EPA'S PROPOSED 111(d) RULE FOR EXISTING POWER PLANTS: LEGAL AND COST ISSUES
TUESDAY, MARCH 17, 2015
House of Representatives,
Subcommittee on Energy and Power
Committee on Energy and Commerce
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield [Chairman of the Subcommittee] presiding.
Members present: Representatives Whitfield, Olson, Barton, Shimkus, Pitts, Latta, Harper, McKinley, Pompeo, Kinzinger, Griffith, Johnson, Long, Ellmers, Flores, Mullin,
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Upton (ex officio), McNerney, Tonko, Engel, Green, Capps, Castor, Sarbanes, Yarmuth, Loebsack, and Pallone (ex officio).

Staff present: Nick Abraham, Legislative Clerk; Charlotte Baker, Deputy Communications Director; Leighton Brown, Press Assistance; Allison Busbee, Policy Coordinator, Energy and Power; Patrick Currier, Counsel, Energy and Power; Tom Hassenboehler, Chief Counsel, Energy and Power; Mary Neumayr, Senior Energy Counsel; Chris Sarley, Policy Coordinator, Environment and Economy; Peter Spencer, Professional Staff Member, Oversight; Jean Woodrow, Director, Information Technology; Christine Brennan, Democratic Press Secretary; Jeff Carroll, Democratic Staff Director; Michael Goo, Democratic Senior Counsel, Energy and Environment; Caitlin Haberman, Democratic Professional Staff Member; Ashley Jones, Democratic Director, Outreach and Member Services; Rick Kessler, Democratic Senior Advisor and Staff Director, Energy and Environment; and John Marshall, Democratic Policy Coordinator.
Mr. {Whitfield.} I would like to call our hearing to order this morning, and today's title is EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues. And we have two panels of witnesses this morning, and I want to thank those of you on the first panel. I will be introducing each one of you before you give your opening statement, and you will be given 5 minutes at that time, but before we are able to listen to your marvelous opening statements, you have to listen to our opening statements, which sometimes is not quite as exciting, people.

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

As I said, this morning our subcommittee will hold its first hearing this year on the EPA's proposed Clean Power Plan. We will examine specifically the circuitous and tortured rationale, in my opinion, of EPA that Section 111(d) of the Clean Air Act grants them the authority to regulate CO2 emissions from electric generating units that are already regulated under Section 112. We are also going to look closely at the impact on states and consumers.
It appears that EPA is--excuse me just 1 minute. Given
the stringency of this EPA proposed rule regarding CO2
emissions that exist in coal plants, states are going to be
forced to adopt state implementation plans within 1 year.
And this regulation is so onerous for coal generation that,
according to EPA's own projections, the amount of coal for
electric generation in America would be--would decline by 40
percent from the 2009 levels. The well-respected economic
consulting firm, MERA, concluded that the proposal is the
most expensive environmental regulation ever imposed on the
electric power sector, costing between $41 to $73 billion per
year, with 14 states facing peak year electricity price
increases that are likely to exceed 20 percent. Regional
grid reliability coordinators have begun warning that the
rule will cost portions of the grid to suffer cascading
outages and voltage collapse.

The North American Electricity Reliability Corporation
recently produced an initial analysis that questions the
validity of the basic assumptions underlying the rule, and
raised a multiple--a multitude of concerns as to how the rule
will affect the grid. This proposed rule has been described
as a power grab, extreme, radical, unprecedented, and a violation of existing law. I agree with those characterizations. Even EPA has acknowledged that a literal application of Section 111(d) would likely preclude its proposal because the electric generating units are already regulated under Section 112. This proposed regulation would create turmoil in the generation, transmission and distribution of electricity. It is being proposed because the President was unable to convince Congress to adopt a cap and trade legislation, and he has made international commitments without input or advice and consent from Congress, and in his Georgetown speech, he committed the U.S. to an extreme policy. It appears that EPA is trying to find a way to implement the President's plan pursuant to his international commitments, even though EPA has readily acknowledged that this proposal would not make a measurable difference in addressing climate change.

So this is a significant issue that is going to have a dramatic impact on everything relating to electricity generation in America, and it is our responsibility to make all of this transparent to give the American people the
opportunity to be aware of how extreme this is, and what a fundamental change it would make, and to address the question is it really legal. And that is what we intend to do today. That is why we are thrilled with the panel of witnesses that we have.

[The prepared statement of Mr. Whitfield follows:]

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

Mr. {McNerney.} Thank you, Mr. Chairman. You mentioned this is the first hearing on this issue this year, but it is our fourth hearing on this issue in the last few years. So climate change is here. I mean it is happening. It is not a matter of speculation. We need to take action; we need to take it now. The longer we wait to take action on climate change, the more expensive it is going to be, the more damaging the effects of climate change are going to be, so it is incumbent upon us to do something about it. But the good news is that if the United States takes the lead, then we are going to be able to develop the technology, we are going to be able to export jobs, I mean we are going to be able to export materials, it is going to be a win for the United States, so we might as well embrace this now. Taking steps to curb carbon emission will have beneficial impacts such as repairing and replacing aging infrastructure with very high efficiency infrastructure.
Now, I know that the coal producers are worried about this, but my advice to them is embrace carbon sequestration. Embrace it, because coal is going to be reduced whether we like it or not, but if we embrace carbon sequestration, then we will be able to continue to use coal and keep those important American jobs. So that is my advice to the coal producers. But we are going to be able to increase our clean energy sources, renewable energy, energy efficiency and so on. So I think this is an opportunity for us.

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

Now, the administration's--the EPA's proposal, in my opinion, is reasonable. It includes energy efficiency, it includes looking for new, more efficient sources of energy, and using demand issues to help us reduce our carbon emissions. Now, the administration does have the responsibility to take action to protect us from the effects
of climate change, so that is exactly what the Clean Power Plan does. Fourteen states in the United States, including my home state of California, have embraced this proposal. In a letter to the EPA, they wrote that even greater levels of cost-effective carbon pollution reductions from the power sector are achievable in this time frame, using the system described by the EPA. The EPA found that the power sector could reduce its emissions by 26 percent below the 2005 levels under this initiative. That is a lot. Twenty-six percent reduction of the 2005 levels. That is significant, and that has put us in a leadership position. It has given other state--other countries like China a motive to start reducing their carbon emissions, which is absolutely critical if we want to reduce carbon emissions in time to prevent the worst impacts of climate change. So this is really a win-win. But another thing that is really important is that the level of the amount of outreach that was done with this proposal was really unprecedented. The rule that we have in front of us is not final, so it is important for us to continue examining this issue, and to hear from all the stakeholders, and work together to find something that is
going to benefit our Nation, put is in a leadership position, increase the economy, economic growth, and help stop climate change before the worst impacts are felt throughout the United States and throughout the world.

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

[The prepared statement of Mr. McNerney follows:]

*************** COMMITTEE INSERT ***************
Mr. {Whitfield.} Thank you, Mr. McNerney.

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

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

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

The Clean Air Act has been around since 1970, and we know from experience that it works best when implemented in the spirit of cooperative federalism. We have proven that we can accomplish a great deal to improve air quality when federal and state governments work together as partners.

However, this proposed rule yanks the rug out from underneath the states with EPA dictating to the states, and effectively micromanaging intrastate electricity policy decisions to a degree even the agency admits is unprecedented. This raises
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a broad array of legal issues, not to mention that it is bad policy.

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

Today, we are going to hear several perspectives from both legal experts and state environmental and energy regulators. I am particularly concerned about the impacts on states, such as Michigan, which have a significant
manufacturing sector. American manufacturers have shown that they can compete with anyone in the world, unless they face an uneven playing field caused by unilateral regulations like the EPA's proposed plan.

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

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

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

[The prepared statement of Mr. Upton follows:]
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Mr. {Pallone.} Thank you, Chairman Whitfield.

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

To that end, EPA has proposed a workable plan to reduce emissions of carbon pollution from power plants, which are the largest uncontrolled source of manmade greenhouse gases
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in the U.S. Today, we will hear more about the Clean Power Plan, but there are few features that merit emphasizing in advance. First, the Clean Power Plan is not a one-size-fits-all proposal for reducing emissions. It uses a flexible state-based approach that takes account of each individual state's unique capacity to reduce emissions from its electricity sector. Second, EPA is not proposing that states act overnight. States have until 2030 to meet their final goals, and the plan's interim goals don't begin until 2020. Third, the Clean Power Plan falls well within the legal authority and responsibility of EPA to address carbon pollution from power plants. This system-wide approach is based on the plain language of the Clean Air Act. And finally, and perhaps most importantly, the Clean Power Plan is just a proposal and is not yet finalized. EPA received over 3-1/2 million public comments on the Clean Power Plan, and is reviewing these comments as we speak. EPA can and will make adjustments to its proposal. EPA is looking hard at a range of issues relating to timing, reliability, technical and legal issues, and EPA is working in close coordination with states, utilities, grid operators,
and other federal agencies like DOE and FERC to make sure the plan is done right.

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

So those who have concerns with EPA's plan have a responsibility, in my opinion, to not just criticize it, but also to propose alternative ways to achieve the same goal. There are always those who are willing to make absurd arguments on behalf of companies that profit from the status quo, and we will hear today from some of that--some of these that EPA's plan is not legal, that it is unworkable, that some states may refuse to participate, but I think that those
making those arguments aren't really interested in finding solutions to our carbon pollution problem. They are not interested in developing a plan to help us reduce emissions, while still maintaining a safe, reasonably-priced electricity system. To quote the words of EPA Administrator McCarthy, they are just trying to put their heads in the sand. They are more than welcome to do that but history will not treat them kindly. Keep this in mind as we listen today and during future hearings and debates on the Clean Power Plan. I think you will be able to recognize those who are simply arguing for inaction on behalf of entrenched fossil fuel interests, and compare them to those who want to act on climate change, and also want the development of our path forward to be thoughtful, sensible, and effective.

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

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

[The prepared statement of Mr. Pallone follows:]
Mr. {Whitfield.} Gentleman yields back. Thank you very much.

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

So our first opening statement will be given by Mr. Laurence Tribe, who is the Carl M. Loeb University Professor and Professor of Constitutional Law Harvard. Professor Tribe, welcome, and we look forward to your testimony. You are recognized for 5 minutes, and be sure to turn the microphone on because it is not on automatically. So thank you.
Mr. {Tribe.}  Mr. Chairman, members of the committee, I am honored to testify about EPA's proposed CO2 power plant regulations. I have submitted my full written statement for the record.

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

First, the plan conflicts with settled principles of federalism and Supreme Court precedent because it would commandeer state governments, treating them more like marionettes, dancing to the tune of a federal puppeteer, than
like laboratories of democracy. It would dictate the CO2 emissions target that each state must adopt within a year, commanding every state to enact an EPA-approved package of laws meeting that target by requiring power plants to shut down or reduce operations, consumers and businesses to use less electricity and pay more for it, and utilities to shift from coal to natural gas and other energy sources; a total overhaul of the states' way of life.

Now, reducing states to this submissive role would confound the political accountability that the Tenth Amendment guarantees. EPA's plan would increase energy costs over local opposition, while cloaking that increase in the Emperor's garb of state choice, with state governments taking the blame for policies actually dictated and necessitated by EPA. A state that submits no plan meeting EPA's approval by 2016 confronts a centrally-planned and administered federal scheme of uncertain scope, burdening the state of its citizens backed by draconian sanctions like the loss of federal funds under preexisting antipollution programs. Prominent defenders of the EPA's proposal necessarily concede that noncomplying states gambling on whatever unpredictable
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backup plan EPA might impose would be at a huge disadvantage. EPA's proposal also presents serious Fifth Amendment problems. We are all CO2 emitters, and atmospheric CO2 is the intermingled result of all human activity, but EPA would impose costs, that ought to be borne equitably by everyone, on a small group of power plants and companies after requiring those same companies to invest billions of dollars to reduce their non-CO2 pollutants over the past 25 years. The Constitution demands just compensation to rectify that bait and switch.

Now, courts would never assume a congressional design to confer such revolutionary and constitutionally dubious power on EPA unless Congress clearly said so. But far from it, under the very Clean Air Act provision that EPA invokes, Section 111(d), Congress expressly prohibited EPA from doing exactly what it proposes to do here: regulate emissions from coal-fired power plants under Section 111(d), when those same power plants are already being regulated in costly ways under Section 112. In 1995, EPA itself read the Clean Air Act to prohibit such duplication, as did the D.C. Circuit Court of Common Pleas Appeals in 2008, and the U.S. Supreme Court in
If the Clean Air Act's meaning were ambiguous, and it isn't, settled principles of statutory interpretation would mean that EPA and any reviewing court would have to interpret the Act to avoid the constitutional difficulties that EPA's interpretation raises under the Fifth and Tenth Amendments. Now, to circumvent that avoidance, principle EPA resorts to sheer fantasy. It claims that Congress enacted a law in 1990 that never made it into the U.S. Code, and that everybody has been using the wrong version of the statute for the past quarter century. Really? Crediting that story would call into question dozens of similar statutory provisions throughout the U.S. Code. The tale is pure fiction. There is no mistake in the U.S. Code, but even if Congress had truly tossed two different bills in the air and told EPA to decide which one to catch and run with, that would be a power Congress could not give away, and EPA could not recognize and exercise. It is a law-making power that belongs only to you, backed by a judicial power that belongs only to the courts. EPA is attempting an unconstitutional trifecta; usurping the prerogatives of the states, Congress and the federal
courts all at once. Much is up for grabs in this complex area, but burning the Constitution of the United States, about which I care deeply, cannot be part of our national energy policy to deal with the problems of climate change.

Thank you very much.

[The prepared statement of Mr. Tribe follows:]

*************** INSERT 1 ***************
Mr. {Whitfield.} Thank you, Professor Tribe.

At this time, our next witness is Allison Wood, who is a partner at Hunton and Williams. And welcome. We appreciate you being here, and you are recognized for 5 minutes.
Ms. Wood. Good morning. It is an honor to appear before this subcommittee to offer testimony on EPA’s proposed Section 111(d) rule.

I have practiced--

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

Ms. Wood. Absolutely.

Mr. Whitfield. Thank you.

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

EPA’s proposed rule suffers from a great many legal infirmities, and I will focus on two of those today. The first defect is that EPA is prohibited from regulating electric generating units under Section 111(d) because those units are already subject to regulation under a different provision of the Clean Air Act, Section 112, which regulates sources of hazardous air pollutants.
Section 111(d) has always been a little-used provision of the Clean Air Act that was designed to catch the handful of sources that were not regulated under the Act's other major provisions. Indeed, this provision has been used to regulate sources only five times since 1970. The confusion over this point comes from two amendments that were made to Section 111(d) during the 1990 amendments to the Clean Air Act, both of which appear in the statutes at large. EPA claims this leads to ambiguity, but in fact, the codifiers properly included in the United States Code only the House amendment; the amendment that clearly precludes regulation under Section 111(d) of source categories that are regulated under Section 112. This was appropriate, given that the managers of the Senate bill had expressly receded to the House amendment.

The second legal defect involves EPA's overbroad interpretation of the term system of emission reduction in Section 111. In every other rulemaking under Section 111(d), EPA looked at existing sources to see what technology and processes were in place to limit pollution. EPA then based its determination of the best system of emission reduction
for those types of existing sources on the known and
demonstrated technologies and processes that were in use.
States then applied the system of emission reduction to
existing sources within their borders that did not yet have
these pollution controls, while taking into account several
factors including the source's remaining useful life.

In this rulemaking, EPA turns this established procedure
on its head and proposes for the first time a standard of
performance that is based on not operating the source. EPA
claims for the first time, based on the dictionary definition
of the word system, that it can regulate any set of things
that leads to reduced emissions from the source category
overall, even if those things go beyond the fence line of the
plan. EPA's new interpretation is fundamentally flawed. A
system of emission reduction must begin and end at the source
itself. EPA's interpretation would allow the agency endless
regulation over all manner of things that are completely
outside its purview. To use an illustration that may help
people better understand what EPA is proposing to do here, it
is as if EPA were requiring car owners not only to have
catalytic converters on their cars, but also to travel a
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certain amount of days per week by bus, purchase a certain number of electric vehicles, and work from home one day a week. All of these things would reduce overall car emissions, but they do nothing to reduce the rate at which those cars emit pollutants per mile, and most people would surely agree that the Clean Air Act would not allow EPA to require these types of things from car owners, yet, this type of regulation is exactly what EPA is trying to do to power plants in the Section 111(d) rule.

Finally, it should be noted that litigation over this rule will absolutely occur when it is finalized. Unfortunately, litigation takes time, and states are going to be forced to act before courts determine whether the Section 111(d) rule is lawful. State plans must be submitted within 1 year after the rule is finalized, unless a partial plan is submitted and EPA grants an extension. These plans will be very complex, and states have never before had to submit a plan under Section 111(d) of this magnitude. Many states will need to pass legislation as part of their plan preparation. Regulations will need to be promulgated. Litigation will not be resolved before these things happen.
Under this timing, any victory the states achieve will end up being hollow. A victory will not be able to give the states back the resources that were expended in plan development, nor will it solve the issue of states having to go through the time-consuming and uncertain process of unwinding legislation and regulations that were passed to put the plan in place.

Thank you again for the opportunity to testify today.

[The prepared statement of Ms. Wood follows:]
Mr. {Whitfield.} Thank you, Ms. Wood.

At this time, our third witness is Professor Richard Revesz, who is the Lawrence King Professor of Law, Dean Emeritus, Director of Institute for Policy Integrity at the New York University School of Law. And thank you very much for being with us today, Professor, and you are recognized for 5 minutes.
Mr. Revesz. Mr. Chairman, and thank you for inviting me to testify before the committee.

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

On the first point, for the past quarter of a century, each President has taken measures to regulate the emissions of existing power plants because they are the Nation's
largest sources of many harmful air pollutants, including mercury, sulfur dioxide, and carbon dioxide. Under the Administration of President George H. W. Bush, Congress enacted a 1990 amendment which capped sulfur dioxide emissions from existing power plants, and established an innovative trade mechanism to achieve reductions as cheaply as possible. Later, the Administrations of President Bill Clinton, George W. Bush, and Barack Obama each promulgated important regulations requiring existing power plants to reduce emissions of smog and particulate precursors that negative affect the air quality in downwind states, again using cost-effective flexible trading mechanisms. And finally, the Administrations of both President George W. Bush and Barack Obama issued rules limiting emissions of mercury from existing plants.

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

My second point on the constitutional issues. The first
claim made by opponents is there is a problem with the way Congress delegated regulatory power to EPA under Section 111(d) because the House and Senate passed arguably inconsistent amendments to the provision in 1990. Both the House and Senate versions were then included in a conference bill that was passed by each chamber and signed by President George H. W. Bush. In all of our history, the Supreme Court has struck down only two statutory provisions as constitutionally impermissible delegations to an administrative agency, both in the mid-1930's, during its skirmishes with President Franklin Roosevelt over the New Deal. Supreme Court has never invalidated a federal statute on non-delegation grounds on the basis of the argument that opponents of the Clean Power Plan now advance: that a statute has arguably inconsistent provisions. Instead, the courts have consistently dealt with this problem by finding ways to develop a workable interpretation of the statute. Opponents of the Clean Power Plan make a similarly farfetched argument the plan violates the Takings Clause of the Fifth Amendment, which protects private property rights. A regulation leads to a Takings violation only if it deprives
an owner of essentially all of the value of his or her property, which is not the case here. And even if it were, the appropriate remedy is a subsequent suit for compensation, not the invalidation of a nationwide rule.

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

The third point, the statutory point. Congress passed 2
amendments, the House Amendment and the Senate Amendment. The opponents of the Clean Power Plan would like us to ignore the Senate Amendment because it was not included in the U.S. Code by the Office of Law Revision Counsel, but everyone knows that a mere functionary cannot supplant the will of Congress. To do so would violate the principles of bicameralism and presentment. And in any event, even the House Amendment, which the opponents of the Clean Power Plan would like to credit, is not subject to a single interpretation; it is subject to multiple interpretations, and under traditional principles of statutory construction, the interpretation by the agency, by EPA, is entitled to deference in the courts.

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

Thank you very much, and I would be delighted to answer questions.
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627 [The prepared statement of Mr. Revesz follows:]

628 *************** INSERT 3 ***************
Mr. {Whitfield.} Thank you, Professor Revesz. And thank all of you for your statements.

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

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

Ms. {Wood.} Outside the--

Mr. {Whitfield.} Turn your microphone on.

Ms. {Wood.} Yes, thank you. The outside-the-fence line nomenclature has been--is being used a lot. Indeed, you can't even go beyond the source itself. So here we are talking about the actual electric generating unit. And the reason why people talk a lot about going beyond the fence line with this rule is that, of the four building blocks that are set forth in the rule, only one of them actually gets any
kind of emission reduction at the source itself, and that is building block one that has to do with energy efficiency improvements that can be made.

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

Mr. {Whitfield.} Never been the case before?
Ms. {Wood.} No.
Mr. {Whitfield.} I take it that a state would even be able to mandate the type of material used in a building under this regulation if it is adopted. Would that be correct?
Ms. {Wood.} It--I--
Mr. {Whitfield.} In order to meet the overall emission cap.
Ms. {Wood.} Right. I--exactly. You could, you know, add building block five that would say you have to have Energy Star buildings to try to reduce--
Mr. {Whitfield.} Right.
Ms. {Wood.} --energy consumption. I mean that could also arguably fall within the building block four, which is
designed to have consumers use less electricity.

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

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

Mr. {Whitfield.} Yeah.

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

Mr. {Whitfield.} Yeah.

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

Mr. {Whitfield.} Yeah.

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

Mr. {Whitfield.} Yeah.

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

Mr. {Whitfield.} Yeah.

Ms. {Wood.} --it has to do with the car not running.
Mr. {Whitfield.} And so, Professor Tribe, do you agree that this inside the fence, outside the fence is a radical change for EPA?

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

Mr. {Whitfield.} Right.

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

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

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

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

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

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

Mr. {Whitfield.} Right.

Mr. {Tribe.} I would hate to live in an unclassifiable
area. But the point is that CO2 comingles with everything uniformly throughout the global atmosphere--

Mr. {Whitfield.} Right.

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

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

Mr. {Tribe.} Right, under 112, there are 188 hazardous air pollutants listed by Congress. Nobody claims that CO2, which is essential for life, is hazardous in that sense.

They try to--

Mr. {Whitfield.} Yeah.

Mr. {Tribe.} --split hairs by saying, well, it may not be hazardous but it is dangerous. But we are not writing a novel here, but we are talking about a law passed by this body, and I am concerned that the--you know, I have cared about the environment ever since, you know, I was a kid, and I taught the first environmental law course in this country,
and I have won major victories for environmental causes, but I am committed to doing it within the law. And there is a legal way to address these problems. They tried to get cap and trade with this Administration, didn't work. And I guess the EPA is now following a kind of marching order saying, well, if you can't do it through the lawful way, just take an agency and tell it to bend and twist and tear and rip the law.

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

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

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

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

Mr. Revesz or Professor, would you describe what the Supreme Court actions have been thus far with regard to the
EPA that is applicable to this— to the Clean Air Plan?

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

Mr. {McNerney.} Your speaker.

Mr. {Revesz.} Sorry. The Supreme Court has never said anything that raises any questions about the legality of the Clean Power Plan. In fact, the case that Professor Tribe mentioned from 2011, the American Electric Power case, actually stands for exactly the opposite proposition. I mean the Supreme Court decided to preempt federal common-law claims because it said that EPA had the authority to regulate the emissions of—the carbon dioxide emissions of plants under Section 111(d). And so the Supreme Court has not stood in the way of this kind of regulation. There isn't a single Supreme Court case that raises any constitutional question.

As I indicated, non-delegation claim is not a serious one. The Supreme Court has never struck any federal statute down on these grounds since the mid-1930's, and here all we have are 2 different conflicting approaches to a provision, and that is exactly where the agency gets the first crack at interpreting, and then the courts review the agency's
interpretation. And that is actually already going on.
There has been a challenge to the proposed rule that is now pending in the D.C. Circuit, it is going be argued on April 16, and then the standard way that these things are going to happen, the D.C. Circuit will decide whether the agency's interpretation is right or is wrong, but there is no real constitutional issue there.

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

And on the Tenth Amendment point, and I wanted to stress something that was very important, the cooperative federalism model that is the core of the Clean Air Act provides for federal standards, gives the states an opportunity to come up with state implementation plans, and if they don't, the Federal Government can act and impose a federal
implementation plan. This is the scheme under Section 108 through 110 that the chairman mentioned. It is the way National Ambient Air Quality Standards are done in this country. These are the standards that have saved hundreds of thousands of lives. They are the most successful federal environmental program ever. And if Section 111(d) has the Tenth Amendment problem, as Professor Tribe ascribes to it, Section 109 would have exactly the same problem because it is exactly the same cooperative federalism model. And, in fact, it—Section 111(d) uses pretty much the same language as Section 109.

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

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

So with that, I will yield back the—

Mr. {Revesz.} Could—if I could say something about the unprecedented nature of this regulation that Professor Tribe
and Ms. Wood alluded to. There is nothing of that sort. I mean just last term, the Supreme Court upheld an important EPA rule that regulates the interstate emissions where the statute says that it prohibits any source from emitting any air pollutant that will significantly contribute to environmental problems in downwind states. And EPA authorized states to adopt trading mechanism that go beyond imposing controls on particular sources. This issue was litigated before the Supreme Court. Its opponents argued EPA didn't have the authority to do that because the statute said refer to any source, and in the end, the Supreme Court upheld that regulation on a 6-2 vote with Justices Scalia and Thomas dissenting.

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

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

Mr. {Whitfield.} Gentleman yields back.

At this time, recognize the gentleman from Texas, Mr. Barton, for 5 minutes.
Mr. {Barton.} Thank you, Mr. Chairman.

I don't normally reread parts of testimony, but I am going to in this case read the first--second--some of the paragraphs of Professor Tribe because I think he lays out pretty explicitly and clearly what this is all about. This is at least his executive summary of his testimony today, and I quote, "EPA lacks the statutory and constitutional authority to adopt its plan. The obscure section of the Clean Air Act that EPA invokes to support its breathtaking exercise of power in fact authorizes only regulating individual plants and, far from giving EPA the green light it claims, actually forbids what it seeks to do. Even if the Act could be stretched to usurp state sovereignty and confiscate business investments the EPA had previously encouraged and in some cases mandated, as this plan does, the duty to avoid clashing with the Tenth and Fifth Amendments would prohibit such stretching. EPA possesses only the authority granted to it by the Congress. It lacks implied or inherent powers. Its gambit here raises serious questions under the separation of powers Article I and Article III because EPA is attempting to exercise lawmaking power that
belongs to Congress, and judicial power that belongs to the federal courts. The absence of EPA legal authority in this case makes the Clean Power Plan quite literally a power grab. EPA is attempting an unconstitutional trifecta: usurping the prerogatives of the states, Congress and the federal courts all at once. Burning the Constitution should not become part of our national energy policy.''

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

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

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

Mr. {Tribe.} Again--

Mr. {Barton.} Some people say that?

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

Mr. {Barton.} Some people say that.

Mr. {Tribe.} Um-hum.

Mr. {Barton.} Well, would you say, and again I want to
quote from another Supreme Court case, this is in the Supreme Court case back in 2001, Whitman v. the American Trucking Association, that Congress does not alter the fundamental details of a regulatory scheme in vague terms. It does not, one might say, hide elephants in a mouse hole. Would you say this is an attempt to hide an elephant in a mouse hole?

Mr. {Tribe.} I would say, Mr. Chairman, that it is an attempt to hide a very large constitutionally-troubled elephant in a very tiny mouse hole, and not a mouse hole that was accurately described, I might add, by Professor Revesz.

I mean let me give you, if I might, just one example. He--

Mr. {Barton.} Be quick because--

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

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

Mr. {Tribe.} Well, he just misdescribed the cases. The case of AEP v. Connecticut, he said Congress--the Supreme Court said that the EPA has this power, except the majority opinion in footnote 7 said there is an exception under 111(d), you can't use this power to regulate a source that is already being regulated under 112. Professor Revesz conveniently left out the only part of this case that is
He also says that—well, I shouldn't take your time.

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

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

And, Mr. Chairman, I hope after the conclusion of these hearings, that we move legislation on a bipartisan basis that explicitly clarifies this point. The EPA has a right to set
a national standard in interstate commerce to protect public health. It does not have the right to go in and micromanage how a state complies with a national standard which, as I understand it, is exactly what this Clean Air--Clean Power Plan does.

And with that, I yield back.

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

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

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

I am a little surprised by some of the legal arguments we are hearing against the Clean Power Plan, but I guess I have been around long enough to know that you can get constitutional lawyers and professors to say anything on both sides, just like you can get lawyers, you know, at home to say anything on both sides. So I just wanted to give Professor Revesz some time to comment on some of the comments that have been made by Professor Tribe. For instance, we are hearing that the Clean Air Act actually prohibits EPA from issuing the Clean Power Plan, however, the Supreme Court disagrees, citing American Electric Power v. the Connecticut
case, if need be. An argument is also being made that since EPA acted to regulate mercury pollution from power plants, EPA does not have the authority to issue the Clean Power Plan. So, Professor Revesz, is this argument a reasonable interpretation of the law?

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

Now, Professor Tribe may, in fact, be ultimately right. That is for a court to decide. I believe that he is wrong.
EPA believes that he is wrong. And we will find out, this issue will be argued extensively on April 16 before the D.C. Circuit.

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

The opponents would like us to ignore the Senate Amendment entirely, and they would like to give the House Amendment a particular gloss, and it is a gloss that involves rewriting the statute. The statute uses two—twice the word or, and they would like us to instead supplant the word and. The word and would be more convenient for them, but actually,
the statute has the word or. So not only would we have to ignore the Senate Amendment, which there is no basis for doing, but we also would have to rewrite the House Amendment, and we would have to go through an additional hurdle which is not giving EPA the deference that it is due under traditional principles of statute interpretation as embodied in the Chevron case.

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

Let me give you an example. When I was growing up in Argentina, where I was born, when I had a fever my mother
would give me a mercury thermometer. These things aren't sold in this country because they are dangerous, and instead, we use digital thermometers. If using the logic of the opponents of the Clean Power Plan, the product would be a mercury thermometer as opposed to a thermometer and, therefore, a regulation that might actually bring mercury thermometers out of business might be considered suspect, but we have never used a principle like this for regulation in this country, for good reason, because doing so entrenches bad technologies and stands in the way of innovation. The product here is not electricity produced by coal-fired power plants, it is usable electricity delivered to the consumers' home.

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

Mr. {Whitfield.} Thank you.

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

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

This hearing is about one document; this Constitution. I have had this in my pocket for over 2 decades now. It is
kind of worn, comes out by pages, but it is still is very
much alive.
And my first question is to you, Ms. Wood. Under EPA's
proposed Clean Power Plan, states would have only 13 months
to develop their state plans. Is that 13 months by statute?
If not, where does that mandate come from?
Ms. {Wood.} No, the 13 months is not from statute. The
13 months is just a deadline that EPA has come up with in
this proposed rule. Under the applicable regulations, the
deadline is actually 9 months for a state to submit its plan,
but the regulations are very clear that EPA can extend that
deadline as it sees fit, so it has wide discretion there. So
it has actually extended it from 9 months to 13.
Mr. {Olson.} Wow, 4 more months. Now correct me if I
am wrong, but under less complex programs don't they allow
usually 3 years to determine these standards, 3 years as
opposed to 9 months or 13 months, is that true?
Ms. {Wood.} Typically, for state implementation plans,
which are often called SIPs under the Section 110, the NAAQS
Program, states do get 3 years.
Mr. {Olson.} And this is for you, Mr. Tribe, as well as
Ms. Wood. In light of the typical period for developing state implementation plans under the NAAQS Programs, does EPA's accelerated timeline in the Clean Power Plan for submitted state plans raise concerns? Constitutional concerns, can you do it, yes, no, reliable, whatever?

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

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

Mr. {Tribe.} Well--

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

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

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

Mr. {Tribe.} --one point which I think is absolutely crucial to that little document that you are holding, and that is the suggestion that we should defer to EPA on which of the 2 versions of this law, are really the law of the land. Let me be absolutely clear, it was not some functionary, it was the Senate conferees on October 27, 1990,
who said we recede to the House version. The Senate version couldn't be implemented because it was just a clerical thing that referred to something that no longer existed. So that is absolutely clear. This ghost version of the law that Professor Revesz wants to resurrect, and I don't know why he would bother if the law as it really is in the books supported what they are doing, but I don't have time to go through the grammar to show why it doesn't, this ghost version doesn't exist. There may be ghosts, but this ghost is a nonexistent one. And now what he is saying is that because courts generally defer to agencies like EPA, when they take a statute that is ambiguous and interpret it one way or another, it should also somehow follow that when Congress tosses a law into the air, and there is another ghost competing with it, it is okay for the EPA to grab the ghost and run with it. What kind of version of the Constitution is he reading? Certainly not the one you have in your pocket.

Mr. {Olson.} Yes, sir. I mean I am looking through this document. It has also the Declaration of Independence and the Constitution, 27 amendments, I don't see a ghost
version anywhere in this document. So that is great insight.

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

Mr. {Tribe.} Well, it is being challenged already in a particular case in the D.C. Circuit, but the problem is that that court might not reach the merits. It might say it is premature because, after all, we don't have a final rule yet, but the real dilemma is that states are confronted with not a ghost but a phantom. They are confronted with some federal alternative that they can't yet see, and so they are under enormous pressure, which is what makes this a violation of the Tenth Amendment, under enormous pressure to revise their whole economy. And by the time that has happened, it might be too late for a court to unwind everything that has gone on. And, you know, maybe if that would have solved the whole climate problem, one would say, well, what is a little legal violation, but when you look at what the EPA itself says, it says that if this proposal were perfectly implemented and
were not offset by what goes on abroad, what it would achieve by the year 2100 is, at most, reducing the rise of sea levels by 3/10 of a centimeter, which is two or three sheets of paper, and reducing global mean temperature by under 1/100 of 1 degree centigrade. And I ask you, even if we could get all of that, is it worth that little document you are holding—

Mr. {Olson.} Thank you, sir.

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

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

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

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

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

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

Mr. {Revesz.} Justice Scalia.

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

Mr. {Revesz.} That is correct.

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

Mr. {Revesz.} Right.

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

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

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

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

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

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

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

What the Senate manager said about receding would have been really interesting and very important if, in fact, they
had carried out what they said and withdrawn the language, but the language was not withdrawn, it was passed by both bodies and, therefore, it became a law. Not a ghost law, a real law. And what EPA is asked to do here is not, as Professor Tribe said, to pick whether it likes the House Amendment better than the Senate Amendment, the question is whether these conflicting provisions of the federal statute can be properly reconciled. That is the business of an administrative agency, and an agency takes a first crack at doing that. EPA is not going to say we like the Senate Amendment better, it is going to say we think we can give both meaning to both the House Amendment and the Senate Amendment. And if they do it appropriately, the courts will defer to their interpretation. And if they don't do it appropriately, the courts will strike it down. And that issue is now being litigated, as Professor Tribe noted, before the D.C. Circuit, and it is going to get argued on April 16, but certainly, that is the standard tool of statute interpretation. That cannot, under any plausible guise, become a constitutional problem.

Ms. {Castor.} And if it was unconstitutional, what
would happen to a whole range of environmental protection laws in America?

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

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

Ms. {Castor.} Okay, thank you.

I yield back my time.

Mr. {Whitfield.} The gentlelady yields back.

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

Mr. {Shimkus.} Thank you for all you smart people for being here. This has really be educational and enlightening,
and unfortunately, it is going to have real consequences.

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

Mr. {Tribe.} Yeah, here--

Mr. {Shimkus.} Briefly.

Mr. {Tribe.} No.

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

Ms. {Wood.} No.

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

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

Mr. {Shimkus.} If--typically, if a chamber withdraws its amendment, would you--
Mr. {Revesz.} It is not--

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

Mr. {Revesz.} It did not--

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

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

Mr. {Shimkus.} All right.

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

Mr. {Shimkus.} All right.

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

That is not the standard situation where a manager--

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

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

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

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

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

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

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

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

Ms. {Wood.} The product is electricity.

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

Ms. {Wood.} But what is being regulated, and what needs to be regulated, is the electric generating unit, the piece of equipment that is generating electricity. And in my car example, the fact that he car, which is what is the emitting 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.
Mr. {Shimkus.}  And as we have had discussions here, the real-world implications are trying to comply financially. The difference between the Clean--some of the Clean Air Act and sulfur dioxide was that we had technology to do it. Ms. {Wood.} Yes. There were scrubbers that would remove the--

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

Ms. {Wood.} --sulfur dioxide.

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

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

Mr. {Shimkus.} Um-hum.

Ms. {Wood.} It was not done in a rulemaking by EPA.
Mr. {Shimkus.}  Well, thank you. And I will just end on this. Mercury thermometers are not dangerous, but breaking the thermometers and drinking the mercury might be hazardous to your health because I think everyone here, based upon our age, probably used mercury thermometers.

And I yield back.

Mr. {Whitfield.}  Thank you.

At this time, recognize the gentleman from Iowa, Mr. Loebsack, for 5 minutes.

Mr. {Loebsack.}  Well, thank you, Mr. Chair.

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

Just one quick note. This isn't new in terms of the EPA taking it upon itself, if you will, or trying to implement some kind of legislation. I understand the arguments just how far they are going, whether they are going too far or not. As you all know, long ago, you know, Ted Lowey talked
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about how, you know, regulatory agencies often go much further than Congress ever intended them to go, and we are going to continue the debate whether the EPA is going too far or not. There is no question about that.

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

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

Mr. {Loebsack.} Um-hum.

Mr. {Revesz.} Here, that is not what happened. It wasn't that there were conflicting House and Senate versions, and the conferees chose the House version. The House version then became the bill that was voted on by both chambers and
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signed by the President. That is not what happened. What happened was that both the House version and the Senate version made it into the bills that were voted by both Houses, they made it into the statutes at large, they were signed by the President, and they are both duly enacted laws of the United States.

Mr. {Loebsack.} All right, thank you, Professor Revesz. Professor Tribe, what is the legal way to address these problems? In your testimony, you mentioned a legal way to address these problems. What are we talking about when you say the legal way, and what are some examples of that?

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

Mr. {Loebsack.} Um-hum.

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

Mr. {Loebsack.} Um-hum.

Mr. {Tribe.} Congress could fund alternative energy sources, put a huge amount of emphasis, as the government
already is doing to some extent, on solar, on wind, on
gеothermal, but it really would take an act of Congress. It
is just not enough for an agency to do it on its own. And
here, even if there were, as Professor Revesz thinks, two
laws that Congress did pass, assume he is right for the
moment and--because both of them made it into the statutes at
large, an agency would have to reconcile them, as he says,
but you can follow both at one, that is, each of them
precludes the EPA from regulating certain things. The Senate
version focused on the pollutant, the House version focused
on the source. You could obey both. There is no need to
choose between them, and choosing between them is not an
exercise of delegated power.

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

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

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

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

Mr. {Loebsack.} --very environmentally-minded over the
years. If you could, you mentioned cap and trade, are there
other kinds of things that Congress could do?

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

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

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

Mr. {Loebsack.} Um-hum.

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

Mr. {Loebsack.} Um-hum.

Mr. {Tribe.} Now, there is a problem. A lot of my friends tell me, look, don't be an idealist, don't be utopian. Congress isn't going to do anything so why are you so hot about the EPA violating the law and the Constitution?

Well, it is just, I guess, the way I was brought up. I think
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the law and the Constitution matter.

Mr. {Loebsack.} Yeah, Professor Revesz?

Mr. {Revesz.} Could I--yeah. So under the Clean Air Act, Congress made a decision in 1970 not to define some limited number of pollutants that could be regulated, because Congress understood that as science evolved, other pollutants would become serious. And, therefore, the Clean Air Act uses a term air pollutant. Typically, air pollutant, dangerous human health or welfare. EPA has--EPA was basically required by the Supreme Court, in Massachusetts v. EPA, to acknowledge that greenhouse gases were air pollutants, subject to regulation under the Clean Air Act. This is not some power grab by this Administration, this has been now a process that has been going on for almost 10 years, and the Supreme Court said yes, when Congress said air pollutants, it meant something pretty broad. It is a broad definition, and greenhouse gases are air pollutants. And then EPA was asked to determine whether greenhouse gases endangered public health, and actually, the Bush EPA administrator made the initial endangerment determination. It didn't become effective at the end of the Bush Administration, and then
This Administration made it again. And so now greenhouse gases are air pollutants, endanger public health, and the other core--and that makes them at--puts them at the core of what the Clean Air Act is designed to deal with.

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

Thanks, Mr. Chair.

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

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

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

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

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

Mr. {Latta.} Well, okay. Professor Tribe, also then, the Clean Air Act places limits on the EPA's authority to use the Section 111(d) to regulate existing sources that are already subject to regulation for hazardous air emissions
under Section 112. Does this prohibit the EPA from regulating coal-fired utilities under Section 111(d)?

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

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

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

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

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

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

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

Secondly, the principle of deference under a case called Chevron only kicks in where there is an ambiguity, and here there isn't an ambiguity. And besides, deference is trumped
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by a principle called constitutional avoidance, that is, the Supreme Court has said, and the D.C. Circuit has said, that when an ambiguous statute, and I maintain this is not ambiguous, would cause constitutional problems if you defer to the agency's interpretation of it, then you don't defer, so that even if deference were otherwise available, here it would be trumped by the serious constitutional problems that I have outlined, haven't had time to talk about in detail, but my statement in written form explains why, for example, even though the property is not being totally destroyed, this is a violation of the Fifth Amendment, and explains a number of other things. So given those constitutional problems, which I don't think have been solved--

Mr. {Latta.} Well, and--

Mr. {Tribe.} --deference--

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

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

Mr. {Latta.}  Thank you.

Mr. Chairman, my time has expired.

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

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

Mr. {Green.}  Thank you, Mr. Chairman, and ranking member for holding the hearing. I want to thank our--both
I know there is some disagreements about the EPA Clean Power Plan, but as a lawyer, I am always interested in hearing the arguments from our professors. Besides this hearing, the EPA Clean Power Plan has been subject to a lot of debate. Whether EPA has the authority to regulate power plants was ultimately decided--decided by the courts, and it is this issue I find most disappointing. I have been in Congress for some time, and I would like to see a solution on our climate issues offered by this body, and not necessary because of the Supreme Court ruling. We should work together and control carbon emissions. That doesn't mean eliminating traditional fuels, and it certainly doesn't mean dismantling the EPA. It would--it means a reasonable approach from a legislative body that would reach required compromise, and that is what we have been sent here to do, and I look forward to both panels.

Professor Tribe, your testimony, a portion that jumped out at me is on page 11 where you say it makes far more sense to address climate change by legislation. I couldn't agree with you more, but without congressional action, the federal
agencies are acting under the existing authority given by the Supreme Court. Professor Tribe, in your testimony on page 14, you address EPA's reference to the Chevron USA case. It is my understanding Chevron created a two-part test to determine regulatory authority. There are many attorneys in Washington and D.C. and around the country making large sums of money advising clients on which version of the House or Senate Amendment the Clean Air Act are law. If the Supreme Court agrees to hear this case, is it your argument that Congress spoke directly to the question at issue, or do you believe the court will rule on the agency's interpretation?

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

Mr. {Green.} Okay.

Mr. {Revesz.} If I can just for a minute--I mean in that case, EPA was trying to regulate 86 percent of the greenhouse gas--of the carbon dioxide emissions of certain
stationary sources. The court in that case allowed EPA to regulate 83 percent of those emissions. Justice Scalia indicates that in his opinion. It only deprived the EPA of the authority to regulate the last 3 percent, and that was because that statute had a particularly--had a specific numerical provision that would have required EPA to either regulate a much larger number of sources than EPA wanted to do, or else disregard the number. And as a result of that problem, the Supreme Court deprived EPA of the authority to regulate the last 3 percent of those emissions, but allowed EPA to regulate 83 percent of the emissions of these stationary sources.

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

Mr. {Green.} Professor Revesz, one of the other things, since I only have a minute and a half, would a strict reading of the House version exclude many if not all potential
regulated sources, and you have written extensively on environmental law and regulatory policy, is Congress, while we don't interpret the law, it is our job and the courts to do that, we have the responsibility for conflicting issues in the laws that we wrote. Do you agree with that?

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

Mr. {Green.} And that is the federal court's job. Let me give you an example of one of the legislation that we have worked on passing. Congressman Olson and Congressman Mike Doyle and I have introduced legislation, and it has actually passed the House, to resolve conflicting language in the Federal Power Act, and that is our job to be able to do that, to do the legislating if there is an issue that the courts may not be addressing in our opinion is what the law is.
88

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

I will be the first to tell you that I--do I think
climate change is occurring? Absolutely. I think it is.
But we have taken this simplistic route to go this direction,
and so what I want to do is get back more to the fundamental.
You all were chasing this rabbit all the way down. You are
arguing over 112 and 112--111(d), and you are talking about
phantoms and ghosts, I think. Don't care. What are we going
to do? What are we doing here with this fight? I would like
to get back to the more basic where we are, because under the
United Nations it said that 96 percent of the CO2 emissions
are naturally occurring. Only 4 percent of all the CO2
emissions of the world are anthropogenic, manmade. See, I
can use the term like you all. Only 4 percent. And then
they go--and the United Nations goes on to say that all coal-
fire powerhouses in America, if you shut off every--
terminated a coal-fire power--every one of them shut down in
America, under the United Nations, said you only reduce the
CO2 emissions by 2/10 of 1 percent. That is not my
statistic, that is from the United Nations, 2/10 of 1
percent.

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

Mr. {Tribe.} Well, my grandchildren ask a similar question, which shows how wise you are, because I think my grandchildren are smart as whips. Grandpa, why are you worried about this 111 and 112 stuff? Is the world going to be destroyed? And then I tell them, well, there is this agency and it says if you do what it wants, it--they are not going to save the world, in fact, maybe by the year 2100, they will prevent the oceans from rising as much as, well, 2 sheets of your paper. But they think that by making a start, it is good, better than nothing. Well, you know, your grandpa spends his life teaching about the Constitution, and so I sort of put that into balance. That is part of--you know, there are a lot of details there, they look like rabbits going into rabbit holes, but that matters because in the long run, all those rabbits add up to something that this country has built. And then they ask a different question. They say, well, if we make a start, isn't that good? And then I try to give them the old proverb, you can't leap across a chasm in two steps, you know. Jumping halfway or
even 1 percent of the way might do a lot more harm, like splat on the bottom of the chasm, than not doing this at all and looking for something else. What would you do, Grandpa? And then I say I am not an expert in that stuff.

Mr. {McKinley.} Ms. Wood?

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

Mr. {McKinley.} Right. And my time has run out, but I just want to--I would rather us be focusing on something more
practical than this ideological--why aren't we doing energy
efficiency, why aren't we looking at more research into clean
coal technology, but to simply go after it and start doing
this and costing us jobs I think is incredibly naive.

Thank you, and I yield back.

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

At this time, recognize the gentleman from Kentucky, Mr.

Yarmuth, for 5 minutes.

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

Thanks to the witnesses.

After listening to this discussion, I am not sure I am
happy or sad that I dropped out of law school years ago. I
think I am happy. But I want to go back to--you mentioned
the Massachusetts v. EPA case, and I--what we were debating
the Waxman-Markey bill several years ago, 2009, and so forth.
That was kind of the motivating factor, I think, for many of
us at that point, that if the Supreme Court had said that we
have to regulate carbon dioxide, wouldn't it be better for
Congress to act and create a mechanism for dealing with it
than trusting the EPA to be flexible enough to deal with
states like my own, and Congressman McKinley's as well. So I
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am curious because I never--I have heard some difference of opinion, and I don't want to start another debate, on whether that decision actually mandated, made it compulsory for EPA to regulate CO2 or just basically said--made it permissive. Could you--you are shaking your head, Ms. Wood, do you want to answer that?

Mr. {Revesz.} Well--

Mr. {Yarmuth.} Or either one.

Mr. {Revesz.} Yeah, that decision held that--EPA in that case was arguing that greenhouse gases were not air pollutants for the purposes of Section 202 of the Clean Air Act. The Supreme Court held that they were, in fact, air pollutants for the purposes of Section 202 of the Clean Air Act. It did not mandate regulation because regulation is mandated only if the air pollutants endanger public health or welfare. So EPA--the next step was for EPA to make the determination, the court did not make it as was appropriate, to make the determination whether greenhouse gases endanger public health and welfare, which is a statutory term. As I indicated earlier, Stephen Johnson, who was the EPA Administrator at the end of the Bush Administration, made
that endangerment finding, but it didn't get--the
Administration ran out of time. It wasn't approved during
the Bush Administration, and it was, therefore, made anew by
the Obama Administration. So now--and that was challenged in
the D.C. Circuit. Many groups challenge the endangerment
finding and said that that was--and the agency had acted
inappropriately in making that finding. The D.C. Circuit
upheld the agency's decision. Those same groups then
petitioned the court for certiorari, and the court, while
granting certain other issues in that case, and that ended up
being the Utility Air Regulatory Group case, denied
certiorari on the endangerment finding.

So now it basically is the law, or at least is it--the
agency has said that greenhouse gas emissions endanger public
health. And now Massachusetts v. EPA dealt with Section 202
of the Clean Air Act. The definition of air pollutant and of
harming public health is very similar across many sections of
the Clean Air Act and, therefore, that case has now led to
all these other rules. These rules are basically based on
exactly the same legal principle. And EPA is proceeding
accordingly with the Supreme Court--
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Mr. {Yarmuth.} They are just--they are doing their job as they see it, based on what the Supreme Court said--

Mr. {Revesz.} Right.

Mr. {Yarmuth.} --about CO2.

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

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

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

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

Mr. {Yarmuth.} Um-hum.

Ms. {Wood.} --is in how the targets are set versus the flexibility that you could use to meet that target. And I think this is a key distinction that needs to be made. And the issue isn't whether a power company could do what you are saying to meet the target, the question is should those types of things be considered in determining what the target is. And to that, my answer is no, the Clean Air Act doesn't permit that. 111 has always been understood to begin and end at the source.

Now, in the Clean Air Mercury Rule that EPA did several years ago, they did have flexible cap and trade mechanism to meet that limit, but the target itself and the limit itself was based on technology that could be applied at every unit. So you started with activated carbon injection, and you figured out what the rate would be at each unit, but then you allowed flexibility in terms of how you would meet that.

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.
Doesn't matter what the issue is. Jefferson is very clear in the Manual of Parliamentary Practice. When there are differences between the two Houses, they get together in a conference and they work those differences out. If both Houses adhere to their position, the bill itself dies. It is not for you to say today that the bill should die if there is some confusion because there are two different versions. There are not two different versions, there is one version. It could not have passed to of both Houses, gone through a Conference Committee, and gotten to the President's desk unless there was one version, and one version exclusively.

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

Mr. {Tribe.} Thank you.

Mr. {Griffith.} --agree. And even when the rules in the Constitution are against me on what I believe ought to happen, I respect that those bodies and those rulings must be followed.
And so we get to that because I think that if there was some kind of a disagreement and suddenly it is found 25, 30 years later, that creates a problem, and I would submit—I don't know about the 1995 ruling. I would ask you quickly if you could tell me about that. You said that it had already been determined in '95, '08 and '11, and I know '08 and '11.

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

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

Mr. {Tribe.} Um-hum.

Mr. {Griffith.} EPA promulgated the CAMR regulations for existing EGUs under Section 111(d). This is a court opinion by the Circuit Court in D.C. This is what I am saying here. For existing EGUs under Section 111(d), but under EPA's own interpretation of the section, it cannot be
used to regulate sources listed under 112.

Mr. {Tribe.} Right.

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

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

Mr. {Tribe.} So--

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

Mr. {Tribe.} I think, because that case was New Jersey, the EPA--it is only New Jersey that could make that
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collateral estoppel argument. Other people confronted by an EPA that says we have now changed our minds, like Robert Jackson once said, it does--the matter does not appear to me now as it appears to have appeared to me then, other people are not going to be able to estop the EPA. But the EPA is free to make these arguments, I just think they are wrong and will lose.

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

Mr. {Tribe.} Correct, and that use of the word or supports the court's reading. The courts have been consistent in accepting this reading all this time, and it is
amazing, though it is not illegal as such, for the EPA to
scratch its head and say how are we going to win this case,
we have to invent a new statute.

Mr. {Griffith.} And they have reached pretty deep to
find something that they could hang their hat on.
Mr. {Tribe.} They reached very deep, to something that
Senator Durenberger when it was first proposed said I can't
imagine this being used very often. It has only been used 5
times. It is a technical little--well, it is a mouse hole,
and they are pulling an elephant out of it.

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

Mr. {Whitfield.} Gentleman yields back. Thank you.
At this time, recognize the gentleman from Maryland, Mr.
Sarbanes, for 5 minutes.

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

I don't know that I have a whole lot to add or more to
ask, but we have talked about phantoms and we have talked
about ghosts, and we are now getting to a dead horse in terms
of beating it over this issue of the interpretation. I
gather that the crux of this is whether the EPA's pursuit of the Clean Power Plan is warranted or authorized under Section 111(d), and I think it is to this question of whether it is seeking to balance and interpret the conflict between these two amendments is appropriate or not appropriate.

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

Mr. {Tribe.} Well, I have tried to encapsulate the essence of it, but it is—what I submitted is over a 50-page document, and I do think courts will pay attention to the several different parts of the argument. One, that even if Congress did give this power to the EPA, it would violate basic principles of federalism, and that is one reason that a court would not interpret Congress' having done so. Two, that there are powerful issues about the statute itself, and the EPA's authority to go beyond a statute. And three, separation of powers issues that arise out of the EPA's recognition that because the statute is written doesn't quite
do what they want to do, they have created a magical mystery
tour through the parliamentary procedure to say, well, there
are two statutes. And although I have suggested, both here
and in my written testimony, that if there really were two,
which doesn't happen, they could follow them both by both
outlawing the regulation of pollutants that are covered by
112, and outlawing the regulation under 111(d) of sources
under 112.

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

Mr. {Revesz.} Yeah, if I can answer your question more
directly. The debate we have been having here is replicated
in hundreds of pages of Briefs before the D.C. Circuit. All
of these issues are being aired in great detail on both
sides. The position that--most of the positions that I have
made here are made by the U.S. Department of Justice, by many
states. Other states are taking the opposite position. Some
industry groups are agreeing with my interpretation of the
Constitution of the statute, other industry groups are on the
other side. All of this, there are hundreds and hundreds of
pages of Briefs on all of the issues we have been talking
about.
If I can just take a moment to respond to an issue that Mr. Griffith raised. There is clearly only one version of the statute. There has to be only one version. That one version includes arguably inconsistent provisions. They are arguably consistent, and arguably inconsistent, but they were both voted on by both chambers and signed by the President. And the CAMR case is different because in the CAMR case, the problem was that EPA had initially sought to regulate mercury emissions under Section 112, then in Bush Administration decided to regulate under 111(d), but it was trying to regulate the same mercury emissions, the same hazardous air pollutant. Everyone concedes that EPA cannot invoke Section 111(d) to regulate a hazardous air pollutant that is being regulated under Section 112. But here the issue is the greenhouse gases are not hazardous air pollutants regulated under Section 112, so the CAMR case is actually an opposite to this problem, but I am sorry, I took up a little bit of your time.

Mr. {Sarbanes.} No, actually, that was--I was going to ask you to add whatever you think is left on this question. Can you real briefly, in 43 seconds, just give me a little
bit more of your perspective on why the Takings issue is not
determinative here?

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

Mr. {Sarbanes.} Thank you.

Mr. {Tribe.} Could I--

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

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

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

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

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

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

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

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

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

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

I want to read you just a little snippet of what we
have, and then kind of ask you all's suggestion on something.

But this is from Mayor Bob Stephens, Mayor of Springfield, Missouri. Affordability and unfunded environmental mandates. And like I say, the--you can think what you want about things, but I stepped off in a side room here and got this in our meeting, I couldn't run back to my office and meet him over there, so I was required to meet him here due to time constraints. Affordability and unfunded environmental mandates. As you know, the city of Springfield, Greene County, and Springfield City Utilities have been working cooperatively to develop a proposed integrated plan frame work that would foster a more holistic approach to the various unfunded EPA environmental mandates that all communities are facing; wastewater, storm water, drinking water, air quality, and solid waste. Our integrated plan frame work attempts to consider all of these issues together instead of each one separately, and to focus resources where the community can achieve the biggest bang for the buck. We appreciate your efforts to ensure that future unfunded environmental mandates must be affordable for the community and the citizens.
Now, one of the things that they did in this report that they are in here in Washington, and were honored enough to be thought of highly enough for the conference to be one of two cities, is they did the math. I know you all are constitutional scholars and such, but I don't know how your math is, but the math that they did was over the next 15 to 20 years, these unfunded mandates from the Environmental Protection Agency are only going to cost each individual in my district a little over $46,000 per person over the next 15 to 20 years.

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

Mr. {Revesz.} Well, it is a little hard for me to comment on a document that I haven't seen, but I can tell you from my experience, one of my areas of expertise is a cost benefit analysis of environmental regulation, and I actually care a lot about the--having the benefits of environmental regulation exceed the cost, and I am a big proponent of the use of cost benefit analysis to justify environmental regulation, which sets me apart from actually the vast
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majority of environmental law professors in this country who don't like it as much as I do. But I can tell you that often, these early cost estimates turn out not to be accurate, and--

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

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

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

Mr. {Long.} So we--

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

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

Mr. {Whitfield.} The gentleman yields back.

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

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

The--since 1970, the Clean Air Act has had several key
features that have helped make it one of the most successful environmental laws in the world. Science-based, health-protective standards keep our eye on the prize: healthy air for everyone. Cooperative federalism allows EPA to set the clean air goals, and allows states to decide how best to achieve them. EPA retains backstop enforcement authority, ensuring that every citizen in the United States receives a minimum level of protection, even if their state fails to act. Some have claimed that this arrangement violates the Tenth Amendment, and I quote, "If a state fails to formulate a plan, EPA will mandate a federal plan. This commandeering violates the Constitution under New York v. U.S."

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

Mr. Revesz. It does not, and the reason is that states are not required to do anything. States are given the option to come up with state implementation plans, and if they don't, EPA can impose federal implementation plans on the sources of pollution. And because EPA imposes those directly on the pollution sources and not on state institutions, there is no Tenth Amendment problem.
The cooperative federalism arrangement under Section 111(d), as I indicated earlier, is exactly the same arrangement that has been in place since the early--since 1970 for meeting the national Ambient Air Quality Standards. EPA sets the reduction requirements in the National Ambient Air Quality Standards to define the maximum permissible concentration of pollution in the ambient air. The states can then decide how to allocate that reduction requirement among their sources through state implementation plans. And generally, they do, but sometimes they don't. And when they don't, EPA imposes federal implementation plans. And it--this system has been going along--has been going on for decades. So the reason there isn't a Tenth Amendment problem is because EPA does not actually require the states to do these state implementation plans, it merely gives them the option to do them. And 111(d) is exactly the same situation. Through its--the Clean Power Plan--the proposed rule in the Clean Power Plan, EPA has set a reduction requirement that applies to each state. Each state can now decide what to do. Each state is not forced in any way to do what EPA has suggested they do in the regulation. They can do whatever
116

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

Mr. (Tonko.) Thank you. And Professor Revesz, we are all hearing all these—we are hearing about these legal questions, about the EPA's ability to regulate greenhouse gases emitted from power plants. As you know, power plants are the largest source of uncontrolled CO2 emissions in the U.S. I am not an attorney, but I thought the overall question of whether EPA has the authority under the--had the authority under the Clean Air Act to regulate greenhouse gases was considered by the Supreme Court. I believe there were three separate cases; Massachusetts v. EPA, American Electric Power v. EPA, and Utility Air Regulatory Group v. EPA, and that the court ruled in favor of EPA regulation of greenhouse gases. In fact, the court in the Utility Air Regulatory Group case, talking about EPA regulation of power plants said that, and I quote, "The Act speaks directly to emissions of carbon dioxide from the defendant's plants." So I just thought we should remember that and put it all in context. And any comments that you have in response--
118
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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.
It is true that the existence of an otherwise unproblematic backup plan can take something out of the normal commandeering world, but here we have something that is much more like what the U.S. Supreme Court decided in NFIB v. Sebelius, was impermissible pressure on the states because preexisting help that the states are getting from the Federal Government to deal with air pollution, in places like Springfield, can be yanked when the state is recalcitrant and does not succumb to the Federal Government's demand that it meet certain goals.

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

Mr. {Whitfield.} Okay.

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

Mr. {Revesz.} If I could--

Mr. {Whitfield.} You want a personal privilege, Professor?

Mr. {Revesz.} Yes, I would like that. That is the way that the Clean Air Act has worked for 45 years. Under the National Ambient Air Quality Standards, EPA can set state limitation plans. If they don't, the Federal Government can impose a federal implementation plan. The Federal Government does not say upfront what that federal implementation plan would look like--

Mr. {Whitfield.} Well--

Mr. {Revesz.} --it waits until the states either submit a state implementation plan or not. Here, EPA is actually doing something it has never done before, which is favorable to the states. It is basically--it has said we are going to give you early guidance and we are going to do it sometime in the next few months so you actually have some information, which is a lot more information than states have had under the kind of bread and butter of the Clean Air Act for the last 45 years.
Mr. {Whitfield.} And we have another panel coming up after you all that will be getting into this also.

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

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

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

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

Mr. {Tribe.} Well, I would say that the flexibility is an illusion. In fact, the Attorney General of Michigan, in
comments filed with the EPA in November of last year, warned
that the plan really takes meaningful freedom away from the
states--
Mrs. {Ellmers.} Um-hum.
Mr. {Tribe.} --and has just a patina--
Mrs. {Ellmers.} Um-hum.
Mr. {Tribe.} --of flexibility.
Mrs. {Ellmers.} Um-hum.
Mr. {Tribe.} It is like the example I gave, your money
or your life, but you can pay--
Mrs. {Ellmers.} But you can pay--
Mr. {Tribe.} --by cash or by check.
Mrs. {Ellmers.} --it however--you can choose any
vehicle as long as you choose a black one, you know, that
kind of thing.
Mr. {Tribe.} Right. Very much like that.
Mrs. {Ellmers.} Ms. Wood, and to that one, do you feel
it is flexible, but then also as a clean air practitioner,
what--how do you--how would North Carolina or any other state
be able to actually implement this rule?
Ms. {Wood.} Um-hum. The flexibility is exactly as
Professor Tribe described it, it is illusory, and the example I like to use in describing the flexibility is it is as if I came to you, the state of North Carolina, and I said I want you to give me change for a dollar. You can do it any way you want. It can be 100 pennies, it can be four quarters, I don't care, you just do it, North Carolina, the way you want. Well, the problem is North Carolina only has 60 cents, and so there really isn't flexibility there.

Mrs. {Ellmers.} Right. So in other words, with the--

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

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

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

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

Professor Revesz, would you like to comment on this?

Mr. {Revesz.} Sure. As I indicated earlier, I mean the product here, what is being regulated is electricity delivered in usable form to consumers.

Mrs. {Ellmers.} To consumers.

Mr. {Revesz.} Consumers. Now, no one is arguing--I don't think EPA is arguing that consumers should use less electricity, or like, you know, take the bus one day a week or work at home, or anything like that.

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

Mrs. {Ellmers.} To the point.

Mr. {Revesz.} That is an interpretation of building block four, and we can disagree with that but I don't think we will resolve it in the next 52 seconds.

Also, we shouldn't lose sight of the fact that nothing is being imposed on any state here.

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

Mr. {Revesz.} These are very--

Mrs. {Ellmers.} --we have--now I am just reclaiming my
time. We have already determined it is not the state we are
talking about. We are talking about the individuals are the
users of this energy, the individuals. So how would this--my
question is how would you enforce this?
Mr. {Revesz.} States in their plans can come up with
reductions any way they choose. They don't have to do
anything in particular. They can have trading schemes, they
can enter into contracts with other states and have
multistate schemes, they can do--they have a million
different options in how they can do this. They don't have
to do it this way.
Mrs. {Ellmers.} But building block number four talks
about the individual use.
Mr. {Revesz.} Building block four is--the building
blocks are used to determine the state reduction
requirements. They are not imposing any requirement on any
state or on anyone else, they are just a way of determining
how states--to what extent states can reduce their carbon
dioxide emissions.
Mrs. {Ellmers.} Thank you.
And I yield back the remainder of my time.
Mr. {Whitfield.} Gentlelady yields back.

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

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

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

Mr. {Tribe.} What I mean I think is best illustrated by decisions that involve not only the Takings and Compensation clauses, but the due process clause. As the Supreme Court has held in a number of cases, including one where the EPA initially promised confidential treatment to pesticide makers and then pulled the rug out from under them, and another in which the United States Government offered companies more favorable accounting treatment if they would bail out failing
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S and Ls, and then reneged, in cases like that, the Supreme Court has found a doctrinal basis either in the contract clause or in the due process clause or in the Takings clause for saying that even though you haven't wiped somebody off the map entirely, you have left them with some value, if you leave them to take a course of action and then pull the rug out from under them, fairness requires some kind of compensation. And in particular, the way the coal companies have been led on here is well know, this was something that was encouraged by the government, and in particular, when they were forced to invest billions of dollars in meeting the requirements under 112 with respect to the hazardous pollutants, they were pouring money down a hole, and they were not told, guess what, it is all gone, because the state that you live in has no choice other than to put you out of business.

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

And so, Ms. Wood, what happens if the states start
implementing the final rule only to have the courts strike
the rule down, and what do these states do, what if they have
already started signing the contracts, people stated breaking
ground on investments, or making capital commitments for
investments, what happens next?

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

Mr. {Flores.} Correct.

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

Most states are going to need to enact legislation and
put in place regulations. So if at the end of the--of that
time period, this is all found to be unlawful, well, all of
that effort will have been lost, but more importantly to the
extent legislation and regulations have been put in place,
that is also going to be time-consuming. And then as you
said, power plants need to start planning now and so they can
enter into contracts and could have financial--
Mr. {Flores.} Right, but it goes unsaid here but is
obvious is that the consumers and the taxpayers and
ratepayers all bear the cost to that.
Continuing on Section 111(d), it is the basis for the
Clean Power Plan that the EPA has come up with, but this
provision as I understand it has seldom been used in EPA's
44-year history. The Supreme Court also recently said it is
skeptical when an agency claims to discover in a long, long
exigent statute, an unheralded power to regulate a
significant portion of the U.S. economy.
And so, Ms. Wood, another question for you. Isn't it
correct that of the--in the 1990 amendments to the Clean Air
Act, only one section of 111(d) regulation has been
promulgated that still exists?
Ms. {Wood.} Yes, that is correct. As Professor Tribe
has talked about, there was one version of Section 111(d)
that was actually promulgated. It is the House version, it is what is shown right now in the United States Code, and it precludes regulation of source categories under 111(d) if they are already regulated under 112.

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

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

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

So, Professor Tribe, would you like to comment?

Mr. {Tribe.} I agree.

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

Mr. {Tribe.} It has only been used for four pollutants and five sources. They are very specialized and localized, like municipal waste landfills or sulfuric acid plants, which give off acid mist, and the idea that it is nothing new,
just, you know, just business as usual is the most fantastic account I have heard.

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

Mr. {Whitfield.} Gentleman yields back.

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

Mr. {Harper.} Thank you, Mr. Chairman. And thanks to each of you for being here. The— you have been very informative, and it is a challenging issue to every one of our states, a very expensive issue and proposition that is here. And the discussion on the Constitution is certainly very intriguing. And yesterday I saw in the vaulted National Archives the original handwritten letter that Thomas Jefferson wrote following the Louisiana Purchase, and— congratulating Congress on this new acquisition, which had not been approved yet. And him being a strict constructionist, you know, he was, you know, obviously concerned about people calling it unconstitutional, and he said it was extra-constitutional. So, you know, it is amazing how we have progressed in 200 years, and how we look
But, Professor Tribe, EPA and proponents of this regulatory approach say Section 111(d) serves as a catchall that provides regulatory authority to ensure there are no gaps in air pollutant regulations. And I know we have touched on it, but what do you—what are your thoughts about this gap-filling argument?

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

Mr. {Harper.} Well, Professor Tribe, following that line, you know, have you identified any evidence that Congress intended to provide EPA powers to expand its own regulatory authority when EPA identifies the need to do so, and how would that be possible under the Constitution?
Mr. {Tribe.} Well, I think it wouldn't be possible, and I have found no such evidence.

Mr. {Harper.} Okay, thank you.

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

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

This is the first time that--in its history that EPA has ever tried to apply any part of 111 in this manner. Rather than being a standard of performance, in other words saying how a source should perform and at what rate it should emit, it is really a standard of nonperformance. Let us try to figure out ways where these plants don't have to run. It is completely backwards and upside-down. Nothing has ever been
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done like this, and in fact, if you think about it, if you are looking for the best system of emission reduction, which is what EPA does, not running it or shutting it down would always be best, and yet that is never what they have found before.

Mr. {Harper.} Thank you very much.

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

Mr. {Whitfield.} The gentleman yields back.

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

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

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

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

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

And I would like to call up the second panel now, who
have been very patient. And on this panel, we are going to really zero-in on the practical impacts at the state level, and what their thoughts are about this proposed rule.

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

But our first witness is Mr. Craig Butler, who is the Director of the Ohio Environmental Protection Agency. Mr. Butler, thank you for being with us, and you are recognized for 5 minutes for a statement. And at the end of that time, we will have questions for you.
Mr. {Butler.} Good morning, Mr. Chairman, Chairman Whitfield, members of the committee. I do appreciate the opportunity to testify before the subcommittee.

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

As reflected in our detailed comments, and extensive comments to U.S. EPA, the proposal seeks to overhaul the Nation's power generation, transmission, distribution
systems, by reducing coal-based electricity, and instituting federally-mandated reliance on energy efficiency, renewable energy under the guise of global climate protection.

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

U.S. EPA's request for comment on more than over 500 different aspects of the proposed rule as it was published in the Federal Register, combined with the inability to answer basic questions throughout that comment period, clearly highlights that the plan has not been well designed and was rushed out the door to meet a predetermined schedule. Nonetheless, Ohio felt a strong obligation to dissect and--the proposed rule from a very technical standpoint. We took it very seriously. We partnered with our Public Utilities Commission of Ohio, and conducted an extensive outreach effort to interested parties during the comment preparation.
Our detailed review produced more than 180 pages of technical comments.

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

Ironically, after coal-fired units are required to make new costly upgrades, their ability to recover the costs in
140

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

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

2762 As Ohioans discuss this issue across the state, we hear
one overriding concern: maintain our affordable, reliable power is critical to both the pocketbooks of Ohioans and continued economic development within our state. Ohio has been a manufacturing hub in the heart of this country since the Industrial Revolution. Fueled by electricity, which remains 9 percent below the national average, Ohio is home to a broad range of energy-intensive industries, and is competitive on the national and global market. The Clean Power Plan, with all its legal and technical flaws, presents a direct threat to these benefits to the Ohio consumer.

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

We do it because it is important to affordable, reliable energy and to protect the environment.

I will close by saying Ohio is willing and is very prepared to participate in a full national debate on carbon, the need or not, frankly, to regulate carbon emissions from power plants, and how Ohio is and remains committed to being a good steward of the environment. However, the Clean Power Plan is a seriously flawed proposal and should not be used to set unprecedented national policy. U.S. EPA should reconsider this misguided approach.

Thank you.

[The prepared statement of Mr. Butler follows:]

*************** INSERT 4 ***************
Mr. {Whitfield.}  Thank you, Mr. Butler.

And our next witness is Ms. Kelly Speakes-Backman, who is the Commissioner at the Maryland Public Service Commission, and Chair of the Regional Greenhouse Gas Initiative. Thank you for being with us, and you are recognized for 5 minutes.
Ms. {Speakes-Backman.} Mr. Chair and members of the committee, thank you very much for inviting me--

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

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

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

As an economic regulator first and foremost, my primary objective is to ensure that the environmental goals of my state are realized in the most cost-effective way possible, while maintaining grid reliability. To this end, I am pleased that the EPA has allowed states to work within the current construct of our electric grid markets by encouraging a regional approach to compliance. As one of the nine states participating in RGGI, the experience of my state as well as
recent analyses completed by several independent grid operators indicates that a regional path to compliance is the most efficient and cost-effective path forward.

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

Our nine states represent 16 percent of the U.S. economy, and generate a total gross domestic product of $2.4 trillion U.S. The states work together within the current electricity markets to create a unified system for auctioning and trading carbon allowances so that our environmental goals are achieved through a least-cost, market-based solution. Although we have collaborated effectively for the better part of a decade, the RGGI remain--RGGI region remains diverse in many aspects. We comprise three separate regional transmission organizations, we have different political landscapes, and dissimilar generation profiles. For example,
in Maryland, we--our generation remains predominantly coal. As part of RGGI, and coupled with other state energy initiatives, however, we have been able to diversify our fuel mix and reduce our carbon footprint. Since 2005, instate generation from renewables, nuclear and natural gas as a percentage of total generation mix has increased from 36 percent to 55 percent, while instate generation from coal has decreased 56 percent to 44 percent. Over our entire RGGI region, the power sector carbon pollution has decreased by 40 percent, while our regional economy has grown by 8 percent. That is from 2005 to 2013. Non-hydro renewable generations has increased by 47 percent, while our regional dependency on coal has--and oil has decreased. Our carbon intensity power--of the power sector has decreased at twice the rate of the rest of the country.

So we believe that market forces, state policies and programs, such as RGGI, are driving these cost-effective pollution reductions, while simultaneously supporting our local economies. Our energy efficiency, demand response, and renewable initiatives, as well as policies to encourage fuel switching and to less carbon-intensive fuels, all work in
tandem to reduce pollution and establish long-term solutions for a reliable energy infrastructure. Many of the complimentary strategic energy initiatives are funded using proceeds from these RGGI allowance auctions, creating a virtual cycle—virtuous cycle of benefits that also serves to minimize ratepayer impact.

I could go through the rest of my written statement, but I would very much prefer to just leave you with five points that we have learned in—as part of RGGI, and I would be happy to take questions afterwards. The five lessons that we have learned in—and what we hope will be helpful to other states as they are crafting their plans, either state or regional, include the formation of—one of the lessons stems from the formation of our intra and interstate agency relationships as part of the regional cooperative effort. These relationships and resources have spilled over into other initiatives such as distributed generation, electric vehicles, and compliance with other EPA and state environmental regulations. Two is the pooling of staff resources and budgets. Basically, we can do a lot more with a lot less. We have been able to complete the necessary
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regional electric sector modeling in a timely fashion with built-in peer review. The third is a regional mechanism stimulates active and productive stakeholder engagement. The fourth, regional consistency does not require the states to implement identical programs. We in Maryland have one way of using these proceeds. Those in New York, those in Massachusetts, those in the other states participating in RGGI base their investments on their own state policies and priorities. And fifth, lastly and the most important lesson that we have learned by the RGGI states as it applies to the Clean Power Plan, is that participation in a regional compliance effort will likely provide our state with--with likely provide other states with the most flexibility moving forward. Initial hurdles surrounding the structure of the mechanism are not, in fact, insurmountable as demonstrated by us and in the RGGI states. Using this regional construct, the regional emission cap is the only enforceable mechanism included in the compliance plan. States retain jurisdiction over their own energy efficiency and renewable energy programs, and can continue to offer these initiatives as complimentary measures that help mitigate the cost of
compliance for their ratepayers.

Thank you very much for your time this morning.

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

*************** INSERT 5 ***************
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Mr. {Whitfield.}  Thank you.

Our next witness is Mr. Art Graham, who is Chairman of the Florida Public Service Commission. Mr. Graham, thanks for being with us, and you are recognized for 5 minutes. And happy birthday, as I said earlier.
Mr. {Graham.} Thank you, Mr. Chairman. Thank you for the birthday wishes. And thank you and the subcommittee for allowing me the opportunity to come and speak today.

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

In Florida, we have below-average CO2 emissions because of the following. We shifted a lot of our generations to low-emission natural gas early on. We offered incentives to harvest the available heat rate improvements over the past 30 years, and through energy efficiency programs that have already reduced consumption by 9,330 gigawatt hours. Now, all these things allowed us to realize a 25 percent decrease in CO2 emissions from 2005 to 2012, but yet none of these things are recognized by the current plan. However, in the
current plan 34 states have higher CO2 emission rates than Florida, but only 15 states have higher reduction percentage required by the CPP.

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

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

So briefly, under building block one, applying the approximate midpoint of EPA's cost range to achieve
approximately 6 percent improvement, Public Counsel identified a cost of $1.15 billion. Under building block two, Public Counsel's conservative methodology precluded costs associated with this building block, but the issues were as follows. Codifying costs for the EPA's overstatement of gas plant capacity, the cost for required new gas transportation infrastructure, i.e., pipelines, the cost for replacing generating units into retirement long before the end of their use of life—long before the end of their useful life, i.e., the stranded costs. I can tell you these are all big-ticketed items. Under building block three, using a U.S. Energy Information Agency's most recent costs for utility scale solar, replacing 10 percent of the conventional capacity would cost Florida $16.8 billion. Under building block four, for Florida EPA's 10 percent reduction equals 5,745 megawatts of avoided capacity. Our demand site program costs $1.48 million per megawatt of avoided capacity. So EPA's assumption will cost us over $8.5 billion.

Now, Florida's Office of Public Counsel limited itself to costs that can be cleanly calculated, applying EPA's numbers with the most basic government data. Counting only
the most obvious and easily qualified costs, the expense to Florida ratepayers start at almost $27 billion. That works out to about $2,800 per utility customer. However, the complete cost is much, much higher.

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

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

[The prepared statement of Mr. Graham follows:]

*************** INSERT 6 ***************
Mr. {Whitfield.} You--okay, Mr. Graham, thank you very much, and we will have an opportunity to ask questions as well, and then we have your full statement for the record.

At this time, I would like to introduce Donald van der Vaart, who is the Secretary for North Carolina Department of Environment and Natural Resources. Thanks very much for being with us, and you are recognized for 5 minutes.
Mr. {van der Vaart.} Thank you. Chairman Whitfield, Ranking Member Rush, and members of the subcommittee, thank you for inviting me to testify this afternoon.

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

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

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

I will address the state resources and advocate for what North Carolina calls the legal trigger approach to Section 111(d) implementation. Given the certain litigation that will ensue if the proposed rule under 111(d) is promulgated, states such as North Carolina are at risk of investing unnecessary time and resources, developing and enacting state 111(d) plans prior to the resolution of litigation. North Carolina recommends that the EPA amend the rule's submittal
deadlines to require states to submit a 111(d) plan only after the conclusion of the judicial review process. Traditionally, when the EPA promulgates a new rule that sets forth requirements designed to address some aspect of the Clean Air Act, each state must take action, usually in the form of legislation and rulemaking, to avoid sanctions directly or avoid sanctions on its sources. The state then submits a demonstration to the EPA for approval, which can take anywhere from a few months to many years, during which time the states implement their rules. If the rule is struck down, however, the state is forced to uproot its earlier work and begin a new planning process; legislation, rulemaking, implementation and enforcement, and the process must often be amended again when EPA revises its illegal rule in an attempt to satisfy the courts.

This is not just an academic concern. There are several recent cases where this study in futility has occurred. The EPA's attempts to address economic inequity in regional energy markets through interstate pollution rules, such as the NOx SIP Call, the Clean Air Interstate Rule, and the Cross-State Air Pollution Control Rule, all prime examples.
There is universal agreement that the 111(d) rule will fundamentally restructure how energy is generated and consumed in America. I would argue that EPA's Section 111(d) rule is to energy what the Affordable Care Act is to healthcare. This fundamental change to America's electricity model will come at the hands of a rule that few consider legally firm. The EPA acknowledges in the rule that it is structured to survive even if portions of the rule are struck down. In my more than 20 years of implementing air quality rules, I am not aware of any rule where the EPA has made an apriority acknowledgement of legal infirmity.

Despite the rule's uncertain future, state plans would need to move forward to allow, for example, switching from a cost-based energy dispatch model to a carbon dioxide dispatch model. Under the EPA's current proposal, legislative changes, utility resource planning, and regulatory execution must proceed while 111(d) is under judicial review. EPA's acknowledgement of the legal frailty of their creative interpretation of the Clean Air Act not only argues further legal trigger, but it also calls Chevron deference into question. In this rule, like many others, EPA--many other
EPA rulemakings, the EPA characterizes statutory language as unambiguous to invoke Chevron deference. Unfortunately, the EPA's legal track record is so poor that one can only wonder if Chevron deference should be withdrawn because the agency has abused its public trust.

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

Thank you for the opportunity to have testified.

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

*************** INSERT 7 ***************
Mr. {Whitfield.} Thank you, Mr. van der Vaart. And thank all of you for taking time to give us your views on this important issue. I will recognize myself for 5 minutes for questions. In my opening statement, I described this proposed regulation as being characterized as extreme, a power grab, radical, unprecedented, and even unlawful. And we get—many—I think you can come to the logical conclusion that this is being implemented to implement the President’s international agreements. And I would ask each of you, the EPA has given the states 13 months to come up with a state implementation plan if this regulation is adopted. Is that an unusually short period of time from your personal experience with EPA? Mr. Butler?

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

Mr. {Whitfield.} Okay.

Mr. {Butler.} Just—and I know states—some states are
162

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

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

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

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

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

Mr. {Graham.} Mr. Chairman, I would agree with you and Mr. Butler on that.
Mr. {Whitfield.} Okay. Mr. van der Vaart?

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

Mr. {Whitfield.} Um-hum.

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

Mr. {Whitfield.} Um-hum.

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

Mr. {Whitfield.} Um-hum.

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

Mr. {Whitfield.} Um-hum.

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

Mr. {Whitfield.} And, you know, in our first panel, you listened to the constitutional arguments and so forth. How many of you actually believe that the average citizen out
there has any basic understanding of the impact of this--what
this--of this regulation and what it would be? Do you think
the average citizen even has any input--insight into this,
Mr. Butler?

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

Mr. {Whitfield.} Right.

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

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

Mr. {Butler.} Right.

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

Ms. {Speakes-Backman.} I believe that public sentiment
is increasingly aware of climate change and the issues--
Mr. {Whitfield.} I am not talking about climate change, I am asking you--

Ms. {Speakes-Backman.} And--

Mr. {Whitfield.} --do they understand the impact, in your opinion, of the consequences of this?

Ms. {Speakes-Backman.} The impact in our RGGI states is less than 1 percent for the overall--

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

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

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

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

Mr. {Whitfield.} Mr. Graham, what about you, do you think they understand?

Mr. {Graham.} I don't think they have any idea. I--we have reached out quite a bit and got very little feedback. I think the power generators--

Mr. {Whitfield.} Um-hum.

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

Mr. {Whitfield.} Okay.

Mr. {Graham.} --but I think the financial impact, and
we really haven't put out--

Mr. {Whitfield.} Okay.

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

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

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

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

Mr. {Graham.} Without a doubt. You know, what gets me, and you see in all of the EPA's data, that they said they want to decrease 30 percent of the CO2 emissions from the 2005 numbers. Now, the biggest--one of the things that Florida has already done from 2005 to 2012, we have already jumped ahead of a lot of this stuff. We switched a lot of things over to natural gas. We are, right now, about 65 percent natural gas. We have done a lot of improvements since then, and for you not to take into account, because they are using 2012 as the baseline.
Now, the problem we run into there is that was an all-
time low for natural gas, so we are using so much more
natural gas, so the carbon emission that they are putting out
there is so much lower than we--than it was, like I said,
back in '05. And so I think--

Mr. {Whitfield.} Okay.

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

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

At this time, recognize the gentlelady from Florida, Ms.

Castor, for 5 minutes.

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

Mr. Graham, it recently came to light that Florida
Governor Rick Scott has an unwritten policy that bans the use
of the terms climate change and global warming. A number of
state employees and scientists from the Florida Department of
Environmental Protection, the Department of Health, the water
management districts, the Florida Department of
Transportation, have all come forward and said this is the
case. I read your testimony. Nowhere in your testimony does
it use the term climate change or global warming. Is that a product of Governor Scott's unwritten policy?

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

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

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

The--you cited a national renewable energy lab report, but, in fact, that report from July 2012 said Florida is indeed ranked third in the nation for total estimated technical potential for rooftop solar voltaics in the U.S. That same report said Florida clearly has the best solar resource east of the Mississippi River, but the commission has scrapped solar rebates, also going to cost us money, especially with the new requirements of the Clean Power Plan. And then the best example is what the Public Service Commission and the legislature has done to heap--to increase bills, especially if you are a Duke Energy customer. And my colleagues might not be aware, but Florida had adopted an advance recovery fee that allowed the utilities to collect
costs in advance for building power plants. And in fact, even when Duke Energy had to scrap a power plant or--and had to put another one on mothballs, without creating one kilowatt hour of energy, customers in my neck of the woods, in central Florida, are on the hook for $3 billion, and that is modest, in costs. $3 billion, not one, not one kilowatt in energy.

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

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

Mr. {Graham.} Thank you. We cut back a lot on the energy efficiency programs because we have done so much so
far. As you heard me say earlier, since we started this
program, we have achieved 9,330 gigabytes worth of--
Ms. {Castor.} Mr. Graham, that is simply not the case.
It is--there is report after report after report that says
the state of Florida is so far behind. Now we are down to
about zero in our energy efficiency goals because the
business model is backwards. It is not a model that helps
address the modern challenges. It is all about how much
energy you can sell. And utilities now need to be
compensated for helping consumers save money. And I really
recommend that you take this obligation seriously and think
about the cost to consumers from here on out.

Thank you.

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

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

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

I am going to start off with a basic question for each
one of you. We will start with you, Mr. Butler.

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

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

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

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

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

Gentleman from--

Mr. {Graham.} No, sir.

Mr. {Barton.} --North Carolina.

Mr. {Graham.} It is not necessary.

Mr. {Barton.} And from Florida.

Mr. {van der Vaart.} Florida--

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

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

Mr. {Barton.} So this is not a necessary thing under the Clean Air Act amendments to meet any standards for
nonattainment. In fact, is it a true statement that nothing in this clean power initiative sets a standard of emission reduction in your state? Is that a true statement? There is not a target you have to meet in terms of parts per million or anything like that?

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

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

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

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

Ms. {Speakes-Backman.} Yes, sir. We voluntarily
decided to take control of our environment, of the reliability issues that we were facing, and with cost increases to our ratepayers.

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

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

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

Ms. {Speakes-Backman.} But--

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

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

This Clean Power Plan is structured--

Mr. {Barton.} Well, in the case of Texas, Texas has to--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
doing. I think that is a good thing. I believe in states' rights. New York doesn't want to allow hydraulic fracturing, so they don't. Pennsylvania allows it, but with different reporting requirements than Texas. I believe in federalism, it is a good thing, but I don't believe in this Clean--this new Clean Power Plan initiative that is imposing a social policy on the states, with no environmental benefit and no real opt-out provision.

With that, Mr. Chairman, I yield back.

Mr. Whitfield. Gentleman yields back.

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

Mr. Pallone. Thank you, Mr. Chairman.

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

Ms. Speakes-Backman. Any time, sir.

Mr. Pallone. I wasn't here for your testimony. I had to go to another committee hearing, but in your testimony you state that through 2013, RGGI states reinvested over $950 million of auction proceeds and energy efficiency, clean and renewable energy and other strategic energy programs. And
you note that these proceeds have helped low-income families pay their energy bills, supported energy efficiency upgrades, and helped families and businesses install solar, wind and geothermal systems at their properties. In fact, under RGGI, just last week, the sale of 15.3 million carbon dioxide allowances netted $82 million and set a record high price.

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

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

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

Mr. {Pallone.} So I mean obviously, the program has been tremendously effective in Maryland and other participating states, and these states are going to have a leg-p when it comes to meeting the EPA standards. Now, I am just mentioning this in part because that is why I am so disappointed that, in my home state of New Jersey, our governor, Chris Christie, has withdrawn our state from the program, as you know. And not only is this going to hinder New Jersey's ability to meet the EPA standards, it is actually costing the state money. According to an analysis by Environment Northeast, since New Jersey withdrew from the RGGI program in 2011, the state has passed up more than $114 million in potential revenue, and the state could miss out on an additional $387.1 million through 2020, and those figures don't even account for the record price for allowances hit at the RGGI auction last week, which you mentioned. That is money that could be used to use support energy efficiency upgrades and job creation, like it is doing in Maryland and other participating states. So I know he is not with us here today, but I have called on Governor Christie to reconsider
his decision to withdraw from RGGI because I think New Jerseyans deserve to reap the benefits of this successful, economically-efficient program, which is reducing carbon emissions and creating jobs in the northeast.

Now, I have about a minute and a half. I know that--if you wanted to respond to some of the questions that were asked before that maybe you didn't have time for, you could use the time to do that, unrelated to my question.

Ms. {Speakes-Backman.} Thank you very much, sir.

May I just add that the car analogy in the panel before was so interesting to me in that, you know, what can be done in--for the car is a catalytic converter, but to me, when I think about a mass-based regional program such as RGGI, and taking that same analysis, it is like having a catalytic converter but then you put a variable toll on the roads that is outside the box. Right? It is outside the car system. And putting a toll on those roads, you can take the money and you can reinvest that in R and D so that you can further improve the equipment that is put on the car to reduce emissions. But in addition, you can take those revenues and further control traffic by putting the tolls on certain roads
that are busy. You can do things like improving those roads themselves. There are ways to reinvest and to make this a positive.

I don't think that there—I don't think it is mutually exclusive to help your environmental goals and to build your economies.

Mr. {Pallone.} All right, thank you so much.

Thank you, Mr. Chairman.

Mr. {Latta.} [Presiding] Thank you very much. And before I recognize myself for 5 minutes, I would like to ask unanimous consent from the committee to enter a letter dated December the 1st, 2014, from Director Butler of the Ohio EPA to the respondent and also the executive summary. And these documents were submitted to the U.S. EPA as part of their comments to oppose Clean Power Plan.

Without objection, so ruled.

[The information follows:]
Mr. {Latta.} If I could start, Director Butler, and also to all of our panel, thanks very much for being here. Again, it has been very informative. But, Director, if you would, would you expand on the reference you made to the differences in the 2005 and 2012 baselines, and how this would affect Ohio by not taking into consideration the early action that many have taken to improve that efficiency?

Mr. {Butler.} Mr. Chairman, thanks for the question. And I think Mr. Graham made a couple of very relevant points in his testimony to this fact as well. Ohio has many utilities that are very early adopters in making sure that their plants run as efficiently as possible. Frankly, the hundreds of millions of dollars that they have invested will be left on the cutting room floor, if you will, if the Clean Power Plan, which talks about a 2005 implementation date, is passed. In reality, that date of looking to develop a plan is all based on the year 2012. So any emission reductions or, frankly, efficiency improvements that have been made prior to 2012 will not count. We think
that not only disincentivizes our utilities from doing that work, but it, frankly, also makes it much more difficult for them to comply, if not exceptionally more expensive for them to comply going forward with meeting the new bucket 1 requirements of having a 4 to 6 percent energy efficiency improvement.

Further, we have talked about utilities as part of our dialog and comments on the Clean Power Plan. They think it is fundamentally very difficult, if not impossible, to reach that 4 or 6 percent efficiency improvements at their--at our existing utilities. Our fleet has gotten much more efficient, ironically because many of those units were shut down because of the mercury standard, others were improved because they needed to--they wanted to be more efficient and generate more power into the grid. But those costs were heavy, and they think that a 1 to 2 percent improvement would be all that they could develop and--to comply with the Clean Power Plan.

Mr. {Latta.} Thank you. If I could continue, Director, could you also explain the issues you foresee with the costs and the efficiency related to the EPA's building block number
two, which will result in the natural gas-fired units used
for base load power in coal-fired plants into peaking power?

Mr. {Butler.} Mr. Chairman, I think the further--the
earlier reference about fundamentally--the Clean Power Plan
fundamentally is changing the electric distribution market
from really one that is based on cost, to one based on
environmental impact, and that is a serious, serious problem.
In addition, just the discontinuity between the way EPA has
set up the Clean Power Plan bucket one on efficiencies at
power plants versus bucket two where they are having--wanting
to see natural gas generation run at a 70 percent rate. I
think we see two fundamental problems. One is we will see
significant closures and--as we already have of our coal-
fired fleet, and we will see some, but I don't know yet how
much natural gas generation come online. There is a
disconnect on how those work, so we are really concerned, as
many others are, about the power grid being able to supply
power.

Fundamentally, we also find an inconsistency here.
While EPA is requiring or suggesting that the power plants
become more efficient, and invest hundreds of millions of
dollars to do that, that they not be allowed to run to
recover those costs because they are then driving gas to take
over that capacity.

Mr. {Latta.} Well, when we look at Ohio, what is--right
now, is Ohio about 71 percent coal-fired?

Mr. {Butler.} Yes, sir.

Mr. {Latta.} And when you look down the road at the--
what the EPA is ordering, you know, and it was already
discussed, I think, by the chairman, the question really
comes then to, with all these costs being put onto these
power plants, who is going to pay for that in the long run?

Mr. {Butler.} Right. Mr. Chairman, we are very
concerned because we think all of those costs get passed onto
the consumers of Ohio.

Mr. {Latta.} And also when you--especially when you
have put out in your discussions with the EPA, have they even
talked about, you know, what the consequences are? Do they
look at what it would do to a state like Ohio with 71 percent
coal generated, especially for our business communities and
the people that work in those factories and businesses?

Mr. {Butler.} Mr. Chairman, I believe they probably do
talk--think about Ohio, although we were very concerned, 
frankly, dismayed, when U.S. EPA--they do talk about they 
have had some extensive outreach across the country, and they 
did attend listening sessions across the country. We, 
frankly, invited, as our--as did our states in West Virginia 
and Kentucky, to come to any three of our states and hold a 
listening session to see and hear from the general population 
that were actually going to be very much impacted by this 
Clean Power Plan, and they elected not to come to either--any 
of our three states.

Mr. {Latta.} So you put on an invitation and they just 
did not come.

Mr. {Butler.} Yes, sir.

Mr. {Latta.} Thanks very much.

My time has expired, and the chair will now recognize

Mr.--

{Voice.} Mrs. Capps.

Mr. {Latta.} --the gentlelady from California, Mrs.
Capps, for 5 minutes.

Mrs. {Capps.} Thank you, Mr. Chairman, for holding this 
hearing. And I want to thank all of our witnesses for your
testimony.

It is so clear that the power sector is responsible for a major portion of carbon dioxide emissions in the United States, but it is also clear that these emissions are causing our planet’s climate change at an unprecedented rate. We need to act today to curb these emissions and prepare for the consequences that are forecast. Fortunately, and, Ms. Kelly Speakes-Backman, you spoke to this, that the Regional Greenhouse Gas Initiative, or RGGI, has really impressively reduced emission rates, and has done so while also improving the regional economy and fostering job creation. My colleague from New Jersey asked you about that, and unfortunately, apparently, his state of New Jersey has backed away from it, but I hope that this momentum will build. I think it is clearly possible to increase energy efficiency, reduce emissions, and provide affordable energy for local residents.

So in addition to carbon emissions, the power sector generates so many other harmful pollutants, including sulfur dioxide, nitrous oxide and mercury, to name a few. In addition to exacerbating the impacts of climate change, these
pollutants have direct impacts on human health, leading to increased rates of respiratory problems, contributing to heart attacks, strokes, and even premature death. This has been documented, and is being documented. The benefits of reducing carbon dioxide and these other pollutants under the Clean Power Plan will likely have benefits that far outweigh the cost of implementation, especially in the health sector.

And I wanted to ask you how this is—how this implementation of RGGI has affected the benefit of human health in your area.

Ms. {Speakes-Backman.} Thank you for the question. As you know, we have—in Maryland especially, we are a little bit downwind of some of the coal plants that are in the Midwest, and they have directly affected the health and the costs of that health to our citizens. And so as part of the effort that our state has undergone to try to mitigate those health issues, as well as to mitigate the reliability issues that we have had from frequent storms, increasing frequency and severity of storms, the ability—the costs that we have had—our ratepayers have had to incur in order to build up resilience against such storms, there are lot of costs aside
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from the work that is going to be done under the Clean Power Plan that need to be taken into account when you are doing a full cost benefit scenario.

Mrs. {Capps.} Yes. Thank you. Significant reductions in sulfur dioxide and nitrous oxide and mercury has benefitted over the long haul, but they are offset by downwind and other aspects that tell us that we are not fully where we want to be yet.

Mr. Butler, I wanted to turn to you, if I could. In August of last year, the waters off Lake Erie, off the coast of Toledo, experienced a harmful algae bloom that impacted drinking water for about 400,000 people. Am I correct?

Mr. {Butler.} Yes, ma'am.

Mrs. {Capps.} The science is increasingly clear that harmful algal blooms will become more severe a frequent in the future due to climate change. This means more human health costs, more taxpayer dollars spent on clean-up, unless we take action to reduce carbon emissions. In your testimony, you focused exclusively on the financial costs of implementing the Clean Power Plan, but, you know, in the constraints of time perhaps you weren't able to reach any of
the benefits. Would you agree that human health benefits
such as fewer harmful algal blooms and cleaner air, should
all be considered in doing a full assessment of the Clean
Power Plan?

Mr. {Butler.} Mr. Chairman--Mrs. Capps, I--if you have
an opportunity, in our extensive comments, we submitted U.S.
EPA, and then were brought into the record today--

Mrs. {Capps.} Great.

Mr. {Butler.} --you will see an extensive summarization
of our issues related to this issue about suggesting that
there will be significant human health improvements by
regulating carbon.

Mrs. {Capps.} Um-hum.

Mr. {Butler.} We do not believe that is the case, and
do not believe that the science proves it. Now, however, in
a lot of reductions that come along, we have improved our
sulfur dioxide and ozone emissions in Ohio and in our
downwind states. I mean we do not deny the fact that there
have been many, many, many improvements to public health, but
I think it is a--it is not appropriate to tie that back to
CO2 emissions--
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191

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
any science on this particular regulation and how much it would change climate change, but that using the normal EPA modeling procedures, the American Coalition for Clean Coal Electricity did run an analysis on how much the rule would reduce climate change, and the American Coalition for Clean Coal Electricity found that atmospheric CO2 concentrations would only be reduced by less than 1 percent in 2050, the increase in global average temperature would only be reduced by 16/1000 of a degree Fahrenheit in 2050, sea-level rise would only be reduced by .3mm or 1/100 of an inch. This is the equivalent of a piece of paper, or a couple of pieces of paper. And so taking that all into consideration—well, first let me say, do you know of any other studies out there, other than the one that I have referenced, that indicate there is going to be some huge change to what sometimes is referred to as global warming, but more commonly, particularly in the east, is referred to as climate change, since warming hasn't happened?

Mr. {Butler.} Yeah, Mr. Griffith, I am unaware of any additional studies. We did a very extensive search when we did our comments on the Clean Power Plan, and the ones that
you referenced are many of the studies that we also took a
look at as part of our review of the Clean Power Plan.

Mr. {Griffith.} Okay, but you don't have any direct
numbers from the EPA themselves?

Mr. {Butler.} We do not.

Mr. {Griffith.} And notwithstanding the fact that they
haven't taken the time, that Mrs. Capps referenced, maybe to
look at this matter and the health studies, et cetera, and
whether or not this would affect anything, this rule is
coming down your state's throat any day now, isn't it?

Mr. {Butler.} Yes, sir, it is. We are very concerned
about the resources that it will take on this—on our state
levels to, you know, on the one hand have these discussions
and perhaps even legal issues around the implementation, but
at the same time go down the path of having to commit our
state resources to develop an implantation plan that, at the
end of the day, one, may not be necessary, two, may—that may
change significantly from where we started.

Mr. {Griffith.} Right. And so your folks are being
forced to go forward, even though there are all kinds of
legal implications going on. And as you could probably tell
from the previous panel and the debate there, I am very well versed, and I believe the EPA does not have authority. We will stay tuned to see what the courts say, but I don't think you can change the law just because you find some reference in the closet that says that maybe there was a different interpretation, because if either side adheres to their position, there is no bill. Senate said it receded.

Without getting into all that legal argument, Secretary van der Vaart, your state is going to have to comply even though the legalities and the fight over the legalities may continue, you have to go ahead and get a plan out there. Isn't that true?

Mr. {van der Vaart.} Well, that is right, and I think that is why I am here. There are a lot of things we can say. I applaud Maryland and the rest for doing what they want to do. North Carolina has made major reductions since the 2005 date. America generally has dropped its carbon dioxide emissions from 2010 to 2013 by 10 percent, and it was all done without the benefit of a federal action. It was done primarily by the revolution that is our natural gas production here in North--in America.
But yes, the concern we have is developing legislation, developing rules, our utility regulatory system has to be altered--

Mr. {Griffith.} And you will spend a lot of money going down that path, and then the Supreme Court comes out a year and a half, 2 years, 3 years from now and all of a sudden, it all has to start over again.

Chairman Graham, your power plants are facing that same problem, but even if this thing goes forward, a number of them are going to have to be shut down before their useful life ends, isn't that correct?

Mr. {Graham.} That is correct. We have--we are about 20 percent coal in Florida. Like I said, we switched to a lot of natural gas early on, and they are talking about closing down about 90 percent of our coal plants.

Mr. {Griffith.} And so you are going to be hurting, and also the--that means that you are going to have some stranded costs, and that means the increased cost we pay--will go on to your ratepayers, isn't that correct?

Mr. {Graham.} It is almost like they paid for the plant twice. They paid for the plant, and they have all this
useful life left, and then we have to shut it down.

Mr. {Griffith.} And the beauty of natural gas in some of the energy revolution is that we can attract jobs back to the United States but we have to have affordable energy, and this plan doesn't do much for the environment, and it damages our ability and our reputation in the world to have affordable energy. Isn't that true? I don't have time for an answer, but I assume that it is with most of you. Ms. Speakes-Backman, I agree you would disagree, but I recognize that, and yield back.

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

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

Mr. {Tonko.} Thank you, Mr. Chair. And thank you to our panelists for appearing before the subcommittee.

The efforts--and, Commissioner Speakes-Backman, let me address my comments first and foremost to you. Welcome, and thank you for your service as chair of the RGGI Board of Directors. As you have noted, New York is a member of RGGI. In my last workstation before service here in the House, I was president and CEO of NYSERDA, New York State Energy
Research and Development Authority, which got me a seat at the RGGI table. And so I am very thankful for your leadership and for carrying forth with the mission of that plan.

As a participant in RGGI, New York has been able to accomplish a great deal. Greater energy efficiency, cleaner air, expanded deployment of renewable energy technologies, and these are just a few of the benefits, many that are arising.

EPA's proposal is just that at this stage; a proposal. I support its goals. As a proposal, I am sure it will evolve and change, perhaps, before the final rule is released.

There, however, seems to be a number of utilities and states that are claiming the goals of the proposal cannot be achieved without severe economic hardship, and sacrificing our electric—our electricity reliability. You seem to take a different view. Why are you convinced that these predictions are wrong?

Ms. {Speakes-Backman.} Well, thank you for your participation in RGGI as a state, and thank you for the question.
I do take a different position, and in fact, I take the position that RGGI, coupled with our other state policies, has helped us to improve reliability. So specific to the reliability issue, which is very near and dear to my heart, and it is actually part of my legal obligation as a commissioner of the Maryland Public Service Commission, we work within—we have implemented RGGI within the construct of existing markets, and that includes the North American Electric Reliability Corporation's oversight of bulk system reliability. It includes FERC's retaining its authority over the market's design. It includes also reliable dispatch of least cost resources remaining with our grid operation system. So this is not an upending of the systems. We have been doing this for 8 years, and we have had fewer reliability issues because we have been able to support programs such as demand response and energy efficiency to help reduce the load in specifically load pocket areas.

Mr. {Tonko.} Thank you. And also there are those who would argue that sound stewardship of our environment and economic recovery, the growth of our economy, cannot go hand-in-hand. Are there any steps that you can cite in terms of
perhaps job growth in the energy areas that have enabled us
to strengthen our economy and provide for cutting-edge new
opportunities with innovation as it relates to the energy
arena?

Ms. {Speakes-Backman.} Yes, sir. I can speak
specifically to the state of Maryland with respect to jobs.
I would have to look up that number, but we have--I believe
it is in my written testimony, sir, but we have created jobs
and we have improved our economy, while we have reduced by 40
percent our carbon reduction--our carbon dioxide from power
plants. And I am sorry, I don't have that number at my
fingertips.

Mr. {Tonko.} Well, I am certain that you also--other
participants at the RGGI table representing that array of
states, but I think it can be documented that we have grown a
new culture of job activity, all while strengthening the
environmental outcome, and--

Ms. {Speakes-Backman.} Absolutely.

Mr. {Tonko.} --the sense of environmental justice that
has been produced by RGGI accompanies that of social and
economic justice. So, you know, I think that there is this
whole silo effort to look at certain impacts, needs to be looked at in a fuller array, a broad view that provides for a strong context of a better future for all of the states involved.

Ms. {Speakes-Backman.} Absolutely, sir. I just recalled the number. In the first 3 years of our program alone of RGGI, we have created 16,000 job years in our region.

Mr. {Tonko.} Is—how many, sorry?

Ms. {Speakes-Backman.} 16,000 job years in our region. Based on the further reductions that we made through a program review in 2014, an independent analysis by the Analysis Group has shown that we will add another—yet another 130,000 job years to the—our region.

Mr. {Tonko.} Thank you very much. And with that, I see my time is up.

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

Mr. {Tonko.} I yield back.

Mr. {Whitfield.} At this time, I recognize the gentlelady from North Carolina, Mrs. Ellmers, for 5 minutes.

Mrs. {Ellmers.} Thank you, Mr. Chairman. And thank you
to our panel, especially to you, Secretary van der Vaart, for
being here from North Carolina.

As your--Secretary, as your position as secretary of DNR North Carolina, and as an attorney, can you reflect a little bit about the discussion that took place on panel 1 about the ambiguities that exist between the rule--the 111 and the 112, especially focusing in on--back to 1990 when it was first put forward?

Mr. {van der Vaart.} Yes, ma'am. Yes, ma'am. The--that is a good point. The previous discussion, I would warn you all, maybe appears to me, at least, setting up a straw man, the question of whether the codified versus the statute at large language actually controls. The fact of the matter is, it doesn't matter. Even if you take the statute at large, there is no ambiguity, and the reason is in 1990, the Clean Air Act, under Section 112 was fundamentally changed from a pollutant-based program to a source category-based program. And, therefore, the language in the statute at large is entirely consistent with what happened at that point.

Mrs. {Ellmers.} Um-hum.
Mr. {van der Vaart.} And I am afraid that the previous discussion, for one reason or another, may have missed that. And so it is very good that you keep that in mind. Thank you.

Mrs. {Ellmers.} And then getting back to some of the--there again, the discussion that took place in the first panel, you know, one of my questions is really about, you know, implementation of this, and especially when it comes to 111, in the building block number 4, and there again, Secretary, from your perspective, how can this possibly be enforced, or can you foresee a way that North Carolinians--or that the EPA would actually be able to enforce this on North Carolinians?

Mr. {van der Vaart.} That is a very good question, and we have thought very hard about it. Another misunderstanding that many people have about the Clean Air Act is that somehow 108 and 110 are implemented similarly to 111. That is not the case. When a state fails, for whatever reason, to submit an approvable plan under 110, 108, to protect NAAQS, the state itself is subject to sanctions including highway funds 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 plan, there is no downside for North Carolina as such as the government, however, the Federal Government will then enforce directly to the source. And so, Representative Ellmers, you are giving me a specter of what happens to my grandma when she--

3976 Mrs. {Ellmers.} Um-hum.

3977 Mr. {van der Vaart.} --doesn't screw in a CFL bulb in her house. Is she going to be thrown in jail by the feds? Am I going to be thrown in jail because I am somehow missing my obligation, or is the utility executive somehow going to get thrown in jail, when really maybe the EPA should be thrown in jail. So--

3983 Mrs. {Ellmers.} Well, there again, it is part of that ongoing discussion of, you know, comparing apples to oranges and, you know, kind of alternative universes when we are talking about this issue.

3987 My final question for you, Secretary van der Vaart, is, there again, looking towards our North Carolinians, is it economically feasible and fiscally responsible for us to
foresee a future where we go from a cost-based energy
dispatch model to a carbon dioxide-based dispatch model?
Mr. {van der Vaart.} It is—we can put a man on the
moon. We can certainly do this, but it will be at a cost,
and the—unfortunately, the people who are going to bear that
cost are the ones least able to afford it. It is going to be
our lower and middleclass folks, it is going to mean the job
losses for high-paying manufacturing jobs because electricity
prices is fundamental to citing of new manufacturing. So
yes, we can do it. Is it legal? Absolutely not. And, in
fact, as you heard, it is already been going on in a more
cost-effective manner by the states themselves.
Mrs. {Ellmers.} Um-hum.
Mr. {van der Vaart.} So what we have here is a Federal
Government attempt to upend, as I said, the world's greatest
electricity system through a little-known codicil in the
Clean Air Act.
Mrs. {Ellmers.} Thank you, sir.
And I will just close out by saying that, you know,
North Carolina has made such strides, and thank you, a lot of
it is due to your leadership and, you know, moving forward on
clean energy. And I believe North Carolina, and so many other states that have taken these steps already, need and deserve that credit. So thank you all to the panel. And thank you, Mr. Chairman. I yield back the remainder of my time.

Mr. {Whitfield.} Lady yields back. At this time, recognize the gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. {Johnson.} Thank you, Mr. Chairman. I appreciate it. And, Director Butler, thank you for joining us today from the great state of Ohio.

Lot of concerns there about the things that we have talked about this morning. Director Butler, it seems as if the Administration is ignoring the lawsuit that many states, including Ohio, are currently engaged in with the EPA, and instead they are solely focused on the implementation of the rule. Given all the legal issues surrounding EPA's 111(d) proposal, would you support the EPA setting aside the implementation planning until legal challenges are resolved?

Mr. {Butler.} Mr. Johnson, thanks for that question. I think, you know, Professor Tribe is far more eloquent than I
I am on these issues in the previous panel, but I think to your point, I think that is the exact request that we would have and have made to U.S. EPA to have them consider. I look at it from a state resource application. We will likely be, if the Clean Power Plan evolves as a final plan, much like the draft plan, and it still has what we believe are its legal flaws, will be challenging that law with many other states. That will not, unless things change, relieve us from the obligation to be developing at the same time in a parallel path, expending state resources to develop a plan of implementation in a very tight time schedule that, as you have heard, we don't think we can meet. Those are scarce state resources, frankly, we cannot and should not have to expend. So directly to your question, I would--have advised and asked U.S. EPA, because there is no compelling deadline relative to this issue about carbon, that we set this implementation issue aside and have our requisite debate about the legal issues, and then go from there.

Mr. {Johnson.} Well, let us expound on that a little bit. You know, states like Ohio, and others that we have talked to here today, are implementing a number of new and
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older EPA regulations ranging from the Mercy and Air Toxics Rules, to particulate matter standards, to new ozone rules. So can you expand a little bit, doesn't this put strain on state resources, and what happens if, on top of all of this, states also have to implement a final 111(d) rule that eventually could get thrown out in court? And the reason I say that is because we have seen that scenario before. The brick industry invested hundreds of millions of dollars into complying with a set of standards that the courts threw out, and then they got virtually no credit by the EPA for all that investment that they did, and the EPA certainly was not standing there ready to give them their money back. Secretary van der Vaart, if they do get thrown in jail, they had better not call me for bail money because I am not going to be at the table.

I--how do you feel about that, Mr. Butler?

Mr. {Butler.} Yeah. Mr. Johnson, I--thanks for that question. I think we have seen--we always are trying to comply with our delegated programs and certainly our air programs. We have made tremendous success in air quality in Ohio. We have seen an unprecedented number of regulatory
requirements come down the road.

So you mentioned the mercury rule. Not only does that, you know, add to the time commitment and planning and implementation for compliance, it is, frankly, having to shut down 1/4 of our coal generation fleet in the state of Ohio.

So we are concerned about that. Today, ironically, as we sit here is the same day that we are required to submit our comments on the proposed new ozone standard, and we are just on the cusp of, frankly, getting to the point of being statewide full compliance of the 2000 ozone standard—2008 ozone standard. I would love to, frankly, declare victory on that and say—but no, we are in a position now where we are having to decide whether or not we need to drop that standard further, and whether or not the science is supportive of that. We are, in addition, in the midst of looking at both the particulate matter and SO2 rules, and whether or not, frankly, we move down the path of having additional ozone transport regulations. And the list goes on.

So that puts an incredible strain on us as state regulators and implementers, and is, frankly, just an additional cost that we are requiring to our legislature to
pass on to customers.

Mr. {Johnson.} Well, thank you.

Mr.--Secretary van der Vaart, do you have a comment on that as well?

Mr. {van der Vaart.} Well, I would just like to emphasize again, America is moving toward cleaner energy. It is moving that direction because of the free market and our revolution in natural gas exploration and production. We are all states doing what we think is right in cleaning up the environment, and I think it is not a time to rush to judgment when we have such a flawed proposal.

Mr. {Johnson.} Thank you very much.

Mr. Chairman, I yield back.

Mr. {Whitfield.} The gentleman's time has expired.

And I want to thank all four of you for joining us today to discuss this significant issue.

I would like to also include the following documents in the record. Comments submitted to EPA on the proposed 111(d) rule by the Florida Public Service Commission, and the Florida Office of Public Counsel.

[The information follows:]
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Mr. Whitfield. And we will keep the record open for 10 days. I was going to come down and say hello to each one of you personally, but we have a vote on the floor and it is almost 15 minutes gone now, so I am going to rush out, but we look forward to working with you. Thank you very much.

And that adjourns today's hearing.

[Whereupon, at 1:39 p.m., the Subcommittee was adjourned.]