international politics, but I really  
1355 do appreciate the back-and-forth and all the rest, but  
1356 eventually we are going to have to make some decisions here  
1357 as a legislative body. There is no question about that.

1358           Just one quick note. This isn't new in terms of the EPA  
1359 taking it upon itself, if you will, or trying to implement  
1360 some kind of legislation. I understand the arguments just  
1361 how far they are going, whether they are going too far or  
1362 not. As you all know, long ago, you know, Ted Lowey talked

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1363 about how, you know, regulatory agencies often go much  
1364 further than Congress ever intended them to go, and we are  
1365 going to continue the debate whether the EPA is going too far  
1366 or not. There is no question about that.

1367 In the meantime, I would--and, Professor Tribe, if you  
1368 would refrain from responding unless I ask you to do so.  
1369 Professor Revesz, would you like to respond to Professor  
1370 Tribe and his response to you on the 2 amendments issue?  
1371 Just take a minute, if you would.

1372 Mr. {Revesz.} Yes. I think as I have already said, you  
1373 know, it is often the case there are conflicting House and  
1374 Senate versions of bills and in conference, the conference  
1375 decides to go with one of the versions. That is the version  
1376 that is then voted on by both chambers, signed by the  
1377 President, and becomes law. That is the standard way that  
1378 conferences work.

1379 Mr. {Loebsack.} Um-hum.

1380 Mr. {Revesz.} Here, that is not what happened. It  
1381 wasn't that there were conflicting House and Senate versions,  
1382 and the conferees chose the House version. The House version  
1383 then became the bill that was voted on by both chambers and

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1384 signed by the President. That is not what happened. What  
1385 happened was that both the House version and the Senate  
1386 version made it into the bills that were voted by both  
1387 Houses, they made it into the statutes at large, they were  
1388 signed by the President, and they are both duly enacted laws  
1389 of the United States.

1390 Mr. {Loebsack.} All right, thank you, Professor Revesz.

1391 Professor Tribe, what is the legal way to address these  
1392 problems? In your testimony, you mentioned a legal way to  
1393 address these problems. What are we talking about when you  
1394 say the legal way, and what are some examples of that?

1395 Mr. {Tribe.} It seems to me that an act of Congress, or  
1396 a series of congressional enactments, is the only legal way.

1397 Mr. {Loebsack.} Um-hum.

1398 Mr. {Tribe.} I mean Congress has the power, did have  
1399 the power to pass for the United States what California has  
1400 done within California, a cap and trade plan, but it didn't  
1401 succeed.

1402 Mr. {Loebsack.} Um-hum.

1403 Mr. {Tribe.} Congress could fund alternative energy  
1404 sources, put a huge amount of emphasis, as the government

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1405 already is doing to some extent, on solar, on wind, on  
1406 geothermal, but it really would take an act of Congress. It  
1407 is just not enough for an agency to do it on its own. And  
1408 here, even if there were, as Professor Revesz thinks, two  
1409 laws that Congress did pass, assume he is right for the  
1410 moment and--because both of them made it into the statutes at  
1411 large, an agency would have to reconcile them, as he says,  
1412 but you can follow both at one, that is, each of them  
1413 precludes the EPA from regulating certain things. The Senate  
1414 version focused on the pollutant, the House version focused  
1415 on the source. You could obey both. There is no need to  
1416 choose between them, and choosing between them is not an  
1417 exercise of delegated power.

1418 Mr. {Loebsack.} And you are someone who recognizes the  
1419 importance of climate change, the reality of climate change,  
1420 you said, and you have the--

1421 Mr. {Tribe.} No, I think--

1422 Mr. {Loebsack.} And you have been environmental--

1423 Mr. {Tribe.} --me personally--

1424 Mr. {Loebsack.} --very environmentally-minded over the  
1425 years. If you could, you mentioned cap and trade, are there

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1426 other kinds of things that Congress could do?

1427 Mr. {Tribe.} Well, you know, if I were just to be very  
1428 imaginative, and I am only speaking for myself here, not for  
1429 anybody else.

1430 Mr. {Loebsack.} That is what I am asking you to do,  
1431 right.

1432 Mr. {Tribe.} A lot of people think that the best  
1433 solution is to pay countries not to do so much deforestation-  
1434 -

1435 Mr. {Loebsack.} Um-hum.

1436 Mr. {Tribe.} --and that would take an expenditure of  
1437 money. It is not the standard thing that comes to mind, it  
1438 is way beyond the fence, but I think if Congress were able, I  
1439 hate to say this, to get its act together, if Congress really  
1440 could act effectively, there are a lot of things it could do.

1441 Mr. {Loebsack.} Um-hum.

1442 Mr. {Tribe.} Now, there is a problem. A lot of my  
1443 friends tell me, look, don't be an idealist, don't be  
1444 utopian. Congress isn't going to do anything so why are you  
1445 so hot about the EPA violating the law and the Constitution?  
1446 Well, it is just, I guess, the way I was brought up. I think

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1447 the law and the Constitution matter.

1448 Mr. {Loebsack.} Yeah, Professor Revesz?

1449 Mr. {Revesz.} Could I--yeah. So under the Clean Air  
1450 Act, Congress made a decision in 1970 not to define some  
1451 limited number of pollutants that could be regulated, because  
1452 Congress understood that as science evolved, other pollutants  
1453 would become serious. And, therefore, the Clean Air Act uses  
1454 a term air pollutant. Typically, air pollutant, dangerous  
1455 human health or welfare. EPA has--EPA was basically required  
1456 by the Supreme Court, in Massachusetts v. EPA, to acknowledge  
1457 that greenhouse gases were air pollutants, subject to  
1458 regulation under the Clean Air Act. This is not some power  
1459 grab by this Administration, this has been now a process that  
1460 has been going on for almost 10 years, and the Supreme Court  
1461 said yes, when Congress said air pollutants, it meant  
1462 something pretty broad. It is a broad definition, and  
1463 greenhouse gases are air pollutants. And then EPA was asked  
1464 to determine whether greenhouse gases endangered public  
1465 health, and actually, the Bush EPA administrator made the  
1466 initial endangerment determination. It didn't become  
1467 effective at the end of the Bush Administration, and then

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1468 this Administration made it again. And so now greenhouse  
1469 gases are air pollutants, endanger public health, and the  
1470 other core--and that makes them at--puts them at the core of  
1471 what the Clean Air Act is designed to deal with.

1472 Mr. {Loebsack.} Thanks to all of you.

1473 Thanks, Mr. Chair.

1474 Mr. {Whitfield.} Gentleman's time has expired.

1475 At this time, recognize the gentleman from Ohio, Mr.  
1476 Latta, for 5 minutes.

1477 Mr. {Latta.} Well, thank you, Mr. Chairman. And thank  
1478 you very much for our witnesses today. We appreciate your  
1479 testimony, and it is very informative.

1480 If I could start, Professor Tribe, last year the Supreme  
1481 Court cautioned the EPA against interpreting the Clean Air  
1482 Act in a way that would bring about an enormous and  
1483 transformative expansion of EPA's regulatory authority  
1484 without clean congressional authorization. In your opinion,  
1485 does the proposed Clean Power Plan comply with this  
1486 directive?

1487 Mr. {Tribe.} I think that what the court said in the  
1488 case that you are quoting, which was Utility Air Regulatory

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1489 Group v. EPA, would apply many times over to this plan, and  
1490 in particular, in that very case the court addressed the  
1491 point that Professor Revesz just made. Yes, air pollutant in  
1492 the dictionary definition part of the Clean Air Act is a very  
1493 broad term, and it does encompass greenhouse gases, but when  
1494 the court, in Mass v. EPA, in 2007, found a specific  
1495 provision for regulating greenhouse gases in connection with  
1496 tailpipe emissions, what UARG, the decision last year, said  
1497 is you can't rewrite clear statutory terms to extrapolate  
1498 from the fact that something which is a greenhouse gas for  
1499 purposes of a particular regulatory context can, therefore,  
1500 be regulated under a different statutory provision which, it  
1501 is very clear, prohibits the regulation under 111(d) of  
1502 greenhouse gases or any other air pollutant from a source  
1503 that has already been forced to spend a lot of money under  
1504 112 in order to meet the requirements of 112 with respect to  
1505 the 188 hazardous air pollutants.

1506 Mr. {Latta.} Well, okay. Professor Tribe, also then,  
1507 the Clean Air Act places limits on the EPA's authority to use  
1508 the Section 111(d) to regulate existing sources that are  
1509 already subject to regulation for hazardous air emissions

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1510 under Section 112. Does this prohibit the EPA from  
1511 regulating coal-fired utilities under Section 111(d)?

1512 Mr. {Tribe.} From regulating? I am sorry, I didn't  
1513 hear you--

1514 Mr. {Latta.} From regulating coal-fired utilities--

1515 Mr. {Tribe.} Under 111(d).

1516 Mr. {Latta.} --under 111(d).

1517 Mr. {Tribe.} Certainly prohibits them as long as those  
1518 utilities are being regulated under 112 for the hazardous  
1519 pollutants. Greenhouses gases cannot be regulated under 111.

1520 Mr. {Latta.} Well, with that then, is--especially from  
1521 the testimony I have been hearing this morning, should the  
1522 EPA's interpretation of these statutory provisions be  
1523 entitled to deference by the courts, and if not, why not?

1524 Mr. {Tribe.} Well, two reasons. First of all, what it  
1525 is doing is not interpretation, it is revision. It is  
1526 picking a statute that Congress did not enact, and that is  
1527 not something to which the courts would ever defer.

1528 Secondly, the principle of deference under a case called  
1529 Chevron only kicks in where there is an ambiguity, and here  
1530 there isn't an ambiguity. And besides, deference is trumped

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1531 by a principle called constitutional avoidance, that is, the  
1532 Supreme Court has said, and the D.C. Circuit has said, that  
1533 when an ambiguous statute, and I maintain this is not  
1534 ambiguous, would cause constitutional problems if you defer  
1535 to the agency's interpretation of it, then you don't defer,  
1536 so that even if deference were otherwise available, here it  
1537 would be trumped by the serious constitutional problems that  
1538 I have outlined, haven't had time to talk about in detail,  
1539 but my statement in written form explains why, for example,  
1540 even though the property is not being totally destroyed, this  
1541 is a violation of the Fifth Amendment, and explains a number  
1542 of other things. So given those constitutional problems,  
1543 which I don't think have been solved--

1544 Mr. {Latta.} Well, and--

1545 Mr. {Tribe.} --deference--

1546 Mr. {Latta.} --if I can just follow up with one  
1547 question here because I am short on time. The Clean Air Act  
1548 as a whole, and Section 111(d) in particular, are based on  
1549 principles of cooperative federalism and are designed to give  
1550 states autonomy and flexibility, and implementing emission  
1551 control programs does the proposed rule strike an appropriate

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1552 balance between the EPA and the states?

1553 Mr. {Tribe.} Well, I think that the EPA is not striking  
1554 a constitutionally appropriate balance. It is basically  
1555 saying, yeah, you have some choice to meet this severe limit,  
1556 but it is like saying your money or your life, and you can  
1557 choose whether to pay me in cash or by check or by Bitcoin,  
1558 that is, there is no power to command the states to do any of  
1559 this stuff. And saying that, well, this is just optional, it  
1560 is like cooperative federalism, completely confuses what  
1561 happens normally under the Clean Air Act with what is  
1562 happening here. Normally, the national goal is set and the  
1563 Federal Government works with the states to find a way to  
1564 implement it locally. That is not what is going on here.  
1565 What is going on here is radically different.

1566 Mr. {Latta.} Thank you.

1567 Mr. Chairman, my time has expired.

1568 Mr. {Whitfield.} Gentleman's time has expired.

1569 At this time I will recognize the gentleman from Texas,  
1570 Mr. Green, for 5 minutes.

1571 Mr. {Green.} Thank you, Mr. Chairman, and ranking  
1572 member for holding the hearing. I want to thank our--both

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1573 our panels of witnesses to be here today.

1574 I know there is some disagreements about the EPA Clean  
1575 Power Plan, but as a lawyer, I am always interested in  
1576 hearing the arguments from our professors. Besides this  
1577 hearing, the EPA Clean Power Plan has been subject to a lot  
1578 of debate. Whether EPA has the authority to regulate power  
1579 plants was ultimately divided--decided by the courts, and it  
1580 is this issue I find most disappointing. I have been in  
1581 Congress for some time, and I would like to see a solution on  
1582 our climate issues offered by this body, and not necessary  
1583 because of the Supreme Court ruling. We should work together  
1584 and control carbon emissions. That doesn't mean eliminating  
1585 traditional fuels, and it certainly doesn't mean dismantling  
1586 the EPA. It would--it means a reasonable approach from a  
1587 legislative body that would reach required compromise, and  
1588 that is what we have been sent here to do, and I look forward  
1589 to both panels.

1590 Professor Tribe, your testimony, a portion that jumped  
1591 out at me is on page 11 where you say it makes far more sense  
1592 to address climate change by legislation. I couldn't agree  
1593 with you more, but without congressional action, the federal

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1594 agencies are acting under the existing authority given by the  
1595 Supreme Court. Professor Tribe, in your testimony on page  
1596 14, you address EPA's reference to the Chevron USA case. It  
1597 is my understanding Chevron created a two-part test to  
1598 determine regulatory authority. There are many attorneys in  
1599 Washington and D.C. and around the country making large sums  
1600 of money advising clients on which version of the House or  
1601 Senate Amendment the Clean Air Act are law. If the Supreme  
1602 Court agrees to hear this case, is it your argument that  
1603 Congress spoke directly to the question at issue, or do you  
1604 believe the court will rule on the agency's interpretation?

1605       Mr. {Tribe.} Well, I don't think the court would accept  
1606 the agency's interpretation. I think here the statute is too  
1607 clear, and the court in the UARG case made as clear as it  
1608 could possibly have made it that the fact that greenhouse  
1609 gases may be a terrible problem doesn't give a blank check to  
1610 any agency to rewrite the law.

1611       Mr. {Green.} Okay.

1612       Mr. {Revesz.} If I can just for a minute--I mean in  
1613 that case, EPA was trying to regulate 86 percent of the  
1614 greenhouse gas--of the carbon dioxide emissions of certain

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1615 stationary sources. The court in that case allowed EPA to  
1616 regulate 83 percent of those emissions. Justice Scalia  
1617 indicates that in his opinion. It only deprived the EPA of  
1618 the authority to regulate the last 3 percent, and that was  
1619 because that statute had a particularly--had a specific  
1620 numerical provision that would have required EPA to either  
1621 regulate a much larger number of sources than EPA wanted to  
1622 do, or else disregard the number. And as a result of that  
1623 problem, the Supreme Court deprived EPA of the authority to  
1624 regulate the last 3 percent of those emissions, but allowed  
1625 EPA to regulate 83 percent of the emissions of these  
1626 stationary sources.

1627         So in--so EPA ended up getting most of what it sought--  
1628 the vast majority of what it sought out of that case, and the  
1629 problem--the statutory problem that arose was a very specific  
1630 statutory problem under that particular provision that has no  
1631 bearing on other provisions that don't have those numerical  
1632 limits.

1633         Mr. {Green.} Professor Revesz, one of the other things,  
1634 since I only have a minute and a half, would a strict reading  
1635 of the House version exclude many if not all potential

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1636 regulated sources, and you have written extensively on  
1637 environmental law and regulatory policy, is Congress, while  
1638 we don't interpret the law, it is our job and the courts to  
1639 do that, we have the responsibility for conflicting issues in  
1640 the laws that we wrote. Do you agree with that?

1641       Mr. {Revesz.} Absolutely. And it often happens. I  
1642 mean, you know, this isn't an example of Congress doing  
1643 something wrong. I mean it often is the case that statutes  
1644 get passed and they have ambiguous provisions that require  
1645 agency interpretation. This is the bread and butter of what  
1646 the federal courts then to do is to determine whether the  
1647 agency interpretations are entitled to deference, and whether  
1648 they should be upheld.

1649       Mr. {Green.} And that is the federal court's job. Let  
1650 me give you an example of one of the legislation that we have  
1651 worked on passing. Congressman Olson and Congressman Mike  
1652 Doyle and I have introduced legislation, and it has actually  
1653 passed the House, to resolve conflicting language in the  
1654 Federal Power Act, and that is our job to be able to do that,  
1655 to do the legislating if there is an issue that the courts  
1656 may not be addressing in our opinion is what the law is.

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1657           Professor Tribe, I am sorry, I don't give you any more  
1658   than 10 seconds, but--

1659           Mr. {Tribe.} Well, I agree with that allocation of  
1660   responsibility. I also think that measuring the law by  
1661   percentages is not exactly right. I saw those talking points  
1662   too--

1663           Mr. {Green.} Yeah.

1664           Mr. {Tribe.} --you know, the EPA wanted to win, and  
1665   they said why don't you point out we won 83 rather than 86.  
1666   That wasn't the point. The point was that their approach to  
1667   the law was totally rejected by the court.

1668           Mr. {Green.} Okay.

1669           Mr. {Revesz.} No, I--there were two issues. EPA won on  
1670   one issue and lost on one issue. It was not totally rejected  
1671   by the court.

1672           Mr. {Whitfield.} Gentleman's time has expired.

1673           Mr. {Green.} Thank you, Mr. Chairman.

1674           Mr. {Whitfield.} At this time, I will recognize the  
1675   gentleman from West Virginia, Mr. McKinley, for 5 minutes.

1676           Mr. {McKinley.} Thank you, Mr. Chairman. And thank you  
1677   to the panel for being here. It is always enlightening to

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1678 hear some of these discussions. I know ultimately the  
1679 decision is going to be made by the courts, but it helps us  
1680 to understand a little bit of these issues, particularly  
1681 between 112 and 111(d), but I don't think the American public  
1682 gives a hoot. They really don't. They just want to make  
1683 sure that Johnny has a job, and their electric rates are  
1684 going to be reasonable for them to be able to continue. And  
1685 I see us getting caught up. We start chasing these rabbits,  
1686 that they get us distracted from where we need to be.

1687 I will be the first to tell you that I--do I think  
1688 climate change is occurring? Absolutely. I think it is.  
1689 But we have taken this simplistic route to go this direction,  
1690 and so what I want to do is get back more to the fundamental.  
1691 You all were chasing this rabbit all the way down. You are  
1692 arguing over 112 and 112--111(d), and you are talking about  
1693 phantoms and ghosts, I think. Don't care. What are we going  
1694 to do? What are we doing here with this fight? I would like  
1695 to get back to the more basic where we are, because under the  
1696 United Nations it said that 96 percent of the CO2 emissions  
1697 are naturally occurring. Only 4 percent of all the CO2  
1698 emissions of the world are anthropogenic, manmade. See, I

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1699 can use the term like you all. Only 4 percent. And then  
1700 they go--and the United Nations goes on to say that all coal-  
1701 fired powerhouses in America, if you shut off every--  
1702 terminated a coal-fired power--every one of them shut down in  
1703 America, under the United Nations, said you only reduce the  
1704 CO2 emissions by 2/10 of 1 percent. That is not my  
1705 statistic, that is from the United Nations, 2/10 of 1  
1706 percent.

1707       So what I am doing, I am the engineer in the room here  
1708 on this. So now we are getting to the point, under this  
1709 rule, they want to reduce it 30 percent, so we are talking  
1710 about a rule that reduces 30 percent of 2/10 of 1 percent.  
1711 We are talking about a reduction of CO2 emissions in the  
1712 globe of 6/100 of 1 percent. Forget the argument over 112 or  
1713 111(d), we are going to spend billions of dollars, we are  
1714 going to raise rates, we are going to--jobs are going to be  
1715 lost to save 6/100 of 1 percent of the CO2 emissions. That  
1716 just--that doesn't make logical sense. From an engineering  
1717 perspective, there is something wrong when we start chasing a  
1718 rabbit over here, when we are putting our economy at risk  
1719 over 6/100 of 1 percent.

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1720           Professor, could you respond to that? Do you--are we  
1721 chasing the right rabbit here?

1722           Mr. {Tribe.} Well, my grandchildren ask a similar  
1723 question, which shows how wise you are, because I think my  
1724 grandchildren are smart as whips. Grandpa, why are you  
1725 worried about this 111 and 112 stuff? Is the world going to  
1726 be destroyed? And then I tell them, well, there is this  
1727 agency and it says if you do what it wants, it--they are not  
1728 going to save the world, in fact, maybe by the year 2100,  
1729 they will prevent the oceans from rising as much as, well, 2  
1730 sheets of your paper. But they think that by making a start,  
1731 it is good, better than nothing. Well, you know, your  
1732 grandpa spends his life teaching about the Constitution, and  
1733 so I sort of put that into balance. That is part of--you  
1734 know, there are a lot of details there, they look like  
1735 rabbits going into rabbit holes, but that matters because in  
1736 the long run, all those rabbits add up to something that this  
1737 country has built. And then they ask a different question.  
1738 They say, well, if we make a start, isn't that good? And  
1739 then I try to give them the old proverb, you can't leap  
1740 across a chasm in two steps, you know. Jumping halfway or

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1741 even 1 percent of the way might do a lot more harm, like  
1742 splat on the bottom of the chasm, than not doing this at all  
1743 and looking for something else. What would you do, Grandpa?  
1744 And then I say I am not an expert in that stuff.

1745 Mr. {McKinley.} Ms. Wood?

1746 Ms. {Wood.} I wanted just to expand for a second on  
1747 what Professor Tribe was saying about, you know, needing to  
1748 make a start and wanting to build on something. I think it  
1749 is important to recognize here that if these sources are not  
1750 regulated under Section 111(d), they are regulated under  
1751 Section 112, and that is what is prohibiting the 111(d).  
1752 Under 112, these sources have to put on maximum available  
1753 control technology, maximum. So it is not as though these  
1754 sources are not going to be controlled. And more  
1755 importantly, in terms of when you start talking about carbon  
1756 dioxide, I think it is also important to note that EPA has  
1757 said that the carbon benefits from that maximum available  
1758 control technology are estimated to be \$360 million annually.  
1759 So it is not as though there isn't a start being made.

1760 Mr. {McKinley.} Right. And my time has run out, but I  
1761 just want to--I would rather us be focusing on something more

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1762 practical than this ideological--why aren't we doing energy  
1763 efficiency, why aren't we looking at more research into clean  
1764 coal technology, but to simply go after it and start doing  
1765 this and costing us jobs I think is incredibly naive.

1766 Thank you, and I yield back.

1767 Mr. {Whitfield.} Gentleman's time has expired.

1768 At this time, recognize the gentleman from Kentucky, Mr.  
1769 Yarmuth, for 5 minutes.

1770 Mr. {Yarmuth.} Thank you very much, Mr. Chairman.

1771 Thanks to the witnesses.

1772 After listening to this discussion, I am not sure I am  
1773 happy or sad that I dropped out of law school years ago. I  
1774 think I am happy. But I want to go back to--you mentioned  
1775 the Massachusetts v. EPA case, and I--what we were debating  
1776 the Waxman-Markey bill several years ago, 2009, and so forth.  
1777 That was kind of the motivating factor, I think, for many of  
1778 us at that point, that if the Supreme Court had said that we  
1779 have to regulate carbon dioxide, wouldn't it be better for  
1780 Congress to act and create a mechanism for dealing with it  
1781 than trusting the EPA to be flexible enough to deal with  
1782 states like my own, and Congressman McKinley's as well. So I

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1783 am curious because I never--I have heard some difference of  
1784 opinion, and I don't want to start another debate, on whether  
1785 that decision actually mandated, made it compulsory for EPA  
1786 to regulate CO2 or just basically said--made it permissive.  
1787 Could you--you are shaking your head, Ms. Wood, do you want  
1788 to answer that?

1789 Mr. {Revesz.} Well--

1790 Mr. {Yarmuth.} Or either one.

1791 Mr. {Revesz.} Yeah, that decision held that--EPA in  
1792 that case was arguing that greenhouse gases were not air  
1793 pollutants for the purposes of Section 202 of the Clean Air  
1794 Act. The Supreme Court held that they were, in fact, air  
1795 pollutants for the purposes of Section 202 of the Clean Air  
1796 Act. It did not mandate regulation because regulation is  
1797 mandated only if the air pollutants endanger public health or  
1798 welfare. So EPA--the next step was for EPA to make the  
1799 determination, the court did not make it as was appropriate,  
1800 to make the determination whether greenhouse gases endanger  
1801 public health and welfare, which is a statutory term. As I  
1802 indicated earlier, Stephen Johnson, who was the EPA  
1803 Administrator at the end of the Bush Administration, made

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1804 that endangerment finding, but it didn't get--the  
1805 Administration ran out of time. It wasn't approved during  
1806 the Bush Administration, and it was, therefore, made anew by  
1807 the Obama Administration. So now--and that was challenged in  
1808 the D.C. Circuit. Many groups challenge the endangerment  
1809 finding and said that that was--and the agency had acted  
1810 inappropriately in making that finding. The D.C. Circuit  
1811 upheld the agency's decision. Those same groups then  
1812 petitioned the court for certiorari, and the court, while  
1813 granting certain other issues in that case, and that ended up  
1814 being the Utility Air Regulatory Group case, denied  
1815 certiorari on the endangerment finding.

1816       So now it basically is the law, or at least is it--the  
1817 agency has said that greenhouse gas emissions endanger public  
1818 health. And now Massachusetts v. EPA dealt with Section 202  
1819 of the Clean Air Act. The definition of air pollutant and of  
1820 harming public health is very similar across many sections of  
1821 the Clean Air Act and, therefore, that case has now led to  
1822 all these other rules. These rules are basically based on  
1823 exactly the same legal principle. And EPA is proceeding  
1824 accordingly with the Supreme Court--

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1825           Mr. {Yarmuth.} They are just--they are doing their job  
1826 as they see it, based on what the Supreme Court said--

1827           Mr. {Revesz.} Right.

1828           Mr. {Yarmuth.} --about CO2.

1829           Mr. {Revesz.} What the Supreme Court said in Mass v.  
1830 EPA, that greenhouse gases are air pollutants. Well, the  
1831 D.C. Circuit said, in the case that became New York versus  
1832 the Supreme Court, is the endanger public health, and then--

1833           Mr. {Yarmuth.} In fact, there has been a considerable  
1834 amount of at least scientific evidence that there is a  
1835 connection between CO2 and elevated levels of asthma and so  
1836 forth in communities. I know that is true in my community as  
1837 well.

1838           I want to get to a question real quick with Ms. Wood.  
1839 In your issue about whether or not we regulate the product or  
1840 go outside the fence, or so forth, if under a state's plan,  
1841 the state utilities, power companies, offered incentive--  
1842 financial incentives for conservation to its customers, would  
1843 that fit within your conclusion of being something that would  
1844 be consistent with your interpretation of what EPA can  
1845 regulate, even though in this case it might be--it would be

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1846 voluntary, I mean the states would be doing it, not EPA, but

1847 EPA would have to approve the plan?

1848 Ms. {Wood.} I think the key difference here--

1849 Mr. {Yarmuth.} Um-hum.

1850 Ms. {Wood.} --is in how the targets are set versus the

1851 flexibility that you could use to meet that target. And I

1852 think this is a key distinction that needs to be made. And

1853 the issue isn't whether a power company could do what you are

1854 saying to meet the target, the question is should those types

1855 of things be considered in determining what the target is.

1856 And to that, my answer is no, the Clean Air Act doesn't

1857 permit that. 111 has always been understood to begin and end

1858 at the source.

1859 Now, in the Clean Air Mercury Rule that EPA did several

1860 years ago, they did have flexible cap and trade mechanism to

1861 meet that limit, but the target itself and the limit itself

1862 was based on technology that could be applied at every unit.

1863 So you started with activated carbon injection, and you

1864 figured out what the rate would be at each unit, but then you

1865 allowed flexibility in terms of how you would meet that.

1866 So in your example, I think that would be permissible in

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1867 terms of meeting the target, but it would not be permissible  
1868 for setting the target.

1869 Mr. {Yarmuth.} Okay, appreciate that.

1870 I yield back. Thank you, Mr. Chairman.

1871 Mr. {Whitfield.} Gentleman yields back.

1872 At this time, recognize the gentleman from Virginia, Mr.  
1873 Griffith, for 5 minutes.

1874 Mr. {Griffith.} Thank you, Mr. Chairman. Appreciate  
1875 you having this hearing very much.

1876 I rarely disagree with my colleague from West Virginia,  
1877 but in this case I do. The process and the procedures by  
1878 which we get our laws and pass our laws may not always make  
1879 sense and be practical in the minds of some, but it is what  
1880 has allowed our republic to exist for the length of time it  
1881 has, over 200-and--I guess we are closing in on 220-some-plus  
1882 years, and it is extremely important.

1883 Professor Revesz, I love these things, and I am going to  
1884 go down a different rabbit hole than the one we have been  
1885 going down, although I am coming back to that one because I  
1886 love that one too. The proposal that you make is a  
1887 parliamentary procedure impossibility. It cannot happen.

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1888 Doesn't matter what the issue is. Jefferson is very clear in  
1889 the Manual of Parliamentary Practice. When there are  
1890 differences between the two Houses, they get together in a  
1891 conference and they work those differences out. If both  
1892 Houses adhere to their position, the bill itself dies. It is  
1893 not for you to say today that the bill should die if there is  
1894 some confusion because there are two different versions.

1895 There are not two different versions, there is one version.  
1896 It could not have passed to of both Houses, gone through a  
1897 Conference Committee, and gotten to the President's desk  
1898 unless there was one version, and one version exclusively.

1899 And then we get to the point that Professor Tribe made,  
1900 and it is an honor for me to be in your presence. We are not  
1901 always going to agree. There are a lot of things we are  
1902 going to disagree on politically, but your defense of the  
1903 Constitution I am 100 percent behind and--

1904 Mr. {Tribe.} Thank you.

1905 Mr. {Griffith.} --agree. And even when the rules in  
1906 the Constitution are against me on what I believe ought to  
1907 happen, I respect that those bodies and those rulings must be  
1908 followed.

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1909           And so we get to that because I think that if there was  
1910   some kind of a disagreement and suddenly it is found 25, 30  
1911   years later, that creates a problem, and I would submit--I  
1912   don't know about the 1995 ruling. I would ask you quickly if  
1913   you could tell me about that. You said that it had already  
1914   been determined in '95, '08 and '11, and I know '08 and '11.

1915           Mr. {Tribe.} Right. Well, in 1995, the EPA itself  
1916   interpreted the Section 111(d) as I have, and as I think the  
1917   courts would.

1918           Mr. {Griffith.} Okay. And then we get to 2008, and you  
1919   didn't make this point, although I am sure you are aware of  
1920   it, and I find this language fascinating and brought this up  
1921   to the EPA months ago. That decision, if you read it, part  
1922   of it says this requires vacation of CAMR's regulations for  
1923   both new and existing EGUs, electric generation units.

1924           Mr. {Tribe.} Um-hum.

1925           Mr. {Griffith.} EPA promulgated the CAMR regulations  
1926   for existing EGUs under Section 111(d). This is a court  
1927   opinion by the Circuit Court in D.C. This is what I am  
1928   saying here. For existing EGUs under Section 111(d), but  
1929   under EPA's own interpretation of the section, it cannot be

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1930     used to regulate sources listed under 112.

1931             Mr. {Tribe.}   Right.

1932             Mr. {Griffith.}   The judge found that they had conceded,  
1933     and he goes on to say, EPA thus concedes that if EGUs remain  
1934     listed under Section 112 as we hold, then the CAMR  
1935     regulations for existing sources must fail. The EPA appealed  
1936     that ruling, but not on that point.

1937             Now, what is significant about that, and the question I  
1938     have for you, and I am going back to first year of law school  
1939     for myself, is the EPA now precluded, under either the theory  
1940     of res judicata or collateral estoppel, having conceded the  
1941     point in the 2008 case and not appeal to the Supreme Court,  
1942     and having been a party in that case, albeit not a party in  
1943     the 2011 case--

1944             Mr. {Tribe.}   So--

1945             Mr. {Griffith.}   --have they conceded the point, and are  
1946     they now thrown out on their backsides because they have  
1947     already conceded this point, and to bring it back up is a  
1948     waste of time, as Mr. McKinley said?

1949             Mr. {Tribe.}   I think, because that case was New Jersey,  
1950     the EPA--it is only New Jersey that could make that

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1951 collateral estoppel argument. Other people confronted by an  
1952 EPA that says we have now changed our minds, like Robert  
1953 Jackson once said, it does--the matter does not appear to me  
1954 now as it appears to have appeared to me then, other people  
1955 are not going to be able to estop the EPA. But the EPA is  
1956 free to make these arguments, I just think they are wrong and  
1957 will lose.

1958       Mr. {Griffith.} All right. And you think they will  
1959 lose also in looking at 2011, although they were not a party  
1960 to that, you were correct in referencing footnote 7 that said  
1961 that the Supreme Court specifically said in their opinion,  
1962 previously cited approvingly by Professor Revesz, that there  
1963 is an exception, EPA may not employ 74 11(d) [sic], which is  
1964 what we are talking about, if existing statutory sources of  
1965 the pollutant in question are regulated under the National  
1966 Ambient Air Quality Standard program, 74 087 through 74 110,  
1967 or the Hazardous Air Pollutants Program, 74 112, which is  
1968 what we are talking about is 111 and 112, am I not correct?

1969       Mr. {Tribe.} Correct, and that use of the word or  
1970 supports the court's reading. The courts have been  
1971 consistent in accepting this reading all this time, and it is

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1972     amazing, though it is not illegal as such, for the EPA to  
1973     scratch its head and say how are we going to win this case,  
1974     we have to invent a new statute.

1975             Mr. {Griffith.} And they have reached pretty deep to  
1976     find something that they could hang their hat on.

1977             Mr. {Tribe.} They reached very deep, to something that  
1978     Senator Durenberger when it was first proposed said I can't  
1979     imagine this being used very often. It has only been used 5  
1980     times. It is a technical little--well, it is a mouse hole,  
1981     and they are pulling an elephant out of it.

1982             Mr. {Griffith.} Thank you. I have to yield back. I  
1983     wish I had more time.

1984             Mr. {Whitfield.} Gentleman yields back. Thank you.

1985             At this time, recognize the gentleman from Maryland, Mr.  
1986     Sarbanes, for 5 minutes.

1987             Mr. {Sarbanes.} Thank you, Mr. Chairman. And thanks to  
1988     the panel.

1989             I don't know that I have a whole lot to add or more to  
1990     ask, but we have talked about phantoms and we have talked  
1991     about ghosts, and we are now getting to a dead horse in terms  
1992     of beating it over this issue of the interpretation. I

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1993   gather that the crux of this is whether the EPA's pursuit of  
1994   the Clean Power Plan is warranted or authorized under Section  
1995   111(d), and I think it is to this question of whether it is  
1996   seeking to balance and interpret the conflict between these  
1997   two amendments is appropriate or not appropriate.

1998           Because you all have been debating this most of the time  
1999   we have been here, I am assuming that while there are other  
2000   parts of your argument, Briefs, that you point to that you  
2001   view that as probably being the issue upon which a court's  
2002   review of this question is going to turn. Is that fair?

2003           Mr. {Tribe.} Well, I have tried to encapsulate the  
2004   essence of it, but it is--what I submitted is over a 50-page  
2005   document, and I do think courts will pay attention to the  
2006   several different parts of the argument. One, that even if  
2007   Congress did give this power to the EPA, it would violate  
2008   basic principles of federalism, and that is one reason that a  
2009   court would not interpret Congress' having done so. Two,  
2010   that there are powerful issues about the statute itself, and  
2011   the EPA's authority to go beyond a statute. And three,  
2012   separation of powers issues that arise out of the EPA's  
2013   recognition that because the statute is written doesn't quite

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2014 do what they want to do, they have created a magical mystery  
2015 tour through the parliamentary procedure to say, well, there  
2016 are two statutes. And although I have suggested, both here  
2017 and in my written testimony, that if there really were two,  
2018 which doesn't happen, they could follow them both by both  
2019 outlawing the regulation of pollutants that are covered by  
2020 112, and outlawing the regulation under 111(d) of sources  
2021 under 112.

2022 Mr. {Sarbanes.} Professor Revesz, do you--

2023 Mr. {Revesz.} Yeah, if I can answer your question more  
2024 directly. The debate we have been having here is replicated  
2025 in hundreds of pages of Briefs before the D.C. Circuit. All  
2026 of these issues are being aired in great detail on both  
2027 sides. The position that--most of the positions that I have  
2028 made here are made by the U.S. Department of Justice, by many  
2029 states. Other states are taking the opposite position. Some  
2030 industry groups are agreeing with my interpretation of the  
2031 Constitution of the statue, other industry groups are on the  
2032 other side. All of this, there are hundreds and hundreds of  
2033 pages of Briefs on all of the issues we have been talking  
2034 about.

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2035           If I can just take a moment to respond to an issue that  
2036 Mr. Griffith raised. There is clearly only one version of  
2037 the statute. There has to be only one version. That one  
2038 version includes arguably inconsistent provisions. They are  
2039 arguably consistent, and arguably inconsistent, but they were  
2040 both voted on by both chambers and signed by the President.  
2041 And the CAMR case is different because in the CAMR case, the  
2042 problem was that EPA had initially sought to regulate mercury  
2043 emissions under Section 112, then in Bush Administration  
2044 decided to regulate under 111(d), but it was trying to  
2045 regulate the same mercury emissions, the same hazardous air  
2046 pollutant. Everyone concedes that EPA cannot invoke Section  
2047 111(d) to regulate a hazardous air pollutant that is being  
2048 regulated under Section 112. But here the issue is the  
2049 greenhouse gases are not hazardous air pollutants regulated  
2050 under Section 112, so the CAMR case is actually an opposite  
2051 to this problem, but I am sorry, I took up a little bit of  
2052 your time.

2053           Mr. {Sarbanes.} No, actually, that was--I was going to  
2054 ask you to add whatever you think is left on this question.  
2055 Can you real briefly, in 43 seconds, just give me a little

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2056 bit more of your perspective on why the Takings issue is not  
2057 determinative here?

2058 Mr. {Revesz.} Well, because first, this is a  
2059 regulation, it is not a physical Takings, so a regulation  
2060 would have to deprive a property owner of almost all of the  
2061 value of the property. And also--and if there is a property  
2062 owner for whom that is the case, the proper remedy is not to  
2063 invalidate this regulation, but it is for that property owner  
2064 to sue separately at a later time for compensation.

2065 Mr. {Sarbanes.} Thank you.

2066 Mr. {Tribe.} Could I--

2067 Mr. {Sarbanes.} Sure, Professor Tribe. You have--

2068 Mr. {Tribe.} --add one word?

2069 Mr. {Sarbanes.} --one more second.

2070 Mr. {Tribe.} We have never suggested striking down the  
2071 law. Compensation is all we have talked about, but ever  
2072 since The Steel Seizure Case, the Supreme Court has said that  
2073 an agency, and that--even the President is not allowed to  
2074 impose a bill on the American taxpayers for compensation  
2075 unless Congress, which has the power of the purse, has  
2076 clearly authorized the action that is going to require the

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2077 compensation. That is all we have been talking about under  
2078 that part of our--

2079 Mr. {Revesz.} But there is no compensation required  
2080 here.

2081 And one last point. On footnote 7, as we have now, I  
2082 think, indicated, footnote 7 is subject to interpretations,  
2083 and there are literally dozens of pages in the D.C. Circuit  
2084 Briefs on either side of that issue. I think it is pretty  
2085 clear what footnote 7 means. Obviously, Professor Tribe  
2086 thinks is it clear on the other side, but there are two  
2087 interpretations of footnote 7 of the American Electric Power  
2088 case that are out there.

2089 Mr. {Whitfield.} Thank you. Gentleman's time has  
2090 expired.

2091 At this time, recognize the gentleman from Missouri, Mr.  
2092 Long, for 5 minutes.

2093 Mr. {Long.} Thank you, Mr. Chairman. And thank you all  
2094 for being here today.

2095 I--when we started this hearing, I didn't have this  
2096 document in my hand. And I represent the Seventh District in  
2097 Missouri, which is Springfield, Joplin, Branson, Missouri,

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2098 and we have a lot of successful businesses that germinated  
2099 there. Bass Pro Shops started from nothing and has become  
2100 what it is today. O'Reilly Automotive, which is across the  
2101 United States, very successful company. We have a great  
2102 medical community there, a lot of successful businesses, and  
2103 a lot of people that just want to raise their kids in a good  
2104 part of the country. Have a good job, raise their kids, have  
2105 a nice place to raise their family. And I saw in my notes  
2106 today, my little handy-dandy pocket card here, that the city  
2107 of Springfield was coming to see me today, and I thought that  
2108 is great. They think enough of me to come and talk to me  
2109 about some issues that they have pressing. I am glad they  
2110 came to Washington to see me, but they didn't come to  
2111 Washington to see me, they came for a conference. And the  
2112 reason they came to this conference, there were two cities of  
2113 the United States that were invited to the conference to  
2114 speak on this. One was Richmond, Virginia, and the other was  
2115 Springfield, Missouri. And the reasons is they have done  
2116 such a good job, such a forward-thinking job with these  
2117 different issues that we are discussing here today.

2118 I want to read you just a little snippet of what we

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2119 have, and then kind of ask you all's suggestion on something.  
2120 But this is from Mayor Bob Stephens, Mayor of Springfield,  
2121 Missouri. Affordability and unfunded environmental mandates.  
2122 And like I say, the--you can think what you want about  
2123 things, but I stepped off in a side room here and got this in  
2124 our meeting, I couldn't run back to my office and meet him  
2125 over there, so I was required to meet him here due to time  
2126 constraints. Affordability and unfunded environmental  
2127 mandates. As you know, the city of Springfield, Greene  
2128 County, and Springfield City Utilities have been working  
2129 cooperatively to develop a proposed integrated plan frame  
2130 work that would foster a more holistic approach to the  
2131 various unfunded EPA environmental mandates that all  
2132 communities are facing; wastewater, storm water, drinking  
2133 water, air quality, and solid waste. Our integrated plan  
2134 frame work attempts to consider all of these issues together  
2135 instead of each one separately, and to focus resources where  
2136 the community can achieve the biggest bang for the buck. We  
2137 appreciate your efforts to ensure that future unfunded  
2138 environmental mandates must be affordable for the community  
2139 and the citizens.

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2140           Now, one of the things that they did in this report that  
2141 they are in here in Washington, and were honored enough to be  
2142 thought of highly enough for the conference to be one of two  
2143 cities, is they did the math. I know you all are  
2144 constitutional scholars and such, but I don't know how your  
2145 math is, but the math that they did was over the next 15 to  
2146 20 years, these unfunded mandates from the Environmental  
2147 Protection Agency are only going to cost each individual in  
2148 my district a little over \$46,000 per person over the next 15  
2149 to 20 years.

2150           So I guess I will start here with Professor, is it  
2151 Revesz? Do you have any suggestions what I tell the folks  
2152 back home about these?

2153           Mr. {Revesz.} Well, it is a little hard for me to  
2154 comment on a document that I haven't seen, but I can tell you  
2155 from my experience, one of my areas of expertise is a cost  
2156 benefit analysis of environmental regulation, and I actually  
2157 care a lot about the--having the benefits of environmental  
2158 regulation exceed the cost, and I am a big proponent of the  
2159 use of cost benefit analysis to justify environmental  
2160 regulation, which sets me apart from actually the vast

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2161 majority of environmental law professors in this country who  
2162 don't like it as much as I do. But I can tell you that  
2163 often, these early cost estimates turn out not to be  
2164 accurate, and--

2165 Mr. {Long.} They are usually low, aren't they?

2166 Mr. {Revesz.} No, actually, empirical studies show that  
2167 initial cost estimates tend to be higher than the final--than  
2168 the ultimate costs are, and there is a good reason for that.  
2169 As additional--initial estimates are generally made on the  
2170 basis of sort of current end-of-the-pipe technology, but  
2171 there is a great ingenuity in American business, and  
2172 businesses figure out ways of doing things more effectively  
2173 and more cheaply, and for that reason, in the end, costs end  
2174 up being lower than are predicted.

2175 There is a lot of debate on cost estimates. There are  
2176 huge--there is huge variance, and each of those estimates  
2177 should be submitted to serious peer review by serious  
2178 experts, and I would take well-conducted cost estimates very  
2179 seriously. But--

2180 Mr. {Long.} So we--

2181 Mr. {Revesz.} --I would caution--

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2182           Mr. {Long.} We--and I hate to interrupt you but I am  
2183 about out of time, but Johnny Morris, the owner of Bass Pro  
2184 Shops, has a saying, we all live downstream. We all do live  
2185 downstream. We want to have a clean environment to raise our  
2186 family, and whether it is in the Ozarks or Washington, D.C.,  
2187 or the state of Washington, we all want a good clean  
2188 environment, but unless you own Bass Pro Shops or you own  
2189 O'Reilly Automotive, or one of these businesses, and our  
2190 median income is under the \$46,000 a year, it is pretty tough  
2191 to explain to the folks back home that you have to put a cup  
2192 in the storm waters that pass through Springfield, and dip it  
2193 and make it palatable, and some of these ridiculous  
2194 regulations.

2195           I think I am over my time. I was going to yield my time  
2196 back but I don't have any, Mr. Chairman. Thank you.

2197           Mr. {Whitfield.} The gentleman yields back.

2198           At this time, recognize the gentleman from New York, Mr.  
2199 Tonko, for 5 minutes.

2200           Mr. {Tonko.} Thank you, Mr. Chair. And welcome to our  
2201 panelists.

2202           The--since 1970, the Clean Air Act has had several key

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2203 features that have helped make it one of the most successful  
2204 environmental laws in the world. Science-based, health-  
2205 protective standards keep our eye on the prize: healthy air  
2206 for everyone. Cooperative federalism allows EPA to set the  
2207 clean air goals, and allows states to decide how best to  
2208 achieve them. EPA retains backstop enforcement authority,  
2209 ensuring that every citizen in the United States receives a  
2210 minimum level of protection, even if their state fails to  
2211 act. Some have claimed that this arrangement violates the  
2212 Tenth Amendment, and I quote, ``If a state fails to formulate  
2213 a plan, EPA will mandate a federal plan. This commandeering  
2214 violates the Constitution under *New York v. U.S.*''

2215       Professor Revesz, does the Clean Air Act state  
2216 plan/federal plan provisions violate the Constitution?

2217       Mr. {Revesz.} It does not, and the reason is that  
2218 states are not required to do anything. States are given the  
2219 option to come up with state implementation plans, and if  
2220 they don't, EPA can impose federal implementation plans on  
2221 the sources of pollution. And because EPA imposes those  
2222 directly on the pollution sources and not on state  
2223 institutions, there is no Tenth Amendment problem.

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2224           The cooperative federalism arrangement under Section  
2225   111(d), as I indicated earlier, is exactly the same  
2226   arrangement that has been in place since the early--since  
2227   1970 for meeting the national Ambient Air Quality Standards.  
2228   EPA sets the reduction requirements in the National Ambient  
2229   Air Quality Standards to define the maximum permissible  
2230   concentration of pollution in the ambient air. The states  
2231   can then decide how to allocate that reduction requirement  
2232   among their sources through state implementation plans. And  
2233   generally, they do, but sometimes they don't. And when they  
2234   don't, EPA imposes federal implementation plans. And it--  
2235   this system has been going along--has been going on for  
2236   decades. So the reason there isn't a Tenth Amendment problem  
2237   is because EPA does not actually require the states to do  
2238   these state implementation plans, it merely gives them the  
2239   option to do them. And 111(d) is exactly the same situation.  
2240   Through its--the Clean Power Plan--the proposed rule in the  
2241   Clean Power Plan, EPA has set a reduction requirement that  
2242   applies to each state. Each state can now decide what to do.  
2243   Each state is not forced in any way to do what EPA has  
2244   suggested they do in the regulation. They can do whatever

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2245 they want as long as they meet the reduction requirement.

2246 And if they choose not to do anything, and some states have

2247 said they won't, EPA can then impose a federal implementation

2248 plan. And the fact that some states have already said that

2249 they will not do it shows that there is no compulsion.

2250 Mr. {Tonko.} Professor, would it be fair to say that

2251 the--and I quote, ``the existence of a backup federal plan

2252 takes the Clean Air Act outside the commandeering world'',

2253 just as the Supreme Court said in the radiation case of New

2254 York v. U.S.?

2255 Mr. {Revesz.} Yes, that is exactly right. And the New

2256 York case was problematic because there, the federal statute

2257 was requiring states to either take--certain ways or adopt

2258 certain regulations--

2259 Mr. {Tonko.} Well, I--

2260 Mr. {Revesz.} --which is not the case here.

2261 Mr. {Tonko.} Thank you. And I ask these--I ask about

2262 these 2 statements because they were both made by Professor

2263 Tribe, and I sensed a bit of conflict there. Do you see any

2264 conflict in the two statements--between the two statements?

2265 Mr. {Revesz.} Well, there certainly is conflict between

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2266 the two statements you mentioned now and Professor Tribe's  
2267 position in his written submissions and in his testimony  
2268 today.

2269 Mr. {Tonko.} Thank you. And Professor Revesz, we are  
2270 all hearing all these--we are hearing about these legal  
2271 questions, about the EPA's ability to regulate greenhouse  
2272 gases emitted from power plants. As you know, power plants  
2273 are the largest source of uncontrolled CO2 emissions in the  
2274 U.S. I am not an attorney, but I thought the overall  
2275 question of whether EPA has the authority under the--had the  
2276 authority under the Clean Air Act to regulate greenhouse  
2277 gases was considered by the Supreme Court. I believe there  
2278 were three separate cases; Massachusetts v. EPA, American  
2279 Electric Power v. EPA, and Utility Air Regulatory Group v.  
2280 EPA, and that the court ruled in favor of EPA regulation of  
2281 greenhouse gases. In fact, the court in the Utility Air  
2282 Regulatory Group case, talking about EPA regulation of power  
2283 plants said that, and I quote, ``The Act speaks directly to  
2284 emissions of carbon dioxide from the defendant's plants.''  
2285 So I just thought we should remember that and put it all in  
2286 context. And any comments that you have in response--

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2287 Mr. {Revesz.} No, I--

2288 Mr. {Tonko.} --to those cases?

2289 Mr. {Revesz.} I totally agree, in the Utility Air  
2290 Regulatory Group case that was decided last year, one of the  
2291 issues was whether best available control technology could  
2292 include the regulation of greenhouse gases, and the Supreme  
2293 Court held that it could, and the reason that it could is  
2294 because it--greenhouse gases were regulated air pollutants  
2295 that endanger public health and welfare.

2296 Mr. {Tonko.} Thank you very much.

2297 With that, I see my time is up and I yield back.

2298 Mr. {Whitfield.} Gentleman's time has expired.

2299 I know that Mr. Tribe was trying to respond. Did you  
2300 want to make a comment?

2301 Mr. {Tribe.} Right. I don't know whether you call it a  
2302 point of personal privilege or whatever, but since I was  
2303 quoted, the context was a statement I made in October of  
2304 2012. I was talking about something that bears no  
2305 resemblance to the plan that was announced, proposed by the  
2306 EPA on September 2014. I may have some ability to foresee  
2307 the future, but not that much.

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2308           It is true that the existence of an otherwise  
2309   unproblematic backup plan can take something out of the  
2310   normal commandeering world, but here we have something that  
2311   is much more like what the U.S. Supreme Court decided in NFIB  
2312   v. Sebelius, was impermissible pressure on the states because  
2313   preexisting help that the states are getting from the Federal  
2314   Government to deal with air pollution, in places like  
2315   Springfield, can be yanked when the state is recalcitrant and  
2316   does not succumb to the Federal Government's demand that it  
2317   meet certain goals.

2318           In addition, the backup plan here, the reason I called  
2319   it a phantom earlier is something that Professor Revesz said  
2320   at page 13 of his prepared statement, he says it remains to  
2321   be seen what a backstop federal implementation plan will look  
2322   like. Now, what kind of alternative is it to tell a state  
2323   either achieve these goals, and you can do it in any of  
2324   several ways but none of them are voluntary, or we will do  
2325   something to you and we won't tell you quite what?

2326           Mr. {Whitfield.} Okay.

2327           Mr. {Tribe.} It is not just putting a bullet to their  
2328   head, it is making them play Russian roulette.

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2329 Mr. {Whitfield.} Thank you, Mr. Tribe.

2330 Mr. {Revesz.} If I could--

2331 Mr. {Whitfield.} You want a personal privilege,

2332 Professor?

2333 Mr. {Revesz.} Yes, I would like that. That is the way

2334 that the Clean Air Act has worked for 45 years. Under the

2335 National Ambient Air Quality Standards, EPA can set state

2336 limitation plans. If they don't, the Federal Government can

2337 impose a federal implementation plan. The Federal Government

2338 does not say upfront what that federal implementation plan

2339 would look like--

2340 Mr. {Whitfield.} Well--

2341 Mr. {Revesz.} --it waits until the states either submit

2342 a state implementation plan or not. Here, EPA is actually

2343 doing something it has never done before, which is favorable

2344 to the states. It is basically--it has said we are going to

2345 give you early guidance and we are going to do it sometime in

2346 the next few months so you actually have some information,

2347 which is a lot more information than states have had under

2348 the kind of bread and butter of the Clean Air Act for the

2349 last 45 years.

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2350           Mr. {Whitfield.} And we have another panel coming up  
2351 after you all that will be getting into this also.

2352           At this time, I would like to recognize the gentlelady  
2353 from North Carolina, Mrs. Ellmers, for 5 minutes.

2354           Mrs. {Ellmers.} Thank you, Mr. Chairman. And thank you  
2355 to our panelists for being here today on this subject.

2356           I would like to, you know, focus in, you know, we are  
2357 talking about our states, and in North Carolina, North  
2358 Carolina is going to be negatively impacted by the increased  
2359 utility bills. I know we have already discussed whether or  
2360 not that will take place over time, but as it plays out I do  
2361 believe that will be the case, and obviously, this  
2362 interpretation of Section 111(d) of the Clean Air Act.

2363           With that, I would like to ask Professor Tribe and Ms.  
2364 Wood, the EPA maintains that the rule is very flexible. How  
2365 would you describe the rule in just a few words, because I  
2366 know we have kind of gone over this subject a bit, and I have  
2367 a very particular question I would like to ask all of you in  
2368 the remainder of my time?

2369           Mr. {Tribe.} Well, I would say that the flexibility is  
2370 an illusion. In fact, the Attorney General of Michigan, in

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2371 comments filed with the EPA in November of last year, warned  
2372 that the plan really takes meaningful freedom away from the  
2373 states--

2374 Mrs. {Ellmers.} Um-hum.

2375 Mr. {Tribe.} --and has just a patina--

2376 Mrs. {Ellmers.} Um-hum.

2377 Mr. {Tribe.} --of flexibility.

2378 Mrs. {Ellmers.} Um-hum.

2379 Mr. {Tribe.} It is like the example I gave, your money  
2380 or your life, but you can pay--

2381 Mrs. {Ellmers.} But you can pay--

2382 Mr. {Tribe.} --by cash or by check.

2383 Mrs. {Ellmers.} --it however--you can choose any  
2384 vehicle as long as you choose a black one, you know, that  
2385 kind of thing.

2386 Mr. {Tribe.} Right. Very much like that.

2387 Mrs. {Ellmers.} Ms. Wood, and to that one, do you feel  
2388 it is flexible, but then also as a clean air practitioner,  
2389 what--how do you--how would North Carolina or any other state  
2390 be able to actually implement this rule?

2391 Ms. {Wood.} Um-hum. The flexibility is exactly as

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2392 Professor Tribe described it, it is illusory, and the example  
2393 I like to use in describing the flexibility is it is as if I  
2394 came to you, the state of North Carolina, and I said I want  
2395 you to give me change for a dollar. You can do it any way  
2396 you want. It can be 100 pennies, it can be four quarters, I  
2397 don't care, you just do it, North Carolina, the way you want.  
2398 Well, the problem is North Carolina only has 60 cents, and so  
2399 there really isn't flexibility there.

2400 Mrs. {Ellmers.} Right. So in other words, with the--  
2401 got it.

2402 Now, to that point, I want to go into something very  
2403 specific because I think it, you know, there again, I know we  
2404 are--we have been debating law and the interpretation. I am  
2405 a nurse and I am much more practical when it comes to these  
2406 things. So what I would like to know is, based on this  
2407 111(d) provision, in building block number four, which is  
2408 relating to the increased energy efficiency, how would this  
2409 be enforced?

2410 And I will start with you, Professor Tribe, and then  
2411 just go to each one of you.

2412 Mr. {Tribe.} I would rather defer, if I could, because

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2413 she is--

2414 Mrs. {Ellmers.} That is fine. That is fine. Ms. Wood.

2415 Mr. {Tribe.} She is more of an expert in the

2416 intricacies than I am.

2417 Mrs. {Ellmers.} Okay.

2418 Mr. {Wood.} That is--gets to the essence of the problem

2419 of this rule which is that it goes beyond the source, as I

2420 have talked about today. There is no mechanism in the Clean

2421 Air Act for you to go and require people to reduce their

2422 electric consumption.

2423 Mrs. {Ellmers.} And basically, what we are talking

2424 about here is we are not talking about the state now or

2425 penalizing the state, we are talking about individuals. We

2426 are talking about individual households, we are talking about

2427 individuals who may or may not be complying with these

2428 regulations.

2429 Ms. {Wood.} Exactly. So either you are going to hold

2430 the individuals directly responsible, which isn't permissible

2431 under the Clean Air Act, or you are somehow going to try to

2432 force the electric utility companies to make--

2433 Mrs. {Ellmers.} To--

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2434 Ms. {Wood.} --their customers do it.

2435 Mrs. {Ellmers.} --enforce. Correct.

2436 Professor Revesz, would you like to comment on this?

2437 Mr. {Revesz.} Sure. As I indicated earlier, I mean the

2438 product here, what is being regulated is electricity

2439 delivered in usable form to consumers.

2440 Mrs. {Ellmers.} To consumers.

2441 Mr. {Revesz.} Consumers. Now, no one is arguing--I

2442 don't think EPA is arguing that consumers should use less

2443 electricity, or like, you know, take the bus one day a week

2444 or work at home, or anything like that.

2445 Ms. {Wood.} That is absolutely building block four.

2446 Mrs. {Ellmers.} To the point.

2447 Mr. {Revesz.} That is an interpretation of building

2448 block four, and we can disagree with that but I don't think

2449 we will resolve it in the next 52 seconds.

2450 Also, we shouldn't lose sight of the fact that nothing

2451 is being imposed on any state here.

2452 Mrs. {Ellmers.} Okay, but there again, now--

2453 Mr. {Revesz.} These are very--

2454 Mrs. {Ellmers.} --we have--now I am just reclaiming my

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2455 time. We have already determined it is not the state we are  
2456 talking about. We are talking about the individuals are the  
2457 users of this energy, the individuals. So how would this--my  
2458 question is how would you enforce this?

2459 Mr. {Revesz.} States in their plans can come up with  
2460 reductions any way they choose. They don't have to do  
2461 anything in particular. They can have trading schemes, they  
2462 can enter into contracts with other states and have  
2463 multistate schemes, they can do--they have a million  
2464 different options in how they can do this. They don't have  
2465 to do it this way.

2466 Mrs. {Ellmers.} But building block number four talks  
2467 about the individual use.

2468 Mr. {Revesz.} Building block four is--the building  
2469 blocks are used to determine the state reduction  
2470 requirements. They are not imposing any requirement on any  
2471 state or on anyone else, they are just a way of determining  
2472 how states--to what extent states can reduce their carbon  
2473 dioxide emissions.

2474 Mrs. {Ellmers.} Thank you.

2475 And I yield back the remainder of my time.

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2476           Mr. {Whitfield.} Gentlelady yields back.

2477           At this time, I recognize the gentleman from Texas, Mr.  
2478 Flores, for 5 minutes.

2479           Mr. {Flores.} Thank you, Mr. Chairman. And I want to  
2480 thank the panel for joining us today. This has been a  
2481 fascinating discussion, particularly with respect to  
2482 government overreach.

2483           Professor Tribe, the question of Takings has come up in  
2484 the course of this conversation today. Professor Revesz, a  
2485 few minutes ago, indicated that it wasn't a problem, but you  
2486 indicate that the rules impact has--raises Fifth Amendment or  
2487 Takings concerns. Can you tell us what you mean by that, can  
2488 you expand?

2489           Mr. {Tribe.} What I mean I think is best illustrated by  
2490 decisions that involve not only the Takings and Compensation  
2491 clauses, but the due process clause. As the Supreme Court  
2492 has held in a number of cases, including one where the EPA  
2493 initially promised confidential treatment to pesticide makers  
2494 and then pulled the rug out from under them, and another in  
2495 which the United States Government offered companies more  
2496 favorable accounting treatment if they would bail out failing

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2497 S and Ls, and then reneged, in cases like that, the Supreme  
2498 Court has found a doctrinal basis either in the contract  
2499 clause or in the due process clause or in the Takings clause  
2500 for saying that even though you haven't wiped somebody off  
2501 the map entirely, you have left them with some value, if you  
2502 leave them to take a course of action and then pull the rug  
2503 out from under them, fairness requires some kind of  
2504 compensation. And in particular, the way the coal companies  
2505 have been led on here is well know, this was something that  
2506 was encouraged by the government, and in particular, when  
2507 they were forced to invest billions of dollars in meeting the  
2508 requirements under 112 with respect to the hazardous  
2509 pollutants, they were pouring money down a hole, and they  
2510 were not told, guess what, it is all gone, because the state  
2511 that you live in has no choice other than to put you out of  
2512 business.

2513 Mr. {Flores.} Well, that sort of brings me to my next  
2514 question related to 111(d). You know, this seems to be on  
2515 shaky legal ground already. It is already the subject of  
2516 lawsuits that haven't been finalized yet.

2517 And so, Ms. Wood, what happens if the states start

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2518 implementing the final rule only to have the courts strike  
2519 the rule down, and what do these states do, what if they have  
2520 already started signing the contracts, people started breaking  
2521 ground on investments, or making capital commitments for  
2522 investments, what happens next?

2523           Ms. {Wood.} Yeah. There are two sets of, you know,  
2524 harm that can happen here; one is to the states and the other  
2525 is to the power plants--

2526           Mr. {Flores.} Correct.

2527           Ms. {Wood.} --themselves. And when you are looking at  
2528 the states, they are having to start now to prepare these  
2529 plans. In the litigation that is pending, the state of  
2530 Alabama, for example, submitted an Affidavit that said that  
2531 this was by far the most complex undertaking that the state  
2532 of Alabama Environment Department had undertaken in 40 years.  
2533 So it is a lot of capital being expended to come up with  
2534 these plans.

2535           Most states are going to need to enact legislation and  
2536 put in place regulations. So if at the end of the--of that  
2537 time period, this is all found to be unlawful, well, all of  
2538 that effort will have been lost, but more importantly to the

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2539 extent legislation and regulations have been put in place,  
2540 all of that is going to have to be reversed, and, you know,  
2541 that is also going to be time-consuming. And then as you  
2542 said, power plants need to start planning now and so they can  
2543 enter into contracts and could have financial--

2544 Mr. {Flores.} Right, but it goes unsaid here but is  
2545 obvious is that the consumers and the taxpayers and  
2546 ratepayers all bear the cost to that.

2547 Continuing on Section 111(d), it is the basis for the  
2548 Clean Power Plan that the EPA has come up with, but this  
2549 provision as I understand it has seldom been used in EPA's  
2550 44-year history. The Supreme Court also recently said it is  
2551 skeptical when an agency claims to discover in a long, long  
2552 exigent statute, an unheralded power to regulate a  
2553 significant portion of the U.S. economy.

2554 And so, Ms. Wood, another question for you. Isn't it  
2555 correct that of the--in the 1990 amendments to the Clean Air  
2556 Act, only one section of 111(d) regulation has been  
2557 promulgated that still exists?

2558 Ms. {Wood.} Yes, that is correct. As Professor Tribe  
2559 has talked about, there was one version of Section 111(d)

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2560 that was actually promulgated. It is the House version, it  
2561 is what is shown right now in the United States Code, and it  
2562 precludes regulation of source categories under 111(d) if  
2563 they are already regulated under 112.

2564 Mr. {Flores.} Well, and that was sort of my next  
2565 question, as these have always had very limited reach.

2566 Ms. {Wood.} Yes, very limited reach. It has only been--  
2567 -it really was designed by Congress to be a catchall for  
2568 something that slipped through the cracks. These sources are  
2569 not slipping through the cracks, they are being regulated  
2570 under 112 and having to install maximum achievable control  
2571 technologies.

2572 Mr. {Flores.} Right. So there has never been an  
2573 expansive use of 111(d) for--like this that we are proposing.

2574 So, Professor Tribe, would you like to comment?

2575 Mr. {Tribe.} I agree.

2576 Mr. {Flores.} And you have 2 seconds.

2577 Mr. {Tribe.} It has only been used for four pollutants  
2578 and five sources. They are very specialized and localized,  
2579 like municipal waste landfills or sulfuric acid plants, which  
2580 give off acid mist, and the idea that it is nothing new,

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2581 just, you know, just business as usual is the most fantastic  
2582 account I have heard.

2583 Mr. {Flores.} Okay. Thank you very much. I yield  
2584 back.

2585 Mr. {Whitfield.} Gentleman yields back.

2586 At this time, recognize the gentleman from Mississippi,  
2587 Mr. Harper, for 5 minutes.

2588 Mr. {Harper.} Thank you, Mr. Chairman. And thanks to  
2589 each of you for being here. The--you have been very  
2590 informative, and it is a challenging issue to every one of  
2591 our states, a very expensive issue and proposition that is  
2592 here. And the discussion on the Constitution is certainly  
2593 very intriguing. And yesterday I saw in the vaulted National  
2594 Archives the original handwritten letter that Thomas  
2595 Jefferson wrote following the Louisiana Purchase, and--  
2596 congratulating Congress on this new acquisition, which had  
2597 not been approved yet. And him being a strict  
2598 constructionist, you know, he was, you know, obviously  
2599 concerned about people calling it unconstitutional, and he  
2600 said it was extra-constitutional. So, you know, it is  
2601 amazing how we have progressed in 200 years, and how we look

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2602 at things.

2603 But, Professor Tribe, EPA and proponents of this  
2604 regulatory approach say Section 111(d) serves as a catchall  
2605 that provides regulatory authority to ensure there are no  
2606 gaps in air pollutant regulations. And I know we have  
2607 touched on it, but what do you--what are your thoughts about  
2608 this gap-filling argument?

2609 Mr. {Tribe.} Well, it is the job of Congress to fill  
2610 gaps in the law, and it tried to fill the little cracks, as  
2611 Ms. Wood suggested, not in a huge gap, when it passed 111(d);  
2612 little things that just weren't covered because they were not  
2613 among the 188 hazardous pollutants that are regulated, you  
2614 know, under 112 at the source. But the idea that when an  
2615 agency is not satisfied with the coverage of a law, it can  
2616 sort of squeeze the law so that the pole in the legal ozone  
2617 layer is sort of closed up is just totally fantastic.

2618 Mr. {Harper.} Well, Professor Tribe, following that  
2619 line, you know, have you identified any evidence that  
2620 Congress intended to provide EPA powers to expand its own  
2621 regulatory authority when EPA identifies the need to do so,  
2622 and how would that be possible under the Constitution?

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2623           Mr. {Tribe.} Well, I think it wouldn't be possible, and  
2624 I have found no such evidence.

2625           Mr. {Harper.} Okay, thank you.

2626           Ms. Wood, I think everybody agrees that EPA has the  
2627 authority under certain circumstances to set standards that  
2628 people comply with by installing certain equipment, for  
2629 example, catalytic converters have been added to cars to meet  
2630 environmental regulations. How is EPA's proposed 111(d) rule  
2631 different than that?

2632           Ms. {Wood.} Um-hum. Well, it is different in the ways  
2633 that I have discussed, which is it is going beyond the source  
2634 of pollution, and the bulk of the reductions that EPA is  
2635 claiming from this rule are not actually coming from the  
2636 source, they are coming from other areas.

2637           This is the first time that--in its history that EPA has  
2638 ever tried to apply any part of 111 in this manner. Rather  
2639 than being a standard of performance, in other words saying  
2640 how a source should perform and at what rate it should emit,  
2641 it is really a standard of nonperformance. Let us try to  
2642 figure out ways where these plants don't have to run. It is  
2643 completely backwards and upside-down. Nothing has ever been

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2644 done like this, and in fact, if you think about it, if you  
2645 are looking for the best system of emission reduction, which  
2646 is what EPA does, not running it or shutting it down would  
2647 always be best, and yet that is never what they have found  
2648 before.

2649 Mr. {Harper.} Thank you very much.

2650 Thank you, Mr. Chairman. I yield back the balance of my  
2651 time.

2652 Mr. {Whitfield.} The gentleman yields back.

2653 And that concludes our questions, and I want to thank  
2654 the three of you for taking time to be with us and discuss  
2655 this very important issue with a lot of profound impacts down  
2656 the road. So, Professor Tribe, thank you. Ms. Wood,  
2657 Professor Revesz, thank you. We look forward to continuing  
2658 to work with you on this issue and others.

2659 And with that, we will adjourn the--release the first  
2660 panel.

2661 Mr. {Tribe.} Thank you, Mr. Chairman.

2662 Ms. {Wood.} Thank you, Mr. Chairman.

2663 Mr. {Whitfield.} Thank you so much. Thank you.

2664 And I would like to call up the second panel now, who

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2665 have been very patient. And on this panel, we are going to  
2666 really zero-in on the practical impacts at the state level,  
2667 and what their thoughts are about this proposed rule.

2668 And we have four witnesses; Mr. Craig Butler, Ms. Kelly  
2669 Speakes-Backman, Mr. Art Graham, and Mr. Donald van der  
2670 Vaart. So if you all would take your seats. And as--just  
2671 like the first panel, I will introduce each one of you right  
2672 before you give your opening statement. I do think it is  
2673 important that everybody understand that today is Mr. Art  
2674 Graham's birthday, so he is one of these--he is a fun-loving  
2675 guy and that is why he is here today for--to celebrate his  
2676 birthday.

2677 But our first witness is Mr. Craig Butler, who is the  
2678 Director of the Ohio Environmental Protection Agency. Mr.  
2679 Butler, thank you for being with us, and you are recognized  
2680 for 5 minutes for a statement. And at the end of that time,  
2681 we will have questions for you.

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2682 ^STATEMENTS OF CRAIG BUTLER, DIRECTOR, OHIO ENVIRONMENTAL  
2683 PROTECTION AGENCY; KELLY SPEAKES-BACKMAN, COMMISSIONER,  
2684 MARYLAND PUBLIC SERVICE COMMISSION, AND CHAIR, BOARD OF  
2685 DIRECTORS, REGIONAL GREENHOUSE GAS INITIATIVE, INC.; ART  
2686 GRAHAM, CHAIRMAN, FLORIDA PUBLIC SERVICE COMMISSION; AND  
2687 DONALD VAN DER VAART, SECRETARY, NORTH CAROLINA DEPARTMENT OF  
2688 ENVIRONMENT AND NATURAL RESOURCES

|

2689 ^STATEMENT OF CRAIG BUTLER

2690 } Mr. {Butler.} Good morning, Mr. Chairman, Chairman  
2691 Whitfield, members of the committee. I do appreciate the  
2692 opportunity to testify before the subcommittee.

2693 My name is Craig Butler. I am director of the Ohio  
2694 Environmental Protection Agency, and I have been asked to  
2695 provide testimony on Ohio's comments and interpretation of  
2696 the Clean Power Plan.

2697 As reflected in our detailed comments, and extensive  
2698 comments to U.S. EPA, the proposal seeks to overhaul the  
2699 Nation's power generation, transmission, distribution

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2700 systems, by reducing coal-based electricity, and instituting  
2701 federally-mandated reliance on energy efficiency, renewable  
2702 energy under the guise of global climate protection.

2703       It is no secret, as we have heard today, that many states  
2704 including Ohio, that the Clean Power Plan is encumbered with  
2705 significant legal problems and should not go forward. While  
2706 I am not here and won't discuss those concerns in detail, be  
2707 assured that Ohio will continue to pursue these challenges  
2708 either independently or joining with other states to prevent  
2709 the likely illegal rulemaking from moving ahead.

2710       U.S. EPA's request for comment on more than over 500  
2711 different aspects of the proposed rule as it was published in  
2712 the Federal Register, combined with the inability to answer  
2713 basic questions throughout that comment period, clearly  
2714 highlights that the plan has not been well designed and was  
2715 rushed out the door to meet a predetermined schedule.  
2716 Nonetheless, Ohio felt a strong obligation to dissect and--  
2717 the proposed rule from a very technical standpoint. We took  
2718 it very seriously. We partnered with our Public Utilities  
2719 Commission of Ohio, and conducted an extensive outreach  
2720 effort to interested parties during the comment preparation.

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2721 Our detailed review produced more than 180 pages of technical  
2722 comments.

2723         One major flaw is how U.S. EPA inexplicably ignores  
2724 efficiency improvements already made to our coal-fired power  
2725 plants, and instead orders sweeping new changes or  
2726 improvements, regardless of feasibility. For example, U.S.  
2727 EPA plan requires an achievement of 4 percent or 6 percent  
2728 efficiency improvement at all coal plants. We know this was  
2729 established without any site-specific assessment in Ohio. In  
2730 reality, Ohio's coal fleet will have recognized a 5.4 percent  
2731 heat rate improvement between 1997 and 2016, and as a result  
2732 of additional reductions, may be very costly or if not  
2733 impossible. In fact, carbon emissions will be reduced by 47  
2734 percent between 2005 and early 2016 from our power plants,  
2735 yet U.S. EPA's allocation allocates no credit in the Clean  
2736 Power Plan for pre-2012 ``early adopters'' of energy  
2737 efficiency improvements, increasing cost to achieve new state  
2738 regulatory targets and threatening more closures of coal  
2739 plants in Ohio.

2740         Ironically, after coal-fired units are required to make  
2741 new costly upgrades, their ability to recover the costs in

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2742 the marketplace is minimized by utilization restrictions as a  
2743 result of the remaining EPA building blocks requiring natural  
2744 gas plants to achieve a 70 percent utilization rate. It is  
2745 nonsensical to force costly upgrades on one hand, and only  
2746 deny the same units the ability to run and pay for them.

2747 In another example, we believe U.S. EPA has misapplied  
2748 the economic feasibility analysis to predict the reliability  
2749 on the bulk power system. It is not clear if U.S. EPA may  
2750 have consulted with the Department of Energy, North American  
2751 Electric Reliability Corporation, Federal Energy Regulatory  
2752 Commission, or power providers to identify and use well-known  
2753 technical modeling software to specifically design to analyze  
2754 how changes in the transmission will be affected. However,  
2755 these organizations currently responsible for maintaining the  
2756 grid and stability and reliability have warned of outages and  
2757 voltage collapse if the plan is implemented as proposed. To  
2758 Ohio, this signals that U.S. EPA failed to consult these  
2759 organizations in a meaningful way while formulating this  
2760 plan, and does not fully understand the implications of the  
2761 plan.

2762 As Ohioans discuss this issue across the state, we hear

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2763 one overriding concern: maintain our affordable, reliable  
2764 power is critical to both the pocketbooks of Ohioans and  
2765 continued economic development within our state. Ohio has  
2766 been a manufacturing hub in the heart of this country since  
2767 the Industrial Revolution. Fueled by electricity, which  
2768 remains 9 percent below the national average, Ohio is home to  
2769 a broad range of energy-intensive industries, and is  
2770 competitive on the national and global market. The Clean  
2771 Power Plan, with all its legal and technical flaws, presents  
2772 a direct threat to these benefits to the Ohio consumer.

2773       One stunning statistic I will share with you is the  
2774 Public Utilities Commission conducted the detailed analysis  
2775 of the Clean Power Plan and indicates that 39 percent higher  
2776 electricity rates in calendar year '25 that will cost Ohioans  
2777 \$2.5 billion. In the last 4 years, Governor Kasich has  
2778 supported an energy policy that is inclusive of all sources  
2779 in generation. From our world-class energy summit in 2011,  
2780 where we discussed developing a broad portfolio of the cost-  
2781 effective sources, to recent legislative activity to include  
2782 combined heat and cogeneration in our qualifying energy  
2783 sources, we have and will continue to embrace the often

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2784 overused but certainly relevant all-of-the-above strategy.

2785 We do it because it is important to affordable, reliable

2786 energy and to protect the environment.

2787 I will close by saying Ohio is willing and is very

2788 prepared to participate in a full national debate on carbon,

2789 the need or not, frankly, to regulate carbon emissions from

2790 power plants, and how Ohio is and remains committed to being

2791 a good steward of the environment. However, the Clean Power

2792 Plan is a seriously flawed proposal and should not be used to

2793 set unprecedented national policy. U.S. EPA should

2794 reconsider this misguided approach.

2795 Thank you.

2796 [The prepared statement of Mr. Butler follows:]

2797 \*\*\*\*\* INSERT 4 \*\*\*\*\*

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|

2798           Mr. {Whitfield.} Thank you, Mr. Butler.

2799           And our next witness is Ms. Kelly Speakes-Backman, who  
2800 is the Commissioner at the Maryland Public Service  
2801 Commission, and Chair of the Regional Greenhouse Gas  
2802 Initiative. Thank you for being with us, and you are  
2803 recognized for 5 minutes.

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|

2804 ^STATEMENT OF KELLY SPEAKES-BACKMAN

2805 } Ms. {Speakes-Backman.} Mr. Chair and members of the  
2806 committee, thank you very much for inviting me--

2807 Mr. {Whitfield.} Your microphone is on, and move it up  
2808 closer please.

2809 Ms. {Speakes-Backman.} Thanks. I think it is with this  
2810 chair.

2811 Thank you very much for inviting me to testify this  
2812 morning. I am grateful for this opportunity to comment on  
2813 the proposal's costs, feasibility, and impact on consumers  
2814 and electrics reliability.

2815 As an economic regulator first and foremost, my primary  
2816 objective is to ensure that the environmental goals of my  
2817 state are realized in the most cost-effective way possible,  
2818 while maintaining grid reliability. To this end, I am  
2819 pleased that the EPA has allowed states to work within the  
2820 current construct of our electric grid markets by encouraging  
2821 a regional approach to compliance. As one of the nine states  
2822 participating in RGGI, the experience of my state as well as

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2823 recent analyses completed by several independent grid  
2824 operators indicates that a regional path to compliance is the  
2825 most efficient and cost-effective path forward.

2826       Together, our nine step--our nine states continue to  
2827 successfully implement the Nation's first fully-operational  
2828 carbon market. The RGGI program caps emissions by first  
2829 determining a regional budget of carbon dioxide allowances,  
2830 then distributing a majority of the CO2 allowances through  
2831 regional auctions, so that states may capture the allowance  
2832 value for reinvestment in strategic energy programs.

2833       Our nine states represent 16 percent of the U.S.  
2834 economy, and generate a total gross domestic product of \$2.4  
2835 trillion U.S. The states work together within the current  
2836 electricity markets to create a unified system for auctioning  
2837 and trading carbon allowances so that our environmental goals  
2838 are achieved through a least-cost, market-based solution.  
2839 Although we have collaborated effectively for the better part  
2840 of a decade, the RGGI remain--RGGI region remains diverse in  
2841 many aspects. We comprise three separate regional  
2842 transmission organizations, we have different political  
2843 landscapes, and dissimilar generation profiles. For example,

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2844 in Maryland, we--our generation remains predominantly coal.  
2845 As part of RGGI, and coupled with other state energy  
2846 initiatives, however, we have been able to diversify our fuel  
2847 mix and reduce our carbon footprint. Since 2005, instate  
2848 generation from renewables, nuclear and natural gas as a  
2849 percentage of total generation mix has increased from 36  
2850 percent to 55 percent, while instate generation from coal has  
2851 decreased 56 percent to 44 percent. Over our entire RGGI  
2852 region, the power sector carbon pollution has decreased by 40  
2853 percent, while our regional economy has grown by 8 percent.  
2854 That is from 2005 to 2013. Non-hydro renewable generations  
2855 has increased by 47 percent, while our regional dependency on  
2856 coal has--and oil has decreased. Our carbon intensity power--  
2857 -of the power sector has decreased at twice the rate of the  
2858 rest of the country.

2859 So we believe that market forces, state policies and  
2860 programs, such as RGGI, are driving these cost-effective  
2861 pollution reductions, while simultaneously supporting our  
2862 local economies. Our energy efficiency, demand response, and  
2863 renewable initiatives, as well as policies to encourage fuel  
2864 switching and to less carbon-intensive fuels, all work in

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2865 tandem to reduce pollution and establish long-term solutions  
2866 for a reliable energy infrastructure. Many of the  
2867 complimentary strategic energy initiatives are funded using  
2868 proceeds from these RGGI allowance auctions, creating a  
2869 virtual cycle--virtuous cycle of benefits that also serves to  
2870 minimize ratepayer impact.

2871 I could go through the rest of my written statement, but  
2872 I would very much prefer to just leave you with five points  
2873 that we have learned in--as part of RGGI, and I would be  
2874 happy to take questions afterwards. The five lessons that we  
2875 have learned in--and what we hope will be helpful to other  
2876 states as they are crafting their plans, either state or  
2877 regional, include the formation of--one of the lessons stems  
2878 from the formation of our intra and interstate agency  
2879 relationships as part of the regional cooperative effort.  
2880 These relationships and resources have spilled over into  
2881 other initiatives such as distributed generation, electric  
2882 vehicles, and compliance with other EPA and state  
2883 environmental regulations. Two is the pooling of staff  
2884 resources and budgets. Basically, we can do a lot more with  
2885 a lot less. We have been able to complete the necessary

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2886 regional electric sector modeling in a timely fashion with  
2887 built-in peer review. The third is a regional mechanism  
2888 stimulates active and productive stakeholder engagement. The  
2889 fourth, regional consistency does not require the states to  
2890 implement identical programs. We in Maryland have one way of  
2891 using these proceeds. Those in New York, those in  
2892 Massachusetts, those in the other states participating in  
2893 RGGI base their investments on their own state policies and  
2894 priorities. And fifth, lastly and the most important lesson  
2895 that we have learned by the RGGI states as it applies to the  
2896 Clean Power Plan, is that participation in a regional  
2897 compliance effort will likely provide our state with--with  
2898 likely provide other states with the most flexibility moving  
2899 forward. Initial hurdles surrounding the structure of the  
2900 mechanism are not, in fact, insurmountable as demonstrated by  
2901 us and in the RGGI states. Using this regional construct,  
2902 the regional emission cap is the only enforceable mechanism  
2903 included in the compliance plan. States retain jurisdiction  
2904 over their own energy efficiency and renewable energy  
2905 programs, and can continue to offer these initiatives as  
2906 complimentary measures that help mitigate the cost of

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2907 compliance for their ratepayers.

2908 Thank you very much for your time this morning.

2909 [The prepared statement of Ms. Speakes-Backman follows:]

2910 \*\*\*\*\* INSERT 5 \*\*\*\*\*

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2911           Mr. {Whitfield.} Thank you.

2912           Our next witness is Mr. Art Graham, who is Chairman of  
2913 the Florida Public Service Commission. Mr. Graham, thanks  
2914 for being with us, and you are recognized for 5 minutes. And  
2915 happy birthday, as I said earlier.

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2916 ^STATEMENT OF ART GRAHAM

2917 } Mr. {Graham.} Thank you, Mr. Chairman. Thank you for  
2918 the birthday wishes. And thank you and the subcommittee for  
2919 allowing me the opportunity to come and speak today.

2920 My testimony is my perspective of--as a utility  
2921 regulator. I believe the EPA's Clean Power Plan, the CPP,  
2922 threatens the affordability and reliability of Florida's  
2923 electric power. I am going to get straight to what I feel is  
2924 the most troubling aspect of the CPP. That would be both the  
2925 fairness and the cost.

2926 In Florida, we have below-average CO2 emissions because  
2927 of the following. We shifted a lot of our generations to  
2928 low-emission natural gas early on. We offered incentives to  
2929 harvest the available heat rate improvements over the past 30  
2930 years, and through energy efficiency programs that have  
2931 already reduced consumption by 9,330 gigawatt hours. Now,  
2932 all these things allowed us to realize a 25 percent decrease  
2933 in CO2 emissions from 2005 to 2012, but yet none of these  
2934 things are recognized by the current plan. However, in the

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2935 current plan 34 states have higher CO2 emission rates than  
2936 Florida, but only 15 states have higher reduction percentage  
2937 required by the CPP.

2938         The second concern I want to express this morning is the  
2939 cost of compliance. EPA's responsibility is economic  
2940 protection, which is very important. I think it is very  
2941 important. But my responsibility is protecting the consumer  
2942 from excessive costs and the reliability of the power grid,  
2943 which I think is equally as important. The costs of  
2944 implementing the CPP aren't certain at this early stage, but  
2945 the utility customers will certainly pay for EPA's dramatic  
2946 shift away from economic planning and least cost operation.  
2947 How much is not exactly known, but the cost analysis I will  
2948 talk to you about this morning from our Florida Office of  
2949 Public Counsel, and you will get some idea from there.

2950         OPC's job is to represent the utility customers'  
2951 interest. They took a very conservative approach and applied  
2952 EPA's own cost assumptions. The specifics are in my written  
2953 testimony that I submitted earlier.

2954         So briefly, under building block one, applying the  
2955 approximate midpoint of EPA's cost range to achieve

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2956 approximately 6 percent improvement, Public Counsel  
2957 identified a cost of \$1.15 billion. Under building block  
2958 two, Public Counsel's conservative methodology precluded  
2959 costs associated with this building block, but the issues  
2960 were as follows. Codifying costs for the EPA's overstatement  
2961 of gas plant capacity, the cost for required new gas  
2962 transportation infrastructure, i.e., pipelines, the cost for  
2963 replacing generating units into retirement long before the  
2964 end of their use of life--long before the end of their useful  
2965 life, i.e., the stranded costs. I can tell you these are all  
2966 big-ticketed items. Under building block three, using a U.S.  
2967 Energy Information Agency's most recent costs for utility  
2968 scale solar, replacing 10 percent of the conventional  
2969 capacity would cost Florida \$16.8 billion. Under building  
2970 block four, for Florida EPA's 10 percent reduction equals  
2971 5,745 megawatts of avoided capacity. Our demand site program  
2972 costs \$1.48 million per megawatt of avoided capacity. So  
2973 EPA's assumption will cost us over \$8.5 billion.

2974 Now, Florida's Office of Public Counsel limited itself  
2975 to costs that can be cleanly calculated, applying EPA's  
2976 numbers with the most basic government data. Counting only

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2977 the most obvious and easily qualified costs, the expense to  
2978 Florida ratepayers start at almost \$27 billion. That works  
2979 out to about \$2,800 per utility customer. However, the  
2980 complete cost is much, much higher.

2981 In short, if EPA wants to reduce the carbon emission by  
2982 30 percent from the 2005 levels, well, then let us use the  
2983 2005 levels as our baseline. It makes no sense that EPA  
2984 won't recognize what states have done since 2005. It is  
2985 unfair to punish early efforts with bigger and more expensive  
2986 requirements.

2987 And I have some more, but I don't want to run over.

2988 [The prepared statement of Mr. Graham follows:]

2989 \*\*\*\*\* INSERT 6 \*\*\*\*\*

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|

2990           Mr. {Whitfield.} You--okay, Mr. Graham, thank you very  
2991 much, and we will have an opportunity to ask questions as  
2992 well, and then we have your full statement for the record.  
2993           At this time, I would like to introduce Donald van der  
2994 Vaart, who is the Secretary for North Carolina Department of  
2995 Environment and Natural Resources. Thanks very much for  
2996 being with us, and you are recognized for 5 minutes.

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2997 ^STATEMENT OF DONALD VAN DER VAART

2998 } Mr. {van der Vaart.} Thank you. Chairman Whitfield,  
2999 Ranking Member Rush, and members of the subcommittee, thank  
3000 you for inviting me to testify this afternoon.

3001 I have the privilege of serving Governor McCrory as  
3002 Secretary of the Department of Environment and Natural  
3003 Resources, and I am grateful for the opportunity to share my  
3004 views on this very important topic. I would also like to  
3005 recognize Representatives Hudson and Ellmers, two  
3006 distinguished North Carolina members who sit on this  
3007 committee.

3008 The Clean Air Act specifically provides that states, not  
3009 the EPA, have the primary responsibility for implementing  
3010 programs that protect the resources of this Nation. It is an  
3011 indisputable fact that states like North Carolina have been  
3012 very successful over the past 30 years implementing programs  
3013 that protect public health and welfare, while providing for  
3014 economic development.

3015 Before I comment on the specific issues of state

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3016 resources, I would like to note that issues not--that are  
3017 emitted from my comments. First, my comments will not  
3018 address the scientific uncertainty of the impact of human  
3019 activity and greenhouse gases have on climate. My comments  
3020 do not discuss the accuracy, or the lack thereof, of the IPCC  
3021 models relied upon by the model--by the EPA to develop this  
3022 rule, or the divergence between the models' predictions and  
3023 actual temperatures over the past 15 years. Although these  
3024 issues are critical in any decision to regulate greenhouse  
3025 gases, my comments are limited to separate but equally  
3026 important aspects of any final 111(d) rulemaking process;  
3027 that is, state resources, state and utility planning efforts,  
3028 and the legal frailty of the proposed rule.

3029 I will address the state resources and advocate for what  
3030 North Carolina calls the legal trigger approach to Section  
3031 111(d) implementation. Given the certain litigation that  
3032 will ensue if the proposed rule under 111(d) is promulgated,  
3033 states such as North Carolina are at risk of investing  
3034 unnecessary time and resources, developing and enacting state  
3035 111(d) plans prior to the resolution of litigation. North  
3036 Carolina recommends that the EPA amend the rule's submittal

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3037 deadlines to require states to submit a 111(d) plan only  
3038 after the conclusion of the judicial review process.  
3039 Traditionally, when the EPA promulgates a new rule that sets  
3040 forth requirements designed to address some aspect of the  
3041 Clean Air Act, each state must take action, usually in the  
3042 form of legislation and rulemaking, to avoid sanctions  
3043 directly or avoid sanctions on its sources. The state then  
3044 submits a demonstration to the EPA for approval, which can  
3045 take anywhere from a few months to many years, during which  
3046 time the states implement their rules. If the rule is struck  
3047 down, however, the state is forced to uproot its earlier work  
3048 and begin a new planning process; legislation, rulemaking,  
3049 implementation and enforcement, and the process must often be  
3050 amended again when EPA revises its illegal rule in an attempt  
3051 to satisfy the courts.

3052       This is not just an academic concern. There are several  
3053 recent cases where this study in futility has occurred. The  
3054 EPA's attempts to address economic inequity in regional  
3055 energy markets through interstate pollution rules, such as  
3056 the NOx SIP Call, the Clean Air Interstate Rule, and the  
3057 Cross-State Air Pollution Control Rule, all prime examples.

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3058 There is universal agreement that the 111(d) rule will  
3059 fundamentally restructure how energy is generated and  
3060 consumed in America. I would argue that EPA's Section 111(d)  
3061 rule is to energy what the Affordable Care Act is to  
3062 healthcare. This fundamental change to America's electricity  
3063 model will come at the hands of a rule that few consider  
3064 legally firm. The EPA acknowledges in the rule that it is  
3065 structured to survive even if portions of the rule are struck  
3066 down. In my more than 20 years of implementing air quality  
3067 rules, I am not aware of any rule where the EPA has made an  
3068 apriority acknowledgement of legal infirmity.

3069 Despite the rule's uncertain future, state plans would  
3070 need to move forward to allow, for example, switching from a  
3071 cost-based energy dispatch model to a carbon dioxide dispatch  
3072 model. Under the EPA's current proposal, legislative  
3073 changes, utility resource planning, and regulatory execution  
3074 must proceed while 111(d) is under judicial review. EPA's  
3075 acknowledgement of the legal frailty of their creative  
3076 interpretation of the Clean Air Act not only argues further  
3077 legal trigger, but it also calls Chevron deference into  
3078 question. In this rule, like many others, EPA--many other

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3079 EPA rulemakings, the EPA characterizes statutory language as  
3080 unambiguous to invoke Chevron deference. Unfortunately, the  
3081 EPA's legal track record is so poor that one can only wonder  
3082 if Chevron deference should be withdrawn because the agency  
3083 has abused its public trust.

3084         Simply stated, if the EPA wants to upend the world's  
3085 greatest power system by forcing a round peg into the square  
3086 hole that is Section 111(d), it should have the prudence to  
3087 allow the final rule to be reviewed by the courts before  
3088 requiring states to undertake such a profound effort.

3089         Thank you for the opportunity to have testified.

3090         [The prepared statement of Mr. van der Vaart follows:]

3091 \*\*\*\*\* INSERT 7 \*\*\*\*\*

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3092           Mr. {Whitfield.} Thank you, Mr. van der Vaart. And  
3093 thank all of you for taking time to give us your views on  
3094 this important issue.

3095           I will recognize myself for 5 minutes for questions.

3096           In my opening statement, I described this proposed  
3097 regulation as being characterized as extreme, a power grab,  
3098 radical, unprecedented, and even unlawful. And we get--  
3099 many--I think you can come to the logical conclusion that  
3100 this is being implemented to implement the President's  
3101 international agreements.

3102           And I would ask each of you, the EPA has given the  
3103 states 13 months to come up with a state implementation plan  
3104 if this regulation is adopted. Is that an unusually short  
3105 period of time from your personal experience with EPA? Mr.  
3106 Butler?

3107           Mr. {Butler.} Mr. Chairman, it is a very short time  
3108 frame, frankly, one which the--we don't believe we could ever  
3109 meet.

3110           Mr. {Whitfield.} Okay.

3111           Mr. {Butler.} Just--and I know states--some states are

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3112 different.

3113 Mr. {Whitfield.} Okay, so it is very short. You don't  
3114 think you can meet it.

3115 What about you, Ms. Speakes-Backman?

3116 Ms. {Speakes-Backman.} Well, thank you for the  
3117 question. I would say that for my state and for the other  
3118 eight participating RGGI states, since EPA has explicitly  
3119 allowed our construct to exist, we already are practicing  
3120 what they are asking for.

3121 Mr. {Whitfield.} So you are saying you could meet the--

3122 Ms. {Speakes-Backman.} Absolutely.

3123 Mr. {Whitfield.} --proposed regulation.

3124 Mr. Graham?

3125 Mr. {Graham.} I agree it is short, and I don't think we  
3126 can do it either. We would have to have several special  
3127 sessions.

3128 Mr. {Whitfield.} Okay. What about you, Mr. van der  
3129 Vaart?

3130 Mr. {van der Vaart.} The plan that we anticipate  
3131 submitting we could meet. It is not the plan the EPA is  
3132 seeking.

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3133           Mr. {Whitfield.} Okay. Now, why--this has been  
3134 described as a real takeover of the electric system in  
3135 America--generating system. Why would EPA, from your  
3136 personal view, would they want a 13-month time period to  
3137 allow states to implement something this complicated? What  
3138 would be the reason for that? Mr. Butler, do you have any  
3139 idea?

3140           Mr. {Butler.} Mr. Chairman, I think it is--as I had  
3141 pointed out in mine, and you had in your testimony, I think  
3142 the President has a goal that he is trying to meet, and is  
3143 asking the states to help him meet that goal, but a very  
3144 short time frame.

3145           Mr. {Whitfield.} Okay. Why do you think, Ms. Speakes-  
3146 Backman?

3147           Ms. {Speakes-Backman.} I can't say exactly why because  
3148 I don't agree with the premise, necessarily, that it is a  
3149 takeover, sir.

3150           Mr. {Whitfield.} Okay, you--okay, what about you, Mr.  
3151 Graham, do you have any idea why?

3152           Mr. {Graham.} Mr. Chairman, I would agree with you and  
3153 Mr. Butler on that.

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3154 Mr. {Whitfield.} Okay. Mr. van der Vaart?

3155 Mr. {van der Vaart.} I believe that this fictitious  
3156 sense of urgency is not about emission reductions. We are  
3157 meeting emission reductions, thanks in large part to the free  
3158 market and the low cost of natural gas.

3159 Mr. {Whitfield.} Um-hum.

3160 Mr. {van der Vaart.} I believe the urgency has to do  
3161 with the fact that they sense that the veil of legal  
3162 authority has been stripped from this rule, and it will soon  
3163 meet its demise.

3164 Mr. {Whitfield.} Um-hum.

3165 Mr. {van der Vaart.} They want to force--

3166 Mr. {Whitfield.} Um-hum.

3167 Mr. {van der Vaart.} --utility companies to begin their  
3168 planning process--

3169 Mr. {Whitfield.} Um-hum.

3170 Mr. {van der Vaart.} --which is a lot longer than 13  
3171 months, so that they can get this ball rolling.

3172 Mr. {Whitfield.} And, you know, in our first panel, you  
3173 listened to the constitutional arguments and so forth. How  
3174 many of you actually believe that the average citizen out

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3175 there has any basic understanding of the impact of this--what  
3176 this--of this regulation and what it would be? Do you think  
3177 the average citizen even has any input--insight into this,  
3178 Mr. Butler?

3179 Mr. {Butler.} Mr. Chairman, I--we did an extensive  
3180 outreach and--as we prepared our comments, and we took a lot  
3181 of public comment on this, but irrespective of that, I think  
3182 in general, the public does not understand any of the  
3183 technical details of any of the legal construct here--

3184 Mr. {Whitfield.} Right.

3185 Mr. {Butler.} --that is under debate, nor, frankly,  
3186 what the potential cost might be because we have not,  
3187 frankly, been able to understand the plan well enough or  
3188 know--

3189 Mr. {Whitfield.} You probably don't understand what the  
3190 cost implications are.

3191 Mr. {Butler.} Right.

3192 Mr. {Whitfield.} Do you think the average citizen  
3193 understands the impact--potential impact of this?

3194 Ms. {Speakes-Backman.} I believe that public sentiment  
3195 is increasingly aware of climate change and the issues--

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3196 Mr. {Whitfield.} I am not talking about climate change,

3197 I am asking you--

3198 Ms. {Speakes-Backman.} And--

3199 Mr. {Whitfield.} --do they understand the impact, in

3200 your opinion, of the consequences of this?

3201 Ms. {Speakes-Backman.} The impact in our RGGI states is

3202 less than 1 percent for the overall--

3203 Mr. {Whitfield.} So you think they do understand--

3204 Ms. {Speakes-Backman.} --so that--

3205 Mr. {Whitfield.} Okay, Mr.--

3206 Ms. {Speakes-Backman.} --impact is not necessary--

3207 Mr. {Whitfield.} Mr. Graham, what about you, do you

3208 think they understand?

3209 Mr. {Graham.} I don't think they have any idea. I--we

3210 have reached out quite a bit and got very little feedback. I

3211 think the power generators--

3212 Mr. {Whitfield.} Um-hum.

3213 Mr. {Graham.} --have an idea of what this is going to

3214 cost--

3215 Mr. {Whitfield.} Okay.

3216 Mr. {Graham.} --but I think the financial impact, and

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3217 we really haven't put out--

3218 Mr. {Whitfield.} Okay.

3219 Mr. {Graham.} --what we propose that some of the  
3220 numbers are until we get the final plan coming back.

3221 Mr. {Whitfield.} Do you think they understand, Mr. van  
3222 der Vaart?

3223 Mr. {van der Vaart.} No, sir.

3224 Mr. {Whitfield.} Okay. Now, Mr. Graham, you talked  
3225 about you viewed this as unfair and very costly. Is that  
3226 your honest opinion of the impact of this regulation on the  
3227 state of Florida?

3228 Mr. {Graham.} Without a doubt. You know, what gets me,  
3229 and you see in all of the EPA's data, that they said they  
3230 want to decrease 30 percent of the CO2 emissions from the  
3231 2005 numbers. Now, the biggest--one of the things that  
3232 Florida has already done from 2005 to 2012, we have already  
3233 jumped ahead of a lot of this stuff. We switched a lot of  
3234 things over to natural gas. We are, right now, about 65  
3235 percent natural gas. We have done a lot of other  
3236 improvements since then, and for you not to take into  
3237 account, because they are using 2012 as the baseline.

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3238           Now, the problem we run into there is that was an all-  
3239   time low for natural gas, so we are using so much more  
3240   natural gas, so the carbon emission that they are putting out  
3241   there is so much lower than we--than it was, like I said,  
3242   back in '05. And so I think--

3243           Mr. {Whitfield.} Okay.

3244           Mr. {Graham.} --it is unfair that we are not getting  
3245   that credit.

3246           Mr. {Whitfield.} Thank you. My time has expired.

3247           At this time, recognize the gentlelady from Florida, Ms.  
3248   Castor, for 5 minutes.

3249           Ms. {Castor.} Thank you, Mr. Chairman. Thank you to  
3250   the panel.

3251           Mr. Graham, it recently came to light that Florida  
3252   Governor Rick Scott has an unwritten policy that bans the use  
3253   of the terms climate change and global warming. A number of  
3254   state employees and scientists from the Florida Department of  
3255   Environmental Protection, the Department of Health, the water  
3256   management districts, the Florida Department of  
3257   Transportation, have all come forward and said this is the  
3258   case. I read your testimony. Nowhere in your testimony does

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3259 it use the term climate change or global warming. Is that a  
3260 product of Governor Scott's unwritten policy?

3261 Mr. {Graham.} Absolutely not. I was told to come here  
3262 and talk about what the financial impact is going to be of  
3263 implementing 111(d), and so that is why that was in my  
3264 written testimony.

3265 Ms. {Castor.} Well, and I find your testimony very  
3266 curious because the Florida Public Service Commission has not  
3267 been on the side of consumers, and they have not, your words,  
3268 you say the Clean Power Plan threatens affordability for  
3269 consumers, and your--the commission will protect consumers  
3270 from excessive costs, but let me give you a few examples of  
3271 the costs that Florida has heaped on our customers. The PFC  
3272 recently gutted energy efficiency initiatives, even though  
3273 efficiency can meet demand at a much lower cost, at a  
3274 fraction of the cost of building new power plants, and can  
3275 help customers reduce energy use, put money back into their  
3276 pocket, create jobs at the same time. I mean we would see  
3277 larger savings on bills, but that is not the business model  
3278 in Florida. So those stunning rollbacks in energy  
3279 efficiency, especially at a time when we have to be looking

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3280 for ways to save on carbon pollution and save money.

3281 Here is another example. The Public Service Commission  
3282 has really worked over the past years to stifle renewable  
3283 energy in Florida, and especially solar. You recently stated  
3284 at a Public Service Commission hearing that Florida, sunshine  
3285 state, branding is nothing more than a license plate slogan.  
3286 Well, I hope everyone was watching the weather over this past  
3287 winter. Florida is the sunshine state. We rely on tourism.

3288 The--you cited a national renewable energy lab report,  
3289 but, in fact, that report from July 2012 said Florida is  
3290 indeed ranked third in the nation for total estimated  
3291 technical potential for rooftop solar voltaics in the U.S.  
3292 That same report said Florida clearly has the best solar  
3293 resource east of the Mississippi River, but the commission  
3294 has scrapped solar rebates, also going to cost us money,  
3295 especially with the new requirements of the Clean Power Plan.

3296 And then the best example is what the Public Service  
3297 Commission and the legislature has done to heap--to increase  
3298 bills, especially if you are a Duke Energy customer. And my  
3299 colleagues might not be aware, but Florida had adopted an  
3300 advance recovery fee that allowed the utilities to collect

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3301 costs in advance for building power plants. And in fact,  
3302 even when Duke Energy had to scrap a power plant or--and had  
3303 to put another one on mothballs, without creating one  
3304 kilowatt hour of energy, customers in my neck of the woods,  
3305 in central Florida, are on the hook for \$3 billion, and that  
3306 is modest, in costs. \$3 billion, not one, not one kilowatt  
3307 in energy.

3308         So when I hear you talk about affordability, and that  
3309 you are really concerned about the consumers, the record  
3310 simply does not support that in the state of Florida.

3311         I want to give you time to respond, but we have an  
3312 obligation, we have a shared obligation, to confront these  
3313 issues. And I am sorry, I am going to give you a little time  
3314 to recover, but think about the state of Florida, what we  
3315 are--what consumers are going to have to pay in storm letter  
3316 damage, costs to re-nourish beaches, what if we have a more  
3317 powerful storm, that comes out of property taxes. You are  
3318 looking at it in a very constrained way; a utility concentric  
3319 way, and that is not reality in our state. Go ahead.

3320         Mr. {Graham.} Thank you. We cut back a lot on the  
3321 energy efficiency programs because we have done so much so

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3322 far. As you heard me say earlier, since we started this  
3323 program, we have achieved 9,330 gigabytes worth of--

3324 Ms. {Castor.} Mr. Graham, that is simply not the case.  
3325 It is--there is report after report after report that says  
3326 the state of Florida is so far behind. Now we are down to  
3327 about zero in our energy efficiency goals because the  
3328 business model is backwards. It is not a model that helps  
3329 address the modern challenges. It is all about how much  
3330 energy you can sell. And utilities now need to be  
3331 compensated for helping consumers save money. And I really  
3332 recommend that you take this obligation seriously and think  
3333 about the cost to consumers from here on out.

3334 Thank you.

3335 Mr. {Whitfield.} Ms. Castor's time has expired.

3336 At this time, recognize the gentleman from Texas, Mr.  
3337 Barton, for 5 minutes.

3338 Mr. {Barton.} Well, thank you, Mr. Chairman. I had  
3339 meetings in my office so I have been listening to the hearing  
3340 on the television in my office, and I want to commend all 4  
3341 of our panelists. I thought your testimony was excellent.

3342 I am going to start off with a basic question for each

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3343 one of you. We will start with you, Mr. Butler.

3344 Are the requirements in this Clean Power Plan necessary  
3345 for Ohio to meet any pending nonattainment areas in your  
3346 state?

3347 Mr. {Butler.} No, sir. No.

3348 Mr. {Barton.} Okay. Ms. Backman, from Maryland.

3349 Ms. {Speakes-Backman.} Speakes-Backman. Yes, sir. The  
3350 programs that we already have in place in Maryland have us in  
3351 good stead to meet the goals of the Clean Power Plan.

3352 Mr. {Barton.} So it is not necessary in Maryland, okay.

3353 Gentleman from--

3354 Mr. {Graham.} No, sir.

3355 Mr. {Barton.} --North Carolina.

3356 Mr. {Graham.} It is not necessary.

3357 Mr. {Barton.} And from Florida.

3358 Mr. {van der Vaart.} Florida--

3359 Mr. {Barton.} Florida. North Carolina. I have you  
3360 backwards.

3361 Mr. {van der Vaart.} But the same answer, no.

3362 Mr. {Barton.} So this is not a necessary thing under  
3363 the Clean Air Act amendments to meet any standards for

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3364 nonattainment. In fact, is it a true statement that nothing  
3365 in this clean power initiative sets a standard of emission  
3366 reduction in your state? Is that a true statement? There is  
3367 not a target you have to meet in terms of parts per million  
3368 or anything like that?

3369 Mr. {Butler.} It is not, sir.

3370 Mr. {Barton.} It is not. Is it a true statement that  
3371 what this is is social planning imposed on your state by the  
3372 Federal Government? We will start with you, Mr. Butler.

3373 Mr. {Butler.} We believe it is an unprecedented act--  
3374 unprecedented action that, frankly, has not--does not have  
3375 any congressional intent behind it.

3376 Mr. {Barton.} Okay. Now, Ms. Speakes-Backman, I was  
3377 impressed with what you said in your testimony. It sounds  
3378 like Maryland is part of a regional group that has  
3379 voluntarily come together, set your own goals, and increased  
3380 your renewable energy portfolio, and done quite a bit of good  
3381 things, but you did that because the compact or the coalition  
3382 that your state is a part of made a voluntary decision to do  
3383 that. Is that not correct?

3384 Ms. {Speakes-Backman.} Yes, sir. We voluntarily

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3385 decided to take control of our environment, of the  
3386 reliability issues that we were facing, and with cost  
3387 increases to our ratepayers.

3388 Mr. {Barton.} And I have no problem with that. I think  
3389 that is good and I am glad Maryland is doing it, but how  
3390 would you feel if we passed a law here that said Maryland had  
3391 to use triple the amount of Texas-produced natural gas in  
3392 that? Would you like that? Clean-burning Texas natural gas,  
3393 I might add.

3394 Ms. {Speakes-Backman.} Well, seeing, sir, as that we  
3395 use plenty of Pennsylvania clean natural gas--

3396 Mr. {Barton.} I understand, and I am not here to--

3397 Ms. {Speakes-Backman.} But--

3398 Mr. {Barton.} --knock Pennsylvania, but my point is--

3399 Ms. {Speakes-Backman.} But, sir, I think the issue--I  
3400 think the question that you are asking me is about being  
3401 forced to use one particular type of fuel or another, which  
3402 is not necessarily how this Clean Power Plan is structured.  
3403 This Clean Power Plan is structured--

3404 Mr. {Barton.} Well, in the case of Texas, Texas has to--  
3405 -if Texas decides to try to comply with this, we have to shut

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3406 down 45 percent of our existing coal-fired power plants; two  
3407 of which are in my old congressional district. Those two  
3408 power plants are the economic linchpins in their counties.  
3409 These are rural counties in south central Texas. One power  
3410 plant has been there over 40 years, the other power plant has  
3411 been there 25 years. I mean they are the economic mainstay  
3412 in those particular counties, and they would be shut down.  
3413 They would be shut down for no environmental reason. No  
3414 environmental positivism. None.

3415 As the gentleman from West Virginia or Virginia pointed  
3416 out, you know, 6/10 of 1 percent decrease in CO2 over a 30 or  
3417 40-year period. I mean it is crazy.

3418 The chairman asked a question about why the 13-year--  
3419 month period to--13-month period to comply, and you all were  
3420 very polite about giving non-answer answers, but I think the  
3421 reason is because the Obama Administration is going to be out  
3422 of office, and they want this thing put in while they are  
3423 still in office. Now, that is speculation on my point, but  
3424 it is informed speculation.

3425 Again, I have no problem with what any of your states  
3426 are doing, and I am extremely impressed with what Maryland is

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3427 doing. I think that is a good thing. I believe in states'  
3428 rights. New York doesn't want to allow hydraulic fracturing,  
3429 so they don't. Pennsylvania allows it, but with different  
3430 reporting requirements than Texas. I believe in federalism,  
3431 it is a good thing, but I don't believe in this Clean--this  
3432 new Clean Power Plan initiative that is imposing a social  
3433 policy on the states, with no environmental benefit and no  
3434 real opt-out provision.

3435 With that, Mr. Chairman, I yield back.

3436 Mr. {Whitfield.} Gentleman yields back.

3437 At this time, recognize the gentleman from New Jersey,  
3438 Mr. Pallone, for 5 minutes.

3439 Mr. {Pallone.} Thank you, Mr. Chairman.

3440 Commissioner Speakes-Backman, I wanted to ask you a  
3441 question about the Regional Greenhouse Gas Initiative.

3442 Ms. {Speakes-Backman.} Any time, sir.

3443 Mr. {Pallone.} I wasn't here for your testimony. I had  
3444 to go to another committee hearing, but in your testimony you  
3445 state that through 2013, RGGI states reinvested over \$950  
3446 million of auction proceeds and energy efficiency, clean and  
3447 renewable energy and other strategic energy programs. And

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3448 you note that these proceeds have helped low-income families  
3449 pay their energy bills, supported energy efficiency upgrades,  
3450 and helped families and businesses install solar, wind and  
3451 geothermal systems at their properties. In fact, under RGGI,  
3452 just last week, the sale of 15.3 million carbon dioxide  
3453 allowances netted \$82 million and set a record high price.

3454 So the question is, the RGGI program seems to be the  
3455 most effective and efficient way for states to meet the  
3456 standards set forth in the EPA's Clean Power Plan. Can you  
3457 tell me about the environmental and economic benefits this is  
3458 providing to the state of Maryland?

3459 Ms. {Speakes-Backman.} Yes, sir. Thank you for the  
3460 question. And, yes, in fact, we auctioned--we--there were an  
3461 additional \$82 million just last Friday announced in our just  
3462 last previous auction.

3463 In Maryland specifically, we have reinvested the auction  
3464 proceeds in consumer benefit programs. It has helped more  
3465 than 215,800 low-income Maryland families to pay their energy  
3466 bills. It has helped--supported energy efficiency upgrades  
3467 at 11,800 low-to-moderate income households, helped 5,206  
3468 families, and 201 businesses in Maryland to install solar,

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3469 wind and geothermal systems.

3470 Mr. {Pallone.} So I mean obviously, the program has

3471 been tremendously effective in Maryland and other

3472 participating states, and these states are going to have a

3473 leg-p when it comes to meeting the EPA standards.

3474 Now, I am just mentioning this in part because that is

3475 why I am so disappointed that, in my home state of New

3476 Jersey, our governor, Chris Christie, has withdrawn our state

3477 from the program, as you know. And not only is this going to

3478 hinder New Jersey's ability to meet the EPA standards, it is

3479 actually costing the state money. According to an analysis

3480 by Environment Northeast, since New Jersey withdrew from the

3481 RGGI program in 2011, the state has passed up more than \$114

3482 million in potential revenue, and the state could miss out on

3483 an additional \$387.1 million through 2020, and those figures

3484 don't even account for the record price for allowances hit at

3485 the RGGI auction last week, which you mentioned. That is

3486 money that could be used to use support energy efficiency

3487 upgrades and job creation, like it is doing in Maryland and

3488 other participating states. So I know he is not with us here

3489 today, but I have called on Governor Christie to reconsider

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3490 his decision to withdraw from RGGI because I think New  
3491 Jerseyans deserve to reap the benefits of this successful,  
3492 economically-efficient program, which is reducing carbon  
3493 emissions and creating jobs in the northeast.

3494 Now, I have about a minute and a half. I know that--if  
3495 you wanted to respond to some of the questions that were  
3496 asked before that maybe you didn't have time for, you could  
3497 use the time to do that, unrelated to my question.

3498 Ms. {Speakes-Backman.} Thank you very much, sir.

3499 May I just add that the car analogy in the panel before  
3500 was so interesting to me in that, you know, what can be done  
3501 in--for the car is a catalytic converter, but to me, when I  
3502 think about a mass-based regional program such as RGGI, and  
3503 taking that same analysis, it is like having a catalytic  
3504 converter but then you put a variable toll on the roads that  
3505 is outside the box. Right? It is outside the car system.  
3506 And putting a toll on those roads, you can take the money and  
3507 you can reinvest that in R and D so that you can further  
3508 improve the equipment that is put on the car to reduce  
3509 emissions. But in addition, you can take those revenues and  
3510 further control traffic by putting the tolls on certain roads

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3511 that are busy. You can do things like improving those roads  
3512 themselves. There are ways to reinvest and to make this a  
3513 positive.

3514 I don't think that there--I don't think it is mutually  
3515 exclusive to help your environmental goals and to build your  
3516 economies.

3517 Mr. {Pallone.} All right, thank you so much.

3518 Thank you, Mr. Chairman.

3519 Mr. {Latta.} [Presiding] Thank you very much. And  
3520 before I recognize myself for 5 minutes, I would like to ask  
3521 unanimous consent from the committee to enter a letter dated  
3522 December the 1st, 2014, from Director Butler of the Ohio EPA  
3523 to the respondent and also the executive summary. And these  
3524 documents were submitted to the U.S. EPA as part of their  
3525 comments to oppose Clean Power Plan.

3526 Without objection, so ruled.

3527 [The information follows:]

3528 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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3529           Mr. {Latta.} If I could start, Director Butler, and  
3530 also to all of our panel, thanks very much for being here.  
3531 Again, it has been very informative.

3532           But, Director, if you would, would you expand on the  
3533 reference you made to the differences in the 2005 and 2012  
3534 baselines, and how this would affect Ohio by not taking into  
3535 consideration the early action that many have taken to  
3536 improve that efficiency?

3537           Mr. {Butler.} Mr. Chairman, thanks for the question.  
3538 And I think Mr. Graham made a couple of very relevant points  
3539 in his testimony to this fact as well.

3540           Ohio has many utilities that are very early adopters in  
3541 making sure that their plants run as efficiently as possible.  
3542 Frankly, the hundreds of millions of dollars that they have  
3543 invested will be left on the cutting room floor, if you will,  
3544 if the Clean Power Plan, which talks about a 2005  
3545 implementation date, is passed. In reality, that date of  
3546 looking to develop a plan is all based on the year 2012. So  
3547 any emission reductions or, frankly, efficiency improvements  
3548 that have been made prior to 2012 will not count. We think

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3549 that that not only disincentivizes our utilities from doing  
3550 that work, but it, frankly, also makes it much more difficult  
3551 for them to comply, if not exceptionally more expensive for  
3552 them to comply going forward with meeting the new bucket 1  
3553 requirements of having a 4 to 6 percent energy efficiency  
3554 improvement.

3555         Further, we have talked about utilities as part of our  
3556 dialog and comments on the Clean Power Plan. They think it  
3557 is fundamentally very difficult, if not impossible, to reach  
3558 that 4 or 6 percent efficiency improvements at their--at our  
3559 existing utilities. Our fleet has gotten much more  
3560 efficient, ironically because many of those units were shut  
3561 down because of the mercury standard, others were improved  
3562 because they needed to--they wanted to be more efficient and  
3563 generate more power into the grid. But those costs were  
3564 heavy, and they think that a 1 to 2 percent improvement would  
3565 be all that they could develop and--to comply with the Clean  
3566 Power Plan.

3567         Mr. {Latta.} Thank you. If I could continue, Director,  
3568 could you also explain the issues you foresee with the costs  
3569 and the efficiency related to the EPA's building block number

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3570 two, which will result in the natural gas-fired units used  
3571 for base load power in coal-fired plants into peaking power?

3572 Mr. {Butler.} Mr. Chairman, I think the further--the  
3573 earlier reference about fundamentally--the Clean Power Plan  
3574 fundamentally is changing the electric distribution market  
3575 from really one that is based on cost, to one based on  
3576 environmental impact, and that is a serious, serious problem.  
3577 In addition, just the discontinuity between the way EPA has  
3578 set up the Clean Power Plan bucket one on efficiencies at  
3579 power plants versus bucket two where they are having--wanting  
3580 to see natural gas generation run at a 70 percent rate. I  
3581 think we see two fundamental problems. One is we will see  
3582 significant closures and--as we already have of our coal-  
3583 fired fleet, and we will see some, but I don't know yet how  
3584 much natural gas generation come online. There is a  
3585 disconnect on how those work, so we are really concerned, as  
3586 many others are, about the power grid being able to supply  
3587 power.

3588 Fundamentally, we also find an inconsistency here.  
3589 While EPA is requiring or suggesting that the power plants  
3590 become more efficient, and invest hundreds of millions of

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3591 dollars to do that, that they not be allowed to run to  
3592 recover those costs because they are then driving gas to take  
3593 over that capacity.

3594 Mr. {Latta.} Well, when we look at Ohio, what is--right  
3595 now, is Ohio about 71 percent coal-fired?

3596 Mr. {Butler.} Yes, sir.

3597 Mr. {Latta.} And when you look down the road at the--  
3598 what the EPA is ordering, you know, and it was already  
3599 discussed, I think, by the chairman, the question really  
3600 comes then to, with all these costs being put onto these  
3601 power plants, who is going to pay for that in the long run?

3602 Mr. {Butler.} Right. Mr. Chairman, we are very  
3603 concerned because we think all of those costs get passed onto  
3604 the consumers of Ohio.

3605 Mr. {Latta.} And also when you--especially when you  
3606 have put out in your discussions with the EPA, have they even  
3607 talked about, you know, what the consequences are? Do they  
3608 look at what it would do to a state like Ohio with 71 percent  
3609 coal generated, especially for our business communities and  
3610 the people that work in those factories and businesses?

3611 Mr. {Butler.} Mr. Chairman, I believe they probably do

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3612 talk--think about Ohio, although we were very concerned,  
3613 frankly, dismayed, when U.S. EPA--they do talk about they  
3614 have had some extensive outreach across the country, and they  
3615 did attend listening sessions across the country. We,  
3616 frankly, invited, as our--as did our states in West Virginia  
3617 and Kentucky, to come to any three of our states and hold a  
3618 listening session to see and hear from the general population  
3619 that were actually going to be very much impacted by this  
3620 Clean Power Plan, and they elected not to come to either--any  
3621 of our three states.

3622 Mr. {Latta.} So you put on an invitation and they just  
3623 did not come.

3624 Mr. {Butler.} Yes, sir.

3625 Mr. {Latta.} Thanks very much.

3626 My time has expired, and the chair will now recognize  
3627 Mr.--

3628 {Voice.} Mrs. Capps.

3629 Mr. {Latta.} --the gentlelady from California, Mrs.  
3630 Capps, for 5 minutes.

3631 Mrs. {Capps.} Thank you, Mr. Chairman, for holding this  
3632 hearing. And I want to thank all of our witnesses for your

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3633 testimony.

3634           It is so clear that the power sector is responsible for  
3635 a major portion of carbon dioxide emissions in the United  
3636 States, but it is also clear that these emissions are causing  
3637 our planet's climate change at an unprecedented rate. We  
3638 need to act today to curb these emissions and prepare for the  
3639 consequences that are forecast. Fortunately, and, Ms. Kelly  
3640 Speakes-Backman, you spoke to this, that the Regional  
3641 Greenhouse Gas Initiative, or RGGI, has really impressively  
3642 reduced emission rates, and has done so while also improving  
3643 the regional economy and fostering job creation. My  
3644 colleague from New Jersey asked you about that, and  
3645 unfortunately, apparently, his state of New Jersey has backed  
3646 away from it, but I hope that this momentum will build. I  
3647 think it is clearly possible to increase energy efficiency,  
3648 reduce emissions, and provide affordable energy for local  
3649 residents.

3650           So in addition to carbon emissions, the power sector  
3651 generates so many other harmful pollutants, including sulfur  
3652 dioxide, nitrous oxide and mercury, to name a few. In  
3653 addition to exacerbating the impacts of climate change, these

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3654 pollutants have direct impacts on human health, leading to  
3655 increased rates of respiratory problems, contributing to  
3656 heart attacks, strokes, and even premature death. This has  
3657 been documented, and is being documented. The benefits of  
3658 reducing carbon dioxide and these other pollutants under the  
3659 Clean Power Plan will likely have benefits that far outweigh  
3660 the cost of implementation, especially in the health sector.

3661         And I wanted to ask you how this is--how this  
3662 implementation of RGGI has affected the benefit of human  
3663 health in your area.

3664         Ms. {Speakes-Backman.} Thank you for the question. As  
3665 you know, we have--in Maryland especially, we are a little  
3666 bit downwind of some of the coal plants that are in the  
3667 Midwest, and they have directly affected the health and the  
3668 costs of that health to our citizens. And so as part of the  
3669 effort that our state has undergone to try to mitigate those  
3670 health issues, as well as to mitigate the reliability issues  
3671 that we have had from frequent storms, increasing frequency  
3672 and severity of storms, the ability--the costs that we have  
3673 had--our ratepayers have had to incur in order to build up  
3674 resilience against such storms, there are lot of costs aside

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3675 from the work that is going to be done under the Clean Power  
3676 Plan that need to be taken into account when you are doing a  
3677 full cost benefit scenario.

3678       Mrs. {Capps.} Yes. Thank you. Significant reductions  
3679 in sulfur dioxide and nitrous oxide and mercury has  
3680 benefitted over the long haul, but they are offset by  
3681 downwind and other aspects that tell us that we are not fully  
3682 where we want to be yet.

3683       Mr. Butler, I wanted to turn to you, if I could. In  
3684 August of last year, the waters off Lake Erie, off the coast  
3685 of Toledo, experienced a harmful algae bloom that impacted  
3686 drinking water for about 400,000 people. Am I correct?

3687       Mr. {Butler.} Yes, ma'am.

3688       Mrs. {Capps.} The science is increasingly clear that  
3689 harmful algal blooms will become more severe a frequent in  
3690 the future due to climate change. This means more human  
3691 health costs, more taxpayer dollars spent on clean-up, unless  
3692 we take action to reduce carbon emissions. In your  
3693 testimony, you focused exclusively on the financial costs of  
3694 implementing the Clean Power Plan, but, you know, in the  
3695 constraints of time perhaps you weren't able to reach any of

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3696 the benefits. Would you agree that human health benefits  
3697 such as fewer harmful algal blooms and cleaner air, should  
3698 all be considered in doing a full assessment of the Clean  
3699 Power Plan?

3700 Mr. {Butler.} Mr. Chairman--Mrs. Capps, I--if you have  
3701 an opportunity, in our extensive comments, we submitted U.S.  
3702 EPA, and then were brought into the record today--

3703 Mrs. {Capps.} Great.

3704 Mr. {Butler.} --you will see an extensive summarization  
3705 of our issues related to this issue about suggesting that  
3706 there will be significant human health improvements by  
3707 regulating carbon.

3708 Mrs. {Capps.} Um-hum.

3709 Mr. {Butler.} We do not believe that is the case, and  
3710 do not believe that the science proves it. Now, however, in  
3711 a lot of reductions that come along, we have improved our  
3712 sulfur dioxide and ozone emissions in Ohio and in our  
3713 downwind states. I mean we do not deny the fact that there  
3714 have been many, many, many improvements to public health, but  
3715 I think it is a--it is not appropriate to tie that back to  
3716 CO2 emissions--

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3717           Mrs. {Capps.} Perhaps that needs to be--

3718           Mr. {Butler.} --close to the Clean Power Plan.

3719           Mrs. {Capps.} Perhaps we need to do more studies along  
3720 that health. I--the EPA's proposal, I believe, the Clean  
3721 Power Plan, is an important step forward in combatting  
3722 climate change, will ultimately lower. How this is impacted,  
3723 as your colleague sitting next to you indicated, it takes  
3724 some time and I believe we should go further into studying  
3725 the effects of changes that are being made more thoroughly as  
3726 they relate to regional and other factors. And this is all  
3727 about the health of our constituents.

3728           And I know I am out of time, so I support this plan, and  
3729 I am going to yield back now.

3730           Mr. {Whitfield.} At this time, I recognize the  
3731 gentleman from Virginia, Mr. Griffith, for 5 minutes.

3732           Mr. {Griffith.} Thank you, Mr. Chairman.

3733           The gentlelady just referenced it in her comments about  
3734 her concerns about global warming and the health concerns,  
3735 and then she went on to say that maybe we need to take some  
3736 more time, we need more studies on the health. Mr. Butler,  
3737 it is my understanding that, in fact, the EPA has not done

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3738 any science on this particular regulation and how much it  
3739 would change climate change, but that using the normal EPA  
3740 modeling procedures, the American Coalition for Clean Coal  
3741 Electricity did run an analysis on how much the rule would  
3742 reduce climate change, and the American Coalition for Clean  
3743 Coal Electricity found that atmospheric CO2 concentrations  
3744 would only be reduced by less than 1 percent in 2050, the  
3745 increase in global average temperature would only be reduced  
3746 by 16/1000 of a degree Fahrenheit in 2050, sea-level rise  
3747 would only be reduced by .3mm or 1/100 of an inch. This is  
3748 the equivalent of a piece of paper, or a couple of pieces of  
3749 paper. And so taking that all into consideration--well,  
3750 first let me say, do you know of any other studies out there,  
3751 other than the one that I have referenced, that indicate  
3752 there is going to be some huge change to what sometimes is  
3753 referred to as global warming, but more commonly,  
3754 particularly in the east, is referred to as climate change,  
3755 since warming hasn't happened?

3756 Mr. {Butler.} Yeah, Mr. Griffith, I am unaware of any  
3757 additional studies. We did a very extensive search when we  
3758 did our comments on the Clean Power Plan, and the ones that

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3759 you referenced are many of the studies that we also took a  
3760 look at as part of our review of the Clean Power Plan.

3761 Mr. {Griffith.} Okay, but you don't have any direct  
3762 numbers from the EPA themselves?

3763 Mr. {Butler.} We do not.

3764 Mr. {Griffith.} And notwithstanding the fact that they  
3765 haven't taken the time, that Mrs. Capps referenced, maybe to  
3766 look at this matter and the health studies, et cetera, and  
3767 whether or not this would affect anything, this rule is  
3768 coming down your state's throat any day now, isn't it?

3769 Mr. {Butler.} Yes, sir, it is. We are very concerned  
3770 about the resources that it will take on this--on our state  
3771 levels to, you know, on the one had have these discussions  
3772 and perhaps even legal issues around the implementation, but  
3773 at the same time go down the path of having to commit our  
3774 state resources to develop an implantation plan that, at the  
3775 end of the day, one, may not be necessary, two, may--that may  
3776 change significantly from where we started.

3777 Mr. {Griffith.} Right. And so your folks are being  
3778 forced to go forward, even though there are all kinds of  
3779 legal implications going on. And as you could probably tell

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3780 from the previous panel and the debate there, I am very well  
3781 versed, and I believe the EPA does not have authority. We  
3782 will stay tuned to see what the courts say, but I don't think  
3783 you can change the law just because you find some reference  
3784 in the closet that says that maybe there was a different  
3785 interpretation, because if either side adheres to their  
3786 position, there is no bill. Senate said it receded.

3787 Without getting into all that legal argument, Secretary  
3788 van der Vaart, your state is going to have to comply even  
3789 though the legalities and the fight over the legalities may  
3790 continue, you have to go ahead and get a plan out there.  
3791 Isn't that true?

3792 Mr. {van der Vaart.} Well, that is right, and I think  
3793 that that is why I am here. There are a lot of things we can  
3794 say. I applaud Maryland and the rest for doing what they  
3795 want to do. North Carolina has made major reductions since  
3796 the 2005 date. America generally has dropped its carbon  
3797 dioxide emissions from 2010 to 2013 by 10 percent, and it was  
3798 all done without the benefit of a federal action. It was  
3799 done primarily by the revolution that is our natural gas  
3800 production here in North--in America.

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3801           But yes, the concern we have is developing legislation,  
3802   developing rules, our utility regulatory system has to be  
3803   altered--

3804           Mr. {Griffith.} And you will spend a lot of money going  
3805   down that path, and then the Supreme Court comes out a year  
3806   and a half, 2 years, 3 years from now and all of a sudden, it  
3807   all has to start over again.

3808           Chairman Graham, your power plants are facing that same  
3809   problem, but even if this thing goes forward, a number of  
3810   them are going to have to be shut down before their useful  
3811   life ends, isn't that correct?

3812           Mr. {Graham.} That is correct. We have--we are about  
3813   20 percent coal in Florida. Like I said, we switched to a  
3814   lot of natural gas early on, and they are talking about  
3815   closing down about 90 percent of our coal plants.

3816           Mr. {Griffith.} And so you are going to be hurting, and  
3817   also the--that means that you are going to have some stranded  
3818   costs, and that means the increased cost we pay--will go on  
3819   to your ratepayers, isn't that correct?

3820           Mr. {Graham.} It is almost like they paid for the plant  
3821   twice. They paid for the plant, and they have all this

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3822 useful life left, and then we have to shut it down.

3823           Mr. {Griffith.} And the beauty of natural gas in some  
3824 of the energy revolution is that we can attract jobs back to  
3825 the United States but we have to have affordable energy, and  
3826 this plan doesn't do much for the environment, and it damages  
3827 our ability and our reputation in the world to have  
3828 affordable energy. Isn't that true? I don't have time for  
3829 an answer, but I assume that it is with most of you. Ms.  
3830 Speakes-Backman, I agree you would disagree, but I recognize  
3831 that, and yield back.

3832           Mr. {Whitfield.} Gentleman's time has expired.

3833           At this time, recognize the gentleman from New York, Mr.  
3834 Tonko, for 5 minutes.

3835           Mr. {Tonko.} Thank you, Mr. Chair. And thank you to  
3836 our panelists for appearing before the subcommittee.

3837           The efforts--and, Commissioner Speakes-Backman, let me  
3838 address my comments first and foremost to you. Welcome, and  
3839 thank you for your service as chair of the RGGI Board of  
3840 Directors. As you have noted, New York is a member of RGGI.  
3841 In my last workstation before service here in the House, I  
3842 was president and CEO of NYSERDA, New York State Energy

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3843 Research and Development Authority, which got me a seat at  
3844 the RGGI table. And so I am very thankful for your  
3845 leadership and for carrying forth with the mission of that  
3846 plan.

3847 As a participant in RGGI, New York has been able to  
3848 accomplish a great deal. Greater energy efficiency, cleaner  
3849 air, expanded deployment of renewable energy technologies,  
3850 and these are just a few of the benefits, many that are  
3851 arising.

3852 EPA's proposal is just that at this stage; a proposal.  
3853 I support its goals. As a proposal, I am sure it will evolve  
3854 and change, perhaps, before the final rule is released.  
3855 There, however, seems to be a number of utilities and states  
3856 that are claiming the goals of the proposal cannot be  
3857 achieved without severe economic hardship, and sacrificing  
3858 our electric--our electricity reliability. You seem to take  
3859 a different view. Why are you convinced that these  
3860 predictions are wrong?

3861 Ms. {Speakes-Backman.} Well, thank you for your  
3862 participation in RGGI as a state, and thank you for the  
3863 question.

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3864           I do take a different position, and in fact, I take the  
3865 position that RGGI, coupled with our other state policies,  
3866 has helped us to improve reliability. So specific to the  
3867 reliability issue, which is very near and dear to my heart,  
3868 and it is actually part of my legal obligation as a  
3869 commissioner of the Maryland Public Service Commission, we  
3870 work within--we have implemented RGGI within the construct of  
3871 existing markets, and that includes the North American  
3872 Electric Reliability Corporation's oversight of bulk system  
3873 reliability. It includes FERC's retaining its authority over  
3874 the market's design. It includes also reliable dispatch of  
3875 least cost resources remaining with our grid operation  
3876 system. So this is not an upending of the systems. We have  
3877 been doing this for 8 years, and we have had fewer  
3878 reliability issues because we have been able to support  
3879 programs such as demand response and energy efficiency to  
3880 help reduce the load in specifically load pocket areas.

3881           Mr. {Tonko.} Thank you. And also there are those who  
3882 would argue that sound stewardship of our environment and  
3883 economic recovery, the growth of our economy, cannot go hand-  
3884 in-hand. Are there any steps that you can cite in terms of

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3885 perhaps job growth in the energy areas that have enabled us  
3886 to strengthen our economy and provide for cutting-edge new  
3887 opportunities with innovation as it relates to the energy  
3888 arena?

3889 Ms. {Speakes-Backman.} Yes, sir. I can speak  
3890 specifically to the state of Maryland with respect to jobs.  
3891 I would have to look up that number, but we have--I believe  
3892 it is in my written testimony, sir, but we have created jobs  
3893 and we have improved our economy, while we have reduced by 40  
3894 percent our carbon reduction--our carbon dioxide from power  
3895 plants. And I am sorry, I don't have that number at my  
3896 fingertips.

3897 Mr. {Tonko.} Well, I am certain that you also--other  
3898 participants at the RGGI table representing that array of  
3899 states, but I think it can be documented that we have grown a  
3900 new culture of job activity, all while strengthening the  
3901 environmental outcome, and--

3902 Ms. {Speakes-Backman.} Absolutely.

3903 Mr. {Tonko.} --the sense of environmental justice that  
3904 has been produced by RGGI accompanies that of social and  
3905 economic justice. So, you know, I think that there is this

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3906 whole silo effort to look at certain impacts, needs to be  
3907 looked at in a fuller array, a broad view that provides for a  
3908 strong context of a better future for all of the states  
3909 involved.

3910 Ms. {Speakes-Backman.} Absolutely, sir. I just  
3911 recalled the number. In the first 3 years of our program  
3912 alone of RGGI, we have created 16,000 job years in our  
3913 region.

3914 Mr. {Tonko.} Is--how many, sorry?

3915 Ms. {Speakes-Backman.} 16,000 job years in our region.  
3916 Based on the further reductions that we made through a  
3917 program review in 2014, an independent analysis by the  
3918 Analysis Group has shown that we will add another--yet  
3919 another 130,000 job years to the--our region.

3920 Mr. {Tonko.} Thank you very much.

3921 And with that, I see my time is up.

3922 Mr. {Whitfield.} Gentleman's time has expired.

3923 Mr. {Tonko.} I yield back.

3924 Mr. {Whitfield.} At this time, I recognize the  
3925 gentlelady from North Carolina, Mrs. Ellmers, for 5 minutes.

3926 Mrs. {Ellmers.} Thank you, Mr. Chairman. And thank you

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3927 to our panel, especially to you, Secretary van der Vaart, for  
3928 being here from North Carolina.

3929 As your--Secretary, as your position as secretary of DNR  
3930 North Carolina, and as an attorney, can you reflect a little  
3931 bit about the discussion that took place on panel 1 about the  
3932 ambiguities that exist between the rule--the 111 and the 112,  
3933 especially focusing in on--back to 1990 when it was first put  
3934 forward?

3935 Mr. {van der Vaart.} Yes, ma'am. Yes, ma'am. The--  
3936 that is a good point. The previous discussion, I would warn  
3937 you all, maybe appears to me, at least, setting up a straw  
3938 man, the question of whether the codified versus the statute  
3939 at large language actually controls. The fact of the matter  
3940 is, it doesn't matter. Even if you take the statute at  
3941 large, there is no ambiguity, and the reason is in 1990, the  
3942 Clean Air Act, under Section 112 was fundamentally changed  
3943 from a pollutant-based program to a source category-based  
3944 program. And, therefore, the language in the statute at  
3945 large is entirely consistent with what happened at that  
3946 point.

3947 Mrs. {Ellmers.} Um-hum.

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3948           Mr. {van der Vaart.} And I am afraid that the previous  
3949 discussion, for one reason or another, may have missed that.  
3950 And so it is very good that you keep that in mind. Thank  
3951 you.

3952           Mrs. {Ellmers.} And then getting back to some of the--  
3953 there again, the discussion that took place in the first  
3954 panel, you know, one of my questions is really about, you  
3955 know, implementation of this, and especially when it comes to  
3956 111, in the building block number 4, and there again,  
3957 Secretary, from your perspective, how can this possibly be  
3958 enforced, or can you foresee a way that North Carolina--or  
3959 that the EPA would actually be able to enforce this on North  
3960 Carolinians?

3961           Mr. {van der Vaart.} That is a very good question, and  
3962 we have thought very hard about it. Another misunderstanding  
3963 that many people have about the Clean Air Act is that somehow  
3964 108 and 110 are implemented similarly to 111. That is not  
3965 the case. When a state fails, for whatever reason, to submit  
3966 an approvable plan under 110, 108, to protect NAAQS, the  
3967 state itself is subject to sanctions including highway funds  
3968 removal. That is not the case in 111.

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3969           Mrs. {Ellmers.}   Um-hum.

3970           Mr. {van der Vaart.}   If we do not submit an approvable  
3971 plan, there is no downside for North Carolina as such as the  
3972 government, however, the Federal Government will then enforce  
3973 directly to the source. And so, Representative Ellmers, you  
3974 are giving me a specter of what happens to my grandma when  
3975 she--

3976           Mrs. {Ellmers.}   Um-hum.

3977           Mr. {van der Vaart.}   --doesn't screw in a CFL bulb in  
3978 her house. Is she going to be thrown in jail by the feds?  
3979 Am I going to be thrown in jail because I am somehow missing  
3980 my obligation, or is the utility executive somehow going to  
3981 get thrown in jail, when really maybe the EPA should be  
3982 thrown in jail. So--

3983           Mrs. {Ellmers.}   Well, there again, it is part of that  
3984 ongoing discussion of, you know, comparing apples to oranges  
3985 and, you know, kind of alternative universes when we are  
3986 talking about this issue.

3987           My final question for you, Secretary van der Vaart, is,  
3988 there again, looking towards our North Carolinians, is it  
3989 economically feasible and fiscally responsible for us to

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3990 foresee a future where we go from a cost-based energy

3991 dispatch model to a carbon dioxide-based dispatch model?

3992 Mr. {van der Vaart.} It is--we can put a man on the

3993 moon. We can certainly do this, but it will be at a cost,

3994 and the--unfortunately, the people who are going to bear that

3995 cost are the ones least able to afford it. It is going to be

3996 our lower and middleclass folks, it is going to mean the job

3997 losses for high-paying manufacturing jobs because electricity

3998 prices is fundamental to citing of new manufacturing. So

3999 yes, we can do it. Is it legal? Absolutely not. And, in

4000 fact, as you heard, it is already been going on in a more

4001 cost-effective manner by the states themselves.

4002 Mrs. {Ellmers.} Um-hum.

4003 Mr. {van der Vaart.} So what we have here is a Federal

4004 Government attempt to upend, as I said, the world's greatest

4005 electricity system through a little-known codicil in the

4006 Clean Air Act.

4007 Mrs. {Ellmers.} Thank you, sir.

4008 And I will just close out by saying that, you know,

4009 North Carolina has made such strides, and thank you, a lot of

4010 it is due to your leadership and, you know, moving forward on

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4011 clean energy. And I believe North Carolina, and so many  
4012 other states that have taken these steps already, need and  
4013 deserve that credit. So thank you all to the panel.

4014 And thank you, Mr. Chairman. I yield back the remainder  
4015 of my time.

4016 Mr. {Whitfield.} Lady yields back.

4017 At this time, recognize the gentleman from Ohio, Mr.  
4018 Johnson, for 5 minutes.

4019 Mr. {Johnson.} Thank you, Mr. Chairman. I appreciate  
4020 it. And, Director Butler, thank you for joining us today  
4021 from the great state of Ohio.

4022 Lot of concerns there about the things that we have  
4023 talked about this morning. Director Butler, it seems as if  
4024 the Administration is ignoring the lawsuit that many states,  
4025 including Ohio, are currently engaged in with the EPA, and  
4026 instead they are solely focused on the implementation of the  
4027 rule. Given all the legal issues surrounding EPA's 111(d)  
4028 proposal, would you support the EPA setting aside the  
4029 implementation planning until legal challenges are resolved?

4030 Mr. {Butler.} Mr. Johnson, thanks for that question. I  
4031 think, you know, Professor Tribe is far more eloquent than I

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4032 am on these issues in the previous panel, but I think to your  
4033 point, I think that is a--the exact request that we would  
4034 have and have made to U.S. EPA to have them consider. I look  
4035 at it from a state resource application. We will likely be,  
4036 if the Clean Power Plan evolves as a final plan, much like  
4037 the draft plan, and it still has what we believe are its  
4038 legal flaws, will be challenging that law with many other  
4039 states. That will not, unless things change, relieve us from  
4040 the obligation to be developing at the same time in a  
4041 parallel path, expending state resources to develop a plan of  
4042 implementation in a very tight time schedule that, as you  
4043 have heard, we don't think we can meet. Those are scarce  
4044 state resources, frankly, we cannot and should not have to  
4045 expend. So directly to your question, I would--have advised  
4046 and asked U.S. EPA, because there is no compelling deadline  
4047 relative to this issue about carbon, that we set this  
4048 implementation issue aside and have our requisite debate  
4049 about the legal issues, and then go from there.

4050 Mr. {Johnson.} Well, let us expound on that a little  
4051 bit. You know, states like Ohio, and others that we have  
4052 talked to here today, are implementing a number of new and

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4053 older EPA regulations ranging from the Mercury and Air Toxics  
4054 Rules, to particulate matter standards, to new ozone rules.  
4055 So can you expand a little bit, doesn't this put strain on  
4056 state resources, and what happens if, on top of all of this,  
4057 states also have to implement a final 111(d) rule that  
4058 eventually could get thrown out in court? And the reason I  
4059 say that is because we have seen that scenario before. The  
4060 brick industry invested hundreds of millions of dollars into  
4061 complying with a set of standards that the courts threw out,  
4062 and then they got virtually no credit by the EPA for all that  
4063 investment that they did, and the EPA certainly was not  
4064 standing there ready to give them their money back.

4065 Secretary van der Vaart, if they do get thrown in jail,  
4066 they had better not call me for bail money because I am not  
4067 going to be at the table.

4068 I--how do you feel about that, Mr. Butler?

4069 Mr. {Butler.} Yeah. Mr. Johnson, I--thanks for that  
4070 question. I think we have seen--we always are trying to  
4071 comply with our delegated programs and certainly our air  
4072 programs. We have made tremendous success in air quality in  
4073 Ohio. We have seen an unprecedented number of regulatory

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4074 requirements come down the road.

4075           So you mentioned the mercury rule. Not only does that,  
4076 you know, add to the time commitment and planning and  
4077 implementation for compliance, it is, frankly, having to shut  
4078 down 1/4 of our coal generation fleet in the state of Ohio.  
4079 So we are concerned about that. Today, ironically, as we sit  
4080 here is the same day that we are required to submit our  
4081 comments on the proposed new ozone standard, and we are just  
4082 on the cusp of, frankly, getting to the point of being  
4083 statewide full compliance of the 2000 ozone standard--2008  
4084 ozone standard. I would love to, frankly, declare victory on  
4085 that and say--but no, we are in a position now where we are  
4086 having to decide whether or not we need to drop that standard  
4087 further, and whether or not the science is supportive of  
4088 that. We are, in addition, in the midst of looking at both  
4089 the particulate matter and SO<sub>2</sub> rules, and whether or not,  
4090 frankly, we move down the path of having additional ozone  
4091 transport regulations. And the list goes on.

4092           So that puts an incredible strain on us as state  
4093 regulators and implementers, and is, frankly, just an  
4094 additional cost that we are requiring to our legislature to

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4095 pass on to customers.

4096 Mr. {Johnson.} Well, thank you.

4097 Mr.--Secretary van der Vaart, do you have a comment on  
4098 that as well?

4099 Mr. {van der Vaart.} Well, I would just like to  
4100 emphasize again, America is moving toward cleaner energy. It  
4101 is moving that direction because of the free market and our  
4102 revolution in natural gas exploration and production. We are  
4103 all states doing what we think is right in cleaning up the  
4104 environment, and I think it is not a time to rush to judgment  
4105 when we have such a flawed proposal.

4106 Mr. {Johnson.} Thank you very much.

4107 Mr. Chairman, I yield back.

4108 Mr. {Whitfield.} The gentleman's time has expired.

4109 And I want to thank all four of you for joining us today  
4110 to discuss this significant issue.

4111 I would like to also include the following documents in  
4112 the record. Comments submitted to EPA on the proposed 111(d)  
4113 rule by the Florida Public Service Commission, and the  
4114 Florida Office of Public Counsel.

4115 [The information follows:]

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4116 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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4117           Mr. {Whitfield.} And we will keep the record open for  
4118 10 days. I was going to come down and say hello to each one  
4119 of you personally, but we have a vote on the floor and it is  
4120 almost 15 minutes gone now, so I am going to rush out, but we  
4121 look forward to working with you. Thank you very much.

4122           And that adjourns today's hearing.

4123           [Whereupon, at 1:39 p.m., the Subcommittee was  
4124 adjourned.]