The Disruptive Politics of Climate Disruption

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I. INTRODUCTION

The impact of anthropogenic emissions of carbon dioxide and other greenhouse gases (“GHG”s) on the Earth’s climate may well be the most profound environmental problem that the civilized world has ever encountered. Since the United States has until quite recently been the largest emitter of greenhouse gases, its efforts to ameliorate climate disruption by reducing those emissions have been of considerable interest to its citizens.

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and the rest of the world’s inhabitants. Yet, it has done very little to reduce GHG emissions until very recently, and even those initial steps have been tiny in comparison to what reputable scientists say is needed to mitigate climate change. In the years since climate disruption became a serious political issue in the late 1980s, supporters of a federal program to reduce GHG emissions have made five serious attempts to move legislation through Congress—the Clinton Administration’s British Thermal Unit (“BTU”) tax in the 103rd Congress, Senator Jim Jeffords’ four-pollutant Bill in the 107th Congress, the Lieberman-Warner Bill in the 110th Congress, and the Waxman-Markey and Kerry-Lieberman-Graham Bills in the 111th Congress. All five of these efforts failed.

This article will examine these five major legislative initiatives with an eye toward extracting lessons for future efforts to enact major environmental legislation. While there are many reasons for Congress’ failure to enact climate disruption legislation, including concerns about the underlying science and the efficacy of proceeding ahead in the absence of commitments from other massive GHG emitters like China and India, I will argue that one powerful explanation lies in a thirty-five-year war against government regulation waged by the business community, several prominent conservative foundations, and the institutions that they created and nourished. I will show how these institutions played a prominent role in defeating climate disruption legislation, even when the business community’s solid opposition to climate disruption appeared to be dissolving as some companies accepted the reality of climate disruption and amended

2. See infra Part III.
their business models accordingly, while others saw opportunities to profit or gain competitive advantage from such legislation. 5

My thesis is that the institutions that trade associations and conservative funders created and continue to create have by-and-large remained true to a laissez faire minimalist prescription for the nation’s economy, and they are therefore unalterably opposed to legislation that would subject greenhouse gas emitters to government-imposed controls, even when such controls might serve the economic interests of a substantial number of businesses. This adamant opposition, which has in turn influenced members of Congress from both political parties, has effectively forestalled climate disruption legislation. I will further argue that the presence of these powerful negative voices in the legislative debates proved to be of great strategic value to companies that preferred that Congress not enact any legislation, but wanted a place at the table when Congress was shaping the bills that would greatly affect their interests if they became law. Hence, the fractures in the business community are not likely to affect the vitality of these institutions in the foreseeable future.

Part II of this article will briefly describe the Laissez-Faire Revival that I document in my book—Freedom to Harm—by highlighting the institutions that the business community and conservative funders created to resist progressive governmental initiatives like climate disruption legislation. 6 Part III will describe the five attempts to enact climate disruption legislation and detail the role those institutions played in defeating each of those initiatives. Part IV will explore some of the lessons that we can learn from these failed attempts. The article reaches the rather discouraging conclusion that strong climate disruption legislation is not likely to emerge from a deeply divided Congress that reflects the deep divisions in the current political culture over the proper role of government in today’s economy.

II. THE LAISSEZ FAIRE REVIVAL

The Laissez Faire Revival began in the late 1970s as a reaction against the progressive legislation that Congress enacted during the late 1960s and early 1970s to protect consumers, workers, and the environment.

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from risky products and business practices. Several wealthy conservative benefactors spent millions of dollars to create an idea infrastructure consisting of think tanks and free enterprise centers in universities and law schools. Financed largely through conservative foundations and corporate contributions, this idea infrastructure conducted an air war against federal regulation in books, scholarly journals, magazines, white papers, internet blogs, op-ed columns, media interviews, and talk shows. Three think tanks that played prominent roles in the climate disruption battles were the Heritage Foundation, the Competitive Enterprise Institute (“CEI”), and the George C. Marshall Institute.

The business community also created an influence infrastructure to conduct the ground war against regulation in the regulatory agencies and Congress. The most visible of the ground troops during the climate wars were the U.S. Chamber of Commerce (“CoC”) and the National Association of Manufacturers (“NAM”). Less visible, but still highly influential were the so-called astroturf grassroots organizations that trade associations and conservative funders created to run advertising campaigns in the districts of swing members of Congress, sponsor local rallies, and generate phone calls, letters, and emails to members of Congress. Some of these organizations, like the American Energy Alliance (“AEA”), Citizens for a Sound Economy (“CSE”), and Americans for Prosperity, were permanent institutions that fought in many wars. Others were created on an ad hoc basis by public relations firms working for companies and trade associations to conduct focused campaigns against particular legislative initiatives. Another critical component of the influence infrastructure was an extremely effective media echo chamber for influencing the content of news and political commentary at both the national and local levels. Two highly influential

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7. Id. at 5.
8. Id. at 40.
9. See id. at 41–56.
10. Id. at 247; Parker-Flynn, supra note 4, at 11100.
11. McGarity, supra note 6, at 57.
12. Id. at 60.
13. Id. at 58–59.
14. See id. at 59; Robert Parry, What Wouldn’t Bob Do for Koch Oil?, NATION, Aug. 26–Sept. 2, 1996, at 11, 13–14; Peter H. Stone, Grass-Roots Goliath, NAT’L J., July 13, 1996, at 1529, 1530. “Established in 1984 by George Mason University economics professor Richard Fink with funding from the David H. Koch Foundation,” CSE was a sophisticated Astroturf grassroots operation committed to “‘lower taxes, less spending, less regulation, and free trade.’” McGarity, supra note 6, at 58; Stone, supra note 14, at 1530.
15. McGarity, supra note 6, at 33.
pro-business media outlets were Rupert Murdoch’s News Corporation and David Smith’s Sinclair Broadcast Group, both of which hosted commentators, like Rush Limbaugh and Steve Milloy, who preached a populist-flavored laissez faire minimalist message to millions of viewers and listeners and provided ready access to conservative think tank scholars.  

With strong idea and influence infrastructures in place, the business community launched three powerful assaults on the protective governmental infrastructure that Congress established during the Progressive Era, New Deal Era, and Public Interest Eras. Those assaults have thus far failed to achieve their fundamental goal of repealing the landmark environmental and consumer protection statutes of the 1970s, but the business community’s idea infrastructure has been remarkably successful in shaping public attitudes toward government regulation in society. After a 35-year barrage of anti-regulation rhetoric, many Americans have lost faith in the capacity of government to protect it from the vicissitudes of the marketplace. 

The business community has never been monolithic in its opposition to federal regulation. Pollution control technology vendors, for example, have not always been strong supporters of the CoC’s fierce attacks on Environmental Protection Agency (“EPA”) regulations. Indeed, the fact that the bedrock regulatory statutes have survived may, in part, be attributable to an understanding on the part of influential members of the business community that the appearance of a protective governmental infrastructure is necessary to maintain the public’s perception that it is not wholly at the mercy of unconstrained economic forces, and that perception, in turn, is necessary to maintain a stable economic structure within which businesses can thrive. During the past few years, there has been a highly visible split in the business community on the issue of global warming that


18. MCGARTY, supra note 6, at 6, 60–61. 

19. See id. at 61. 


22. See MCGARTY, supra note 6, at 5–6.
goes deeper than the fraying at the edges that might be expected in any large organization putatively devoted to a single cause. The following description of the battles over climate change legislation will highlight these divisions and evaluate their significance.

III. THE ASSAULTS ON CLIMATE CHANGE REGULATION

Climate disruption became a salient public policy issue in the mid-1980s as scientists verified the reality of human activity-induced global warming and called for increased energy efficiency to reduce GHG emissions. During his 1988 campaign to be the nation’s first environmental president, candidate George H.W. Bush promised to take action to address global warming. Soon after his inauguration, the EPA delivered a report to Congress proposing bold action, including fees on coal, oil, and natural gas to discourage future use of those fossil fuels in producing electricity. A panel of experts assembled by the National Academies of Sciences urged the federal government to take concrete steps to reduce GHG emissions, including raising energy taxes and enacting mandatory efficiency standards.

The business community responded to these developments with a coordinated campaign to sow doubt in the minds of policymakers and the public about the scientific basis of global warming predictions. Relying heavily on think-tanks and a small group of mostly industry-funded scientists in academia, the electric utility and manufacturing industries sponsored an effective public relations campaign to persuade Congress not to enact legislation requiring mandatory GHG reductions. The Global Climate

25. McGARTY, supra note 6, at 108.
29. GELBSSPAN, supra note 28, at 9, 19, 31; RAMPTON & STAUBER, supra note 28, at 270.
Coalition (“GCC”) was created in 1989, comprising of the CoC, the NAM, and the auto and energy industries to lobby against climate change legislation.\textsuperscript{30} In 1991, the National Coal Association (“NCA”), the Western Fuels Association, the Edison Electric Institute (“EEI”), and trade associations for the coal, oil and gas, and electric utility industries, created a group called the Information Council on the Environment (“ICE”) which “launched a[n] . . . advertising and public relations [effort] to . . . ‘reposition global warming as theory—not fact.’”\textsuperscript{31} The public relations firm it hired arranged for the sympathetic scientists on its advisory board to appear in broadcast appearances, op-ed pages, and newspaper interviews.\textsuperscript{32} Faced with this strong opposition from the business community, the Bush Administration did not seriously attempt to fulfill the president’s campaign promise.\textsuperscript{33}

Toward the end of the Bush Administration, however, a thin fracture line began to develop in the business community’s opposition to climate disruption regulation as the American Gas Association (“AGA”)—a trade association of natural gas producers and distributors—joined the Solar Energy Industries Association in sponsoring a study concluding that the United States could reduce GHG emissions and increase employment by moving rapidly to natural gas-fired power plants, renewable energy, and high-efficiency technologies.\textsuperscript{34}

A. The BTU Tax in the 103rd Congress

The Clinton Administration hit the ground running with a proposal for a tax on energy consumption as part of the Administration’s broader legislative effort to balance the federal budget and stimulate the economy.\textsuperscript{35} During the first two weeks of January 1993, transition officials debated whether the tax should be on the carbon content of all fuels—a carbon tax—or the heating value of all fuels—a BTU tax.\textsuperscript{36} The BTU tax offered a weaker incentive to move toward renewable energy than a carbon tax, which would not have affected dams, solar energy generators, or nuclear power

\begin{itemize}
\item \textsuperscript{31} Rampton & Stauberg, supra note 28, at 272.
\item \textsuperscript{32} Id. at 272–73.
\item \textsuperscript{33} Kriz, Warm-Button Issue, supra note 30, at 319, 320.
\item \textsuperscript{34} Margaret E. Kriz, The New Economics, Nat’l J., May 30, 1992.
\item \textsuperscript{36} David Hage & Sara Collins, Pointing to Tax Increases, U.S. News & World Rep., Feb. 8, 1993, at 46; Gas a Winner in Tax Debate, supra note 35.
\end{itemize}
plants. The coal industry and coal-burning utility companies, however, strongly opposed the carbon tax, arguing that it would result in substantial price increases for coal compared to natural gas and sources of energy that did not burn fossil fuels. Both energy taxes were more attractive to the incoming administration than an addition to the federal gasoline tax, which would have been immediately noticeable to consumers. Since the Democratic Party controlled the White House and both houses during the 103rd Congress, supporters of an energy tax were optimistic.

Both the energy industry and industries that were large consumers of energy were united in their opposition to any new energy taxes. The EEI, the primary trade association for the electric utility industry, prepared a set of economic analyses of several variations of energy taxes and presented them to members of the transition team and incoming Energy Secretary Hazel O'Leary. The industry argued that any tax capable of reducing GHG emissions would have to be so high that it would have an undesirable impact on the economy and a disproportionate impact on the poor. The CoC also took an uncompromising stand against any energy tax. Long before the Clinton Administration drafted proposed legislation, industry lobbyists and Astroturf grassroots groups were meeting with—and phoning and sending emails to—White House officials and members of Congress, urging them to stop the energy tax in its tracks. The President publicly complained that

38. Hage & Collins, supra note 36; Wald, supra note 37.
39. Hage & Collins, supra note 36 (referencing coal-producing state opposition); Wald, supra note 37.
44. Id.; Utilities, Automakers Note Comments by O’Leary That Energy Tax May Be Delayed, NAT’L ENV’T DAILY (BNA), Jan. 25, 1993 (quoting Alan Richardson, American Public Power Association).
45. Pianin & Lippman, supra note 40.
opponents of the carbon tax “ha[d] already lined the corridors of power with high-priced lobbyists.”47

In late January, Secretary of Treasury Lloyd Bentsen announced that the incoming Administration was considering an energy tax, and the major players in the business community’s influence infrastructure sprang into action to shoot down the trial balloon.48 The American Petroleum Institute (“API”) hosted a well-attended gathering for all interested companies and trade associations at which the message was “[l]et’s not fight each other.”49 The GCC circulated reports concluding that an energy tax would increase unemployment and precipitate an economic downturn.50 A brand new association of public utility companies calling itself the Alliance Against a Carbon Tax conducted grassroots organizing and lobbying against the tax.51 A Denver-based think tank called the Center for a New West contracted for studies concluding that a carbon tax would cause regional imbalances and put more than 600,000 jobs at risk.52 Nearly all electric utility companies opposed any tax on electrical energy,53 but Southern California Edison—a large utility company that had already invested heavily in natural gas facilities—supported a BTU tax.54

On February 17, 1993, President Clinton announced a four-year blueprint for stimulating the American economy that included, among its many revenue-enhancing provisions, a BTU tax on nearly all fuels.55 The decision to go with a BTU tax, rather than a carbon tax, reflected the Administration’s determination to make the proposal as palatable as possible to Democrats from coal-producing states by spreading the burden to other

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47. Wines, supra note 46.
48. Industry Repeats Opposition to Taxes as White House Floats Trial Balloon, supra note 43; Pianin & Lippman, supra note 40.
49. Novak, supra note 42.
50. Id.; Pianin & Lippman, supra note 40.
51. Novak, supra note 42.
53. See Death of Energy Tax Makes Carbon Levy, Other Environmental Taxes Less Likely, supra note 3.
fuels, including nuclear and hydroelectric power. Yet, in a victory for environmental groups, the proposal exempted wind and solar power from the tax. The Bill also included additional funding for the federal low-income energy assistance program to offset some of the adverse effect on low-income Americans. Since the tax would be hidden in gas, electric, and fuel bills, most Americans would probably not notice that they were paying it. The Department of Energy (“DOE”) predicted that the tax would result in the reduction of GHG emissions by about 25 million tons per year.

Environmental groups supported the proposal. Although they favored a carbon tax, they were persuaded by Treasury Secretary Bentsen that it was politically infeasible. They worried that the tax rate was too low to result in a reduction of GHG emissions to 1990 levels by 2000, but they decided that any increase in the cost of fossil fuels would encourage power plants to consider moving to renewable sources of energy. And they were pleased that President Clinton had chosen the BTU tax over a gasoline tax. Consumer groups were dubious about the tax because of its regressive effects on low-income consumers. But they applauded the provisions in the proposal ensuring that low-income consumers did not bear a disproportionate burden of the tax. They warned regulated utility companies that if they tried to persuade state public utility commissions to allow them to pass the tax through to consumers, the groups would argue that the companies already

57. Lippman, Energy Tax Would Touch All, supra note 55.
59. Lippman, Energy Tax Would Touch All, supra note 55.
60. Clinton Plan: BTU’s Bearing the Brunt, supra note 58.
63. See Environmental Groups Flex for Industry Opposition to BTU Tax, supra note 61; Kriz, A Green Tax?, supra note 56 at 917–18 (quoting Dan Lashof, NRDC).
64. Lippman, Energy Tax Proposal Has ‘Green’ Tint, supra note 61.
66. Environmental Groups Flex For Industry Opposition to BTU Tax, supra note 61.
owed consumers hundreds of millions of dollars in rebates because of unexpected declines in interest costs on capital projects.67

The energy industry was unified in its opposition to the tax.68 The API predicted that the tax would cost seven hundred thousand jobs and reduce the gross national product by about $5 billion.69 The coal industry estimated that coal prices would increase by more than 25%.70 Manufacturing trade associations argued that it would bring a nascent economic recovery to a rapid end.71 Even the natural gas industry was unhappy.72 Its primary concern was the decision to collect the tax from natural gas producers at the wellhead, rather than from consumers at the consumption end of the pipeline.73 At the same time, the major natural gas players did not join the chorus of energy interests in the hope that a less categorical stand would be more likely to get it a seat at the negotiating table when the proposal began to work its way through Congress.74 The Electric Generation Association, a trade association representing independent power producers, offered qualified support for “a properly structured broad-based energy tax.”75 Not surprisingly, the American Wind Energy Association and the Geothermal Resources Association strongly supported the proposal, so long as wind and geothermal energy remained exempt from the tax.76

69. Administration Figure on Consumer Costs “Grossly Underestimated,” Industry Says, NAT’L ENV’T DAILY (BNA), Feb. 24, 1993.
72. Energy Tax Focuses on Raising Money, Ignores Costs, Officials Growl, supra note 56 (undermining competitiveness; devastating impact).
75. Energy Tax Focuses on Raising Money, Ignores Costs, Officials Growl, supra note 56 (quoting Thomas Dodd, Electric Generation Association).
76. Environmental Groups Flex for Industry Opposition to BTU Tax, supra note 61.
Stung by the industry criticism, the Clinton Administration adopted “a strategy of placate and conquer.” As they worked out the details of a proposed bill, high-level officials engaged in a series of meetings with industry lobbyists over a two-week period in an attempt to address their objections. They hoped to convince the industries that an energy tax was inevitable and they were better served by working with the Administration than by standing on the outside denouncing any energy tax. Trade associations for the natural gas industry quickly agreed to meet with Administration officials to argue that the tax should not be collected at the wellhead. The manufacturing, petroleum, and electric utility industries continued to take a hard line against any energy tax, even though that meant that they were not invited to participate in the negotiations. The NAM assembled an ad hoc 1300-member umbrella group containing a broad array of energy, manufacturing, and transportation companies called the Affordable Energy Alliance—later renamed the American Energy Alliance—the exclusive goal of which was to kill the BTU tax. It hired two public relations firms to conduct a $2 million advertising campaign to generate pressure on members of Congress from energy-producing states to oppose the tax. The Sierra Club responded with a far less resource-intensive appeal to its members to urge their representatives to support the tax.

President Clinton’s BTU tax proposal got off to a bad start in Congress. At a hearing conducted by the Senate Committee on Energy and the Environment in late February 1993, Committee Chairman Bennett

77. Thomas W. Lippman, Administration Courts Energy Tax Foes, WASH. POST, Mar. 9, 1993, at D1 [hereinafter Lippman, Administration Courts Energy Tax Foes].
78. Id.
79. Id.
80. Id.; see White House Firm on BTU Tax, Appears Flexible on Collection Point, PLATTS INSIDE FERC, Mar. 8, 1993, at 1, available at 1993 WLNR 1718127.
84. Environmental Groups Flex for Industry Opposition to BTU Tax, supra note 61.
Johnston (D-Louisiana) expressed his strong opposition to the proposal.\textsuperscript{86} The Republican committee members all opposed the BTU tax.\textsuperscript{87} The Clinton Administration failed to provide a witness to defend the tax, and no other members of the committee came to its defense.\textsuperscript{88} In late March, Senator Johnston expressed a willingness to support a BTU tax, so long as it was collected by electric utility companies directly from consumers—something that Administration officials opposed because they feared it would precipitate a consumer revolt.\textsuperscript{89}

In early April, the Treasury Department circulated a draft of a modified BTU tax that changed the point of collection for natural gas from the wellhead to the local distribution companies and for coal from the coal producer to the utility companies that burned the coal.\textsuperscript{90} The natural gas industry remained unhappy with the change because it still did not place the burden of payment on the ultimate consumer of the gas.\textsuperscript{91} The petroleum and electric utility industries remained adamantly opposed to the tax.\textsuperscript{92} The coal industry was pleased with the changes, but it continued to oppose the Bill because of the disproportionate negative economic impact it would have on the industry as a whole.\textsuperscript{93} The National Association of Regulatory Utility Commissioners and consumer and environmental groups strongly opposed the shift in the collection point.\textsuperscript{94}

Capitulating to industry pressure once again, President Clinton agreed to allow the tax to be collected by utility companies without the

\begin{enumerate}
\item[87.] \textit{See Skeptical Senators Reveal BTU Doubts}, supra note 85.
\item[88.] \textit{Id.}
\item[89.] Cano, \textit{While Not Sold on Idea, Johnston Cites Keys to Implementing BTU Tax}, supra note 86.
\item[90.] \textit{Treasury Unveils Modified BTU Tax Proposal}, \textsc{Congress Daily}, Apr. 1, 1993.
\item[92.] Patrick Crow, \textit{U.S. BTU Tax Plan Revised; Industry Wary of Results}, \textsc{Oil & Gas J.}, Apr. 12, 1993, at 21, 21; Loveless, supra note 91.
\item[93.] \textit{See Industry Reacts to BTU Tax Modifications}, \textsc{Coal & Synfuels Tech.}, Apr. 19, 1993, at 1.
\end{enumerate}
approval of state public utility commissions. The House Ways and Means Committee in mid-May approved a bill that contained this compromise, along with a number of exemptions for the aluminum and chlor-alkyl industries and farming interests. The House, in late May, narrowly approved (219-213) the stimulus bill with the BTU provision intact. It was the first time that either house of Congress had passed legislation aimed at reducing GHG emissions.

The battle then shifted to the Senate Finance Committee, where the CoC and the energy industry hoped to kill it. Because Senator David Boren (D-Oklahoma) was one of the senators who made up the eleven to nine Democratic majority on the committee, he became the target of an intensive campaign to influence his vote. The Affordable Energy Alliance and CSE, a grassroots organization devoted to less government regulation created in 1984 by the David H. Koch Foundation, convened taxpayer rallies in Oklahoma, commissioned polls demonstrating strong opposition to the tax in Oklahoma, and generated letters and phone calls from his constituents urging him to oppose the tax. Newspaper ads proclaiming that Senator Boren could stop a BTU bill that stood for Big Time Unemployment were part of CSE’s $100,000 advertising campaign. A direct-mail blitz to more than nine thousand Oklahoma community leaders and a corresponding telemarketing campaign generated a huge number of pre-written letters and calls to Boren’s offices. In addition, a study commissioned by several

95. Calmes & Wessel, supra note 94.
101. Parry, supra note 14, at 13; Stone, supra note 14, at 1529–30; Weisskopf, supra note 100.
102. Weisskopf, supra note 100.
103. Id.
104. Id.
energy companies from economists at the University of Oklahoma predicted that the tax would destroy eleven thousand Oklahoma jobs, devalue farmland by $1 billion, and add $180 per year to household energy bills.\textsuperscript{105} The effort paid off when Senator Boren appeared at a rally on Capitol Hill sponsored by the Independent Petroleum Association of America to urge the attendees to help him kill the tax.\textsuperscript{106} Senator Boren then assembled a bipartisan group of senators to offer an alternative stimulus bill that did not include an energy tax.\textsuperscript{107}

Once it became clear that well placed political pressure could turn the President around, it was katy-bar-the-door as lobbyists insisted that their clients should not have to pay the tax.\textsuperscript{108} The NAM maintained that it contained so many loopholes that it was unfair to the industries that did not have one.\textsuperscript{109} Then, in late June, Clinton agreed to a giant exemption for the entire manufacturing and agricultural sectors of the economy.\textsuperscript{110} Still, Senator Boren refused to vote for any change that included any form of tax based on the heat content of fuel.\textsuperscript{111} The Finance Committee ultimately approved a bill with a 4.3¢ per gallon gasoline tax and a number of additional spending cuts, but no BTU tax.\textsuperscript{112} The Senate barely approved a deficit reduction bill that contained the modest gasoline tax in late June after Vice President Gore broke a forty-nine to forty-nine tie vote in which all of the Republicans voted against the Bill.\textsuperscript{113}

Worried that the conference committee might restore the BTU tax, both the AEA and CSE launched new advertising campaigns in the districts.

\textsuperscript{105} Id.
\textsuperscript{106} Gas Lobby Wins BTU-Tax Concessions as Ways and Means Reports Bill, supra note 96.
\textsuperscript{109} Hilzenrath, supra note 83.
\textsuperscript{110} Clinton Expects Senate to Pass Budget Reconciliation Bill This Week, NAT’L ENV’T DAILY (BNA), June 22, 1993.
\textsuperscript{111} Id.
of members of committee they deemed to be swing votes.\textsuperscript{114} The conference committee voted out a Bill with the Senate’s gasoline tax, and it passed both houses of Congress.\textsuperscript{115} The trade associations for the energy industry were, to say the least, pleasantly surprised by the outcome.\textsuperscript{116} In a thoughtful postmortem gesture, the AEA spent some of its remaining cash on newspaper ads thanking the Democratic Senators who had come to the industry’s aid.\textsuperscript{117}

Congress’ failure to pass a BTU tax left President Clinton’s April 1993 promise to reduce GHG emissions to 1990 levels by 2000 in tatters.\textsuperscript{118} And the ease with which the business community’s influence infrastructure forced the President to abandon the tax did not bode well for legislative efforts to address climate change during the remainder of his administration.\textsuperscript{119} Having prevailed in a face-to-face confrontation with the new President on his signature climate change initiative, energy industry lobbyists correctly predicted that climate change legislation would be a non-starter for the remainder of the Clinton Administration.\textsuperscript{120}

B. The Jeffords Cap-and-Trade Bill in the 107th Congress

Any hope that Congress would enact legislation requiring GHG reduction measures appeared dead with the Supreme Court of the United States’s declaration that George W. Bush had won the 2000 presidential election.\textsuperscript{121} The Bush Administration was far more concerned with increasing domestic energy production than in protecting the environment from global warming.\textsuperscript{122} Indeed, the Administration was not convinced that


\textsuperscript{115} \textit{Death of Energy Tax Makes Carbon Levy, Other Environmental Taxes Less Likely}, supra note 3.

\textsuperscript{116} See Sonali Paul, \textit{Against All Odds: The Big BTU Victory}, \textit{PLATTS OILGRAM NEWS}, Aug. 9, 1993, at 1 [hereinafter Paul, \textit{Against All Odds}], available at 1993 WLNR 1754024 (quoting an unnamed lobbyist for the oil industry).

\textsuperscript{117} \textit{Id.}


\textsuperscript{119} Paul, \textit{Against All Odds}, supra note 116; \textit{Death of Energy Tax Makes Carbon Levy, Other Environmental Taxes Less Likely}, supra note 3.

\textsuperscript{120} Paul, \textit{Against All Odds}, supra note 116; \textit{Death of Energy Tax Makes Carbon Levy, Other Environmental Taxes Less Likely}, supra note 3.


anthropogenic emissions of GHGs did in fact increase global temperatures.\textsuperscript{123} Instead of legislation, the Bush Administration preferred voluntary programs with vague and unenforceable targets.\textsuperscript{124} Nevertheless, President Bush recognized the need to place additional controls on \textit{grandfathered} power plants to protect downwind states from long-range transport of nitrogen oxides (“NO\textsubscript{x}”), sulfur dioxide (“SO\textsubscript{2}”), and mercury emissions; it looked for some time like newly appointed EPA Administrator Christine Todd Whitman would persuade the President to include GHGs in the \textit{Clear Skies} Bill that the Administration was drafting to address the continuing problem of interstate transport.\textsuperscript{125}

Reports of a possible \textit{four-pollutant} Clear Skies Bill sent energy industry lobbyists and conservative think tanks back into battle mode.\textsuperscript{126} A spokesperson for the CEI called the four-pollutant Bill a \textit{colossal mistake}.\textsuperscript{127} The coal industry and most of the electric utility industry undertook a massive lobbying campaign to convince the Administration to take GHG emissions out of the Bill.\textsuperscript{128} One focal point of the lobbying efforts was the Vice President’s National Energy Policy Development Group, a task force made up of high level governmental officials charged with recommending a national energy policy.\textsuperscript{129} The Cheney Task Force went out of its way to meet with lobbyists from the coal, petroleum, and utilities industries to solicit their views on what should be included in its report.\textsuperscript{130} The EEI put together

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\item[130.] Drew & Oppel, \textit{supra} note 126; Judy Pasternak, \textit{Bush’s Energy Plan Bares Industry Clout; Cheney-Led Task Force Consulted Extensively with Corporate}
a group of around twenty utility executives to meet personally with Vice President Cheney.\textsuperscript{131} Representing several electric utility companies, former Republican National Committee chairman, Haley Barbour, sent a memorandum to Vice President Cheney urging the Administration to abandon the president’s campaign promise to regulate GHG emissions from power plants.\textsuperscript{132}

Presidential Economic Advisor, Lawrence Lindsey, “then convene[d] a series of meetings” at which officials from the EPA, the DOE, and the White House debated whether the administration’s Clear Skies Bill should include GHGs.\textsuperscript{133} At the same time, industry lobbyists focused a last-minute barrage on the White House and sympathetic members of Congress in the hope that they would in turn put pressure on the President.\textsuperscript{134} Participants in the lobbying effort were later singled out for special praise for the efforts that Thomas Kuhn, the president of the EEI and a former Yale classmate of President Bush, had played in pleading the energy industry’s case.\textsuperscript{135} Pressure also came from conservative think tanks and advocacy organizations.\textsuperscript{136} Grover Norquist, the head of Americans for Tax Reform, and Fred Smith, head of the CEI, complained directly to Bush’s political advisor Karl Rove.\textsuperscript{137}

In mid-March, the President announced that he would not support legislation mandating reductions in GHG emissions.\textsuperscript{138} The announcement

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\textsuperscript{131} Mike Allen & Dana Milbank, Cheney’s Role Offers Strengths and Liabilities, WASH. POST, May 17, 2001, at A1. The Vice President also met with environmental groups, but only after the Task Force’s report was essentially completed. Michael Abramowitz & Steven Mufson, Papers Detail Industry’s Role in Cheney’s Energy Report, WASH. POST, July 18, 2007, at A1.

\textsuperscript{132} Drew & Oppel, supra note 126; Pasternak, supra note 130.

\textsuperscript{133} John J. Fialka & Jeanne Cummings, How the President Changed His Mind on Carbon Dioxide, WALL ST. J., Mar. 15, 2001, at A20 [hereinafter Fialka & Cummings, How the President Changed His Mind on Carbon Dioxide].

\textsuperscript{134} Shogren, U-Turn on Emissions Shows Big Energy Clout, supra note 128.


\textsuperscript{136} See Jehl, Bush Defends Emissions Stance, supra note 135; Shogren, U-Turn on Emissions Shows Big Energy Clout, supra note 128.


\textsuperscript{138} Compare Goldstein & Pianin, supra note 123, and Douglas Jehl & Andrew C. Revkin, Bush, in Reversal, Won’t Seek Cut in Emissions of Carbon Dioxide, N.Y.
came as a surprise to EPA Administrator Whitman, who was busily assuring both the American public and European allies, that the United States would regulate carbon dioxide emissions from power plants. Environmental activists accused the Bush Administration of yielding to industry pressure and criticized Whitman for failing to resign after her public humiliation. Whitman gamely defended the President’s decision. Denying “that the president had ‘pulled the rug out’ from under her,” she promised to pursue alternative approaches to greenhouse gas reduction that would emphasize technology development, nuclear power, and voluntary approaches to reducing GHG emissions. The CoC and most of the energy industry praised the administration for adopting a more balanced approach to climate change. The greatest benefactors of the decision were coal producers and utilities that burned mostly coal in their plants.

Prospects for climate change legislation brightened somewhat in May 2001 when Senator James Jeffords of Vermont abandoned the Republican Party to become an independent who caucused with the Democrats. A primary reason for the move was Jeffords’ growing discomfort with the position of the Bush White House on environmental issues. In gratitude for returning the Senate to Democratic control, the

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140. Jehl, Whitman Calls for Patience on Environmental Policies, supra note 139; Jehl & Revkin, supra note 138; Bill McKibben, Commentary, When Courage Was Called for, She Punted; Ex-EPA Leader Whitman Caved in to Bush Instead of Doing the Brave Thing, L.A. TIMES, Mar. 20, 2005, at M5; Pianin & Goldstein, supra note 139.

141. Jehl, Whitman Calls for Patience on Environmental Policies, supra note 139.


143. Mike Ferullo, EPA: Whitman Supports Voluntary Programs, Without ‘Backing Away from Compliance,’ 32 Env’t Rep. (BNA) No. 24, at 1200 (June 15, 2001); Jehl, Whitman Calls for Patience on Environmental Policies, supra note 139.

144. Jehl, Bush Defends Emissions Stance, supra note 135; Pianin & Goldstein, supra note 139.


leadership appointed Jeffords to chair the Senate Committee on Environment and Public Works. Jeffords had already introduced a *four-pollutant* bill that was modeled on the Clean Air Act’s acid rain program. The Bill would have required every covered source of carbon dioxide (“CO2”)—a greenhouse gas—to acquire an *allowance* for every ton of CO2 that it emitted. The allowances could come from many sources, including purchases at annual government auctions, gifts from the government to ease transitions, and purchases from other companies that held extra allowances. The total number of allowances available in any given year would be limited—or capped—by statute, and the caps would gradually decrease in accordance with specified statutory benchmarks. For example, the bill provided for reducing CO2 emissions to 1990 levels by 2012.

At this point, however, noticeable fracture lines were beginning to appear in the energy industry’s approach to climate change. The natural gas industry was disappointed with the Bush Administration’s disavowal of the president’s campaign promise, as were a few companies in the electric utility industry that had already invested heavily in nuclear power and natural gas-fired power plants and had begun to implement energy conservation measures, sometimes in response to state GHG reduction initiatives. Concluding that GHG controls were inevitable, they valued the certainty of knowing what the rules would be as they planned future projects. In June, “a coalition of seven electric [power] companies” calling itself the *Clean*
Energy Group drafted a four-pollutant bill that would have cut CO2 emissions to 2000 levels by 2008 and to 1990 levels by 2012.\(^{157}\) Utility companies more heavily invested in coal generating capacity and nearly all coal companies, however, remained steadfastly against any form of mandatory restrictions on GHG emissions.\(^{158}\) Eight coal-dependent utility companies created a new group called the National Electric Reliability Coordinating Council to lobby against climate change legislation.\(^{159}\)

To no one’s surprise, the proposed limitations on power plant emissions in the Bush Administration’s Clear Skies Bill did not reach GHGs.\(^{160}\) Despite strong support from the energy industry, however, the proposal got a lukewarm reception in Congress.\(^{161}\) Instead, the Senate Environment and Public Works Committee marked up the Jeffords Bill.\(^{162}\) No electric utility companies supported the Bill.\(^{163}\) An umbrella group purporting to represent “more than 75,000 businesses and millions of workers and energy consumers” called the Coalition for Affordable and Reliable Energy (“CARE”) predicted that the Bill would cause “escalating energy prices and significant risk of electricity shortages for American consumers and businesses.”\(^{164}\) Despite President Bush’s threat to veto any bill that contained mandatory limits on GHG emissions,\(^{165}\) the Committee, after a bitter debate, voted largely along party lines to approve the Jeffords

\(^{157}\) Regina P. Cline, Utilities: Seven Power Companies Draft Bill to Control Four Pollutants, Including CO2, 32 ENV’T REP. (BNA) No.27, at 1310 (July 6, 2001).

\(^{158}\) See Morgan & Behr, supra note 155; Revkin & Banerjee, supra note 154.

\(^{159}\) Jeff Goodell, Blasts from the Past, N.Y. TIMES MAG., July 22, 2001, at 6.31; Pasternak, supra note 130; Katharine Q. Seelye, Utilities Hire Ex-Chairman of G.O.P. to Fight Suits, N.Y. TIMES, June 6, 2001, at A20.


\(^{162}\) Steve Cook, Utilities: Inclusion of Carbon in Power Plant Bill Splits Senate Environment Committee, 33 ENV’T REP. (BNA) No. 24, at 1316 (June 14, 2002).

\(^{163}\) Senate Panel Approves Emissions Bill with Carbon Cap, PLATTS INSIDE ENERGY, July 1, 2002, at 7, available at 2002 WLNR 2374708 (citing Senator Thomas Carper (D-Delaware)).


Bill in late June.166 Jeffords offered to work with the Bush Administration to come up with a consensus bill, but EPA Administrator Whitman replied that “‘the door [was] closed’” on any negotiations that included a cap on CO2 emissions.167 With a presidential veto assured, the Senate leadership decided not to take the Jeffords Bill to the floor.168 That turned out to be the death knell for climate change legislation for the next four years because the Republicans regained control of the Senate in the 2002 elections.169

C. The McCain-Warner-Boxer Bill in the 110th Congress

With both the House and the Senate controlled by the Democrats after the 2006 elections, the prospects for climate change seemed as bright as they had been in years.170 The new chairperson of the Senate Committee on Environment and Public Works was Barbara Boxer (D-California), an outspoken proponent of climate change legislation, who characterized the Bush Administration’s record on climate change as worse than dismal.171 Sensing a groundswell of public opinion in support of legislation,172 she hoped to make climate disruption a bipartisan issue.173 Boxer was joined in her enthusiasm by Senator Jeff Bingaman (D-New Mexico), the incoming


167. Multipollutant Bill in Trouble, supra note 165 (veto threat).


171. Steven D. Cook, Climate Change: Boxer Pledges Action on Global Warming, Close Oversight of Bush Administration, 37 ENV’T. REP. (BNA) No. 48, at 2477 (Dec. 8, 2006) [hereinafter Cook, Climate Change: Boxer Pledges Action on Global Warming]; Manimoli Dinesh, Green Democrats to Take over Key Senate Committees, OIL DAILY, Nov. 9, 2006 [hereinafter Dinesh, Green Democrats to Take over Key Senate Committees].


chairman of the Energy and Natural Resources Committee. And some former skeptics in Congress—like Senators Ted Stevens and Lisa Murkowski of Alaska—were persuaded by the growing evidence of shrinking glaciers and disappearing permafrost that global warming was real.  

The picture was not entirely rosy for proponents of climate change legislation, however, because a large number of Democratic members represented rust belt and energy-producing states that could be adversely affected by climate disruption legislation. Moreover, the election had taken a huge toll on moderate Republicans from the Northeast, thereby dimming the prospects for truly bipartisan legislation. In the House, Representative John Dingell (D-Michigan) replaced climate change denier Joe Barton (R-Texas) as chairperson of the House Committee on Energy and Commerce, but Dingell was wary of any environmental legislation that affected the automobile manufacturers in his district. Finally, President Bush retained his veto power, and the Administration remained deeply opposed to any legislation providing for mandatory GHG emissions reductions.

Most of the climate disruption bills introduced at the outset of the 110th Congress employed some variation of a cap-and-trade regime, but they presented a bewildering array of options on many critical issues. One issue was whether to apply the cap-and-trade regime to all sectors of the economy or just to power plants. Another was whether to allocate allowances to sources free of charge during the early years or auction them off to the highest bidders. Of those allowances given away to power

174. Dinesh, Green Democrats to Take over Key Senate Committees, supra note 171.
177. Id.
179. Babington, supra note 172.
180. Cathy Cash, Bush Administration Still Opposes CO2 Mandate; Key Lawmakers Are Still Determined to Pursue It, ELECTRIC UTIL. WK., Dec. 18, 2006, available at 2006 WLNR 22789552.
181. Craig Gannett et al., Carbon Management: The Bumpy Road to Federal Carbon Dioxide Caps, POWER, July 2007, at 43.
182. Id.
plants, another issue was whether to do so on the basis of the amount of electricity the plant produced—an option that would favor companies that relied on renewable energy and natural gas because they would have excess allowances to sell to coal-burning plants that produced much more CO2 per unit of electricity produced—or on the heat input of the fuels burned in the plant—an option that would favor coal-burning plants because it would prevent renewable energy and natural gas-burning plants from getting credit for the fact that they produced fewer CO2 emissions per unit of heat input.184 Still another issue was whether or not the cap-and-trade program should contain a safety valve guaranteeing an upper price for allowances by requiring the EPA to sell all allowances demanded above the safety valve price, even though that would have the effect of raising the cap.185 A final issue was whether or not to preempt state GHG emissions reduction programs.186

Sensing that the political winds were changing, some electric utilities began to shift their position from adamant opposition to any mandatory climate change legislation to grudging acceptance of the need for limits on GHG emissions.187 They were not opposed to a cap-and-trade program for GHG emissions so long as it did not single out the electric utility industry, allocated a substantial proportion for allowances free of charge in the early years, began auctioning allowances only after carbon control and sequestration (“CCS”) technologies were commercially available—most likely ten to twenty years in the future—, required little upfront expenditure, pushed the deadlines far into the future, and provided generous safety valves that ensured stable prices at some level.188 Beset by internal division, the EEI maintained a position of studied neutrality on the desirability of a cap-and-trade regime for GHG emissions.189 The oil and gas industry continued to oppose mandatory climate change legislation, but indicated its willingness to support a properly designed cap-and-trade regime that also preempted all

184. Id.
185. Gannett et al., supra note 181.
186. Id.
188. Id. at 1–2, 4.
189. Id. at 3.
state climate change laws.\textsuperscript{190} The coal industry maintained its strong opposition to any climate change legislation whatsoever.\textsuperscript{191}

Senator Boxer kicked off congressional consideration of climate change legislation with an ambitious series of nine hearings on climate change over three months.\textsuperscript{192} As the hearings progressed, it became apparent that some Republicans could support a cap-and-trade bill, if it would meet the electric utility industry’s demands and would eliminate the EPA’s highly successful new source review program under which the Justice Department was seeking very large penalties from most of the nation’s prominent electric utility companies.\textsuperscript{193} Others, like Senator James Inhofe and Representative Joe Barton remained skeptical of both the scientific basis for global warming claims and cap-and-trade as a tool for reducing GHG emissions.\textsuperscript{194}

As the hearings were wrapping up in April 2007, the Supreme Court of the United States delivered a landmark opinion that dramatically changed the political calculus.\textsuperscript{195} The Court held GHGs were pollutants and EPA therefore had authority to regulate GHG emissions from autos and—by implication—from other sources such as power plants and refineries.\textsuperscript{196} This meant that if EPA found that GHGs endangered public health or the environment, it could begin regulating GHG emissions from new sources and modifications of existing sources.\textsuperscript{197} If Congress did not enact legislation saying otherwise, EPA could proceed ahead with stringent technology-based standards that would have no trading opportunities and no blow-softening provisions like free allocations of allowances and safety valves.\textsuperscript{198} The fact

\begin{thebibliography}{99}
\bibitem{196} \textit{Massachusetts}, 549 U.S. at 500; Whitten, supra note 195.
\bibitem{197} \textit{Massachusetts}, 549 U.S. at 533.
\bibitem{198} See id.
\end{thebibliography}
that the Bush Administration remained strongly opposed to mandatory measures, however, ensured that EPA was not likely to act in the immediate future.199

Sensing no movement on any of the pending Democratic bills, several senators began to work on bipartisan alternatives. 200 Senators Joe Lieberman (I-Connecticut) and John Warner (R-Virginia) unveiled a proposal for a more stringent bill that called for a cap-and-trade regime applicable to all sectors of the economy that would have capped GHG emissions at the 2005 level by 2012, 15\% below the 2005 level by 2020, and 70\% below the 2005 level by 2050.201 Of the initial allowances, 24\% would have been auctioned, 20\% would have been given to the power sector, 20\% would have been given to the industrial sector, and 2.5\% to the transportation sector.202 The proportion of allowances auctioned would gradually increase to 52\% in 2035.203 Revenues from the auctions would be channeled to low- and moderate-income consumers and technology development projects.204 The proposal included a novel cost containment provision that would have created an administrative board that could authorize cost relief measures to companies presented with unexpected economic hardship. 205 The electric utility industry presented a nearly united front in opposition to the Lieberman-Warner Bill.206 Only Exelon and Pacific Gas & Electric, companies that relied heavily on nuclear power and natural gas respectively, supported the Bill.207

As it became clear that a climate change bill containing mandatory caps was likely to reach the Senate floor, utility company executives huddled

199. Whitten, supra note 195.
203. Id.
204. Dillon, Democrats Unveil Details of Climate Change Legislation in Senate, supra note 200.
205. Ware, supra note 202; Lacey, supra note 194.
206. See Dillon, Democrats Unveil Details of Climate Change Legislation in Senate, supra note 200.
“behind closed doors with White House [aides] and administration officials”
to come up with a legislative approach to a cap-and-trade program that more
closely reflected what the industry had in mind.\textsuperscript{208} The favored approach
would have preempted state climate change laws and replaced EPA’s new
source review program.\textsuperscript{209} The authority to regulate GHG emissions would
have been delegated to the DOE, rather than EPA.\textsuperscript{210} And, GHG reductions
would have been required only when proven technologies were available.\textsuperscript{211}

The Environment and Public Works Committee passed the
Lieberman-Warner Bill with only a few minor amendments by a vote of
eleven to eight.\textsuperscript{212} Only one Republican—Senator Warner—voted yes.\textsuperscript{213}
The Bill now had to clear the sixty vote hurdle necessary to halt the
Republicans’ promised filibuster.\textsuperscript{214} The Bill’s sponsors began a lengthy
process of negotiating the concessions that would be necessary to persuade
ten to twelve Republicans and nearly all coal-state Democrats to vote to cut off debate.\textsuperscript{215} By the time that the negotiations were nearing completion in
January 2008, a persistently sluggish economy had dimmed enthusiasm for
comprehensive climate change legislation.\textsuperscript{216} Nevertheless, the Democratic
leadership assured the Bill’s supporters that it would go to the floor in early
2008.\textsuperscript{217}

In the meantime, climate change legislation was moving at a snail’s
pace in the House.\textsuperscript{218} At the outset of the 110th Congress, Majority Leader
Pelosi created a special committee to address climate change issues and
appointed long-time climate change activist Representative Edward Markey
(D-Massachusetts) to head it, but the committee lacked the jurisdiction over

\textsuperscript{208}. Utility Execs’ Plan for GHG Capture Proposes Federal Control, No
\textsuperscript{209}. \textit{Id.}
\textsuperscript{210}. \textit{Id.}
\textsuperscript{211}. \textit{See id.}
\textsuperscript{212}. See Alexander Duncan, Panel Sends Global-Warming Bill to Senate
Warming Bill to Senate Floor], available at http://www.lexisnexis.com.
\textsuperscript{213}. \textit{Id.}; Doug Obey, Senate Markup Defines Scope of Future Talks on Climate
\textsuperscript{214}. Dean Scott, Legislation: Senate Cap-and-Trade Bill Gains Momentum,
but Delayed House Bill Complicates Passage, 39 \textit{Envt’l Rep. (BNA) (Special Issue)} No. 3, at
S-9 (Jan. 18, 2008); Duncan, Panel Sends Global-Warming Bill to Senate Floor, supra note
212.
\textsuperscript{215}. Scott, supra note 214; Obey, supra note 213.
\textsuperscript{216}. Scott, supra note 214; see also Cathy Cash, House Preparing for Climate
\textsuperscript{217}. Scott, supra note 214.
\textsuperscript{218}. \textit{See id.}
any actual legislation.\textsuperscript{219} The Energy and Commerce Committee, which had jurisdiction over climate disruption legislation, was preoccupied with the Bush Administration’s energy bill.\textsuperscript{220} In sharp contrast to Senator Boxer’s committee, it failed to hold a single hearing on climate change legislation during 2007.\textsuperscript{221} The chairperson of the subcommittee with jurisdiction over the climate disruption legislation was Rick Boucher (D-Virginia), a moderate Democrat who represented a coal-producing district in Virginia.\textsuperscript{222} Although Boucher had been a global warming skeptic, he now believed that legislation was necessary to forestall EPA action.\textsuperscript{223} Convinced that coal should play a major role in electricity generation for the foreseeable future, he insisted that the rate at which GHG reduction technologies became available to coal-fired power plants should determine how rapidly the government required GHG emissions reductions.\textsuperscript{224} 

In mid-January 2008, representatives of a new group, called the Climate Action Partnership—consisting of environmental groups and more than thirty companies concerned about global warming—urged Congress to enact mandatory climate change legislation “on a fast-track basis.”\textsuperscript{225} They called for a 60% to 80% reduction in GHG emissions from 2005 levels by 2050 and for a 10% to 30% reduction during the first fifteen years.\textsuperscript{226}

\begin{footnotesize}

\textsuperscript{220} Scott, supra note 214.

\textsuperscript{221} Id.


\textsuperscript{223} Id., supra note 222.

\textsuperscript{224} Id.; Niven, \textit{House Energy Committee Targeting Early 2008 to Introduce CO2 Legislation, Says Boucher}, supra note 222.


\textsuperscript{226} Id.
\end{footnotesize}
Before drafting a bill, Boucher took the unusual step of having the subcommittee staff draft a series of public position papers on issues that were likely to arise when the committee considered a bill.\textsuperscript{227} As the position papers trickled out through the spring of 2008,\textsuperscript{228} it became clear that the bill that Representative Boucher had in mind was considerably less stringent than the Lieberman-Warner Bill in the Senate.\textsuperscript{229}

When the Lieberman-Warner Bill came to the floor of the Senate during the first week of June 2008, the lobbyists for the affected interests were out in force.\textsuperscript{230} The CoC joined with oil and gas and mining interests to create the Alliance for Energy and Economic Growth to send Congress the message that the Lieberman-Warner Bill would harm the economy with little resulting impact on global warming so long as China and India failed to reduce GHG emissions.\textsuperscript{231} The NAM opposed the Bill on many grounds.\textsuperscript{232} Another advocacy organization for the business community, the Club for Growth, launched “a radio and [television] ad[vertising] campaign against the bill in states [with] senators [who were] potential[ly] swing votes.”\textsuperscript{233} Even the natural gas industry opposed the legislation because it required natural gas processors to purchase allowances instead of end users.\textsuperscript{234} Environmental groups had reservations about the Bill and favored more

\textsuperscript{227} Goode, Dingell, Boucher Call for Cap-and-Trade on Emissions, supra note 219; Hart, Boucher Says Chances Dim for Climate Change Legislation This Year, supra note 222.


\textsuperscript{229} See Steven D. Cook, Legislation: Climate Change Bill Must Preserve Coal As Fuel for Electric Power; Boucher Says, 39 EN’VT REP. (BNA) No. 11, at 497 (Mar. 14, 2008).


\textsuperscript{231} See Williamson, supra note 21.


stringent requirements in several regards, but they united behind the Bill after the sponsors made several changes designed to meet their objections.235

On the day before the scheduled cloture vote, President Bush threatened to veto any bill that contained mandatory limits on GHG emissions.236 With such formidable opposition lined up against the Bill, it was clear to the Bill’s sponsors that it would be impossible to line up the sixty votes necessary to prevent a filibuster without making major concessions that would be opposed by environmental groups and could cause progressive Democrats to abandon the effort.237 Despite its poor prospects, Democratic strategists believed that the party would benefit in the upcoming elections by forcing Republicans to vote against climate change legislation.238 Recognizing the political risks involved, the Republican leadership shifted its strategy away from outright refusal to acknowledge the reality of global warming to an insistence that the Lieberman-Warner Bill intruded too deeply into the American economy.239 Reflecting the laissez faire minimalist view espoused by the conservative think tanks, they argued that the Bill amounted to little more than a stealth tax on American consumers.240


238. Scott, Climate Change: Talks on Cap-and-Trade Bill Accelerate As Concerns Raised over Cost, Other Issues, supra note 234.


As expected, the 48-36 vote in favor of cloture did not reach the sixty-vote majority necessary to end the filibuster. The full Senate never debated the merits of the Bill. After the vote, Senate Majority Leader Reid pulled the Bill and announced that it would not be taken up again during the 110th Congress.

D. The Waxman-Markey Bill in the 111th Congress

The 2008 elections appeared to mark a major shift in the politics of climate disruption. Both houses of Congress remained under the control of the Democratic Party, and the Democratic majority in the Senate had reached the magic number of sixty. The voters also sent to the White House a charismatic young Democrat who had promised during the campaign to make climate change legislation one of his top priorities. President Obama featured climate disruption in his inaugural address, and he promised to “work tirelessly to . . . roll back the specter of a warming planet.” To demonstrate his commitment to climate change legislation, he hired former EPA Administrator Carol Browner as a White House Advisor and charged her with directing the Administration’s legislative efforts on matters relating to energy and the environment. At the same

244. See, e.g., id.
248. Steven D. Cook, U.S. Policy: Obama’s Energy, Environment Team Seen Bringing Cohesion to Administration Response on Warming, ENERGY & CLIMATE REP. (BNA)
time, many states were already putting climate change regulatory programs into effect, and the EPA was rapidly proceeding ahead with an endangerment finding and associated regulatory programs.249

In the House, Speaker Pelosi re-authorized the Select Committee on Energy Independence and Global Warming and re-appointed Representative Edward Markey (D-Massachusetts) to head it.250 In an audacious move, Representative Henry Waxman (D-California) challenged Representative John Dingell (D-Michigan) for the chairmanship of the Committee on Energy and Commerce,251 and he prevailed by a vote of 137–122 in the Democratic caucus.252 The CEI proclaimed that the Waxman election provided “a loud wake-up call to American business leaders that the 111th Congress is not going to play nicely with them on energy rationing policies.”253

Having wrested control of the committee from Representative Dingell, Chairman Waxman announced that the 111th Congress had “an opportunity that comes only once in a generation” to enact landmark climate change legislation.254 He and Speaker Nancy Pelosi hoped to move a bill out of his committee by Memorial Day with an eye toward enactment by the end of the year.255 But Waxman first had to patch up the wounded feelings of Dingell’s supporters and reach an accommodation with Democrats from

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249. See Cash, Obama Election Steers Industry Straight to Cap on Carbon, supra note 245.
coal-dependent states who were already banding together to defend their states’ economic interests.\footnote{256}

If anyone was capable of steering the climate change bill through the treacherous waters of the House of Representatives, it was the energetic Henry Waxman.\footnote{257} He was in an excellent position to work with the White House because his former aide of more than twenty years, Philip Schiliro, was President Obama’s liaison to Congress.\footnote{258} But Waxman’s committee had a full plate of important bills, including the president’s health care reform bill, which taxed even his formidable capacity for hard work.\footnote{259} He therefore delegated to Representative Markey, who replaced Representative Boucher as chairperson of the Subcommittee on Energy and Air Quality, the responsibility for drafting the initial bill.\footnote{260}

As Waxman’s committee began a series of hearings on climate disruption, the Reality Coalition, an umbrella organization composed of several of the nation’s largest environmental groups, sponsored an advertising campaign featuring a yeti and a mermaid holding lumps of coal to make their point that coal could not play a major role in America’s energy future.\footnote{261} At the committee’s first hearing in mid-January, it received testimony on the \textit{Blueprint for Legislative Action} that the Climate Action Partnership had drafted.\footnote{262} The blueprint’s goal was to achieve a 42\% reduction in emissions from 2005 levels by 2030 and an 80\% reduction by 2050.\footnote{263} It allocated a substantial portion of the allowances on the basis of historical emissions and contained cost containment measures to act as a safety valve.\footnote{264} The blueprint allowed companies to purchase offsets from

\begin{footnotes}
\footnote{257. See Charles Homans, \textit{Marathon Man}, \textit{WASH. MONTHLY}, May–June 2009, at 10, 12–13.}
\footnote{258. \textit{Id.} at 11.}
\footnote{259. \textit{Id.}}
\footnote{261. \textit{Hearings Draw Out the Climate Change, Clean Coal, Practical Sides of Appointees}, \textit{supra note 255}.}
\footnote{262. \textit{Id.}}
\end{footnotes}
companies that agreed to improve the efficiency of their operations or farmers who agreed to plant more carbon absorbing vegetation. Despite the substantial industry support for the blueprint, the Republican members of the committee rejected the cap-and-trade proposal and argued that Congress should consider a carbon tax instead.

President Obama signaled his support for a cap-and-trade regime with auctioned allowances in February 2009 when he included in his fiscal year 2010 budget request a surprisingly detailed description of what the President wanted to see in a climate change bill, including a GHG emissions cap of 14% below 2005 levels by 2020 and 83% below 2005 levels by 2050, with 100% of the allowances to be auctioned to prevent the dirtiest emitters from reaping windfall profits. The coal industry and coal-dependent electric utility companies strongly objected to the President’s suggestion that 100% of allowances should be auctioned. If that happened, executives from American Electric Power and Duke Energy predicted electricity rates in some states—like Indiana—would go up by as much as 40%.

In mid-March, Senator Boxer and Representatives Waxman and Markey met with the White House staff to come up with a strategy for passing climate change legislation. They agreed on the broad contours of a comprehensive energy and climate change bill that would create an economy-wide cap-and-trade regime. Since Boxer had the votes in her committee to report out a bill at any time, they decided that the House Bill


268. Cash et al., Obama Sets Pace for Congress on Carbon, supra note 264.

269. See Cassandra Sweet, Coal-Burning Utilities Want Time on CO2 Rules, WALL ST. J., Mar. 11, 2009; Hearings Draw Out the Climate Change, Clean Coal, Practical Sides of Appointees, supra note 255.

270. Sweet, supra note 269.


272. See id.
should move forward first to give the Senate sponsors some idea of what was possible.273

In late March 2009, Representatives Waxman and Markey introduced a 648-page discussion draft to serve as a starting point for the Energy and Commerce Committee’s consideration of climate change legislation.274 Based on the Climate Action Partnership blueprint,275 the Bill would have established an economy-wide cap-and-trade regime that capped GHG emissions at 20% below 2005 levels by 2020, at 42% below 2005 emissions in 2030, and at 83% below 2005 levels by 2050.276 The Federal Energy Regulatory Commission (“FERC”) would have managed the primary allowance market.277 The draft did not specify the percentages of allowances that would have been given away and auctioned; nor did it specify how the revenues from the auctions would have been spent.278 The draft would have allowed emitters to increase emissions over their allowances if every four tons of emissions were offset by five tons of emissions reductions from other domestic or international sources.279 It would have “create[d] a ‘strategic reserve’ of . . . 2.5 billion allowances” for EPA to auction to emitters in times of price volatility to stabilize allowance prices.280 To further increase flexibility, it would have allowed a source to borrow allowances from next year for this year’s emissions.281 The draft also contained a renewable energy portfolio standard that would have required electrical generators to derive at least 25% of their production from renewable energy by 2025.282

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273. Id.
277. Whieldon & Cash, supra note 275.
279. Whieldon & Cash, supra note 275.
280. Id.; see also Hart, House Energy, Climate Change Bill Cuts Carbon Emissions 20% by 2020, supra note 274.
282. Broder, 2 Democrats Introduce Far-Reaching Bill on Energy and Warming, supra note 278; Talley & Power, supra note 278.
The Waxman-Markey draft also contained a number of provisions to reduce predictable opposition; to make the coal industry happy, the Bill created a $10 billion pool to finance carbon capture and storage and related technologies.\textsuperscript{283} To mollify the electric utility industry, the Bill prohibited the EPA from regulating GHGs under its existing Clean Air Act authorities and suspended state climate change programs for five years until the federal program got underway.\textsuperscript{284} To please environmental groups, a citizen suit provision would have empowered private citizens to sue the federal government for failing to enforce the Bill’s requirements.\textsuperscript{285}

EPA Administrator Lisa Jackson and the Secretaries of Energy and Transportation praised many aspects of the draft without giving it the Administration’s formal endorsement.\textsuperscript{286} In response to anticipated complaints from the “no we can’t” crowd that the proposal would cause huge increases in electric bills, Jackson cited an EPA analysis of the draft concluding that it would have only a modest effect on consumers—27¢ to 38¢ per day—if it retained its generous offset program and if most of the revenues from the auctions of allowances went to regulated local distribution companies.\textsuperscript{287} The Climate Action Partnership applauded the Bill as a strong starting point for a bill, but said it would insist that a substantial number of allowances be awarded for free to emitters.\textsuperscript{288} Environmental groups and clean energy companies also supported the draft, but they were somewhat taken aback by Waxman’s decision to limit EPA’s Clean Air Act authority to

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\textsuperscript{283} Broder, 2 Democrats Introduce Far-Reaching Bill on Energy and Warming, supra note 278.
\textsuperscript{285} Jean Chemnick & Brian Hansen, Bill Allows People to Sue the Government over Alleged Harms from Climate Change, PLATTS INSIDE ENERGY, Apr. 20, 2009, at 9, available at 2009 WLNR 8452640.
\textsuperscript{288} Broder, 2 Democrats Introduce Far-Reaching Bill on Energy and Warming, supra note 278.
\end{flushright}
regulate GHG emissions and to preempt state climate change laws for five years without demanding any concessions from industry in return.289 Democratic committee members from coal-producing states did not support the draft as written.290 Among other things, they believed the 20% by 2020 goal was highly unrealistic.291 Republicans were unified in opposition against the draft bill.292

Coal-dependent electric utility companies and the EEI supported the cap-and-trade concept, but they refused to support a bill that did not distribute free allowances to emitters.293 They strongly opposed the renewable portfolio requirement, arguing that states were in a better position to impose such measures.294 The CoC and several conservative think tanks objected to all of the measures in the draft.295 The Heritage Foundation predicted that the Bill would impose a cost of $1600 a year on the average household and kill as many as three million manufacturing jobs.296 The head of the CEI promised that his organization would “work to see that it dies as quickly as possible.”297


293. Cathy Cash, Moderates Try to Tone Down Stringent Climate Bill, PLATTS INSIDE ENERGY, Apr. 27, 2009, at 1 [hereinafter Cash, Moderates Try to Tone Down Stringent Climate Bill], available at 2009 WLNR 8941907; Eilperin, House Panel Begins Debate on Climate Bill, supra note 289 (quoting David Ratcliffe, Southern Company).

294. Cash, Moderates Try to Tone Down Stringent Climate Bill, supra note 293 (quoting Jim Rogers, Duke Energy).


297. Whieldon & Cash, supra note 275.
The CoC’s adamant opposition to any climate change legislation caused three electric companies, PG&E, PNM Resources, and Exelon, to terminate their memberships in protest.\(^{298}\) The companies preferred to live with the limited restrictions of a cap-and-trade program than with the uncertainties of no legislation or the strictures of EPA regulation under the Clean Air Act.\(^{299}\) The American Coalition for Clean Coal Electricity (“ACCCE”)—which included mining companies and electric utility companies—also lost members over its opposition to climate disruption legislation.\(^{300}\) Duke Energy, Alstom Power, and Alcoa no longer wanted to be associated with a group that did not acknowledge the reality of climate disruption and the need for legislation to deal with it.\(^{301}\)

President Obama dealt climate disruption legislation a minor setback when he decided to make health care reform his top legislative priority, after which the White House became absorbed in lengthy—but ultimately unproductive—negotiations with House and Senate Republican leaders over the content of the health care bill.\(^{302}\) Pressed by the need to take up President Obama’s health care legislation, Chairman Waxman decided to skip the subcommittee markup of the Waxman-Markey Bill and move directly to markup by the full committee.\(^{303}\) But that required him to reach an accord with the committee’s coal-state, oil-patch, and rust-belt Democrats and the lobbyists for the coal, oil refining, and manufacturing industries that were pressuring them.\(^{304}\) Hoping to move the issue along, President Obama met with all of the Democratic committee members at the White House, at which time he indicated that he was willing to compromise on key issues.\(^{305}\)

\(^{298}\). Industry Fractures on Climate Policy, supra note 23, at 5–6; see also Williamson, supra note 231.

\(^{299}\). See Industry Fractures on Climate Policy, supra note 23, at 5–6.


\(^{301}\). Industry Fractures on Climate Policy, supra note 23, at 6.

\(^{302}\). See ALTER, supra note 246, at 115–16.

\(^{303}\). Darren Goode, Waxman, Checking Clock, Sticks to Memorial Day Goal, CONGRESS DAILY (AM ED.), May 7, 2009 [hereinafter Goode, Waxman, Checking Clock, Sticks to Memorial Day Goal]; see also ALTER, supra note 246, at 260.

\(^{304}\). Dean Scott, Legislation: Energy Committee Democrats Reach Deal on Key Issues, Setting Stage for Markup, 40 ENV’T REP. (BNA) No. 20, at 1103 (May 15, 2009) [hereinafter Scott, Legislation: Energy Committee Democrats Reach Deal on Key Issues]; Steven Mufson, Climate Bill Seeks a Broad Coalition; Legislation Would Cap Greenhouse Gases, Hand Out Billions to Utilities, WASH. POST, May 16, 2009, at A9 [hereinafter Mufson, Climate Bill Seeks a Broad Coalition]; see also Goode, Waxman, Checking Clock, Sticks to Memorial Day Goal, supra note 303.

\(^{305}\). See Scott, Legislation: Energy Committee Democrats Reach Deal on Key Issues, supra note 304.
example, he dropped his opposition to giving free allowances to emitters during the first years of the program. 306

Soon thereafter, on May 12, 2009, Waxman announced that the Democratic committee members had reached an agreement on a 932-page bill that they all could support. 307 Waxman agreed to lower the 2020 target for GHG emissions reductions from 20% below 2005 emissions to 17%. 308 He also agreed to give away more than half of the allowances to emitters and local distribution companies during the early years. 309 The largest portion—35%—would go to local distribution companies and would cover 90% of the current emissions of the electric utilities that provided their electricity. 310 The formula for dividing up allowances within the electric utility industry was derived from a consensus agreement arrived at by the EEI after two years of internal negotiations and was based on a fifty-fifty formula under which half of a plant’s allowances would be based on emissions and half on energy output. 311 The agreement, however, left coal-dependent rural electrical cooperatives out in the cold. 312 In order to win the support of oil-patch and rust-belt Democrats, billions of dollars worth of free allowances would go to energy-intensive manufacturing industries (15%), gas utility companies (9%), refineries (2%), and automobile manufacturers (3%). 313

306. Id.
308. Scott, Legislation: Energy Committee Democrats Reach Deal on Key Issues, supra note 304; Power & Hughes, supra note 307.
309. See Power & Hughes, supra note 307.
312. See Cash, Carbon Cap Bill Jumps Hurdle with House Panel Approval, supra note 311.
313. Scott, Legislation: Energy Committee Democrats Reach Deal on Key Issues, supra note 304; Mufson, Climate Bill Seeks a Broad Coalition, supra note 304.
And the renewable energy mandate would drop from 25% by 2025 to 20%, with up to 8% coming from state efforts to enhance efficiency.\footnote{Scott, Legislation: Energy Committee Democrats Reach Deal on Key Issues, \textit{supra} note 304; Darren Goode with Billy House, \textit{Groups Step Up Climate Campaigns}, \textit{Congress Daily} (AM ED.), June 9, 2009.}


As the Energy and Commerce Committee was completing its work, trouble loomed on the horizon in the form of a request by Representative Collin Peterson (D-Minnesota) to have the Bill referred to the Agriculture Committee that he chaired.\footnote{Fahrenthold, \textit{House Panel Passes Limit on Greenhouse-Gas Emissions}, \textit{supra} note 317; Jerry Hagstrom, \textit{Peterson Raises Concerns About House Climate Measure}, \textit{Congress Daily} (AM ED.), May 20, 2009 [hereinafter Hagstrom, \textit{Peterson Raises Concerns About House Climate Measure}].} Frequently at odds with environmental groups, Peterson had made light of global warming by stating that it would allow Minnesota farmers to grow more corn.\footnote{Stephen Power, \textit{In the House, It’s Peterson vs. Climate Bill}, \textit{Wall St. J.}, June 22, 2009, at A4 [hereinafter Power, \textit{In the House, It’s Peterson vs. Climate Bill}].} Peterson had a \textit{long list} of issues that would have to be addressed to his satisfaction before he would be
willing to support the Bill. 321 Among other things, he wanted to protect United States farmers from international competition in the market for offsets, increase the allowances given to rural electrical coops and municipal power plants, and prohibit Wall Street banks from trading in the allowance markets. 322 He reported that forty-five additional Democrats shared his concerns. 323

Lobbyists for farming and forestry interests stepped up their efforts to influence members of the House Agriculture Committee. 324 Constituents in the districts of all of the Democratic members of the House Agriculture Committee received emails and robocalls from the National Republican Congressional Committee and other opponents of the Bill characterizing it as a “job-killing climate bill.” 325 Six organizations representing farmers and ranchers demanded that the Bill be amended to allow unlimited offsets from domestic, but not foreign, agriculture and forestry; notwithstanding the fact that GHG emissions from cattle—approximately one-quarter of United States methane emissions—and tilling soil on farms had been excluded from the Bill. 326 Another farmer alliance called for amending the Bill to provide for a list of pre-approved farming practices, such as planting trees, preserving forests, and no-till farming practices that would offset GHG emissions. 327 Both groups agreed with Agriculture Secretary Tom Vilsack’s

321. Hagstrom, Peterson Raises Concerns About House Climate Measure, supra note 319.
322. Jean Chemnick, Corn-Ethanol Spat Could Derail Major Climate Bill, PLATTS INSIDE ENERGY, June 1, 2009, at 1, available at 2009 WLNR 11440851; Fahrenthold, House Panel Passes Limit on Greenhouse-Gas Emissions, supra note 317; Goode, Panel Completes Climate Marathon, supra note 318; Hagstrom, Peterson Raises Concerns About House Climate Measure, supra note 319.
323. Goode, Panel Completes Climate Marathon, supra note 318; see also Chemnick, Corn-Ethanol Spat Could Derail Major Climate Bill, supra note 322.
327. Cook, Legislation: Farm Groups Call for Climate Legislation, supra note 326.
recommendation that Congress give the United States Department of Agriculture (“USDA”) the authority to manage the offsets program.328

Waxman hoped to work out a deal with Peterson to avoid a nasty fight over amendments to the Bill in the Agriculture Committee.329 Peterson was especially miffed by the fact that rural electric cooperatives received so few allowances in comparison to those awarded to utilities on the East and West Coasts.330 Peterson also insisted on the transfer to USDA as a condition to going forward with the bill.331 Waxman then met with the heads of the EEI and the National Rural Electric Cooperative Association (“NRECA”) to iron out a compromise on the allocation issue that would be acceptable to the rural cooperatives.332 Two days before the June 26th floor debates, Waxman and Peterson struck a deal in which Waxman effectively capitulated to the demands of farm-state Democrats.333 USDA would oversee the offsets markets.334 The Bill required non-coal-dependent companies to surrender some of their allowances to coal-dependent rural cooperatives, allocating 0.5% of allowances specifically to small utility companies that generated “less than [four] million megawatt hours.”335 The net effect of the changes was to channel billions of dollars worth of allowances to the agricultural sector and to lodge a critical piece of the

328. Cook, Legislation: Farm Groups Call for Climate Legislation, supra note 326; Jerry Hagstrom, Vilsack Makes a Bid to Oversee Climate Change Efforts, CONGRESS DAILY, June 3, 2009, available at 2009 WLNR 10638586; Agriculture Groups Seek to Limit EPA Offset Role Under Climate Bill, supra note 324.

329. Goode, House Dem Leaders Reach Out to Disparate Caucuses, supra note 325.


333. Dean Scott, Legislation: Climate Bill Slated for House Floor Vote; Waxman, Other Chairmen Reach Agreements, 40 ENV’T REP. (BNA) No. 26, at 1489 (June 26, 2009) [hereinafter Scott, Legislation: Climate Bill Slated for House Floor Vote]; Darren Goode, Waxman, Peterson Have Climate Deal, CONGRESS DAILY (AM ED.), June 24, 2009 [hereinafter Goode, Waxman, Peterson Have Climate Deal].

334. Scott, Legislation: Climate Bill Slated for House Floor Vote, supra note 333; Goode, Waxman, Peterson Have Climate Deal, supra note 333.

335. Goode, Waxman, Peterson Have Climate Deal, supra note 333.
regulatory program in a department that had historically placed agricultural interests over environmental concerns.\textsuperscript{336}

As the Bill neared consideration by the full House at the end of June, however, President Obama began to vigorously lobby Democratic members to vote for it.\textsuperscript{337} EPA released an analysis of the most recent version that concluded that the average annual household cost of compliance with its provisions would be somewhere between $80 and $111, or 22¢ and 30¢ per day.\textsuperscript{338} In other words, the Bill was quite affordable. Despite EPA’s assessment, the National Republican Congressional Committee aired advertisements featuring its claim that the Bill would add $1800 to the average annual electric bills of middle-class families.\textsuperscript{339}

The bill that the House took up on June 26 had expanded to more than 1200 pages, reflecting dozens of deals that Waxman and Markey had made with wavering Democrats.\textsuperscript{340} Nevertheless, the major environmental and consumer groups held their collective noses and supported the compromise bill with all of its warts.\textsuperscript{341} Several groups, including EEI,\textsuperscript{342} the AGA,\textsuperscript{343} and the NRECA,\textsuperscript{344} supported the Bill, but planned to demand changes in the Senate.\textsuperscript{345} The trade associations for farming interests and rural electric cooperatives were pleased with the changes, but divided on

\textsuperscript{336} Reap What We Sow; the Agriculture Lobby’s Fingerprint are All over a Crucial Bill to Fight Global Warming, L.A. TIMES, June 26, 2009, at A32; see Power, In the House, It’s Peterson vs. Climate Bill, supra note 320.
\textsuperscript{337} Paul West, Obama Lobbying for Climate Bill; He Says It Would Help Save as Much as the U.S. Imports from the Persian Gulf. Figures are Conflicting, L.A. TIMES, June 25, 2009, at A16; see Scott, Legislation: Climate Bill Slated for House Floor Vote, supra note 333; Ian Talley & Siobhan Hughes, Climate Bill Set for Vote After Deal Is Reached, WALL ST. J., June 24, 2009, at A6.
\textsuperscript{338} Darren Goode with Billy House, EPA Sees Low Annual Cost For Waxman Bill, CONGRESS DAILY (PM ED.), June 23, 2009.
\textsuperscript{340} Scott, Legislation: Climate Bill Slated for House Floor Vote, supra note 333; see also Cash & Weinzimer, supra note 311.
\textsuperscript{343} House-Passed Climate Bill Will Promote Renewable Energy and Create Jobs, Says Majority; Republicans Decry “National Energy Tax,” While Oil and Gas Producers Hope for Better Deal in Senate, supra note 339.
\textsuperscript{344} Cash & Weinzimer, supra note 311.
\textsuperscript{345} See id.
whether to support the overall Bill. The CoC, the NAM, the Independent Petroleum Association of America, and the ACCCE all opposed the Bill.

The Bill passed by a narrow 219–212 margin. Forty-four House Democrats—nearly 20%—voted against the Bill, and eight Republicans voted for it. The fact that the Climate Action Partnership supported the Bill made it easier for some Democrats to vote favorably. The final Bill established a multi-sector cap-and-trade regime that capped GHG emissions at 17% below 2005 emissions by 2020, 42% by 2040, and 83% by 2050. The allowance markets were overseen by the FERC and the allowance derivatives markets by the Commodity Futures Trading Commission (“CFTC”). The Bill set aside allowances for the EPA to distribute to various public and private beneficiaries in accordance with formulas provided for in the statute. Beginning in 2026, the allowance gifts would be gradually phased out until they ended in 2035, at which point all allowances would be allocated by auction. The allowances set aside for the electric utility industry would be allocated to local distribution companies so that state public utility commissions would have the power to ensure that retail consumers received their economic benefit.


348. Hitt & Bendavid, supra note 342.

349. House-Passed Climate Bill Will Promote Renewable Energy and Create Jobs, Says Majority; Republicans Decry “National Energy Tax,” While Oil and Gas Producers Hope for Better Deal in Senate, supra note 339; Waxman-Markey, Characterized As ‘A Pile of (Bleep)’ by One Lawmaker, supra note 347.


351. Hitt & Bendavid, supra note 342.


355. Tiernan, Deep in the Weeds of Allowance Allocations, supra note 353.
Instead of reducing emissions, emitters could purchase offset credits on a one-to-one basis—not the five-to-four basis of the original Bill. Each offset credit would represent one ton of CO2 emissions removed from the atmosphere by declining to engage in activities that would otherwise result in CO2 emissions; planting vegetation to take CO2 out of the atmosphere, capturing methane emissions from cow manure, or other forms of permanent carbon sequestration. The USDA would oversee the offset markets.

The Bill established an overall limit of two billion tons of offset credits per year, only half of which could come from international sources. The Bill also contained a renewable energy portfolio mandate under which utilities would be required to generate 15% of their electricity from renewable sources and save 5% from energy efficiency by 2020. This was far less ambitious than many existing state renewable energy standards.

To provide a safety valve, the bill established a $25 per megawatt–hour alternative compliance payment that a utility company could pay in lieu of a renewable energy credit. Finally, the Bill retained a technology-based requirement—new power plants would have to emit 50% fewer GHGs and plants built after 2020 would have to emit 65% fewer GHGs than existing plants.


357. How Offset Credits Will Work Under Waxman-Markey Climate Bill, supra note 356.

358. Id.

359. Id.


362. Id.

In anticipation of Senate consideration of the House-passed bill, a number of governmental and private sector entities produced analyses of the House bill.\textsuperscript{364} In late July, the USDA released a study concluding that the Waxman-Markey Bill would impose very little short-run cost in the form of increased prices for fuel and fertilizer on farms, and in the long run, farmers would come out ahead because of the ability to sell offsets to GHG emitting companies.\textsuperscript{365} An analysis prepared by the DOE’s Energy Information Administration concluded that the Bill would probably increase average household energy costs by $114 in 2020 and $288 in 2030.\textsuperscript{366} A study prepared for NAM by Science Applications International Corporation, by contrast, concluded that the Bill would reduce the gross domestic product by a minimum of 1.8% by 2030, reduce household income by at least $730, and bring about the loss of at least 1.7 million jobs.\textsuperscript{367} The Heritage Foundation warned that the Bill could cause gasoline prices to go up 74% by 2035.\textsuperscript{368}

E. The Kerry-Graham-Lieberman Bill in the 111th Congress

The lobbyists for the various interest groups now turned their attention to the Senate, where things were moving with far less dispatch than in the House.\textsuperscript{369} As in the House, the CoC and many coal and oil companies joined the CEI and the Heritage Foundation in opposing all climate change legislation.\textsuperscript{370} Many groups that had supported the final House Bill now hoped to persuade the Senate to include provisions that had been deleted from the House Bill or remove provisions from the House Bill that they had failed to defeat.\textsuperscript{371} The electric utility industry came together to lobby for lower targets for the caps, less ambitious deadlines, more allowances for electric utilities, and a \textit{price collar} that would set a minimum and a

\begin{itemize}
\item \textsuperscript{364} See, e.g., Dean Scott, \textit{Legislation: USDA Study Estimates Little Cost to Farms from House Bill, but Senators Are Skeptical}, 40 ENV’T REP. (BNA) No. 30, at 1755 (July 24, 2009).
\item \textsuperscript{365} Id.
\item \textsuperscript{368} House-Passed Climate Bill Will Promote Renewable Energy and Create Jobs, Says Majority; Republicans Decry “National Energy Tax,” While Oil and Gas Producers Hope for Better Deal in Senate, supra note 339.
\item \textsuperscript{369} Id.
\item \textsuperscript{370} See Lieberman, supra note 295; Mulkern, \textit{Coal Industry Sees Life or Death in Senate Climate Debate}, supra note 295.
\item \textsuperscript{371} Tiernan, \textit{Deep in the Weeds of Allowance Allocations}, supra note 353.
\end{itemize}
maximum price on allowances. The high end of the price collar would act as a safety valve to ensure against disruptive price spikes, and the low end would provide assurance to a company and its bankers that the price of allowances would not drop below the statutory price, as it was comparing the purchase of allowances to investing in GHG emissions reductions technologies. The NRECA wanted the Senate to distribute all allowances based on the carbon content of the fuel used, rather than using the EEI formula that distributed half on the basis of electrical output. A new group of coal-dependent power companies called Generators for Affordable Power was formed specifically with the goal of ensuring that unregulated merchant generators received their fair share of allowances in any cap-and-trade legislation.

Environmental groups wanted the Senate to set the 2020 cap at 20% below 2005 emissions and to require all allowance trading to be conducted on regulated public exchanges. They strongly objected to giving the USDA authority over offsets and allowance trading. In addition, they urged the Senate to prohibit any source that was out of compliance with the Clean Air Act’s requirements for conventional pollutants from receiving free allowances and from purchasing offsets in the climate change program.


375. Tiernan, Allocations to Merchants Reveal Fault Lines, supra note 374.


377. Id. at 31–32.

378. Id. at 6–7.
urged the senators to refrain from preempting EPA and state regulation of GHG emissions under their existing authorities.379

Senator Barbara Boxer, who remained chairperson of the Environment and Public Works Committee, decided to proceed cautiously until she was confident that she had sixty votes lined up to end the guaranteed Republican filibuster.380 To accomplish this, she had to seek an accommodation with a group of sixteen Democratic senators from coal-dependent states that had coalesced during the defeat of climate change legislation in the 110th Congress.381 The committee kicked off its work on the climate disruption Bill with a hearing on July 7th featuring EPA Administrator Lisa Jackson, Secretary of Agriculture Tom Vilsack, Secretary of Energy Steven Chu, and Interior Secretary Ken Salazar;382 all four of whom urged the committee to report out a bill similar to the House Bill.383 At the same time, Senator Boxer and Senator John Kerry (D-Massachusetts)—a strong supporter of stringent climate change legislation—met with coal-state, farm-belt, and rust-belt Democrats to address their concerns and to negotiate over potential changes to the Bill.384

Agricultural interests dominated the hearing that the Senate Agriculture Committee held in late July 2009.385 They argued that up to 5% of the allowances should go directly to farmers to offset the higher prices they would probably have to pay for fuel and fertilizer after cap-and-trade provisions went into effect.386 The American Farm Bureau Federation (“AFBF”) continued to oppose the Bill in its entirety.387 The Democrats on the Committee were sympathetic to the pleas for more allowances, while the Republicans tended to take the AFBF position that no bill was necessary.388

379. Id. at 23–24.
381. Broder, Geography Is Dividing Democrats over Energy, supra note 256.
383. Darren Goode, Top Officials Pitch Climate Bill to Senators, CONGRESS DAILY (PM ED.), July 7, 2009; Senate Gets to Grips with Climate Change Bill, supra note 382.
386. Id.
387. Id.
388. Id.
Committee Chairman Tom Harkin (D-Iowa) expressed support for an off ramp that would allow the United States to abandon the cap-and-trade program if China and India declined to implement equivalent programs in the near future.389

Finance Committee Chairman Max Baucus (D-Montana) also claimed jurisdiction over both the allowance allocation and the international trade aspects of any cap-and-trade bill.390 Baucus represented Montana, a major coal-producing state with a large number of rural cooperatives, and he was determined to protect the interests of both industries.391 He sided with the coal-dependent utility companies who believed that free allocations to electric companies should be based on historical emissions alone and not on the EEI’s 50–50 formula that also relied on energy output.392 The Finance Committee heard from economists from across the political spectrum who urged the Senate to abandon the idea of allocating allowances for free and to distribute allowances through a more efficient auction.393 An economist for the Environmental Defense Fund testified in support of the House Bill, which, in his view, channeled 43% of the value of the allowances to consumers.394 But Baucus made it clear that he was not sold on the allocation arrangements in the House Bill.395

While Congress took its August recess, a river of money flowed into grassroots efforts to build support for and against climate disruption legislation.396 The NAM and the National Federation of Independent

391. Id.
392. See id.
396. Darren Goode, Climate Bill Backers Unveil Large-Scale Effort for 28 States, CONGRESS DAILY (AM ED.), Sept. 9, 2009 [hereinafter Goode, Climate Bill Backers Unveil Large-Scale Effort for 28 States].
Businesses spent several million dollars on television ads in thirteen swing states characterizing such legislation as anti-jobs and anti-energy.397 Americans for Prosperity, an offshoot of Citizens for a Sound Economy that was likewise funded by the Koch brothers—whose petroleum interests were directly affected by the proposals—hosted eighty grassroots events at which speakers asserted—erroneously—that backyard barbecues would be taxed if Congress enacted the House Bill.398

The AEA arranged a bus tour through coal-producing and manufacturing states to stir up public opposition to any climate change bill.399 The CoC staged its own road show demanding that EPA hold a modern “Scopes Monkey Trial” to debunk the evidence that GHG emissions caused global warming.400 Another industry-funded grassroots group called Energy Citizens sponsored rallies featuring ready-made signs for members of the crowds to display to local media and a video of a country western star bemoaning the higher energy costs that would follow the enactment of a climate change bill.401 Still another industry-funded group called CO2 is Green, which was created in 2009 for the purpose of influencing the climate disruption debate, began running advertisements in Montana and New Mexico aimed at Senators Max Baucus and Jeff Bingaman, arguing that increasing GHG emissions would help the planet’s ecosystems and that reducing them would kill jobs.402 Several thousands of oil industry employees were bussed to a rally against climate disruption legislation in


400. Fahrenthold, Environmentalists Slow to Adjust in Climate Debate, supra note 397.

401. See Fahrenthold, Environmentalists Slow to Adjust in Climate Debate, supra note 397; Mufson, New Groups Revive the Debate over Causes of Climate Change, supra note 300.

402. Mufson, New Groups Revive the Debate over Causes of Climate Change, supra note 300. One of the group’s founders was Corbin J. Robertson, Jr.—perhaps the largest private owner of coal resources in the country. See id.
downtown Houston, where they enjoyed hamburgers and hot dogs, heard a local high school band, and received free t-shirts saying, “I’ll pass on $4 gas.”

To rally support for climate change legislation, environmental groups purchased television ads, operated phone banks, and sponsored public events. The Alliance for Climate Protection, a group assembled by former Vice President Al Gore, and the Blue-Green Alliance, an umbrella organization of environmental groups and labor unions, undertook a twenty-two-state, Made in America Jobs Tour to demonstrate how such legislation would create good jobs. In September, a coalition of sixty-eight environmental, labor, civil rights, and consumer groups calling itself the Clean Energy Works Campaign, launched a $20 million advertising campaign, run by a former top media advisor to the Obama presidential campaign to support the enactment of climate change legislation. A major grassroots effort to generate calls, letters, and emails to key members of Congress accompanied the ad campaign.

Flanked by military veterans, clean energy entrepreneurs, and state and local lawmakers, Senators Boxer and Kerry, in late September, unveiled an eight hundred-page draft climate disruption bill. The Bill established a cap-and-trade regime for all facilities emitting more than 25,000 tons of GHGs per year that reduced GHG emissions by 20% below 2005 levels—higher than the House bill’s 17%—by 2020, 41% by 2030, and 83% percent by 2050. Although the draft resembled the House Bill on many critical

404. Fahrenthold, Environmentalists Slow to Adjust in Climate Debate, supra note 397.
406. Goode, Climate Bill Backers Unveil Large-Scale Effort for 28 States, supra note 396.
407. See id.
issues, it contained some important differences. For example, it established a soft price collar that set a minimum price for auctioned allowances of $10 per ton and created a strategic reserve of allocations to be sold at a minimum price of $28 per ton at first and increasing 5% plus inflation per year for five years and by 7% plus inflation per year thereafter. Unlike the House bill, the Bill would have preserved EPA’s authority to apply the new source review and new source performance standards of the Clean Air Act to GHG emissions. The draft left some critical questions unanswered because they came under the jurisdiction of other committees. Although 25% of the allowances would be auctioned in the early years—more than the 15% in the House bill—the Bill did not address how the remaining allowances would be allocated among the targeted recipients. The Finance Committee would have to resolve those issues. It also failed to specify which agency would oversee the allowance and allowance derivatives markets.

The draft was an immediate flop with the audience that mattered most—Democratic senators from coal-producing, oil-patch, and rust-belt states. Senators Ben Nelson (D-Nebraska) and Mary Landrieu (D-Louisiana) said they would not vote for the Bill because it adopted a cap-and-trade approach. Senator Jay Rockefeller (D-West Virginia) called the Bill a ‘‘disappointing step in the wrong direction’’ because it did not give electric utilities sufficient time to develop and deploy CCS technology. Senators Byron Dorgan (D-North Dakota) and Kent Conrad (D-North Dakota) thought the 20% by 2020 emissions reduction target was too

410. Cordner, Draft Legislation Punts on Oversight, Collar, supra note 408.
411. Id.; Christine Cordner, Senate Bill to Set Floor on Auctioned Allowances, PLATTS MEGAWATT DAILY, Oct. 1, 2009, at 1, available at 2009 WLNR 20343286; Eilperin, EPA, Senate Take Aim at Greenhouse Gases, supra note 408.
412. Scott, Legislation: Bill Maintains Emissions Cuts, supra note 409; Hodgkins, Analyst: Senate Climate Bill Slightly Tougher than House’s, supra note 409.
413. See Hodgkins, Analyst: Senate Climate Bill Slightly Tougher than House’s, supra note 409.
414. Eilperin, EPA, Senate Take Aim at Greenhouse Gases, supra note 408; Hodgkins, Analyst: Senate Climate Bill Slightly Tougher than House’s, supra note 409.
415. See Karey & Cash, supra note 409.
ambitious. Senator Claire McCaskill (D-Missouri) was also concerned about the Bill’s aggressive deadlines. When not a single Republican senator ventured out of the fold to support the Bill, it became clear that supporters did not have nearly enough votes to overcome a promised Republican filibuster.

Unwilling to concede failure, Senator Kerry made an overture to Senator Lindsey Graham (R-South Carolina) to come up with a bill that could attract bipartisan support. In a New York Times editorial, on October 11th, Senators Kerry and Graham announced that they had come up with a framework for climate disruption legislation that would attract the necessary sixty votes. In support of their framework, they argued that sending “$800 million a day to sometimes-hostile oil-producing countries threaten[ed] national security.” They warned opponents of the legislation that failure to act would leave climate change regulation to EPA and the clumsy tools available to it under the Clean Air Act. President Obama immediately jumped on the bandwagon. In a speech at the Massachusetts Institute of Technology, the President praised Kerry for reaching out to Republicans, and he attacked “the naysayers” who pretended that global warming was not an issue.

While Senators Kerry and Graham drafted their Bill, Kerry and Senator Boxer filled in some missing details of the Kerry-Boxer Bill, made some minor adjustments, and added some allowance giveaways to make it more palatable to affected industries. At that point, the Bill had blossomed

424. Id.
425. Id.
426. See id.
428. Id.
EPA predicted that the Bill would cost consumers $79 to $80 each year per household in increased prices for energy and consumer products, about the same as the House Bill. The Environment and Public Works Committee held a quick series of three hearings on the Kerry-Boxer Bill, and it went straight to committee markup over the strenuous objections of Republican committee members who boycotted the markup sessions. In the absence of the Republican members, the committee quickly voted out the Bill. Although it was highly unlikely that the Bill would attract sixty votes, the Senate leadership now had a vehicle to take to the floor where it could be amended or even replaced with a completely different bill at the appropriate time.

As hopes for the Kerry-Boxer Bill faded, the efforts of Senators Kerry and Graham to craft a bipartisan bill assumed greater importance. Soon after their editorial appeared, Senator Joe Lieberman (I-Connecticut) joined the effort. They met with Energy Secretary Steven Chu, Interior Secretary Ken Salazar, and Energy Czar Carol Browner at the White House to ascertain the Administration’s position on the elements—like expediting nuclear power plant licensing and opening offshore areas to oil and gas drilling—that some Republicans deemed critical to supporting a cap-and-trade bill. In early November, the CoC suggested that it might support a
bill reflecting the approach outlined in the Kerry-Graham editorial. Lieberman called the letter a game changer because it signaled that the three sponsors might be able to bring a large segment of the business community to the negotiating table. An industry lobbyist acknowledged that "Kerry-Graham-Lieberman is where the game will be decided." Senator Graham’s attempts to forge a bipartisan bill, however, attracted the wrath of the AEA, which spent almost $300 thousand on a series of radio, television, and online advertisements just before Halloween, warning that one of the “scary stories coming out of Washington” was that Senator Graham “support[ed] . . . a national energy tax called cap-and-trade.” Environmental groups responded with a more modest ad campaign asking why “[o]ut-of-state interests [were] attacking” Senator Graham for “backing an energy plan that produces more power [for] America.”

In the meantime, the electric utility industry’s compromise over the allocation of allowances among regulated electric utility companies, as reflected in the EEI’s 50-50 formula, was unraveling. Coal-burning Midwest utility companies and rural electric cooperatives—which had not been involved in the EEI negotiations—complained that they would have to purchase offsets or install GHG reduction technologies to meet the steadily decreasing caps of the House and Senate bills, while non-coal-dependent utility companies would receive a substantial share of the allowances they needed without having to do much in the way of reducing emissions or purchasing credits. Representatives of the non-coal-dependent companies argued that their computer modeling showed that the costs of the Bill were evenly divided among all utility companies.

The split was also widening between regulated utility companies and unregulated merchant companies. The regulated companies joined the

439. Juliet Eilperin, Merkel Urges Congress to Act on Climate; Partisan Divide That Greeted German Leader Also Seen on Senate Bill, WASH. POST, Nov. 4, 2009, at A4.
441. Cathy Cash, ‘Art of Compromise’ Now the Focus as Senate Puts Everything on Table to Win a Climate Bill, ELECTRIC UTIL. WK., Nov. 9, 2009, at 1, available at 2009 WLNR 23615667.
442. Eilperin, Climate Bill Faces Hurdles in Senate, supra note 399.
443. Id.
444. Margaret Kriz Hobson, Let’s Unmake a Deal, CONGRESS DAILY (AM ED.), Oct. 21, 2009 [hereinafter Kriz Hobson, Let’s Unmake a Deal].
445. Id.
446. Id.
rural electric cooperatives and two associations of public utility commissions in a letter to senators, arguing that the only way to ensure that the benefits of the free allowances award to the industry flowed through to consumers was to limit them to companies subject to state utility commission requirements. Unregulated utility companies, they argued, would just channel the savings to their shareholders. EEI attempted to smooth over both contentious issues by asking the Senate to allocate more allowances to all utility companies and to set a price ceiling for allowances as a safety valve, a solution that was sure to anger environmental groups.

The efforts to move climate disruption legislation through the Senate received a bolt from the blue in November 2009, when more than three thousand purloined emails and documents to and from scientists involved in preparing a report for the Intergovernmental Panel on Climate Change were leaked to the press. The emails, which were taken from East Anglia University’s Climate Research Unit, revealed that some of the hundreds of scientists involved in preparing the report had attempted to prevent papers from climate change skeptics from being published in scientific journals. Critics also saw evidence in the emails of attempts to hide scientific data and to manipulate the data to fit particular theories of global warming. As Senator James Inhofe demanded that the Senate Environment and Public Works Committee conduct a full-scale investigation into the scandal, a spokesperson for the CEI boasted that “[w]e may be close to having [the legislation] permanently stymied.”

The revelations did not undermine the integrity of the science underlying the report. Several re-examinations of the scientific underpinnings of the report chastised the scientists for belittling fellow scientists and for poor choices of words in their emails, but otherwise

448. Id.
449. See id.
450. Kriz Hobson, Let’s Unmake a Deal, supra note 444.
454. Johnson & Naik, supra note 452; Strassel, supra note 451 (quoting Myron Ebell, CEI).
supported the conclusions reached in the report. The scandal did, however, arrest the forward momentum of climate disruption legislation. If nothing else, the need to investigate the incident gave wavering Democrats a reason to urge the leadership to slow down the process until after the 2010 elections.

As the prospect for climate change legislation faded and it began to look like the Republican Party might regain control of the House in the upcoming elections, British Petroleum, ConocoPhillips, and Caterpillar, Inc. announced that they would not be renewing their memberships in the Climate Action Partnership. A spokesperson for ConocoPhillips said that passing a bill had become such a high priority for the group that it was no longer attempting to ensure that the substance of the bill was workable for all companies in the coalition. Since it did not appear that Congress would be enacting climate change legislation, the companies decided to pursue what was in the best interest of their shareholders and consumers. More than twenty other large companies, however, remained in the coalition.

As the Senate was wrapping up its work on the President’s health care legislation in early March, Senators Kerry, Lieberman, and Graham held a series of meetings with senators from both parties to attract their support for the Bill that they were still in the process of drafting. They made it clear that they would consider alternatives that were less stringent than the House Bill to bring more senators into the fold. At the same time, President Obama and high-level administration environmental officials met with thirteen senators to try to hammer out a compromise that could be featured in the Kerry-Lieberman-Graham Bill. At the meeting, the

456. Somerville Testimony, supra note 455, at 40; see also Kintisch, Panel Faults IPCC Leadership but Praises Its Conclusions, supra note 455, at 1135 (report not undermined).


460. Id.

461. Obama Forced to Dial Down Ambitions for Climate Initiative, ELECTRICITY CURRENTS, Apr. 2010, at 1, 2.

462. Power & Casselman, supra note 459.


464. See id.

465. Darren Goode, Senate Trio Taps Obama’s Support On Deal, CONGRESS DAILY (PM ED.), Mar. 9, 2010 [hereinafter Goode, Senate Trio Taps Obama’s Support on
President seemed open to the possibility of implementing a cap-and-trade regime quickly for the electric utility industry, but taking a more deliberate approach to reducing emissions from the manufacturing sector. Although a consensus position did not emerge from the meeting, it did clarify that a multi-sector cap-and-trade bill like the House and Kerry-Boxer Bills was not a serious option. At Kerry’s request, former President Bill Clinton began lobbying wavering senators, explaining to them that climate disruption legislation would create thousands of jobs and make the nation more competitive. The constant refrains of climategate, war on coal, and cap and tax at Tea Party rallies and in the conservative media echo chamber had found their way into the mainstream media, and the public was souring on the idea of climate disruption legislation.

Kerry, Lieberman, and Graham concluded that they could win the votes of oil-patch, rust-belt, and coal-state Democrats, as well as a few persuadable Republicans if they could soften the resistance of the CoC, the API, and coal-dependent electric utilities. Over the course of two weeks in late March, they met the CoC, more than a dozen trade associations, and various other industry groups to solicit their input on the measures the senators were considering to make their bill more attractive to industry. The Bill “would regulate power plants beginning in 2012,” but would not extend to other industrial sectors until 2016. The Bill would establish a cap-and-trade regime with a hard price collar limiting the amount paid allowance to between $10 and $30 per ton, as adjusted for inflation.
targets for the caps would be 17% of 2005 emissions by 2020 and 80% by 2050—lower than the House bill. The cap-and-trade regime would preempt EPA and state regulation of GHGs. For the transportation sector, the Bill would levy a tax on fuel at the pump—not at the refinery where the oil companies would most likely bear some of the cost. The Bill would also encourage faster permitting of nuclear power plants and open up more offshore areas for oil and gas development. The industry groups were delighted that the senators had gone to such lengths to allow them to participate in the drafting process.

The direction in which the three senators were moving deeply concerned their progressive colleagues. Senator Bernie Sanders objected to the provisions preempting EPA and the states, the support for nuclear power, and the decision to open up more offshore areas to oil and gas development. A group of senators led by Senator Bill Nelson of Florida urged the trio not to include offshore oil and gas drilling in the Bill. Several state attorney generals joined the National Association of Clean Air Agencies in complaining about the trio’s position on preempting EPA.
regulation and state law. Environmental groups were also deeply concerned about the concessions. With the 2010 off-year election campaigns not going well for the Democrats, the groups realized that if Congress did not enact a bill, however compromised, by the end of the year, the prospects for climate change legislation in the next Congress were quite grim. Most were willing to hold their noses and acquiesce in the changes contemplated by the three senators, but others were less inclined to compromise.

Senators Kerry, Lieberman, and Graham scheduled a press conference for Monday, April 26, 2010 to roll out their long-awaited Bill. Six days before the rollout, however, Senate Majority Leader Harry Reid told the Democratic leadership that he was moving immigration reform ahead of climate disruption legislation on the legislative agenda. The move infuriated Senator Graham, who viewed the move as “nothing more than a cynical political ploy” to attract Hispanic votes in the upcoming election. He announced that he was no longer willing to support the Bill if

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484. Cash, Senators Shop CO2 Cap on Utilities in 2012, supra note 474 (quoting Timothy Wirth, United Nations Foundation); Cash et al., Senators Mull Provision to Block EPA, States from Regulating Carbon Emissions, supra note 372 (quoting Center for Biological Diversity).


immigration reform remained on the Senate’s agenda. Senator Reid quickly backtracked, but Senator Graham was not mollified. Under attack in his home state from Tea Party activists, he may have welcomed the opportunity to separate himself from climate disruption legislation.

If Graham’s departure was not enough to sink the Bill, the Deepwater Horizon blowout, which began on April 20, 2010 and continued throughout the summer, ensured that the Bill’s provisions for opening up more offshore areas to deepwater drilling was no longer viable. In addition, Senator Bill Nelson (D-Florida) promised to filibuster any bill that contained such a provision. Taking that provision out of the Bill, however, would cause the oil and gas industry to oppose it with the consequent loss of support from oil-patch senators.

Senators Kerry and Lieberman introduced their 987-page Bill without Senator Graham on May 12, 2010 to little fanfare, because the Senate was absorbed in the Deepwater Horizon spill. Not a single

490. Darren Goode & Chris Strohm, Graham Wants Immigration off Table for Year or He Bolts, CONGRESS DAILY, Apr. 27, 2010, available at 2010 WLNR 8700591; Tankersley, supra note 489.


496. See Hodgkins, Hope Diminish for Climate Bill as Oil Spill, supra note 494.

497. Energy and Climate Bill in Congress Would Add Some Barriers to Offshore Drilling, Greatly Expand Market for Natural Gas as Transportation Fuel, FOSTER NAT. GAS REP., May 14, 2010, available at 2010 WLNR 10547851; see also Broder, Companies, Crews and Regulators Share Blame in Coast Guard on Oil Spill, supra note 494; Darren Goode & Amy Harder, Kerry, Lieberman Work to Keep Together Fragile Coalition, CONGRESS DAILY (AM ED), May 13, 2010 [hereinafter Goode & Harder, Kerry, Lieberman Work to Keep Together Fragile Coalition].
Republican supported the Bill. The Bill resembled the outline that the three senators had described earlier in the year, but with some important details filled in and many additional giveaways. It would have established a cap-and-trade regime with a 2020 cap 17% reduction from 2005 emissions and a 2050 cap of 83% reduction. The program would take effect in 2013 for power plants, but would not kick in for the manufacturing and natural gas distributing companies until 2016. The Bill provided such generous allowances that many sources would not have to purchase allowances—or reduce GHG emissions—for several years. Allowances would be allocated to unregulated merchant generators in an amount equal to half of their emissions, but the percentage would diminish to zero by 2029. The formula for allowances for the electric power industry allocated 75% on the basis of emissions and 25% on the basis of retail sales, rather than the 50–50 split of the House Bill. Two-thirds of the proceeds from the auctions would go immediately back to consumers through their local electricity distributors.

The Bill allowed emitters to purchase offsets, but at least 75% of all offsets had to be produced domestically, unless sufficient domestic offsets were unavailable. Trading of allowances, derivatives, and offsets would

498. Cash, Electricity Rates on List of Considerations as Senators Contemplate GHG Bill, supra note 373.
499. Id.; Cash, Senators Shop CO2 Cap on Utilities in 2012, supra note 474; Goode & Harder, Senate Trio Gives Industry First Peek at Contours of Deal, supra note 472; Tankersley & Simon, supra note 493.
504. Cash, Finally Revealed, Senate Climate Bill Proposal Wins Utility Backing, but Big Hurdles Remain, supra note 500.
505. Senate Climate Bill Retains Key EPA Authorities Despite Broad Preemption, supra note 502.
be overseen by the CFTC. The Bill contained a hard price collar with a floor of $12 and a ceiling of $25. It required the EPA to write technology-based standards requiring new coal-fired power plants to reduce GHG emissions by 50% and by 65% after 2020, and it preserved the EPA’s authority to require states to write technology-based standards for existing power plants for non-criteria pollutants. To please coal-fired power plant owners and the coal industry, the Bill contained a line charge on sales of electricity to finance research on CCS technology. To make natural gas producers happy, it included tax incentives and faster environmental permitting for existing plants that converted from coal to cleaner fuels. For the nuclear power industry, the Bill contained $2 billion to $6 billion in direct support and an increase from $18.5 billion to $54 billion in loan guarantees. The Bill contained a provision giving states a veto over offshore oil and gas drilling in adjacent waters, but it preempted state and regional GHG emissions programs. The EEI and most investor owned electric companies and representatives of environmental groups were present at the unveiling to express their support for the Bill. The CoC and the API remained neutral. The Midwestern Climate Coalition and the NRECA said that it

508. Senate Climate Bill Retains Key EPA Authorities Despite Broad Preemption, supra note 502.
509. 42 U.S.C. § 7411(d) (2006); Senate Climate Bill Retains Key EPA Authorities Despite Broad Preemption, supra note 502.
514. Cash, Finally Revealed, Senate Climate Bill Proposal Wins Utility Backing, but Big Hurdles Remain, supra note 500; Goode & Harder, Kerry, Lieberman Work to Keep Together Fragile Coalition, supra note 497.
515. Goode & Harder, Kerry, Lieberman Work to Keep Together Fragile Coalition, supra note 497.
would withhold judgment until they saw EPA’s cost analysis of the Bill.\footnote{516} The American Public Power Association complained that the price cap was too high and that it provided too many allowances to unregulated merchant generators.\footnote{517} Although some major oil and gas producers supported the Bill, the natural gas industry’s umbrella group, America’s Natural Gas Alliance, was not high on the Bill, because it did not provide sufficient direct incentives to use natural gas over coal.\footnote{518}

Environmental groups were concerned about the provisions preempting the states’ power to regulate GHG emissions, providing incentives for nuclear power plants, and allowing offshore drilling, even with the state veto power.\footnote{519} Despite those concerns, a group of environmental, labor, and military veterans groups spent $11 million on a series of television advertisements and an associated online campaign in states of wavering senators, suggesting that viewers urge their senators to support broad climate disruption and energy legislation.\footnote{520} Other environmental groups opposed the Bill; Frank O’Donnell of Clean Air Watch criticized Kerry and Lieberman for following an inside-the-beltway strategy that ultimately failed to attract a single Republican supporter.\footnote{521} The National Association of Clean Air Agencies also opposed the Bill because it preempted state regulation of GHG emissions.\footnote{522}

Supporters of cap-and-trade legislation got a minor boost in mid-June when EPA’s analysis of the Kerry-Lieberman Bill concluded that it would have a \textit{relatively modest impact} on consumers.\footnote{523} The average annual cost per household would be between $79 and $146, compared with the $80–

\begin{thebibliography}{99}

\footnote{516}{Cash, \textit{Electricity Rates on List of Considerations as Senators Contemplate GHG Bill}, supra note 373; Goode & Harder, \textit{Kerry, Lieberman Work to Keep Together Fragile Coalition}, supra note 497.}

\footnote{517}{Cash, \textit{Finally Revealed, Senate Climate Bill Proposal Wins Utility Backing, but Big Hurdles Remain}, supra note 500.}


\footnote{519}{See Goode & Harder, \textit{Kerry, Lieberman Work to Keep Together Fragile Coalition}, supra note 497 (discussing statements made by David Hawkins, NRDC).}

\footnote{520}{Groups Plan Ad Campaign Targeting Senators, \textit{Congress Daily (PM Ed.)}, June 24, 2010.}


\footnote{522}{Hart, \textit{Air Agencies Want Senate Climate Bill to Let States Enact Tougher Emissions Standards}, supra note 483; \textit{Senate Climate Bill Retains Key EPA Authorities Despite Broad Preemption}, supra note 502.}


\end{thebibliography}
$111 cost that EPA attributed to the House bill.\textsuperscript{524} In early July, the Congressional Budget Office released a report concluding that complying with the Kerry-Lieberman Bill would be slightly less expensive than complying with the House bill.\textsuperscript{525} In addition, public opinion polls taken during the Deepwater Horizon oil spill showed that two-thirds of the public supported mandatory limits on GHG emissions.\textsuperscript{526}

As the oil continued to spew from the Deepwater Horizon well, President Obama met with a group of Democratic and Republican senators to discuss the possibility of linking a legislative response to the Deepwater Horizon oil spill with a cap-and-trade bill that would be limited to the electric utility industry.\textsuperscript{527} Most of the Republican senators were unwilling to consider any form of cap-and-trade bill and they urged the President instead to pour federal dollars into research on GHG emission reduction technologies.\textsuperscript{528} The meeting ended with no agreement on a framework for moving forward.\textsuperscript{529}

In late July, Senator Reid announced that neither the Democratic leadership nor the President had been able to cobble together sixty votes for a climate disruption bill of any size or shape.\textsuperscript{530} They had therefore called a halt to their efforts.\textsuperscript{531} Climate disruption was now in the hands of the EPA, which was exercising its limited power under the Clean Air Act, and states that were willing to take on that controversial topic.\textsuperscript{532} The conservative think tanks turned their attention to enacting legislation calling a halt to those climate change initiatives.\textsuperscript{533}

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\bibitem{524} Goode, \textit{EPA: Kerry-Lieberman's Costs 'Modest,'} supra note 431.
\bibitem{528} Eilperin, \textit{Senators Predict a Narrower Climate Bill,} supra note 527.
\bibitem{530} Power, \textit{Senate Halts Effort to Cap Emissions,} supra note 3.
\bibitem{531} Amy Harder, \textit{Pending EPA Emission Regulations Move Front and Center, CONGRESS DAILY (AM ED.),} July 23, 2010; Power, \textit{Senate Halts Effort to Cap Emissions, supra note 3.}
\bibitem{532} Power, \textit{Senate Halts Effort to Cap Emissions,} supra note 3.
\bibitem{533} See Obama Could Fall Short on Copenhagen Pledge, \textit{OIL DAILY,} July 26, 2010.
\end{thebibliography}
IV. LESSONS LEARNED

A. Introduction

What can we learn from these four attempts to enact climate disruption legislation over the past twenty years? Some lessons are obvious and bear little analysis. Thus, one lesson to take away from the fate of climate change legislation during the 107th Congress is that it is very difficult to enact legislation that the president strongly opposes when your party controls only one House of Congress.534 This section of the article will probe some less obvious lessons that the past failures to enact climate disruption legislation may have for future attempts to enact similar legislation or any other environmental legislation that the business community is likely to oppose.

B. Powerful Institutions Are Aligned Against Regulatory Legislation

Any attempt to enact domestic policy legislation over the objections of the business community must contend with the institutions that it has erected to protect its interests and to advance a laissez faire minimalist agenda. The idea and influence infrastructures that the business community put into place over the past thirty-five years were steadfastly opposed to climate disruption legislation, and they played an important role in forestalling that legislation. Three think tanks—the Heritage Foundation, the CEI, and the George C. Marshall Institute—have played prominent roles in the ideological air wars over climate change.535 Over the years they have provided a constant stream of laissez faire minimalist critiques of government regulation that has found its way into the public consciousness as it resonates through the conservative media echo chamber.536 Industry-sponsored climate change skeptics in academia—many of whom are affiliated with one or more conservative think tanks—have likewise played an important role in the debates over climate change legislation by instilling doubt about the reality of climate disruption in the public consciousness.537 Both the think tank scholars and the industry-sponsored scientists have made themselves freely available to mainstream press reporters who feel duty

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534. See supra Part III.B.
535. GELBSPAN, supra note 28, at 3–4, 52; McGARTY, supra note 6, at 49–52, 247–48.
536. McGARTY, supra note 6, at 49–55.
537. GELBSPAN, supra note 28, at 3–4, 8–9, 19, 33–34; McGARTY, supra note 6, at 54–55.
bound to present **both sides** of public controversies. \(^{538}\) The net result is that an appreciable segment of the United States population believes that GHG emissions do not cause climate disruption and that, even if they did, government regulation is not the right way to go about limiting GHG emissions.

The business community’s influence infrastructure has had an even more powerful influence on the progress of climate disruption legislation. The CoC—the largest and most visible mouthpiece of the business community—and the NAM have consistently opposed every bill that would have imposed mandatory restrictions on GHG emitters. \(^{539}\) And they have invested tens of millions of dollars on advertising campaigns in the districts of key members of Congress, maintaining websites on climate change issues, and contributing to the campaigns of sympathetic candidates. \(^{540}\)

Over the years, industry trade associations—like the EEI, the API, and the AGA—have spent millions of dollars hiring lobbyists, financing studies of the impacts of various bills, hosting briefings, generating calls and emails from their members to key legislators, participating in meetings with members and committee staffs, and working with business-supported grassroots organizations to stir up public opposition to climate disruption legislation. \(^{541}\) Individual companies have hired their own lobbyists to serve as soldiers in the ground wars. \(^{542}\) These troops may aim their fire at one another on narrow issues like the proper allocation formula for free allowances, but they tend to fall in line with the trade associations and the broader business community on issues like whether allowances should be auctioned or given away and whether stringent caps should kick in before CCS technology becomes easily available to electric utility companies.

The pro-business media echo chamber has provided a robust opportunity for the public to hear the business community’s position on controversial issues like climate disruption. Fox News commentators railed against *cap and tax* legislation, and its coverage of coal-related issues often flashed “War on Coal” across the bottom of the screen. \(^{543}\) During the debates over climate disruption legislation in the 110th and 111th Congress, Fox News commentator Steven Milloy provided a steady stream of criticism

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541. Id. at 1529–31.
542. Id. at 1529–30.
of advocates of climate disruption legislation and ready access to a national audience for climate disruption skeptics on his *Junk Science* show and blog.544

Finally, the grassroots organizations that the business community created to stir up public opposition to unwanted legislation have proven very effective in the battles over climate disruption legislation. CSE was an early generator of grassroots opposition to the BTU tax, and its successor organization, Americans for Prosperity, generated targeted opposition to later climate disruption bills and played critical roles in the Tea Party movement that has moved the Republican Party even farther away from support for climate disruption legislation.545 In addition to these relatively longstanding organizations, the energy industry created a number of ad hoc organizations like the AEA and Energy Citizens to wage extremely effective grassroots campaigns against climate change legislation in the districts of likely swing voters in Congress.546

The BTU tax battle provided an early example of how adept the business community’s idea and influence infrastructures were at framing attempts by the energy industry to avoid its environmental responsibilities as worthy crusades to preserve jobs and enhance economic growth.547 They argued that a BTU tax was not in the public interest, not because it forced energy companies to choose between paying the tax or reducing emissions, but because it would raise prices for consumer goods, reduce economic activity, and bring about job loss.548 It was much harder on the other side to characterize a complex tax on the energy content of fuels as a much-needed tool to protect the planet from a host of maladies that might or might not flow from global temperatures that might or might not be increasing.549

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545. See McGarity, supra note 6, at 40, 59, 247.

546. See Muñoz, *New Groups Revive the Debate over Causes of Climate Change*, supra note 300; *Lobbyists Boast BTU Tax Beaten in the House*, supra note 82.


548. Id. (quoting Monica Lovell, Tax Director for the National Association of Manufacturers, arguing that “[s]upport against the tax was easy to galvanize, . . . because opponents could make a direct link between the tax, manufacturing costs, and job losses”).

549. Id. (Treasury Department official argues that the “‘creativity and complexity’ of the [BTU tax] idea made it easy for critics to undermine”).
C. America is Deeply and Widely Fractured Over Climate Disruption

America is a deeply divided nation on many cultural and economic issues, but climate disruption is an issue that divides us more than most. And the division is both deep and wide. Participants on both sides of the climate disruption debates have strongly held beliefs about the role of GHG emissions in causing climate disruption, the likely cost and availability of technologies for reducing or sequestering GHG emissions, whether government regulations or voluntary programs are more effective in reducing GHG emissions, and whether the United States should unilaterally take steps to address climate disruption before other major GHG-emitting nations take action. In many cases the gulf between the two sides is so wide that negotiation and compromise are virtually impossible. A congressperson who believes that climate disruption is a fraud perpetrated by arrogant scientists on gullible liberals is unlikely to find common ground with a congressperson who believes that climate disruption is a real phenomenon, the effects of which we are currently witnessing in unprecedented hurricanes, typhoons, and droughts, and the causes of which are corporations that will always put the bottom line ahead of the public welfare.

Science plays a role in these divisions. Despite the embarrassing East Anglia diversion, the scientific community has come to closure on the question of whether anthropogenic GHG emissions cause increased global temperatures. Nevertheless, a small, but determined group of scientists—many of whom have derived financial support from energy companies—have provided a sufficient degree of doubt to persuade those who want to be persuaded that climate disruption is a theory that lacks a scientific basis.

Ideology also plays a significant role in the divisions. The business community’s idea infrastructure and its media echo chamber have been exceedingly effective in convincing a large segment of the population that government should not interfere in private economic arrangements.

553. GELBSPAN, supra note 28, at 9, 19.
555. See Mufson, New Groups Revive the Debate over Causes of Climate Change, supra note 300.
Many Americans are therefore ideologically predisposed to oppose government-based solutions to the threat of climate disruption. Even those who are convinced that climate disruption is real are not convinced that BTU taxes or cap-and-trade regimes are the way to go about addressing the problem. On the other side, environmental activists have historically been inclined ideologically to distrust corporations and to look to the government to solve environmental problems. This has changed somewhat in recent years with the acceptance by nearly all environmental groups of market-based approaches to regulations that give companies flexibility to meet predetermined environmental goals in the most efficient way possible.

Finally, regional differences play a powerful role in these divisions. In part, these differences stem from the fact that some areas of the country are rich in coal, some are rich in natural gas, and some are poor in both resources. People from states in which coal plays a large role in the economy are not predisposed to favor programs that have the effect of discouraging coal use, just as people from natural gas-producing states are likely to favor such programs if the result is to induce power plants to switch from coal to natural gas. The differences may also reflect a subtler economic distinction reflecting the differing cost of electricity in different states. Economists John and Christopher Sautter have demonstrated that the distinction between Red States that vote mostly Republican and Blue States that vote mainly Democratic very closely tracks the cost of electricity in those states. The average cost of electricity in Red States is about 2.5¢ per kilowatt-hour lower than in Blue States. This suggests that people in Red States should be more inclined to oppose climate disruption legislation not just because it may harm local industries and increase unemployment, but also because it may increase the price they pay for electricity in the future. The business community’s influence infrastructure has proven very adept at appealing to these regional differences in advertising initiatives.

556. See Mufson, New Groups Revive Debate over Causes of Climate Change, supra note 300; Sautter & Sautter, supra note 554, at 72, 74.
557. See Cano, While Not Sold on Idea, Johnston Cites Keys to Implementing BTU Tax, supra note 86; Gerson, supra note 295.
558. See Mufson, Climate Bill Seeks a Broad Coalition, supra note 304; Mufson, New Groups Revive the Debate over Causes of Climate Change, supra note 300.
559. See Mufson, Climate Bill Seeks a Broad Coalition, supra note 304.
560. Sautter & Sautter, supra note 554, at 72.
561. Id. at 72–73.
562. See id.
563. Id. at 73–74.
564. Id. at 71–73.
565. Sautter & Sautter, supra note 554, at 73.
566. See id. at 73–74.
and grassroots campaigns to generate opposition to climate disruption legislation.\textsuperscript{567}

As suggested by the Sautters’ study, these deep and wide divisions are now almost perfectly reflected in our two-party system.\textsuperscript{568} There was once a day when Republicans from the Northeast fought with Republicans from the Midwest over the content of the Clean Air Act and the Clean Water Act.\textsuperscript{569} In the 1970s, some of the most vigorous proponents of environmental protection were Republicans like Senators Jacob Javits and John Chafee.\textsuperscript{570} Although there are still vigorous Democratic supporters of the coal and electric utility industries in the South and Midwest, their numbers have diminished as the voters replaced them with Republicans.\textsuperscript{571} Now there are very few Republican politicians who are willing to advocate strong governmental intervention to solve environmental problems. And they tend to vote with their fellow Republicans when it is their votes that really matter.

D. \textit{The Business Community is Fractured on Climate Disruption, but the Fractures Are Neither Deep Nor Wide}

The business community has never been entirely of one mind in the debates over climate change. In the early 1990s, the National Gas Association split with the rest of the business community in supporting a study concluding that GHG emissions could be reduced by moving rapidly to natural gas and other renewables.\textsuperscript{572} During the debates over the BTU tax, two small trade associations—both of which had an economic interest in higher energy taxes—broke ranks and supported the Clinton Administration’s bill.\textsuperscript{573}

Fissures became more apparent in the 110th Congress. A split developed between electric utility companies that were heavily dependent on coal and opposed cap-and-trade legislation, companies that were not so dependent on coal and supported cap-and-trade legislation with stringent caps and short deadlines, and still other companies that supported cap-and-

\begin{itemize}
\item \textsuperscript{567} See Fahrenthold, \textit{Environmentalists Slow to Adjust in Climate Debate}, supra note 397; Mufson, \textit{New Groups Revive the Debate over Causes of Climate Change}, supra note 300.
\item \textsuperscript{568} Sautter & Sautter, supra note 554, at 72–73.
\item \textsuperscript{569} See Amy Harder, \textit{A Stalled Movement}, NAT’L J., Apr. 14, 2011.
\item \textsuperscript{571} See Sautter & Sautter, supra note 554, at 73–74.
\item \textsuperscript{572} Dillon, \textit{Democrats Unveil Details of Climate Change Legislation in Senate}, supra note 200.
\item \textsuperscript{573} Industry Reacts to BTU Tax Modifications, supra note 93.
\end{itemize}
trade legislation in principle, but opposed legislation that kicked in before the industry had time to develop CCS technology. This period also witnessed a major split in the business community over the reality of global warming as several Fortune 500 companies parted company with the CoC on climate disruption legislation. These fractures continued and deepened somewhat during the debates in the 111th Congress over the Waxman-Markey Bill in the House and the Kerry-Boxer and Kerry-Graham-Lieberman Bills in the Senate.

Upon close examination, however, it appears that these fractures are neither deep nor wide. First, only relatively few companies have parted with the CoC—the nominal spokesperson for the business community. The breakaway companies are either manufacturers, like the Apple Corporation, that want to project a clean image, or natural gas distributors and public utilities that stand to gain economically from climate change legislation. The most serious fractures within the energy industry have occurred over how the free allowances should be allocated among various segments of the industry. On the broader issue of free distribution of allowances versus auctions, the industry has been united in favoring free distribution.

Second, the idea and influence infrastructures have lives and minds of their own. Although the think tanks, media outlets, and grassroots organizations depend heavily on the business community for financial support, they are driven by a strong ideological commitment to free markets and noninterventionist governmental policies. Because they also receive substantial support from conservative foundations—billionaires like the Koch brothers—and sympathetic individuals, the rift in the business community is not likely to affect them financially. It is therefore unlikely that they will change their positions on climate change legislation in the

574. Industry Fractures on Climate Policy, supra note 23, at 1, 5.
575. Id. at 5–6; see also Williamson, supra note 231.
580. See Williamson, supra note 231.
581. See McGARITY, supra note 6, at 33–34, 40.
582. See id.
foreseeable future, despite the rifts in the business community.\textsuperscript{583} Consequently, it is unlikely that many Republican senators and representatives will change their tunes.

Third, to the extent that the support indicated by some companies and trade associations for climate disruption legislation is strategic, the strong opposition to the same legislation by the CoC, as well as pro-business think tanks, grassroots organizations, and media outlets can be very useful.\textsuperscript{584} There is an inside-the-beltway adage that “‘if you [are] not at the table, you [are] on the menu.’”\textsuperscript{585} Companies that would rather not see climate change legislation enacted may still want to play an influential role in shaping such legislation as it moves through Congress. If they announce that they support reasonable legislation so long as it is fair to them, they can actively participate in the legislative deal-making, comfortable in the knowledge that the idea and influence infrastructures are carrying on the fight to prevent Congress from enacting that legislation.

A spokesperson for EEI—which had opposed climate change during the Clinton and George W. Bush Administrations—acknowledged in August 2009 that its position had evolved from opposing anything but a voluntary program to support for “‘well-designed legislation that will reduce GHG emissions while also containing costs to customers.’”\textsuperscript{586} Frank O’Donnell, the head of Clean Air Watch, suggested that the evolution did not represent a change in position so much as an acknowledgement that the politics of climate change had changed after the 2008 elections.\textsuperscript{587} Given the real possibility that a Democrat-controlled Congress would pass legislation that a Democratic president would sign, EEI may have decided that it should do what it could to influence the content of that legislation, even though it preferred no legislation at all. The strong opposition to any legislation by the business community’s idea and influence infrastructures gave it an opportunity to have it both ways.

At the end of the day, the divisions in the business community were not debilitating. It presented a united front in opposition to any cap-and-trade bill that allocated a significant proportion of the initial allowances through an auction, the tool preferred by most economists, and that lacked a bright-line safety valve that effectively removed the cap once the price of

\textsuperscript{583} Industry Fractures on Climate Policy, supra note 23, at 6; see also McGarity, supra note 6, at 33–34, 40.
\textsuperscript{584} See McGarity, supra note 6, at 40; Power & Casselman, supra note 459.
\textsuperscript{585} Power & Casselman, supra note 459.
\textsuperscript{586} Saiyid, supra note 579.
\textsuperscript{587} See id. (discussing the opinion of Frank O’Donnell, Clean Air Watch).
allowances exceeded a prescribed level.\footnote{See Cash, Allowance Game Continues, supra note 372; Cash, Building a Climate Change Bill, Congress Hears More from Utilities About Challenges, supra note 187.} Even on issues on which a few non-coal-dependent electric utility companies parted company with the EEI, the energy industry as a whole was capable of devoting considerable resources to stopping legislation they deemed undesirable.\footnote{See Ari Berman, The Dirt on Clean Coal: The Coal Industry Presents Itself as Committed to Environmental Sustainability—But Is It?, NATION, Apr. 13, 2009, at 17, 17–18.} The ACCCE, an umbrella group for the electric utility and coal industry,\footnote{See About Us, AM. COALITION FOR CLEAN COAL ELECTRICITY, http://www.cleancoalusa.org/about-us (last visited Mar. 30, 2014).} spent almost $10 million on lobbyists in its short—but successful—campaign to defeat the Lieberman-Warner Bill.\footnote{Berman, supra note 589, at 18; Coral Davenport, Coal Industry Digs in with Lobbying Campaign, CQ WKLY., Mar. 23, 2009, at 652; Anne C. Mulkern, A ‘Propaganda War’ over ‘Clean Coal,’ INT’L N.Y. TIMES (Apr. 20, 2009), http://www.nytimes.com/gwire/2009/04/20/20greenwire-propaganda-war-over-clean-coal-escalates-ahead-of-hi-10594.html?pagewanted=all.} Fissures certainly developed in the industry most affected by climate change legislation, but they disappeared in the face of the kind of stringent legislation demanded by environmental groups.

E. \textit{On the Question of Climate Disruption, Republicans Are Dogs, and Democrats Are Cats}

Time after time, the Republican leadership in Congress was able to persuade all but a tiny few members to vote as a pack against mandatory climate disruption legislation at both the committee level and on those rare occasions when bills came to the floors of the House and Senate. The threat of a Republican filibuster in the Senate was so credible that the bills’ sponsors simply assumed that it would take sixty votes to pass them.\footnote{See Kerry & Graham, supra note 423.} For the Democratic leadership, by contrast, corralling enough votes to get bills through committees and past floor votes was like herding cats.

In part, this reflects the geographical fact that few Republican members come from states that stand to benefit from climate change legislation beyond the benefits that accrue to all states from reduced climate disruption.\footnote{See, e.g., 155 CONG. REC. 22,601–02 (2009).} But it also reflects a deep ideological commitment to a laissez faire minimalist approach to the role of government in society. And this in turn reflects the influence of three decades worth of books, white papers, issue briefs, op-eds, and conferences undertaken by the conservative think...
tanks and academic centers, and the business-oriented news and political commentary of the conservative media echo chamber.

In every serious attempt to enact climate disruption legislation during the past two decades, Democratic members have divided along lines that reflected the economic interests of their states.594 In part, this is a manifestation of the fact that Democratic members come from more economically diverse regions.595 The fact that a large number of Democratic members hail from coal-producing states like West Virginia, Virginia, Illinois, and Pennsylvania, and manufacturing states like Ohio and Michigan, guarantees that critical issues, like the stringency of the caps and the allocation of allowances, will be divisive for Democrats.596 And the fact that many Democratic members represent rural agricultural states in the farm belt means that fractures are likely to occur on issues like the stringency of the caps—which arguably cause fuel and fertilizer prices to increase—and the entity that oversees trading in offsets.597

These divisions had three significant consequences. First, they prevented the Democrats from voting as a block in favor of climate disruption legislation.598 Given the thinness of Democratic majorities in both houses in years in which they were in control, this made it extremely difficult to hit upon a formula that would secure the majority needed to pass legislation in the House and the supermajority needed to pass legislation over the opposition of a unified Republican Party in the Senate.599 Second, they

598. See Bravender, supra note 594.
guaranteed that any bills that the Democrats were able to move through Congress would contain many exemptions and giveaways to industries favored by holdout members.\textsuperscript{600} Third, they ensured that the bill that Congress finally passed would probably not meet stringent intermediate environmental goals.\textsuperscript{601} Thus, one of the early concessions that Representative Waxman and Senators Kerry and Lieberman made to coal-state members was a reduction in the 2020 cap from 20\% below 2005 levels to 17\%.\textsuperscript{602}

\section*{F. Public Interest Groups Are Outgunned and Outclassed}

The major environmental groups, like the Sierra Club, the Environmental Defense Fund, and the Natural Resources Defense Council, vigorously supported strong climate disruption legislation,\textsuperscript{603} and they benefitted from the fact that climate disruption legislation was high on the list of two Democratic presidents and Democratic leaders in both houses of Congress during the 107th and 111th Congresses.\textsuperscript{604} But they were clearly outgunned by the large agglomeration of industries that opposed their bills.\textsuperscript{605} Although the environmental organizations devoted unprecedented sums to lobbying, advertising, and grassroots campaigns, they were no match for the sophisticated efforts of the professional lobbyists and public relations operations of the CoC, the NAM, industry trade associations, and individual companies.\textsuperscript{606} Except for the Sierra Club, they had no equivalent of the highly organized grassroots campaigns of Citizens for a Sound Economy, Americans for Prosperity, and the many ad hoc organizations that industry created to fight particular battles.\textsuperscript{607} Perhaps more importantly, they had no

\begin{itemize}
  \item \textsuperscript{600} See, e.g., Broder, \textit{Adding Something for Everyone}, supra note 98.
  \item \textsuperscript{601} See Ryan Lizza, \textit{As the World Burns}, NEW YORKER, Oct. 11, 2010, at 70.
  \item \textsuperscript{602} See Hart, \textit{House Energy, Climate Change Bill Cuts Carbon Emissions 20\% by 2020}, supra note 274; Lizza, supra note 601.
  \item \textsuperscript{603} Ben Geman, \textit{Green Groups to Obama: Choose Climate over Oil}, NAT’L J. (Jan. 17, 2014), http://www.nationaljournal.com/energy/green-groups-to-obama-choose-climate-over-oil-20140117.
  \item \textsuperscript{605} See Fahrenthold, \textit{Environmentalists Slow to Adjust in Climate Debate}, supra note 397.
  \item \textsuperscript{606} See id. (relating lobbying expenses of industry and environmental groups for the first half of 2009).
  \item \textsuperscript{607} See Americans for Prosperity Calls Victorious Defeat of Bridge to Nowhere a Testament to the Power of Grassroots Activism, U.S. NEWswire, Sep. 21, 2007;
\end{itemize}
equivalents of Fox News and Rush Limbaugh to spread their message throughout the country; although in the later years MSNBC and its commentators Rachel Maddow and Keith Olbermann began to fill that gap.608

The campaign to enact climate disruption legislation in the 111th Congress was by far the most expensive campaign ever run by environmental groups.609 But even with tens of millions of dollars to spend on lobbying, advertising, and grassroots organizing, their efforts did not match the sophistication of the industry operations.610 The difference in approach is well illustrated by the grassroots tours that both the AEA and a coalition of environmental groups conducted during the critical August recess after the House had passed the Waxman-Markey Bill.611 People attending an AEA rally in Athens, Ohio enjoyed free lunches, live concerts, and free T-shirts, and heard stirring speeches filled with calls to action.612 People attending an environmental group rally in the same city soon thereafter got to hear a scholarly panel discuss the issues in a classroom and received free bumper stickers.613

G. It Takes a Crisis

In Freedom to Harm, I argue that “[r]egulatory legislation usually requires a crisis and a resulting groundswell of public opinion.”614 For example, the crisis brought on by the financial meltdown of September 2008 motivated Congress to enact the Dodd-Frank Wall Street Reform and

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609. See Fahrenthold, Environmentalists Slow to Adjust in Climate Debate, supra note 397.

610. See id.


612. Fahrenthold, Environmentalists Slow to Adjust in Climate Debate, supra note 397.

613. Id.

614. McGARTY, supra note 6, at 57.
Consumer Protection Act of 2010.\textsuperscript{615} Climate disruption, by contrast, does not create the sort of extreme crises that lead Congress to enact legislation.\textsuperscript{616} Thus, Senator James Inhofe scoffed at any suggestion that Congress should enact climate disruption legislation based “on speculative computer model predictions of [fifty] to [one hundred] years away of a looming climate catastrophe.”\textsuperscript{617} Environmental groups could try to attribute Superstorm Sandy, Supertyphoon Haiyan, or the sinking Polar Vortex of the winter of 2013–14 to climate disruption. Since few competent scientists are willing to support that claim, however, the groups have been hesitant to rely on such events to stir up public support for climate disruption legislation.\textsuperscript{618} Climate disruption comes gradually as glaciers melt, sea levels rise, periods of drought lengthen, and hurricanes worsen in intensity.\textsuperscript{619} Even in the absence of powerful idea and influence infrastructures aligned against legislation, it would have been very difficult for supporters of climate disruption legislation to persuade Congress to enact a stringent bill without the impetus of a crisis. And climate disruption is not likely to yield such crises until it is far too late to do something about it.

H. Climate Change Legislation Will Not Be Pretty

One very clear lesson of the past attempts to enact climate disruption legislation is that the end result of any successful attempt in the future is not likely to be pretty. Economists and policy analysts have created elegant models of carbon or BTU taxes and cap-and-trade regimes that appear to achieve GHG emissions reduction goals fairly and efficiently.\textsuperscript{620} Putting aside the question whether the models would work as fairly and efficiently in the real world, supporters of such solutions should understand that if Congress ever does enact climate disruption legislation, the regulatory regime that it creates will not adhere to the elegant models. It will reflect dozens of compromises, concessions, and giveaways that its sponsors will have to make in order to get the legislation enacted. As Representative Waxman observed after the House passed the Waxman-Markey Bill, “Congress has to recognize that there are differing opinions, there are

\begin{itemize}
\item \textsuperscript{615} Id. at 238–40.
\item \textsuperscript{616} See id. at 248.
\item \textsuperscript{618} See Fahrenthold, \textit{Environmentalists Slow to Adjust in Climate Debate}, supra note 397.
\item \textsuperscript{619} See Louise Gray, \textit{Stern Warning on Climate Change}, DAILY TELEGRAPH, Apr. 21, 2009, at 27.
\item \textsuperscript{620} See \textit{McGarity}, supra note 6, at 247.
\end{itemize}
differing interests.” To accommodate all of these interests, the Bill’s sponsors will have to make compromises and look for ways to channel resources to particular regions of the country or to particular industries. Outside observers of this process may not like it, but until this country comes up with a way to finance political campaigns in a way that does not heavily depend on contributions from wealthy individuals and corporations, this is the political world in which we live.

I. EPA Should Press Ahead with its GHG Regulations

The fact that the EPA was busily promulgating technology-based regulations for greenhouse gas emissions was an important driver of reluctant House Democrats to support the Waxman-Markey Bill in the 111th Congress. The in terrorem effect of the EPA’s regulatory program was not, however, an adequate inducement to Senate Democrats to finish the job. The EPA has now promulgated a series of regulations that, when fully implemented, will reduce emissions from major new facilities and modify existing facilities, and it has proposed a very ambitious new source performance standard for GHG emissions from power plants. We are still a very long way from the reductions that scientists tell us are necessary to slow down climate disruption. But if the EPA had waited until Congress acted, we would not be as far down the road toward a reduced carbon footprint as we are.

V. Conclusion

If the Republican Party retains control of the House or gains control of the Senate in the 2014 elections, the probability that Congress will enact serious climate change legislation is very low. That party is still heavily influenced by its Tea Party constituency and the Tea Party is financed by


622. See Broder, Adding Something for Everyone, supra note 98.


624. See Duncan, Waxman: Fear over EPA Carbon Regs Prompted Members to Pass Climate Bill, supra note 621.

funders who are strongly opposed to any governmental solution to global warming. After two election cycles in which moderate Republicans have lost primary elections to Tea Party candidates and general elections to Democratic opponents, there are precious few Republican members of Congress who would support even very modest federal legislation on climate disruption. And there is no reason to suppose that this will change in the foreseeable future. As long as it takes two houses of Congress to enact legislation, the adamant opposition of the Republican Party to climate disruption legislation will ensure that none will be forthcoming from a Congress in which at least one House is controlled by that party.

Even if the Democratic Party retains control of the White House and the Senate and gains control of the House in 2014 or 2016, the prospects for enacting serious climate change legislation remain dim. The myriad of interest groups that will be affected by serious climate change legislation will do whatever they can to influence legislators to oppose legislation that might damage their economic interests. The legislators will, in turn, negotiate for their votes with those interests in mind. If Congress does enact legislation, it is likely to be a hodge-podge of conflicting provisions that may or may not attain the larger GHG emission reduction goals of its sponsors. The result will not be pretty, but it may be the best that we can expect in an economically diverse nation that, after a remarkable laissez faire revival, remains deeply divided on the fundamental question of the propriety of governmental intervention into private economic arrangements.


627. See Party Division in the Senate, 1789–Present, supra note 599.

628. See Chemnick, Waxman, Markey Seek Moderate Votes for Their Stringent Climate-Change Bill, supra note 284; Party Division in the Senate, 1789–Present, supra note 599.