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# Addressing Global Climate Change in an Age of Political Climate Change

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## Addressing Global Climate Change in an Age of Political Climate Change

*Brigham Daniels\**

*For a number of years, many within the environmental legal community have advocated an all-out attack strategy of forcing the United States to address climate change by bringing novel lawsuits under existing environmental laws. In 2007, with the seminal case of Massachusetts v. EPA, it appeared that those advocating this strategy had a winning game plan. That sense grew and solidified when the Obama Administration came to power.*

*However, over the past several years, we have seen a countervailing movement embodied in a growing resentment towards EPA and climate change policy in general. This movement has mobilized into a powerful political force. This Article raises the following question to those who want the United States to take action on climate change: given the backlash we have seen, is this no-holds-barred approach to force action on climate change the best way forward? While admittedly the answer to this question is a difficult one, this Article ultimately argues that it is not.*

I. INTRODUCTION.....	1900
II. RELEVANT BACKGROUND .....	1904
A. Bush Administration’s Avoidance Behavior.....	1905
B. Obama Administration’s Endangerment Finding and Subsequent Regulation.....	1908
III. POLITICAL BACKLASH .....	1914

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A. Rhetoric .....	1915
1. Climate Change Skepticism.....	1915
2. Congressional Intent.....	1917
3. Parade of Horribles .....	1919
4. Greenmailing .....	1921
5. Rogue Agency .....	1924
B. Attempts to Strip EPA of Power to Regulate Greenhouse Gases .....	1924
C. Attempts to Cut EPA's Budget .....	1928
D. Calls to Diminish EPA Generally or Abolish It Completely .....	1930
IV. FRAGILE EARTH, FRAGILE LAW .....	1932

### I. INTRODUCTION

In a speech to policymakers, activists, scholars, and other interested members of the public, Professor John Holdren framed the challenge of climate change in these terms: “Our options in this domain are three. They are mitigation, adaptation, and suffering. Basically, if we do less mitigation and adaptation, we’re going to do a lot more suffering.”<sup>1</sup> Holdren’s observation in significant ways encapsulates the motivations of many who desire to reduce the future severity and impact of climate change. Given the stakes at issue, it is hardly surprising that those worried about the problem have called on all levels and branches of government to use their influence to address climate change. These efforts have produced a myriad of actions that one might hold up as examples of the fruits of this sort of labor, ranging from international agreements like the Kyoto Protocol to affirmative steps taken by a number of municipalities to reduce their carbon footprint. Despite all this success, however, meaningful actions were slow to emerge in Washington.

Decades of inaction by the United States government caused many to ask, “What can be done to get the United States to take action?” In seeking an answer to this question, some determined to

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1. John P. Holdren, Professor, Harvard Univ., President & Dir., The Woods Hole Research Ctr., Address at the Eighth Annual John H. Chafee Memorial Lecture on Science and the Environment: Meeting the Climate Change Challenge 5 (Jan. 17, 2008), *available at* <http://cnie.org/Conference/Chafee08final.pdf>.

bring litigation using existing environmental law in hopes of reducing the United States' greenhouse gas emissions and did so without much concern for negative political fallout. Examples of these are many, but to put this into context, consider a few. Using the Clean Water Act, an environmental nonprofit organization sued EPA to force it to consider climate change when approving a Total Maximum Daily Load (TMDL).<sup>2</sup> Relying on a theory of nuisance under the federal common law, a number of states brought suit against a wide range of large-scale emitters of greenhouse gases, particularly power generators.<sup>3</sup> Citing the National Environmental Policy Act, an environmental group brought suit against the National Highway Traffic Safety Administration to force it to write an environmental impact statement that considered how its decision relating to the nation's automobile fuel economy standards would affect climate change.<sup>4</sup> Pointing to provisions within the Endangered Species Act, an advocacy group filed suit against the Department of the Interior to try to force it to list the polar bear as an endangered species due to the melting of the polar ice caps, which would in turn open the door to myriad of suits against private and public entities that are influencing climate change.<sup>5</sup> Relying on the Clean Air Act, a number of states and other groups tried to force EPA to address automobile emissions.<sup>6</sup>

The final of these examples, the Clean Air Act case mentioned, was the basis for the Supreme Court's seminal decision in *Massachusetts v. EPA*.<sup>7</sup> While the litigants bringing the Clean Air Act suit may have hoped to prevail, it is hard to imagine they understood their case as the true policy and political time bomb that it was. It unlocked a powerful tool to potentially reduce greenhouse gases, one that has seemingly only begun to manifest its true potential. If

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2. Complaint for Declaratory Judgment & Injunctive Relief ¶ 74, at 13, *Conservation Law Found. v. Env'tl. Prot. Agency*, No. 2:08-cv-00238-wks (D. Vt. Oct. 28, 2008). The case is discussed at length in H.M. Zamudio, Note, *Predicting the Future and Acting Now: Climate Change, the Clean Water Act, and the Lake Champlain Phosphorus TMDL*, 35 VT. L. REV. 975 (2011).

3. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

4. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

5. *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litigation*, No. 08-764, 2011 U.S. Dist. LEXIS 70172 (D.D.C. June 30, 2011).

6. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

7. *Id.*

one is looking for a measure of the significance of the case, it should be noted that in a recent survey, a large number of environmental law scholars and practitioners deemed *Massachusetts v. EPA* to be the most important environmental law decision in American jurisprudence.<sup>8</sup> The political pressure, fallout, and backlash that would later arise from *Massachusetts v. EPA* are a significant part of the focus of this Article.

While this Article focuses on the aftermath of *Massachusetts v. EPA*, it does so by highlighting a counter-tension that was largely ignored at the outset but that has become obvious within United States politics: pushing ahead might result in some pushing back. And, while a no-holds-barred approach might seem appropriate when addressing a no-holds-barred problem, what we are seeing in today's politics at least raises some questions about the efficacy of that strategy.

The seeds of today's political backlash from EPA's regulation of greenhouse gases through the Clean Air Act were planted well before President Obama came to power. For those wanting action on climate change, pulling the Clean Air Act's lever seemed all too tempting (particularly given the way the law was written).<sup>9</sup> With the Supreme Court's decision in *Massachusetts v. EPA*, the political calculus shifted wildly: it became clear that all that was needed to begin addressing climate change in a meaningful way with the Clean Air Act was a president willing to use the available tools. As the field of candidates narrowed in the 2008 election to the Republican nominee, John McCain, one of the main proponents for cap-and-trade legislation at the time,<sup>10</sup> and the Democratic challenger, Barack

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8. James Salzman & J.B. Ruhl, *Who's Number One?*, 26 ENVTL. F. 36, 36–37 (2009).

9. The Clean Air Act is triggered when EPA's Administrator is able to make an endangerment finding. For example, for the endangerment finding at issue in *Massachusetts v. EPA*, the factors the Administrator may consider according to the statutory language are limited to finding the emission at issue (1) qualifies as an "air pollutant," (2) is emitted by automobiles, and (3) may "reasonably be anticipated to endanger public health or welfare." Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006). The term "air pollutant" is defined very broadly by the Clean Air Act, and whether the emissions at issue come from automobiles is simple to determine. The only real question is whether the emissions at issue may "reasonably be anticipated" to harm the broadly defined terms of "public health" and "welfare." Of course, there is an enormous literature, some of it distinguished as having won a Nobel Prize, that EPA could use to support such a finding.

10. Senator John McCain, Remarks on Climate Change Policy at the Vestas Training Facility in Portland, Oregon (May 12, 2008), *in* N.Y. TIMES, May 12, 2008, <http://www.nytimes.com/2008/05/12/us/politics/12text-mccain.html?ref=politics>; *see also* *The*

Obama, it seemed quite likely that such a president would soon occupy the White House.

As the election grew nearer and Obama took a commanding lead in the polls, the likelihood of EPA beginning to address climate change with the Clean Air Act only increased. Whether Obama intended it or not, many believed the assurance of a high-level staffer on his campaign that Obama would allow EPA to use the Clean Air Act to regulate greenhouse gases regardless of whether Congress decided to enact specific climate change legislation.<sup>11</sup> While some accused Obama of attempting to use this statement to pressure or even strong-arm Congress into passing climate change legislation that would presumably preempt the Obama Administration from using the Clean Air Act,<sup>12</sup> many within the environmental community felt relieved. For those who desired action, it looked like the Bush Administration strategy of refusing to address the Supreme Court's ruling in *Massachusetts v. EPA*<sup>13</sup> would soon come to an end.

As discussed in this Article, what many did not anticipate was that a close to the chapter of inaction would be followed by a chapter of visceral attacks, budget cuts, and attempts to strip EPA of its power. It still remains to be seen how this story will end. It is possible that those attacking EPA (as many of those who have attacked EPA before them) will end up among the ranks of the politically defeated. However, it is possible that the current attacks against EPA are just the beginning.

To tell this story, at least what we know of it up to this point, Part II begins by providing a brief overview of how the Bush EPA refused to use the Clean Air Act to regulate greenhouse gases and how the Obama EPA has used the Act to address climate change. Part III then discusses the various forms of backlash the Obama EPA

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*Second Presidential Debate*, N.Y. TIMES, Oct. 7, 2008, <http://elections.nytimes.com/2008/president/debates/transcripts/second-presidential-debate.html>. While McCain has criticized the Obama Administration for making the endangerment finding, many still suspect that he would have done essentially the same thing had he become president. Lawrence Hurley & Elana Schor, *Congress Emits Half-Truths in Spin War Over Mass. v. EPA*, N.Y. TIMES, Mar. 17, 2011, <http://www.nytimes.com/gwire/2011/03/17/17greenwire-congress-emits-half-truths-in-spin-war-over-im-12380.html?pagewanted=all>.

11. Jim Efstathiou, Jr., *Obama to Declare Carbon Dioxide Dangerous Pollutant (Update 1)*, BLOOMBERG (Oct. 16, 2008), <http://tinyurl.com/77og5en>.

12. Editorial, *Obama's Carbon Ultimatum*, WALL ST. J., Oct. 20, 2008, at A18 [hereinafter *Obama's Carbon Ultimatum*].

13. See *infra* Part II.A.

has experienced as the result of its greenhouse gas regulations. These include negative rhetoric, attempts (some successful) to cut its budget, attempts to strip EPA of its regulatory authority, and even calls to abolish the Agency. In Part IV, the Article provides some musings on lessons that we might learn from the backlash EPA has experienced and how this backlash might inform strategic thinking about tackling the United States' contribution to climate change.

## II. RELEVANT BACKGROUND

Before telling the story of how the push for climate regulation resulted in regulatory push-back, it is important to remember that for many years the prospect of such regulation languished in Washington. In fact, early on, the Bush Administration established a pattern of actively refusing to give credence to the notion that humans had a hand in climate change, or even that it was happening at all. For example, the Bush Administration (and particularly the Vice President's Office) had taken an interest in federal agencies' positions on climate change and had apparently even successfully insisted that EPA edit or remove sections of reports that dealt with climate change.<sup>14</sup> Substantial evidence suggests that the Administration even used its power to pressure federal employees to diminish congressional testimony relating to climate change.<sup>15</sup>

In 2007, after extensive feet-dragging on the part of EPA, the Supreme Court was asked to consider a petition from a number of states for EPA to begin regulating automobile emissions under the Clean Air Act.<sup>16</sup> In *Massachusetts v. EPA*, the Court ruled that greenhouse gases constituted "air pollutants" as defined under the Clean Air Act,<sup>17</sup> and that under mandates provided in the Act, EPA had a duty to determine whether greenhouse gases therefore "cause,

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14. See, e.g., Jim Tankersley & Alexander C. Hart, *Bush-Era Climate Report Is Made Public*, L.A. TIMES, Oct. 14, 2009, at A14.

15. See, e.g., Juliet Eliperin, *Cheney's Staff Cut Testimony on Warming; Health Threats at Issue, Ex-EPA Official Says*, WASH. POST, July 9, 2008, at A1.

16. *Massachusetts v. EPA*, 549 U.S. 497, 510–17 (2007) (explaining that the lawsuit dated back to a request presented to the Clinton Administration EPA in 1999 that the Bush Administration did not respond to until it issued a denial in September 2003).

17. *Id.* at 528–29 ("On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.' The statute is unambiguous." (footnotes omitted) (alterations in original)).

or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>18</sup> The Court remanded the issue back to EPA and ordered it to conduct the analysis provided for within the Act.<sup>19</sup> Below, I tell the story of how the Bush and Obama EPAs responded to the Court’s order.

#### *A. Bush Administration’s Avoidance Behavior*

When the Court decided to hear *Massachusetts v. EPA*, Senator Jim Jeffords, a moderate Republican, expressed a feeling felt by many when he said, “It is encouraging that the high court feels this case needs to be reviewed. . . . It is high time to stop relying on technicalities and finger pointing to avoid action on climate change.”<sup>20</sup> Certainly, the Court’s ruling was met with excitement from those who had previously failed to get the federal government to address climate change in a meaningful way. A sample of such responses provides a telling picture of the mood of the day. Senator John Kerry responded by saying, “It’s an historic moment when the Supreme Court has to step in to protect the environment from the Bush Administration. Now that the White House must go back and take a fresh look at regulating greenhouse gas emissions from automobiles, they must take the challenge seriously.”<sup>21</sup> Senator John Edwards reflected, “It’s official—the only thing standing between us and a healthier climate is President Bush’s refusal to accept the truth about global warming. After today’s Supreme Court decision, the president can no longer claim that he lacks the power to address this crisis.”<sup>22</sup> Representative Marty Meehan provided the following pointed language to explain the implications of the Court’s ruling:

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18. *Id.* at 519–20 (citing the standard put forth in 42 U.S.C. § 7521(a)(1) (2006)).

19. *Id.* at 534–35 (“In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore ‘arbitrary, capricious, . . . or otherwise not in accordance with law.’ We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute.” (citations omitted)).

20. *Supreme Court to Hear Key Environment Case*, N.Y. TIMES, June 26, 2006, <http://tinyurl.com/8x3e2mv>.

21. Press Release, Senator John Kerry, John Kerry on *Mass. vs. EPA* Supreme Court Verdict (Apr. 2, 2007), *available at* <http://kerry.senate.gov/press/release/?id=9c8acda5-00c1-4ea2-a095-552843d41c74>.

22. Press Release, Senator John Edwards, Edwards Statement on Supreme Court Decision on Greenhouse Gas Emissions (Apr. 2, 2007), *available at*



For years now, the President has been warned about the dangers of climate change—by Congress, by progressive states like Massachusetts, and by many American citizens. These concerned groups have pleaded with the President to take decisive action before it's too late. Today, the Supreme Court rejected the Bush Administration's efforts to avoid regulating greenhouse gases that are exacerbating global warming. The Court validated what scientists around the world have verified: That global warming is incontrovertible, that man-made greenhouse gas emissions are contributing to the problem, and that the Bush Administration has the duty to act to slow this worldwide crisis.<sup>23</sup>

Finally, consider the words of Senator Barbara Boxer in the days following the issuance of *Massachusetts v. EPA*: “This decision puts the wind at our back. It takes away the excuse the administration has been using for not taking action to deal with global-warming pollution.”<sup>24</sup>

Even though the Bush Administration seemed to give more attention to climate change in some other respects,<sup>25</sup> the Bush EPA ultimately opted to bide its time and avoid the issue of regulating greenhouse gases under the Clean Air Act. In some ways it would be fair to say that it even tried to undermine attempts to use the Clean Air Act for such a purpose.<sup>26</sup>

Note, however, that the Bush Administration's EPA actually drafted an endangerment finding, but the draft did not make it through the political review process put in place by the White House and the Office of Management and Budget.<sup>27</sup> In that draft document, EPA would have made the following finding:

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<http://tinyurl.com/7vybn7w>.

23. Meehan Praises Supreme Court Ruling on Global Warming, STATES NEWS SERV., Apr. 2, 2007.

24. Felicity Barringer, *Ruling Undermines Lawsuits Opposing Emissions Controls*, N.Y. TIMES, Apr. 3, 2007, at A18.

25. See, e.g., Steven Mufson & Juliet Eilperin, *Bush Steps Out Front on Climate Issue; But No Policy Shift Is Planned as Nations Begin Debate on Post-Kyoto Accord*, WASH. POST, Sept. 23, 2007, at A14.

26. See, e.g., Juliet Eilperin, *U.S. Trying to Block Calif. on Emissions*, WASH. POST, Sept. 25, 2007, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401563.html> (discussing how documents obtained by the House Committee on Oversight and Government Reform suggest the Administration had “conducted a concerted, behind-the-scenes lobbying campaign to try to generate opposition to California's request to regulate greenhouse gas emissions from cars and trucks”).

27. Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year; Instead of New Rules, More Comment Sought*, WASH. POST, July 11, 2008, at A1; Juliet Eilperin, *EPA E-*

The Administrator believes that the scientific findings in totality point to compelling evidence of human-induced climate change, and that serious risks and potential impacts to public health and welfare have been clearly identified, even if they cannot always be quantified with confidence. The Administrator's proposed endangerment finding is based on weighing the scientific evidence, considering the uncertainties, and balancing any benefits to human health, society the environment that may also occur.<sup>28</sup>

The Administration's unwillingness to address the Court's order in *Massachusetts v. EPA* raised the consternation of those anxious for the federal government to address climate change. Senators Dianne Feinstein and Olympia Snowe expressed that frustration by cosponsoring a bill that would have "set a firm deadline for EPA to complete the endangerment finding."<sup>29</sup> As the Bush Administration's term of office came closer to expiring, the Bush Administration EPA did purport to try to "respond to our legal obligations in a timely manner."<sup>30</sup> To do so, EPA released what it called an "advanced notice of a proposed rulemaking" (ANPR) that presented a litany of

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*Mail Concluded Global Warming Endangers Public Health, Senator Says*, WASH. POST, July 25, 2008, at A19; *see also* Press Release, U.S. Senate Comm. on Env't & Pub. Works, Boxer Delivers "Reality Check" on Global Warming Action (Mar. 19, 2009), *available at* <http://tinyurl.com/6qr6ukd>.

28. Memorandum from the Bush White House to EPA on Attorney-Client Privilege 1, *available at* <http://tinyurl.com/8acxzsg>. This language first came to light in the form of a memo marked "deliberative—attorney client privilege" that addressed objections to an endangerment finding drafted by the Bush Administration, which was leaked and ultimately ended up in the hands of Senator John Barrasso and later on his website. Press Release, Senator John Barrasso, EPA Holding a Smoking Gun (May 12, 2009), *available at* <http://tinyurl.com/79jz9ao>. In October 2009, the Obama administration's EPA released the draft created during the Bush administration. A copy of this can be found in many places on the Internet. *See, e.g.*, E-mail from Jason K. Burnett to Susan Dudley (Dec. 5, 2007, 14:15 EST), *available at* <http://tinyurl.com/8x5fqfb>.

29. Press Release, Senator Dianne Feinstein, Senators Feinstein and Snowe Introduce Measure to Set Deadline for EPA to Complete Endangerment Finding on Greenhouse Gas Emissions (Apr. 2, 2008), *available at* <http://tinyurl.com/7154myk>.

30. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (to be codified at 40 C.F.R. ch. 1). Note that despite EPA's unwillingness to move forward on the endangerment finding, within days of releasing the ANPR, EPA released a major study on climate change, and the major finding highlighted in the first sentence of the report's abstract was as follows: "Climate change, interacting with changes in land use and demographics, will affect important human dimensions in the United States, especially those related to human health, settlements and welfare." EPA, ANALYSES OF THE EFFECTS OF GLOBAL CHANGE ON HUMAN HEALTH AND WELFARE AND HUMAN SYSTEMS, FINAL REPORT, SYNTHESIS AND ASSESSMENT PRODUCT 4.6 (2008). It seems that the report provides ample evidence to support an endangerment finding.

reasons why regulating greenhouse gases with the Clean Air Act was a bad idea.<sup>31</sup>

An omen of the supposed trajectory of things to come, however, is found in EPA Administrator Stephen Johnson's explanation to reporters while discussing EPA's ANPR: "If our nation is serious about regulating greenhouse gases, the Clean Air Act is the wrong tool for the job. It's really at the feet of Congress to come up with good legislation that cuts through, literally, decades of regulation and litigation."<sup>32</sup>

Some in Congress who supported the goal of making regulation of greenhouse gases part of the federal government's mandate were severely disappointed in EPA's failure to use the Clean Air Act to address climate change. For example, Senator Barbara Boxer became so frustrated with the way that the Administrator of EPA, Stephen Johnson, had avoided grappling with the Court's mandate that she lamented she had "lost all confidence in Stephen Johnson's ability to carry out EPA's mission in accordance with the law" and therefore called on him "to immediately resign his position."<sup>33</sup> She was not alone in calling for his resignation.<sup>34</sup>

#### *B. Obama Administration's Endangerment Finding and Subsequent Regulation*

During the campaign, then-candidate Obama was not shy about his resolve to do something about climate change if he became president. For example, as a candidate he focused mainly on pursuing a greenhouse gas cap-and-trade program and investing strategically in green jobs and green energy with hopes of making the economy less carbon-intensive.<sup>35</sup> While apparently he did not

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31. *See, e.g.*, Regulating Greenhouse Gas Emissions, 73 Fed. Reg. at 44,354.

32. Juliet Eilperin, *EPA Seeks Comment on Emissions Rules, Then Discredits Effort*, WASH. POST, July 12, 2008, at A4.

33. Press Release, U.S. Senate Comm. on Env't & Pub. Works, Senators Call for EPA Administrator's Resignation (July 29, 2008), available at <http://tinyurl.com/7npzrhr> (including calls for Administrator Johnson's resignation by Senators Boxer, Whitehouse, Klobuchar, and Lautenberg).

34. *See, e.g., id.* (providing statements from other senators).

35. *See, e.g.*, *Obama Speaks About the Financial Crisis in Florida Today; \$700 Billion Questions; Treasury Secretary Makes His Mark; The Facts & Fiction: McCain, Obama Under the Microscope* (CNN television broadcast Sept. 23, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/0809/23/cnr.06.html>; *The Second Presidential Debate*, *supra* note 10.

address whether he would use the Clean Air Act to regulate greenhouse gases during his campaign, in an interview with Bloomberg.com, one of his senior advisers, Jason Grumet, suggested that Obama would be willing and in fact was planning to do so. The resulting article read as follows:

Obama “would initiate [CO<sub>2</sub>] rulemakings,” Grumet said in an Oct. 6 interview in Boston.

. . . .

“The EPA is obligated to move forward in the absence of Congressional action,” Grumet said. “If there’s no action by Congress in those 18 months, I think any responsible president would want to have the regulatory approach.”<sup>36</sup>

After his election, President Obama did not immediately state that this would be the direction his Administration would take, though he hinted as much. In announcing his choice of Lisa Jackson to be Administrator of EPA, President-elect Obama said,

For my Administrator of the Environmental Protection Agency, I have chosen Lisa Jackson. Lisa has spent a lifetime in public service at the local, state and federal level. As Commissioner of New Jersey’s Department of Environmental Protection, she has helped make her state a leader in *reducing greenhouse gas emissions* and developing new sources of energy, and she has the talent and experience to *continue this effort at the EPA*.<sup>37</sup>

Obama not only chose an Administrator steeped in regulating greenhouse gases but also, given EPA’s existing authority, hinted at a forthcoming endangerment finding under the Clean Air Act. At that same news conference, Administrator Jackson echoed President Obama’s suggestion by saying,

Now more than ever, our country is in need of leadership on a host of urgent environmental challenges that face our communities, our cities, our farms, and our rivers, streams, lakes, and oceans. At the top of the list is the threat of climate change, which requires us to

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36. Efstathiou, *supra* note 11.

37. Press Release, The Office of the President-Elect, President-Elect Barack Obama Announces Key Members of Energy and Env’t Team (Dec. 15, 2008) (emphasis added), available at <http://tinyurl.com/566dmb>.

transform how we produce and use energy throughout the economy.<sup>38</sup>

In her opening memo to EPA employees, Administrator Jackson put aside all speculation about her resolve to act in response to the Court's Order in *Massachusetts v. EPA*:

The President has pledged to make responding to the threat of climate change a high priority of his administration. He is confident that we can transition to a low-carbon economy while creating jobs and making the investment we need to emerge from the current recession and create a strong foundation for future growth. I share this vision. EPA will stand ready to help Congress craft strong, science-based climate legislation that fulfills the vision of the President. As Congress does its work, we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act.<sup>39</sup>

Soon thereafter, President Obama gave his first State of the Union speech. He asked Congress to pass a greenhouse gas cap-and-trade bill to help "save our planet from the ravages of climate change."<sup>40</sup>

Then, only a few months into her time as Administrator, Jackson issued a proposed endangerment finding that specifically triggered regulation of automobiles.<sup>41</sup> Relying on climate change science, she had no problem finding that greenhouse gases endangered public health and welfare. To justify her finding, she pointed to impacts often attributed to climate change by scientists at the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change, and the National Research Council.<sup>42</sup> Several months later,

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38. President-Elect Barack Obama, Energy and Environment Team Announcement (Dec. 15, 2008), in N.Y. TIMES, Dec. 15, 2008, <http://www.nytimes.com/2008/12/15/us/politics/15text-obama.html/pagewanted=3>.

39. Memorandum from EPA Adm'r Lisa P. Jackson, Opening Memo to EPA Employees (Jan. 23, 2009), available at <http://blog.epa.gov/administrator/2009/01/26/opening-memo-to-epa-employees/>.

40. Barack Obama, President, U.S., Address to Joint Session of Congress (Feb. 24, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress).

41. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

42. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

she issued a finalized endangerment finding, and when she did, Administrator Jackson concluded, “The evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions, that climatic changes are already occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action.”<sup>43</sup>

With the endangerment finding in place, EPA moved forward with the task of regulating vehicular greenhouse gas emissions.<sup>44</sup> The content of these regulations, in large part, reflects a brokered deal that created a mandate to increase vehicles’ fuel economy to 35.5 miles per gallon by 2016.<sup>45</sup> While many have attacked EPA and its regulation of greenhouse gases, very rarely do we hear protests about these specific regulations. In fact, when President Obama announced the standard, he had with him representatives from a diverse set of interests, ranging from automobile companies, environmental groups, EPA, the Department of Transportation, and a number of governors, including those from Michigan and California.<sup>46</sup>

A second set of regulations triggered by the endangerment finding is much more controversial. Because greenhouse gases from automobiles were regulated through the Clean Air Act, greenhouse

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43. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 18,904.

44. Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pts. 531, 533, 536, 537, 538).

45. Text: *Obama’s Remarks on New Auto-Emissions Rules*, N.Y. TIMES (May 19, 2009), <http://www.nytimes.com/2009/05/19/us/politics/19obama.text.html>; Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. at 25,545.

46. Text: *Obama’s Remarks on New Auto-Emissions Rules*, *supra* note 45. Moreover, even before these regulations came about, many had argued that using the Clean Air Act to create new emission and fuel economy standards was one of the most commonsensical aspects of the Clean Air Act as applied to the greenhouse gases. Brigham Daniels, et al., *Regulating Climate: What Role for the Clean Air Act?*, 39 ENVTL. L. REP. 10837, 10837–38 (2009) (“As a number of experts at the conference noted, the automobile regulatory structure under § 202 is the most straightforward and sensible of all the tools in the CAA toolbox.”); Josh Voorhees, *Climate Bill Takes Aim at Transportation Emissions on Land and at Sea*, N.Y. TIMES (Apr. 1, 2009), <http://www.nytimes.com/gwire/2009/04/01/01greenwire-climate-bill-takes-aim-at-emissions-on-land-an-10373.html>; Bryan Walsh, *Obama’s Move on Fuel Efficiency: A Clean Win for Greens*, TIME (Jan. 26, 2009), <http://www.time.com/time/health/article/0,8599,1874106,00.html>; Kate Sheppard, *EPA Says Greenhouse-Gas Emissions a Threat to Public Health*, GRIST (Apr. 17, 2009), <http://www.grist.org/article/2009-04-17-epa-moves-toward-regulating>.

gases became “regulated pollutants.”<sup>47</sup> As a consequence, this activated regulations applicable to stationary sources.<sup>48</sup> Specifically, a stationary source emitting regulated pollutants typically crosses the regulatory thresholds established in the Clean Air Act if it emits more than 100 or 250 tons of any such pollutant per year (the limit depends on the pollutant).<sup>49</sup> In most instances, 100 or 250 tons per year of a pollutant is a significant pollution stream, generally only reached by major industrial, commercial, or energy-producing facilities.<sup>50</sup> However, emissions of greenhouse gases are much more plentiful than traditional pollutants like nitrogen oxides or carbon monoxide.<sup>51</sup> Because of this, a large number of entities that are currently not regulated as point sources under the Clean Air Act would reach the 100 and 250 tons-per-year levels. According to estimates from EPA under the Bush Administration, examples of such entities include “apartment buildings, large homes, schools, and hospitals.”<sup>52</sup> To avoid—or at least delay—such a broad regulatory reach, EPA created what is known as the Greenhouse Gas Tailoring Rule, which lays out a time schedule for regulating entities that emit between 50,000 and 100,000 tons of greenhouse gases per year.<sup>53</sup> This rule would effectively limit EPA’s reach to the same sorts of stationary sources that the Agency already regulates under the Clean Air Act. While there has been some pushback against the Tailoring Rule,<sup>54</sup> much of the resistance relates not to the idea of regulating greenhouse emissions but to the expansive reach the Clean Air Act

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

48. *Id.*

49. Clean Air Act § 169(1), 42 U.S.C. § 7479(1) (2006).

50. *See id.*

51. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,308 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

52. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1).

53. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. at 55,292; Press Release, EPA, EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses and Farms Will be Shielded (May 13, 2010), *available at* <http://tinyurl.com/2vr4qom>.

54. *See, e.g.*, Marsha Blackburn, *EPA Stands in the Way of Recovery*, THE HILL, Apr. 22, 2010, at 32, *available at* <http://thehill.com/special-reports/earth-day-april-2010/93643-epa-stands-in-the-way-of-recovery-> (arguing against the endangerment finding due to the specific impacts of the greenhouse gas tailoring rule).

might have in the absence of the Tailoring Rule. Indeed, without the Tailoring Rule, the endangerment finding would require EPA to regulate millions of entities not currently regulated as point sources under the Clean Air Act.<sup>55</sup>

In addition to the regulations that the endangerment finding *clearly* triggered, there is also a subset of regulations that the endangerment finding *may* have triggered. While this may sound nebulous, the structure of the Clean Air Act makes the rationale behind this worry clear. In general terms, the endangerment finding EPA employed to regulate automobiles requires the Administrator to find that the emission at issue (1) is an “air pollutant,” (2) is emitted by automobiles, and (3) that this air pollutant may “reasonably be anticipated to endanger public health or welfare.”<sup>56</sup> The requirements of this endangerment finding are very similar (though not identical) to other endangerment finding provisions found within the Act, some of which trigger regulations related to fuels and fuel additives,<sup>57</sup> new or modified stationary sources,<sup>58</sup> engines and vehicles other than those for automobiles (including vessels and construction, farm, and lawn equipment),<sup>59</sup> aircraft,<sup>60</sup> and even air quality.<sup>61</sup> While lengthy discussions could be had regarding each of these provisions and others,<sup>62</sup> the main point is that the automobile endangerment finding has the potential to open a Pandora’s box of Clean Air Act regulations.

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55. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,533 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

56. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006).

57. *Id.* § 211(c)(1), 42 U.S.C. § 7545(c)(1).

58. *Id.* § 111(b)(1), 42 U.S.C. § 7411(b)(1).

59. *Id.* § 213, 42 U.S.C. § 7547.

60. *Id.* § 231, 42 U.S.C. § 7571.

61. *Id.* § 108(a)(1), 42 U.S.C. § 7408(a)(1).

62. *See, e.g.*, ROBERT MELTZ, CONG. RESEARCH SERV., R40984, LEGAL CONSEQUENCES OF EPA’S ENDANGERMENT FINDING FOR NEW MOTOR VEHICLE GREENHOUSE GAS EMISSIONS 1 (2009) (“It is not, however, the likelihood of standards for *new motor vehicle* GHG [greenhouse gas] emissions that has sparked controversy. Indeed, EPA’s proposed standards for emissions of carbon dioxide (CO<sub>2</sub>, the principal GHG) from new light-duty vehicles were set so as to align with the Department of Transportation’s simultaneously proposed fuel economy standards, and are reported to be achievable with presently available technology. Rather, objection has been raised to the section 202 endangerment finding for GHGs and the upcoming motor vehicle GHG emission standards because of the argument they will trigger a cascade of unacceptable regulatory consequences under *other* CAA provisions.” (footnote omitted)); Daniels et al., *supra* note **Error! Bookmark not defined.**, at 10837.



EPA's navigation of the regulatory landscape associated with its endangerment finding has been tricky from a legal perspective. As discussed below, however, from a political perspective, the landscape has been downright treacherous. While EPA has tread carefully, its movement on regulating greenhouse gases has engendered considerable political backlash. I now turn to how this backlash has manifested itself.

### III. POLITICAL BACKLASH

Even before the 2010 congressional elections came to an end, many in Washington, including the Republican leadership, began making preparations to take on EPA and its greenhouse gas regulations.<sup>63</sup> Indeed, during the election cycle, many Republicans and some Democrats running for Congress in 2010 seriously questioned the reality of climate change, the prudence of addressing the problem, and the credibility of EPA.<sup>64</sup> As the 2010 election results came in, many came to believe that some in Congress were voted out of office at least in part due to their support of greenhouse gas regulation, particularly their support of climate legislation.<sup>65</sup> In fact, when President Obama addressed the nation about the Democratic Party's loss, he discussed not only the stagnant economy but also the cap-and-trade bill and EPA's greenhouse gas regulations.<sup>66</sup> Regardless of why the 2010 election was a rough one

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63. See Robin Bravender, *If Upton Takes Reins, GOP Wants Say on His Staff*, POLITICO (Oct. 19, 2010, 4:49 AM), <http://www.politico.com/news/stories/1010/43797.html>; Fred Upton, *Declaring War on the Regulatory State: Pelosi's Congress Ignores the Red-Tape Brigade but the GOP Won't*, WASH. TIMES, Oct. 19, 2010, at B01, available at <http://tinyurl.com/25uju7s>.

64. See Neela Banerjee, *GOP Plans Attacks on the EPA and Climate Scientists: If Republicans Win Control of the House, They Will Challenge Environmental Policies and Global Warming Researchers*, L.A. TIMES, Oct. 30, 2010, at A18; Ronald Brownstein, *Giving Climate Science a Cold Shoulder*, NAT'L J., Oct. 9, 2010, at 52; Editorial, *In Climate Denial, Again*, N.Y. TIMES, Oct. 18, 2010, at A34; Brad Johnson, *GOP Senate Candidates Oppose Climate Science and Policy*, THINK PROGRESS (Sept. 13, 2010, 12:22 PM), <http://thinkprogress.org/report/gop-senate-deniers/>.

65. Ben Geman & Darren Goode, *Battle Under Way to Define Cap-and-Trade: How it Played in House Democrats' Beating*, THE HILL, Nov. 4, 2010, at 18; Randy Rieland, *Boehner Takes Over and Climate Legislation Fades to Black*, GRIST (Nov. 3, 2010, 10:20 AM), <http://tinyurl.com/73ffem4>; Darren Samuelsohn & Robin Bravender, *Democrats' Day of Reckoning Comes for Climate Vote*, POLITICO (Nov. 3, 2010, 5:19 AM), <http://www.politico.com/news/stories/1110/44617.html>.

66. Press Release, White House Office of the Press Secretary, Press Conference by the President (Nov. 3, 2010), available at <http://www.whitehouse.gov/the-press->

for Democrats, many of the new members of Congress had serious questions about whether climate change was manmade and consequently opposed regulation of greenhouse gases.<sup>67</sup> Perhaps due to either political calculations or neglect, much to the dismay of those who want action on climate change, President Obama did not even allude to climate change in his 2011 State of the Union address.<sup>68</sup>

The rhetoric aimed at EPA over the past couple of years falls along a spectrum. Below I discuss a number of attacks that have been used in an attempt to diminish EPA's power and credibility. The simplest of these attacks—though still undoubtedly damaging to EPA—is the argument that we should be skeptical that climate change is occurring and that it is caused by people. This Part begins by discussing this and other sorts of rhetoric that are at play. It moves on to detail attempts, some of which have been successful, to cut EPA's budget. It also brings up the major threat that EPA has had to worry about over the past few years—that Congress would revoke at least a portion of its regulatory power. Finally, this Part highlights a number of proposals from influential politicians to dismantle EPA.

### *A. Rhetoric*

#### *1. Climate change skepticism*

The first line of attack used against EPA's regulations is a classic, if not tired, argument against taking action on climate change: that climate change is not occurring, and, if it is, that human causes are at best uncertain. Despite the fact that this position contradicts a strong consensus within the scientific community,<sup>69</sup> this sort of argument is made frequently within the political arena.

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office/2010/11/03/press-conference-president.

67. See e.g., Brad Johnson, *Half of GOP Caucus Are Climate Zombies, Four Members Admit Science Is Real*, GRIST (Nov. 3, 2010, 6:46 PM), <http://feeds.grist.org/click.phdo?i=ef724c8b2b209f20864f904bc2bc7f9d>; Scott Keyes, *Meet the 2010 GOP Freshman Class*, THINK PROGRESS (Nov. 3, 2010, 2:00 PM), <http://thinkprogress.org/politics/2010/11/03/128002/gop-frosh-class/>.

68. See David Roberts, *Obama Was Wrong Not to Mention Climate Change in His State of the Union*, GRIST (Jan. 28, 2011, 3:48 PM), <http://www.grist.org/article/2011-01-26-obama-wrong-not-to-mention-climate-change-in-state-of-the-union>.

69. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007); *Scientific Consensus on Global Warming*, UNION

While it is not necessary to exhaustively document the fact that many in Congress are climate change skeptics, in order to provide some context, consider a few of the more memorable criticisms in this vein. For example, the greatest opponent to addressing climate change in the Senate, Senator James Inhofe, characterized the science of climate change as “nothing conclusive” and “totally debunked.”<sup>70</sup> Representative Michele Bachmann, before beginning her run for the presidency, framed climate change in these terms: “It’s all voodoo, nonsense, hokum, a hoax.”<sup>71</sup> Another presidential candidate, Governor Rick Perry, in a book he wrote before launching his candidacy, called climate change “all one contrived phony mess that is falling apart under its own weight.”<sup>72</sup>

Even if such a view may not harmonize with the overwhelming view of scientists with expertise in this area, it has not changed the fact that those pushing this sort of rhetoric have a political constituency. In fact, in a recent nationwide poll, more than half of the respondents thought there was significant disagreement within the scientific community regarding climate change, and even more than that thought it at least somewhat likely that scientists have falsified data to support their theories of global warming.<sup>73</sup> From December 2009, when EPA made its endangerment finding, to August 2011, the number of people who think that scientists have falsified data has increased by ten percent.<sup>74</sup> It should be noted that despite the questions that the public has about climate change, the public still seems quite supportive of EPA and paradoxically—or perhaps indicative of U.S. ignorance of the causes of climate

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OF CONCERNED SCIENTISTS, <http://ucsusa.org/ssi/climate-change/scientific-consensus-on.html> (last visited Oct. 7, 2011).

70. Bradford Plumer, *Is This What the Climate-Change Debate Has Come to?*, THE NEW REPUBLIC (Feb. 10, 2011, 12:00 AM), <http://www.tnr.com/article/environment-energy/83196/epa-regulations-congress-inhofe-upton>.

71. Jennifer Edwards, *16B Candidates Kiffmeyer, Lumley Attend Convention GOP Convenes at Salida*, CLEARWATER-WEST SHERBURNE TRIB. (Mar. 15, 2008), <http://westsherburnetribune.com/main.asp?SectionID=2&SubSectionID=62&ArticleID=10471>.

72. RICK PERRY, FED UP! OUR FIGHT TO SAVE AMERICA FROM WASHINGTON 92 (2010).

73. *69% Say It's Likely Scientists Have Falsified Global Warming Research*, RASMUSSEN REP. (Aug. 3, 2011), <http://tinyurl.com/3wesauw>.

74. *See id.*; *see also* Richard Harris, *Climate Change: Public Skeptical, Scientists Sure*, NPR (June 21, 2011), <http://www.npr.org/2011/06/21/137309964/climate-change-public-skeptical-scientists-sure>.

change—even supportive of EPA’s efforts to regulate carbon dioxide.<sup>75</sup>

It is clearly important for those in politics, and particularly Republicans, to tread carefully when discussing the science behind climate change. For example, this past year as Congress considered undoing EPA’s endangerment finding, Representative Henry Waxman put forward a motion to put Congress on record that “climate change is occurring, is caused largely by human activities, and poses significant risks for public health and welfare.”<sup>76</sup> The House shot down the amendment by a vote of 240–184.<sup>77</sup> Furthermore, among those vying for the presidential nomination during the summer of 2011, skepticism about climate change emerged as an important political issue. Some have even gone so far as to label it a new litmus test for the Republican Party.<sup>78</sup> This caused some, and most notably presidential candidate Jon Huntsman, to worry publicly that Republicans would be seen as the “anti-science party.”<sup>79</sup>

## 2. Congressional intent

The second of the rhetorical themes used to attack EPA is the assertion that by passing the Clean Air Act, Congress did not intend EPA to use the Act to address greenhouse gases.<sup>80</sup> While this is not

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75. See ORC INTERNATIONAL, SURVEY HIGHLIGHTS: AMERICANS WANT EPA TO DO MORE, NOT LESS (2011), available at <http://tinyurl.com/3d3cwvx>; AMERICAN LUNG ASSOCIATION, FREQUENCY QUESTIONNAIRE (Feb. 7–14, 2011), available at <http://www.lungusa.org/assets/documents/healthy-air/clean-air-survey.pdf>; AMERICAN LUNG ASSOCIATION, FREQUENCY QUESTIONNAIRE (June 4–12, 2011), available at <http://www.lungusa.org/healthy-air/outdoor/resources/clean-air-survey/clean-air-survey-2011.pdf>. Somewhat surprisingly, similar findings were made even within the legislative districts of some of the biggest proponents of curbing EPA’s power. See NATIONAL RESOURCES DEFENSE COUNCIL, PUBLIC POLICY POLLING (Feb. 6, 2011), <http://switchboard.nrdc.org/blogs/paltman/Compiled%20PPP%202-6-11%20results%20table.pdf>.

76. H. Amend. 245 to H.R. 910, 112th Cong. (as rejected by House, Apr. 6, 2011).

77. 157 CONG. REC. H2387–88 (daily ed. Apr. 6, 2011).

78. Raymond S. Bradley, *Global Warming Is a Litmus Test for US Republicans*, THE GUARDIAN (Aug. 3, 2011, 8:30 AM), <http://www.guardian.co.uk/environment/2011/aug/03/global-warming-republicans>.

79. Paul Krugman, Op-Ed., *Republicans Against Science*, N.Y. TIMES, Aug. 29, 2011, at A23.

80. See, e.g., *Massachusetts v. U.S. EPA, Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. 5 (2008) (statement of F. James Sensenbrenner, Ranking Member, Select Comm. for Energy Independence and Global Warming) (“By focusing on two laws, the Clean

the most incendiary claim that can be made, it is among the most common. For example, take the representative argument made along these lines by Senator Mary Landrieu:

[T]he Clean Air Act was never intended to regulate greenhouse gases. It was designed to reduce the smog and acid rain that was choking our cities in the 1970s and 1980s. That law, which I support, has worked fairly well. But greenhouse gases do not harm our lungs and pollute our air.<sup>81</sup>

Further, even though the Clean Air Act was passed about forty years ago, some of the memories of those in Congress can reach back that far. Consider the following argument by Representative John Dingell:

I continue to make the case that the Supreme Court, in *Massachusetts v. EPA*, erroneously found that greenhouse gases are pollutants covered by the Clean Air Act. The Clean Air Act was not designed to regulate greenhouse gases[;] as the then-Chairman of the House Energy and Commerce Committee I know what was intended when we wrote the legislation.<sup>82</sup>

Others have made similar claims.<sup>83</sup>

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Air Act and the Endangered Species Act, the courts stand to extend the scope of these laws far beyond what they were intended to accomplish.”); Barringer, *supra* note 24 (quoting Rep. John Dingell, on the day after the Court handed down *Massachusetts v. EPA*, stating, “While I still believe Congress did not intend for the Clean Air Act to regulate greenhouse gases, the Supreme Court has made its decision and the matter is now settled.”).

81. Press Release, U.S. Sen. Mary L. Landrieu, Landrieu Co-Sponsors Resolution to Halt EPA Efforts to Use Clean Air Act to Regulate Greenhouse Gases (Jan. 21, 2010), *available at* <http://landrieu.senate.gov/mediacenter/pressreleases/01-21-2010-2.cfm?renderforprint=1&>.

82. Press Release, Office of Congressman John D. Dingell, Dingell on EPA Action Concerning Greenhouse Gases (Dec. 7, 2009), *available at* <http://tinyurl.com/7zzw8ol>.

83. *See, e.g.*, John M. Broder, *E.P.A. Expected to Regulate Carbon Dioxide and Other Heat-Trapping Gases*, N.Y. TIMES, Feb. 19, 2009, at A15; Sen. Saxby Chambliss, *Congress Must Stop EPA's Vast Overreach*, THE HILL, Feb. 23, 2010, at 22, *available at* <http://thehill.com/special-reports/agriculture-a-food-safety-february-2010/83235-congress-must-stop-epas-vast-overreach> (“I am truly appalled by EPA’s statements and actions suggesting that it can and will use the existing Clean Air Act to regulate something the statute was never intended to regulate.”); Press Release, Office of the Attorney Gen. of Tex., Texas Challenges EPA’s Greenhouse Gas Regulations, Argues “Timing” and “Tailoring” Rules Violate Federal Law (June 21, 2011), *available at* <https://www.oag.state.tx.us/oagnews/release.php?id=3769>; Press Release, Office of Congressman Collin C. Peterson, Peterson Sponsors Legislation to Restrict the EPA (Feb. 2, 2010), *available at* <http://tinyurl.com/6rk3gfp> (“The Clean Air Act was not meant for this. It was meant to clean up the air, to get lead out of the air. It was not meant to fight global warming.”); Office

Still, it could be argued, as the Supreme Court's majority opinion in *Massachusetts v. EPA* suggests, that, regardless of whether climate change was on the minds of the members of Congress who passed the Act, the way that Congress drafted the Clean Air Act allowed EPA to regulate "pollutants" generally and not only those pollutants Congress specified at the time of passage. The structure of the Act was designed for flexibility as EPA began to unweave the country's pollution problems. So, it is irrelevant whether Congress specifically contemplated regulation of greenhouse gas emissions under the Clean Air Act. Since Congress contemplated regulating a vaguely defined set of pollutants, the question is whether greenhouse gases constitute a pollutant under the Act. The sprawling 1970 Clean Air Act ignored climate change completely. Of course, no matter how one slices it, the issue of whether greenhouse gases ought to be considered a pollutant under the Act is a matter of dispute. Indeed, many people, including the dissenting justices in *Massachusetts v. EPA*, read the law differently.<sup>84</sup>

### 3. *Parade of horrors*

A third line of argument relies on pointing to negative consequences or questioning the wisdom of following through with what the Court seemed to require in *Massachusetts v. EPA*—using the Clean Air Act to regulate greenhouse gases in ways prescribed by the Act. Again, after the Court handed down its decision in *Massachusetts v. EPA*, President Bush responded to the opinion in the press by questioning, at least by implication, the wisdom of complying with the Court's order. According to the New York Times, the President said, "Whatever we do . . . must be in concert with what happens internationally. . . . Unless there is an accord with China, China will produce greenhouse gases that will offset anything

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of Sen. Kay Bailey Hutchison, *President Obama's EPA Power Grab Will Hurt American Jobs and Businesses*, HUTCHISON.SENATE.GOV (Feb. 19, 2010), <http://tinyurl.com/7myy87z> ("Make no mistake; this is nothing short of a bureaucratic power grab that will endanger American jobs and businesses.").

84. *See, e.g.*, Press Release, Office of Congressman Joe Barton, EPA Overregulation is Crushing the American Economy (Apr. 6, 2011), *available at* <http://joebarton.house.gov/Newsroom.aspx?FormMode=Detail&ID=655>; 156 CONG. REC. S4828 (daily ed. June 10, 2010) (statement of Sen. John McCain) ("Demonstrating an unparalleled disregard for Congressional intent, the EPA is attempting to make the case that Congress intended to regulate greenhouse gas emissions under the Clean Air Act, even though greenhouse gas emissions were not formally addressed by the Act.").

we do in a brief period of time.”<sup>85</sup> Subsequently, in the summer of 2008, EPA published a notice of proposed rulemaking that sought input about how EPA might address the Court’s mandate.<sup>86</sup> As part of this proposed notice, the Bush Administration sought input from many federal agencies on the implications of regulating greenhouse gases with the Clean Air Act. In a cover letter introducing the advance notice, Administrator Johnson argued that the following negative consequences would result if EPA used the Clean Air Act to regulate greenhouse gases:

[I]t has become clear that if EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: The potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.

...

I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations. These rules would largely pre-empt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.<sup>87</sup>

Of course, the Bush Administration is not alone in wanting to avoid a myriad of negative consequences that the Bush Administration EPA found likely to be associated with using the Clean Air Act to regulate greenhouse gases.<sup>88</sup> It seems worth noting,

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85. Felicity Barringer & William Yardley, *Bush Splits on Greenhouse Gases with Congress and State Officials*, N.Y. TIMES, Apr. 4, 2007, at A1.

86. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

87. *Id.*

88. 155 CONG. REC. S4557 (daily ed. Apr. 22, 2009) (statement of Sen. John Barrasso); Sen. Kit Bond, *EPA’s Decision Will Do More Harm than Good*, THE HILL (Apr. 21,

however, that as time has progressed the major objection along this line has focused on the negative effects regulation could have on the economy—particularly jobs.<sup>89</sup>

#### 4. *Greenmailing*

A fourth line of rhetoric is an accusation that, in light of purported negative consequences of using the Clean Air Act to regulate greenhouse gases, any movement in that direction amounts to blackmailing or strong-arming Congress to act.<sup>90</sup> While there is room to disagree about how much pressure constitutes strong-arming, there is little doubt that—at the very least—even the staunchest of EPA’s supporters believe that congressional action on climate change could be much more effective than leaving the task to EPA.<sup>91</sup> One might also argue that the endangerment finding increased the pressure for Congress to legislate, but it did not rise to

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2009, 11:06 AM), <http://thehill.com/blogs/congress-blog/politics/25636-epas-decision-will-do-more-harm-than-good-sen-kit-bond>; Sen. Lisa Murkowski, *Endangerment Finding Threatens Economic Recovery*, THE HILL (Apr. 21, 2009, 9:01 AM), <http://tinyurl.com/7wjezf7>; Press Release, Office of Sen. David Vitter, Vitter, Barrasso Caution against Implications of Greenhouse Gas Endangerment Finding (Dec. 7, 2009), available at <http://tinyurl.com/7elc44z>; Press Release, Office of Sen. John Barrasso, *supra* note 28.

89. Ben Geman, *Boehner Backs Effort to Kill EPA ‘Endangerment Finding,’* THE HILL (Dec. 17, 2009, 2:38 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/72787-boehner-backs-effort-to-kill-epa-endangerment-finding>.

90. Implicit within this argument is that if Congress were to act, it would enact some sort of climate legislation and not just legislatively preempt the use of the Clean Air Act to regulate greenhouse gases. Of course, this assumption seemed much more plausible when the Democrats controlled both houses of Congress.

91. John Kerry & Lindsey Graham, Op-Ed., *Yes We Can (Pass Climate Legislation)*, N.Y. TIMES, Oct. 11, 2009, at WK11; Press Release, Office of Congresswoman Nancy Pelosi, Pelosi: As Copenhagen Begins, EPA Finding Underscores Need for Am. Clean Energy and Sec. Act (Dec. 7, 2009), available at <http://pelosi.house.gov/news/press-releases/2009/12/releases-Dec09-epa.shtml>; Press Release, Office of Senator Joe Lieberman, Lieberman Reaction to EPA Endangerment Finding (Dec. 7, 2009), available at <http://lieberman.senate.gov/index.cfm/news-events/news/2009/12/lieberman-reaction-to-epa-endangerment-finding>; Press Release, U. S. Environmental Protection Agency, EPA Finds Greenhouse Gases Pose Threat to Public Health, Welfare / Proposed Finding Comes in Response to 2007 Supreme Court Ruling (Apr. 17, 2009), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/0ef7df675805295d8525759b00566924!OpenDocument>; Press Release, U.S. Senate Comm. on Env’t. & Pub. Works, Boxer Delivers “Reality Check” on Global Warming Action (Mar. 19, 2009), available at <http://tinyurl.com/6qr6ukd>; Press Release, White House Office of the Press Sec’y, Press Briefing by Press Secretary Robert Gibbs (Mar. 23, 2009), available at <http://tinyurl.com/7pu5zyq>.



the level of blackmail. In fact, in facing questions about whether EPA was trying to force congressional legislation, Administrator Lisa Jackson responded as follows:

I can't say how other people will see it but EPA acts independently of Congress. The important thing to remember about the endangerment [is] that there are two signposts that compel the EPA to act. The first is the Supreme Court decision [*Massachusetts v. EPA*]. The dispute over whether the Clean Air Act should be used to regulate greenhouse gases was settled by the highest court in the land. The court ruled over two years ago that EPA should determine whether or not greenhouse gases meet the test for criteria pollutants, whether they endanger public health and welfare. For two years the EPA has been compelled to act and for two years the EPA thumbed its nose at the Supreme Court. The other guardrail is the science, and in between [those two] is the road the EPA has to walk. The science on whether or not these gases are pollutants is clear. As the endangerment finding says, in both magnitude and probability climate change is an enormous problem. The way to change the road is to change one of those guideposts. People tend to think we're trying to compel folks, but we're just trying to do our job.<sup>92</sup>

Putting aside the more difficult and important issue of the truth of the matter, the line of argument that alleges EPA regulation amounts to congressional blackmail predates the Obama Administration. In fact, the U.S. Chamber of Congress made this argument about the Bush Administration EPA after it released its ANRP. In one document, it argued, "EPA staff state in their draft analysis that unless and until Congress steps in, they will continue down the path of CAA regulation, and the ANPR sets forth the roadmap as to how our economy will ultimately look."<sup>93</sup> In a related document, the Chamber asserted, "EPA staff is clearly trying to force Congress to legislate, and is using the ANPR as a form of political blackmail: give us climate legislation, or else we will give you the

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92. Bryan Walsh, *Q&A: Lisa Jackson: The New Head of the EPA*, TIME (Apr. 23, 2009) (second alteration in original), <http://www.time.com/time/health/article/0,8599,1893155,00.html>; see also Press Release, White House Office of the Press Sec'y, Press Briefing by Secretary of Transportation Ray LaHood and Environmental Protection Agency Administrator Lisa Jackson (Sep. 15, 2009), available at <http://tinyurl.com/3xmhqzq>.

93. Letter from R. Bruce Josten, Exec. Vice President, Gov't Affairs, to Members of the United States Congress (Aug. 4, 2008), available at <http://www.uschamber.com/sites/default/files/CO2/files/080804EPAANPRGreenhouseGasCongress.pdf>.

programs in the ANPR.”<sup>94</sup> While I cannot find an instance where Obama asserted that he would use the Clean Air Act to regulate greenhouse gases as a candidate, as mentioned above, Grumet, a senior member of Obama’s campaign, did make that assertion in an interview with Bloomberg.com.<sup>95</sup> The Wall Street Journal found that interview and made the same argument that the U.S. Chamber had pointed at the Bush Administration EPA.

As Barack Obama’s energy adviser has now made clear, the would-be President intends to blackmail or rather, greenmail—Congress into falling in line with his climate agenda.

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Now it turns out that a President Obama would himself wield such a finding as a political bludgeon. He plans to issue an ultimatum to Congress: Either impose new taxes and limits on carbon that he finds amenable, or the EPA carbon police will be let loose to ravage the countryside.<sup>96</sup>

The U.S Chamber and the Wall Street Journal are not alone in making this sort of argument.<sup>97</sup>

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94. U.S. CHAMBER OF COMMERCE, EPA’S ADVANCE NOTICE OF PROPOSED RULEMAKING ON CO2: CONDENSED FACT SHEET 3 (2008), *available at* <http://www.uschamber.com/sites/default/files/issues/energy/files/anpr.pdf>.

95. *See* Efstathiou, *supra* note 11.

96. *Obama’s Carbon Ultimatum*, *supra* note 12.

97. *See, e.g.*, Chambliss, *supra* note 83 (“As elected officials sent to Washington to be a voice for our constituents, we should not be bullied into passing bad legislation.”); Senator James Inhofe, *The EPA’s Endangerment Finding is a Ticking Time Bomb*, THE HILL (May 4, 2009, 9:52 AM), <http://thehill.com/blogs/congress-blog/politics/25576-the-epas-endangerment-finding-is-a-ticking-time-bomb-sen-james-ihofe>; Murkowski, *supra* note 88 (“Global climate change is a serious problem and we should address it through well thought out legislation for that reason, not because of a threat that draconian regulations will be imposed by the administration.”); Senator Lisa Murkowski, *Disapproval Resolution: June 2010*, THE HILL (June 2, 2010, 1:18 PM), <http://thehill.com/blogs/congress-blog/energy-environment/101051-disapproval-resolution-june-2010-sen-lisa-murkowski> (“Those who favor [EPA regulation of greenhouse gases] tend to have a simple and unfortunate reason for doing so: they believe the threat of regulation will force Congress to pass cap-and-trade legislation, no matter how bad the bill in question may be. But we will not, and should not, pass bad legislation to stave off bad regulations.”); Press Release, Senator Richard G. Lugar, Lugar Cosponsors Legislation to Prevent Further EPA Regulation (Mar. 3, 2011), *available at* <http://lugar.senate.gov/record.cfm?id=331620> (“The threat of EPA regulation has only made the debate on environmental protection more polarized and made it more difficult to find lasting solutions.”); Jim Sensenbrenner, *Stimulate, Don’t Stifle the Economy*, 183 NEWS FROM CONGRESS (Rep. Jim Sensenbrenner), Jan. 2010, at 2, *available at* [http://sensenbrenner.house.gov/UploadedFiles/008\\_Sensenbrenner-Dec09\\_Sen.pdf](http://sensenbrenner.house.gov/UploadedFiles/008_Sensenbrenner-Dec09_Sen.pdf).

### 5. *Rogue agency*

A fifth sort of argument, and the final sort addressed here, is a blanket attack on EPA. While some who make this argument would undoubtedly disapprove of EPA issuing its endangerment finding, the displeasure with the agency is much broader than this. What is striking is the extent to which EPA generally has become a target of politicians, particularly conservatives upset with President Obama's job performance. While the rhetoric along this vein is certainly not without strong counterarguments and might just reflect politics at play, the major issue here is that the rhetoric has reached a surprisingly extreme level.

One of the first of such blunt attacks on EPA from Congress came from Representative Darrell Issa, who called EPA "a wrecking ball that is destroying jobs, putting more businesses under water and increasing government control over our everyday lives."<sup>98</sup> The most important and visible attacks on EPA, however, have not occurred on the floors of the House or the Senate. Rather, these attacks have occurred on the campaign trail by Republicans vying for their party's presidential nomination. Presidential candidate and former House Speaker Newt Gingrich has characterized EPA as part of what he termed the Obama Administration's "war against American energy."<sup>99</sup> Similarly, Representative Michele Bachmann has suggested the agency be renamed "the job-killing organization of America."

#### *B. Attempts to Strip EPA of Power to Regulate Greenhouse Gases*

As bad as it is for EPA and its reputation to deal with the war of words, the attacks on EPA amount to much more than cheap talk. This is not surprising. It is hard to imagine that complacency is the policy prescription when there are those in Washington who think that EPA is wrong on the science, flouting congressional intent, releasing a parade of horrors on the country and the economy, attempting to strong-arm Congress, and acting like a rogue agency.

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98. Representative Darrell Issa, *EPA: Regulatory Mess, Economic Massacre*, ISSA.HOUSE.GOV (Mar. 4, 2010), <http://tinyurl.com/84jwdb9>.

99. Chris Cillizza, *Newt Gingrich Calls for Replacing the EPA*, THE FIX (Feb. 10, 2011, 1:28 PM), <http://voices.washingtonpost.com/thefix/eye-on-2012/newt-gingrich-calls-for-abolit.html>.

One plausible response for those upset with EPA would have been to cut back its powers and attempt to rein it in. And, in fact, within a week of EPA's release of its proposed endangerment finding, Senator James Inhofe began advocating for Congress to "pass [a] simple, narrowly-targeted bill" that would strip EPA's power to regulate greenhouse gases.<sup>100</sup> As EPA finalized its endangerment finding months later, Senator Lisa Murkowski began advocating for legislation that would overturn EPA's finding.

I remain committed to reducing emissions through a policy that will protect our environment and strengthen our economy, but EPA's backdoor climate regulations achieve neither of those goals. . . . EPA regulation must be taken off the table so that we can focus on more responsible approaches to dealing with global climate change . . . .

. . . .

EPA has taken these actions despite the fact that Congress is continuing to work on climate legislation. I find that highly counter-productive, especially as our nation struggles to regain its economic footing. . . . The endangerment finding must be stopped so that Congress can pass responsible legislation that is sound on its own merits, and not merely a defense against the threat of damaging regulations.<sup>101</sup>

As Congress reconvened in January of 2010, a month after EPA finalized its endangerment finding, Murkowski moved beyond just talking about voiding EPA's endangerment finding and actually proposed a Senate Joint Resolution that would do just that.<sup>102</sup> Representative Collin Peterson introduced the same legislation in the House in February, and in doing so argued, "We need to stop the EPA in its tracks on this and prevent them from simply imposing these over-reaching regulations on all of us."<sup>103</sup> Other bills that would void or at least delay the endangerment finding soon

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100. Senator James Inhofe, *EPA Endangerment Finding Will Destroy Jobs, Harm Consumers*, THE HILL (Apr. 20, 2009, 1:27 PM), <http://tinyurl.com/86vn6oe>.

101. Press Release, U.S. Sen. Comm. on Energy & Nat. Res., Murkowski Seeks to Halt EPA Endangerment of U.S. Economy (Dec. 14, 2009), *available at* <http://tinyurl.com/7tnyvqr>.

102. S.J. Res. 26, 111th Cong. (2010).

103. Press Release, Congressman Collin Peterson, Peterson Introduces "Disapproval Resolution" in the House (Feb. 26, 2010), *available at* <http://collinpeterston.house.gov/press-release/peterson-introduces-disapproval-resolution-house>.

followed,<sup>104</sup> but, at least originally, it was Senator Murkowski's bill that seemed to be getting the most traction. By the summer of 2010, President Obama had threatened to veto Senator Murkowski's resolution in the event Congress passed it.<sup>105</sup> Nonetheless, she pushed for a vote on her resolution, and on June 10, the measure failed forty-seven to fifty-three.<sup>106</sup>

Of course, the 2010 congressional election gave Republicans a majority in the House and narrowed the Democrats' majority in the Senate. Not surprisingly, the 2011 session of Congress marked a dramatic reduction in the chances of climate change legislation passing and a significant increase in the prospects of legislation that would displace EPA's ability to regulate greenhouse gases. On the first day Congress was in session in 2011, legislation to overturn EPA's regulatory authority was introduced again.<sup>107</sup> And, in the President's State of the Union address delivered at the end of January, any mention of climate change was conspicuously missing.<sup>108</sup> By March, a bill that would have stripped EPA of its power to regulate greenhouse gases cleared the House Energy and Commerce Committee's Energy and Power subcommittee<sup>109</sup> and a few days later the House Energy and Commerce Committee itself.<sup>110</sup> Again, President Obama responded by threatening to veto any legislation that would strip EPA of its power to regulate greenhouse gases.<sup>111</sup>

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104. S. 3072, 111th Cong. (2010); H.R. 391, 111th Cong. (2009).

105. Ben Geman & Puneet Kollipara, *Obama Threatens to Veto Murkowski Climate Plan as Lobbying Intensifies*, THE HILL (June 8, 2010, 2:06 PM), <http://tinyurl.com/33e9qrz>.

106. 156 CONG. REC. S4836 (daily ed. June 10, 2010).

107. Ben Geman, *Nearly 50 House Republicans Offer Bill to Block EPA Climate Rules*, THE HILL (Jan. 6, 2011, 1:25 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/136399-nearly-50-house-republicans-offer-bill-to-block-epa-climate-rules>.

108. Ben Geman, *Absence of Climate Change in Obama Address a Sign of the Times*, THE HILL (Jan. 25, 2011, 10:40 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/140231-lack-of-sotu-climate-discussion-a-sign-of-the-times>.

109. Andrew Restuccia, *Cantor Promises Swift House Vote on Legislation to Block EPA Rules*, THE HILL (Mar. 10, 2011, 12:09 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/148611-republicans-approve-bill-to-block-epa-climate-rules-in-key-subcommittee>.

110. Andrew Restuccia, *Bill to Block EPA Rules Advances After Spat on Climate Science*, THE HILL (Mar. 15, 2011, 4:56 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/149713-house-panel-approve-bill-to-block-epa-climate-rules>.

111. Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: H.R. 910—Energy Tax Prevention Act of 2011 (Apr. 5, 2011), available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr910r\\_20110405.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr910r_20110405.pdf).

In the Senate, climate change legislation also began to accumulate. By the end of March, Senate leaders agreed to allow this legislation to make it to the floor for debate and votes. It reached the Senate floor on April 6. While Republicans rallied around legislation that was identical to that in the House, the Senate first considered three pieces of compromise legislation offered by Democrats. Senator Rockefeller's bill, which would have put a two-year moratorium on EPA's ability to regulate greenhouse gases, received only twelve votes (three of which came from Republicans).<sup>112</sup> Senator Stabenow's bill, which would have delayed EPA's ability to regulate greenhouse gases for two years and exempted various aspects of agriculture from the reach of EPA's regulation, attracted only seven votes—all from Democrats.<sup>113</sup> Senator Max Baucus's bill, which would have exempted agriculture from EPA's regulation and codified EPA's tailoring rule, received only seven votes, again all from Democrats.<sup>114</sup> Senate Republicans, however, came out in force when considering a bill identical to the one pushed in the House, which would have permanently blocked EPA from regulating greenhouse gas emissions. Four Democrats and all but one Republican voted for the bill, making the final vote tally fifty to fifty.<sup>115</sup> (A tiebreaking vote was not needed because under the Senate's cloture rule, sixty votes were needed to pass the bill.) It is noteworthy, however, that sixty-four senators voted for at least one of the amendments.<sup>116</sup> Yet, even if all of these senators could have come to an agreement on a single bill, this still would not have been enough to override a veto from the White House.

While the Senate narrowly rejected legislation that would have blocked EPA's greenhouse gas regulatory authority, the House approved its legislation in a 255 to 172 vote.<sup>117</sup> Of course, because the legislation failed in the Senate, and because President Obama

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112. 157 CONG. REC. S2154, S2178–79 (daily ed. April 6, 2011).

113. *Id.* at S2178.

114. *Id.* at S2177.

115. *Id.* at S2179.

116. Andrew Restuccia, *Senate Rejects Block to EPA Climate Regs*, THE HILL (Apr. 6, 2011, 5:34 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/154385-senate-rejects-gop-backed-proposal-to-block-epa-climate-rules>.

117. Andrew Restuccia, *House Votes to Block EPA Climate Regs*, THE HILL (Apr. 7, 2011, 3:09 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/154637-house-votes-to-block-epa-climate-regulations>.

had threatened to veto it even if it did pass,<sup>118</sup> this marked a likely end of bills that would strip EPA of its power to regulate greenhouse gases for the 2011 Congress. Members of Congress vowed, however, to make this an issue in the 2012 election. It is interesting to note that by the end of summer 2011 all of the major Republican candidates for president had at least voiced concerns about EPA, and several had made opposition to the Agency a major part of their campaigns.<sup>119</sup> As the primary season approaches and as this Article goes to print, those vying for the Republican nomination have not backed off from these positions.

### *C. Attempts to Cut EPA's Budget*

Congress has other levers it can pull to rein in an agency. One of the major ways those in Congress attempt to control agencies is through the budget process. As soon as the 2010 election results were made known (if not before), it seemed likely that the newly-elected Republican majority would block climate change legislation and frustrate EPA's regulatory greenhouse gas regulations.<sup>120</sup> As the 2011 session began, those predictions started to come to fruition. In February, congressional Republicans proposed a plan that would eliminate \$3 billion from EPA's budget, something that administration officials within the White House called "irresponsible and reckless."<sup>121</sup> Still, perhaps taking a cue from the Republican's proposed budget, and attempting to find some common ground, the President circulated his budget, in which he proposed cutting EPA's budget by \$1.3 billion.<sup>122</sup> It is worth noting, however, that despite

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118. Ben Geman, *Obama Vows Veto of House Bill to Kill EPA Greenhouse Gas Rules*, THE HILL (Apr. 5, 2011, 2:23 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/154005-obama-waves-veto-pen-at-house-bill-to-kill-epa-climate-rules>.

119. See, e.g., John M. Broder, *Bashing E.P.A. is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 17, 2011, at A1.

120. See John B. Judis, *A Lost Generation*, THE NEW REPUBLIC (Nov. 3, 2010), <http://www.tnr.com/article/politics/78890/a-lost-generation>; Andrew C. Revkin, *The Real Threat to Science in the New Political Climate*, N.Y. TIMES DOT EARTH BLOG (Nov. 3, 2010, 9:43 AM), <http://dotearth.blogs.nytimes.com/2010/11/03/the-real-threat-to-science-in-the-new-political-climate/>.

121. Andrew Restuccia, *Administration Rails Against GOP Plan to Block Funding for Climate Regulations*, THE HILL (Feb. 12, 2011, 7:54 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/143705-administration-pushing-back-against-house-gop-plans-to-cut-epa-budget?page=3>.

122. Ben Geman, *White House Budget Proposal Cuts Funding for EPA, but GOP Wants*

the President's proposed cuts, his proposed budget actually increased EPA's climate change budget by \$46 million.<sup>123</sup>

The debate over the 2011 budget came to an impasse in April of 2011, just a few days after the bills to strip EPA of its authority to regulate greenhouse gases pattered out on the floor of the Senate. Those in Congress attempting to target EPA through its budget had mixed results. Among the budget riders that did not get sufficient traction was one that would have forbade EPA from spending funds on using the Clean Air Act to regulate greenhouse gases.<sup>124</sup>

On the other hand, those attempting to cut EPA's budget did succeed in some of their efforts. To achieve this success, Republicans in the House pushed the issue to the brink of a government shutdown (a similar skirmish had already occurred earlier in the year). In bargaining to keep the government running, Democrats agreed to \$40 billion in budget cuts,<sup>125</sup> including a \$1.6 billion cut from EPA's budget, which was a sixteen percent decrease from its 2010 level.<sup>126</sup> And, whereas President Obama's budget included a \$46 million increase in spending on climate change programs, the negotiated budget cut that spending by \$49 million, a thirteen percent decrease from the previous year.<sup>127</sup>

Many speculated that Congress might have targeted EPA again during its summer negotiations to raise the debt ceiling.<sup>128</sup> However,

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*More*, THE HILL (Feb. 14, 2011, 12:17 PM), <http://thehill.com/blogs/e2-wire/677-e2-wire/143855-white-house-budget-plan-cuts-epa-but-gop-wants-more>.

123. Andrew Restuccia & Ben Geman, *Overnight Energy: Spending Plans Preview Upcoming Energy Clashes*, THE HILL (Feb. 14, 2011, 9:12 PM), <http://tinyurl.com/7xs268t>.

124. Alexander Bolton, *Senate Democrats Rule Out 'Ridiculous' EPA*, NPR *Policy Riders*, THE HILL (Apr. 1, 2011, 1:55 PM), <http://thehill.com/homenews/senate/153341-senate-dems-rule-out-ridiculous-epa-npr-riders-%27>; Mark Clayton, *With 'Riders,' GOP Seeks to Undo Obama Environmental Policies*, THE CHRISTIAN SCI. MONITOR (Apr. 5, 2011), <http://www.csmonitor.com/Environment/2011/0405/With-riders-GOP-seeks-to-undo-Obama-environmental-policies>; Jonathan Zasloff, *Good News from the Budget Negotiations?*, LEGAL PLANET (Apr. 1, 2011), <http://legalplanet.wordpress.com/2011/04/01/good-news-from-the-budget-negotiations/>.

125. See, e.g., Karen Tumulty, *Boehner's Leadership is Tested in the Budget Battle*, WASH. POST, Apr. 8, 2011, [http://www.washingtonpost.com/politics/boehners-leadership-is-tested-in-the-budget-battle/2011/04/08/AFF01P4C\\_story.html](http://www.washingtonpost.com/politics/boehners-leadership-is-tested-in-the-budget-battle/2011/04/08/AFF01P4C_story.html).

126. Andrew Restuccia, *Spending Bill Cuts EPA Funding, Delists Wolves, Limits Funds for Interior 'Wild Lands' Policy*, THE HILL (Apr. 12, 2011, 9:01 AM), <http://tinyurl.com/3colzqk>.

127. *Id.*

128. Most speculations on this subject stem from comments made by Speaker John Boehner. For a summary of those comments see Ben Geman & Andrew Restuccia, *Overnight Energy: It's Gore Time!*, THE HILL (Apr. 14, 2011, 6:48 PM), <http://thehill.com/blogs/e2->



while deficit spending was cut going forward, EPA did not receive further cuts during the current fiscal year. While some expected the worst when it came to the committee of Senators and House members empanelled to cut government spending, referred to as the Super Committee,<sup>129</sup> the failure of the Super Committee to come to a super compromise hardly puts the EPA out of harm's way. As one contemplates the fate of EPA in the upcoming fight about next year's budget, it is not hard to conclude that EPA is on shaky ground given the mood to cut budgets and the myriad of members who have recently pushed and, in fact, continue to push budget riders targeting environment-related agencies, particularly EPA.<sup>130</sup>

*D. Calls to Diminish EPA Generally or Abolish It Completely*

While targeted efforts to control EPA have at least partially succeeded, there are many in Congress and in politics that would push these efforts much further. This is saying a lot considering the serious attacks EPA has faced from Congress in the past, and the attacks it currently faces from perhaps “the most anti-environment House of Representatives in history.”<sup>131</sup> Consider a few examples of statements from members of Congress with significant leadership roles. The chair of the Transportation and Infrastructure Committee, Representative John Mica, has said, “EPA’s regulatory jihad is strangling any chance of economic recovery.”<sup>132</sup> Representative Mike Simpson, who chairs the Interior and Environmental Subcommittee asserted, “[T]he scariest agency in the federal government is the EPA . . . . The EPA’s unrestrained effort to regulate greenhouse gases and the pursuit of an overly aggressive regulatory agenda are signs of an agency that has lost its bearings.”<sup>133</sup> The Chair of the

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wire/677-e2-wire/156159-overnight-energy.

129. Brad Johnson, *Super Congress Stacked with Climate Zombies*, GRIST (Aug. 10, 2011, 3:38 PM), <http://www.grist.org/climate-skeptics/2011-08-10-super-congress-stacked-with-climate-zombies>.

130. *See, e.g.*, Leslie Kaufman, *House Republicans Try to Curb Environmental Rules*, N.Y. TIMES, July 28, 2011, at A16.

131. *See, e.g.*, Natasha Lennard, *Is This the Most Anti-Environment House in History*, SALON (Aug. 5, 2011, 1:06 PM), [http://www.salon.com/news/politics/war\\_room/2011/08/05/anti\\_environment\\_gop\\_house](http://www.salon.com/news/politics/war_room/2011/08/05/anti_environment_gop_house).

132. Press Release, House Transportation and Infrastructure Committee, Hearing Examines EPA’s Burdensome Nutrients Policy (June 24, 2011), *available at* <http://transportation.house.gov/News/PRArticle.aspx?NewsID=1328>.

133. Press Release, Mike Simpson, Simpson Cuts EPA Budget, Reins in Regulatory

House Appropriations Committee, Representative Harold Rogers, has criticized EPA for “unparalleled, out-of-control spending and job-killing over-regulation” and has said that EPA “has become the epitome of the continued and damaging regulatory overreach of this Administration.”<sup>134</sup> House Energy and Commerce Committee Chair, Representative Fred Upton, has alleged that “[m]illions of American jobs are in jeopardy because of the costly rules proposed or under development by the EPA” and has called on the President to “put[] the brakes on this regulatory train wreck.”<sup>135</sup> While it has not gotten much movement, Senator Richard Burr has even proposed a bill that would eliminate EPA and reassign most of its duties to a new agency focused on energy.<sup>136</sup>

While perhaps not as visceral as some of the attacks coming from members of Congress, due to their highly visible nature, some of the most damaging attacks on EPA have come from some of those aspiring to carry the Republican Party’s banner in the 2012 presidential election. In January 2011, Newt Gingrich, then only a possible 2012 candidate, called for the abolition of EPA and for its replacement with a new “Environmental Solutions Agency.”<sup>137</sup> Gingrich criticized EPA as an agency that represents “bureaucracy, regulation, litigation and restrictions on American energy.”<sup>138</sup> Similarly, Republican presidential candidate Representative Ron Paul has advocated eliminating “the ineffective EPA” because “[p]olluters should answer directly to property owners in court for the damages they create—not to Washington.”<sup>139</sup> Representative Michele

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Agenda (July 12, 2011), *available at* <http://simpson.house.gov/News/DocumentSingle.aspx?DocumentID=251465>.

134. Press Release, U.S. House of Representatives Committee on Appropriations, Chairman Rogers Floor Statement on FY 2012 Interior-Environment Appropriations Bill (July 25, 2011), *available at* <http://tinyurl.com/8ypn3hj>.

135. Andrew Restuccia, *Republican to Obama: Create Jobs by ‘Putting the Brakes’ on EPA ‘Train Wreck,’* THE HILL (Aug. 5, 2011, 11:20 AM), <http://thehill.com/blogs/e2-wire/677-e2-wire/175627-upton-to-obama-create-jobs-by-putting-the-brakes-on-epa>.

136. *See* Press Release, Richard Burr, Burr Bill Cuts Spending, Increases Efficiency by Combining Dep’t of Energy and EPA (May 5, 2011), *available at* [http://burr.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=c1ba1805-d36e-05b2-1312-7c07e24fa340](http://burr.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=c1ba1805-d36e-05b2-1312-7c07e24fa340).

137. Kasie Hunt, *Newt Gingrich Proposes Abolishing EPA*, POLITICO (Jan. 26, 2011, 4:51 AM), <http://www.politico.com/news/stories/0111/48143.html>.

138. *Id.*

139. *The-Issues/Energy*, RONPAUL2012.COM, <http://www.ronpaul2012.com/the-issues/energy/> (last visited Oct. 6, 2011).

Bachmann has promised that if elected she will have EPA's "doors locked and lights turned off"<sup>140</sup> and has dubbed it "the job-killing organization of America."<sup>141</sup> And in a somewhat probing personal interview with CBN News, Governor Rick Perry has said,

Frankly I pray for the president every day. I pray for his wisdom, I pray that God will open his eyes. I wish this president would turn back the health care law that's been passed, ask that his EPA back down these regulations that are causing businesses to hesitate to spend money.<sup>142</sup>

#### IV. CONCLUSION: FRAGILE EARTH, FRAGILE LAW

It is uncertain if EPA has passed through the worst of the attacks on it. Environmental and disaster law scholar Dan Farber has recently suggested that he does not think the end of such attacks is coming any time soon.<sup>143</sup> I tend to agree. It seems more of a matter of *when* and not *if*. But there are some likely flashpoints. For example, the battle to secure EPA's budget appropriation for the upcoming year seems to be one of these. In fact, there are currently a substantial number of potential budget riders in bill form, many of which are aimed at EPA and other agencies with environmental responsibilities.<sup>144</sup> While the Obama Administration has signaled that it would veto such legislation,<sup>145</sup> a threat of a veto, of course, is only a threat and could erode.

Another possible flashpoint is the ongoing budget talks that have resulted from the failure of the "Super Committee" to come to agreement and the resulting across-the-board cuts what will occur unless Congress steps in. While it is possible that some of the

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140. Broder, *supra* note 121, at A1.

141. CNN *Live Event/Special Republican Debate* (CNN June 13, 2011, 8:00 PM), available at <http://transcripts.cnn.com/TRANSCRIPTS/1106/13/se.02.html>.

142. Rick Perry: "I Pray for the President Everyday," CBN (Aug. 5, 2011, 10:27 AM), <http://blogs.cbn.com/beltwaybuzz/archive/2011/08/05/rick-perry-i-pray-for-the-president-everyday.aspx>.

143. Dan Farber, *The War Against the Environment*, LEGAL PLANET (Aug. 10, 2011), <http://legalplanet.wordpress.com/2011/08/10/the-gop-war-against-the-environment/>.

144. See, e.g., Editorial, *GOP vs. Mother Nature*, L.A. TIMES, Aug. 5, 2011, at A20.

145. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2584—DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2012 (July 21, 2011), available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2584r\\_20110721.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2584r_20110721.pdf).

funding will be reinstated (such as money allocated to the Defense Department), it is hard to imagine mustering the votes in the House to reinstate funding scheduled to be cut from many agencies, and perhaps particularly EPA.

On the other hand, there is an alternative trajectory (or perhaps an additional trajectory since these are not necessarily mutually exclusive) for this narrative: namely, that those who have attempted to wage war on EPA and cast aspersions against climate change science end up paying a political cost. In fact, a number of lawmakers have already faced ad campaigns criticizing their attempts to block EPA regulation.<sup>146</sup>

Republican presidential candidate Jon Huntsman raised this prospect in a very visible way when he publicly challenged the wisdom of questioning science, including science relating to climate change. Huntsman first stated his concern in a Twitter post that included just enough sarcasm to go viral. The post read, “To be clear. I believe in evolution and trust scientists on global warming. Call me crazy.”<sup>147</sup> Following a few days of this tweet getting play in the media, Huntsman expounded on his thoughts on national television:

I think there’s a serious problem. The minute that the Republican Party becomes the . . . anti-science party, we have a huge problem. We lose a whole lot of people who would otherwise allow us to win the election in 2012. When we take a position that isn’t willing to embrace evolution, when we take a position that basically runs counter to what 98 of 100 climate scientists have said, what the National Academy of . . . Sciences has said about what is causing climate change and man’s contribution to it, I think we find ourselves on the wrong side of science, and, therefore, in a losing position.

The Republican Party has to remember that we’re drawing from traditions that go back as far as Abraham Lincoln, Theodore Roosevelt, President Eisenhower, Nixon, Reagan and Bush. And we’ve got a lot of traditions to draw upon. But I can’t remember a

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146. See, e.g., Andrew Restuccia, *Green Group Targets Lawmaker Votes to Block EPA Climate Regulations*, THE HILL (Apr. 18, 2011, 9:07 AM), <http://tinyurl.com/6mzjt6c>.

147. Jon Huntsman, TWITTER (Aug. 18, 2011), <http://twitter.com/#!/JonHuntsman/status/104250677051654144>. His comments, particularly those aimed at evolution, obviously caused serious concerns for some. See, e.g., Bob Ellis, *Huntsman Disses Christians, Shoots for Zero in Polls*, DAKOTA VOICE (Aug. 26, 2011), <http://tinyurl.com/7yrjs7n>.

time in our history where we actually were willing to shun science and become a . . . party that . . . was antithetical to science. I'm not sure that's good for our future and it's not a winning formula.<sup>148</sup>

Huntsman is not alone in wondering whether taking a position that opposes science will result in political liability.<sup>149</sup>

Regardless of the turns this narrative takes, perhaps the backlash we have seen from EPA attempting to regulate greenhouse gases should give us pause and cause us to ask, how much lifting should litigation under existing environmental law be doing in efforts to prompt the United States to act on climate change? For those who hold we take a no-holds-barred approach, there is ample room to think that the dictates of the law have only begun to unfold in the fight against climate change. It is easy to imagine that courts following the logic in *Massachusetts v. EPA* could present EPA with *Massachusetts v. EPA*-like remands applicable to other sections of the Clean Air Act. It seems quite possible that EPA's Tailoring Rule will not withstand judicial scrutiny and that the number of point sources affected by EPA's existing endangerment finding will increase many-fold.

Moreover, there are other big sticks that could be used to address climate change in other enactments. Of ongoing litigation, the most obvious of these is found in the powers of the Endangered Species Act. Recently, in considering litigation that would have forced the Fish and Wildlife Service to list the polar bear as an endangered species rather than a threatened species, U.S. District Court Judge Emmet Sullivan asked what should be done to curb the loss of polar bears and their icy habitat.<sup>150</sup> The lawyer representing the environmental plaintiffs in the case responded, "Deep and rapid greenhouse gas reductions."<sup>151</sup>

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148. Jake Tapper, *Jon Huntsman Comes Out Swinging*, ABC NEWS (Aug. 20, 2011, 10:23 AM), <http://blogs.abcnews.com/politicalpunch/2011/08/jon-huntsman-comes-out-swinging.html>.

149. Broder, *supra* note 121, at A1; Andrew C. Revkin, *A Fundamental Republican Science Problem*, N.Y. TIMES DOT EARTH BLOG (Aug. 22, 2011, 1:13 PM), <http://dotearth.blogs.nytimes.com/2011/08/22/a-fundamental-republican-science-problem/>.

150. Erika Bolstad, *How Can Polar Bears be Saved, Court Asks?*, MCCLATCHY NEWSPAPERS, Feb. 23, 2011, <http://www.mcclatchydc.com/2011/02/23/109306/how-can-polar-bears-be-saved-court.html>.

151. *Id.*

Even for those who want the federal government to take serious steps to address climate change, the question of whether it is a good idea to use existing environmental law to that end deserves much more attention than it has received from environmentalists and the environmental bar. The backlash faced by EPA does not seem to be a special case. If the Agency used the Endangered Species Act or any other environmental law in the same way, it seems entirely predictable that a similar backlash would follow.

It is tempting to say, “So what? Let politicians fight it out.” For those who believe climate change is a great political challenge—if not the greatest political challenge—of our generation, this seems a reasonable response. Yet, during the past couple of years we have seen EPA drained of its budget and pushed to its limits to sustain its credibility. The answer to “so what?” might be found in the true concern that the Clean Air Act and EPA have been weakened. And, despite all the talk of EPA trying to force Congress to address climate change through its endangerment finding, one has to wonder whether the endangerment finding has instead served as more of a distraction and political cover for those who are unwilling to act.

Those who championed using existing environmental laws to address climate change have done so due to their concern for the fragility of our planet. Clearly, the planet deserves our attention. However, very little of this discussion has focused on the fact that our existing environmental laws might also be fragile. It seems we need to tread carefully when traversing the political landscape. In some instances, the breadth of our laws seems significantly larger than our political system’s tolerance to enforce. When litigants win in such circumstances, backlash will follow. When litigants lose, adverse opinions may chip away at the very laws used in litigation.

In an age of a changing planet, we need to seriously consider whether we are willing to risk what political capital we have and what environmental victories we have won in the hopes that we will navigate this terrain unscathed. If nothing else, it would pay long-term dividends to recognize when it come to no-holds-barred fights, it is almost always the case that both sides risk getting seriously hurt.

