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

5 AND COST ISSUES

6 TUESDAY, MARCH 17, 2015

7 House of Representatives,

8 Subcommittee on Energy and Power

9 Committee on Energy and Commerce

10 Washington, D.C.

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

14 Members present: Representatives Whitfield, Olson,
15 Barton, Shimkus, Pitts, Latta, Harper, McKinley, Pompeo,
16 Kinzinger, Griffith, Johnson, Long, Elmers, Flores, Mullin,
17 Upton (ex officio), McNerney, Tonko, Engel, Green, Capps,
18 Castor, Sarbanes, Yarmuth, Loeb sack, and Pallone (ex

19 officio).

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

|

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

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

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

56 It appears that EPA is--excuse me just 1 minute. Given
57 the stringency of this EPA proposed rule regarding CO2
58 emissions that exist in coal plants, states are going to be

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

72 The North American Electricity Reliability Corporation
73 recently produced an initial analysis that questions the
74 validity of the basic assumptions underlying the rule, and
75 raised a multiple--a multitude of concerns as to how the rule
76 will affect the grid. This proposed rule has been described
77 as a power grab, extreme, radical, unprecedented, and a
78 violation of existing law. I agree with those
79 characterizations. Even EPA has acknowledged that a literal
80 application of Section 111(d) would likely preclude its
81 proposal because the electric generating units are already
82 regulated under Section 112. This proposed regulation would

83 create turmoil in the generation, transmission and
84 distribution of electricity. It is being proposed because
85 the President was unable to convince Congress to adopt a cap
86 and trade legislation, and he has made international
87 commitments without input or advice and consent from
88 Congress, and in his Georgetown speech, he committed the U.S.
89 to an extreme policy. It appears that EPA is trying to find
90 a way to implement the President's plan pursuant to his
91 international commitments, even though EPA has readily
92 acknowledged that this proposal would not make a measurable
93 difference in addressing climate change.

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

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

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

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

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

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

125 Now, I know that the coal producers are worried about
126 this, but my advice to them is embrace carbon sequestration.
127 Embrace it, because coal is going to be reduced whether we

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

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

140 Now, the administration's--the EPA's proposal, in my
141 opinion, is reasonable. It includes energy efficiency, it
142 includes looking for new, more efficient sources of energy,
143 and using demand issues to help us reduce our carbon
144 emissions. Now, the administration does have the
145 responsibility to take action to protect us from the effects
146 of climate change, so that is exactly what the Clean Power
147 Plan does. Fourteen states in the United States, including
148 my home state of California, have embraced this proposal. In
149 a letter to the EPA, they wrote that even greater levels of
150 cost-effective carbon pollution reductions from the power
151 sector are achievable in this time frame, using the system

152 described by the EPA. The EPA found that the power sector
153 could reduce its emissions by 26 percent below the 2005
154 levels under this initiative. That is a lot. Twenty-six
155 percent reduction of the 2005 levels. That is significant,
156 and that has put us in a leadership position. It has given
157 other state--other countries like China a motive to start
158 reducing their carbon emissions, which is absolutely critical
159 if we want to reduce carbon emissions in time to prevent the
160 worst impacts of climate change. So this is really a win-
161 win. But another thing that is really important is that the
162 level of the amount of outreach that was done with this
163 proposal was really unprecedented. The rule that we have in
164 front of us is not final, so it is important for us to
165 continue examining this issue, and to hear from all the
166 stakeholders, and work together to find something that is
167 going to benefit our Nation, put us in a leadership position,
168 increase the economy, economic growth, and help stop climate
169 change before the worst impacts are felt throughout the
170 United States and throughout the world.

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

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

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

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

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

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

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

185 The Clean Air Act has been around since 1970, and we
186 know from experience that it works best when implemented in
187 the spirit of cooperative federalism. We have proven that we
188 can accomplish a great deal to improve air quality when
189 federal and state governments work together as partners.
190 However, this proposed rule yanks the rug out from underneath
191 the states with EPA dictating to the states, and effectively
192 micromanaging intrastate electricity policy decisions to a
193 degree even the agency admits is unprecedented. This raises
194 a broad array of legal issues, not to mention that it is bad
195 policy.

196 As a result, many states are sounding the alarm about

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

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

219 Other EPA regulations like the Utility MACT rules have
220 already contributed to rising electric rates and growing

221 concerns about reliability. With the economy still far from
222 fully recovered, the last thing job creators need is another
223 expensive regulation likely to drive up energy prices. And
224 the last thing struggling families need is to see their
225 electric bills go up as well.

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

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

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

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

|
236 Mr. {Whitfield.} Gentleman yields back.

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

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

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

253 To that end, EPA has proposed a workable plan to reduce
254 emissions of carbon pollution from power plants, which are
255 the largest uncontrolled source of manmade greenhouse gases
256 in the U.S. Today, we will hear more about the Clean Power
257 Plan, but there are few features that merit emphasizing in
258 advance. First, the Clean Power Plan is not a one-size-fits-

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

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

279 And there are those who deny science. We--they claim
280 that climate change is not real or manmade, that it is caused
281 by natural cycles or sunspots, and that simply is untrue.
282 The world's leading scientists have told us that climate

283 change is happening, is caused by humans, and will have
284 extremely serious impacts. The republican-led Congress has
285 not listened to the scientists, and has yet to take action to
286 address these serious climate threats. And just saying no
287 isn't an option anymore. We must reduce our carbon
288 emissions, and the Clean Power Plan is a reasonable first
289 step.

290 So those who have concerns with EPA's plan have a
291 responsibility, in my opinion, to not just criticize it, but
292 also to propose alternative ways to achieve the same goal.
293 There are always those who are willing to make absurd
294 arguments on behalf of companies that profit from the status
295 quo, and we will hear today from some of that--some of these
296 that EPA's plan is not legal, that it is unworkable, that
297 some states may refuse to participate, but I think that those
298 making those arguments aren't really interested in finding
299 solutions to our carbon pollution problem. They are not
300 interested in developing a plan to help us reduce emissions,
301 while still maintaining a safe, reasonably-priced electricity
302 system. To quote the words of EPA Administrator McCarthy,
303 they are just trying to put their heads in the sand. They
304 are more than welcome to do that but history will not treat
305 them kindly. Keep this in mind as we listen today and during
306 future hearings and debates on the Clean Power Plan. I think

307 you will be able to recognize those who are simply arguing
308 for inaction on behalf of entrenched fossil fuel interests,
309 and compare them to those who want to act on climate change,
310 and also want the development of our path forward to be
311 thoughtful, sensible, and effective.

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

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

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

319 ***** COMMITTEE INSERT *****

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

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

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

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

|
339 ^STATEMENT OF LAURENCE H. TRIBE

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

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

347 First, the plan conflicts with settled principles of
348 federalism and Supreme Court precedent because it would
349 commandeer state governments, treating them more like
350 marionettes, dancing to the tune of a federal puppeteer, than
351 like laboratories of democracy. It would dictate the CO2
352 emissions target that each state must adopt within a year,
353 commanding every state to enact an EPA-approved package of

354 laws meeting that target by requiring power plants to shut
355 down or reduce operations, consumers and businesses to use
356 less electricity and pay more for it, and utilities to shift
357 from coal to natural gas and other energy sources; a total
358 overhaul of the states' way of life.

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

373 EPA's proposal also presents serious Fifth Amendment
374 problems. We are all CO₂ emitters, and atmospheric CO₂ is
375 the intermingled result of all human activity, but EPA would
376 impose costs, that ought to be borne equitably by everyone,
377 on a small group of power plants and companies after

378 requiring those same companies to invest billions of dollars
379 to reduce their non-CO2 pollutants over the past 25 years.
380 The Constitution demands just compensation to rectify that
381 bait and switch.

382 Now, courts would never assume a congressional design to
383 confer such revolutionary and constitutionally dubious power
384 on EPA unless Congress clearly said so. But far from it,
385 under the very Clean Air Act provision that EPA invokes,
386 Section 111(d), Congress expressly prohibited EPA from doing
387 exactly what it proposes to do here: regulate emissions from
388 coal-fired power plants under Section 111(d), when those same
389 power plants are already being regulated in costly ways under
390 Section 112. In 1995, EPA itself read the Clean Air Act to
391 prohibit such duplication, as did the D.C. Circuit Court of
392 Common Pleas Appeals in 2008, and the U.S. Supreme Court in
393 2011.

394 If the Clean Air Act's meaning were ambiguous, and it
395 isn't, settled principles of statutory interpretation would
396 mean that EPA and any reviewing court would have to interpret
397 the Act to avoid the constitutional difficulties that EPA's
398 interpretation raises under the Fifth and Tenth Amendments.
399 Now, to circumvent that avoidance, principle EPA resorts to
400 sheer fantasy. It claims that Congress enacted a law in 1990
401 that never made it into the U.S. Code, and that everybody has

402 been using the wrong version of the statute for the past
403 quarter century. Really? Crediting that story would call
404 into question dozens of similar statutory provisions
405 throughout the U.S. Code. The tale is pure fiction. There
406 is no mistake in the U.S. Code, but even if Congress had
407 truly tossed two different bills in the air and told EPA to
408 decide which one to catch and run with, that would be a power
409 Congress could not give away, and EPA could not recognize and
410 exercise. It is a law-making power that belongs only to you,
411 backed by a judicial power that belongs only to the courts.

412 EPA is attempting an unconstitutional trifecta; usurping
413 the prerogatives of the states, Congress and the federal
414 courts all at once. Much is up for grabs in this complex
415 area, but burning the Constitution of the United States,
416 about which I care deeply, cannot be part of our national
417 energy policy to deal with the problems of climate change.

418 Thank you very much.

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

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

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

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

|
425 ^STATEMENT OF ALLISON D. WOOD

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

429 I have practiced--

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

432 Ms. {Wood.} Absolutely.

433 Mr. {Whitfield.} Thank you.

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

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

444 Section 111(d) has always been a little-used provision
445 of the Clean Air Act that was designed to catch the handful
446 of sources that were not regulated under the Act's other

447 major provisions. Indeed, this provision has been used to
448 regulate sources only five times since 1970. The confusion
449 over this point comes from two amendments that were made to
450 Section 111(d) during the 1990 amendments to the Clean Air
451 Act, both of which appear in the statutes at large. EPA
452 claims this leads to ambiguity, but in fact, the codifiers
453 properly included in the United States Code only the House
454 amendment; the amendment that clearly precludes regulation
455 under Section 111(d) of source categories that are regulated
456 under Section 112. This was appropriate, given that the
457 managers of the Senate bill had expressly receded to the
458 House amendment.

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

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

495 Finally, it should be noted that litigation over this
496 rule will absolutely occur when it is finalized.
497 Unfortunately, litigation takes time, and states are going to
498 be forced to act before courts determine whether the Section
499 111(d) rule is lawful. State plans must be submitted within
500 1 year after the rule is finalized, unless a partial plan is
501 submitted and EPA grants an extension. These plans will be
502 very complex, and states have never before had to submit a
503 plan under Section 111(d) of this magnitude. Many states
504 will need to pass legislation as part of their plan
505 preparation. Regulations will need to be promulgated.
506 Litigation will not be resolved before these things happen.
507 Under this timing, any victory the states achieve will end up
508 being hollow. A victory will not be able to give the states
509 back the resources that were expended in plan development,
510 nor will it solve the issue of states having to go through
511 the time-consuming and uncertain process of unwinding
512 legislation and regulations that were passed to put the plan
513 in place.

514 Thank you again for the opportunity to testify today.

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

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

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

518 At this time, our third witness is Professor Richard
519 Revesz, who is the Lawrence King Professor of Law, Dean
520 Emeritus, Director of Institute for Policy Integrity at the
521 New York University School of Law. And thank you very much
522 for being with us today, Professor, and you are recognized
523 for 5 minutes.

|
524 ^STATEMENT OF RICHARD L. REVESZ

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

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

540 On the first point, for the past quarter of a century,
541 each President has taken measures to regulate the emissions
542 of existing power plants because they are the Nation's
543 largest sources of many harmful air pollutants, including
544 mercury, sulfur dioxide, and carbon dioxide. Under the
545 Administration of President George H. W. Bush, Congress

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

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

563 My second point on the constitutional issues. The first
564 claim made by opponents is there is a problem with the way
565 Congress delegated regulatory power to EPA under Section
566 111(d) because the House and Senate passed arguably
567 inconsistent amendments to the provision in 1990. Both the
568 House and Senate versions were then included in a conference
569 bill that was passed by each chamber and signed by President

570 George H. W. Bush. In all of our history, the Supreme Court
571 has struck down only two statutory provisions as
572 constitutionally impermissible delegations to an
573 administrative agency, both in the mid-1930's, during its
574 skirmishes with President Franklin Roosevelt over the New
575 Deal. Supreme Court has never invalidated a federal statute
576 on non-delegation grounds on the basis of the argument that
577 opponents of the Clean Power Plan now advance: that a
578 statute has arguably inconsistent provisions. Instead, the
579 courts have consistently dealt with this problem by finding
580 ways to develop a workable interpretation of the statute.

581 Opponents of the Clean Power Plan make a similarly
582 farfetched argument the plan violates the Takings Clause of
583 the Fifth Amendment, which protects private property rights.
584 A regulation leads to a Takings violation only if it deprives
585 an owner of essentially all of the value of his or her
586 property, which is not the case here. And even if it were,
587 the appropriate remedy is a subsequent suit for compensation,
588 not the invalidation of a nationwide rule.

589 Finally, opponents claim that the Clean Power Plan runs
590 afoul of the Tenth Amendment's prohibition against the
591 commandeering of state institutions by the Federal
592 Government. This extreme and unsupported interpretation of
593 the Tenth Amendment would invalidate many of the core

594 provisions of the Clean Air Act, not only Section 111(d), in
595 fact, it is the basis for how the National Ambient Air
596 Quality Standards under the Clean Air Act, which are the
597 centerpiece of the statute, and have been its centerpiece
598 since 1970, are administered. And nothing here is
599 commandeered anyway. The states are merely given the option
600 to submit plans if they choose to do so. If they do not, the
601 Federal Government has the authority to impose federal
602 implementation plans that give rise to no constitutional
603 problem at all because they do not involve state
604 institutions.

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

618 deference in the courts.

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

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

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

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

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

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

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

640 Ms. {Wood.} Outside the--

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

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

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

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

657 Ms. {Wood.} No.

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

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

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

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

667 Mr. {Whitfield.} Right.

668 Ms. {Wood.} --energy consumption. I mean that could
669 also arguably fall within the building block four, which is
670 designed to have consumers use less electricity.

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

676 automobile.

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

679 Mr. {Whitfield.} Yeah.

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

682 Mr. {Whitfield.} Yeah.

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

685 Mr. {Whitfield.} Yeah.

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

687 Mr. {Whitfield.} Yeah.

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

689 Mr. {Whitfield.} Yeah.

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

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

694 Mr. {Tribe.} Mr. Chairman, I agree very much that it is
695 a radical change, and it is a radical change that bears on
696 what this committee needs to think about in several ways.
697 First of all, I think it shows how unrealistic is the claim
698 that, you know, there is nothing going on here, just move
699 along, don't bother, which is, I think, the essence of

700 Professor Revesz's testimony. No constitutional problem,
701 nothing new. But it is radically new. I mean we should all,
702 I think, be honest with ourselves. Yes, many people think
703 that there are severe problems that need to be addressed, but
704 the question is do we care about the rule of law and how we
705 go about addressing them.

706 Mr. {Whitfield.} Right.

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

711 Mr. {Whitfield.} Right.

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

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

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

723 Mr. {Whitfield.} Yeah. Well, why wouldn't they

724 regulate under Section 108?

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

731 Mr. {Whitfield.} Right.

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

735 Mr. {Whitfield.} Right.

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

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

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

747 Mr. {Whitfield.} Yeah.

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

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

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

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

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

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

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

778 Mr. {McNerney.} Your speaker.

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

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

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

811 And on the Tenth Amendment point, and I wanted to stress
812 something that was very important, the cooperative federalism
813 model that is the core of the Clean Air Act provides for
814 federal standards, gives the states an opportunity to come up
815 with state implementation plans, and if they don't, the
816 Federal Government can act and impose a federal
817 implementation plan. This is the scheme under Section 108
818 through 110 that the chairman mentioned. It is the way
819 National Ambient Air Quality Standards are done in this

820 country. These are the standards that have saved hundreds of
821 thousands of lives. They are the most successful federal
822 environmental program ever. And if Section 111(d) has the
823 Tenth Amendment problem, as Professor Tribe ascribes to it,
824 Section 109 would have exactly the same problem because it is
825 exactly the same cooperative federalism model. And, in fact,
826 it--Section 111(d) uses pretty much the same language as
827 Section 109.

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

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

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

836 Mr. {Revesz.} Could--if I could say something about the
837 unprecedented nature of this regulation that Professor Tribe
838 and Ms. Wood alluded to. There is nothing of that sort. I
839 mean just last term, the Supreme Court upheld an important
840 EPA rule that regulates the interstate emissions where the
841 statute says that it prohibits any source from emitting any
842 air pollutant that will significantly contribute to
843 environmental problems in downwind states. And EPA

844 authorized states to adopt trading mechanism that go beyond
845 imposing controls on particular sources. This issue was
846 litigated before the Supreme Court. Its opponents argued EPA
847 didn't have the authority to do that because the statute said
848 refer to any source, and in the end, the Supreme Court upheld
849 that regulation on a 6-2 vote with Justices Scalia and Thomas
850 dissenting.

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

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

856 Mr. {Whitfield.} Gentleman yields back.

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

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

860 I don't normally reread parts of testimony, but I am
861 going to in this case read the first--second--some of the
862 paragraphs of Professor Tribe because I think he lays out
863 pretty explicitly and clearly what this is all about. This
864 is at least his executive summary of his testimony today, and
865 I quote, ``EPA lacks the statutory and constitutional
866 authority to adopt its plan. The obscure section of the
867 Clean Air Act that EPA invokes to support its breathtaking

868 exercise of power in fact authorizes only regulating
869 individual plants and, far from giving EPA the green light it
870 claims, actually forbids what it seeks to do. Even if the
871 Act could be stretched to usurp state sovereignty and
872 confiscate business investments the EPA had previously
873 encouraged and in some cases mandated, as this plan does, the
874 duty to avoid clashing with the Tenth and Fifth Amendments
875 would prohibit such stretching. EPA possesses only the
876 authority granted to it by the Congress. It lacks implied or
877 inherent powers. Its gambit here raises serious questions
878 under the separation of powers Article I and Article III
879 because EPA is attempting to exercise lawmaking power that
880 belongs to Congress, and judicial power that belongs to the
881 federal courts. The absence of EPA legal authority in this
882 case makes the Clean Power Plan quite literally a power grab.
883 EPA is attempting an unconstitutional trifecta: usurping the
884 prerogatives of the states, Congress and the federal courts
885 all at once. Burning the Constitution should not become part
886 of our national energy policy.''

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

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

891 Mr. {Barton.} Some people have said that, okay. I

892 would also assume that the committee can stipulate that you
893 are an expert in regulatory authority or environmental
894 issues, is that also fair to say?

895 Mr. {Tribe.} Again--

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

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

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

899 Mr. {Tribe.} Um-hum.

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

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

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

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

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

915 Mr. {Tribe.} Well, he just misdescribed the cases. The

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

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

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

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

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

948 And with that, I yield back.

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

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

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

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

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

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

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

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

1000 The opponents would like us to ignore the Senate
1001 Amendment entirely, and they would like to give the House
1002 Amendment a particular gloss, and it is a gloss that involves
1003 rewriting the statute. The statute uses two--twice the word
1004 or, and they would like us to instead supplant the word and.
1005 The word and would be more convenient for them, but actually,
1006 the statute has the word or. So not only would we have to
1007 ignore the Senate Amendment, which there is no basis for
1008 doing, but we also would have to rewrite the House Amendment,
1009 and we would have to go through an additional hurdle which is
1010 not giving EPA the deference that it is due under traditional
1011 principles of statute interpretation as embodied in the

1012 Chevron case.

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

1025 Let me give you an example. When I was growing up in
1026 Argentina, where I was born, when I had a fever my mother
1027 would give me a mercury thermometer. These things aren't
1028 sold in this country because they are dangerous, and instead,
1029 we use digital thermometers. If using the logic of the
1030 opponents of the Clean Power Plan, the product would be a
1031 mercury thermometer as opposed to a thermometer and,
1032 therefore, a regulation that might actually bring mercury
1033 thermometers out of business might be considered suspect, but
1034 we have never used a principle like this for regulation in
1035 this country, for good reason, because doing so entrenches

1036 bad technologies and stands in the way of innovation. The
1037 product here is not electricity produced by coal-fired power
1038 plants, it is usable electricity delivered to the consumers'
1039 home.

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

1041 Mr. {Whitfield.} Thank you.

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

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

1046 This hearing is about one document; this Constitution.
1047 I have had this in my pocket for over 2 decades now. It is
1048 kind of worn, comes out by pages, but it is still is very
1049 much alive.

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

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

1060 it has actually extended it from 9 months to 13.

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

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

1068 Mr. {Olson.} And this is for you, Mr. Tribe, as well as
1069 Ms. Wood. In light of the typical period for developing
1070 state implementation plans under the NAAQS Programs, does
1071 EPA's accelerated timeline in the Clean Power Plan for
1072 submitted state plans raise concerns? Constitutional
1073 concerns, can you do it, yes, no, reliable, whatever?

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

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

1078 Mr. {Tribe.} Well--

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

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

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

1084 Mr. {Tribe.} --one point which I think is absolutely
1085 crucial to that little document that you are holding, and
1086 that is the suggestion that we should defer to EPA on which
1087 of the 2 versions of this law, are really the law of the
1088 land. Let me be absolutely clear, it was not some
1089 functionary, it was the Senate conferees on October 27, 1990,
1090 who said we recede to the House version. The Senate version
1091 couldn't be implemented because it was just a clerical thing
1092 that referred to something that no longer existed. So that
1093 is absolutely clear. This ghost version of the law that
1094 Professor Revesz wants to resurrect, and I don't know why he
1095 would bother if the law as it really is in the books
1096 supported what they are doing, but I don't have time to go
1097 through the grammar to show why it doesn't, this ghost
1098 version doesn't exist. There may be ghosts, but this ghost
1099 is a nonexistent one. And now what he is saying is that
1100 because courts generally defer to agencies like EPA, when
1101 they take a statute that is ambiguous and interpret it one
1102 way or another, it should also somehow follow that when
1103 Congress tosses a law into the air, and there is another
1104 ghost competing with it, it is okay for the EPA to grab the
1105 ghost and run with it. What kind of version of the
1106 Constitution is he reading? Certainly not the one you have
1107 in your pocket.

1108 Mr. {Olson.} Yes, sir. I mean I am looking through
1109 this document. It has also the Declaration of Independence
1110 and the Constitution, 27 amendments, I don't see a ghost
1111 version anywhere in this document. So that is great insight.

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

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

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

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

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

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

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

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

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

1148 Professor Revesz, you have cited the *Whitman v. American*
1149 *Trucking Association* opinion as one of the most important
1150 environmental decisions overall in the history of the Supreme
1151 Court, and you say it has particular import for the Clean
1152 Power Plan. That was a case--who was the author of that
1153 case?

1154 Mr. {Revesz.} Justice Scalia.

1155 Ms. {Castor.} Justice Scalia. The central issue was

1156 the delegation of authority, whether it was constitutional or
1157 unconstitutional, is that right?

1158 Mr. {Revesz.} That is correct.

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

1162 Mr. {Revesz.} Right.

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

1164 Mr. {Revesz.} Right. Thank you. So that was a case in
1165 which Professor Tribe wrote a Brief, arguing that the Clean
1166 Air Act was--involved an unconstitutional delegation of
1167 legislative power to the administrative agency. Justice
1168 Scalia was widely regarded at the time, and still is, as the
1169 greatest friend of non-delegation doctrine in the Supreme
1170 Court, and Justice Scalia writing for unanimous court
1171 rejected the non-delegation argument. It was rejected
1172 unanimously by a vote of 9 to 0. And that case is relevant
1173 to this situation because that was the last time that a broad
1174 non-delegation argument was made challenging a major
1175 environmental provision. It was a provision of the--

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

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

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

1179 Mr. {Revesz.} It is the Clean Air Act as well, the very

1180 same statute. And Professor Tribe made his argument, just
1181 like he is making it now, and it was unanimously rejected by
1182 the Supreme Court.

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

1193 What the Senate manager said about receding would have
1194 been really interesting and very important if, in fact, they
1195 had carried out what they said and withdrawn the language,
1196 but the language was not withdrawn, it was passed by both
1197 bodies and, therefore, it became a law. Not a ghost law, a
1198 real law. And what EPA is asked to do here is not, as
1199 Professor Tribe said, to pick whether it likes the House
1200 Amendment better than the Senate Amendment, the question is
1201 whether these conflicting provisions of the federal statute
1202 can be properly reconciled. That is the business of an
1203 administrative agency, and an agency takes a first crack at

1204 doing that. EPA is not going to say we like the Senate
1205 Amendment better, it is going to say we think we can give
1206 both meaning to both the House Amendment and the Senate
1207 Amendment. And if they do it appropriately, the courts will
1208 defer to their interpretation. And if they don't do it
1209 appropriately, the courts will strike it down. And that
1210 issue is now being litigated, as Professor Tribe noted,
1211 before the D.C. Circuit, and it is going to get argued on
1212 April 16, but certainly, that is the standard tool of statute
1213 interpretation. That cannot, under any plausible guise,
1214 become a constitutional problem.

1215 Ms. {Castor.} And if it was unconstitutional, what
1216 would happen to a whole range of environmental protection
1217 laws in America?

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

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

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

1231 I yield back my time.

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

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

1235 Mr. {Shimkus.} Thank you for all you smart people for
1236 being here. This has really be educational and enlightening,
1237 and unfortunately, it is going to have real consequences.

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

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

1247 Mr. {Shimkus.} Briefly.

1248 Mr. {Tribe.} No.

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

1250 Ms. {Wood.} No.

1251 Mr. {Shimkus.} Professor Revesz, you seem to think

1252 there is. How can there be two amendments when there--when
1253 you vote on a conference bill with language that has been
1254 given up by the Senate?

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

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

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

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

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

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

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

1265 Mr. {Shimkus.} All right.

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

1267 Mr. {Shimkus.} All right.

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

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

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

1275 Mr. {Shimkus.} You would have multiple definitions of

1276 the language that was supposedly passed by the Legislative
1277 Branch.

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

1279 Mr. {Shimkus.} Okay.

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

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

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

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

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

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

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

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

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.

1321 Mr. {Shimkus.} And as we have had discussions here, the
1322 real-world implications are trying to comply financially.
1323 The difference between the Clean--some of the Clean Air Act

1324 and sulfur dioxide was that we had technology to do it.

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

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

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

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

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

1340 Mr. {Shimkus.} Um-hum.

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

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

1347 And I yield back.

1348 Mr. {Whitfield.} Thank you.

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

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

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

1358 Just one quick note. This isn't new in terms of the EPA
1359 taking it upon itself, if you will, or trying to implement
1360 some kind of legislation. I understand the arguments just
1361 how far they are going, whether they are going too far or
1362 not. As you all know, long ago, you know, Ted Lowey talked
1363 about how, you know, regulatory agencies often go much
1364 further than Congress ever intended them to go, and we are
1365 going to continue the debate whether the EPA is going too far
1366 or not. There is no question about that.

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

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

1379 Mr. {Loebsack.} Um-hum.

1380 Mr. {Revesz.} Here, that is not what happened. It
1381 wasn't that there were conflicting House and Senate versions,
1382 and the conferees chose the House version. The House version
1383 then became the bill that was voted on by both chambers and
1384 signed by the President. That is not what happened. What
1385 happened was that both the House version and the Senate
1386 version made it into the bills that were voted by both
1387 Houses, they made it into the statutes at large, they were
1388 signed by the President, and they are both duly enacted laws
1389 of the United States.

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

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

1395 Mr. {Tribe.} It seems to me that an act of Congress, or

1396 a series of congressional enactments, is the only legal way.

1397 Mr. {Loebsack.} Um-hum.

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

1402 Mr. {Loebsack.} Um-hum.

1403 Mr. {Tribe.} Congress could fund alternative energy
1404 sources, put a huge amount of emphasis, as the government
1405 already is doing to some extent, on solar, on wind, on
1406 geothermal, but it really would take an act of Congress. It
1407 is just not enough for an agency to do it on its own. And
1408 here, even if there were, as Professor Revesz thinks, two
1409 laws that Congress did pass, assume he is right for the
1410 moment and--because both of them made it into the statutes at
1411 large, an agency would have to reconcile them, as he says,
1412 but you can follow both at one, that is, each of them
1413 precludes the EPA from regulating certain things. The Senate
1414 version focused on the pollutant, the House version focused
1415 on the source. You could obey both. There is no need to
1416 choose between them, and choosing between them is not an
1417 exercise of delegated power.

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

1420 you said, and you have the--

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

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

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

1424 Mr. {Loebsack.} --very environmentally-minded over the
1425 years. If you could, you mentioned cap and trade, are there
1426 other kinds of things that Congress could do?

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

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

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

1435 Mr. {Loebsack.} Um-hum.

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

1441 Mr. {Loebsack.} Um-hum.

1442 Mr. {Tribe.} Now, there is a problem. A lot of my
1443 friends tell me, look, don't be an idealist, don't be

1444 utopian. Congress isn't going to do anything so why are you
1445 so hot about the EPA violating the law and the Constitution?
1446 Well, it is just, I guess, the way I was brought up. I think
1447 the law and the Constitution matter.

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

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

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

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

1473 Thanks, Mr. Chair.

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

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

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

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

1487 Mr. {Tribe.} I think that what the court said in the
1488 case that you are quoting, which was Utility Air Regulatory
1489 Group v. EPA, would apply many times over to this plan, and
1490 in particular, in that very case the court addressed the
1491 point that Professor Revesz just made. Yes, air pollutant in

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

1506 Mr. {Latta.} Well, okay. Professor Tribe, also then,
1507 the Clean Air Act places limits on the EPA's authority to use
1508 the Section 111(d) to regulate existing sources that are
1509 already subject to regulation for hazardous air emissions
1510 under Section 112. Does this prohibit the EPA from
1511 regulating coal-fired utilities under Section 111(d)?

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

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

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

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

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

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

1524 Mr. {Tribe.} Well, two reasons. First of all, what it
1525 is doing is not interpretation, it is revision. It is
1526 picking a statute that Congress did not enact, and that is
1527 not something to which the courts would ever defer.
1528 Secondly, the principle of deference under a case called
1529 Chevron only kicks in where there is an ambiguity, and here
1530 there isn't an ambiguity. And besides, deference is trumped
1531 by a principle called constitutional avoidance, that is, the
1532 Supreme Court has said, and the D.C. Circuit has said, that
1533 when an ambiguous statute, and I maintain this is not
1534 ambiguous, would cause constitutional problems if you defer
1535 to the agency's interpretation of it, then you don't defer,
1536 so that even if deference were otherwise available, here it
1537 would be trumped by the serious constitutional problems that
1538 I have outlined, haven't had time to talk about in detail,
1539 but my statement in written form explains why, for example,

1540 even though the property is not being totally destroyed, this
1541 is a violation of the Fifth Amendment, and explains a number
1542 of other things. So given those constitutional problems,
1543 which I don't think have been solved--

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

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

1546 Mr. {Latta.} --if I can just follow up with one
1547 question here because I am short on time. The Clean Air Act
1548 as a whole, and Section 111(d) in particular, are based on
1549 principles of cooperative federalism and are designed to give
1550 states autonomy and flexibility, and implementing emission
1551 control programs does the proposed rule strike an appropriate
1552 balance between the EPA and the states?

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

1564 implement it locally. That is not what is going on here.

1565 What is going on here is radically different.

1566 Mr. {Latta.} Thank you.

1567 Mr. Chairman, my time has expired.

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

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

1571 Mr. {Green.} Thank you, Mr. Chairman, and ranking
1572 member for holding the hearing. I want to thank our--both
1573 our panels of witnesses to be here today.

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

1588 that is what we have been sent here to do, and I look forward
1589 to both panels.

1590 Professor Tribe, your testimony, a portion that jumped
1591 out at me is on page 11 where you say it makes far more sense
1592 to address climate change by legislation. I couldn't agree
1593 with you more, but without congressional action, the federal
1594 agencies are acting under the existing authority given by the
1595 Supreme Court. Professor Tribe, in your testimony on page
1596 14, you address EPA's reference to the Chevron USA case. It
1597 is my understanding Chevron created a two-part test to
1598 determine regulatory authority. There are many attorneys in
1599 Washington and D.C. and around the country making large sums
1600 of money advising clients on which version of the House or
1601 Senate Amendment the Clean Air Act are law. If the Supreme
1602 Court agrees to hear this case, is it your argument that
1603 Congress spoke directly to the question at issue, or do you
1604 believe the court will rule on the agency's interpretation?

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

1611 Mr. {Green.} Okay.

1612 Mr. {Revesz.} If I can just for a minute--I mean in
1613 that case, EPA was trying to regulate 86 percent of the
1614 greenhouse gas--of the carbon dioxide emissions of certain
1615 stationary sources. The court in that case allowed EPA to
1616 regulate 83 percent of those emissions. Justice Scalia
1617 indicates that in his opinion. It only deprived the EPA of
1618 the authority to regulate the last 3 percent, and that was
1619 because that statute had a particularly--had a specific
1620 numerical provision that would have required EPA to either
1621 regulate a much larger number of sources than EPA wanted to
1622 do, or else disregard the number. And as a result of that
1623 problem, the Supreme Court deprived EPA of the authority to
1624 regulate the last 3 percent of those emissions, but allowed
1625 EPA to regulate 83 percent of the emissions of these
1626 stationary sources.

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

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

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

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

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

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
1678 hear some of these discussions. I know ultimately the
1679 decision is going to be made by the courts, but it helps us
1680 to understand a little bit of these issues, particularly
1681 between 112 and 111(d), but I don't think the American public
1682 gives a hoot. They really don't. They just want to make
1683 sure that Johnny has a job, and their electric rates are

1684 going to be reasonable for them to be able to continue. And
1685 I see us getting caught up. We start chasing these rabbits,
1686 that they get us distracted from where we need to be.

1687 I will be the first to tell you that I--do I think
1688 climate change is occurring? Absolutely. I think it is.
1689 But we have taken this simplistic route to go this direction,
1690 and so what I want to do is get back more to the fundamental.
1691 You all were chasing this rabbit all the way down. You are
1692 arguing over 112 and 112--111(d), and you are talking about
1693 phantoms and ghosts, I think. Don't care. What are we going
1694 to do? What are we doing here with this fight? I would like
1695 to get back to the more basic where we are, because under the
1696 United Nations it said that 96 percent of the CO2 emissions
1697 are naturally occurring. Only 4 percent of all the CO2
1698 emissions of the world are anthropogenic, manmade. See, I
1699 can use the term like you all. Only 4 percent. And then
1700 they go--and the United Nations goes on to say that all coal-
1701 fired powerhouses in America, if you shut off every--
1702 terminated a coal-fired power--every one of them shut down in
1703 America, under the United Nations, said you only reduce the
1704 CO2 emissions by 2/10 of 1 percent. That is not my
1705 statistic, that is from the United Nations, 2/10 of 1
1706 percent.

1707 So what I am doing, I am the engineer in the room here

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

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

1722 Mr. {Tribe.} Well, my grandchildren ask a similar
1723 question, which shows how wise you are, because I think my
1724 grandchildren are smart as whips. Grandpa, why are you
1725 worried about this 111 and 112 stuff? Is the world going to
1726 be destroyed? And then I tell them, well, there is this
1727 agency and it says if you do what it wants, it--they are not
1728 going to save the world, in fact, maybe by the year 2100,
1729 they will prevent the oceans from rising as much as, well, 2
1730 sheets of your paper. But they think that by making a start,
1731 it is good, better than nothing. Well, you know, your

1732 grandpa spends his life teaching about the Constitution, and
1733 so I sort of put that into balance. That is part of--you
1734 know, there are a lot of details there, they look like
1735 rabbits going into rabbit holes, but that matters because in
1736 the long run, all those rabbits add up to something that this
1737 country has built. And then they ask a different question.
1738 They say, well, if we make a start, isn't that good? And
1739 then I try to give them the old proverb, you can't leap
1740 across a chasm in two steps, you know. Jumping halfway or
1741 even 1 percent of the way might do a lot more harm, like
1742 splat on the bottom of the chasm, than not doing this at all
1743 and looking for something else. What would you do, Grandpa?
1744 And then I say I am not an expert in that stuff.

1745 Mr. {McKinley.} Ms. Wood?

1746 Ms. {Wood.} I wanted just to expand for a second on
1747 what Professor Tribe was saying about, you know, needing to
1748 make a start and wanting to build on something. I think it
1749 is important to recognize here that if these sources are not
1750 regulated under Section 111(d), they are regulated under
1751 Section 112, and that is what is prohibiting the 111(d).
1752 Under 112, these sources have to put on maximum available
1753 control technology, maximum. So it is not as though these
1754 sources are not going to be controlled. And more
1755 importantly, in terms of when you start talking about carbon

1756 dioxide, I think it is also important to note that EPA has
1757 said that the carbon benefits from that maximum available
1758 control technology are estimated to be \$360 million annually.
1759 So it is not as though there isn't a start being made.

1760 Mr. {McKinley.} Right. And my time has run out, but I
1761 just want to--I would rather us be focusing on something more
1762 practical than this ideological--why aren't we doing energy
1763 efficiency, why aren't we looking at more research into clean
1764 coal technology, but to simply go after it and start doing
1765 this and costing us jobs I think is incredibly naive.

1766 Thank you, and I yield back.

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

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

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

1771 Thanks to the witnesses.

1772 After listening to this discussion, I am not sure I am
1773 happy or sad that I dropped out of law school years ago. I
1774 think I am happy. But I want to go back to--you mentioned
1775 the Massachusetts v. EPA case, and I--what we were debating
1776 the Waxman-Markey bill several years ago, 2009, and so forth.
1777 That was kind of the motivating factor, I think, for many of
1778 us at that point, that if the Supreme Court had said that we
1779 have to regulate carbon dioxide, wouldn't it be better for

1780 Congress to act and create a mechanism for dealing with it
1781 than trusting the EPA to be flexible enough to deal with
1782 states like my own, and Congressman McKinley's as well. So I
1783 am curious because I never--I have heard some difference of
1784 opinion, and I don't want to start another debate, on whether
1785 that decision actually mandated, made it compulsory for EPA
1786 to regulate CO2 or just basically said--made it permissive.
1787 Could you--you are shaking your head, Ms. Wood, do you want
1788 to answer that?

1789 Mr. {Revesz.} Well--

1790 Mr. {Yarmuth.} Or either one.

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

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

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

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

1827 Mr. {Revesz.} Right.

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

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

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

1838 I want to get to a question real quick with Ms. Wood.
1839 In your issue about whether or not we regulate the product or
1840 go outside the fence, or so forth, if under a state's plan,
1841 the state utilities, power companies, offered incentive--
1842 financial incentives for conservation to its customers, would
1843 that fit within your conclusion of being something that would
1844 be consistent with your interpretation of what EPA can
1845 regulate, even though in this case it might be--it would be
1846 voluntary, I mean the states would be doing it, not EPA, but
1847 EPA would have to approve the plan?

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

1849 Mr. {Yarmuth.} Um-hum.

1850 Ms. {Wood.} --is in how the targets are set versus the
1851 flexibility that you could use to meet that target. And I

1852 think this is a key distinction that needs to be made. And
1853 the issue isn't whether a power company could do what you are
1854 saying to meet the target, the question is should those types
1855 of things be considered in determining what the target is.
1856 And to that, my answer is no, the Clean Air Act doesn't
1857 permit that. 111 has always been understood to begin and end
1858 at the source.

1859 Now, in the Clean Air Mercury Rule that EPA did several
1860 years ago, they did have flexible cap and trade mechanism to
1861 meet that limit, but the target itself and the limit itself
1862 was based on technology that could be applied at every unit.
1863 So you started with activated carbon injection, and you
1864 figured out what the rate would be at each unit, but then you
1865 allowed flexibility in terms of how you would meet that.

1866 So in your example, I think that would be permissible in
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.
1888 Doesn't matter what the issue is. Jefferson is very clear in
1889 the Manual of Parliamentary Practice. When there are
1890 differences between the two Houses, they get together in a
1891 conference and they work those differences out. If both
1892 Houses adhere to their position, the bill itself dies. It is
1893 not for you to say today that the bill should die if there is
1894 some confusion because there are two different versions.
1895 There are not two different versions, there is one version.
1896 It could not have passed to of both Houses, gone through a
1897 Conference Committee, and gotten to the President's desk
1898 unless there was one version, and one version exclusively.

1899 And then we get to the point that Professor Tribe made,

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

1904 Mr. {Tribe.} Thank you.

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

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

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

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

1924 Mr. {Tribe.} Um-hum.

1925 Mr. {Griffith.} EPA promulgated the CAMR regulations
1926 for existing EGUs under Section 111(d). This is a court
1927 opinion by the Circuit Court in D.C. This is what I am
1928 saying here. For existing EGUs under Section 111(d), but
1929 under EPA's own interpretation of the section, it cannot be
1930 used to regulate sources listed under 112.

1931 Mr. {Tribe.} Right.

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

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

1944 Mr. {Tribe.} So--

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

1948 waste of time, as Mr. McKinley said?

1949 Mr. {Tribe.} I think, because that case was New Jersey,
1950 the EPA--it is only New Jersey that could make that
1951 collateral estoppel argument. Other people confronted by an
1952 EPA that says we have now changed our minds, like Robert
1953 Jackson once said, it does--the matter does not appear to me
1954 now as it appears to have appeared to me then, other people
1955 are not going to be able to estop the EPA. But the EPA is
1956 free to make these arguments, I just think they are wrong and
1957 will lose.

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

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

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

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

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

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

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

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

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

1989 I don't know that I have a whole lot to add or more to
1990 ask, but we have talked about phantoms and we have talked
1991 about ghosts, and we are now getting to a dead horse in terms
1992 of beating it over this issue of the interpretation. I
1993 gather that the crux of this is whether the EPA's pursuit of
1994 the Clean Power Plan is warranted or authorized under Section
1995 111(d), and I think it is to this question of whether it is

1996 seeking to balance and interpret the conflict between these
1997 two amendments is appropriate or not appropriate.

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

2003 Mr. {Tribe.} Well, I have tried to encapsulate the
2004 essence of it, but it is--what I submitted is over a 50-page
2005 document, and I do think courts will pay attention to the
2006 several different parts of the argument. One, that even if
2007 Congress did give this power to the EPA, it would violate
2008 basic principles of federalism, and that is one reason that a
2009 court would not interpret Congress' having done so. Two,
2010 that there are powerful issues about the statute itself, and
2011 the EPA's authority to go beyond a statute. And three,
2012 separation of powers issues that arise out of the EPA's
2013 recognition that because the statute is written doesn't quite
2014 do what they want to do, they have created a magical mystery
2015 tour through the parliamentary procedure to say, well, there
2016 are two statutes. And although I have suggested, both here
2017 and in my written testimony, that if there really were two,
2018 which doesn't happen, they could follow them both by both
2019 outlawing the regulation of pollutants that are covered by

2020 112, and outlawing the regulation under 111(d) of sources
2021 under 112.

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

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

2035 If I can just take a moment to respond to an issue that
2036 Mr. Griffith raised. There is clearly only one version of
2037 the statute. There has to be only one version. That one
2038 version includes arguably inconsistent provisions. They are
2039 arguably consistent, and arguably inconsistent, but they were
2040 both voted on by both chambers and signed by the President.
2041 And the CAMR case is different because in the CAMR case, the
2042 problem was that EPA had initially sought to regulate mercury
2043 emissions under Section 112, then in Bush Administration

2044 decided to regulate under 111(d), but it was trying to
2045 regulate the same mercury emissions, the same hazardous air
2046 pollutant. Everyone concedes that EPA cannot invoke Section
2047 111(d) to regulate a hazardous air pollutant that is being
2048 regulated under Section 112. But here the issue is the
2049 greenhouse gases are not hazardous air pollutants regulated
2050 under Section 112, so the CAMR case is actually an opposite
2051 to this problem, but I am sorry, I took up a little bit of
2052 your time.

2053 Mr. {Sarbanes.} No, actually, that was--I was going to
2054 ask you to add whatever you think is left on this question.
2055 Can you real briefly, in 43 seconds, just give me a little
2056 bit more of your perspective on why the Takings issue is not
2057 determinative here?

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

2065 Mr. {Sarbanes.} Thank you.

2066 Mr. {Tribe.} Could I--

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

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

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

2070 Mr. {Tribe.} We have never suggested striking down the
2071 law. Compensation is all we have talked about, but ever
2072 since The Steel Seizure Case, the Supreme Court has said that
2073 an agency, and that--even the President is not allowed to
2074 impose a bill on the American taxpayers for compensation
2075 unless Congress, which has the power of the purse, has
2076 clearly authorized the action that is going to require the
2077 compensation. That is all we have been talking about under
2078 that part of our--

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

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

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

2091 At this time, recognize the gentleman from Missouri, Mr.

2092 Long, for 5 minutes.

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

2095 I--when we started this hearing, I didn't have this
2096 document in my hand. And I represent the Seventh District in
2097 Missouri, which is Springfield, Joplin, Branson, Missouri,
2098 and we have a lot of successful businesses that germinated
2099 there. Bass Pro Shops started from nothing and has become
2100 what it is today. O'Reilly Automotive, which is across the
2101 United States, very successful company. We have a great
2102 medical community there, a lot of successful businesses, and
2103 a lot of people that just want to raise their kids in a good
2104 part of the country. Have a good job, raise their kids, have
2105 a nice place to raise their family. And I saw in my notes
2106 today, my little handy-dandy pocket card here, that the city
2107 of Springfield was coming to see me today, and I thought that
2108 is great. They think enough of me to come and talk to me
2109 about some issues that they have pressing. I am glad they
2110 came to Washington to see me, but they didn't come to
2111 Washington to see me, they came for a conference. And the
2112 reason they came to this conference, there were two cities of
2113 the United States that were invited to the conference to
2114 speak on this. One was Richmond, Virginia, and the other was
2115 Springfield, Missouri. And the reasons is they have done

2116 such a good job, such a forward-thinking job with these
2117 different issues that we are discussing here today.

2118 I want to read you just a little snippet of what we
2119 have, and then kind of ask you all's suggestion on something.
2120 But this is from Mayor Bob Stephens, Mayor of Springfield,
2121 Missouri. Affordability and unfunded environmental mandates.
2122 And like I say, the--you can think what you want about
2123 things, but I stepped off in a side room here and got this in
2124 our meeting, I couldn't run back to my office and meet him
2125 over there, so I was required to meet him here due to time
2126 constraints. Affordability and unfunded environmental
2127 mandates. As you know, the city of Springfield, Greene
2128 County, and Springfield City Utilities have been working
2129 cooperatively to develop a proposed integrated plan frame
2130 work that would foster a more holistic approach to the
2131 various unfunded EPA environmental mandates that all
2132 communities are facing; wastewater, storm water, drinking
2133 water, air quality, and solid waste. Our integrated plan
2134 frame work attempts to consider all of these issues together
2135 instead of each one separately, and to focus resources where
2136 the community can achieve the biggest bang for the buck. We
2137 appreciate your efforts to ensure that future unfunded
2138 environmental mandates must be affordable for the community
2139 and the citizens.

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

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

2153 Mr. {Revesz.} Well, it is a little hard for me to
2154 comment on a document that I haven't seen, but I can tell you
2155 from my experience, one of my areas of expertise is a cost
2156 benefit analysis of environmental regulation, and I actually
2157 care a lot about the--having the benefits of environmental
2158 regulation exceed the cost, and I am a big proponent of the
2159 use of cost benefit analysis to justify environmental
2160 regulation, which sets me apart from actually the vast
2161 majority of environmental law professors in this country who
2162 don't like it as much as I do. But I can tell you that
2163 often, these early cost estimates turn out not to be

2164 accurate, and--

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

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

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

2180 Mr. {Long.} So we--

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

2182 Mr. {Long.} We--and I hate to interrupt you but I am
2183 about out of time, but Johnny Morris, the owner of Bass Pro
2184 Shops, has a saying, we all live downstream. We all do live
2185 downstream. We want to have a clean environment to raise our
2186 family, and whether it is in the Ozarks or Washington, D.C.,
2187 or the state of Washington, we all want a good clean

2188 environment, but unless you own Bass Pro Shops or you own
2189 O'Reilly Automotive, or one of these businesses, and our
2190 median income is under the \$46,000 a year, it is pretty tough
2191 to explain to the folks back home that you have to put a cup
2192 in the storm waters that pass through Springfield, and dip it
2193 and make it palatable, and some of these ridiculous
2194 regulations.

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

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

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

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

2202 The--since 1970, the Clean Air Act has had several key
2203 features that have helped make it one of the most successful
2204 environmental laws in the world. Science-based, health-
2205 protective standards keep our eye on the prize: healthy air
2206 for everyone. Cooperative federalism allows EPA to set the
2207 clean air goals, and allows states to decide how best to
2208 achieve them. EPA retains backstop enforcement authority,
2209 ensuring that every citizen in the United States receives a
2210 minimum level of protection, even if their state fails to
2211 act. Some have claimed that this arrangement violates the

2212 Tenth Amendment, and I quote, ``If a state fails to formulate
2213 a plan, EPA will mandate a federal plan. This commandeering
2214 violates the Constitution under New York v. U.S.''

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

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

2224 The cooperative federalism arrangement under Section
2225 111(d), as I indicated earlier, is exactly the same
2226 arrangement that has been in place since the early--since
2227 1970 for meeting the national Ambient Air Quality Standards.
2228 EPA sets the reduction requirements in the National Ambient
2229 Air Quality Standards to define the maximum permissible
2230 concentration of pollution in the ambient air. The states
2231 can then decide how to allocate that reduction requirement
2232 among their sources through state implementation plans. And
2233 generally, they do, but sometimes they don't. And when they
2234 don't, EPA imposes federal implementation plans. And it--
2235 this system has been going along--has been going on for

2236 decades. So the reason there isn't a Tenth Amendment problem
2237 is because EPA does not actually require the states to do
2238 these state implementation plans, it merely gives them the
2239 option to do them. And 111(d) is exactly the same situation.
2240 Through its--the Clean Power Plan--the proposed rule in the
2241 Clean Power Plan, EPA has set a reduction requirement that
2242 applies to each state. Each state can now decide what to do.
2243 Each state is not forced in any way to do what EPA has
2244 suggested they do in the regulation. They can do whatever
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
2266 the two statements you mentioned now and Professor Tribe's
2267 position in his written submissions and in his testimony
2268 today.

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

2284 emissions of carbon dioxide from the defendant's plants.''
2285 So I just thought we should remember that and put it all in
2286 context. And any comments that you have in response--

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.

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

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

2326 Mr. {Whitfield.} Okay.

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

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

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

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

2332 Professor?

2333 Mr. {Revesz.} Yes, I would like that. That is the way
2334 that the Clean Air Act has worked for 45 years. Under the
2335 National Ambient Air Quality Standards, EPA can set state
2336 limitation plans. If they don't, the Federal Government can
2337 impose a federal implementation plan. The Federal Government
2338 does not say upfront what that federal implementation plan
2339 would look like--

2340 Mr. {Whitfield.} Well--

2341 Mr. {Revesz.} --it waits until the states either submit
2342 a state implementation plan or not. Here, EPA is actually
2343 doing something it has never done before, which is favorable
2344 to the states. It is basically--it has said we are going to
2345 give you early guidance and we are going to do it sometime in
2346 the next few months so you actually have some information,
2347 which is a lot more information than states have had under
2348 the kind of bread and butter of the Clean Air Act for the
2349 last 45 years.

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

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

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

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

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

2369 Mr. {Tribe.} Well, I would say that the flexibility is
2370 an illusion. In fact, the Attorney General of Michigan, in
2371 comments filed with the EPA in November of last year, warned
2372 that the plan really takes meaningful freedom away from the
2373 states--

2374 Mrs. {Elmers.} Um-hum.

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

2376 Mrs. {Elmers.} Um-hum.

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

2378 Mrs. {Elmers.} Um-hum.

2379 Mr. {Tribe.} It is like the example I gave, your money

2380 or your life, but you can pay--

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

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

2383 Mrs. {Ellmers.} --it however--you can choose any

2384 vehicle as long as you choose a black one, you know, that

2385 kind of thing.

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

2387 Mrs. {Ellmers.} Ms. Wood, and to that one, do you feel

2388 it is flexible, but then also as a clean air practitioner,

2389 what--how do you--how would North Carolina or any other state

2390 be able to actually implement this rule?

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

2392 Professor Tribe described it, it is illusory, and the example

2393 I like to use in describing the flexibility is it is as if I

2394 came to you, the state of North Carolina, and I said I want

2395 you to give me change for a dollar. You can do it any way

2396 you want. It can be 100 pennies, it can be four quarters, I

2397 don't care, you just do it, North Carolina, the way you want.

2398 Well, the problem is North Carolina only has 60 cents, and so

2399 there really isn't flexibility there.

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

2401 got it.

2402 Now, to that point, I want to go into something very

2403 specific because I think it, you know, there again, I know we

2404 are--we have been debating law and the interpretation. I am
2405 a nurse and I am much more practical when it comes to these
2406 things. So what I would like to know is, based on this
2407 111(d) provision, in building block number four, which is
2408 relating to the increased energy efficiency, how would this
2409 be enforced?

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

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

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

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

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

2437 Mr. {Revesz.} Sure. As I indicated earlier, I mean the
2438 product here, what is being regulated is electricity
2439 delivered in usable form to consumers.

2440 Mrs. {Ellmers.} To consumers.

2441 Mr. {Revesz.} Consumers. Now, no one is arguing--I
2442 don't think EPA is arguing that consumers should use less
2443 electricity, or like, you know, take the bus one day a week
2444 or work at home, or anything like that.

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

2446 Mrs. {Ellmers.} To the point.

2447 Mr. {Revesz.} That is an interpretation of building
2448 block four, and we can disagree with that but I don't think
2449 we will resolve it in the next 52 seconds.

2450 Also, we shouldn't lose sight of the fact that nothing
2451 is being imposed on any state here.

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

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

2454 Mrs. {Ellmers.} --we have--now I am just reclaiming my
2455 time. We have already determined it is not the state we are
2456 talking about. We are talking about the individuals are the
2457 users of this energy, the individuals. So how would this--my
2458 question is how would you enforce this?

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

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

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

2474 Mrs. {Ellmers.} Thank you.

2475 And I yield back the remainder of my time.

2476 Mr. {Whitfield.} Gentlelady yields back.

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

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

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

2489 Mr. {Tribe.} What I mean I think is best illustrated by
2490 decisions that involve not only the Takings and Compensation
2491 clauses, but the due process clause. As the Supreme Court
2492 has held in a number of cases, including one where the EPA
2493 initially promised confidential treatment to pesticide makers
2494 and then pulled the rug out from under them, and another in
2495 which the United States Government offered companies more
2496 favorable accounting treatment if they would bail out failing
2497 S and Ls, and then reneged, in cases like that, the Supreme
2498 Court has found a doctrinal basis either in the contract
2499 clause or in the due process clause or in the Takings clause

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

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

2517 And so, Ms. Wood, what happens if the states start
2518 implementing the final rule only to have the courts strike
2519 the rule down, and what do these states do, what if they have
2520 already started signing the contracts, people stated breaking
2521 ground on investments, or making capital commitments for
2522 investments, what happens next?

2523 Ms. {Wood.} Yeah. There are two sets of, you know,

2524 harm that can happen here; one is to the states and the other
2525 is to the power plants--

2526 Mr. {Flores.} Correct.

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

2535 Most states are going to need to enact legislation and
2536 put in place regulations. So if at the end of the--of that
2537 time period, this is all found to be unlawful, well, all of
2538 that effort will have been lost, but more importantly to the
2539 extent legislation and regulations have been put in place,
2540 all of that is going to have to be reversed, and, you know,
2541 that is also going to be time-consuming. And then as you
2542 said, power plants need to start planning now and so they can
2543 enter into contracts and could have financial--

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

2547 Continuing on Section 111(d), it is the basis for the

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

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

2558 Ms. {Wood.} Yes, that is correct. As Professor Tribe
2559 has talked about, there was one version of Section 111(d)
2560 that was actually promulgated. It is the House version, it
2561 is what is shown right now in the United States Code, and it
2562 precludes regulation of source categories under 111(d) if
2563 they are already regulated under 112.

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

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

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

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

2575 Mr. {Tribe.} I agree.

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

2577 Mr. {Tribe.} It has only been used for four pollutants
2578 and five sources. They are very specialized and localized,
2579 like municipal waste landfills or sulfuric acid plants, which
2580 give off acid mist, and the idea that it is nothing new,
2581 just, you know, just business as usual is the most fantastic
2582 account I have heard.

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

2585 Mr. {Whitfield.} Gentleman yields back.

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

2588 Mr. {Harper.} Thank you, Mr. Chairman. And thanks to
2589 each of you for being here. The--you have been very
2590 informative, and it is a challenging issue to every one of
2591 our states, a very expensive issue and proposition that is
2592 here. And the discussion on the Constitution is certainly
2593 very intriguing. And yesterday I saw in the vaulted National
2594 Archives the original handwritten letter that Thomas
2595 Jefferson wrote following the Louisiana Purchase, and--

2596 congratulating Congress on this new acquisition, which had
2597 not been approved yet. And him being a strict
2598 constructionist, you know, he was, you know, obviously
2599 concerned about people calling it unconstitutional, and he
2600 said it was extra-constitutional. So, you know, it is
2601 amazing how we have progressed in 200 years, and how we look
2602 at things.

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

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

2618 Mr. {Harper.} Well, Professor Tribe, following that
2619 line, you know, have you identified any evidence that

2620 Congress intended to provide EPA powers to expand its own
2621 regulatory authority when EPA identifies the need to do so,
2622 and how would that be possible under the Constitution?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2664 And I would like to call up the second panel now, who
2665 have been very patient. And on this panel, we are going to
2666 really zero-in on the practical impacts at the state level,
2667 and what their thoughts are about this proposed rule.

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

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

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

|
2689 ^STATEMENT OF CRAIG BUTLER

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

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

2697 As reflected in our detailed comments, and extensive
2698 comments to U.S. EPA, the proposal seeks to overhaul the
2699 Nation's power generation, transmission, distribution
2700 systems, by reducing coal-based electricity, and instituting
2701 federally-mandated reliance on energy efficiency, renewable
2702 energy under the guise of global climate protection.

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

2710 U.S. EPA's request for comment on more than over 500
2711 different aspects of the proposed rule as it was published in
2712 the Federal Register, combined with the inability to answer
2713 basic questions throughout that comment period, clearly
2714 highlights that the plan has not been well designed and was
2715 rushed out the door to meet a predetermined schedule.
2716 Nonetheless, Ohio felt a strong obligation to dissect and--
2717 the proposed rule from a very technical standpoint. We took
2718 it very seriously. We partnered with our Public Utilities
2719 Commission of Ohio, and conducted an extensive outreach
2720 effort to interested parties during the comment preparation.
2721 Our detailed review produced more than 180 pages of technical
2722 comments.

2723 One major flaw is how U.S. EPA inexplicably ignores
2724 efficiency improvements already made to our coal-fired power
2725 plants, and instead orders sweeping new changes or
2726 improvements, regardless of feasibility. For example, U.S.

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

2740 Ironically, after coal-fired units are required to make
2741 new costly upgrades, their ability to recover the costs in
2742 the marketplace is minimized by utilization restrictions as a
2743 result of the remaining EPA building blocks requiring natural
2744 gas plants to achieve a 70 percent utilization rate. It is
2745 nonsensical to force costly upgrades on one hand, and only
2746 deny the same units the ability to run and pay for them.

2747 In another example, we believe U.S. EPA has misapplied
2748 the economic feasibility analysis to predict the reliability
2749 on the bulk power system. It is not clear if U.S. EPA may
2750 have consulted with the Department of Energy, North American

2751 Electric Reliability Corporation, Federal Energy Regulatory
2752 Commission, or power providers to identify and use well-known
2753 technical modeling software to specifically design to analyze
2754 how changes in the transmission will be affected. However,
2755 these organizations currently responsible for maintaining the
2756 grid and stability and reliability have warned of outages and
2757 voltage collapse if the plan is implemented as proposed. To
2758 Ohio, this signals that U.S. EPA failed to consult these
2759 organizations in a meaningful way while formulating this
2760 plan, and does not fully understand the implications of the
2761 plan.

2762 As Ohioans discuss this issue across the state, we hear
2763 one overriding concern: maintain our affordable, reliable
2764 power is critical to both the pocketbooks of Ohioans and
2765 continued economic development within our state. Ohio has
2766 been a manufacturing hub in the heart of this country since
2767 the Industrial Revolution. Fueled by electricity, which
2768 remains 9 percent below the national average, Ohio is home to
2769 a broad range of energy-intensive industries, and is
2770 competitive on the national and global market. The Clean
2771 Power Plan, with all its legal and technical flaws, presents
2772 a direct threat to these benefits to the Ohio consumer.

2773 One stunning statistic I will share with you is the
2774 Public Utilities Commission conducted the detailed analysis

2775 of the Clean Power Plan and indicates that 39 percent higher
2776 electricity rates in calendar year '25 that will cost Ohioans
2777 \$2.5 billion. In the last 4 years, Governor Kasich has
2778 supported an energy policy that is inclusive of all sources
2779 in generation. From our world-class energy summit in 2011,
2780 where we discussed developing a broad portfolio of the cost-
2781 effective sources, to recent legislative activity to include
2782 combined heat and cogeneration in our qualifying energy
2783 sources, we have and will continue to embrace the often
2784 overused but certainly relevant all-of-the-above strategy.
2785 We do it because it is important to affordable, reliable
2786 energy and to protect the environment.

2787 I will close by saying Ohio is willing and is very
2788 prepared to participate in a full national debate on carbon,
2789 the need or not, frankly, to regulate carbon emissions from
2790 power plants, and how Ohio is and remains committed to being
2791 a good steward of the environment. However, the Clean Power
2792 Plan is a seriously flawed proposal and should not be used to
2793 set unprecedented national policy. U.S. EPA should
2794 reconsider this misguided approach.

2795 Thank you.

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

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

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

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

|
2804 ^STATEMENT OF KELLY SPEAKES-BACKMAN

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

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

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

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

2815 As an economic regulator first and foremost, my primary
2816 objective is to ensure that the environmental goals of my
2817 state are realized in the most cost-effective way possible,
2818 while maintaining grid reliability. To this end, I am
2819 pleased that the EPA has allowed states to work within the
2820 current construct of our electric grid markets by encouraging
2821 a regional approach to compliance. As one of the nine states
2822 participating in RGGI, the experience of my state as well as
2823 recent analyses completed by several independent grid
2824 operators indicates that a regional path to compliance is the
2825 most efficient and cost-effective path forward.

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

2833 Our nine states represent 16 percent of the U.S.
2834 economy, and generate a total gross domestic product of \$2.4
2835 trillion U.S. The states work together within the current
2836 electricity markets to create a unified system for auctioning
2837 and trading carbon allowances so that our environmental goals
2838 are achieved through a least-cost, market-based solution.
2839 Although we have collaborated effectively for the better part
2840 of a decade, the RGGI remain--RGGI region remains diverse in
2841 many aspects. We comprise three separate regional
2842 transmission organizations, we have different political
2843 landscapes, and dissimilar generation profiles. For example,
2844 in Maryland, we--our generation remains predominantly coal.
2845 As part of RGGI, and coupled with other state energy
2846 initiatives, however, we have been able to diversify our fuel
2847 mix and reduce our carbon footprint. Since 2005, instate
2848 generation from renewables, nuclear and natural gas as a
2849 percentage of total generation mix has increased from 36

2850 percent to 55 percent, while instate generation from coal has
2851 decreased 56 percent to 44 percent. Over our entire RGGI
2852 region, the power sector carbon pollution has decreased by 40
2853 percent, while our regional economy has grown by 8 percent.
2854 That is from 2005 to 2013. Non-hydro renewable generations
2855 has increased by 47 percent, while our regional dependency on
2856 coal has--and oil has decreased. Our carbon intensity power-
2857 -of the power sector has decreased at twice the rate of the
2858 rest of the country.

2859 So we believe that market forces, state policies and
2860 programs, such as RGGI, are driving these cost-effective
2861 pollution reductions, while simultaneously supporting our
2862 local economies. Our energy efficiency, demand response, and
2863 renewable initiatives, as well as policies to encourage fuel
2864 switching and to less carbon-intensive fuels, all work in
2865 tandem to reduce pollution and establish long-term solutions
2866 for a reliable energy infrastructure. Many of the
2867 complimentary strategic energy initiatives are funded using
2868 proceeds from these RGGI allowance auctions, creating a
2869 virtual cycle--virtuous cycle of benefits that also serves to
2870 minimize ratepayer impact.

2871 I could go through the rest of my written statement, but
2872 I would very much prefer to just leave you with five points
2873 that we have learned in--as part of RGGI, and I would be

2874 happy to take questions afterwards. The five lessons that we
2875 have learned in--and what we hope will be helpful to other
2876 states as they are crafting their plans, either state or
2877 regional, include the formation of--one of the lessons stems
2878 from the formation of our intra and interstate agency
2879 relationships as part of the regional cooperative effort.
2880 These relationships and resources have spilled over into
2881 other initiatives such as distributed generation, electric
2882 vehicles, and compliance with other EPA and state
2883 environmental regulations. Two is the pooling of staff
2884 resources and budgets. Basically, we can do a lot more with
2885 a lot less. We have been able to complete the necessary
2886 regional electric sector modeling in a timely fashion with
2887 built-in peer review. The third is a regional mechanism
2888 stimulates active and productive stakeholder engagement. The
2889 fourth, regional consistency does not require the states to
2890 implement identical programs. We in Maryland have one way of
2891 using these proceeds. Those in New York, those in
2892 Massachusetts, those in the other states participating in
2893 RGGI base their investments on their own state policies and
2894 priorities. And fifth, lastly and the most important lesson
2895 that we have learned by the RGGI states as it applies to the
2896 Clean Power Plan, is that participation in a regional
2897 compliance effort will likely provide our state with--with

2898 likely provide other states with the most flexibility moving
2899 forward. Initial hurdles surrounding the structure of the
2900 mechanism are not, in fact, insurmountable as demonstrated by
2901 us and in the RGGI states. Using this regional construct,
2902 the regional emission cap is the only enforceable mechanism
2903 included in the compliance plan. States retain jurisdiction
2904 over their own energy efficiency and renewable energy
2905 programs, and can continue to offer these initiatives as
2906 complimentary measures that help mitigate the cost of
2907 compliance for their ratepayers.

2908 Thank you very much for your time this morning.

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

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

|
2911 Mr. {Whitfield.} Thank you.

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

|
2916 ^STATEMENT OF ART GRAHAM

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

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

2926 In Florida, we have below-average CO2 emissions because
2927 of the following. We shifted a lot of our generations to
2928 low-emission natural gas early on. We offered incentives to
2929 harvest the available heat rate improvements over the past 30
2930 years, and through energy efficiency programs that have
2931 already reduced consumption by 9,330 gigawatt hours. Now,
2932 all these things allowed us to realize a 25 percent decrease
2933 in CO2 emissions from 2005 to 2012, but yet none of these
2934 things are recognized by the current plan. However, in the
2935 current plan 34 states have higher CO2 emission rates than
2936 Florida, but only 15 states have higher reduction percentage
2937 required by the CPP.

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

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

2954 So briefly, under building block one, applying the
2955 approximate midpoint of EPA's cost range to achieve
2956 approximately 6 percent improvement, Public Counsel
2957 identified a cost of \$1.15 billion. Under building block
2958 two, Public Counsel's conservative methodology precluded
2959 costs associated with this building block, but the issues
2960 were as follows. Codifying costs for the EPA's overstatement
2961 of gas plant capacity, the cost for required new gas

2962 transportation infrastructure, i.e., pipelines, the cost for
2963 replacing generating units into retirement long before the
2964 end of their use of life--long before the end of their useful
2965 life, i.e., the stranded costs. I can tell you these are all
2966 big-ticketed items. Under building block three, using a U.S.
2967 Energy Information Agency's most recent costs for utility
2968 scale solar, replacing 10 percent of the conventional
2969 capacity would cost Florida \$16.8 billion. Under building
2970 block four, for Florida EPA's 10 percent reduction equals
2971 5,745 megawatts of avoided capacity. Our demand site program
2972 costs \$1.48 million per megawatt of avoided capacity. So
2973 EPA's assumption will cost us over \$8.5 billion.

2974 Now, Florida's Office of Public Counsel limited itself
2975 to costs that can be cleanly calculated, applying EPA's
2976 numbers with the most basic government data. Counting only
2977 the most obvious and easily qualified costs, the expense to
2978 Florida ratepayers start at almost \$27 billion. That works
2979 out to about \$2,800 per utility customer. However, the
2980 complete cost is much, much higher.

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

2986 requirements.

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

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

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

|
2990 Mr. {Whitfield.} You--okay, Mr. Graham, thank you very
2991 much, and we will have an opportunity to ask questions as
2992 well, and then we have your full statement for the record.

2993 At this time, I would like to introduce Donald van der
2994 Vaart, who is the Secretary for North Carolina Department of
2995 Environment and Natural Resources. Thanks very much for
2996 being with us, and you are recognized for 5 minutes.

|
2997 ^STATEMENT OF DONALD VAN DER VAART

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

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

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

3015 Before I comment on the specific issues of state
3016 resources, I would like to note that issues not--that are
3017 emitted from my comments. First, my comments will not
3018 address the scientific uncertainty of the impact of human

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

3029 I will address the state resources and advocate for what
3030 North Carolina calls the legal trigger approach to Section
3031 111(d) implementation. Given the certain litigation that
3032 will ensue if the proposed rule under 111(d) is promulgated,
3033 states such as North Carolina are at risk of investing
3034 unnecessary time and resources, developing and enacting state
3035 111(d) plans prior to the resolution of litigation. North
3036 Carolina recommends that the EPA amend the rule's submittal
3037 deadlines to require states to submit a 111(d) plan only
3038 after the conclusion of the judicial review process.
3039 Traditionally, when the EPA promulgates a new rule that sets
3040 forth requirements designed to address some aspect of the
3041 Clean Air Act, each state must take action, usually in the
3042 form of legislation and rulemaking, to avoid sanctions

3043 directly or avoid sanctions on its sources. The state then
3044 submits a demonstration to the EPA for approval, which can
3045 take anywhere from a few months to many years, during which
3046 time the states implement their rules. If the rule is struck
3047 down, however, the state is forced to uproot its earlier work
3048 and begin a new planning process; legislation, rulemaking,
3049 implementation and enforcement, and the process must often be
3050 amended again when EPA revises its illegal rule in an attempt
3051 to satisfy the courts.

3052 This is not just an academic concern. There are several
3053 recent cases where this study in futility has occurred. The
3054 EPA's attempts to address economic inequity in regional
3055 energy markets through interstate pollution rules, such as
3056 the NOx SIP Call, the Clean Air Interstate Rule, and the
3057 Cross-State Air Pollution Control Rule, all prime examples.
3058 There is universal agreement that the 111(d) rule will
3059 fundamentally restructure how energy is generated and
3060 consumed in America. I would argue that EPA's Section 111(d)
3061 rule is to energy what the Affordable Care Act is to
3062 healthcare. This fundamental change to America's electricity
3063 model will come at the hands of a rule that few consider
3064 legally firm. The EPA acknowledges in the rule that it is
3065 structured to survive even if portions of the rule are struck
3066 down. In my more than 20 years of implementing air quality

3067 rules, I am not aware of any rule where the EPA has made an
3068 apriority acknowledgement of legal infirmity.

3069 Despite the rule's uncertain future, state plans would
3070 need to move forward to allow, for example, switching from a
3071 cost-based energy dispatch model to a carbon dioxide dispatch
3072 model. Under the EPA's current proposal, legislative
3073 changes, utility resource planning, and regulatory execution
3074 must proceed while 111(d) is under judicial review. EPA's
3075 acknowledgement of the legal frailty of their creative
3076 interpretation of the Clean Air Act not only argues further
3077 legal trigger, but it also calls Chevron deference into
3078 question. In this rule, like many others, EPA--many other
3079 EPA rulemakings, the EPA characterizes statutory language as
3080 unambiguous to invoke Chevron deference. Unfortunately, the
3081 EPA's legal track record is so poor that one can only wonder
3082 if Chevron deference should be withdrawn because the agency
3083 has abused its public trust.

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

3089 Thank you for the opportunity to have testified.

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

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

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

3095 I will recognize myself for 5 minutes for questions.

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

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

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

3110 Mr. {Whitfield.} Okay.

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

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

3139 idea?

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

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

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

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

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

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

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

3159 Mr. {Whitfield.} Um-hum.

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

3163 meet its demise.

3164 Mr. {Whitfield.} Um-hum.

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

3166 Mr. {Whitfield.} Um-hum.

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

3169 Mr. {Whitfield.} Um-hum.

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

3172 Mr. {Whitfield.} And, you know, in our first panel, you
3173 listened to the constitutional arguments and so forth. How
3174 many of you actually believe that the average citizen out
3175 there has any basic understanding of the impact of this--what
3176 this--of this regulation and what it would be? Do you think
3177 the average citizen even has any input--insight into this,
3178 Mr. Butler?

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

3184 Mr. {Whitfield.} Right.

3185 Mr. {Butler.} --that is under debate, nor, frankly,
3186 what the potential cost might be because we have not,

3187 frankly, been able to understand the plan well enough or
3188 know--

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

3191 Mr. {Butler.} Right.

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

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

3196 Mr. {Whitfield.} I am not talking about climate change,
3197 I am asking you--

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

3199 Mr. {Whitfield.} --do they understand the impact, in
3200 your opinion, of the consequences of this?

3201 Ms. {Speakes-Backman.} The impact in our RGGI states is
3202 less than 1 percent for the overall--

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

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

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

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

3207 Mr. {Whitfield.} Mr. Graham, what about you, do you
3208 think they understand?

3209 Mr. {Graham.} I don't think they have any idea. I--we
3210 have reached out quite a bit and got very little feedback. I

3211 think the power generators--

3212 Mr. {Whitfield.} Um-hum.

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

3214 cost--

3215 Mr. {Whitfield.} Okay.

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

3217 we really haven't put out--

3218 Mr. {Whitfield.} Okay.

3219 Mr. {Graham.} --what we propose that some of the

3220 numbers are until we get the final plan coming back.

3221 Mr. {Whitfield.} Do you think they understand, Mr. van

3222 der Vaart?

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

3224 Mr. {Whitfield.} Okay. Now, Mr. Graham, you talked

3225 about you viewed this as unfair and very costly. Is that

3226 your honest opinion of the impact of this regulation on the

3227 state of Florida?

3228 Mr. {Graham.} Without a doubt. You know, what gets me,

3229 and you see in all of the EPA's data, that they said they

3230 want to decrease 30 percent of the CO2 emissions from the

3231 2005 numbers. Now, the biggest--one of the things that

3232 Florida has already done from 2005 to 2012, we have already

3233 jumped ahead of a lot of this stuff. We switched a lot of

3234 things over to natural gas. We are, right now, about 65

3235 percent natural gas. We have done a lot of other
3236 improvements since then, and for you not to take into
3237 account, because they are using 2012 as the baseline.

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

3243 Mr. {Whitfield.} Okay.

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

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

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

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

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

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

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

3265 Ms. {Castor.} Well, and I find your testimony very
3266 curious because the Florida Public Service Commission has not
3267 been on the side of consumers, and they have not, your words,
3268 you say the Clean Power Plan threatens affordability for
3269 consumers, and your--the commission will protect consumers
3270 from excessive costs, but let me give you a few examples of
3271 the costs that Florida has heaped on our customers. The PFC
3272 recently gutted energy efficiency initiatives, even though
3273 efficiency can meet demand at a much lower cost, at a
3274 fraction of the cost of building new power plants, and can
3275 help customers reduce energy use, put money back into their
3276 pocket, create jobs at the same time. I mean we would see
3277 larger savings on bills, but that is not the business model
3278 in Florida. So those stunning rollbacks in energy
3279 efficiency, especially at a time when we have to be looking
3280 for ways to save on carbon pollution and save money.

3281 Here is another example. The Public Service Commission
3282 has really worked over the past years to stifle renewable

3283 energy in Florida, and especially solar. You recently stated
3284 at a Public Service Commission hearing that Florida, sunshine
3285 state, branding is nothing more than a license plate slogan.
3286 Well, I hope everyone was watching the weather over this past
3287 winter. Florida is the sunshine state. We rely on tourism.

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

3296 And then the best example is what the Public Service
3297 Commission and the legislature has done to heap--to increase
3298 bills, especially if you are a Duke Energy customer. And my
3299 colleagues might not be aware, but Florida had adopted an
3300 advance recovery fee that allowed the utilities to collect
3301 costs in advance for building power plants. And in fact,
3302 even when Duke Energy had to scrap a power plant or--and had
3303 to put another one on mothballs, without creating one
3304 kilowatt hour of energy, customers in my neck of the woods,
3305 in central Florida, are on the hook for \$3 billion, and that
3306 is modest, in costs. \$3 billion, not one, not one kilowatt

3307 in energy.

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

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

3320 Mr. {Graham.} Thank you. We cut back a lot on the
3321 energy efficiency programs because we have done so much so
3322 far. As you heard me say earlier, since we started this
3323 program, we have achieved 9,330 gigabytes worth of--

3324 Ms. {Castor.} Mr. Graham, that is simply not the case.
3325 It is--there is report after report after report that says
3326 the state of Florida is so far behind. Now we are down to
3327 about zero in our energy efficiency goals because the
3328 business model is backwards. It is not a model that helps
3329 address the modern challenges. It is all about how much
3330 energy you can sell. And utilities now need to be

3331 compensated for helping consumers save money. And I really
3332 recommend that you take this obligation seriously and think
3333 about the cost to consumers from here on out.

3334 Thank you.

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

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

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

3342 I am going to start off with a basic question for each
3343 one of you. We will start with you, Mr. Butler.

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

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

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

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

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

3353 Gentleman from--

3354 Mr. {Graham.} No, sir.

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

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

3357 Mr. {Barton.} And from Florida.

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

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

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

3362 Mr. {Barton.} So this is not a necessary thing under
3363 the Clean Air Act amendments to meet any standards for
3364 nonattainment. In fact, is it a true statement that nothing
3365 in this clean power initiative sets a standard of emission
3366 reduction in your state? Is that a true statement? There is
3367 not a target you have to meet in terms of parts per million
3368 or anything like that?

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

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

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

3376 Mr. {Barton.} Okay. Now, Ms. Speakes-Backman, I was
3377 impressed with what you said in your testimony. It sounds
3378 like Maryland is part of a regional group that has

3379 voluntarily come together, set your own goals, and increased
3380 your renewable energy portfolio, and done quite a bit of good
3381 things, but you did that because the compact or the coalition
3382 that your state is a part of made a voluntary decision to do
3383 that. Is that not correct?

3384 Ms. {Speakes-Backman.} Yes, sir. We voluntarily
3385 decided to take control of our environment, of the
3386 reliability issues that we were facing, and with cost
3387 increases to our ratepayers.

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

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

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

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

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

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

3403 This Clean Power Plan is structured--

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

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

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

3436 Mr. {Whitfield.} Gentleman yields back.

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

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

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

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

3443 Mr. {Pallone.} I wasn't here for your testimony. I had
3444 to go to another committee hearing, but in your testimony you
3445 state that through 2013, RGGI states reinvested over \$950
3446 million of auction proceeds and energy efficiency, clean and
3447 renewable energy and other strategic energy programs. And
3448 you note that these proceeds have helped low-income families
3449 pay their energy bills, supported energy efficiency upgrades,
3450 and helped families and businesses install solar, wind and

3451 geothermal systems at their properties. In fact, under RGGI,
3452 just last week, the sale of 15.3 million carbon dioxide
3453 allowances netted \$82 million and set a record high price.

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

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

3463 In Maryland specifically, we have reinvested the auction
3464 proceeds in consumer benefit programs. It has helped more
3465 than 215,800 low-income Maryland families to pay their energy
3466 bills. It has helped--supported energy efficiency upgrades
3467 at 11,800 low-to-moderate income households, helped 5,206
3468 families, and 201 businesses in Maryland to install solar,
3469 wind and geothermal systems.

3470 Mr. {Pallone.} So I mean obviously, the program has
3471 been tremendously effective in Maryland and other
3472 participating states, and these states are going to have a
3473 leg-p when it comes to meeting the EPA standards.

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

3475 why I am so disappointed that, in my home state of New
3476 Jersey, our governor, Chris Christie, has withdrawn our state
3477 from the program, as you know. And not only is this going to
3478 hinder New Jersey's ability to meet the EPA standards, it is
3479 actually costing the state money. According to an analysis
3480 by Environment Northeast, since New Jersey withdrew from the
3481 RGGI program in 2011, the state has passed up more than \$114
3482 million in potential revenue, and the state could miss out on
3483 an additional \$387.1 million through 2020, and those figures
3484 don't even account for the record price for allowances hit at
3485 the RGGI auction last week, which you mentioned. That is
3486 money that could be used to use support energy efficiency
3487 upgrades and job creation, like it is doing in Maryland and
3488 other participating states. So I know he is not with us here
3489 today, but I have called on Governor Christie to reconsider
3490 his decision to withdraw from RGGI because I think New
3491 Jerseyans deserve to reap the benefits of this successful,
3492 economically-efficient program, which is reducing carbon
3493 emissions and creating jobs in the northeast.

3494 Now, I have about a minute and a half. I know that--if
3495 you wanted to respond to some of the questions that were
3496 asked before that maybe you didn't have time for, you could
3497 use the time to do that, unrelated to my question.

3498 Ms. {Speakes-Backman.} Thank you very much, sir.

3499 May I just add that the car analogy in the panel before
3500 was so interesting to me in that, you know, what can be done
3501 in--for the car is a catalytic converter, but to me, when I
3502 think about a mass-based regional program such as RGGI, and
3503 taking that same analysis, it is like having a catalytic
3504 converter but then you put a variable toll on the roads that
3505 is outside the box. Right? It is outside the car system.
3506 And putting a toll on those roads, you can take the money and
3507 you can reinvest that in R and D so that you can further
3508 improve the equipment that is put on the car to reduce
3509 emissions. But in addition, you can take those revenues and
3510 further control traffic by putting the tolls on certain roads
3511 that are busy. You can do things like improving those roads
3512 themselves. There are ways to reinvest and to make this a
3513 positive.

3514 I don't think that there--I don't think it is mutually
3515 exclusive to help your environmental goals and to build your
3516 economies.

3517 Mr. {Pallone.} All right, thank you so much.

3518 Thank you, Mr. Chairman.

3519 Mr. {Latta.} [Presiding] Thank you very much. And
3520 before I recognize myself for 5 minutes, I would like to ask
3521 unanimous consent from the committee to enter a letter dated
3522 December the 1st, 2014, from Director Butler of the Ohio EPA

3523 to the respondent and also the executive summary. And these
3524 documents were submitted to the U.S. EPA as part of their
3525 comments to oppose Clean Power Plan.

3526 Without objection, so ruled.

3527 [The information follows:]

3528 ***** COMMITTEE INSERT *****

|
3529 Mr. {Latta.} If I could start, Director Butler, and
3530 also to all of our panel, thanks very much for being here.
3531 Again, it has been very informative.

3532 But, Director, if you would, would you expand on the
3533 reference you made to the differences in the 2005 and 2012
3534 baselines, and how this would affect Ohio by not taking into
3535 consideration the early action that many have taken to
3536 improve that efficiency?

3537 Mr. {Butler.} Mr. Chairman, thanks for the question.
3538 And I think Mr. Graham made a couple of very relevant points
3539 in his testimony to this fact as well.

3540 Ohio has many utilities that are very early adopters in
3541 making sure that their plants run as efficiently as possible.
3542 Frankly, the hundreds of millions of dollars that they have
3543 invested will be left on the cutting room floor, if you will,
3544 if the Clean Power Plan, which talks about a 2005
3545 implementation date, is passed. In reality, that date of
3546 looking to develop a plan is all based on the year 2012. So
3547 any emission reductions or, frankly, efficiency improvements
3548 that have been made prior to 2012 will not count. We think
3549 that that not only disincentivizes our utilities from doing
3550 that work, but it, frankly, also makes it much more difficult
3551 for them to comply, if not exceptionally more expensive for

3552 them to comply going forward with meeting the new bucket 1
3553 requirements of having a 4 to 6 percent energy efficiency
3554 improvement.

3555 Further, we have talked about utilities as part of our
3556 dialog and comments on the Clean Power Plan. They think it
3557 is fundamentally very difficult, if not impossible, to reach
3558 that 4 or 6 percent efficiency improvements at their--at our
3559 existing utilities. Our fleet has gotten much more
3560 efficient, ironically because many of those units were shut
3561 down because of the mercury standard, others were improved
3562 because they needed to--they wanted to be more efficient and
3563 generate more power into the grid. But those costs were
3564 heavy, and they think that a 1 to 2 percent improvement would
3565 be all that they could develop and--to comply with the Clean
3566 Power Plan.

3567 Mr. {Latta.} Thank you. If I could continue, Director,
3568 could you also explain the issues you foresee with the costs
3569 and the efficiency related to the EPA's building block number
3570 two, which will result in the natural gas-fired units used
3571 for base load power in coal-fired plants into peaking power?

3572 Mr. {Butler.} Mr. Chairman, I think the further--the
3573 earlier reference about fundamentally--the Clean Power Plan
3574 fundamentally is changing the electric distribution market
3575 from really one that is based on cost, to one based on

3576 environmental impact, and that is a serious, serious problem.
3577 In addition, just the discontinuity between the way EPA has
3578 set up the Clean Power Plan bucket one on efficiencies at
3579 power plants versus bucket two where they are having--wanting
3580 to see natural gas generation run at a 70 percent rate. I
3581 think we see two fundamental problems. One is we will see
3582 significant closures and--as we already have of our coal-
3583 fired fleet, and we will see some, but I don't know yet how
3584 much natural gas generation come online. There is a
3585 disconnect on how those work, so we are really concerned, as
3586 many others are, about the power grid being able to supply
3587 power.

3588 Fundamentally, we also find an inconsistency here.
3589 While EPA is requiring or suggesting that the power plants
3590 become more efficient, and invest hundreds of millions of
3591 dollars to do that, that they not be allowed to run to
3592 recover those costs because they are then driving gas to take
3593 over that capacity.

3594 Mr. {Latta.} Well, when we look at Ohio, what is--right
3595 now, is Ohio about 71 percent coal-fired?

3596 Mr. {Butler.} Yes, sir.

3597 Mr. {Latta.} And when you look down the road at the--
3598 what the EPA is ordering, you know, and it was already
3599 discussed, I think, by the chairman, the question really

3600 comes then to, with all these costs being put onto these
3601 power plants, who is going to pay for that in the long run?

3602 Mr. {Butler.} Right. Mr. Chairman, we are very
3603 concerned because we think all of those costs get passed onto
3604 the consumers of Ohio.

3605 Mr. {Latta.} And also when you--especially when you
3606 have put out in your discussions with the EPA, have they even
3607 talked about, you know, what the consequences are? Do they
3608 look at what it would do to a state like Ohio with 71 percent
3609 coal generated, especially for our business communities and
3610 the people that work in those factories and businesses?

3611 Mr. {Butler.} Mr. Chairman, I believe they probably do
3612 talk--think about Ohio, although we were very concerned,
3613 frankly, dismayed, when U.S. EPA--they do talk about they
3614 have had some extensive outreach across the country, and they
3615 did attend listening sessions across the country. We,
3616 frankly, invited, as our--as did our states in West Virginia
3617 and Kentucky, to come to any three of our states and hold a
3618 listening session to see and hear from the general population
3619 that were actually going to be very much impacted by this
3620 Clean Power Plan, and they elected not to come to either--any
3621 of our three states.

3622 Mr. {Latta.} So you put on an invitation and they just
3623 did not come.

3624 Mr. {Butler.} Yes, sir.

3625 Mr. {Latta.} Thanks very much.

3626 My time has expired, and the chair will now recognize

3627 Mr.--

3628 {Voice.} Mrs. Capps.

3629 Mr. {Latta.} --the gentlelady from California, Mrs.

3630 Capps, for 5 minutes.

3631 Mrs. {Capps.} Thank you, Mr. Chairman, for holding this

3632 hearing. And I want to thank all of our witnesses for your

3633 testimony.

3634 It is so clear that the power sector is responsible for
3635 a major portion of carbon dioxide emissions in the United
3636 States, but it is also clear that these emissions are causing
3637 our planet's climate change at an unprecedented rate. We
3638 need to act today to curb these emissions and prepare for the
3639 consequences that are forecast. Fortunately, and, Ms. Kelly
3640 Speakes-Backman, you spoke to this, that the Regional
3641 Greenhouse Gas Initiative, or RGGI, has really impressively
3642 reduced emission rates, and has done so while also improving
3643 the regional economy and fostering job creation. My
3644 colleague from New Jersey asked you about that, and
3645 unfortunately, apparently, his state of New Jersey has backed
3646 away from it, but I hope that this momentum will build. I
3647 think it is clearly possible to increase energy efficiency,

3648 reduce emissions, and provide affordable energy for local
3649 residents.

3650 So in addition to carbon emissions, the power sector
3651 generates so many other harmful pollutants, including sulfur
3652 dioxide, nitrous oxide and mercury, to name a few. In
3653 addition to exacerbating the impacts of climate change, these
3654 pollutants have direct impacts on human health, leading to
3655 increased rates of respiratory problems, contributing to
3656 heart attacks, strokes, and even premature death. This has
3657 been documented, and is being documented. The benefits of
3658 reducing carbon dioxide and these other pollutants under the
3659 Clean Power Plan will likely have benefits that far outweigh
3660 the cost of implementation, especially in the health sector.

3661 And I wanted to ask you how this is--how this
3662 implementation of RGGI has affected the benefit of human
3663 health in your area.

3664 Ms. {Speakes-Backman.} Thank you for the question. As
3665 you know, we have--in Maryland especially, we are a little
3666 bit downwind of some of the coal plants that are in the
3667 Midwest, and they have directly affected the health and the
3668 costs of that health to our citizens. And so as part of the
3669 effort that our state has undergone to try to mitigate those
3670 health issues, as well as to mitigate the reliability issues
3671 that we have had from frequent storms, increasing frequency

3672 and severity of storms, the ability--the costs that we have
3673 had--our ratepayers have had to incur in order to build up
3674 resilience against such storms, there are lot of costs aside
3675 from the work that is going to be done under the Clean Power
3676 Plan that need to be taken into account when you are doing a
3677 full cost benefit scenario.

3678 Mrs. {Capps.} Yes. Thank you. Significant reductions
3679 in sulfur dioxide and nitrous oxide and mercury has
3680 benefitted over the long haul, but they are offset by
3681 downwind and other aspects that tell us that we are not fully
3682 where we want to be yet.

3683 Mr. Butler, I wanted to turn to you, if I could. In
3684 August of last year, the waters off Lake Erie, off the coast
3685 of Toledo, experienced a harmful algae bloom that impacted
3686 drinking water for about 400,000 people. Am I correct?

3687 Mr. {Butler.} Yes, ma'am.

3688 Mrs. {Capps.} The science is increasingly clear that
3689 harmful algal blooms will become more severe a frequent in
3690 the future due to climate change. This means more human
3691 health costs, more taxpayer dollars spent on clean-up, unless
3692 we take action to reduce carbon emissions. In your
3693 testimony, you focused exclusively on the financial costs of
3694 implementing the Clean Power Plan, but, you know, in the
3695 constraints of time perhaps you weren't able to reach any of

3696 the benefits. Would you agree that human health benefits
3697 such as fewer harmful algal blooms and cleaner air, should
3698 all be considered in doing a full assessment of the Clean
3699 Power Plan?

3700 Mr. {Butler.} Mr. Chairman--Mrs. Capps, I--if you have
3701 an opportunity, in our extensive comments, we submitted U.S.
3702 EPA, and then were brought into the record today--

3703 Mrs. {Capps.} Great.

3704 Mr. {Butler.} --you will see an extensive summarization
3705 of our issues related to this issue about suggesting that
3706 there will be significant human health improvements by
3707 regulating carbon.

3708 Mrs. {Capps.} Um-hum.

3709 Mr. {Butler.} We do not believe that is the case, and
3710 do not believe that the science proves it. Now, however, in
3711 a lot of reductions that come along, we have improved our
3712 sulfur dioxide and ozone emissions in Ohio and in our
3713 downwind states. I mean we do not deny the fact that there
3714 have been many, many, many improvements to public health, but
3715 I think it is a--it is not appropriate to tie that back to
3716 CO2 emissions--

3717 Mrs. {Capps.} Perhaps that needs to be--

3718 Mr. {Butler.} --close to the Clean Power Plan.

3719 Mrs. {Capps.} Perhaps we need to do more studies along

3720 that health. I--the EPA's proposal, I believe, the Clean
3721 Power Plan, is an important step forward in combatting
3722 climate change, will ultimately lower. How this is impacted,
3723 as your colleague sitting next to you indicated, it takes
3724 some time and I believe we should go further into studying
3725 the effects of changes that are being made more thoroughly as
3726 they relate to regional and other factors. And this is all
3727 about the health of our constituents.

3728 And I know I am out of time, so I support this plan, and
3729 I am going to yield back now.

3730 Mr. {Whitfield.} At this time, I recognize the
3731 gentleman from Virginia, Mr. Griffith, for 5 minutes.

3732 Mr. {Griffith.} Thank you, Mr. Chairman.

3733 The gentlelady just referenced it in her comments about
3734 her concerns about global warming and the health concerns,
3735 and then she went on to say that maybe we need to take some
3736 more time, we need more studies on the health. Mr. Butler,
3737 it is my understanding that, in fact, the EPA has not done
3738 any science on this particular regulation and how much it
3739 would change climate change, but that using the normal EPA
3740 modeling procedures, the American Coalition for Clean Coal
3741 Electricity did run an analysis on how much the rule would
3742 reduce climate change, and the American Coalition for Clean
3743 Coal Electricity found that atmospheric CO2 concentrations

3744 would only be reduced by less than 1 percent in 2050, the
3745 increase in global average temperature would only be reduced
3746 by 16/1000 of a degree Fahrenheit in 2050, sea-level rise
3747 would only be reduced by .3mm or 1/100 of an inch. This is
3748 the equivalent of a piece of paper, or a couple of pieces of
3749 paper. And so taking that all into consideration--well,
3750 first let me say, do you know of any other studies out there,
3751 other than the one that I have referenced, that indicate
3752 there is going to be some huge change to what sometimes is
3753 referred to as global warming, but more commonly,
3754 particularly in the east, is referred to as climate change,
3755 since warming hasn't happened?

3756 Mr. {Butler.} Yeah, Mr. Griffith, I am unaware of any
3757 additional studies. We did a very extensive search when we
3758 did our comments on the Clean Power Plan, and the ones that
3759 you referenced are many of the studies that we also took a
3760 look at as part of our review of the Clean Power Plan.

3761 Mr. {Griffith.} Okay, but you don't have any direct
3762 numbers from the EPA themselves?

3763 Mr. {Butler.} We do not.

3764 Mr. {Griffith.} And notwithstanding the fact that they
3765 haven't taken the time, that Mrs. Capps referenced, maybe to
3766 look at this matter and the health studies, et cetera, and
3767 whether or not this would affect anything, this rule is

3768 coming down your state's throat any day now, isn't it?

3769 Mr. {Butler.} Yes, sir, it is. We are very concerned
3770 about the resources that it will take on this--on our state
3771 levels to, you know, on the one had have these discussions
3772 and perhaps even legal issues around the implementation, but
3773 at the same time go down the path of having to commit our
3774 state resources to develop an implantation plan that, at the
3775 end of the day, one, may not be necessary, two, may--that may
3776 change significantly from where we started.

3777 Mr. {Griffith.} Right. And so your folks are being
3778 forced to go forward, even though there are all kinds of
3779 legal implications going on. And as you could probably tell
3780 from the previous panel and the debate there, I am very well
3781 versed, and I believe the EPA does not have authority. We
3782 will stay tuned to see what the courts say, but I don't think
3783 you can change the law just because you find some reference
3784 in the closet that says that maybe there was a different
3785 interpretation, because if either side adheres to their
3786 position, there is no bill. Senate said it receded.

3787 Without getting into all that legal argument, Secretary
3788 van der Vaart, your state is going to have to comply even
3789 though the legalities and the fight over the legalities may
3790 continue, you have to go ahead and get a plan out there.
3791 Isn't that true?

3792 Mr. {van der Vaart.} Well, that is right, and I think
3793 that that is why I am here. There are a lot of things we can
3794 say. I applaud Maryland and the rest for doing what they
3795 want to do. North Carolina has made major reductions since
3796 the 2005 date. America generally has dropped its carbon
3797 dioxide emissions from 2010 to 2013 by 10 percent, and it was
3798 all done without the benefit of a federal action. It was
3799 done primarily by the revolution that is our natural gas
3800 production here in North--in America.

3801 But yes, the concern we have is developing legislation,
3802 developing rules, our utility regulatory system has to be
3803 altered--

3804 Mr. {Griffith.} And you will spend a lot of money going
3805 down that path, and then the Supreme Court comes out a year
3806 and a half, 2 years, 3 years from now and all of a sudden, it
3807 all has to start over again.

3808 Chairman Graham, your power plants are facing that same
3809 problem, but even if this thing goes forward, a number of
3810 them are going to have to be shut down before their useful
3811 life ends, isn't that correct?

3812 Mr. {Graham.} That is correct. We have--we are about
3813 20 percent coal in Florida. Like I said, we switched to a
3814 lot of natural gas early on, and they are talking about
3815 closing down about 90 percent of our coal plants.

3816 Mr. {Griffith.} And so you are going to be hurting, and
3817 also the--that means that you are going to have some stranded
3818 costs, and that means the increased cost we pay--will go on
3819 to your ratepayers, isn't that correct?

3820 Mr. {Graham.} It is almost like they paid for the plant
3821 twice. They paid for the plant, and they have all this
3822 useful life left, and then we have to shut it down.

3823 Mr. {Griffith.} And the beauty of natural gas in some
3824 of the energy revolution is that we can attract jobs back to
3825 the United States but we have to have affordable energy, and
3826 this plan doesn't do much for the environment, and it damages
3827 our ability and our reputation in the world to have
3828 affordable energy. Isn't that true? I don't have time for
3829 an answer, but I assume that it is with most of you. Ms.
3830 Speakes-Backman, I agree you would disagree, but I recognize
3831 that, and yield back.

3832 Mr. {Whitfield.} Gentleman's time has expired.

3833 At this time, recognize the gentleman from New York, Mr.
3834 Tonko, for 5 minutes.

3835 Mr. {Tonko.} Thank you, Mr. Chair. And thank you to
3836 our panelists for appearing before the subcommittee.

3837 The efforts--and, Commissioner Speakes-Backman, let me
3838 address my comments first and foremost to you. Welcome, and
3839 thank you for your service as chair of the RGGI Board of

3840 Directors. As you have noted, New York is a member of RGGI.
3841 In my last workstation before service here in the House, I
3842 was president and CEO of NYSERDA, New York State Energy
3843 Research and Development Authority, which got me a seat at
3844 the RGGI table. And so I am very thankful for your
3845 leadership and for carrying forth with the mission of that
3846 plan.

3847 As a participant in RGGI, New York has been able to
3848 accomplish a great deal. Greater energy efficiency, cleaner
3849 air, expanded deployment of renewable energy technologies,
3850 and these are just a few of the benefits, many that are
3851 arising.

3852 EPA's proposal is just that at this stage; a proposal.
3853 I support its goals. As a proposal, I am sure it will evolve
3854 and change, perhaps, before the final rule is released.
3855 There, however, seems to be a number of utilities and states
3856 that are claiming the goals of the proposal cannot be
3857 achieved without severe economic hardship, and sacrificing
3858 our electric--our electricity reliability. You seem to take
3859 a different view. Why are you convinced that these
3860 predictions are wrong?

3861 Ms. {Speakes-Backman.} Well, thank you for your
3862 participation in RGGI as a state, and thank you for the
3863 question.

3864 I do take a different position, and in fact, I take the
3865 position that RGGI, coupled with our other state policies,
3866 has helped us to improve reliability. So specific to the
3867 reliability issue, which is very near and dear to my heart,
3868 and it is actually part of my legal obligation as a
3869 commissioner of the Maryland Public Service Commission, we
3870 work within--we have implemented RGGI within the construct of
3871 existing markets, and that includes the North American
3872 Electric Reliability Corporation's oversight of bulk system
3873 reliability. It includes FERC's retaining its authority over
3874 the market's design. It includes also reliable dispatch of
3875 least cost resources remaining with our grid operation
3876 system. So this is not an upending of the systems. We have
3877 been doing this for 8 years, and we have had fewer
3878 reliability issues because we have been able to support
3879 programs such as demand response and energy efficiency to
3880 help reduce the load in specifically load pocket areas.

3881 Mr. {Tonko.} Thank you. And also there are those who
3882 would argue that sound stewardship of our environment and
3883 economic recovery, the growth of our economy, cannot go hand-
3884 in-hand. Are there any steps that you can cite in terms of
3885 perhaps job growth in the energy areas that have enabled us
3886 to strengthen our economy and provide for cutting-edge new
3887 opportunities with innovation as it relates to the energy

3888 arena?

3889 Ms. {Speakes-Backman.} Yes, sir. I can speak
3890 specifically to the state of Maryland with respect to jobs.
3891 I would have to look up that number, but we have--I believe
3892 it is in my written testimony, sir, but we have created jobs
3893 and we have improved our economy, while we have reduced by 40
3894 percent our carbon reduction--our carbon dioxide from power
3895 plants. And I am sorry, I don't have that number at my
3896 fingertips.

3897 Mr. {Tonko.} Well, I am certain that you also--other
3898 participants at the RGGI table representing that array of
3899 states, but I think it can be documented that we have grown a
3900 new culture of job activity, all while strengthening the
3901 environmental outcome, and--

3902 Ms. {Speakes-Backman.} Absolutely.

3903 Mr. {Tonko.} --the sense of environmental justice that
3904 has been produced by RGGI accompanies that of social and
3905 economic justice. So, you know, I think that there is this
3906 whole silo effort to look at certain impacts, needs to be
3907 looked at in a fuller array, a broad view that provides for a
3908 strong context of a better future for all of the states
3909 involved.

3910 Ms. {Speakes-Backman.} Absolutely, sir. I just
3911 recalled the number. In the first 3 years of our program

3912 alone of RGGI, we have created 16,000 job years in our
3913 region.

3914 Mr. {Tonko.} Is--how many, sorry?

3915 Ms. {Speakes-Backman.} 16,000 job years in our region.

3916 Based on the further reductions that we made through a
3917 program review in 2014, an independent analysis by the
3918 Analysis Group has shown that we will add another--yet
3919 another 130,000 job years to the--our region.

3920 Mr. {Tonko.} Thank you very much.

3921 And with that, I see my time is up.

3922 Mr. {Whitfield.} Gentleman's time has expired.

3923 Mr. {Tonko.} I yield back.

3924 Mr. {Whitfield.} At this time, I recognize the
3925 gentlelady from North Carolina, Mrs. Ellmers, for 5 minutes.

3926 Mrs. {Ellmers.} Thank you, Mr. Chairman. And thank you
3927 to our panel, especially to you, Secretary van der Vaart, for
3928 being here from North Carolina.

3929 As your--Secretary, as your position as secretary of DNR
3930 North Carolina, and as an attorney, can you reflect a little
3931 bit about the discussion that took place on panel 1 about the
3932 ambiguities that exist between the rule--the 111 and the 112,
3933 especially focusing in on--back to 1990 when it was first put
3934 forward?

3935 Mr. {van der Vaart.} Yes, ma'am. Yes, ma'am. The--

3936 that is a good point. The previous discussion, I would warn
3937 you all, maybe appears to me, at least, setting up a straw
3938 man, the question of whether the codified versus the statute
3939 at large language actually controls. The fact of the matter
3940 is, it doesn't matter. Even if you take the statute at
3941 large, there is no ambiguity, and the reason is in 1990, the
3942 Clean Air Act, under Section 112 was fundamentally changed
3943 from a pollutant-based program to a source category-based
3944 program. And, therefore, the language in the statute at
3945 large is entirely consistent with what happened at that
3946 point.

3947 Mrs. {Elmers.} Um-hum.

3948 Mr. {van der Vaart.} And I am afraid that the previous
3949 discussion, for one reason or another, may have missed that.
3950 And so it is very good that you keep that in mind. Thank
3951 you.

3952 Mrs. {Elmers.} And then getting back to some of the--
3953 there again, the discussion that took place in the first
3954 panel, you know, one of my questions is really about, you
3955 know, implementation of this, and especially when it comes to
3956 111, in the building block number 4, and there again,
3957 Secretary, from your perspective, how can this possibly be
3958 enforced, or can you foresee a way that North Carolina--or
3959 that the EPA would actually be able to enforce this on North

3960 Carolinians?

3961 Mr. {van der Vaart.} That is a very good question, and
3962 we have thought very hard about it. Another misunderstanding
3963 that many people have about the Clean Air Act is that somehow
3964 108 and 110 are implemented similarly to 111. That is not
3965 the case. When a state fails, for whatever reason, to submit
3966 an approvable plan under 110, 108, to protect NAAQS, the
3967 state itself is subject to sanctions including highway funds
3968 removal. That is not the case in 111.

3969 Mrs. {Ellmers.} Um-hum.

3970 Mr. {van der Vaart.} If we do not submit an approvable
3971 plan, there is no downside for North Carolina as such as the
3972 government, however, the Federal Government will then enforce
3973 directly to the source. And so, Representative Ellmers, you
3974 are giving me a specter of what happens to my grandma when
3975 she--

3976 Mrs. {Ellmers.} Um-hum.

3977 Mr. {van der Vaart.} --doesn't screw in a CFL bulb in
3978 her house. Is she going to be thrown in jail by the feds?
3979 Am I going to be thrown in jail because I am somehow missing
3980 my obligation, or is the utility executive somehow going to
3981 get thrown in jail, when really maybe the EPA should be
3982 thrown in jail. So--

3983 Mrs. {Ellmers.} Well, there again, it is part of that

3984 ongoing discussion of, you know, comparing apples to oranges
3985 and, you know, kind of alternative universes when we are
3986 talking about this issue.

3987 My final question for you, Secretary van der Vaart, is,
3988 there again, looking towards our North Carolinians, is it
3989 economically feasible and fiscally responsible for us to
3990 foresee a future where we go from a cost-based energy
3991 dispatch model to a carbon dioxide-based dispatch model?

3992 Mr. {van der Vaart.} It is--we can put a man on the
3993 moon. We can certainly do this, but it will be at a cost,
3994 and the--unfortunately, the people who are going to bear that
3995 cost are the ones least able to afford it. It is going to be
3996 our lower and middleclass folks, it is going to mean the job
3997 losses for high-paying manufacturing jobs because electricity
3998 prices is fundamental to citing of new manufacturing. So
3999 yes, we can do it. Is it legal? Absolutely not. And, in
4000 fact, as you heard, it is already been going on in a more
4001 cost-effective manner by the states themselves.

4002 Mrs. {Elmers.} Um-hum.

4003 Mr. {van der Vaart.} So what we have here is a Federal
4004 Government attempt to upend, as I said, the world's greatest
4005 electricity system through a little-known codicil in the
4006 Clean Air Act.

4007 Mrs. {Elmers.} Thank you, sir.

4008 And I will just close out by saying that, you know,
4009 North Carolina has made such strides, and thank you, a lot of
4010 it is due to your leadership and, you know, moving forward on
4011 clean energy. And I believe North Carolina, and so many
4012 other states that have taken these steps already, need and
4013 deserve that credit. So thank you all to the panel.

4014 And thank you, Mr. Chairman. I yield back the remainder
4015 of my time.

4016 Mr. {Whitfield.} Lady yields back.

4017 At this time, recognize the gentleman from Ohio, Mr.
4018 Johnson, for 5 minutes.

4019 Mr. {Johnson.} Thank you, Mr. Chairman. I appreciate
4020 it. And, Director Butler, thank you for joining us today
4021 from the great state of Ohio.

4022 Lot of concerns there about the things that we have
4023 talked about this morning. Director Butler, it seems as if
4024 the Administration is ignoring the lawsuit that many states,
4025 including Ohio, are currently engaged in with the EPA, and
4026 instead they are solely focused on the implementation of the
4027 rule. Given all the legal issues surrounding EPA's 111(d)
4028 proposal, would you support the EPA setting aside the
4029 implementation planning until legal challenges are resolved?

4030 Mr. {Butler.} Mr. Johnson, thanks for that question. I
4031 think, you know, Professor Tribe is far more eloquent than I

4032 am on these issues in the previous panel, but I think to your
4033 point, I think that is a--the exact request that we would
4034 have and have made to U.S. EPA to have them consider. I look
4035 at it from a state resource application. We will likely be,
4036 if the Clean Power Plan evolves as a final plan, much like
4037 the draft plan, and it still has what we believe are its
4038 legal flaws, will be challenging that law with many other
4039 states. That will not, unless things change, relieve us from
4040 the obligation to be developing at the same time in a
4041 parallel path, expending state resources to develop a plan of
4042 implementation in a very tight time schedule that, as you
4043 have heard, we don't think we can meet. Those are scarce
4044 state resources, frankly, we cannot and should not have to
4045 expend. So directly to your question, I would--have advised
4046 and asked U.S. EPA, because there is no compelling deadline
4047 relative to this issue about carbon, that we set this
4048 implementation issue aside and have our requisite debate
4049 about the legal issues, and then go from there.

4050 Mr. {Johnson.} Well, let us expound on that a little
4051 bit. You know, states like Ohio, and others that we have
4052 talked to here today, are implementing a number of new and
4053 older EPA regulations ranging from the Mercury and Air Toxics
4054 Rules, to particulate matter standards, to new ozone rules.
4055 So can you expand a little bit, doesn't this put strain on

4056 state resources, and what happens if, on top of all of this,
4057 states also have to implement a final 111(d) rule that
4058 eventually could get thrown out in court? And the reason I
4059 say that is because we have seen that scenario before. The
4060 brick industry invested hundreds of millions of dollars into
4061 complying with a set of standards that the courts threw out,
4062 and then they got virtually no credit by the EPA for all that
4063 investment that they did, and the EPA certainly was not
4064 standing there ready to give them their money back.

4065 Secretary van der Vaart, if they do get thrown in jail,
4066 they had better not call me for bail money because I am not
4067 going to be at the table.

4068 I--how do you feel about that, Mr. Butler?

4069 Mr. {Butler.} Yeah. Mr. Johnson, I--thanks for that
4070 question. I think we have seen--we always are trying to
4071 comply with our delegated programs and certainly our air
4072 programs. We have made tremendous success in air quality in
4073 Ohio. We have seen an unprecedented number of regulatory
4074 requirements come down the road.

4075 So you mentioned the mercury rule. Not only does that,
4076 you know, add to the time commitment and planning and
4077 implementation for compliance, it is, frankly, having to shut
4078 down 1/4 of our coal generation fleet in the state of Ohio.
4079 So we are concerned about that. Today, ironically, as we sit

4080 here is the same day that we are required to submit our
4081 comments on the proposed new ozone standard, and we are just
4082 on the cusp of, frankly, getting to the point of being
4083 statewide full compliance of the 2000 ozone standard--2008
4084 ozone standard. I would love to, frankly, declare victory on
4085 that and say--but no, we are in a position now where we are
4086 having to decide whether or not we need to drop that standard
4087 further, and whether or not the science is supportive of
4088 that. We are, in addition, in the midst of looking at both
4089 the particulate matter and SO2 rules, and whether or not,
4090 frankly, we move down the path of having additional ozone
4091 transport regulations. And the list goes on.

4092 So that puts an incredible strain on us as state
4093 regulators and implementers, and is, frankly, just an
4094 additional cost that we are requiring to our legislature to
4095 pass on to customers.

4096 Mr. {Johnson.} Well, thank you.

4097 Mr.--Secretary van der Vaart, do you have a comment on
4098 that as well?

4099 Mr. {van der Vaart.} Well, I would just like to
4100 emphasize again, America is moving toward cleaner energy. It
4101 is moving that direction because of the free market and our
4102 revolution in natural gas exploration and production. We are
4103 all states doing what we think is right in cleaning up the

4104 environment, and I think it is not a time to rush to judgment
4105 when we have such a flawed proposal.

4106 Mr. {Johnson.} Thank you very much.

4107 Mr. Chairman, I yield back.

4108 Mr. {Whitfield.} The gentleman's time has expired.

4109 And I want to thank all four of you for joining us today
4110 to discuss this significant issue.

4111 I would like to also include the following documents in
4112 the record. Comments submitted to EPA on the proposed 111(d)
4113 rule by the Florida Public Service Commission, and the
4114 Florida Office of Public Counsel.

4115 [The information follows:]

4116 ***** COMMITTEE INSERT *****

|
4117 Mr. {Whitfield.} And we will keep the record open for
4118 10 days. I was going to come down and say hello to each one
4119 of you personally, but we have a vote on the floor and it is
4120 almost 15 minutes gone now, so I am going to rush out, but we
4121 look forward to working with you. Thank you very much.

4122 And that adjourns today's hearing.

4123 [Whereupon, at 1:39 p.m., the Subcommittee was
4124 adjourned.]