THE SEEDS OF DISSENSUS AND THE ORIGINS OF THE ENDANGERMENT FINDING

by Jonathan Cannon

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Perhaps this should begin: Once upon a time, in the 1970s and early 1980s, "environmentalism," although variously understood, was a consensus political value. In 1977, Ronald Reagan, leader of the conservative movement in the Republican party, wrote, "Virtually every one of us is an environmentalist at heart."[1]

But Reagan's presidency, beginning in 1981 and lasting through 1989, challenged that consensus, as Reagan's initial appointees at the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Interior sought to limit the reach and stringency of environmental regulations and protections for public lands. Midcourse corrections in Reagan's tenure—Bill Ruckelshaus to EPA and Don Hodel to Interior—seemed to recover the balance and promise a less contentious, if not halcyon, path for environmental governance. But the cracks in the environmental consensus would never fully heal.

Having first joined EPA after Ruckelshaus had returned to right it, I would watch with others at the Agency during the William J. Clinton Administration as fissures in that consensus reopened, sometimes in new and unexpected places and with unexpected strength, like lava seeking a vent to the surface. In coming decades, periodic eruptions would destabilize environmental and other federal programs as the nation itself split deeply into "red and blue" factions. These are some recollections along that path from consensus to dissensus.

I. EPA Wars Renewed

In February 1995, delivering his first speech on the environment as Speaker of the House, Newt Gingrich scolded EPA as "a highly centralized command bureaucracy artificially trying to impose its judgment with almost no knowledge of local conditions and with a static not a dynamic view of itself."[2] He omitted mention that the laws the Agency operated under had been passed with broad support of both major parties in the 1970s and 1980s. But with the House and U.S. Senate under Republican control for the first time in 40 years, the environmental laws had become fair game.

Confirmed two years earlier at age 37, Carol Browner was the youngest EPA Administrator in history and the second woman to hold the job. She grew up in Florida and had worked in Washington as the legislative assistant for Sen. Lawton Chiles (D-Fla.) and later for then-Sen. Al Gore (D-Tenn.), before a stint as secretary of the Florida Department of Environmental Regulation. From her earlier jobs, she had a reputation as a fighter, a tough negotiator, and an organized administrator. She was direct, a stickler for detail, and hyperaware of what was going on around her.

I was at EPA when she arrived there the day of her confirmation by the Senate, walking through headquarters' byzantine array of offices at Waterside Mall, meeting and greeting the staff. I shook her hand at the door of EPA's policy office, where I had landed as acting director during the transition. A holdover from 12 years of Republican rule that environmental activists were celebrating the end of, I was a political liability in a Democratic administration.

But my history at EPA did give me knowledge that was useful to Browner and the team that came in with her: how things got done in the Agency, how to mesh with career staff. We worked together, and I blended into her team. After making me her deputy pending confirmation of the permanent pick for the job, Carol proposed my nomination for a Senate-confirmed position heading EPA's Office of Administration and Resource Management (OARM). The title fairly captured OARM's bureaucratic domain—EPA's budget and financial, personnel, and information systems. I was happy to have the job.

Editor's Note: This Comment is adapted from the author's memoir, Ecologies of Home, *currently in progress.*

1. Ronald Reagan Presidential Foundation and Institute, *Words to Live By: Environment*, LinkedIn (Dec. 9, 2024), https://www.linkedin.com/pulse/words-live-environment-ronaldreagan-xa5uc/; *see also Interview With Reporters From the Los Angeles Times*, Ronald Reagan Presidential Libr. & Museum (Jan. 20, 1982), https://www.reaganlibrary.gov/archives/speech/interview-reporters-los-angeles-times ("I fancy myself an environmentalist.").

2. Gary Lee, *Gingrich Lashes Out at EPA*, Wash. Post (Feb. 16, 1995), https://www.washingtonpost.com/archive/politics/1995/02/17/gingrich-lashes-out-at-epa/cfd4a3ae-4af6-4828-b2bf-c869d85efe31/.

II. Waterside Mall, March 1995

March 3, 1995, the day after the House letter came, Sylvia Lowrance, another EPA career executive whom Carol had taken into her confidence, took me aside: "They are not used to this. They have never been through it like you and I have. They don't know whether to laugh or run away. It's going to get nasty." She remembered navigating acrimonious exchanges with Democratic Congresses in the Reagan and George H.W. Bush Administrations.

Addressed to the Administrator from David McIntosh, who'd been an antiregulatory hawk in the George H.W. Bush White House and now chaired a subcommittee of the House Committee on Oversight and Government Reform, the letter attached an EPA fact sheet critical of regulatory reform proposals in the U.S. Congress. "I am deeply concerned," it read, "that the EPA fact sheet may be in violation of federal laws, including the criminal provisions of the Anti-Lobbying Act, 18 U.S.C. Sec. 1913."[3]

The House majority's 1994 campaign document, the "Contract With America"—satirically known among its opponents as the Contract *on* America—would have privileged efficiency over protection; inflated private-property rights; punished agency employees for vaguely defined "prohibited regulatory practices"; and put a hold on new regulations while all this was being put in place. Though these reforms were generally framed, EPA and other environmental programs were their main targets: the object was a broad renovation of environmental law. And the assault did not end with the Contract. The 1995 House appropriations bill for EPA would have cut the Agency's budget by 30% and sported 16 (by some counts 17) riders stifling funds for specific applications.

Still bruised from the mid-term elections that had ceded Congress to the Republicans, the Clinton White House was cautious. Someone there told Carol—"a very high-ranking official," she would say—you're just going to have to accept some of this. She demurred. That's not where the public was, she believed—not where it would be if she could get its attention.

She launched her counteroffensive in a January 1995 interview with the Cleveland *Plain Dealer*, branding the Republican proposals an environmental "rollback." The tagline stuck, and the interview heralded a stream of speeches, press statements, and interviews by Carol and others at EPA condemning the Contract. An EPA working group, charged with getting the message out, spun dozens of "fact sheets" assessing the Contract's impacts on Agency programs and faxed them to the press, allies on the Hill, and interest groups, from the Chemical Producers and Distributors to Ducks Unlimited. The press was receptive, in an era before the 24/7 news cycle when reporters could offer sustained coverage, and Carol felt the campaign take hold. But she was out there on her own, vulnerable.

Now came the McIntosh letter, claiming the campaign was criminal. Sleepless that night, she wondered, "What have I done?" Maybe her critics, including not a few in the Administration, were right, and she had overreached. A *New York Times* article the next day related McIntosh's accusations and did not include Carol's denial.[4] She realized then she had to fight; if she didn't, no one would fight for her. In an interview quoted the next day in papers across the country, she said: "This is an effort to intimidate me and EPA in an important debate on public health and the environment—perhaps the most important in [our] history—and I will not be silenced."[5]

An internal review that Carol asked me to lead found no EPA violation of the Anti-Lobbying Act. Although broadly written, the Act had been read to bar only "large-scale, high-expenditure campaigns specifically urging private recipients to contact members of Congress about pending legislative matters on behalf of an Administration position."[6] An intense week's work by the review team—interviewing 35 EPA employees, parsing thousands of documents—turned up nothing that met the test. "Large-scale," yes; "high-expenditure," likely. Relentlessly critical of "pending legislative matters," yes. But "specifically urging," no.

Despite the finding, or perhaps spurred by it, McIntosh continued to bombard Carol with accusations of politicizing the Agency and ethical misconduct. An acrimonious spring and summer yielded to a bitter winter of charge and countercharge, a budget impasse and government shutdown, and uncertainty about the Agency's future.

In an article on the shutdown, the longest up to that time, the *Washington Post* ran a photo of me hunkered over my Waterside Mall office desk, the size of a ping-pong table, stacked with papers and notebooks.[7] I was general counsel now, one of the federal employees working despite the shutdown, the caption read, keeping the Agency current on all its court commitments. I'm intent on signing something or pretending to. It wouldn't have mattered what. The image was of bureaucratic inconsequence, as the political storm thrashed outside; a local weather event, although with national repercussions, as only happens in D.C.

III. Rayburn House Office Building, May 1996

A man descends around two levels of curving benches, where the congresspeople will soon take their places, and

3. Letter from Rep. David M. McIntosh to EPA Administrator Carol M. Browner (Mar. 2, 1995).

4. John H. Cushman Jr., *EPA Chief Accused of Lobbying*, N.Y. Times, Mar. 4, 1995, at 1, 8.

5. *E.g.*, *EPA Chief Accused of Illegal Lobbying Vows to Fight*, Fort Lauderdale Sun-Sentinel, Mar. 5, 1995, at 11A; *"I Will Not Be Silenced," EPA Administrator Insists*, St. Louis Post-Dispatch, Mar. 5, 1994, at 10A; Gary Lee, *Lawmaker Says EPA Chief Violates Anti-Lobbying Act*, Wash. Post, Mar. 5, 1995, at A16.

6. Memorandum Opinion for Counsel to the President from Charles Cooper, Assistant Attorney General, Office of Legal Counsel (Feb. 1, 1988).

7. Stephen Barr & Frank Swabosa, *Jobless Aid, Toxic Waste Cleanup Halt*, Wash. Post, Jan. 3, 1996, at A1.

onto the hearing room floor. The room is wood-paneled and extravagantly high-ceilinged, a space to inspire deference, if not awe, in those invited or compelled to enter it. Eight other places of interrogation like it are slotted through the H-shaped Rayburn, the largest of the House office buildings, a two-million-square-foot colossus that squats in the drainage of D.C.'s buried Tiber Creek.[8] Those clay soils had to be reinforced to support its bulk, and its basement incorporates the 19th-century Tiber Creek sewer—a vestigial crease in the seat of power. Ten-foot marble statues, Spirit of Justice and Majesty of Law, flank the entrance.

Tall, thick-waisted, the man avoids the standing clumps of people waiting for the hearing to begin and moves quickly to a box that has been partitioned off with black curtains to the side of the witness tables. His distinctive feature, arresting the attention of everyone who happens to notice his progress to the box, is that he is wearing a black hood with holes cut out for the eyes. It is the kind of hood that executioners wear in the movies.

I look over at EPA's deputy general counsel, Scott Fulton, to get his reaction. A decade younger than me, Scott is a gifted lawyer and tactician, steady-handed, a friend. In the general counsel's office before I arrived there, he led the Agency team that culled the anti-lobbying documents the House had demanded and dealt with the abuse from committee staffers, their weekend calls, yelling, and accusations of withholding, obfuscating, and stalling. Looking up from his last-minute note-making, he grimaces.

Until 10 days ago, when Bill Clinger (R-Pa.), chair of the House Committee on Government Reform and Oversight, announced the hearing, I thought the anti-lobbying skirmish was behind us. In the 14 months since McIntosh's opening shot, the field had shifted momentously. The regulatory reforms of the Contract hit a Senate wall. The new budget ending the shutdown gave EPA a 2% increase instead of a 30% cut, and stripped out the anti-environmental riders.

With public opinion swinging in EPA's direction, Clinton stood with Carol in Rock Creek Park to decry the Republicans' "Dirty Water Act"; Gingrich conceded that his party was "strategically out of position on the environment"; and *Washington Post* columnist Jack Anderson declared Carol "the leading enviro-evangelist of the Clinton administration," having braved Republican contempt and White House indifference.[9]

This battle for EPA's soul was over, although not the war, which would simmer and erupt spasmodically, a blood feud between increasingly hostile factions. The anti-lobbying allegations, tied so closely to the reforms that the Republicans had all but abandoned, were like a morning hangover threatening to last into the afternoon. Did the congressional overseers seriously mean to pursue them? Or was this a last act of political theater before they moved on? Neither Scott nor I believed the hearing would be simply about legislation Clinger had introduced to tighten the Anti-Lobbying Act, legislation that anyone could see had no chance of emerging from the scrum.

The Agency had shuttled 40,000 pages of documents to the Hill. Committee members and staff had had months to comb through them, find the worst, and hone their attack. Scott and I spent much of the previous two days going over the most sensitive documents—documents that showed environmental groups had told EPA about their lobbying efforts on the Hill, asked for our plans, and sought information from EPA that would assist their efforts.

There were ways of looking at this evidence that did not offend the Anti-Lobbying Act. But there were other ways of looking at it too. We supposed that McIntosh and his chief collaborator, John Mica, a conservative representative from Florida, would use these documents to frame a broad-ranging conspiracy between the Agency and its allies to pressure the Hill.

Then, late yesterday came the news of the hooded witness. "If he hauls out new evidence that someone at EPA was asking people to contact Congress," I ask Scott, "what do we say?"

"I don't know what you can say. 'We'll have to look into it?'" We both are wondering whether the committee had dug up a smoking gun. At least the hearing now had a face, albeit one we would never see. It was decided that I would go first among the witnesses for the five agencies summoned, as "Mr. X's" testimony would target EPA, and we needed an immediate rebuttal for whatever press might be in the room.

When Clinger asks Mr. X to rise and swear he will tell the truth, Rep. Henry Waxman (D-Cal.) objects: "This is a new low. How do we know this person? How do we know he has any credibility in his testimony?"[10]

Mr. Clinger: "I would say that this is not a[n] unprecedented action. It was certainly not something we orchestrated for purposes of high theater."

Mr. Waxman: "No, not high theater."

Mr. Clinger: "Or low theater, for that matter."

The committee's ranking minority member, Waxman was scheduled for other events this morning, but came to the hearing when he found out there would be a hooded witness. Brushing past his objection, Clinger swears in the witness, whose electronically disguised voice produces a tremulous "I do."

The witness states that EPA faxed lobbying documents to his trade association that attacked Republican-sponsored legislation. These documents, which he produced for the record, made him angry. He is a working man and a taxpayer, and he doesn't believe his money should be used to advocate positions he doesn't believe in. Mr. X's head

8. Architect of the Capitol, *Rayburn House Office Building*, https://www.aoc.gov/explore-capitol-campus/buildings-grounds/house-office-buildings/rayburn (last visited Nov. 13, 2025).

9. Jack Anderson & Michael Binstein, *Rehabilitating the Environment Issue*, Wash. Post (Mar. 7, 1996), https://www.washingtonpost.com/archive/local/1996/03/07/rehabilitating-the-environment-issue/332d999f-a359-4be2-a667-5d9ec442601d/; William J. Clinton, Remarks on Clean Water Legislation (May 30, 1995), https://www.presidency.ucsb.edu/documents/remarks-clean-water-legislation.

10. References and dialogue excerpts are to the transcript of *Hearing Before the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1996).

shows above the partition as he speaks; the pulse of his breath puffs the hood in and out. His altered voice is falsetto, clipped, hard to understand, even harder to take seriously. I think of Alvin and the Chipmunks.

He believes that the Agency was telling him to support its position or face less favorable treatment for his organization or its members, which are small businesses. He is afraid if his identity is known that the Agency will retaliate for his speaking out. The Agency committed a crime. He doesn't know why nothing is being done.

When it's Waxman's turn to question, he asks Mr. X: "You indicate in your written statement that you feel intimidated because you got this fax. Have you been physically threatened in any way?"

"No, sir."

"Has anybody in your family been threatened?"

"No, sir."

"Are you under a witness protection program anywhere?"

"No, sir. I think I've explained why we have concerns. The agencies can very subtly affect our businesses."

I have a flash of sympathy for Mr. X: I see his anger at these documents, the insinuations of a powerful agency with which he must deal, and understand why he wants to stay anonymous, as awkward as that turns out to be. He did not tell his association that he intended to testify because he believed the members would think it too risky. He had a family. He wanted to have a job tomorrow. He was putting himself on the line.

That fellow-feeling vanishes when it's time for me to testify, and I pick at the wound that Waxman has opened. What exactly had happened to Mr. X? He received some materials from EPA with the Agency's views on legislative proposals in Congress, materials that many others received. These documents did not suggest he contact Congress. No one from EPA talked to him about these documents or tried to coerce him.

Nothing bad happened. No law was broken. The Agency was doing what it ought to be doing—providing its views to the public on important legislation. No one has to agree with us, and many don't. We expect debate. That's the give-and-take of the democratic process. No one except Mr. X seems to have trouble coming forward to register their views.

While the Agency witnesses offer their five minutes each, Mica and McIntosh drift conspiratorially in and out of the hearing room. I am relieved when they leave, wishing they had somewhere else to be, but am inured to their return. What do they do in the back rooms—connive with staff on their next round of questions, joke about Mr. X? Mica's eyes are close-set, which gives him a shifty look. Not unlike mine.

"Really," Mica pounces when it's his turn, we "just become more and more appalled, more shocked, more outraged every time, particularly EPA."

Particularly, he is outraged by a sentence written by an EPA staffer in an internal report, commenting on financial support for environmental outreach by the National Parent Teacher Association (PTA). The sentence reads: "The PTA could become a major alley [sic] for the Agency in preventing Congress from slashing our budget, but their voices need to be heard."[11] This would be the smoking gun, federal funding linked to the PTA's lobbying for EPA appropriations.

But a second memo records that the staffer who wrote the first memo spoke only for themselves in imagining the PTA a budget ally. They had not asked the PTA or any other outside organization to contact Congress. The same memo records that the employee was counselled against even the appearance of using a recipient of EPA funds to approach Congress, and was told to meet with their superior to discuss their legal obligations under the Anti-Lobbying Act.[12]

Mica's rage migrates to the adequacy of the remedy. In a House appropriations hearing, he fumes, the Administrator reported that the employee in question had been reprimanded. Counseling, lessons learned, an Anti-Lobbying Act tutorial—this does not sound like a reprimand to him. "Does this sound like a reprimand to you?"

"I think we are into an arena of talking about possible, it appears, or actual action taken against an employee. I'm concerned that there are Privacy Act concerns relating to that employee." He asks to know more about action taken against the employee, and I agree to provide it, consistent with the employee's rights. He suspects the memos are a scheme to erase the crime by reinterpreting EPA's original intent.

"If I may respond on just one point," I say, reading a note Scott has just slipped in front of me, too good to let pass, "the grants that we give to PTA and other organizations preclude any moneys we give from being used for lobbying purposes."

The Republican members plant documents for comment by the witnesses, and we pick our way through them like sappers in a minefield. We sever outreach from lobbying. (Q. "So you are indicating that these materials were used to generate public opposition to the legislation, are you not?" A. "These were used to communicate the agency's views.") Fall back on truisms. (Q. "If this information were given to outside groups for lobbying . . . , do you think that creates . . . some illegality under the current statutes?" A. "If this were part of a substantial grassroots lobbying campaign that called on the public to contact Congress there would certainly be an issue under the Anti-Lobbying Act.") Plead honest ignorance—of the document, its intent, its use. We agree to get back to the committee, again and again.

After five hours it is all over, and the witnesses stand, smiling, recovering ourselves. When my arms drop to my sides, I feel the dampness against my ribs where the sweat dripping from my armpits has spattered. I thank Scott for his help and, silently, the apt, acerbic Waxman.

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11. Memorandum from Director, Enforcement Capacity and Outreach Office, to Senior Communications Specialist, U.S. EPA (Mar. 21, 1996), reprinted in *Hearing Before the H. Comm. on Gov't Reform & Oversight*, *supra* note 10, at 108-09.
12. *Id.*

IV. Rayburn House Office Building, March 1998

Alarmed that human-caused emissions of carbon dioxide (CO_2) and other greenhouse gases were rapidly warming the planet, the world community in 1992 declared climate change "a common concern of mankind," and set a sweeping objective of preventing "dangerous anthropogenic interference with the climate system."[13] To give teeth to this objective, the United States and other developed countries pledged in the 1997 Kyoto Protocol to reduce their greenhouse gas emissions by targeted amounts.[14]

Because it imposed binding limits only on developed countries, excusing countries like China and India with large and growing emissions but less-advanced economies, the Protocol faced heavy domestic resistance and the Senate expressed virtually unanimous opposition to it. Facing certain defeat, the White House did not send the Protocol for Senate ratification and promised not to implement it without the Senate's imprimatur. Suspicion ran rampant in many quarters, however, including among congressional Republicans, that the Administration, and EPA in particular, were surreptitiously planning to carry it out.

Even if EPA had wanted to regulate emissions to meet the Kyoto targets, it was not clear the Agency had the legal authority to do that. The Clean Air Act (CAA) lacked provisions tailored to climate regulation. Some environmental groups argued that the Act applied to greenhouse gases as well as conventional air pollutants, but the Agency had not adopted that view, and deregulatory and anti-climate factions scoffed at it. In the absence of regulatory authority, EPA had little more than voluntary programs, working with businesses to improve energy efficiency and reduce emissions, and Congress showed no interest in giving it that authority. Hearings before a House appropriations subcommittee in March 1988 would start to undo that knot.

The subcommittee room was dense, warm with the heat of crowded bodies. Carol sat facing Subcommittee Chair Jerry Lewis, an affable white-haired California Republican. Camped behind her were rows of EPA political appointees and budget staff, there to answer any questions she could not, although her minute grasp of the Agency's budget and programs assured we would have largely ornamental status. In its second day, the hearing wandered through disjointed topics—state air pollution plans, the nation's water quality, the safety of chemicals, visibility in the Grand Canyon.

Rep. Tom DeLay (R-Tex.), House majority leader, subcommittee member, and former pesticide formulator, appeared, vanished, and reappeared. DeLay was known for keeping a bullwhip coiled on his office desk. Crusading for the Contract With America, he had branded EPA the "Gestapo of the government, one of the major clawholds that the government has maintained on the backs of our constituents."[15] He insisted that dichlorodiphenyltrichloroethane (DDT), which the Agency banned in 1975 to stave off extinction of the bald eagle and other raptors, was harmless. "He was an exterminator," Carol would remind her audiences, a favorite punchline.

Yesterday, the first day of the hearings, DeLay had badgered Carol on EPA's climate policies, insinuating a clandestine plot to implement the Kyoto Protocol. There was no backdoor to Kyoto, she answered. The president had given his word, and EPA would honor that.[16]

Today, when he entered the room, DeLay was studying a document and took his seat slowly, still intent on the pages he was holding. Through EPA's own writings he was about to expose, he must have believed, the secret plan to regulate climate emissions that Carol the day before had testified did not exist.

Mr. DeLay: "The March 6, 1998, issue of the publication called, 'Inside EPA,' contains an article referring to a memorandum allegedly prepared by someone inside EPA which asserts that the EPA had the authority under the Clean Air Act to regulate carbon dioxide emissions.

"Have you seen or otherwise been informed of any such memorandum?"

Ms. Browner: "First of all, I want to make very clear that 'Inside EPA' is a private publication. It is not a product of the Environmental Protection Agency. It is a group of reporters like any other group of reporters who cover EPA."

Mr. DeLay: "Not a product of the agency?"

Ms. Browner: "No. There is a lot of confusion about this. People think we put it out. Rest assured, if we put it out, I would get better press in it. [Laughter.]"

She had not seen the leaked memo or memos—there seemed to be more than one—until the previous week, when they surfaced in *Inside EPA* and a Washington newspaper. She had not requested the memos. She did not know who in EPA had requested them. She did not know that any decision was under consideration. But she was sure there had been "no decisions based on these memos. I make the decisions."

Mr. DeLay (reading to Browner from one of the leaked documents): "'EPA currently has authority under the Clean Air Act to establish pollution control requirements for all four pollutants of concern from electric power generation, nitrogen dioxide, sulfur dioxide, carbon dioxide, and mercury.'

"Insofar as that statement refers to carbon dioxide, do you as the Administrator agree with that statement?"

Ms. Browner: "That is a general summary statement about authorities provided in the Clean Air Act which I would agree with."

Mr. DeLay: "Would you get me a legal opinion on that."

Ms. Browner: "Certainly."

13. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994).
14. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 148 (entered into force Feb. 16, 2025).
15. Bruce Burkhard, *Year in Review: Congress vs. Environment*, CNN (Dec. 29, 1995), http://www.cnn.com/EARTH/9512/congress_enviro/.
16. References and dialogue excerpts are to the transcript of *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 105th Cong. (1998) (U.S. EPA).

The memo being quoted by DeLay was written by David Doniger, a talented and savvy climate lawyer in EPA's air office who represented EPA in an interagency working group on energy policy. Intended for the internal deliberations of the workgroup, it had somehow found its way into the public domain. Although Carol had not seen the memo, in that moment, facing DeLay, she did not hesitate to embrace the position Doniger had argued. Looking back, she would delight in the irony that DeLay, in demanding a legal opinion on the point, had "no clue that he [would become] the proximate cause of why EPA can regulate greenhouse gas."[17]

I worked on the opinion with Alan Ekart and Alexandra Teitz, attorneys in the Office of General Counsel, and Gary Guzy, Carol's chief of staff, who as general counsel after my departure would reaffirm the opinion and defend it on the Hill. The analysis was straightforward, anchored in the statute's text. Section 202 of the CAA gives EPA authority to regulate any "air pollutant" from new motor vehicles that the Agency has found causes or contributes to "air pollution which may reasonably be anticipated to endanger public health or welfare." "Air pollutant" is "any air pollution agent, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."

The language was capacious enough to include CO_2 emissions from cars, power plants, and other fossil fuel-fired sources. But before the Agency could regulate emissions of CO_2 or other greenhouse gases, it had to find endangerment, a step it had not taken. The authority was inchoate.

The opinion rankled climate skeptics, antiregulatory conservatives, and business interests, who ridiculed the notion that CO_2, a natural component of the atmosphere, could be a "pollutant," with its connotations of impurity and foulness. As DeLay had lectured Carol in the appropriation hearing, "carbon dioxide, rather than being a pollutant as the word ordinarily would be understood . . . is a gas that is absolutely essential for growth, the life of trees and plants, including our nation's agricultural crops."

"As is frequently true in the environment," she replied, sidestepping the lexical trap, "in the right quantities it is a positive influence, and in the wrong quantities it is a negative influence." The science was there. The buildup of CO_2 in the atmosphere stoked by two centuries of escalating use of fossil fuels was shifting the planet's energy balance, raising temperatures on its surface and promising cataclysms if not abated.

> *In May 2006, as the CO_2-as-pollutant issue threaded its way to the U.S. Supreme Court, a Competitive Enterprise Institute (CEI) TV spot aired in 14 U.S. cities, extending the argument made by DeLay and others. It montaged sunbathers in Central Park; a young woman, blond, blowing soap bubbles; children skipping rope; a runner on an ocean beach skirting the incoming waves; a girl in pigtails blowing seeds from a dandelion head; an evergreen forest; a fleeting herd of gazelles, ocean, geyser, sky.*
>
> Voiceover: "There's something in these pictures you can't see. It's essential to life. We breathe it out and breathe it in. It comes from animal life, the ocean, the earth and the fuels we find in it. It's called carbon dioxide, CO_2."
>
> *Oil rig, a Black woman pounding grain with a mortar, a jumbo tractor plowing a field.*
>
> "The fuels that produce CO_2 have freed us from a life of back-breaking labor"—city lights at night, points, circles, lines, vivid purple, pink, orange, red; a welder's arc; a freight train speeding on a curve; a family van filling with children going to school—"lighting up our lives, allowing us to create and move the things we need, the people we love."
>
> *Ominous music. A panel composite of tractor, train, van, welder's arc, city lights.*
>
> "Now some politicians want to label carbon dioxide a pollutant. Imagine if they succeed. What would our lives be like then?"
>
> *Panels blink out, darkness. The girl scattering seeds from the dandelion head again, little parachutes spinning into open sky.*
>
> "Carbon dioxide. They call it pollution. We call it life."

The legal opinion went out as a memo from me to Carol, answering DeLay's request. By itself, it did nothing; it spun and floated like one of the dandelion seeds that would later figure in the CEI spot (see box), a fertile mote at the mercy of the political breezes. The Clinton Administration did not make an endangerment finding.

Bolstered by the opinion, a citizen group petitioned EPA to make the finding for greenhouse gas emissions from cars, but the Agency let the petition go unanswered, concerned that granting it would incite the Republican-controlled Congress and fossil-fuel constituencies. "We could have done it," Carol would say, "but the White House didn't want us to in the end."[18] When it became clear that George W. Bush was the winner over Al Gore in the 2000 election, she did put the petition out for public comment, a move to force the incoming Administration's hand.[19]

V. One First Street, April 2007

"A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the trends are related." These were the first two sen-

17. Interview with Carol Browner (Apr. 21, 2023).

18. *Id.*

19. Jody Freeman, *The EPA and Climate Change*, *in* Fifty Years at the US Environmental Protection Agency: Progress, Retrenchment, and Opportunities 121, 134-35 (A. James Barnes et al. eds., Rowman & Littlefield Publishers 2021); Interview with Carol Browner (Apr. 21, 2023).

tences of Justice John Paul Stevens' opinion for the U.S. Supreme Court in *Massachusetts v. Environmental Protection Agency*.[20] "Calling global warming 'the most pressing environmental challenge of our time,'" the Court continued, "a group of States, local governments, and private organizations alleged . . . that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide."[21] The striking rhetoric of the majority opinion's opening paragraphs, before the Court took step one to analyze the law, marked the case's symbolic importance: a declaration by the nation's highest judicial body—infallible if only because final, as Justice Robert Jackson once said—that anthropogenic climate change was real, and it was serious.

The Bush EPA had taken the bait left by the Clintonites. It reversed the legal opinion on EPA's authority over CO_2 and denied the citizen group's petition, citing its new opinion that it lacked authority to regulate greenhouse gas emissions and arguing that even if it had authority, granting the petition at this time would be unwise. The denial gave states and public interest groups a foothold for judicial action, and at the end of a winding path of litigation, the case was before the Court on two issues: whether EPA had the authority to regulate climate emissions and, if so, whether its reasons for refusing to do so were sound.

After deciding as a preliminary matter that the case was properly before it, the Court had "little trouble concluding" that the CAA gave EPA authority to regulate greenhouse gases. Its analysis followed the logic of the Agency's original legal opinion—the statute's logic. The "sweeping definition of 'air pollutant' . . . embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'"[22] "Unambiguous" on this point, the statute foreclosed the Agency's revisionist reading. Brushing aside EPA's host of backup reasons for denying the petition, the Court sent the matter back to the Agency to decide the endangerment question on the science.

Justice Antonin Scalia dissented, quipping in characteristic fashion that the Court's reading of the definition of "air pollutant" was capacious enough to include "*everything* airborne, from Frisbees to flatulence."[23] Drawing on the dictionary definition (from his favored *Webster's Third*) of "pollute"—"to make impure or unclean"—he would have parsed the statute to exclude greenhouse gases, which, he wrote, are not impurities in the air at ground level. A more sophisticated variant of DeLay's argument and CEI's, Scalia's view failed in the Court by a single vote.

The Court christened the Agency's original legal opinion the "Cannon memo." But it could just as well have been the "Browner memo" or the "Tietz memo" or the "Doniger memo." Or even the "DeLay memo." By luck and the work of skilled and determined lawyers, the fragile seed had found fertile ground; commentators hailed *Massachusetts* as the most important environmental law decision ever. Its cultural moment was undeniable. But its practical effect, as well as its longevity, was uncertain.

Would Congress overrule the decision by amending the CAA? Would it blossom into effective policy? Would anti-climate action political masters at EPA be able to avoid a meaningful exercise of their newly consecrated authority? What measures were possible under the Act, a 1970s statute not tailored to combat problems at the scale of climate change? And how would domestic measures, if undertaken, combine with steps by other countries to make progress on an issue that required, more than any other, a global solution? The contingencies seemed endless. The timeline of climate change was centuries; how long would it take to arrive at stable and effective measures to counter it? In this lifetime maybe, or the next.

VI. Epilogue, 2026

The seeds of the present dissensus were there in the 1990s, as they had been in the early years of the Reagan Administration: the high ambitions of environmentalists and their supporters; the increasingly bold sallies by businesses and their conservative political allies; the continued crumbling of the environmental consensus that had seemed to unite major political players in the early 1970s; the larger fracturing of civil society and assaults on foundational understandings that have long channeled our political life.

This dissensus has born bitter fruit, and the harvest seems far from over. The second Donald Trump Administration has already terminated or ushered out thousands of EPA career personnel; an estimated 25% of the Agency's work force is gone, and more staff cuts are projected.[24] It has pulled back regulations, softened enforcement, and systematically undersold the benefits of the Agency's programs. This blitzkrieg makes the antiregulatory assaults of the past look modest by comparison.

The Administration has taken particular aim at EPA's climate change programs, as the present EPA Administrator vowed with a Crusader's zeal to drive "a dagger straight into the heart of the climate change religion."[25] The Agency has clawed back regulations of greenhouse gases for the transportation and utility sectors, chopped funds for clean energy transition appropriated by the Inflation Reduction Act, and proposed to rescind the endangerment finding, the linchpin of domestic environmental regulation under *Massachusetts*.

Legal arguments EPA now makes in support of its proposed rescission are versions of arguments already considered by the Court in deciding *Massachusetts*, a thinly disguised invitation for the Court to reverse its 2007 deci-

20. 549 U.S. 497, 504-05 (2007).
21. *Id.* at 505.
22. *Id.* at 528-29.
23. *Id.* at 558.
24. Elizabeth Blum & Chris Sellers, *Trump Administration Is on Track to Cut 1 in 3 EPA Staffers by the End of 2025*, Gov't Executive (Sept. 30, 2025), https://www.govexec.com/workforce/2025/09/trump-administration-track-cut-1-3-epa-staffers-end-2025/408455/.
25. Press Release, U.S. EPA, EPA Launches Biggest Deregulatory Action in U.S. History (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history.

sion or limit it so drastically as to make it meaningless. EPA's rescission proposal includes themes from DeLay and CEI that are now echoed widely in the anti-climate discourse: the life-giving functions of CO_2 and the benefits of greenhouse gas-emitting processes, with scant acknowledgement of their costs.

Meanwhile, across a range of federal programs, the Administration has acted to block clean energy initiatives and encourage fossil fuel production and consumption. Responding to this sweeping reversal of U.S. climate change policy, including the country's withdrawal from the Paris Agreement, other nations are putting their climate commitments on hold or abandoning them altogether.

My anecdotal account captures only a few environmental moments in a long and varied string that leads to the present. Its main value may be to affirm what's already apparent to most observers: that the present retrenchment, while dire in its sweep and force, is the latest chapter in a long-running story of surge and countersurge in the environmental wars, which mirror larger conflicts in U.S. political culture. What the past tells us is that we should be careful of accepting any victory or defeat as final.

Environmental concerns will assert themselves again, but to what effect in the long term? A stable regime would seem crucial for real progress on global issues like climate change, ocean degradation, and biodiversity loss. But in the current dissensus, it's hard to visualize the circumstances that might produce a policy equilibrium. Will rapprochement become possible politically only when harms reach catastrophic levels and are effectively irreversible? This joins a growing list of critical tests facing our beleaguered republic and the world community.