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## **Presidential Power to Address Climate Change in an Era of Legislative Gridlock**

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PRESIDENTIAL POWER TO ADDRESS CLIMATE CHANGE IN  
AN ERA OF LEGISLATIVE GRIDLOCK

*Robert V. Percival\**

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Climate change “may be a ‘crisis,’ even ‘the most pressing environmental problem of our time,’” which “may ultimately affect nearly everyone on the planet in some potentially adverse way.”<sup>1</sup> So wrote Chief Justice John Roberts in his dissenting opinion, in which he stated that the judiciary had no role to play in addressing climate change when the issue first reached the Court in *Massachusetts v. EPA* in 2007.<sup>2</sup> By a 5-4 vote, the Court held in that case that greenhouse gases (“GHGs”) are “air pollutants” subject to regulation under the Clean Air Act.<sup>3</sup> This established the legal foundation for current efforts by the Environmental Protection Agency (“EPA”) to regulate greenhouse gas emissions, a process set in motion by the Court’s additional holding that

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<sup>1</sup> *Massachusetts v. EPA*, 549 U.S. 497, 535 (Roberts, C.J., dissenting).

<sup>2</sup> *See id.* at 535–37.

<sup>3</sup> *Id.* at 532.

the excuses for inaction offered by the Bush Administration's Environmental Protection Agency were "arbitrary, capricious," and contrary to law.<sup>4</sup>

In *Massachusetts v. EPA*, the Supreme Court returned to its historic role of intervening when the political branches of government fail to address critical environmental problems.<sup>5</sup> By enabling EPA to use its existing regulatory authority to address climate change, the Court confirmed the ability of the American legal system to respond to new challenges. Indeed, the U.S. Constitution remains the oldest written constitution in the world due largely to its ability to adapt to profound economic and social changes that its framers could not possibly have foreseen.<sup>6</sup> Even though the word "environment" is not mentioned in the U.S. Constitution, the judiciary has interpreted it to authorize Congress to enact comprehensive regulatory statutes, such as the Clean Air Act, to protect against environmental harm.<sup>7</sup> The vigor with which these statutes are implemented and enforced has varied from one presidential administration to another, a fact that is well illustrated by the history of executive efforts to respond to climate change.

Since taking office in January 2009, President Obama has taken a variety of executive actions to address the climate change problem. Although he was unable to persuade Congress to adopt comprehensive legislation to control emissions of greenhouse gases, he has prodded EPA to regulate GHG emissions, and he has directed federal agencies to promote renewable sources of energy while improving their own energy efficiency. These measures are described in the president's Climate Action Plan, which was released on June 25, 2013.<sup>8</sup>

This article analyzes claims that the president has overstepped his constitutional authority by acting in the absence of new legislation to address climate change. It begins with a brief historical review of the use of presidential power to protect the environment. It then evaluates the various powers the Constitution gives to the president and the

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<sup>4</sup> *Id.* at 534.

<sup>5</sup> This argument is explained in more detail in Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111 (2008).

<sup>6</sup> Robert V. Percival, "Greening" the Constitution – Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 812 (2002).

<sup>7</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (rejecting constitutional challenge to the Clean Air Act).

<sup>8</sup> EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013) [hereinafter PRESIDENT'S CLIMATE ACTION PLAN], available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

constitutional issues at the heart of the persistent “tug of war between the president and the Congress.”<sup>9</sup>

In my previous work on presidential powers, I have argued that even though the president has unsurpassed ability to persuade agency heads to adopt policies he favors, he does not have legal authority to dictate the content of decisions entrusted by statute to agency heads.<sup>10</sup> But presidents have historically been able to exercise powerful influence over environmental policy by persuading their appointed heads of executive agencies to act. While President Obama has purported at times to assert directive authority, the willingness of his appointees to execute his Climate Action Plan lends his authority firmer constitutional footing.<sup>11</sup> This article argues that President Obama has properly exercised his executive powers, particularly in light of Congress’s failure to enact legislation to control GHG emissions and the Supreme Court’s displacement of federal nuisance law in favor of executive action.<sup>12</sup> It concludes that the blurred constitutional demarcation between executive and legislative power, reflected in the late Justice Jackson’s famous concurrence in *Youngstown Sheet and Tube v. Sawyer*,<sup>13</sup> enables our system of government to work effectively when Congress stalls and the judiciary intervenes to spur the executive branch to act.

## I. PRESIDENTIAL POWER TO PROTECT THE ENVIRONMENT IN HISTORICAL CONTEXT

### A. *The Early History of Presidential Actions to Protect the Environment*

In the early days of the republic, the perception that the United States possessed nearly limitless and untapped resources spawned federal policies facilitating the settlement of public lands and the promotion of natural resource development.<sup>14</sup> In 1849, the Department of Interior was

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<sup>9</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting).

<sup>10</sup> Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) [hereinafter Percival, *Presidential Management*]; Robert V. Percival, *Who’s In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions*, 79 FORDHAM L. REV. 2487 (2011).

<sup>11</sup> Robert V. Percival, *Separation of Powers, the Presidency and the Environment*, 21 J. LAND, RESOURCES & ENVTL. L. 25 (2001).

<sup>12</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

<sup>13</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

<sup>14</sup> Percival, *supra* note 11, at 27–29.

established with a primary mission to manage public lands.<sup>15</sup> Land grants were made from the federal government's vast inventory of public lands to encourage railroad construction and to promote settlement pursuant to the Homestead Act.<sup>16</sup> It was not until 1872 that the creation of Yellowstone National Park marked the beginning of efforts to set aside portions of public lands as protected areas.

In 1891 Congress authorized the president to protect forestlands owned by the federal government from certain kinds of development when it established the national forest system.<sup>17</sup> President William Henry Harrison used this authority to create thirteen million acres of national forests.<sup>18</sup> President Grover Cleveland doubled the size of this area in his final days in office.<sup>19</sup>

President Theodore Roosevelt undertook some of the most significant presidential initiatives to protect the environment when he assumed office after President William McKinley was assassinated in September of 1901. Roosevelt aggressively promoted environmental interests by use of his executive power. He created the first National Wildlife Refuge by executive order in 1903, which marked the first use of presidential power to protect public lands without specific approval from Congress.<sup>20</sup> Roosevelt created a national conservation commission, as well as commissions on the management of public lands and inland waterways.<sup>21</sup> Roosevelt used his Annual Message to Congress in 1905 to decry the failure of municipal governments to control smoke pollution,<sup>22</sup> and he convened the first National Governor's Conference on Conservation in 1908.

Congress expanded presidential power to set aside public lands when it enacted the Antiquities Act of 1906 authorizing the president to create protected areas designated as national monuments.<sup>23</sup> Roosevelt used this

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<sup>15</sup> Act of March 13, 1849, ch. 108, § 1, 9 Stat. 395 (1849) (codified at 43 U.S.C. § 1451).

<sup>16</sup> The Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161–302) (repealed 1976).

<sup>17</sup> ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936* 303–304 (3d ed. 1969).

<sup>18</sup> A.L. RIESCH OWEN, *CONSERVATION UNDER F.D.R.* 43 (1983).

<sup>19</sup> Robbins, *supra* note 17, at 314.

<sup>20</sup> PAUL RUSSELL CUTRIGHT, *THEODORE ROOSEVELT: THE MAKING OF A CONSERVATIONIST* 223 (1985).

<sup>21</sup> Andrea K. Gerlak & Patrick J. McGovern, *The Twentieth Century: Progressivism, Prosperity, and Crisis*, in *THE ENVIRONMENTAL PRESIDENCY* 41, 50 (Dennis L. Soden ed., 1999).

<sup>22</sup> 40 CONG. REC. 102 (1905).

<sup>23</sup> Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431–33).

legislation to create national monuments at Devils Tower and the Grand Canyon. Subsequent presidents have used it to set aside additional federal lands, creating more than 100 new national monuments. Only three presidents—Reagan, Nixon, and George H.W. Bush—have failed to use the Antiquities Act.<sup>24</sup> Two weeks before leaving office, President George W. Bush created three vast, new marine national monuments covering more than 195,000 square miles in the Pacific Ocean.<sup>25</sup>

Pollution problems became more visible as industrial activity expanded after World War II. Congress responded to these problems by expanding federal assistance to states in an effort to spur them to take action to combat pollution. An important milestone occurred in 1956 when Congress launched a construction grants program to fund the building of municipal sewage treatment plants.<sup>26</sup> This program was enacted over the opposition of President Dwight D. Eisenhower, who was philosophically opposed to expanding the size of federal grant programs.<sup>27</sup>

### *B. The President and the Environment After the Rise of the Contemporary Regulatory State*

It was not until the 1970s that Congress created comprehensive national regulatory programs to protect the environment, such as the Clean Air Act and Clean Water Act. Responding to fears from businesses that the new laws would lead to regulatory overreach, President Nixon created the first program for White House review of the regulatory actions by executive agencies.<sup>28</sup> Every subsequent president has continued some form of White House review of agency regulatory actions.<sup>29</sup>

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<sup>24</sup> *Supreme Court Upholds Clinton's National Monuments*, ENVT. NEWS SERV. (Oct. 6, 2003), <http://www.ens-newswire.com/ens/oct2003/2003-10-06-05.asp>.

<sup>25</sup> Juliet Eilperin, *Bush to Protect Three Areas in Pacific*, WASH. POST (Jan. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/05/AR2009010501181.html>.

<sup>26</sup> Env'tl. Prot. Agency, *Municipal Sewage Treatment Plant Construction*, <http://yosemite.epa.gov/ee/epa/eed.nsf/2602a2edfc22e38a8525766200639df0/41c47fab01840f78525777d000cbd09!OpenDocument> (last updated May 31, 2014).

<sup>27</sup> Dwight D. Eisenhower, Statement by the President Upon Signing the Water Pollution Act Amendments of 1956 (July 9, 1956), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=10524>. In February of 1960, Eisenhower vetoed H.R. 3610, a bill to increase grants for construction of sewage treatment works. Dwight D. Eisenhower, Veto of Bill to Amend the Federal Water Pollution Control Act (Feb. 22, 1960), available at <http://www.presidency.ucsb.edu/ws/?pid=12103>.

<sup>28</sup> President Nixon created the "Quality of Life" regulatory review program in the Office of Management and Budget (OMB).

<sup>29</sup> President Ford continued the Quality of Life review program. President Carter replaced it with the Regulatory Analysis Review Group.

Faced with a Congress unwilling to roll back federal environmental regulation, President Reagan gave the Office of Management and Budget (“OMB”) unprecedented authority to review every proposed and final regulatory action by executive agencies.<sup>30</sup> Perhaps the most significant action protecting the environment taken by President Reagan was the negotiation of global agreements to phase out ozone-depleting substances. The United States played a leading role in negotiating the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer. Under Reagan’s leadership, the U.S. signed and promptly ratified both conventions,<sup>31</sup> which have become the most successful multilateral environmental agreements in history.

## II. THE PRESIDENTIAL RESPONSE TO CLIMATE CHANGE

### A. Early Presidential Action

Climate change has long been on the radar screen of federal environmental policy officials. The first report of the Council on Environmental Quality in 1970 devoted a full chapter to global warming and climate change.<sup>32</sup> But it was not until two decades later that global negotiations focused on this issue. In 1992, President George H.W. Bush traveled to the Rio Earth Summit where he joined the leaders of 153 other nations in signing the Framework Convention on Climate Change (“FCCC”) on June 12, 1992. Although the FCCC did not include specific targets for reducing GHG emissions, it established a comprehensive negotiating process for developing such controls, and it required developed countries to announce their own plans for emissions limits.<sup>33</sup> The U.S. Senate swiftly and unanimously ratified the FCCC on

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<sup>30</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (issued on Feb. 17, 1981). President George H.W. Bush continued this program of regulatory review. President Clinton narrowed regulatory review through promulgation of Executive Order Number 12,866, 3 C.F.R. 638 (1993), which remains in effect today.

<sup>31</sup> Ozone Secretariat, *Status of Ratification*, U.N. ENV’T PROGRAMME, [http://ozone.unep.org/new\\_site/en/treaty\\_ratification\\_status.php](http://ozone.unep.org/new_site/en/treaty_ratification_status.php) (last updated Mar. 14, 2014); Message to the Senate Transmitting the Vienna Convention for the Protection of the Ozone Layer (Sept. 4, 1985), *available at* <http://www.reagan.utexas.edu/archives/speeches/1984/90485a.htm>; President Reagan on Montreal Protocol Ratification (Dec. 21, 1987), *available at* <http://www2.epa.gov/aboutepa/president-reagan-montreal-protocol-ratification>.

<sup>32</sup> COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 93–104 (1970).

<sup>33</sup> U.N. Framework Convention on Climate Change art. 4, May 9, 1992, S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 107, *available at*

October 7, 1992,<sup>34</sup> making the U.S. the first developed country to do so. When he signed the U.S. instrument of ratification, President George H.W. Bush pledged that the U.S. “will reduce projected levels of net greenhouse gas emissions in the year 2000 by as much as eleven percent.”<sup>35</sup>

In December 1997 at the Third Conference of the Parties to the FCCC, agreement was reached on the Kyoto Protocol, which required the United States to reduce its GHG emissions by seven percent from 1990 levels during the period 2008-2012. Vice President Gore played a major role in the Kyoto negotiations, but even so the negotiations failed to produce a commitment by developing nations for future controls on their GHG emissions. As a result, there was no chance of ratification by the U.S. Senate, which on July 25, 1997 had adopted the Byrd-Hagel Resolution by a vote of 95-0. This resolution expressed the view that the U.S. should not sign any agreement at Kyoto that would commit developed nations to limit their GHG emissions unless it also required developing countries to limit their emissions.<sup>36</sup> President Clinton never submitted the Kyoto Protocol to the Senate for ratification.

Many believed that climate change would be a significant issue during the 2000 presidential campaign because the Democratic candidate, Vice President Al Gore, previously declared climate change so daunting a problem that environmental protection should become “the central organizing principle for civilization.”<sup>37</sup> Although he opposed ratification of the Kyoto Protocol, Republican candidate George W. Bush also believed that climate change was a serious problem. In a major policy speech on September 29, 2000, Bush declared that if elected president he would “require all power plants” to control emissions of carbon dioxide (“CO<sub>2</sub>”).<sup>38</sup> His position paper made

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[http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf).

<sup>34</sup> 138 CONG. REC. S17,156 (daily ed. Oct. 7, 1992), cited in CONGRESSIONAL RESEARCH SERVICE, GLOBAL CLIMATE CHANGE: SELECTED LEGAL QUESTIONS ABOUT THE KYOTO PROTOCOL (1998), available at <http://research.policyarchive.org/586.pdf>. Few people are aware of the fact that the Senate voted unanimously to ratify the Framework Convention on Climate Change as I repeatedly confirm when polling the audience whenever I give lectures on climate change.

<sup>35</sup> President George H.W. Bush, Statement on Signing the Instrument of Ratification for the United National Framework Convention on Climate Change (Oct. 13, 1992) (transcript available at [http://bushlibrary.tamu.edu/research/public\\_papers.php?id=4953&year=1992&month=10](http://bushlibrary.tamu.edu/research/public_papers.php?id=4953&year=1992&month=10)).

<sup>36</sup> S. Res. 98, 105th Cong. (1977) (resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change).

<sup>37</sup> AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 269 (1992).

<sup>38</sup> *Energy Issues*, C-SPAN (Sept. 29, 2000), available at



it clear that “mandatory reduction targets” would apply to major sources of CO<sub>2</sub> old and new.<sup>39</sup> This campaign promise was incorporated into the briefing books prepared by Bush’s transition team when he took office following the contested 2000 presidential election.<sup>40</sup>

However, on March 13, 2001, just 52 days after taking office, Bush repudiated this campaign pledge under pressure from conservative senators in his own party. This greatly embarrassed EPA Administrator Christine Todd Whitman, who had just returned from an international conference where she had assured environmental officials from other countries of the new president’s commitment to controlling U.S. GHG emissions.<sup>41</sup> Whitman writes that “[t]he president’s decision was meant to mollify the anti-regulation element of the far-right base, and it was made with too little regard for what is in fact a serious problem, or for how it would be received by both moderates in the United States and our allies abroad.”<sup>42</sup> Bush’s stunning policy reversal was reportedly engineered by Vice President Richard Cheney, who went to great lengths to exclude EPA and the State Department from any input in the decision.<sup>43</sup>

Two years later, the Bush administration’s refusal to control GHG emissions resulted in a significant strategic blunder that ultimately produced a Supreme Court decision confirming EPA’s authority to regulate GHGs. In September 2003, Bush’s EPA denied a petition asking the agency to regulate GHG emissions from motor vehicles.<sup>44</sup> By officially denying the petition, the EPA opened the courthouse doors to judicial review of whether the CAA gave the agency authority to act. By a five-to-four vote, the Supreme Court in *Massachusetts v. EPA* ultimately held that greenhouse gases were “air pollutants” covered by the CAA.<sup>45</sup> As noted above, Chief Justice Roberts, joined in dissent by Justices Scalia, Thomas, and Alito, stated that even if climate change is the most pressing environmental problem of our time, the harm it may cause is too diffuse and speculative to give anyone standing to seek

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<http://www.c-span.org/video/?159527-1/energy-issues>.

<sup>39</sup> BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 82–83 (2008).

<sup>40</sup> CHRISTINE TODD WHITMAN, IT’S MY PARTY TOO: THE BATTLE FOR THE HEART OF THE GOP AND THE FUTURE OF AMERICA 170 (2005) (former Bush EPA Administrator reports that “a mandatory cap on carbon dioxide emissions was listed as one of the Bush campaign’s promises in the thick notebook titled ‘Transition 2001,’ a copy of which I was given when I was nominated for the EPA position”).

<sup>41</sup> *Id.* at 171–179.

<sup>42</sup> *Id.* at 178.

<sup>43</sup> GELLMAN, *supra* note 39, at 82–90.

<sup>44</sup> 68 Fed. Reg. 52,922 (Sept. 8, 2003).

<sup>45</sup> 549 U.S. 497, 500 (2007).

judicial redress.<sup>46</sup> Justice Kennedy, however, sided with the other four Justices in rejecting this view. This five-justice majority held that EPA has the authority to control greenhouse gas emissions under the CAA, and it rejected EPA's excuses for failing to regulate them.<sup>47</sup>

EPA Administrator Steven Johnson sought to respond to the Supreme Court's decision by proposing to make a finding that GHG emissions endanger public health and welfare. However, he was blocked by the Office of Management and Budget, which refused even to open his email submitting the proposal for review.<sup>48</sup> On January 31, 2008, Johnson wrote directly to President Bush proposing that EPA make an endangerment finding by the end of 2008 because "[t]he state of the latest climate change science does not permit a negative finding, nor does it permit a credible finding that we need to wait for more research."<sup>49</sup> His proposal was rejected. On July 30, 2008, EPA issued an advance notice of proposed rulemaking that simply asked the public to comment generally on what EPA should do.<sup>50</sup>

On December 19, 2007, Johnson unexpectedly denied the state of California a waiver allowing the state to issue controls on motor vehicle GHG emissions. A subsequent investigation by the House Committee on Oversight and Government Reform found substantial evidence that Johnson had supported the waiver, but changed his mind after communicating with White House staff, despite the unanimous conclusion of EPA staff that a denial of the waiver would likely be overturned in court. Johnson refused to reveal his discussions with the White House, but he insisted that denial of the waiver was his own decision.<sup>51</sup>

### *B. President Obama's Response to Climate Change*

After taking office in January 2009, President Obama moved quickly to take action to reverse Bush administration policies that had blocked

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<sup>46</sup> *Id.* at 542–46 (Roberts, C.J., dissenting).

<sup>47</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>48</sup> Felicity Barringer, *White House Refused to Open Pollutants E-Mail*, N.Y. TIMES (June 25, 2008), [http://www.nytimes.com/2008/06/25/washington/25epa.html?\\_r=0](http://www.nytimes.com/2008/06/25/washington/25epa.html?_r=0).

<sup>49</sup> Letter from Stephen L. Johnson, Adm'r, Env'tl. Prot. Agency, to President George W. Bush (January 31, 2008) (available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Bush-EPA-Carbon-Reduction-Actions-2008-1-31.pdf>).

<sup>50</sup> *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008).

<sup>51</sup> *EPA's New Ozone Standards, Hearing before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 137 (2008) (testimony of EPA Administrator Stephen Johnson).

action to reduce GHG emissions. On January 26, 2009, six days after taking office, the new president issued a memorandum directing the EPA Administrator to reconsider its denial of the California waiver in order to enable the state to set GHG emissions standards for motor vehicles.<sup>52</sup> Obama also issued a separate memorandum to the Secretary of Transportation and the Administrator of the National Highway Traffic Safety Administration directing them to promulgate stronger fuel efficiency standards under the 2007 Energy Independence and Security Act (“EISA”).<sup>53</sup>

In his first address to a joint session of Congress, which then had a Democratic majority in each House, the president called for enactment of legislation creating a comprehensive national program to control emissions of GHGs.<sup>54</sup> The president’s first budget endorsed a national cap-and-trade system designed to reduce GHG emissions by fourteen percent below 2005 levels by 2020 and eighty-three percent below 2005 levels by 2050,<sup>55</sup> measures that ultimately were incorporated into the Waxman-Markey bill that passed the U.S. House by a vote of 219-212 on June 26, 2009.<sup>56</sup> But he also warned that if Congress failed to act, EPA would use its existing regulatory authority in the CAA to control these emissions.

During the 2008 presidential campaign, President Obama supported a cap-and-trade program that would auction off all emissions allowances. The president’s first proposed budget stated that the auctioning of allowances was necessary “to ensure that the biggest polluters do not enjoy windfall profits.”<sup>57</sup> The budget estimated that the auction would raise \$150 billion over ten years that “will fund vital investments in a clean energy future” with the balance of the revenues “returned to the

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<sup>52</sup> Memorandum from President Barack Obama to Adm’r, Env’tl. Prot. Agency (Jan. 26, 2009) (available at <http://www.whitehouse.gov/the-press-office/california-request-waiver-under-clean-air-act>).

<sup>53</sup> Memorandum from President Barack Obama to the Sec’y of Transp. & the Adm’r of the Nat’l Highway Transp. Safety Admin. (Jan. 26, 2009) (available at <http://www.whitehouse.gov/the-press-office/energy-independence-and-security-act-2007>).

<sup>54</sup> *Remarks of President Barack Obama – As Prepared for Delivery, Address to Joint Session of Congress, Feb. 24, 2009*, WHITEHOUSE.GOV, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/) (last visited Apr. 17, 2014).

<sup>55</sup> EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA’S PROMISE 100 (2009) [hereinafter A NEW ERA OF RESPONSIBILITY], available at

<http://www.gpo.gov/fdsys/pkg/BUDGET-2010-BUD/pdf/BUDGET-2010-BUD-22.pdf>.

<sup>56</sup> *H.R. 2454 (111<sup>th</sup>): American Clean Energy and Security Act of 2009*, GOVTRACK.US, available at <https://www.govtrack.us/congress/bills/111/hr2454> (last visited Apr. 17, 2014).

<sup>57</sup> A NEW ERA OF RESPONSIBILITY, *supra* note 55, at 100.

people, especially vulnerable families, communities, and businesses to help the transition to a clean energy economy.”<sup>58</sup> However, the Waxman-Markey bill approved by the House largely abandoned the auction approach in an effort to gain the support of electric utilities and other industry sectors that would have received the bulk of allowances for free.<sup>59</sup> This substantially diminished enthusiasm for the legislation among the environmental community.

The Senate Environment and Public Works Committee approved its own cap-and-trade legislation in November 2009. The Clean Energy Jobs and American Power Act of 2009, S. 1733, was approved by a vote of 11-1 with all seven Republican members of the committee boycotting the vote in protest. However, Senate Majority Leader Harry Reid announced in July 2010 that the absence of bipartisan support in the Senate had persuaded him not to seek a floor vote on cap-and-trade legislation.<sup>60</sup> After the 2010 midterm elections gave Republicans control of the House, it became clear that it would be impossible to pass national climate legislation, and while the enactment of environmental legislation often has required some “trigger event”—usually a highly publicized incident of visible environmental harm that generates immediate public concern<sup>61</sup>—even Hurricane Sandy in 2012 was not enough to shake opposition to climate legislation in the 113<sup>th</sup> Congress from the estimated 160 Representatives, a majority of the Republicans in the House, who are on record as denying that climate change is real.<sup>62</sup>

Thus, as Obama had promised, EPA acted to regulate emissions of GHGs. On April 17, 2009, EPA proposed to find that emissions of GHGs endanger public health or welfare, which would trigger their

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<sup>58</sup> *Id.*

<sup>59</sup> PEW CTR. ON GLOBAL CLIMATE CHANGE, DISTRIBUTION OF ALLOWANCES UNDER THE AMERICAN CLEAN ENERGY AND SECURITY ACT (WAXMAN-MARKEY) (2009), available at <http://www.e2es.org/docUploads/policy-memo-allowance-distribution-under-waxman-markey.pdf>.

<sup>60</sup> Carl Hulse & David Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES (July 22, 2010), [http://www.nytimes.com/2010/07/23/us/politics/23cong.html?\\_r=1&](http://www.nytimes.com/2010/07/23/us/politics/23cong.html?_r=1&).

<sup>61</sup> Examples include the “Superfund” legislation adopted in 1980 after highly publicized contamination of homes in Love Canal by previously buried hazardous wastes, the Emergency Planning and Community Right to Know Act adopted in 1986 in response to the Bhopal tragedy, and the Oil Pollution Act of 1990 adopted in response to the Exxon Valdez oil spill. See Robert V. Percival, *Environmental Legislation and the Problem of Collective Action*, 9 DUKE ENVTL. L. & POL’Y F. 20–21 (1998).

<sup>62</sup> Jeff Spross, *The Anti-Science Climate Denier Caucus*, THINK PROGRESS (June 26, 2013), <http://thinkprogress.org/climate-denier-caucus/> (noting that these 160 representatives have received more than \$55.5 million in campaign contribution from fossil fuel industries that are the leading contributors to GHG emissions).

regulation under the CAA.<sup>63</sup> On December 7, 2009, EPA made a formal “endangerment finding” for GHGs.<sup>64</sup>

President Obama also took executive action to reduce GHG emissions by federal entities. In October 2009, he issued Executive Order 13514, which requires federal agencies to establish targets to control their GHG emissions.<sup>65</sup> The order also directs agencies to increase energy efficiency, reduce waste, conserve water, reduce fleet petroleum consumption, and utilize government purchasing power to support environmentally friendly products.<sup>66</sup> On May 21, 2010, President Obama issued a memorandum directing federal agencies to develop the first fuel economy standards for medium and heavy-duty trucks for model years 2014-18 and to tighten another fuel efficiency and emissions standard for passenger cars and light-duty trucks starting in 2017.<sup>67</sup>

After making its finding that emissions of greenhouse gases “endanger public health and or welfare,” EPA issued a “Tailpipe Rule” setting standards for GHG emissions from motor vehicles.<sup>68</sup> Following its longstanding interpretation of the CAA, EPA concluded that the Tailpipe Rule automatically triggered regulation of stationary sources of GHG emissions under two programs (Prevention of Significant Deterioration, “PSD,” and “Title V”) that require permits for sources of “any air pollutant.”<sup>69</sup> EPA determined that major stationary sources of GHGs would be subject to PSD and Title V permitting on January 2, 2011, the date the Tailpipe Rule became effective.<sup>70</sup> This became known as the “Timing Rule.”

The most controversial aspect of the EPA’s action was its effort to tailor the permitting regulations to initially apply to only the very largest sources of GHG emissions in what it called the “Tailoring Rule.” The

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<sup>63</sup> Jonathan Wiesman & Siobhan Hughes, *U.S. in Historic Shift on CO2*, WALL ST. J. (Apr. 18, 2009), <http://online.wsj.com/news/articles/SB123997738881429275>.

<sup>64</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,509 (Dec. 15, 2009).

<sup>65</sup> Exec. Order No. 13,514, 74 Fed. Reg. 194 (Oct. 5, 2009).

<sup>66</sup> *Id.*

<sup>67</sup> Memorandum on Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation’s Fleet of Cars and Trucks, 75 Fed. Reg. 29,399 (May 26, 2010).

<sup>68</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,398 (May 7, 2010) (to be codified at 40 C.F.R. pts. 531, 533, 536–38).

<sup>69</sup> Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

<sup>70</sup> *Id.* at 17,004, 17,019, 17,023.

CAA sets statutory thresholds of 100 and 250 tons of emissions per year for various sources to be covered by the PSD and Title V permit programs.<sup>71</sup> Because so many sources emit GHGs, the EPA estimated that 81,000 PSD permits and 6.1 million Title V permits would fall within the statutory thresholds. Because this would overwhelm the permit programs, EPA issued the Tailoring Rule to apply the permit requirements only to sources whose GHG emissions exceed 75,000 or 100,000 tons per year.<sup>72</sup> This includes sources responsible for 86 percent of GHG emissions from stationary sources.<sup>73</sup>

Various industry groups and states challenged the EPA's action by filing scores of petitions for review in the D.C. Circuit. The court consolidated the cases into a single proceeding reviewing the EPA's Endangerment Finding, its Tailpipe Rule, and its Timing and Tailoring Rules. Oral argument consumed two full days. So many hundreds of lawyers were involved in the cases that the listing of their names occupies six full pages of the Federal Reporter.

On June 26, 2012, the D.C. Circuit unanimously dispatched all of the challenges in a per curiam opinion by Chief Judge Sentelle and Judges Rogers and Tatel.<sup>74</sup> The panel upheld the Endangerment Finding and Tailpipe Rules, and it determined that EPA's conclusion that the Tailpipe Rule triggered the PSD and Title V permit requirements was "unambiguously correct."<sup>75</sup> The court dismissed challenges to the Timing and Tailoring Rules by finding that no party had standing to challenge EPA's failure to regulate smaller sources, a rare example of standing doctrine being used to benefit environmental interests.<sup>76</sup>

Climate change was never mentioned during the 2012 presidential debates, but in his acceptance speech Republican nominee Mitt Romney mocked President Obama for his pledge "to begin to slow the rise of the oceans and heal the planet."<sup>77</sup> This came back to haunt him less than two months later when Hurricane Sandy devastated the east coast of the U.S., destroying much of the Jersey shore and flooding lower Manhattan. In his second inaugural address, President Obama pledged,

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<sup>71</sup> 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2), 7661a(a).

<sup>72</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,553–54, 31,562–63, 31,570 (June 3, 2010).

<sup>73</sup> *Id.* at 31,514 (June 3, 2010).

<sup>74</sup> *Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102 (D.C. Cir. 2012).

<sup>75</sup> *Id.* at 113.

<sup>76</sup> *Id.*

<sup>77</sup> Mitt Romney, Acceptance Speech at the Republican National Convention (Aug. 30, 2012) (transcript available at <http://www.npr.org/2012/08/30/160357612/transcript-mitt-romneys-acceptance-speech>).

“[w]e will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations. Some may still deny the overwhelming judgment of science, but none can avoid the devastating impact of raging fires and crippling drought and more powerful storms.”<sup>78</sup>

In his 2013 State of the Union Address, President Obama issued one of his strongest calls for congressional action on climate change. He stated, “for the sake of our children and our future, we must do more to combat climate change.”<sup>79</sup> While recognizing “that no single event makes a trend,” he noted that “the twelve hottest years on record have all come in the last fifteen” and that “[h]eat waves, droughts, wildfires, floods—all are now more frequent and more intense.”<sup>80</sup> Citing “Superstorm Sandy,” he stated that we could choose to believe that it was “just a freak coincidence” or instead to “believe in the overwhelming judgment of science—and act before it’s too late.”<sup>81</sup> Obama urged “Congress to get together to pursue a bipartisan, market-based solution to climate change.”<sup>82</sup> But he warned that “if Congress won’t act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.”<sup>83</sup>

Despite Democratic gains in the 2012 elections, Congress remains wary of enacting climate legislation. During the 112th session of Congress, the Republican-controlled U.S. House of Representatives was the most anti-environmental house of Congress in U.S. history. In the twenty months that it was in session before adjourning on September 21, 2012, the House passed 317 anti-environmental measures.<sup>84</sup> Nearly

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<sup>78</sup> President Barack Obama, Second Inaugural Address (Jan. 21, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>).

<sup>79</sup> President Barack Obama, State of the Union Address (Feb. 12, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (The President cited a bipartisan bill to control GHG emissions that had been drafted by Senators McCain and Lieberman in the past.).

<sup>83</sup> *Id.*

<sup>84</sup> *Database of Anti-Environment Votes in the 112th House of Representatives*, Democrats Comm. on Energy & Commerce, <http://democrats.energycommerce.house.gov/index.php?q=legislative-database-anti-environment&legislation=50&topic=All&statute=All&agency=All> (last visited Apr. 18, 2014).

all of these measures died in the Democratic-controlled U.S. Senate, which is more sympathetic to environmental regulation.<sup>85</sup>

In June 2013, President Obama announced a comprehensive approach to slow the effects of climate change in his Climate Action Plan.<sup>86</sup> The plan outlines strategies for cutting carbon pollution, preparing the U.S. for the impacts of climate change, and leading international efforts to mitigate global climate change. The plan pledges regulations of GHG emissions from stationary sources such as power plants, tightened fuel economy standards, and improved efficiency in energy use in U.S. homes and businesses. It sets a goal to double electricity generation from renewable sources by 2020.<sup>87</sup> The plan specifies that the Department of Interior will issue permits for an additional ten gigawatts of renewable energy projects on public lands by 2020.<sup>88</sup>

Under the plan, federal officials will work with states, cities, and local communities to support climate-resilient investment and to remove policies that increase vulnerabilities.<sup>89</sup> EPA is incorporating climate change impacts and adaptive measures into programs, such as the Clean Water and Drinking Water State Revolving Funds.<sup>90</sup> Additionally, the Department of Housing and Urban Development is requiring grant recipients in the Hurricane Sandy-affected regions to consider sea-level rise in future development projects.<sup>91</sup>

To protect the U.S. economy and natural resources from the negative effects of climate change, the plan seeks to improve the resiliency of energy infrastructure, to encourage leadership by insurance companies and to help with efforts to manage drought, to reduce wildfires, and to prepare for floods.<sup>92</sup> The plan emphasizes that these efforts should be undertaken through increased interagency cooperation and collaboration. The plan also encourages the development of climate data to assist government officials, communities, and businesses in understanding and addressing the risks associated with climate change.<sup>93</sup>

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<sup>85</sup> One exception was legislation authorizing the Secretary of Transportation to block U.S. airlines from paying GHG emissions fees to the European Union on flights to and from the EU. President Obama signed this legislation into law on Nov. 27, 2012. European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477.

<sup>86</sup> PRESIDENT'S CLIMATE ACTION PLAN, *supra* note 8.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 12–13.

<sup>90</sup> *Id.* at 13.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 15.

<sup>93</sup> *Id.* at 16.



The president's plan also pledges that the U.S. will lead international efforts to address global climate change. It seeks to couple national efforts to combat climate change with international action to reduce emissions, prepare for climate impacts, and spark progress through international negotiations. Two promising components of the plan include termination of support for public financing of new coal plants overseas and elimination of U.S. fossil fuels tax subsidies in the fiscal year 2014 budget.<sup>94</sup> To promote the transition to renewable electricity generation at an international level, the U.S. plans to work with trading partners to encourage global free trade in clean energy technologies, such as solar, wind, hydro, and geothermal.<sup>95</sup> The Obama Administration already has mobilized billions of dollars for investments in clean energy projects in developing countries. A major focus of U.S. efforts in the international arena is to encourage a global transition away from coal and towards natural gas as a "bridge fuel" to help countries make the transition to cleaner sources of energy.<sup>96</sup> The Climate Action Plan claims to be a "blueprint for steady, responsible national and international action to slow the effects of climate change."<sup>97</sup>

Environmentalists generally have praised the President's Climate Action Plan as a step in the right direction,<sup>98</sup> while also noting that "it will require continued presidential leadership to translate the plan's good intentions into concrete policy."<sup>99</sup> The president's political opponents argue that it will "increase the cost of energy and kill more American jobs at a time when the American people are still asking 'where are the jobs?'"<sup>100</sup> They also argue that in light of Congress's failure to enact new legislation addressing climate change, the president has overstepped the bounds of his constitutional authority. Senator Charles Grassley, R-Iowa, said on the Senate floor that "[t]he president looks more and more like a king that the Constitution was designed to

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<sup>94</sup> *Id.* at 20.

<sup>95</sup> *Id.* at 19–20.

<sup>96</sup> *Id.* at 19.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> Jason Samenow, *Obama Unveils Broad Climate Change Plan, to Deliver Major Speech Today*, WASH. POST (June 26, 2013), <http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2013/06/25/obama-unveils-broad-climate-change-plan-to-deliver-major-speech-today/>. NRDC's Dan Lashof stated: "This plan takes aim at the heart of the problem: the dangerous carbon pollution from power plants. Reducing that pollution is the most important step we can take, as a nation, to stand up to climate change." *Id.*

<sup>99</sup> *Id.* (quoting Eileen Claussen of the Center for Climate and Energy Solutions).

<sup>100</sup> *Id.* (quoting Speaker of the House John Boehner).

replace.”<sup>101</sup> Conservative columnist Charles Krauthammer accused President Obama of “gross executive usurpation” that “disdains the Constitution,” and undermines “the very creation of new law.”<sup>102</sup>

### III. EXECUTIVE AUTHORITY AND CLIMATE CHANGE

Analysis of claims that the president has exceeded his constitutional authority should begin by recognizing the murky state of law in this area, particularly given the judiciary’s historic reluctance to umpire disputes between Congress and the president. The *Steel Seizure Case*<sup>103</sup> remains one of the few precedents on the limits of executive power. Justice Jackson’s concurring opinion in this case argues that the scope of permissible executive power varies depending upon how aggressively Congress has asserted itself in the particular policy area that is the focus of executive action.<sup>104</sup>

#### A. Criticisms of President Obama’s Use of Executive Power

It seems inevitable that views concerning the proper scope of, and limits on, executive power depend in large part on which political party controls which branch of government. While in the Senate, President Obama was a prominent critic of the exercise of executive power by his predecessor, President George W. Bush, particularly with respect to the conduct of the “War on Terror.”<sup>105</sup> Now that Obama is president, his critics argue that he has embraced some of the expansive theories of executive power he previously criticized.<sup>106</sup> Conversely, some of those who benefited from President Bush’s expansive assertions of executive power now argue that the same policies employed by President Obama have crossed constitutional bounds.<sup>107</sup>

Even before the terrorist attacks on September 11, 2001, expanded executive power had become a prominent feature of the modern

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<sup>101</sup> Peter Baker, *Obama Making Plans to Use Executive Power*, N.Y. TIMES (Feb. 12, 2010), [http://www.agriculturedefensecoalition.org/sites/default/files/file/constitution\\_1/1X\\_2010\\_President\\_Obama\\_Making\\_Plans\\_to\\_Use\\_Executive\\_Power\\_NYTimes\\_February\\_13\\_2010.pdf](http://www.agriculturedefensecoalition.org/sites/default/files/file/constitution_1/1X_2010_President_Obama_Making_Plans_to_Use_Executive_Power_NYTimes_February_13_2010.pdf).

<sup>102</sup> *Id.*

<sup>103</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>104</sup> *Id.* at 634 (Jackson, J., concurring in the judgment and opinion of the Court).

<sup>105</sup> Baker, *supra* note 101.

<sup>106</sup> Anita Kumar, *Obama Turning to Executive Power to Get What He Wants*, MCCLATCHY DC (Mar. 19, 2013), <http://www.mcclatchydc.com/2013/03/19/186309/obama-turning-to-executive-power.html>; see also JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 5 (2012).

<sup>107</sup> Carl Hulse, *Role Reversals Emerge in Dispute Over Obama’s Recess Appointments*, N.Y. TIMES, Jan. 11, 2014, at A11.

presidency. Presidents Reagan and Bush increased their control over executive agencies to advance their conservative agendas.<sup>108</sup> President Clinton responded to opposition from a Republican Congress by increasing White House involvement in agency rulemaking and using executive orders to achieve domestic policy goals.<sup>109</sup> This spawned considerable criticism of Clinton for executive overreach.<sup>110</sup> After the Bush Administration launched the “War on Terror,”<sup>111</sup> “increased executive power” officially became “one of the key elements of the emerging constitutional revolution.”<sup>112</sup>

When compared to the actions of his predecessors, President Obama’s assertions of executive power do not appear exceptional. President Obama has issued executive orders at the lowest rate of any president since President William McKinley in the nineteenth century (see Figure I below).<sup>113</sup> What appears to be of greater concern to Obama’s critics is his perceived change of position on the scope of executive powers since his time in the U.S. Senate.

FIGURE I. EXECUTIVE ORDERS BY PRESIDENT<sup>114</sup>

<u>President and Term of Office</u>	<u>Number</u>	<u>Per Year in Office</u>
Ronald Reagan (1981-1989)	381	47.6/year
George H.W. Bush (1989-1993)	166	41.5/year
William J. Clinton (1993-2001)	364	45.5/year
George W. Bush (2001-2009)	291	36.4/year
Barack Obama (2009-2013)	167	33.4/year

<sup>108</sup> See Exec. Order No. 12,291, 3 C.F.R. 127 (1982); see also Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

<sup>109</sup> Charlie Savage, Shift on Executive Power Lets Obama Bypass Rivals, N.Y. TIMES, April 22, 2012 ([http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?\\_r=1&](http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?_r=1&)).

<sup>110</sup> See, e.g., Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, HERITAGE FOUND. (Feb. 21, 2001), <http://www.heritage.org/research/reports/2001/02/the-use-and-abuse-of-executive-orders-and-other-presidential-directives>.

<sup>111</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

<sup>112</sup> Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 73 FORDHAM L. REV. 489, 504 (2006).

<sup>113</sup> Aaron Blake, *Obama’s Love Affair with Executive Orders – or Not (in 1 Chart)*, WASH. POST (Jan. 31, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/31/obamas-love-affair-with-executive-orders-or-not-in-1-chart/> (claiming that Obama has issued the fewest executive orders since President Grover Cleveland). *But see* Percival, *supra* note 10, at 982.

<sup>114</sup> *Executive Orders Disposition Table Index*, NATIONAL ARCHIVES, <http://www.archives.gov/federal-register/executive-orders/disposition.html> (last visited Apr. 18, 2014).

During his initial presidential campaign, Obama was a critic of the use by previous presidents of “signing statements” that questioned the constitutionality of provisions in bills the presidents signed into law. The practice, which involves the president issuing a written statement of constitutional objections, originated in the Reagan administration and became more prevalent during the administrations of President George H.W. Bush and George W. Bush. As illustrated by Figure II, President Obama has issued signing statements far less frequently than the two Bushes, but he has not completely eliminated their use.

FIGURE II. SIGNING STATEMENTS BY PRESIDENT

<u>President</u>	<u>No. of Signing Statements</u>	<u>No. of Challenges</u>
Ronald Reagan	16 (2/year)	22 (2.8/year)
George H.W. Bush	71 (17.8/year)	150 (37.5/year)
William J. Clinton	16 (2.0/year)	39 (4.9/year)
George W. Bush	63 (7.9/year)	386 (48.3/year)
Barack Obama	10 (2.3/year)	78 (9.8/year)

Obama also appointed an estimated thirty-eight “czars,” executive branch employees responsible for making the federal bureaucracy work with respect to specified issues.<sup>115</sup> These appointments, not subject to Senate confirmation, were criticized as “a series of constitutional end-runs and a power grab by a frustrated and legacy-driven president.”<sup>116</sup> White House counsel Gregory Craig defended these appointments by arguing that they were not designed “to supplant or replace existing federal agencies or departments, but rather to help coordinate their efforts and help devise comprehensive solutions to complex problems,” which “is, and *always has been*, the traditional role of White House staff.”<sup>117</sup>

<sup>115</sup> David Davenport, *President Obama's Executive Power End Run Around the Constitution*, FORBES (Jan. 13, 2012), <http://www.forbes.com/sites/daviddavenport/2013/01/16/president-obamas-executive-power-end-run-around-the-constitution/>; see also Aaron J. Saiger, *Obama's 'Czars' for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011).

<sup>116</sup> Davenport, *supra* note 115.

<sup>117</sup> *Examining the History and Legality of Executive Branch Czars: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 9 (2006), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57708/pdf/CHRG-111shrg57708.pdf> (emphasis in original) (letter from Gregory Craig, White House Counsel, to U.S. Senator Russell Feingold).

President Obama has argued that he is justified in using executive power expansively because of congressional gridlock.<sup>118</sup> During the first two years of the Obama Administration, the Democrats controlled both Houses of Congress, but after Republicans regained control of the House in 2010 Obama increasingly relied on executive powers.<sup>119</sup> As Professors Jody Freeman and David Spence have documented, Congress has failed to update major regulatory statutes for decades because of legislative gridlock produced by ideological polarization of its members.<sup>120</sup> They argue that in the absence of clear direction from Congress, the president and executive agencies are in the best position to adapt old statutes to new problems and that the judiciary generally should defer to such efforts.

As this article goes to press, the Supreme Court, in a decision upholding EPA's regulations governing interstate air pollution, again has indicated its willingness to give EPA leeway to adopt reasonable interpretations of ambiguous statutory language in the CAA. The Chief Justice and five other Justices concluded that EPA had acted properly in interpreting the CAA to give the agency flexibility to base the degree of emission reduction required by upwind states on their ability to reduce emissions cost-effectively.<sup>121</sup>

### *B. Executive Power to Address Climate Change*

When he represents the interests of the United States in conducting foreign policy, President Obama's powers are extremely broad.<sup>122</sup> A clear example of this is Obama's agreement with Chinese President Xi Jinping to support a global phase-out under the Montreal Protocol of hydrofluorocarbons ("HFCs"), ozone-depleting substances that also are potent greenhouse gases.<sup>123</sup> Obama also used his foreign policy powers

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<sup>118</sup> Baker, *supra* note 101.

<sup>119</sup> *Id.* (quoting Professor Richard H. Pildes of New York University Law School as emphasizing that "Obama's not saying he has the right to defy a Congressional statute, but if the legislative path is blocked and he otherwise has the legal authority to issue an executive order on an issue, they are clearly much more willing to do that now than two years ago"); Davenport, *supra* note 115.

<sup>120</sup> Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 162 U. Penn. L. Rev. (forthcoming 2014) (available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2393033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393033)).

<sup>121</sup> EPA v. EME Homer City Generation, L.P., 2014 WL 1672044 (2014).

<sup>122</sup> United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

<sup>123</sup> Steven Mufson, *President Obama and Chinese President Xi Jinping Agree to Wind Down Production and Use of Hydrofluorocarbons, or HFCs*, WASH. POST (June 8, 2013), [http://www.washingtonpost.com/business/economy/president-obama-and-chinese-president-xi-jinping-agree-to-wind-down-production-and-use-of-hydrofluorocarbons-or-hfcs/2013/06/08/92e4d79e-d08f-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/business/economy/president-obama-and-chinese-president-xi-jinping-agree-to-wind-down-production-and-use-of-hydrofluorocarbons-or-hfcs/2013/06/08/92e4d79e-d08f-11e2-8845-d970ccb04497_story.html).

to bypass Congress on a critical global environmental issue when he determined that the U.S. could deposit its instrument of acceptance for the Minimata Convention on Mercury without seeking Senate ratification.<sup>124</sup> On November 6, 2013, the U.S. became the first country formally to accept the convention after the Obama Administration determined that existing U.S. law already provided sufficient authority for the U.S. to implement it.<sup>125</sup>

The president's Climate Action Plan specifies an ambitious timetable for EPA to regulate GHG emissions. EPA has a solid legal foundation for action in light of the Supreme Court's decisions in *Massachusetts v. EPA* and *American Electric Power v. Connecticut*. As noted above, *Massachusetts v. EPA*<sup>126</sup> held that GHG emissions were air pollutants subject to regulation under the CAA. In *American Electric Power*, the Court unanimously held that because the CAA delegated authority to EPA to regulate GHG emissions, it displaced the federal common law of nuisance in an action brought by eight states and the City of New York against six of the largest electric utilities operating coal-fired power plants in the United States.<sup>127</sup>

These decisions make it clear that EPA has broad authority under the existing Clean Air Act to regulate GHG emissions. Although industry groups asked the U.S. Supreme Court to review virtually every aspect of the D.C. Circuit's decision upholding EPA's GHG regulations, the Supreme Court granted review solely to the question whether the Tailpipe Rule "triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."<sup>128</sup> At oral argument on February 24, 2014, the Justices made it clear that they were not entertaining any thoughts of overruling *Massachusetts v. EPA*<sup>129</sup> or reversing EPA's endangerment finding. Thus, it is clear that EPA has the authority to regulate GHG emissions. The only question under consideration by the Court is which parts of the CAA can be used for that regulation.

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<sup>124</sup> *Minimata Convention on Mercury*, U.S. DEPT. OF STATE, <http://www.state.gov/e/oes/eqt/mercury/index.htm> (last visited Apr. 18, 2014).

<sup>125</sup> *Id.*

<sup>126</sup> 549 U.S. 497 (2007).

<sup>127</sup> 131 S.Ct. 2527 (2011).

<sup>128</sup> U.S. SUPREME COURT, ORDER LIST, TUESDAY, OCT. 15, 2013 (2013), *available at* [http://www.supremecourt.gov/orders/courtorders/101513zor\\_4g25.pdf](http://www.supremecourt.gov/orders/courtorders/101513zor_4g25.pdf).

<sup>129</sup> Chief Justice Roberts told counsel for the industry challengers: "[Y]ou began that discussion by saying putting *Massachusetts v. EPA* to one side. But I was in dissent in that case, but we still can't do that." Transcript of Record at 18-19, *Utility Air Regulatory Group v. EPA*, 684 F.3d 102 (2014) (No. 12-1146), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1146\\_nk5h.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_nk5h.pdf).

Given the Court's confirmation of EPA's authority to regulate GHG emissions under the CAA, the only viable question concerning executive overreach is whether EPA overstepped its bounds when it decided not to regulate all sources that the Act normally subjects to regulation under the Prevention of Significant Deterioration ("PSD") program. In essence, the industry challengers are claiming that EPA has been too reasonable in focusing its regulatory attention only on the largest sources that generate eighty-six percent of GHG emissions.

Aside from this issue, which may produce a 5-4 split when the Court decides the case by June 2014, there is little question that the bulk of President Obama's Climate Action Plan can be carried out by executive action alone. Arguments that regulation of GHGs under the CAA represent a power grab by the Obama Administration ignore the fact that the Supreme Court has twice confirmed EPA's authority to regulate GHGs under the CAA.<sup>130</sup> As the Court opined in *American Electric Power*, regulation by an expert administrative agency is preferable to regulation "by judicial decree under federal tort law."<sup>131</sup> EPA "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions" because

[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.<sup>132</sup>

Thus, EPA is "better suited to serve as primary regulator of greenhouse gas emissions."<sup>133</sup>

#### IV. CONCLUSION

During the 1970s, Congress's adoption of landmark environmental laws promised the public comprehensive protection against threats to public health and the environment. These laws were updated and refined by Congress during the decade of the 1980s. However, since the adoption of the Clean Air Act Amendments of 1990, legislative gridlock has largely removed Congress from shaping environmental policy by legislative action. After an effort to win adoption of a new climate

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<sup>130</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007); *American Electric Power v. Connecticut*, 131 S.Ct. 2527 (2011).

<sup>131</sup> 131 S.Ct. at 2539.

<sup>132</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531 (2011).

<sup>133</sup> *Id.* at 2539.

change law failed, the Obama administration has been using executive action to address this important problem through the issuance of regulations and other executive actions. This article analyzes claims that the president has overstepped his constitutional authority by acting in the absence of new legislation to address climate change. Reviewing the history of the use of presidential power to protect the environment, this article concludes that the president is simply performing his historic role of acting to address important problems by using his existing authority when Congress fails to act.