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## Deruglatory Riders Redux

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# DEREGULATORY RIDERS REDUX

Thomas O. McGarity\*

*Soon after the 2010 elections placed the Republican Party in control of the House of Representatives, the House took up a number of deregulatory bills. Recognizing that deregulatory legislation had little chance of passing the Senate, which remained under the control of the Democratic Party, or of being signed by President Obama, the House leadership reprised a strategy adopted by the Republican leaders during the 104th Congress in the 1990s. The deregulatory provisions were attached as riders to much-needed legislation in an attempt to force the Senate and the President to accept the deregulatory riders to avoid the adverse consequences of failing to pass the more important bills.*

*This Article examines the deregulatory riders of the 104th Congress and the experience to date with deregulatory riders during the 112th Congress. Although riders are not inherently good or evil, the Article concludes that riders, like the deregulatory riders examined here, that advance narrow special interests over the general public welfare represent bad public policy. The Article examines several methods for discouraging deregulatory riders, but concludes that none of them are likely to be implemented until the public signals its strong disapproval of deregulatory riders.*

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## INTRODUCTION

With much of the world anxiously looking on during the sweltering summer of 2011, the United States barely avoided a worldwide economic disaster as Congress and President Obama struggled to enact legislation to raise the statutory ceiling on the government's debt.<sup>1</sup> The purpose of the debt ceiling when it was established by Congress in 1917 was to force Congress periodically to deliberate over the amount of United States indebtedness and come up with ways to limit it.<sup>2</sup> Because they simply authorize the Treasury to pay debts previously incurred, bills raising the debt ceiling are normally relatively noncontroversial and are often accomplished by attaching a provision raising the debt ceiling to a budget or appropriation bill.<sup>3</sup> However, the 2011 debt ceiling bill provided an ideal vehicle for a determined minority of Tea Party-driven Republicans in the House of Representatives, eager to reduce government spending, to extract concessions from the Obama administration.<sup>4</sup>

It was a clear case of extortion, and the president ultimately capitulated to the undisguised threat to bring on worldwide economic catastrophe: a failure to increase the debt ceiling would force the United States to default

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1. See, e.g., Elizabeth Drew, *What Were They Thinking?*, N.Y. REV. BOOKS, Aug. 18, 2011, at 13, 13.

2. See D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL31967, *THE DEBT LIMIT: HISTORY AND RECENT INCREASES 2-3* (2010).

3. See *id.* at 10-12; Drew, *supra* note 1, at 13. Between March 1962 and the end of 2009, Congress raised the debt ceiling a total of seventy-four times. AUSTIN & LEVIT, *supra* note 2, at 3.

4. Drew, *supra* note 1, at 13.

on its obligations.<sup>5</sup> Days before the deadline, President Obama and House and Senate leaders reached an accord under which the President and the Democratic leaders agreed to \$917 billion in spending cuts over a ten-year period in return for a two-stage, \$900 billion increase in the debt ceiling.<sup>6</sup> Additionally, a twelve-member “Super Congress” would, by December 23, 2011, come up with \$1.5 trillion in additional deficit reduction by cutting operating and entitlement expenses and raising taxes.<sup>7</sup> If that process failed, specified cuts from domestic and defense programs would automatically go into effect.<sup>8</sup> Federal Reserve Board Chairman Ben S. Bernanke stated that the unseemly fight had “disrupted financial markets and probably the economy as well.”<sup>9</sup> Nevertheless, Senate Minority Leader Mitch McConnell (R-Ky.) promised more of the same in the future; the standoff over the debt ceiling provided “the new template” for achieving the Republican Party’s policy goals so long as President Obama remained in the White House.<sup>10</sup>

As the debt ceiling incident suggests, politics in the twenty-first century has become extremely polarized, especially on issues related to the role of government in regulating business activities.<sup>11</sup> Not only is there little agreement on common goals, there is also a much-reduced commitment to civility in political discourse.<sup>12</sup> Few boundaries confine the subject matter of partisan brawls, and the participants recognize few limits on the vitriol expressed in their attacks. In this highly competitive environment, the legislative process has become far more strategic. And for issues with respect to which a substantial number of legislators are unshakenly committed to an ideological or economic goal, negotiation and compromise are not the strategies of choice. For many politicians in important positions in Congress, the object of the legislative process is not to produce legislation that best serves the public interest; the goal is to win. And if political

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5. See Fred Barbash & Richard E. Cohen, *Summer of Strife*, 69 CQ WKLY. 1736, 1736–39 (2011); Michael Hirsch, *Vantage Point: What Just Happened?*, NAT’L J., Aug. 4, 2011, at 8; Robert Schlesinger, *Lessons for the Next Debt Fight*, U.S. NEWS & WORLD REP. (Aug. 12, 2011), <http://www.usnews.com/opinion/articles/2011/08/12/lessons-for-the-next-debt-fight>.

6. *The Debt Ceiling Deal: No Thanks to Anyone*, ECONOMIST, Aug. 6–12, 2011, at 25, 25.

7. *Id.*

8. *Id.*

9. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Federal Reserve Bank of Kansas City Economic Symposium: The Near- and Longer-Term Prospects for the U.S. Economy 12 (Aug. 26, 2011), <http://www.federalreserve.gov/newsevents/speech/bernanke20110826a.pdf>.

10. Schlesinger, *supra* note 5 (quoting Mitch McConnell) (internal quotation marks omitted).

11. See Susan Davis & Major Garrett, *Storm Clouds Ahead*, NAT’L J., Aug. 6, 2011, at 30, 30–31; Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 670–72 (2006).

12. See Jane Harman, *Escape from the Asylum*, NEWSWEEK, Aug. 15, 2011, at 28, 28, 31.

damage can be inflicted on members of the opposing party in the process, so much the better.

In this kind of toxic legislative environment, one of the more effective strategies for securing legislative victories and imposing political pain is the rider, a provision added to an unrelated bill that “rides” the targeted bill through the legislative process and becomes law when the President signs the bill. Since the early nineteenth century, Congress has made policy through such add ons to must-pass legislation like appropriation bills, bills raising the debt limit, or bills that are so politically attractive that supporters will tolerate the riders to ensure that the bill is enacted.<sup>13</sup> Although riders have always played a role in enacting controversial laws, they have become far more common since the 1990s. By attaching riders to appropriation bills and other must-pass legislation, the leadership of the House of Representatives has attempted to avoid presidential vetoes and sidestep the lengthy process of pushing legislation through the authorizing committees that have subject-matter jurisdiction over particular substantive issues.<sup>14</sup>

This Article will examine a particular class of riders that is designed to stall, modify, or eliminate an ongoing regulatory program that is being implemented by a regulatory agency pursuant to duly enacted authorizing legislation. Usually pursued at the behest of affected regulated industries, these “deregulatory riders” threaten to derail ongoing regulatory programs that are highly popular with the general public and therefore not likely to be dismantled through the normal legislative processes. Although riders are sometimes necessary to avoid antimajoritarian congressional roadblocks, when they are used to advance the narrow interests of a regulated industry (or an individual company) in avoiding new or ongoing regulatory programs designed to protect workers, consumers, and the environment, riders are indistinguishable from the legislative “earmarks” that have attracted much criticism in recent years.

This Article will focus on one especially disturbing feature of riders that has been on display during the 112th Congress: their extortionate use by a determined minority of legislators to advance special interests at the

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13. See, e.g., Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 461–63; Lazarus, *supra* note 11, at 674–76. For example, the Gramm-Rudman-Hollings Balanced Budget Act, which has had a profound impact on the congressional budgetary process, was originally introduced as a rider to a joint resolution to raise the debt ceiling. See John F. Hoadley, *Easy Riders: Gramm-Rudman-Hollings and the Legislative Fast Track*, 19 PS: POL. SCI. & POL. 30, 31 (1986). The first significant regulation promulgated by the Consumer Product Safety Commission, a regulation setting safety standards for lawn mowers, generated such a powerful outcry from the industry that Congress passed an appropriation bill rider requiring the agency to weaken the standard. See Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 89, 93–94 (1982).

14. Lazarus, *supra* note 11, at 674–76.

expense of the broader public interest. Part I will offer a brief description of riders. Part II will describe the battles over deregulatory riders during the Clinton administration, which serve as a precedent for the ongoing battles over deregulatory riders during the past two years of the Obama administration (discussed in Part III of the Article). Part III will focus specifically on the recent strategic use of riders by House Republicans to dismantle and redirect two nascent regulatory programs: the Environmental Protection Agency's (EPA) greenhouse gas reduction program and the new Consumer Financial Protection Bureau (CFPB) established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>15</sup> Part IV will then offer a critique of those efforts, highlighting the potential for abuse inherent in the practice of deregulation through riders. Finally, Part V will offer some suggestions for eliminating or mitigating the disadvantages of deregulatory riders in the future.

## I. LIMITATION RIDERS AND LEGISLATIVE RIDERS

Riders come in two broad varieties—limitation riders and legislative riders.<sup>16</sup> The *limitation rider* is associated exclusively with appropriation bills, and it prohibits the relevant agency from expending any of the appropriated funds to engage in a proscribed activity.<sup>17</sup> This is an effective tool because it is unlawful under the Antideficiency Act for any individual to spend monies in contravention of such a command in an appropriation act.<sup>18</sup> A *legislative rider* modifies existing law by amending an existing statute, changing existing common law, or directing a federal agency to take a particular affirmative action (thereby rendering lawful administrative action that might otherwise have been unlawful).<sup>19</sup> In the House of Representatives, the distinction between limitation and legislative riders has been incorporated into the so-called “Ramseyer Rule,” which requires committee reports on bills to show in detail how the bill, including legislative riders, will affect existing law.<sup>20</sup> By convention, limitation riders (which always

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15. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

16. Lazarus, *supra* note 11, at 635–36.

17. *Id.*; Devins, *supra* note 13, at 461.

18. 31 U.S.C. § 1512 (2006). Because the appropriations process has over the years become complex to the point of incomprehensibility, involving multiple committees, bills, and procedural stages, those who understand it well can easily use it to their own ends. See generally Jason M. Patlis, *Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 262–66 (2003).

19. Lazarus, *supra* note 11, at 636.

20. CLERK OF THE H.R., 112TH CONG., RULES OF THE H.R. r. XIII(3)(e) (2011), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

originate in the House Appropriations Committee) are not subject to the Ramseyer Rule.<sup>21</sup>

Although the bulk of riders—both limiting and legislative—are attached to appropriation bills, Congress has imposed action-forcing mechanisms in other kinds of legislation that can produce similar opportunities for attaching unrelated riders.<sup>22</sup> The statute requiring Congress to approve increases in the debt ceiling provides an ideal vehicle. When trying to reauthorize existing programs that by statute expire on a certain date, authorization committees can find themselves operating under the same pressures as appropriations committees to allow extraneous riders.<sup>23</sup> Likewise, bills introducing tax breaks or reauthorizing tax advantages can become vehicles for extracting concessions from the bill's supporters on matters that may or may not be relevant to the purpose of the tax legislation.<sup>24</sup>

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21. For an example of the Ramseyer Rule in action, see H.R. REP. NO. 112-151, at 134–39 (2011), listing changes to the law made by legislative riders in compliance with the rule but without mention of the limitation riders in the related bill.

22. See, e.g., SBIR/STTR Reauthorization Act of 2011, S. 493, 112th Cong. (2011).

23. A good example is the Prescription Drug User Fee Act of 1992 (PDUFA), Pub. L. No. 102-571, 106 Stat. 4491 (1992), which required applicants for new drug approvals by the Food and Drug Administration (FDA) to pay substantial “user fees” to the FDA to be devoted exclusively to new drug reviews. The bill was intended to be an experiment in speeding up the approval process, but it provided that the user fee program would expire after five years if Congress did not renew it. See PHILIP J. HILTS, PROTECTING AMERICA'S HEALTH 279 (2003); Bruce N. Kuhlik, *Industry Funding of Improvements in the FDA's New Drug Approval Process: The Prescription Drug User Fee Act of 1992*, 47 FOOD & DRUG L.J. 483, 487–88 (1992); Richard A. Merrill, *The Architecture of Government Regulation of Medical Products*, 82 VA. L. REV. 1753, 1795–96 & n.131 (1996). When the Act came up for renewal in 1997, Congress enacted the Food and Drug Administration Modernization Act of 1997 (FDAMA), Pub. L. No. 105-115, 111 Stat. 2296 (1997). In the process, the drug industry extracted a number of additional concessions from FDA as a condition to allowing the user fees to continue, most of which were deregulatory in nature. For example, the statute “streamlined” the agency's good manufacturing procedures, allowed manufacturers to circulate peer-reviewed articles from medical journals to promote drugs for unapproved uses, required FDA to use the “least burdensome” procedures for approving medical devices, and eliminated the mandatory post-market surveillance requirements for device manufacturers. *Id.*; see also STEPHEN J. CECCOLI, PILL POLITICS 159 (2004) (discussing the circulation of peer-reviewed articles); COMM. ON POSTMARKET SURVEILLANCE OF PEDIATRIC MED. DEVICES, INST. OF MED., SAFE MEDICAL DEVICES FOR CHILDREN 82, 95 (Marilyn J. Field & Hugh Tilson eds., 2005) (discussing less burdensome procedures and elimination of post-market surveillance).

24. See, e.g., Jonathan Weisman, *Tobacco Rider Adds Fire to Debate Over Corporate Tax Bill*, WASH. POST, Oct. 6, 2004, at A4 (describing an attempt to add a rider authorizing FDA to regulate tobacco as “the most significant corporate tax legislation in two decades”). The must-pass bill that becomes the vehicle for the riders is “literally akin to a Christmas tree on which enough members of Congress have hung their favorite ornaments with little regard (or perhaps even knowledge) of what else is on that same tree.” Lazarus, *supra* note 11, at 662.

Legislative riders are more controversial than limitation riders for a number of reasons, not the least of which is the fact that they are more likely to intrude into the jurisdictions of the authorization committees from which substantive legislation is supposed to emerge.<sup>25</sup> Limitation riders tend to be less worrisome because they remain in effect for only a single fiscal year and face expiration on an annual basis. In the context of entitlement programs and licensing regimes, however, limitation riders can achieve a surprising degree of permanence. For example, a limitation rider prohibiting EPA from expending any appropriated monies to require greenhouse gas reductions for the purpose of climate control in any Clean Air Act (CAA) would have a semi-permanent effect, extending for the life of permits issued that year.<sup>26</sup>

## II. DEREGULATORY RIDERS IN THE CLINTON YEARS

The current battles over deregulatory riders in the 112th Congress are by no means unprecedented. The strong proponents of deregulation in the House of Representatives have adopted many of the strategies of the Republican-controlled House during the last six years of the Clinton administration. Deregulatory riders played a prominent role in the highly-publicized budget battles of the 104th Congress, where their advocates were only moderately successful. The proponents of deregulatory riders, however, quietly persisted in their efforts through the 105th and 106th Congresses, with some notable successes. Their successors in the 112th Congress have carried the lessons learned during that period of mixed government forward into the ongoing battles described in Part III.

The 104th Congress was assembled in the wake of the 1994 off-year elections that put the Republican Party in control of the House of Representatives for the first time in a generation.<sup>27</sup> Hitting the ground running, the House Republicans conducted an intense campaign to fulfill promises they had made in the “Contract with America” to enact several ambitious

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25. Lazarus, *supra* note 11, at 636.

26. The appropriation bill for FY 2012 that emerged from the House Appropriations Committee contained such a rider. See H.R. REP. NO. 112-151, at 115–16 (2011). As a practical matter, this rider exempted any new permit applicant from EPA’s existing requirement that large sources install the best available control technology for reducing greenhouse gas emissions for the relevant year. See *id.* Presumably, applicants receiving a permit during that year would not have to control greenhouse gas emissions until some year in which Congress failed to renew the rider. In my view, this was not a limitation rider, because it changed existing law for a year, rather than limiting EPA’s ability to implement existing law with appropriated funds. But the Appropriations Committee apparently did not view it as a legislative rider, because it was not included in the section of the Committee’s report that it devoted to substantive changes in the law under the Ramseyer rule. See *id.* at 134–39.

27. See LINDA KILLIAN, THE FRESHMEN 3–4 (1998).



pieces of omnibus regulatory-reform legislation during the first 100 days that Congress was in session.<sup>28</sup> Although they delivered on their promise, the omnibus legislation for the most part died in the Senate.<sup>29</sup> A second wave of amendments to specific statutes like the Clean Water Act (CWA) and the Occupational Safety and Health Act (OSHA) also foundered in the Senate, where the chairpersons of the relevant committees were moderate Republicans not interested in advancing radical reforms. Stymied by both the sixty-vote majority needed to overcome a threatened filibuster in the Senate and by President Clinton's promise to veto bills that cut back on health, safety, and environmental protections, the House leadership adopted a strategy of attaching deregulatory riders to appropriation bills.<sup>30</sup>

### *A. Deregulation in the Authorization Committees*

Initially, the House leadership attempted to enact deregulatory legislation through the normal procedures employing the relevant authorization committees.<sup>31</sup> The authorization committees in the House held a number of hearings on proposals to repeal or radically amend several of the bedrock safety and environmental statutes. Two of the statutes that were targeted for the most comprehensive rewrites were the CWA and the OSHA.

#### 1. Amending the Clean Water Act

Viewed by many environmentalists as "one of the nation's most successful environmental laws,"<sup>32</sup> the CWA's past emphasis on "technology-based" standards made it a prime target of industrial and municipal dischargers,<sup>33</sup> and its wetlands protections were anathema to private real estate developers

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28. See *id.* at 3–12.

29. See Thomas O. McGarity, *Deflecting the Assault: How EPA Survived a "Disorganized Revolution" by "Reinventing" Itself a Bit*, 31 *Env't. L. Rep.* (Env't. Law Inst.) 11,249, 11,250–55 (Nov. 2001).

30. See Fred Barnes, *Zero Hour*, *NEW REPUBLIC*, Jan. 23, 1995, at 18, 18–19; Jeff Shear, *Pain's the Game*, 27 *NAT'L J.* 108, 111 (1995).

31. Lazarus, *supra* note 11, at 641–42.

32. CLAUDIA COPELAND, *CONG. RESEARCH SERV.*, 95-427 ENR, *CLEAN WATER: SUMMARY OF H.R. 961, AS PASSED* (1995), available at <http://www.cnie.org/NLE/crsreports/water/h2o-5.cfm>.

33. See, e.g., *Reauthorization of the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Res. & the Env't of the H. Comm. on Transp. & Infrastructure*, 104th Cong. 1804–23 (1995) (statement of Neil Jaquet, Manager, Water Resource Development, Coors Brewing Company); *id.* at 601–03 (testimony of Winifred Perkins, Edison Electric Institute); *id.* at 223–25 (testimony of Skip Missimer, American Forest and Paper Association); *Industry Coalition Details Reforms Sought Under Revised Clean Water Act*, 26 *Env't Rep.* (BNA) 2071 (Mar. 1, 1996).

and property rights activists.<sup>34</sup> During the frenetic first 100 days, House Transportation and Infrastructure Committee Chairman Bud Shuster (R-Pa.) introduced a bill that would have rewritten all of the core provisions of the twenty-five-year-old statute, required EPA to rewrite existing standards and limitations to comply with a new cost-benefit decision criterion, and replaced EPA's wetlands program with a less protective program.<sup>35</sup>

Environmental groups complained about the procedures under which the House subcommittee marked up the bill, arguing that the "closed door, private sessions"<sup>36</sup> offered "industry and special interests [the opportunity] to craft their dream bill."<sup>37</sup> Confirming these allegations, the tag line at the top of the faxed copies of the draft legislation sent to committee Democrats indicated that it had originated in an industry law firm.<sup>38</sup> Despite the protests, however, the committee approved the Shuster bill with only minor amendments, and the bill easily passed the full House.<sup>39</sup>

Calling the bill the "Dirty Water Act," Clinton promised to veto the bill if it passed the Senate in its present form.<sup>40</sup> Additionally, Senate Environment and Public Works Committee Chairman John Chafee (R-R.I.) did not convene a hearing until mid-December, and that hearing was only called to obtain views on what issues should have priority in any Senate rewrite effort.<sup>41</sup> The bill died a quiet death in the Senate committee.

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34. See, e.g., *Reauthorization of the Federal Water Pollution Control Act*, *supra* note 33, at 924–41 (statement of Virginia Albrecht, Partner, Beveridge & Diamond); *id.* at 836–37 (testimony of Ronald Anderson, American Farm Bureau Board of Directors); JEFFREY A. ZINN & CLAUDIA COPELAND, CONG. RESEARCH SERV., 95028: WETLAND ISSUES 4 (1997).

35. See H.R. REP. NO. 104-112, at 184 (1996); COPELAND, *supra* note 32 (detailing H.R. 961's alterations to core provisions of the CWA); ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 226 (1997); ZINN & COPELAND, *supra* note 34, at 8–9; *Provisions in CWA Rewrite Bill 'Troubling,' EPA Water Chief Says at Subcommittee Hearing*, 25 Env't Rep. (BNA) 2031 (Feb. 24, 1995).

36. *House Transportation Committee Excludes EPA, Environmental Groups From Panels Revising CWA*, 25 Env't Rep. (BNA) 2298 (Mar. 17, 1995).

37. *Oil Group Is Part of Water Act Review*, 73 Oilgram News (Platts) No. 62, at 5 (Mar. 30, 1995).

38. Gareth Cook, *Laws for Sale*, WASH. MONTHLY, July 1995, at 44, 46.

39. H.R. REP. NO. 104-112, at 187–200 (1996) (voting records of Committee on Transportation and Infrastructure); 141 CONG. REC. H5,013 (daily ed. May 16, 1995) (voting record of H.R. 961).

40. DREW, *supra* note 35, at 226 (noting Clinton's reference to the "Dirty Water Act").

41. See *Chafee Indicates Preference for Narrow Bill as Municipal Concerns Aired at Senate Hearing*, 26 Env't Rep. (BNA) 1565 (Dec. 22, 1995).

## 2. Amending the Occupational Safety and Health Act

The Occupational Safety and Health Administration (OSHA) had been the poster child of the regulatory reform movement since the early days of the Carter administration.<sup>42</sup> Horror stories abounded of OSHA inspectors citing employers for allowing workers to chew gum on jobs, for failing to provide warnings on dishwashing liquid, and for other minor infractions of OSHA regulations.<sup>43</sup> The chairman of the Subcommittee on Workforce Protections of the Economic and Educational Opportunities Committee was Representative Cass Ballenger (R-N.C.), a highly vocal critic of OSHA since his years as the owner of a plastic bag manufacturing business.<sup>44</sup> After conducting a series of hearings on alleged OSHA abuses in the spring of 1995, Ballenger introduced a bill that would have drastically changed how OSHA promulgated and enforced occupational safety and health standards.<sup>45</sup> The Department of Labor responded with a report predicting that the Ballenger bill would cause workplace injuries to increase by 50,000 per year and subject 50,000 more workers per year to increased risk of contracting work-related diseases.<sup>46</sup>

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42. See generally ROBERT STEWART SMITH, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, *THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ITS ACHIEVEMENTS* (1976); Philip J. Harter, *In Search of OSHA*, REG., Sept./Oct. 1977, at 33. According to a June 1996 survey of the Chamber of Commerce membership, American businesses believed that OSHA regulations were by far the most burdensome of all the federal rules employers faced. *OSHA Rules 'By Far' Most Burdensome, National Chamber of Commerce Survey Says*, 26 O.S.H. Rep. (BNA) 113 (July 3, 1996). A bumper sticker described OSHA as "America's KGB," busily turning the "American Dream into a Nightmare." Michael Weisskopf & David Maraniss, *The Hill May Be a Health Hazard for Safety Agency*, WASH. POST, July 23, 1995, at A1.

43. See, e.g., *Corrections Day Policy and Procedures: J. Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Res., & Regulatory Affairs of the H. Comm. on Gov't Reform & Oversight & the Subcomm. on Rules & Org. of the H. of the H. Comm. on Rules*, 104th Cong. 18 (1995) (statement of Hon. Tom DeLay, Majority Whip of the H.R.); *Reich's Denial of OSHA 'Chewing Gum' Rule Exemplifies Regulatory Confusion, Group Says*, 24 O.S.H. Rep. (BNA) 1725 (Jan. 25, 1995). But see *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1996: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 104th Cong. 70 (1995) (statement of Joseph A. Dear, Assistant Secretary, Occupational Safety & Health) (denying horror stories).

44. See DAVID MARANISS & MICHAEL WEISSKOPF, "TELL NEWT TO SHUT UP!" 57-58 (1996); Kirk Victor, *Sitting Duck*, 27 NAT'L J. 1999, 2000-01 (1995).

45. Safety and Health Improvement and Regulatory Reform Act of 1995, H.R. 1834, 104th Cong. (as introduced June 14, 1995); see also *Dear Calls Republican Plan an Invitation for Non-Compliance*, 24 O.S.H. Rep. (BNA) 2442 (May 17, 1995) (describing the administration's position); *OSHA Berated by Industry Representatives Before House Oversight Subcommittee Hearing*, 24 O.S.H. Rep. (BNA) 1876 (Feb. 22, 1995) (discussing the hearings held by Representative Ballenger).

46. *DOL Report Claims Congressional Efforts Would Reverse 25 Years of Job Safety Progress*, 25 O.S.H. Rep. (BNA) 364 (Aug. 2, 1995).

In the Senate, Senator Nancy Landon Kassebaum (R-Kan.) chaired the Labor and Human Resources Committee. A moderate Republican with an independent streak on social issues,<sup>47</sup> Senator Kassebaum was among the senators who introduced a more “moderate” OSHA reform bill.<sup>48</sup> Vice President Al Gore announced in a February 19, 1996 speech to top union officials that the President would veto the bill.<sup>49</sup> By the time the Senate committee completed its markup on March 4, there were less than fifty legislative days left in the session. Preoccupied with an ongoing budget battle, and aware of the veto threat that was hanging over the Kassebaum bill, Senate leadership apparently decided not to bring it to the floor for a vote.

### B. Deregulation Through Riders

By the fall of 1995, it was becoming clear that omnibus regulatory reform legislation was dead and that the efforts to change the agencies’ substantive mandates were unlikely to succeed. After pouring a great deal of effort into attempts to enact comprehensive amendments to the CWA and the OSHA Act, it was clear to supporters of deregulation that the normal legislative processes would not yield the radical statutory change that they had in mind. Public interest groups had used the hearings to feature victims of irresponsible corporate conduct and to attack the sponsors of the legislation.<sup>50</sup> More importantly, President Clinton’s promise to veto radical changes made some Republicans in the Senate wary of voting to gut longstanding safety and environmental statutes. The House leadership therefore turned its attention to an alternative strategy—the appropriation rider. House Majority Leader Dick Armey (R-Tex.) instructed the chairpersons of the authorization committees that the preferred strategy was to move substantive legislation through the appropriations process.<sup>51</sup>

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47. *Senate to Address OSHA in Full Committee Following GOP’s Elimination of Labor Panels*, 24 O.S.H. Rep. (BNA) 1628 (Jan. 11, 1995); *Nancy Landon Kassebaum*, WOMEN IN CONGRESS, <http://womenincongress.house.gov/member-profiles/profile.html?intID=125> (last visited Nov. 19, 2011).

48. *Occupational Safety and Health Reform and Reinvention Act*, S. 1423, 104th Cong. (as introduced Nov. 17, 1995); *Kassebaum to Move Bill in September; More Moderate Approach Expected in Committee*, 25 O.S.H. Rep. (BNA) 508 (Aug. 30, 1995).

49. *President Will Veto GOP Bills, Gore Tells Top Labor Union Officials*, 25 O.S.H. Rep. (BNA) 1292 (Feb. 21, 1996).

50. See, e.g., *Hearings on Occupational Safety and Health (OSHA): Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 111–19 (1995) (statement of Thomas Donahue, Secretary-Treasurer, AFL-CIO); Lazarus, *supra* note 11, at 641–42.

51. Lazarus, *supra* note 11, at 676–77.

## 1. FY 1995 Rescissions

The first potential must-pass vehicle to serve as a carrier for substantive riders was a bill to rescind previously appropriated FY 1995 monies in order to provide funds for certain emergencies (for example, disaster relief for victims of the 1994 California earthquake and the 1995 Oklahoma City bombing) and to make a “down payment” on deficit reduction goals.<sup>52</sup> The House Appropriations Committee reported out a bill containing \$10–15 billion of cuts to existing programs.<sup>53</sup> It also added several deregulatory riders to the bill, the most controversial of which required the Forest Service and the Bureau of Land Management to sell 6.2 billion board feet of publicly-owned “salvage” timber over two years, which would double the yearly yield, and waived all objections under existing environmental laws.<sup>54</sup> The committee also added three air pollution riders offered by committee member Representative Tom DeLay (R-Tex.). The first two would have prohibited EPA from requiring states to implement centralized automobile inspection and employer-based commuter reduction programs in heavily-polluted areas. The third would have rescinded a court-ordered implementation plan prepared by EPA for Los Angeles.<sup>55</sup>

Representative DeLay proposed another last-minute rider on the floor of the House in a fit of pique over a suggestion by an OSHA employee that the agency would continue to work on its “ergonomics” standard to protect employees from repetitive motion injuries even if the House passed a rule-making moratorium.<sup>56</sup> After vilifying the agency on the floor, DeLay proposed a rider to stop the standard in its tracks.<sup>57</sup> The rider easily passed.<sup>58</sup>

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52. Jerry Gray, *Negotiators Agree on Cuts, but Clinton Veto Is Expected*, N.Y. TIMES, May 17, 1995, at A1.

53. See Jerry Gray, *Republicans Begin Deep Budget Cuts in 5 House Panels*, N.Y. TIMES, Feb. 23, 1995, at A1.

54. Tom Kenworthy & Dan Morgan, *Panel Would Allow Massive Logging On Federal Land*, WASH. POST, Mar. 3, 1995, at A1. See generally Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 465–86 (1997); Mary Christina Olmsted & Chad Hanson, Op-Ed., *The Gorton-Hatfield Forest Giveaway*, N.Y. TIMES, Apr. 30, 1995, at E15. The rider would have overturned “decades of environmental policy and compromise relating to logging in sensitive old growth forests of the Pacific Northwest.” Zellmer, *supra*, at 465–66.

55. See *Republican Budget Proposal Would Slash \$1.3 Billion from Drinking Water Loan Fund*, 25 ENV'T REP. (BNA) 2116 (Mar. 3, 1995).

56. See *OSHA Ergonomic Rulemaking Targeted; Additional \$3.5 Million Cut in House Vote*, 24 O.S.H. REP. (BNA) 2110 (Mar. 22, 1995).

57. 141 CONG. REC. H3,250–54 (daily ed. Mar. 15, 1995) (remarks of Representative DeLay).

58. *Id.* at H3,254; see also *OSHA Ergonomic Rulemaking Targeted; Additional \$3.5 Million Cut in House Vote*, *supra* note 56.

In the Senate, the same salvage timber and ergonomics riders were attached to the bills.<sup>59</sup> The Senate also added a rider to prohibit the Department of Agriculture from delineating additional agricultural lands as wetlands, unless requested by the landowner.<sup>60</sup> The Conference Committee retained all of the riders from both houses.<sup>61</sup>

President Clinton then exercised the first veto of his administration to kill the rescissions bill on June 7, 1995.<sup>62</sup> The President singled out the timber salvage rider as an undesirable aspect of the bill.<sup>63</sup> In full-page ads in the *New York Times* and the *Washington Post*, environmental groups said, "Thank You, Mr. President, for Standing Tall!"<sup>64</sup>

The celebration was short lived. President Clinton and the Republicans worked through late June and early July to produce a "compromise" bill that reinstated \$0.5 billion of the original \$17 billion in cuts and left all of the riders intact.<sup>65</sup> The President signed it on July 27, 1995.<sup>66</sup> Concluding that the President had yielded to the Republicans' threat to withhold disaster relief monies, outraged environmental groups staged a "21 chain saw salute" to Clinton in a park across the street from the White House.<sup>67</sup> Vice President Al Gore later called the salvage timber rider the Clinton administration's "biggest mistake."<sup>68</sup> But the President did have to accept the timber rider and the other deregulatory riders in order to secure the necessary disaster relief funds. The Republican leadership could take away from this initial skirmish the lesson that President Clinton might threaten to veto appropriation bills containing unacceptable riders, but he would ultimately yield if forced to choose between stopping the riders and ensuring critical funding for unrelated governmental programs.

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59. 141 CONG. REC. S4,869–82 (daily ed. Mar. 30, 1995) (salvage timber rider); *Conferees Unable to Reach Agreement; OSHA Again Funded Through Stopgap Measure*, 25 O.S.H. Rep. (BNA) 1523 (Apr. 3, 1996); see also Dan Morgan, *Aid Packages May Threaten Budget Cut Plan*, WASH. POST, May 12, 1995, at A9.

60. See 141 CONG. REC. S4,883–84 (daily ed. Mar. 30, 1995).

61. See H.R. REP. NO. 104-124, at 26, 45–53, 62–63 (1995).

62. Ann Devroy, *President's First Veto Hits Package of Spending Cuts*, WASH. POST, June 8, 1995, at A1.

63. See Alison Mitchell, *With First Veto, Clinton Rejects Budget-Cut Bill*, N.Y. TIMES, June 8, 1995, at A1.

64. Alexander Cockburn & Jeffrey St. Clair, *Slime Green: The Big Environmental Groups Help Clinton Sell Out*, PROGRESSIVE, May 1996, at 18, 18.

65. See *Clinton Signs Bill Cutting \$1.3 Billion in EPA Spending Approved for Fiscal 1995*, 26 ENV'T Rep. (BNA) 659 (Aug. 4, 1995); *OSHA Relatively Unscathed by Rescissions, but Will Face Deep Cuts in Fiscal 1996 Spending*, 25 O.S.H. Rep. (BNA) 363 (Aug. 2, 1995).

66. See Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 37 ENVTL. L. 1035, 1047–48 (1997).

67. Ann Devroy, *President Approves Rescissions Measure; Process May Offer Glimpse of Future Showdowns*, WASH. POST, July 28, 1995, at A16 (internal quotation marks omitted).

68. Goldman & Boyles, *supra* note 66, at 1037.

## 2. FY 1996 Budget

The skirmish over the FY 1995 rescissions bill was merely a prelude to the major battle that was brewing over the FY 1996 budget. At the hearings that the thirteen subcommittees of the House Appropriations Committee held on the proposed budgets of the individual agencies, several trade associations and think tanks seized the opportunity to criticize health, safety, and environmental programs and to urge Congress to disable those programs.<sup>69</sup> Representative DeLay insisted upon adding seventeen deregulatory riders to EPA's appropriation bill that would have, among other things, prevented EPA from promulgating industrial effluent and stormwater discharge limitations, from enforcing its wetlands protection program, from finalizing its primary standards for arsenic and radon content in drinking water, from implementing or enforcing the recently-enacted CAA permit requirements, and from revoking or refusing to issue tolerances for carcinogenic pesticides in processed food.<sup>70</sup> The riders would also have suspended EPA's efforts to promulgate hazardous air emissions standards for refineries, exempted the oil and gas industry from EPA's accident prevention programs, reduced the stringency of EPA's planned regulations for hazardous waste incinerator emissions, and prevented EPA from insisting that the Upjohn Corporation's pharmaceutical plant in Kalamazoo, Michigan treat its discharges before sending them to the public water treatment plant.<sup>71</sup> The subcommittee accepted all of DeLay's riders and added some of its own.<sup>72</sup> The subcommittee-approved appropriation bill for the Department of Labor similarly contained riders that would have prevented OSHA from publishing its ergonomics standard and from enforcing its fall-protection regulations for the construction industry.<sup>73</sup> Despite a determined effort by

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69. See, e.g., *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1996: Hearing Before a Subcomm. of the H. Comm. on Appropriations*, 104th Cong. 107–10 (1995) (statement of C. Boyden Gray, Chairman, Citizens for a Sound Economy); *id.* at 310–20 (statement of Edward L. Hudgins, Director of Regulatory Studies, Cato Institute); *Downsizing Government and Setting Priorities of Federal Programs, Part 1: Hearing Before Subcomms. of the H. Comm. on Appropriations*, 104th Cong. 304–21 (1995) (testimony of Fred Smith, President, Competitive Enterprise Institute); *Downsizing Government and Setting Priorities of Federal Programs, Part 3: Hearing Before Subcomms. of the H. Comm. on Appropriations*, 104th Cong. 678–89 (1995) (testimony of Bryan Riley, Economist, Citizens for a Sound Economy Foundation).

70. See 141 CONG. REC. H7,899–7,900 (daily ed. July 27, 1995); Dan Morgan, *HUD and EPA Biggest Losers in House Panel's Spending Bill*, WASH. POST, July 11, 1995, at A6.

71. See 141 CONG. REC. H7,899–7,900 (daily ed. July 27, 1995).

72. *EPA Funding Bill Rider Highlights Weakness in Water Act Flexibility Program*, 16 Inside EPA (Inside Wash. Publishers) No. 29, at 14 (July 21, 1995); see also Morgan, *supra* note 70.

73. *OSHA Enforcement Would Be Cut By Third; Restriction on Ergonomics Rulemaking Approved*, 25 O.S.H. Rep. (BNA) 288 (July 12, 1995); see also CITIZENS FOR SENSIBLE SAFEGUARDS, BACK DOOR EXTREMISM: MISUSING THE APPROPRIATIONS PROCESS TO GUT

Democrats to eliminate the riders, the full Appropriations Committee made very few changes to the subcommittee recommendations.<sup>74</sup>

To the House leadership's surprise, a group of fifty-one moderate Republicans broke ranks and joined most of the Democrats in approving an amendment to strike DeLay's seventeen environmental riders.<sup>75</sup> Deferring to DeLay's demands, a second vote was held late Monday evening.<sup>76</sup> Enough Democrats were still out of town that the re-vote resulted in a tie, which meant that the riders stayed in the bill.<sup>77</sup> The bill then easily passed the full House.<sup>78</sup> When the House took up the OSHA appropriation bill, the Democrats did not get as much help from moderate Republicans. An amendment to eliminate the ergonomics and fall-protection riders failed by a lopsided vote.<sup>79</sup>

Most business groups applauded the budget cuts, and they were delighted to see the House provide so many deregulatory riders.<sup>80</sup> Environmental groups and labor unions reacted very negatively to the bills.<sup>81</sup> Editorial pages across the country bristled with warnings that the Republicans in the House were pursuing a radical deregulatory agenda.<sup>82</sup>

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PUBLIC PROTECTIONS 23–26 (1995) (explaining the ergonomics and fall-protection riders and their impact). Not all of the proposed riders made it into the committee bills. A rider offered by Representative DeLay to end a decade-old moratorium on offshore oil and gas drilling in environmentally sensitive areas was rejected after environmental groups launched a full-scale attack and California and Florida Republicans expressed strong opposition. See Jerry Gray, *Panel Votes to Keep Tobacco Subsidies*, N.Y. TIMES, June 28, 1995, at A14.

74. See *House Appropriations Panel Backs EPA Cuts; Efforts Fail to Strike Environmental Riders*, 26 Env't Rep. (BNA) 593 (July 21, 1995); *OSHA Cuts Maintained in Committee Vote; Democrats Accuse GOP of Assault on Workers*, 25 O.S.H. Rep. (BNA) 363 (Aug. 2, 1995).

75. 141 CONG. REC. H7,954 (daily ed. July 28, 1995); DREW, *supra* note 35, at 265–66 (quoting DeLay as saying he was “livid” because the “amendment gutted all my regulatory reform that I had been working on all year” (internal quotation marks omitted)); John H. Cushman Jr., *House Coalition Sets G.O.P. Back on Environment*, N.Y. TIMES, July 29, 1995, at 1; Michael Weisskopf & David Maraniss, *In a Moment of Crisis, the Speaker Persuades*, WASH. POST, Aug. 13, 1995, at A1 (indicating lack of Republican attention to the issue as a reason for the vote).

76. 141 CONG. REC. H8,049–50 (daily ed. July 28, 1995).

77. *See id.*

78. *Id.* at H8051–52.

79. *OSHA Cuts, Ergonomics Restriction Maintained in House-Approved Labor Bill*, 25 O.S.H. Rep. (BNA) 389 (Aug. 9, 1995).

80. See, e.g., *Petroleum MACT Standard Moving Forward Despite Congressional Threats to Funding*, 26 Env't Rep. (BNA) 591 (July 21, 1995).

81. See, e.g., CITIZENS FOR SENSIBLE SAFEGUARDS, *supra* note 73, at 23–26. See generally SHARON BUCCINO & SCOTT SUROVELL, NATURAL RES. DEF. COUNCIL, STEALTH ATTACK: GUTTING ENVIRONMENTAL PROTECTION THROUGH THE BUDGET PROCESS (1995) (describing the effects of each budget cut).

82. See, e.g., Editorial, *Americans Are Being Robbed of Environmental Protection; Polluters' Pals are Hard at Work in Congress*, BUFFALO NEWS, July 19, 1995, at B2; Editorial, *House of*



With the media and public opinion polls indicating that the environment could be a wedge issue in the 1996 elections, President Clinton jumped at the opportunity to criticize the Republican sponsors of the appropriation riders,<sup>83</sup> and he promised to veto the appropriation bill if it emerged from the Senate with the riders intact.<sup>84</sup>

The Senate Appropriations Committee was somewhat more reluctant to add riders than its House counterpart, but it did add riders that would have prohibited EPA from issuing drinking water standards for arsenic, radon, and several other contaminants; eliminated EPA's power to veto wetlands permits; prohibited EPA from adding new sites to the list of superfund sites unless requested by a state; prevented EPA from requiring automobiles in Fairbanks, Alaska to use oxygenated fuels; and (as in the House bill) prevented EPA from insisting that the Upjohn Corporation's pharmaceutical plant in Kalamazoo, Michigan treat its discharges before sending them to the public water treatment plant.<sup>85</sup> The Senate Committee incorporated virtually none of the House bill's OSHA riders, observing, in reference to the ergonomics standard prohibition, that standard setting was "a legislative matter that should be addressed by the authorizing committees."<sup>86</sup>

The Republican House leadership faced another revolt when it came time to appoint the House conferees on the FY 1996 appropriation bill for EPA. Sixty-three moderate Republicans, mostly from the Northeast, joined the Democrats in voting to instruct the conferees to delete the seventeen anti-environmental riders in their negotiations with the Senate.<sup>87</sup> DeLay, who led the fight in favor of the riders, once again postponed the vote (twice) in an attempt to schedule it for the most advantageous moment, but his efforts proved unavailing—the Conference Committee deleted the seventeen environmental riders.<sup>88</sup> But the Senate's riders, several of which were identical to the House riders, survived.<sup>89</sup>

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*Environmental Horrors*, N.Y. TIMES, Aug. 7, 1995, at A12; Editorial, *Reporting on Pollution*, WASH. POST, Aug. 12, 1995, at A20.

83. See, e.g., Margaret Kriz, *Drawing a Green Line in the Sand*, 27 NAT'L J. 2076, 2076 (1995); Paul Richter, *Clinton Acts to Curb GOP Attack on EPA*, L.A. TIMES, Aug. 9, 1995, at A5.

84. See Todd S. Purdum, *Clinton Lashes out at Congress, Citing Pollution and Guns*, N.Y. TIMES, Aug. 2, 1995, at A1.

85. 141 CONG. REC. S14,179–80 (daily ed. Sept. 25, 1995).

86. *Senate Panel Restores OSHA Funds, Sending 'Clean' Bill Toward Floor Vote*, 25 O.S.H. Rep. (BNA) 603 (Sept. 20, 1995) (internal quotation marks omitted).

87. *House Abandons Riders on EPA Money Bill; Move Aimed at Maintaining Agency Enforcement*, 26 Env't Rep. (BNA) 1176 (Nov. 10, 1995).

88. *Id.*

89. *See Conferees Approve EPA Funding of \$5.7 Billion; Temporary Spending, Reconciliation Bills Passed*, 26 Env't Rep. (BNA) 1265 (Nov. 24, 1995).

As a government shutdown loomed—the 1996 fiscal year was fast approaching and there was still no appropriation to pay for it—President Clinton issued a stern warning that he was not prepared to sign a bill that would result in “the ravaging of our environment.”<sup>90</sup> Belittling the veto threat, Representative Newt Gingrich’s (R-Ga.) argument in response was, “what if we closed the Government and no one noticed?”<sup>91</sup> At a meeting of the Republican caucus to decide how to deal with the prospect of continuing shutdowns, DeLay and other hard-liners argued strongly against any compromise. In response to the suggestion that the Senate would not go along with this approach, DeLay responded: “Screw the Senate. It’s time for all-out war.”<sup>92</sup>

The long-expected train wreck occurred on November 13, when President Clinton and the congressional leadership could not reach agreement on a second continuing resolution.<sup>93</sup> On November 14, all nonessential federal employees went on leave without pay.<sup>94</sup> A poll indicated that fifty-one percent of those surveyed blamed the impasse on the Republicans, while only twenty-eight percent blamed Clinton.<sup>95</sup> Although a negotiated continuing resolution did resume government operations on November 20, the government shut down again on December 15 after a marathon round of budget negotiations failed and the President vetoed the EPA and Interior appropriation bills.<sup>96</sup> Hundreds of thousands of federal workers were left to endure the holiday season with no paychecks, and polls continued to indicate that the public blamed the Republicans.<sup>97</sup> By early January, Gingrich was willing to go a considerable distance to avoid a continuation of the shutdown, but he faced stiff resistance from the anti-government Republicans in the House who feared that he would give away too much.<sup>98</sup> The second shutdown came to an end on January 6, 1996, pursuant to another

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90. Todd S. Purdum, *President Warns Congress to Drop Some Budget Cuts*, N.Y. TIMES, Oct. 29, 1995, at 1 (internal quotation marks omitted).

91. Jason DeParle, *Rant/Listen, Exploit/Learn, Scare/Help, Manipulate/Lead*, N.Y. TIMES MAG., Jan. 28, 1996, at 34, 61.

92. Paul Burka, *Whipping National Politics into Shape: Tom Delay*, TEX. MONTHLY, Sept. 1996, at 128 (internal quotation marks omitted).

93. See DREW, *supra* note 35, at 328–30.

94. See *id.* at 330; Ann Devroy & Eric Pianin, *Workers Go Home; Talks Go Nowhere*, WASH. POST, Nov. 15, 1995, at A1.

95. David E. Rosenbaum, *As Standoff Ends, Clinton Is Seeking the High Ground*, N.Y. TIMES, Nov. 21, 1995, at A1.

96. See *Clinton Vetoes EPA, Interior Bills; Agencies Shut Down for Second Time*, 26 ENV’T Rep. (BNA) 1552 (Dec. 22, 1995); *Federal Government Shuts Down Again as Lawmakers Disavow Another Resolution*, 25 O.S.H. Rep. (BNA) 990 (Dec. 20, 1995).

97. See DREW, *supra* note 35, at 358; Eric Pianin & Ann Devroy, *Congress Leaves for Recess With Budget Unresolved*, WASH. POST, Dec. 23, 1995, at A1.

98. See Adam Clymer, *Leaders in House Drop G.O.P. Plan on U.S. Workers*, N.Y. TIMES, Jan. 5, 1996, at A1.

stop-gap continuing resolution.<sup>99</sup> Multiple continuing resolutions were passed as the two sides negotiated.<sup>100</sup> One of the critical sticking points was the refusal of the Senate and House negotiators to remove the environmental and ergonomics riders.<sup>101</sup>

Finally, on April 26, 1996, the President signed a FY 1996 appropriation bill.<sup>102</sup> In a partial victory for the Clinton administration, the final bill dropped some of the Senate's environmental riders, weakened others, and allowed the President to waive the endangered species and salvage timber riders.<sup>103</sup> But it retained the Senate's version of the prohibition on promulgating an ergonomics standard<sup>104</sup> as well as the riders limiting EPA's ability to issue certain drinking water standards or add new sites to its Superfund list.<sup>105</sup> The Kalamazoo rider also survived.<sup>106</sup>

The bad press that the Republican radicals experienced with appropriation riders during the 104th Congress had little impact on their efforts to reduce federal safety and environmental regulations. Although President Clinton was re-elected in 1996, both houses of Congress remained under control of the Republican Party until the end of the Clinton administration, and the leadership of the House of Representatives remained committed to a deregulatory agenda. The House leadership had learned that the public could react negatively to congressional efforts to force the President to sign appropriation bills containing provisions designed to gut popular regulatory programs. But the House leadership could also conclude from the experience with the rescissions bill that the President was not prepared to veto every appropriation bill containing riders that he would have vetoed were they in stand-alone legislation. For the remainder of the Clinton administration,

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99. See Adam Clymer, *Clinton Meets Challenge by Offering Budget Plan; Crucial Talks Begin Soon*, N.Y. TIMES, Jan. 7, 1996, at 1.

100. See Eric Pianin, *Congress Approves Interim Spending; Measure Sends \$219 Million to District*, WASH. POST, Mar. 30, 1996, at A1; Eric Pianin, *Congress Passes 11th Interim Spending Measure, Buys Another Week for Negotiation*, WASH. POST, Mar. 22, 1996, at A11; *Latest Funding Measure Avoids OSHA Shutdown but Opens Door for Furloughs, Possible Layoffs*, 25 O.S.H. Rep. (BNA) 1131 (Jan. 31, 1996); *Third Shutdown Avoided at Job Safety Agency, With Temporary Funding Provided Until March 22*, 25 O.S.H. Rep. (BNA) 1467 (Mar. 20, 1996).

101. See Eric Pianin, *Congress Passes 11th Interim Spending Measure, Buys Another Week for Negotiation*, WASH. POST, Mar. 22, 1996, at A11; Gore, *Democrats Rip Republican Record; Senator Defends Riders Against 'Misstatements'*, 26 Env't Rep. (BNA) 2370 (Apr. 19, 1996).

102. See Robert Pear, *With New Budget, Domestic Spending Is Cut \$24 Million*, N.Y. TIMES, Apr. 27, 1996, at 10.

103. See *Clinton Signs Omnibus Appropriations Bill, Immediately Waives Environmental Provisions*, 27 Env't Rep. (BNA) 8 (May 3, 1996).

104. See *Congress, White House Agree On Funding Bill; Fiscal 1996 Funds Boosted To \$305 Million*, 25 O.S.H. Rep. (BNA) 1633 (May 1, 1996).

105. 142 CONG. REC. H8,959 (1996); *Clinton Signs Omnibus Appropriations Bill, Immediately Waives Environmental Provisions*, supra note 103.

106. 142 CONG. REC. H8,959 (1996).

Congress continued to enact deregulatory riders, including limitation riders prohibiting EPA from implementing the Kyoto Protocol to the United Nations Framework Convention on Climate Change and a legislative rider amending the CAA to reduce restrictions on certain nonattainment areas.<sup>107</sup> President Clinton did not, however, highlight the issue of deregulatory riders, as he had during the 104th Congress, by vetoing the bills to which the riders were attached.<sup>108</sup> With the election in 2000 of a Republican President who was committed to deregulation, the need for deregulatory riders was less pressing, and the number of appropriation bill riders decreased dramatically.<sup>109</sup>

### III. DEREGULATORY RIDERS IN THE 112TH CONGRESS

The Republicans who assumed control of the House of Representatives in the 112th Congress were even more fiercely partisan than the Republicans of the 104th Congress. A substantial contingent of the new freshman class of Republican representatives had drawn support from the nascent “Tea Party” movement that had its origins in the government’s reaction to the financial meltdown of September 2008 and the subsequent government bailout of Wall Street financial institutions. After disrupting town meetings of a number of Democratic members during the summer recess of 2009, the movement successfully supported anti-government conservatives in the primaries (sometimes upsetting incumbent Republicans).<sup>110</sup> During the fall campaign, Tea Party candidates appealed to strong public resentment over the government bailouts of large Wall Street financial institutions and growing public concern about the nation’s budget deficit. With the assistance of public relations experts, the Tea Party’s leaders effectively channeled public anger at Wall Street into anger at the federal government for allowing the meltdown to happen and for pouring billions of dollars of taxpayer money into undeserved bailouts.<sup>111</sup> They won a surprising number of contests. After the election put the Republican Party in charge of the House of Representatives, a new Tea Party caucus

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107. Lazarus, *supra* note 11, at 644–46.

108. *See id.*

109. *See id.* at 647.

110. Douglas A. Blackmon et al., *Birth of a Movement*, WALL ST. J., Oct. 29, 2010, at A1. *See generally* Amy Gardner, *A Movement Without a Compass*, WASH. POST, Oct. 24, 2010, at A1.

111. *See* Michael M. Phillips, *FreedomWorks Harnesses Growing Activism on the Right*, WALL ST. J., Oct. 5, 2009, at A4; Kate Zernike, *Shaping Tea Party Passion into Campaign Force*, N.Y. TIMES, Aug. 26, 2010, at A1.

claimed credit for the change and demanded that the leadership pay attention to its small-government agenda.<sup>112</sup>

Soon after the election, a conservative grass roots organization called FreedomWorks, headed by former House Majority Leader Dick Armey (the enforcer of the deregulatory rider strategy during the 104th Congress), hosted a two-day retreat in Baltimore for newly-elected Republicans.<sup>113</sup> Armey exhorted them not to stray from the limited-government principles they had espoused during the campaign.<sup>114</sup> A similar organization called Americans for Prosperity planned to assemble “grass-roots activists and coalition partners” to lobby for tax cuts, reduced government spending, and regulatory relief for American business.<sup>115</sup> The members got the message. The Republican caucus elected John A. Boehner (R-Ohio) to be Speaker of the House. The Majority Whip was Paul Ryan (R-Wis.), a devotee of libertarian author Ayn Rand.<sup>116</sup>

At a closed-door meeting, Boehner assured eighty members of the Business Roundtable (a lobbying organization consisting of the CEOs of more than 200 of the nation’s largest corporations) that he would be working with them to pursue a deregulatory agenda in the 112th Congress.<sup>117</sup> As in the 104th Congress, the Republican leadership apparently planned to pass stand-alone deregulatory bills through the authorization committees. But since the Senate remained in the Democrats’ control and a Democrat occupied the Oval Office, deregulatory riders were to play a strategic role in enacting the legislation. The strategy of the House Republican leadership was to proceed along two paths. First, deregulatory legislation would proceed through the authorizing committees, which would hold hearings on particular bills and mark them up for consideration by the full House. Second, the bills that emerged from committee would also be incorporated as riders to appropriation bills and other must-pass legislation as opportunities arose. If the Senate failed to pass or the President threatened to veto legislation travelling on the first path, it could be forced on the Senate and the President as it proceeded along the second path. As in 1995, a prime target for the deregulators was the EPA. And a brand new agency called the

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112. See Dana Milbank, *Bachmann Goes Rogue Again*, WASH. POST, Jan. 26, 2011, at A23; Philip Rucker, *Is Michele Bachmann Getting the Party Started?*, WASH. POST, Nov. 20, 2010, at A1.

113. Amy Gardner, *FreedomWorks Gathers GOP Lawmakers to Refocus on Tea Party Goals*, WASH. POST, Nov. 12, 2010, at A1.

114. *Id.*

115. Jennifer Steinhauer, *Focusing on Next Step, Tea Party Rallies Congressional Freshmen*, N.Y. TIMES, Nov. 13, 2010, at A10; see also Jane Mayer, *Covert Operations*, NEW YORKER, Aug. 30, 2010, at 45, 46–47, 53.

116. See Jonathan Chait, *War on the Weak*, NEWSWEEK, Apr. 18, 2011, at 6, 7.

117. See Perry Bacon Jr. & Jia Lynn Yang, *Obama Tries Again to Reach Out to Chief Executives*, WASH. POST, Dec. 15, 2010, at A12.

Consumer Financial Protection Bureau (CFPB) took OSHA's place as the poster child for the deregulatory movement.

### *A. Deregulation in the Authorizing Committees*

A primary target of the advocates of deregulation was EPA's recently-established climate change program, which was designed to limit emissions of greenhouse gases into the environment. In the case of the new CFPB, the goal was to prevent the new agency from promulgating any regulations at all under its new authority. In both cases, the initial strategy of the House leadership was to develop the specifics of the deregulatory bills in the authorizing committees.

#### 1. Climate Change Deauthorizing Legislation

In early 2009, the stars appeared to be aligned for Congress to enact the first major environmental statute in almost two decades. In February, the Obama administration proposed an ambitious cap-and-trade regime for greenhouse gas emissions, the goal of which was to address climate change resulting from global warming.<sup>118</sup> The House passed its own 1,300-page cap-and-trade bill in May over the unanimous opposition of House Republicans. Both bills were vigorously opposed by the Chamber of Commerce, much of the energy industry, and several conservative think tanks.<sup>119</sup> Americans for Prosperity hosted eighty grass roots events for Tea Party groups at which speakers made exaggerated claims that backyard barbecues would be taxed if Congress enacted the House bill.<sup>120</sup> The phrase "cap and tax" replaced "cap and trade" in the conservative media's echo chamber.<sup>121</sup> And so, after the 2010 elections returned the House to Republican control and left the Democrats with a razor-thin majority in the Senate, the Obama

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118. Margaret Kriz, *Changed Climate*, NAT'L J., Feb. 7, 2009, at 40, 41; Dean Scott, *Obama Plan Uses 2005 Emissions Baseline; Reductions in Line With Recent Legislation*, 40 Env't Rep. (BNA) 474 (Mar. 6, 2009).

119. Julie Kosterlitz, *The Chamber's Summer Offensive*, NAT'L J., July 4, 2009, at 46, 46–47; John M. Broder, *House Backs Bill, 219–212, to Curb Global Warming*, N.Y. TIMES, June 27, 2009, at A1; see also BEN LIEBERMAN, HERITAGE FOUND., PROPOSED GLOBAL WARMING BILLS AND REGULATIONS WILL DO MORE HARM THAN GOOD 1 (2009), <http://www.heritage.org/research/reports/2009/10/proposed-global-warming-bills-and-regulations-will-do-more-harm-than-good> (criticizing the proposed legislation).

120. Mayer, *supra* note 115, at 53.

121. See Elwin Green, *The Power of Words*, PITTSBURGH POST-GAZETTE, June 11, 2009, at C1. For an example of an article using the "tax and cap" language, see Steve Forbes, *Fact and Comment*, FORBES, Nov. 2, 2009, at 17, 17–18. For a thorough description of the conservative media echo chamber, see generally DAVID BROCK, THE REPUBLICAN NOISE MACHINE (2004); KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, ECHO CHAMBER (2010); TRUDY LIEBERMAN, SLANTING THE STORY: THE FORCES THAT SHAPE THE NEWS (2000).

administration gave up entirely on a climate change bill, opting instead for modest energy conservation legislation.<sup>122</sup>

As the prospects for climate change legislation dimmed, EPA seized the initiative by employing its existing CAA authority.<sup>123</sup> First, EPA granted California's request for a waiver allowing California to regulate auto emissions of greenhouse gases.<sup>124</sup> Thirteen states soon followed with their own identical emissions limits, as permitted by the CAA.<sup>125</sup> Second, EPA made a formal finding that greenhouse gas emissions "endangered" public health and welfare, thereby triggering its own obligation to regulate motor vehicle emissions.<sup>126</sup> Third, EPA and the National Highway Traffic Safety Administration jointly promulgated regulations limiting greenhouse gas emissions and raising fuel economy standards for sedans, SUVs, and pickups.<sup>127</sup> Fourth, EPA promulgated a "triggering" rule that required states to incorporate greenhouse gas emissions standards into permits for major new industrial facilities and modifications of existing large industrial facilities.<sup>128</sup>

These were not welcome developments for the energy industry and other large greenhouse gas emitters. With financial support from conservative foundations connected to the energy industry, the Tea Party made denial of any relationship between emissions of greenhouse gases and climate change an article of faith.<sup>129</sup> In one survey, "[m]ore than half of Tea Party supporters said that global warming would have no serious effect at any time in the future."<sup>130</sup> Tea Party activists made EPA's efforts to curb greenhouse gases a campaign issue in the 2010 elections by accusing the agency of destroying jobs.<sup>131</sup> Soon after the 2010 elections returned the

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122. See Richard J. Lazarus, *Climate Change Law in and over Time*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 29, 30 (2010); Juliet Eilperin & Steven Mufson, *Obama Shifting Climate Strategy After GOP Gains*, WASH. POST, Nov. 5, 2010, at A3.

123. See Ian Talley, *EPA Set to Move Toward Carbon-Dioxide Regulation*, WALL ST. J., Feb. 23, 2009, at A2.

124. David A. Fahrenthold, *EPA to Let Calif. Set Own Auto Emissions Limits*, WASH. POST, July 1, 2009, at A2.

125. See *id.*

126. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516–36 (Dec. 15, 2009); see also Carl Hulse, *Senate Rejects Republican Effort to Thwart Carbon Limits*, N.Y. TIMES, June 11, 2010, at A22 (discussing Republican opposition).

127. 49 C.F.R. §§ 531, 533, 536–38 (2010); Steven D. Cook, *Standard on Vehicle Carbon Emissions Announced in EPA Greenhouse Gas Limits*, 41 Env't Rep. (BNA) 723 (Apr. 2, 2010).

128. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009); Steven D. Cook, *EPA Begins to Phase in Requirements to Control Stationary Source Emissions*, 41 Env't Rep. (BNA) 727 (2010).

129. John M. Broder, *Skepticism on Climate Change Is Article of Faith for Tea Party*, N.Y. TIMES, Oct. 21, 2010, at A1.

130. *Id.*

131. See *id.*

House to Republican control, twenty-one industry trade associations, including the U.S. Chamber of Commerce, the National Association of Manufacturers, and the American Petroleum Institute, asked House and Senate leaders to insert a rider into an appropriation bill to delay EPA's implementation of its greenhouse gas reduction regulations.<sup>132</sup>

The climate for climate change legislation in the House of Representatives at the outset of the 112th Congress was radically different from that the 111th Congress. Half of the eighty-seven newly arrived House freshmen questioned whether human activities were in fact contributing to global warming.<sup>133</sup> The Republican leadership assigned top priority to legislation designed to take away EPA's authority to regulate greenhouse gases and to repeal the regulatory actions that it had recently taken to address climate change. As the House Republicans seized every opportunity to divest EPA of its authority to regulate greenhouse gases, an April 2011 Gallup poll found that only fifty-one percent of its respondents worried a great deal or a fair amount about global warming.<sup>134</sup>

In early March 2011, Representative Fred Upton (R-Mich.) and Senator James Inhofe (R-Okla.) introduced identical bills to prohibit EPA from regulating, or even taking into consideration, emissions of greenhouse gas for the purpose of addressing climate change.<sup>135</sup> The bills also retroactively repealed EPA's original "endangerment" finding and all of the regulations that it had promulgated to implement its greenhouse gas reduction program.<sup>136</sup> Most industry groups supported the bills.<sup>137</sup> Several Democrats, some of whom were ranking members of their committees, also supported the bills.<sup>138</sup> Environmental groups strongly opposed them.<sup>139</sup>

The Subcommittee on Energy and Power of the House Committee on Energy and Commerce held two hearings on the Upton bill. The first

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132. *Industry Groups Ask House, Senate Leaders to Delay EPA Rules for Greenhouse Gases*, 41 Env't Rep. (BNA) 2676 (Dec. 3, 2010).

133. Margaret Kriz Hobson, *Political Tidal Wave Turns EPA Strategy*, CQ WKLY., Feb. 14, 2011, at 335, 335.

134. Geof Koss, *Last-Gasp Effort to Keep EPA's Authority Intact*, CQ WKLY., Apr. 4, 2011, at 744, 745.

135. H.R. 910, 112th Cong. § 2 (2011); S. 482, 112th Cong. § 2 (2011).

136. H.R. 910, 112th Cong. § 2 (2011); S. 482, 112th Cong. § 2 (2011). The bill made an exception for EPA's regulation of auto emissions and for two fuel economy standards that the National Highway Traffic Safety Administration promulgated in May 2010. H.R. 910, 112th Cong. § 2 (2011); S. 482, 112th Cong. § 2 (2011). An even more extreme bill was introduced by Senator John Barrasso (R-Wyo.). S. 228, 112th Cong. (2011); *see also Barrasso Bill Would Eliminate EPA Authority to Regulate Greenhouse Gas Emissions*, 42 Env't Rep. (BNA) 217 (Feb. 4, 2011).

137. Dean Scott, *Bill Introduced to Bar EPA Emissions Rules; Upton Locks Down Some Democratic Support*, 42 Daily Env't Rep. (BNA) (Online) A-10, (Mar. 4, 2011).

138. *Id.*

139. *Id.*



hearing featured testimony from Senator Inhofe, a long-time climate change denier; EPA Administrator Lisa Jackson; an array of scientists who were mostly climate change skeptics; representatives of seven major greenhouse-gas-emitting corporations; and a single scientist representing the American Public Health Association who argued in favor of greater greenhouse gas controls.<sup>140</sup> The Republican members who attended the hearing spent more than two hours berating EPA Administrator Jackson, asserting that the science underpinning her finding was a hoax, and accusing the Obama Administration of killing jobs in a quixotic quest to address a non-problem.<sup>141</sup> Jackson gamely fought back, warning the committee that its “legacy” would be the unseemly memory of “[p]oliticians overruling scientists on a scientific question.”<sup>142</sup>

A second hearing on March 1, 2011 featured EPA’s Assistant Administrator for Air, representatives of four trade associations that supported the bill, and an economist who argued that EPA’s program would kill jobs.<sup>143</sup> Only two of the witnesses that day, a Stanford University professor and an EPA official, testified in favor of leaving EPA’s greenhouse gas program in place.<sup>144</sup> The House easily passed the Upton bill on April 7, 2011.<sup>145</sup>

In the Senate, Democratic Senator Jay Rockefeller (D-W. Va.) introduced a less extreme bill that would have delayed for two years EPA’s greenhouse gas emissions rules for power plants.<sup>146</sup> Like the Inhofe bill, the Rockefeller bill was referred to the Senate Environment and Public Works Committee, which was chaired by Senator Barbara Boxer (D-Cal.), a strong supporter of cap-and-trade legislation.<sup>147</sup> As of late November 2011, the committee had not taken up either bill. The President may well veto stand-alone legislation taking away EPA’s authority to regulate greenhouse gases, should it pass the Senate. It is less clear, however, that he will veto appropriation bills or similar must-pass legislation to which a rider reducing or eliminating EPA’s authority to regulate greenhouse gases is attached.

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140. See *H.R. 910, the Energy Tax Prevention Act of 2011: Hearings Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. v–vi (2011) [hereinafter *Energy Tax Prevention Act Hearings*].

141. See *id.* at 30–72; Hobson, *supra* note 133, at 335; John M. Broder, *House Republicans Take E.P.A. Chief to Task*, N.Y. TIMES, Feb. 10, 2011, at A16.

142. *Energy Tax Prevention Act Hearings*, *supra* note 140, at 27.

143. *EPA’s Greenhouse Gas Regulations and Their Effect on American Jobs: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. V (2011).

144. See *id.* at 80–90, 119–126.

145. 157 CONG. REC. H2,505–07 (daily ed. Apr. 7, 2011).

146. See S. 231, 112th Cong. (2011).

147. See S. 231—*EPA Stationary Source Regulations Suspension Act*, OPENCONGRESS, <http://www.opencongress.org/bill/112-s231/show> (last visited Nov. 19, 2011).

## 2. Amending or Repealing the Dodd-Frank Act.

For many years prior to the September 2008 financial meltdown, Professor Elizabeth Warren had been urging Congress to create an independent consumer financial protection agency to administer the consumer protection laws applicable to the financial sector.<sup>148</sup> If consumer safety regulation made it impossible to purchase a toaster with a one-in-five chance of bursting into flames, she wondered, how was it that a consumer could refinance an existing home using a mortgage with a one-in-five chance of “putting the family out on the street” through default without even so much as a warning?<sup>149</sup> The answer was that “[c]redit products . . . are regulated by a tattered patchwork of federal and state laws that have failed to adapt to changing markets” and that have permitted financial institutions to market products with “incomprehensible terms” and to engage in “sharp practices that have left families at the mercy of those who write the contracts.”<sup>150</sup>

President Obama spent his first 100 days in a frantic effort to stabilize collapsing financial markets that he had inherited from the Bush administration. Rather than pressing ahead with comprehensive financial reform legislation as a quid pro quo for the government bailout of Wall Street, however, he decided to make health care reform his top domestic priority. The administration did not produce a comprehensive plan for financial reform until June 2009, when it released an eighty-eight-page “blueprint” containing most, but not all of its ideas for legislation.<sup>151</sup> The administration did not offer dramatic changes like breaking up “too-big-to-fail” financial institutions.<sup>152</sup> Rather, the proposal demonstrated a strong preference for “technical solutions” to the problems raised by the financial crisis, and it delegated many of the hardest decisions to the implementing agencies.<sup>153</sup>

The one striking exception to the blueprint’s otherwise rather modest suggestions for government intervention was a recommendation that Congress create a new Consumer Financial Protection Agency (CFPA) to

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148. See, e.g., Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 8; see also Jodi Kantor, *Consumers’ Champion Wages Her Own Crusade*, N.Y. TIMES, Mar. 25, 2010, at A1 (describing Elizabeth Warren’s passion for the consumer protection agency).

149. Warren, *supra* note 148, at 8.

150. *Id.* at 9.

151. See ROBERT KUTTNER, A PRESIDENCY IN PERIL 88–90, 116 (2010).

152. *Id.* at 89–90.

153. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 191 (2010); see also Paul Krugman, Op-Ed., *Out of the Shadows*, N.Y. TIMES, June 19, 2009, at A27. According to one seasoned observer, it was “little more than an attempt to stick some new regulatory fingers into a very leaky financial dam rather than rebuild the dam itself.” Joe Nocera, *A Financial Overhaul Plan, but Only a Hint of Roosevelt*, N.Y. TIMES, June 18, 2009, at A1.

regulate predatory lending practices of banks and mortgage companies and to ensure that banks do not make loans to borrowers who cannot afford them.<sup>154</sup> Drawing heavily upon Professor Warren's work, the proposal was uncharacteristically specific. The agency was to be an independent commission. Its members were to be appointed for a term of years and not subject to removal by the President except for cause.<sup>155</sup> The sponsors hoped that making the agency independent would shield it from political pressures from the White House and powerful congresspersons, protect it from capture by the industry, and provide some degree of institutional stability as it carried out its primary mission of protecting consumers from fraudulent and abusive lending practices.<sup>156</sup>

Consumer groups strongly supported the administration's proposal to create a new CFPB.<sup>157</sup> They pointed to the obvious conflict of interest on the part of the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision, which were responsible both for the safety and soundness of the institutions they regulated and for administering consumer protection laws that, if adequately implemented, would increase costs and thereby potentially threaten the safety and soundness of those institutions.<sup>158</sup> The business community just as strongly objected to the idea of creating a new agency to protect consumers from predatory lending.<sup>159</sup> The Chamber of Commerce launched an advertising campaign to "Stop the CFPB."<sup>160</sup>

The new agency appeared doomed to certain Senate filibuster until its sponsors agreed to a suggestion by Senator Bob Corker (R-Tenn.) to house it in the Federal Reserve.<sup>161</sup> The sponsors insisted, however, that the agency's director not be subject to direction from the Federal Reserve or to removal by the President except for good cause.<sup>162</sup> They also attempted to enhance independence of the new agency, now called the Consumer Financial Protection Bureau (CFPB), by funding it from monies collected by the Federal Reserve from the banks it regulated in amounts to be determined by

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154. See JOHNSON & KWAK, *supra* note 153, at 198; KUTTNER, *supra* note 151, at 94–98; Binyamin Appelbaum & David Cho, *Obama Blueprint Deepens Federal Role in Markets*, WASH. POST, June 17, 2009, at A1.

155. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 72 (2010).

156. See *id.*

157. *Id.*

158. Appelbaum & Cho, *supra* note 154.

159. Barkow, *supra* note 155, at 73.

160. *Id.* at 74.

161. See Damian Paletta, *Fight over Consumer Agency Looms as Overhaul Is Signed*, WALL ST. J., July 22, 2010, at A1.

162. See Barkow, *supra* note 155, at 74.

the head of the agency.<sup>163</sup> The sponsors also agreed to some special interest exemptions for auto dealers and small banks with less than \$10 billion in assets.<sup>164</sup>

#### a. The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,<sup>165</sup> which Congress passed in July 2010, was one of the most popular bills enacted during the first two years of the Obama administration. The statute created the quasi-independent CFPB under the Federal Reserve Board. The CFPB was to be headed by a Director, appointed by the President with the advice and consent of the Senate, who was to serve a five-year term and could be fired only for “inefficiency, neglect of duty, or malfeasance in office.”<sup>166</sup> The CFPB’s funding for the first three years was to come from the Federal Reserve’s fees on banks in an amount determined by the Director “to be reasonably necessary” to carry out its authorities.<sup>167</sup> The Federal Reserve was prohibited from “interven[ing] in any matter or proceeding before the Director,” appointing, directing, or removing any CFPB employee, or merging CFPB with any other office of the Federal Reserve.<sup>168</sup> The Act also gave the agency a degree of political independence by allowing the Director and agency officers to testify before Congress without obtaining approval from the Federal Reserve or the White House.<sup>169</sup> Finally, the Act gave CFPB the authority to bring civil actions directly in federal court without seeking approval from the Department of Justice.<sup>170</sup>

The new agency’s primary statutory goals were to ensure that “consumers are provided with timely and understandable information to make responsible decisions about financial transactions” and to protect consumers from “unfair, deceptive, or abusive acts and practices.”<sup>171</sup> At the same time, CFPB was to ensure that “outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.”<sup>172</sup> Other goals of the statute were to ensure

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163. See *id.* at 77.

164. See Paletta, *supra* note 161.

165. Pub. L. No. 111-203, 124 Stat. 1376.

166. *Id.* § 1011, 124 Stat. at 1964.

167. *Id.* § 1017, 124 Stat. at 1975.

168. *Id.* § 1012(c), 124 Stat. at 1965.

169. *Id.* § 1012(c)(4), 124 Stat. at 1965.

170. See *id.* § 1054, 124 Stat. at 2028.

171. *Id.* § 1021(b)(1)–(2), 124 Stat. at 1980; see also *id.* § 1031(c)–(d), 124 Stat. at 2006 (defining “unfair” and “abusive”).

172. *Id.* § 1021(b)(3), 124 Stat. at 1980; see also *id.* § 1027, 124 Stat. at 1995 (excluding entities Congress did not intend to cover).

federal consumer financial protection laws were enforced consistently across various sectors of the banking industry, and to make consumer financial service markets transparent and efficient so as to “facilitate access and innovation.”<sup>173</sup> The Dodd-Frank Act empowered CFPB to write rules, regulations, and procedures to achieve these goals.<sup>174</sup>

CFPB had exclusive rule-making authority under the new statute and the older consumer financial protection statutes that the statute assigned to CFPB for implementation. The Act instructed the courts to defer to CFPB’s interpretation of the earlier consumer protection statutes, not to the agencies that formerly implemented them.<sup>175</sup> Rules promulgated by the CFPB, however, were subject to review by a new fifteen-member Financial Stability Oversight Council (FSOC) that included the Treasury Secretary, the Federal Reserve Chairman, and an “independent” member with expertise in insurance.<sup>176</sup> The FSOC could overrule a CFPB regulation if a two-thirds majority of its ten voting members concluded that it might endanger the safety and soundness of the banks to which it applied.<sup>177</sup> In addition, any member of the FSOC was empowered to stay any CFPB regulation for ninety days.<sup>178</sup>

## b. Industry Reaction

The ink was barely dry on the Dodd-Frank Act when the banking industry began to complain that it went too far. Before the first regulation was promulgated, the U.S. Chamber of Commerce announced that the new law would generate a “regulatory tsunami” that would hobble the American economy.<sup>179</sup> The industry predicted that it would cost billions of dollars to comply with the statute’s requirements and that many companies would

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173. *Id.* § 1021(b)(4)(5), 124 Stat. at 1980.

174. *Id.* § 1031(b), 124 Stat. at 2007. The statute empowered CFPB to write regulations requiring lenders to disclose relevant information about the terms and conditions imposed by lending instruments and to prepare model disclosures for covered entities to use in consumer financial transactions, as well as make information available electronically. *Id.* §§ 1032–33, 124 Stat. at 2006. CFPB must also establish a procedure for consumers to file complaints and to follow up on those complaints with the relevant covered entities. *Id.* § 1034, 124 Stat. at 2008.

175. *Id.* § 1022, 124 Stat. at 1980.

176. *Id.* §§ 111, 1023, 124 Stat. at 1392, 1985.

177. *Id.* § 1023(c), 124 Stat. at 1985.

178. *Id.*

179. Press Release, U.S. Chamber of Commerce, U.S. Chamber Highlights Regulatory Tsunami to Follow Financial Reform Bill (June 28, 2010), available at <http://www.uschamber.com/press/releases/2010/june/us-chamber-highlights-regulatory-tsunami-follow-financial-reform-bill>.

simply relocate overseas to avoid the burden.<sup>180</sup> Less than three months after enactment, the financial services industry had come up with a battle plan to roll back some of the Dodd-Frank Act provisions, beginning with the new CFPB.<sup>181</sup>

According to a Chamber spokesperson, it was important to “fix things that just don’t work in the legislation,”<sup>182</sup> a curious position to take before the regulations implementing the provisions under attack had even been finalized. Another Chamber of Commerce spokesperson unconvincingly protested that “[w]e’re not trying to hurt the thing. We’re trying to improve it.”<sup>183</sup> The head of the powerful Financial Services Roundtable, an organization composed of the CEOs of 100 of the nation’s largest financial services institutions, vowed to “reform the reform.”<sup>184</sup>

It was not difficult to persuade the new House leadership to take up measures to reform the CFPB reforms. Before President Obama had signed the Dodd-Frank bill, then-Minority Leader Boehner told reporters that he thought the statute should be repealed.<sup>185</sup> Senator Richard Shelby (R-Ala.), the ranking minority member of the Senate Banking Committee, agreed, focusing his complaints specifically on the new CFPB.<sup>186</sup> Every Republican incumbent in the House had voted against the original bill.<sup>187</sup> When a large freshmen class of Republican congresspersons committed to reducing the role of government regulation in the economy entered office in January 2011, any deregulatory measures aimed at the CFPB were guaranteed smooth sailing through the House of Representatives.<sup>188</sup>

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180. Ben Protess, *The Financial Overhaul Has Its Defender in Chief*, N.Y. TIMES, July 21, 2011, at B5. See generally *The Costs of Implementing the Dodd-Frank Act: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 112th Cong. (2011).

181. See Susanne Craig & Andrew Ross Sorkin, *Regulatory Pregame: Laying Bets*, N.Y. TIMES, Sept. 30, 2010, at F1; *Financial Regulatory Reform*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit\\_crisis/financial\\_regulatory\\_reform/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html) (last updated Sept. 20, 2011).

182. Maya Jackson Randall & Jessica Holzer, *Dodd-Frank Foes Adopt New Tactics*, WALL ST. J. (Apr. 7, 2011, 6:38 PM), <http://online.wsj.com/article/SB10001424052748704013604576248982186837122.html> (internal quotation marks omitted).

183. Eileen Ambrose, *Foes Trying to Chip Away at New Agency for Consumers*, BALTIMORE SUN, May 8, 2011, at C1 (internal quotation marks omitted).

184. Ben Protess, *Leading the Wall Street Lobby*, N.Y. TIMES, July 15, 2011, at B1 (internal quotation marks omitted).

185. Sean Lengell, *Boehner Calls for Repeal of Wall Street Reform Bill*, WASH. TIMES (July 15, 2010), <http://www.washingtontimes.com/news/2010/jul/15/boehner-repeal-wall-street-reform-bill/>.

186. Dave Clarke & Rachele Younglai, *Key Senator Wants to Reopen Wall Street Bill*, REUTERS (Sept. 20, 2010), <http://www.reuters.com/article/2010/09/20/us-washington-summit-regulation-idUSTRE68J49920100920>.

187. See 155 CONG. REC. H14,804 (daily ed. Dec. 11, 2009).

188. See Editorial, *Who Will Rescue Financial Reform?*, N.Y. TIMES, Mar. 28, 2011, at A26.

Any effort to dismantle the new CFPB would run directly counter to public opinion, which strongly supported the new agency. A poll taken near the first anniversary of the statute's enactment reported that seventy-four percent of those surveyed supported the new agency.<sup>189</sup> But supporters of rollbacks or repeal undoubtedly had strong ideological reasons for pressing ahead, even in the face of contrary public opinion. The prospect of large campaign contributions from a financial services industry that was once again flush with resources after the 2009 federal bailout probably played a powerful role as well. During the first quarter of 2011, seven of the ten Republican freshmen on the House Financial Services Committee received about forty percent of their campaign contributions from the financial services industry alone.<sup>190</sup>

### c. Attempts to Amend and Repeal

By the first anniversary of the statute's enactment, two dozen bills to roll back or repeal the Dodd-Frank Act were pending in Congress.<sup>191</sup> Not surprisingly, CFPB was the target of many of these bills. In early January 2011, Representative Michele Bachmann (R-Minn.), a Tea Party leader and future presidential candidate, introduced a bill that would have repealed the Dodd-Frank Act.<sup>192</sup> Senator Jim DeMint (R-S.C.) introduced a companion Dodd-Frank Repeal Act in the Senate.<sup>193</sup> Two bills introduced by Representative Randy Neugebauer (R-Tex.) would have transferred CFPB to the Treasury Department, where it would no longer have independent status.<sup>194</sup> Since it would no longer be the beneficiary of the Federal Reserve's funding, it would also be subject to limitation riders.<sup>195</sup> Representative Bill Posey (R-Fla.) introduced a similar bill that would have subjected CFPB to annual appropriations.<sup>196</sup> Representative Barney Frank (D-Mass.), one of the authors of the Dodd-Frank Act, complained that the banking industry

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189. Jim Puzzanghera, *Fight Over Watchdog Continues*, L.A. TIMES, July 21, 2011, at B1.

190. Gary Rivlin, *The Billion-Dollar Bank Heist*, NEWSWEEK, July 18, 2011, at 9, 11.

191. Proress, *supra* note 180; Edward Wyatt, *Dodd-Frank Under Fire a Year Later*, N.Y. TIMES, July 19, 2011, at B1.

192. H.R. 87, 112th Cong. (2011); *see also* Donovan Slack, *Republicans Seek Repeal of Financial Rules*, BOS. GLOBE, Jan. 7, 2011, at 1.

193. S. 712, 112th Cong. (2011). The bill was referred to the Senate Finance Committee, where it remained.

194. H.R. 1355, 112th Cong. (2011); H.R. 557, 112th Cong. (2011).

195. H.R. 1355, 112th Cong. (2011); H.R. 557, 112th Cong. (2011).

196. H.R. 1640, 112th Cong. (2011). Both Neugebauer bills and the Posey bill were referred to the Subcommittee on Financial Institutions and Consumer Credit of the House Financial Services Committee, and remained there.

and its Republican allies were pursuing a strategy of “death by a thousand cuts.”<sup>197</sup>

The bills that received the most serious consideration went directly to the heart of the Dodd-Frank Act’s consumer protection program. A bill introduced by Representative Spencer Bachus (R-Ala.) and Senator Jerry Moran (R-Kan.) would have replaced CFPB’s single Director with a five-member commission composed of the Vice Chairman for Supervision of the Federal Reserve System and four members appointed by the President.<sup>198</sup> A bill introduced by Representative Sean Duffy (R-Wis.) would have allowed the FSOC to veto CFPB rules with a majority (rather than two-thirds) vote, and it would have empowered the Chairperson of the FSOC to issue a stay of any rule pending the vote.<sup>199</sup> It would also have required (rather than authorized) the FSOC to set aside any CFPB regulation that would put the safety and soundness of the United States banking system or the stability of the United States financial system at risk.<sup>200</sup> A bill offered by Representative Shelley Moore Capito (R-W.Va.) would have delayed the Dodd-Frank Act’s transfer of regulatory authority over the older consumer financial protection statutes to the CFPB until a CFPB Director was confirmed by the Senate.<sup>201</sup>

The Subcommittee on Financial Institutions and Consumer Credit of the House Financial Services Committee held two hearings on the CFPB. The first featured a single witness: Elizabeth Warren, by that time an assistant to the Secretary of the Treasury and aide to President Obama charged with responsibility for setting up the new CFPB.<sup>202</sup> Warren opposed the bills as attempts “to chip away at [CFPB’s] independence.”<sup>203</sup> The second hearing focused on three of the prominent CFPB reform bills and featured eight witnesses. Four presidents of financial institutions, the head of the

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197. Slack, *supra* note 192 (internal quotation marks omitted). Other amendments to the Dodd-Frank Act also received serious consideration in the House. See, e.g., H.R. REP. NO. 112-196, 112th Cong. (2011) (House Financial Services Committee report in favor of repealing a portion of the Dodd-Frank Act regarding credit ratings); David S. Hilzenrath, *House Panel Defers Overhaul Action*, WASH. POST, May 5, 2011, at A17 (discussing House Agricultural Committee vote in favor of bill to delay implementation of derivatives rules by eighteen months).

198. S. 737, 112th Cong. (2011); H.R. 1121, 112th Cong. (2011); see also Ambrose, *supra* note 183; Cheyenne Hopkins, *Political Sniping Dominates House Hearing on the CFPB*, AM. BANKER, Apr. 7, 2011, at 3.

199. H.R. 1315, 112th Cong. (2011).

200. *Id.*

201. H.R. 1667, 112th Cong. (2011); see also Ambrose, *supra* note 183; Hopkins, *supra* note 198.

202. See *Oversight of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. v (2011).

203. Katrina vanden Heuvel, *Elizabeth Warren’s Battle*, NATION (Feb. 22, 2011, 12:31 PM), <http://www.thenation.com/blog/158780/elizabeth-warrens-battle>.



Consumer Bankers Association, and the executive director of the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce all testified in favor of one or more of the proposals.<sup>204</sup> Only a witness representing the NAACP and a Georgetown University law professor testified against the proposals.<sup>205</sup> The Bachus, Duffy, and Capito bills were then marked up and reported out of committee.<sup>206</sup> In late July 2011, the full House passed a single bill combining the contents of the three bills.<sup>207</sup> That bill would have turned CFPB into a multi-member agency, made it easier for the FSOC to veto its rules, and delayed the transfer of power to the new agency until its members were confirmed.<sup>208</sup>

### B. Deregulation Through Riders

Recognizing that it would be difficult to persuade the Democrat-controlled Senate to enact deauthorizing legislation, and conscious of President Obama's threat to veto such legislation, the House Republican leadership pursued a simultaneous strategy of attaching environmental and CFPB limitation riders to must-pass legislation.<sup>209</sup> One major difference between the battles over riders in the 112th Congress and those of the 104th Congress was the virtual absence of moderate Republicans in either house of Congress in 2011.<sup>210</sup> By 2010, the conservatives and the Tea Party had effectively purged the Republican Party of moderates who might have voted against the leadership on environmental issues.

#### 1. The 2011 Continuing Resolution

The first opportunity for the rider strategy came in mid-February 2011 as Congress took up a continuing resolution to fund the government. Because the 111th Congress had adjourned without passing a FY 2011 budget, a continuing resolution was necessary to keep the government's doors open

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204. *Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. (2011).

205. *Id.* at 14–16 (testimony of Hilary O. Shelton, Director, NAACP Washington Bureau, and Senior Vice President for Advocacy and Policy, NAACP); *id.* at 47–49 (testimony of Adam J. Levitin, Professor, Georgetown University Law Center).

206. H.R. REP. NO. 112-107 (2011); H.R. REP. NO. 112-93 (2011); H.R. REP. NO. 112-89 (2011).

207. 157 CONG. REC. H5,347–48 (daily ed. July 21, 2011).

208. *Id.* at H5,317–48.

209. See Nick Juliano, *Senate Democrats Vow to Drop EPA Policy Measures from FY11 Budget Bill*, 32 *Inside EPA* (Inside Wash. Publishers) No. 8, at 3 (Feb. 25, 2011).

210. See Paul Starr, *The Demise of the Moderate Republican*, AM. PROSPECT, June 2011, at 3, 3.

for the remainder of the fiscal year.<sup>211</sup> The continuing resolution, as introduced, contained limitation riders preventing EPA from expending any appropriated funds for the “purposes of enforcing or promulgating any regulation,” or from denying approval of a permit or state implementation plan “because of the emissions of greenhouse gases due to concerns regarding possible climate change.”<sup>212</sup> It also prevented EPA from expending any of the appropriated funds to “implement, administer, or enforce” a draft CWA guidance document expanding the scope of the definition of “wetlands.”<sup>213</sup> According to a former member of the House Budget Committee Staff, it was *déjà vu* all over again.<sup>214</sup> The full House added a long list of deregulatory limitation riders to the Committee’s bill, including the following riders prohibiting EPA from using appropriated funds to:

establish numeric quality criteria for nutrients in Florida surface waters to protect the Everglades (offered by Representative Tom Rooney (R-Fla.));<sup>215</sup>

implement or enforce any policy giving closer scrutiny to CWA permits for mountaintop removal mining operations (offered by Representative Morgan Griffith (R-Va.));<sup>216</sup>

classify coal ash as a hazardous waste, or to veto any dredge-and-fill permit issued by the Corps of Engineers (offered by Representative David McKinley (R-W.Va.));<sup>217</sup>

promulgate Maximum Daily Loads under the CWA for a number of pollutants in the Chesapeake Bay (offered by Representative Robert Goodlatte (R-Va.));<sup>218</sup>

211. *See id.*

212. H.R. 1, 112th Cong. § 1746 (as introduced in House, Feb. 11, 2011).

213. *Id.* § 1747; *see also* Juliano, *supra* note 209, at 4. The expanded definition would have subjected more land to the CWA’s permit requirement for filling wetlands with soil. *See* EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011); ENVTL. PROT. AGENCY, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT 2–3 (2011), *available at* [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

214. Juliano, *supra* note 209, at 4.

215. *See* 157 CONG. REC. H1,290–91, H1,305–06 (daily ed. Feb. 18, 2011).

216. *Id.* at H1,312–14, H1,332; *see also* Alan Kovski, *EPA Effort to Improve Stream Protections Seen as Slowing, Not Blocking Mine Permits*, 41 Env’t Rep. (BNA) 329 (Feb. 12, 2010) (describing the targeted policy); Janice Valverde, *Army Corps Plan Would Ban Permit or Mountaintop Mining in Appalachia*, 40 Env’t Rep. (BNA) 1444 (June 19, 2009) (detailing stricter scrutiny of mining permits).

217. 157 CONG. REC. H1,318–20, H1,336 (daily ed. Feb. 18, 2011).

218. *Id.* at H1,282–84, H1,304.

revise the National Ambient Air Quality Standards for coarse particulate matter (offered by Representative Kristi Noem (R-S.D.));<sup>219</sup> and

enforce its hazardous air pollutant emissions standard for cement plants (offered by Representative John Carter (R-Tex.)).<sup>220</sup>

An environmental activist noted that the riders were inconsistent with the Republican “Pledge to America” manifesto from the 2010 elections. That document had committed the candidates to “end[ing] the practice of packaging unpopular bills with ‘must-pass’ legislation” and to “advanc[ing] major legislation one issue at a time.”<sup>221</sup>

Throughout the House committee and floor debates, President Obama remained curiously silent about the proposed anti-environmental riders. He rarely mentioned global warming in his energy addresses during this time, focusing instead on green technologies, “clean coal,” domestic oil and gas production, and nuclear power development.<sup>222</sup> With the White House on the sidelines, the showdown came in the Senate. As the clock wound down toward a government shutdown, the environmental riders became a major sticking point in the negotiations over the bill.<sup>223</sup> At the last possible moment, the House leadership agreed to drop the environmental riders from the bill.<sup>224</sup> The leadership was apparently willing to abandon this early opportunity to force the deregulatory rider issue in furtherance of a broader strategy of adding deregulatory riders at every opportunity and hoping that, as during the Clinton years, the opposition would diminish over time.

In the case of CFPB, the rider strategy could not consist of the tried-and-true limitation rider prohibiting the federal agency from expending appropriated monies to perform the targeted function. The supporters of CFPB in the 111th Congress had anticipated such a move and had insulated the agency against it by providing that its funding would come from the monies that the Federal Reserve collected from the banking industry in various fees. The House Republicans were, however, successful in including a provision subjecting CFPB to annual audits by the Government

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219. *Id.* at H1,325–27, H1,339.

220. *Id.* at H1,115–21, H1,142.

221. REPUBLICANS IN CONG., A PLEDGE TO AMERICA 33 (2010) [hereinafter A PLEDGE TO AMERICA], available at <http://www.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf>

222. John M. Broder, *House Panel Votes to Strip E.P.A. of Power to Regulate Greenhouse Gases*, N.Y. TIMES, Mar. 11, 2011, at A18.

223. See Amena H. Saiyid, *EPA Riders Are Out of Spending Bill, but Analysts Say Battle Is Far from Over*, 42 Env't Rep. (BNA) 816 (Apr. 15, 2011).

224. *See id.*

Accountability Office and private-sector auditors to assess the agency's impact on jobs and the adequacy of its cost-benefit analyses.<sup>225</sup>

## 2. The SBIR/STTR Reauthorization Act of 2011

The next move came in the Senate, where Republicans and some oil-patch Democrats attempted to take away EPA's greenhouse gas regulatory authority by attaching the text of the Inhofe and Rockefeller bills to the reauthorization act for the Small Business Innovation Research and Small Business Technology Transfer programs.<sup>226</sup> The sponsors hoped that adding the riders to this highly popular bill would insure against a presidential veto. The full Senate, however, rejected both amendments in a fifty-fifty vote in which one Republican joined the Democrats and four Democrats joined the Republicans.<sup>227</sup> The Senate also rejected an amendment offered by Senator Debbie Stabenow (D-Mich.) that would have suspended EPA's enforcement of its greenhouse gas regulations for two years, and an amendment offered by Senator Max Baucus (D-Mont.) that would have exempted the agricultural sector and limited EPA's regulation to the very largest power plants.<sup>228</sup> The Republicans voted against these amendments because they were not sufficiently limiting. Nonetheless, Senator Bill Nelson (D-Fla.), another Democrat who supported rolling back EPA's regulations, promised to look for other bills to which the riders could be attached.<sup>229</sup> The Republican opponents of EPA's climate change protections were likewise undaunted.

## 3. The 2012 Appropriation Bills

The next available vehicle for deregulatory riders was the FY 2012 appropriation bills. The FY 2012 Financial Services and General Government Appropriations Bill, reported out of the House Appropriations Committee on July 7, 2011, contained several legislative riders related to CFPB. One rider would have amended the Dodd-Frank Act to limit the amount of money that the Federal Reserve could transfer to CFPB to \$200 million, a thirty-nine percent reduction from the amount that CFPB requested and a seventy-one percent reduction from the amount that the Dodd-Frank Act

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225. Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, § 1573, 125 Stat. 38, 138 (2011); *see also* Cheyenne Hopkins, *Budget Pact Includes Audits of CFPB*, AM. BANKER, Apr. 12, 2011, at 3.

226. SBIR/STTR Reauthorization Act of 2011, S. 493, 112th Cong.; Ari Natter, *Senate Rejects Amendments Blocking EPA Climate Authority; Critics Vow Retry*, 42 Env't Rep. (BNA) 737 (Apr. 8, 2011) (explaining the failed attempt to attach the greenhouse gas prohibition).

227. Natter, *supra* note 226.

228. *Id.*

229. *Id.*

had originally authorized the Federal Reserve to transfer.<sup>230</sup> A second legislative rider would have amended the Dodd-Frank Act to make CFPB's funding subject to the annual appropriations process beginning in FY 2013 rather than in FY 2015, as provided for in the statute.<sup>231</sup> A third legislative rider would have required CFPB to submit an "operating plan" to the committee within sixty days of enactment detailing how the agency planned to allocate its resources.<sup>232</sup> Finally, the committee's report signaled its amenability to further legislative riders as floor amendments with a paragraph concluding that "a five-member commission is more suitable for guiding the [CFPB] than a single director" and expressing its strong support for Representative Bachus's bill.<sup>233</sup>

The riders in the FY 2012 Department of Interior and EPA appropriation bill were reported out of the House Appropriations Committee on a strict party-line vote on July 12, 2011.<sup>234</sup> The riders in the bill surpassed in number and aggressiveness the notorious environmental riders of the 104th Congress.<sup>235</sup> One legislative rider, for instance, prohibited EPA from doing any of the following for one year following enactment: "propos[ing] or promulgat[ing] any regulation regarding the emissions of greenhouse gases from stationary sources to address climate change"; including any enforceable condition for greenhouse gases to address climate change in any permit application submitted within one year of enactment; and issuing any legally operative permit conditions regulating such emissions.<sup>236</sup> Additionally, the rider prohibited common law tort actions, including nuisance claims, based on any actual or potential damage due to the contribution of greenhouse gas emissions to climate change for one year following enactment.<sup>237</sup> Additional substantive riders exempted pesticide applicators from the CWA's discharge permit requirement<sup>238</sup>—thereby overruling a court of appeals opinion holding that permits were required<sup>239</sup>—and expedited air quality permits for offshore oil and gas facilities and exempted them from appeals to EPA's Environmental Appeals Board.<sup>240</sup>

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230. H.R. REP. NO. 112-136, at 8 (2011).

231. *See id.*

232. *Id.*

233. *Id.* at 8–9.

234. *See* H.R. REP. NO. 112-151, at 132 (2011).

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

236. H.R. 2584, 112th Cong. § 431 (2011). This was a legislative rider, in my view, because it amended the statute itself and did not merely withhold appropriated funds for a particular purpose.

237. *Id.* § 431(a)(4); H.R. REP. NO. 112-151, at 116 (2011).

238. H.R. REP. NO. 112-151, at 136.

239. *See Nat'l Cotton Council v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009).

240. H.R. REP. NO. 112-151, at 138.

The bill also contained a number of limitation riders, including prohibitions on using appropriated funds for the following purposes:

preparing, proposing, or finalizing any regulations of “greenhouse gas emissions from new motor vehicles and new motor engines”;<sup>241</sup>

implementing closer scrutiny of CWA permits for mountaintop removal mining;<sup>242</sup>

finalizing or implementing proposed regulations requiring stream buffers for mountaintop removal mining;<sup>243</sup>

identifying coal ash as a hazardous waste;<sup>244</sup>

expanding the definition of wetlands;<sup>245</sup>

lowering ambient standards to within or below background concentration levels;<sup>246</sup>

completing EPA’s proposed rule setting air toxics emissions standards for industrial boilers;<sup>247</sup>

implementing or enforcing its hazardous air pollutant emissions standards for Portland cement plants;<sup>248</sup>

finalizing its regulations governing thermal discharges under the CWA;<sup>249</sup>

writing numerical nutrient standards for bodies of water in Florida;<sup>250</sup>

modifying the National Ambient Air Quality Standards for coarse particulate matter;<sup>251</sup>

finalizing guidance on false or misleading pesticide labels;<sup>252</sup> or

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241. *Id.* at 117.

242. H.R. 2584, 112th Cong. § 433 (2011).

243. *See id.* § 432.

244. *Id.* § 434.

245. *Id.* § 435.

246. H.R. REP. NO. 112-151, at 60–61 (2011).

247. *Id.* at 70.

248. H.R. 2584, 112th Cong. § 448 (2011).

249. *See id.* § 436.

250. *See id.* § 452.

251. *Id.* § 454.

252. *Id.* § 460.

requiring mandatory reporting of greenhouse gas emissions from manure management.<sup>253</sup>

Representative Mike Simpson (R-Idaho) explained that the riders were necessary because “[m]any of us think that the overregulation from E.P.A. is at the heart of our stalled economy.”<sup>254</sup> Representative Norm Dicks (D-Wash.) observed that it was “already like a wish list for polluters,” and it was “going to get worse on the floor.”<sup>255</sup> As of the August recess, the full House had not completed its deliberations on the bill. President Obama threatened to veto the bill if it contained anti-environmental riders,<sup>256</sup> but that threat was no more credible than his threat to veto the FY 2011 continuing resolution.

#### IV. THE RIDER AS A POLICYMAKING TOOL

Riders have been “a constant presence in the legislative landscape for 150 years.”<sup>257</sup> As a legislative tool, the rider is not inherently good or evil.<sup>258</sup> Riders can be abused in ways that defeat democracy, but they also make it possible for legislation having the support of a large majority of the national population to prevail over an obstructionist minority. Riders have been employed by both Democrats and Republicans whether they are in the majority or in the minority.<sup>259</sup> Although riders have most frequently been deployed at the behest of companies and trade associations to advance narrow economic interests, they have also been effectively utilized by public interest groups advancing their views of the broader public interest. While environmental and consumer groups universally deplored the environmental and financial riders described above, for many years some of the same groups supported a limitation rider to the appropriation bills for the Federal Motor Carrier Safety Administration prohibiting expenditures to implement a program that would allow trucks from Mexico to serve destinations in the interior of the United States.<sup>260</sup> This section will analyze some of the benefits and costs of riders to society and to public perceptions of the legitimacy of the legislative process.

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253. H.R. REP. NO. 112-151, at 116 (2011).

254. Kaufman, *supra* note 235 (internal quotation marks omitted).

255. *Id.* (internal quotation marks omitted).

256. *See Despite Veto Threat, House Limits on EPA Policy May Survive Senate Debate*, 32 *Inside EPA* (Inside Wash. Publishers) No. 30, at 1, 1, 24 (July 29, 2011).

257. Patlis, *supra* note 18, at 327.

258. *See id.* at 260 (“[Riders] are not *a priori* evil.”).

259. Lazarus, *supra* note 11, at 637, 640; Patlis, *supra* note 18, at 261.

260. *See* Patlis, *supra* note 18, at 269. The rider played a major role in the litigation leading to the Supreme Court’s decision in *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 761–62 (2004).

### A. Benefits of Riders

The rider offers a convenient shortcut to avoid the normal path of legislation, which can take a number of unexpected turns and wind up at a dead end. Riders often address controversial issues of public policy for which compromise is difficult and progress is possible only if the majority prevails. Given the difficulties of enacting legislation in a highly polarized political environment in which a supermajority in the Senate is ordinarily required to enact controversial legislation, the rider can be the only way for Congress to legislate at all in controversial areas.<sup>261</sup> At the same time, riders can be the only effective tool for Congress to terminate Executive Branch initiatives that exceed delegated authority.<sup>262</sup> A President who would be happy to veto an attempt to rein in executive power may not be willing to veto a critical appropriation bill or continuing resolution.<sup>263</sup>

### B. Costs of Riders

Despite these advantages, it is fair to conclude that riders are not a favored method of public policymaking in a representative democracy.<sup>264</sup> Scholars have identified several serious disadvantages of legislating through riders. Because the process of adding riders to appropriation bills and other must-pass legislation is often clouded in secrecy, it is difficult for citizens who are adversely affected by riders to hold their elected representatives accountable for supporting them. Riders often allow determined special interest groups to have their way without the full public participation and deliberation promised by our republican form of government.<sup>265</sup> The committees that are often responsible for adding riders to bills lack the subject matter expertise that the bypassed authorization committees possess. The motivating forces behind most riders are special interests seeking special advantages at the expense of the general population. Finally, and in my view most importantly, special interests and their allies in Congress can use riders to extort concessions out of the Executive Branch that can debilitate

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261. See Devins, *supra* note 13, at 464.

262. See *id.*

263. See *id.* It should be noted, however, that the Constitution does provide a vehicle for Congress to override presidential vetoes with a two-thirds vote in each house. U.S. CONST. art. I, § 7. The rider is a vehicle for avoiding this hurdle.

264. See Lazarus, *supra* note 122, at 36. See generally SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA* 63–79 (1992); Devins, *supra* note 13.

265. See Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 112 (1987) (“[A]ppropriation riders are frequently not the product of legislative deliberation and consensus.”); Cass R. Sunstein, *Legislative Foreword, Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 283–84 (1996).



new and ongoing regulatory programs to the detriment of the public welfare.

### 1. Transparency and Accountability

The process of adding riders to appropriation bills and other must-pass legislation is not especially transparent under the best of conditions, and it can be downright secretive at times. In the case of deregulatory riders that reduce the protections provided by popular consumer and environmental legislation, the sponsors of riders are especially anxious to hide them in 1,000-page consolidated appropriation bills where they become visible, if at all, after it is too late for opponents to sound a public alarm.<sup>266</sup> For example, parts of the salvage timber rider in the 1995 rescissions bill that emerged from the House Appropriations Committee were handwritten, and the final version was still unavailable at the time the full House voted on the bill.<sup>267</sup>

Citizens affected by the substantive changes imposed by riders that are hidden from public view find it difficult to hold members of Congress accountable for the practical consequences of their votes.<sup>268</sup> When citizens do learn of riders after the fact, members of Congress can avoid accountability by claiming that their hands were tied by the need to enact must-pass legislation.

Lack of transparency and accountability, however, was not a problem that afflicted the environmental and worker safety riders to the FY 1996 appropriation bill that the House passed during the 104th Congress. As we have seen, the contents of those riders were widely publicized in the press and highlighted by President Clinton, who detected from opinion polls that challenging the riders would be a wise political move. Likewise, the environmental riders that were added to the FY 2011 rescissions bill and EPA's 2012 appropriation bill were widely publicized in the mainstream press and well known to environmental groups who vigorously opposed them. The more technical riders to the FY 2012 appropriation bill aimed at disempowering the CFPB were slightly less visible, but nevertheless received enough media attention to make consumer groups well aware of them and to hold their representatives accountable for voting for them.<sup>269</sup> The partisan

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266. Lazarus, *supra* note 11, at 660; *see also* Sunstein, *supra* note 265, at 283–84 (criticizing the House of Representatives for reducing environmental regulation through the “relatively less visible mechanism” of appropriation riders).

267. Goldman & Boyles, *supra* note 66, at 1043–44.

268. *See* Zellmer, *supra* note 54, at 510.

269. For an example of such media attention, see Peter Schroeder, *GOP Targets Funding of Consumer Bureau*, HILL (June 15, 2011, 10:03 AM), <http://thehill.com/blogs/on-the-money/appropriations/166531-gop-sets-sights-on-consumer-bureau-in-latest-approps-bill>.

proponents of these riders did not want to hide the changes from the public. To the contrary, they apparently wanted their supporters to know that they opposed the regulatory programs that EPA and CFPB were implementing under existing statutory authority and that they were prepared to do something about it.

## 2. Lack of Due Deliberation

Perhaps the most frequently expressed complaint about appropriations riders is that they allow Congress to push through legislation without the due deliberation that should attend the serious enterprise of legislating substantive law.<sup>270</sup> Since the Civil War, both houses of Congress have attempted to ensure that substantive legislation receives the deliberation that the public rightly expects.<sup>271</sup> They have divided the labor of preparing bills for full consideration between the authorization committees—responsible for considering substantive legislation creating, modifying, or eliminating federal programs—and the budget and appropriations committees responsible for funding authorized programs.<sup>272</sup> The very existence of riders is inconsistent with this arrangement, a point that is nominally captured in the rules of both houses of Congress. The relevant Senate rule allows a Senator to raise a point of order with respect to any amendment to an appropriation bill that “proposes general legislation,”<sup>273</sup> and the House rule provides that a “provision changing existing law may not be reported in a general appropriation bill.”<sup>274</sup> The rules have been interpreted, however, to exclude limitation riders, which arguably do not change law and are applicable for only a single fiscal year.<sup>275</sup> Even with respect to legislative riders, the rules are often flouted when the rules committees of both houses liberally issue waivers for riders the leadership prefers and deny waivers for riders the leadership opposes.<sup>276</sup>

Authorization committees generally proceed in a far more deliberative fashion when considering substantive legislation than the appropriations committees proceed when considering appropriation riders. Authorizing

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270. See, e.g., Devins, *supra* note 13 at 464–65; Goldman & Boyles, *supra* note 66, at 1036–37; Lazarus, *supra* note 11, at 632–33; Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 474 (1992); Zellmer, *supra* note 54, at 503–04.

271. Lazarus, *supra* note 11, at 633.

272. See *id.* But see Zellmer, *supra* note 54, at 505–07 (noting the division of labor is often not followed).

273. STANDING RULES OF THE U.S. SENATE, S. DOC. NO. 110-9, R. XVI(4) (2007).

274. CLERK OF THE H.R., 112TH CONG., RULES OF THE H.R. r. XXI(2)(b) (2011), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

275. See Devins, *supra* note 13, at 462.

276. See Lazarus, *supra* note 11, at 676; Zellmer, *supra* note 54, at 506–07.

committees typically hold one or more hearings on a substantive bill at which witnesses can testify for and against the bill, offering information and arguments in support of their positions.<sup>277</sup> In the case of legislation affecting particular regulatory programs, the list of witnesses invariably includes a representative of the affected agency, who is given an opportunity to defend the program and is available to be quizzed by skeptical members of the committee.<sup>278</sup> In addition, the witness list typically includes representatives of the affected industry and consumer or environmental groups who can also present information and arguments for and against changing the existing law.

When an appropriations committee reports out a bill that is laden with substantive riders, it effectively usurps the authority of the authorization committees and preempts the substantive legislation-writing process under the House and Senate rules.<sup>279</sup> Appropriations committees understandably expend most of their deliberative efforts on agency budget justifications and matters of fiscal policy. They rarely take testimony on riders that they attach to appropriation bills, and they seldom debate them at any length during markup sessions.<sup>280</sup> The absence of due deliberation is especially troubling for deregulatory riders that operate to change existing law. They are of great concern to the regulatory beneficiaries because the process allows rider proponents to bring to the floor legislation that might never have emerged from the relevant authorization committees over the objections of regulatory-program proponents.<sup>281</sup> When riders are attached to must-pass legislation that faces a looming deadline, as is nearly always the case with riders to continuing resolutions, the relevant authorization committees may not even have time to read and digest the riders' content before being required to vote on them.<sup>282</sup>

Floor riders added to appropriation bills and other must-pass legislation also circumvent the carefully designed deliberative process envisioned by the House and Senate rules, even if the legislation to which they are attached has undergone hearings and markup. The floor debates over appropriation bills tend to be quite limited, especially in the House of Representatives.<sup>283</sup> For example, the OSHA ergonomics appropriation

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277. Zellmer, *supra* note 54, at 500–01.

278. In contrast, appropriation riders “are often added as last minute measures, not by legislative committees responsible for and experienced in substantive legislation, but rather by appropriations committees that generally lack both substantive expertise and the benefit of hearings and committee reports, and then passed by the Congress with little or no debate.” Bloch, *supra* note 265, at 112.

279. See Goldman & Boyles, *supra* note 66, at 1043; Zellmer, *supra* note 54, at 505.

280. Lazarus, *supra* note 11, at 655.

281. See Zellmer, *supra* note 54, at 457.

282. *Id.* at 507–08.

283. See Sunstein, *supra* note 265, at 284–85.

rider in the 104th Congress had a profound impact on one of the most important rule-making initiatives in that agency's history. Yet the OSHA rulemaking barely surfaced in the vigorous substantive debates over Medicare and other expensive federal programs that absorbed the bulk of the members' attention during the floor consideration of the appropriation bill.

While the deliberation critique of riders is well taken as a general matter, it is only marginally relevant to the deregulatory riders examined in this Article. The House leadership in both the 104th and 112th Congresses adopted a strategy of moving stand-alone bills rapidly through the authorization committees so that the work product of those committees could be used as templates for riders to appropriation bills. Thus, most of the riders examined here were the subjects of hearings before the relevant authorization committees, and many were voted on and reported out of committee before being attached as riders to continuing resolutions or appropriation bills. The amendments to the CWA that showed up in the House-passed FY 1996 appropriation bill had already been reported out of the relevant authorization committee. At the same time that Tom Delay was insisting on a rider to prevent OSHA from issuing an ergonomics standard, the House Economic and Educational Opportunities Committee was conducting extensive hearings on amendments that would have put an end to that rule-making initiative and many others. Similarly, the climate change rider to the House version of EPA's FY 2012 appropriation bill had already been the subject of hearings before the relevant authorization committee. The same was true for changes to the Dodd-Frank Act that showed up as riders to the FY 2012 appropriation bill for the Treasury Department.

This is not to say that all of the aforementioned riders received the deliberation that was due. As we have seen, the House hearings on climate change and CFPB bills during the 112th Congress featured many witnesses favoring the deregulatory policies advanced by the legislation and very few witnesses representing the beneficiaries of the targeted regulatory programs. All of the bills would no doubt have benefitted from fuller and fairer hearings. But the fact remains that the committees aired at least two sides of the relevant issues in a public forum that complied with the due deliberation requirements of both houses of Congress. And the bills reflected that deliberation after they were added as riders to continuing resolutions and appropriation bills.

This suggests that in these highly polarized times, the value of deliberation may be overrated. Pro forma hearings in which agency heads are pummeled with rhetorical questions and demands for information are not paradigms of democratic deliberation. The riders that were attached to the FY 2012 appropriation bills received about as much deliberation as they were going to receive in the authorization committees before moving to the

floor of the House. Furthermore, the relevant Senate committees, which were controlled by the Democratic Party, were free to hold additional hearings on the subject matter of the House bills, most of which had companion bills pending in the Senate. When applied to the deregulatory riders studied here, the deliberation critique strikes a glancing blow at best.

### 3. Lack of Expertise

A primary reason for dividing legislative committees along functional lines according to subject matter is to ensure that proposed legislation is reviewed by committees with expertise in the relevant subject matter.<sup>284</sup> Over time, the members and the staff of the authorizing committees acquire expertise in the relevant body of law and in the way that the designated agency is implementing and enforcing that law. The authorization committees also gain a sense of how difficult it is to establish new programs and of how disruptive sudden changes to ongoing programs can be for the agencies, the regulated industries, and the beneficiaries of those programs. The fact that the authorizing committee can bring its expertise to bear on the substance of proposed legislation should help ensure a sounder legislative product.<sup>285</sup>

Appropriations committees generally lack the authorizing committees' expertise regarding the nature and operation of the regulatory programs.<sup>286</sup> To be sure, appropriations subcommittee members and staff must have some familiarity with ongoing programs to make considered judgments about how much money to appropriate. Since they are primarily concerned with budgetary matters, however, they are generally not as familiar with the substance of programs that are the targets of deregulatory riders as are the members and staffs of the authorizing committees. Moreover, as the keepers of the government fisc, they are likely to be more favorably inclined toward deregulatory riders that reduce the scope of regulatory programs and thereby reduce the cost of running those programs than authorizing committees, which may be more inclined to expand the reach of the agencies that they oversee. Authorizing committee members may bring their expertise to bear on proposed riders to appropriation bills or other must-pass legislation when they are introduced and debated on the floor of the House or Senate. Even then, however, such riders do not necessarily receive the full benefit of the expertise of the authorization committee

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284. See Lazarus, *supra* note 11, at 655; Zellmer, *supra* note 54, at 501–02.

285. Lazarus, *supra* note 11, at 653–55; Zellmer, *supra* note 54, at 501.

286. See Devins, *supra* note 13, at 458 (noting that appropriation riders “may prevent the appropriate authorizing committee from applying its expertise”); Lazarus, *supra* note 11, at 654 (“[T]here is no reason to suppose that the two different kinds of committees possess remotely similar degrees of relevant policy expertise in the substantive details . . .”).

members because the riders are usually taken up in rapid succession with little time allocated for serious study and debate.

Like the deliberation critique, the expertise critique is not fully applicable to the deregulatory riders considered here. As discussed above, many of the riders were referred to authorization committees in the House, and most of those were reported out of those committees before being added as riders to appropriation bills. Others were added by the appropriations committees or were offered as floor amendments. Bills that have been fully considered by authorization committees and attached as riders to must-pass legislation do not necessarily suffer from lack of committee expertise.

#### 4. Special Interest Pandering

As noted above, riders are available to proponents both of deregulation and of more stringent regulation, but they have been employed far more frequently by the former.<sup>287</sup> Both during the Clinton years and in the 112th Congress thus far, the House Republican leadership opened special channels of communication to business-community lobbyists that facilitated industry efforts to enact both legislative and limitation riders. During the 104th Congress, for example, House Republican Conference Chairman John Boehner met with corporate lobbyists, representatives of selected think tanks, and grass roots groups every Thursday morning in the Speaker's office; there they coordinated their lobbying efforts with the Republican leadership's deregulatory agenda.<sup>288</sup> At the outset of the 112th Congress, the Financial Services Roundtable hosted a gathering of congressional staffers that it called "Financial Services University," at which "visiting professors" gave lectures on the Dodd-Frank Act and its projected adverse impacts on the banking industry.<sup>289</sup> Soon thereafter, Representative Darryl Issa (R-Cal.), Chairman of the House Committee on Oversight and Government Reform, invited members of the business community to submit lists of regulations that, in their view, should be repealed or modified.<sup>290</sup>

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287. See Lazarus, *supra* note 11, at 663–64.

288. See JOHN B. JUDIS, *THE PARADOX OF AMERICAN DEMOCRACY* 220 (2001); Jeffrey H. Birnbaum, *The Thursday Regulars*, *TIME*, Mar. 27, 1995, at 30, 30–31.

289. Protes, *supra* note 184.

290. See H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., *ASSESSING REGULATORY IMPEDIMENTS TO JOB CREATION* 7–8 (2011) [hereinafter *ASSESSING REGULATORY IMPEDIMENTS*], available at [http://oversight.house.gov/images/stories/Reports/Preliminary\\_Staff\\_Report\\_Regulatory\\_Impediments\\_to\\_Job\\_Creation.pdf](http://oversight.house.gov/images/stories/Reports/Preliminary_Staff_Report_Regulatory_Impediments_to_Job_Creation.pdf) (preliminary staff report); Press Release, Congressman Darrell Issa, Issa Makes Submissions Reflecting Input from Job Creators on Regulatory Barriers to Job Creation Public (Feb. 7, 2011), available at [http://issa.house.gov/index.php?option=com\\_content&task=view&id=620&Itemid=28&Itemid=4](http://issa.house.gov/index.php?option=com_content&task=view&id=620&Itemid=28&Itemid=4).

Many of the resulting suggestions became riders to the FY 2012 EPA appropriation bill in the House.<sup>291</sup>

Deregulatory riders invariably undermine the policies that Congress meant to advance when it enacted the regulatory statutes. In the case of limitation riders, the impact is temporary (unless Congress renews the rider with each agency appropriation, as is frequently the case). Legislative riders, however, change existing law through a process that rarely reflects the full public input and congressional deliberation that attended the enactment of the original statute. In both cases, the deregulatory rider is nearly always intended to advance the economic interests of an industry, or even a single company, at the expense of the beneficiaries of the statute. The “rider game invite[s] special interests to use their influence to obtain ‘get out of jail free cards’ for violating [existing] laws and running afoul of settled public policy.”<sup>292</sup> Deregulatory riders also tend to interfere with an agency’s ongoing efforts to implement the statute in a way that is fair to all regulated entities.

## 5. Extortion

The most serious problem with the environmental and OSHA riders of the 104th Congress, and the environmental and CFPB riders of the 112th Congress, was not the lack of transparency, the absence of congressional hearings, the lack of expertise, or even the fact that they were advanced by narrow economic interests. As with the spending riders attached to the debt ceiling bill in the summer of 2011, the problem with these riders was extortion. The proponents of the riders held appropriation bills and continuing resolutions hostage to their demands for specific deregulatory policy changes without persuading Congress and the President that such changes were in the public interest. While these efforts made great strategic sense, they are nevertheless troublesome from the broader perspective of lawmaking in a representative democracy.

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291. The industry responses included suggestions for a number of deregulatory changes that found their way into the deregulatory riders, including changes eliminating or limiting EPA’s authority to regulate greenhouse gas emissions, mountaintop removal mining, coal ash disposal, hazardous emissions from cement plants, and discharges of nutrients in the Chesapeake Bay. See ASSESSING REGULATORY IMPEDIMENTS, *supra* note 290, at app. I.

292. Goldman & Boyles, *supra* note 66, at 1037. The salvage timber rider, for example, “truncated the required environmental analysis, eliminated administrative appeals, and rendered federal environmental and natural resources laws unenforceable” for entire categories of new timber sales, *id.* at 1048, and directed the relevant agencies “to proceed with a category of old timber sales that had been canceled or held up because they violated federal environmental laws,” thereby undoing “past actions taken by the agencies and the courts to comply with the law.” *Id.* at 1051. This was all done at the behest of lumber companies and unions bent on achieving short term profits at the expense of long term forest management goals. *Id.* at 1043.

Ordinarily, the pressure to enact, amend, or repeal authorizing legislation comes from lobbyists for affected interests who press Congress to act or refrain from acting. Because inaction leaves the status quo in place, the burden is on the proponents of legislative change to persuade the leadership of both houses of Congress to move the legislation forward and to persuade a majority of House members and (in the case of virtually all controversial legislation) a supermajority of sixty senators to vote for the bill.<sup>293</sup> The opposite is true of appropriation legislation and legislation raising the debt limit, both of which must be enacted periodically for the government to function and to maintain the full faith and credit of the United States.<sup>294</sup> Determined proponents of special interest riders who are positioned to stop or delay legislation in this latter category can hold legislation hostage by threatening to exercise that power if it fails to include the rider.

Because appropriations committees are responsible for funding the federal government annually, they typically adhere to strict schedules to ensure that the federal government does not shut down.<sup>295</sup> Strict schedules also characterize legislation raising the debt ceiling and legislation reauthorizing existing programs. As the deadline nears, the legislative environment can become quite conducive to attempts by proponents of special interests to attach ill-considered riders to the bill.<sup>296</sup> It can be very difficult for a congressperson to vote against an appropriation bill, a continuing resolution, a bill raising the debt ceiling, or a bill reauthorizing an existing program simply because a single rider is unfair or offensive.<sup>297</sup> The same is true for the President's decision whether to veto such bills. Thus, a promise to impede the progress of such a bill if it does not contain a favored rider amounts to an extortionate threat to bring the federal government to a halt, to refuse to pay the government's existing debts, or to end a popular government program if the rider does not pass.<sup>298</sup> The extortion is even clearer in the case of a continuing resolution that must be passed quickly to avoid a government shutdown.<sup>299</sup>

Strategic use of riders allows a political party that controls a single house of Congress to effectuate substantive policies that are actively

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293. Lazarus, *supra* note 11, at 634–35.

294. *See id.* at 635.

295. *See id.*

296. *See id.* Delay is an option, but only if Congress is willing to pass a continuing resolution to fund the relevant programs until it passes a full appropriation bill or to temporarily raise the debt ceiling. *See* Devins, *supra* note 13, at 469 & n.82.

297. Lazarus, *supra* note 11, at 661.

298. *See* Goldman & Boyles, *supra* note 66, at 1047–48 (explaining that some Senators strongly objected to attaching the salvage timber rider to the 1995 rescissions bill, but voted for it anyway “because of the importance of deficit reduction”).

299. *See* Zellmer, *supra* note 54, at 508.



opposed by a majority of the members of the other house, the President, and the general public. Such a strategy is effective so long as that party is willing to risk that public opinion will turn against it if either the other house or the President prevents enactment of the underlying “must-pass” legislation. Congressional gerrymandering has created a large number of “safe” congressional seats, however, and the risk that changed public opinion at the national level will drive the occupant of a safe seat out of office is often quite low.<sup>300</sup> Although riders are not unconstitutional, such extortion by a single house of Congress is certainly inconsistent with the notion of a bicameral legislature. If one branch of the legislature can effectively extort the other by attaching substantive riders to must-pass bills, the power of the other branch in the law-making process has been greatly reduced. It also limits the President’s ability to exercise independent judgment concerning the substantive policies effectuated by a rider.<sup>301</sup>

Finally, the 2011 debt ceiling fight has demonstrated that public respect for the institution of Congress suffers when an uncompromising majority in one house imposes its will on the majority of the other house and on the President. It is one thing to engage in a serious debate over the meaning of the public interest in the context of a pending bill to change substantive law; it is quite another to impose a single view of the public interest on the nation by threatening to shut down the government or blow up the national economy. Public trust in Congress is currently at its lowest level since approval polls have been taken,<sup>302</sup> in large part because of the spectacle of the recent fight over riders to the debt ceiling bill. And there are strong prospects for more of the same throughout the rest of the 112th Congress, and perhaps beyond. The lack of public confidence in Congress’s ability to navigate the troubled waters in the wake of the second-worst economic downturn in American history is more than a little disturbing.

## V. SOLUTIONS

From the above discussion, it would appear that the disadvantages of deregulatory riders far outweigh the advantages. Yet, while it is easy to

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300. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 622–26 (2002); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 570–74 (2004). With the advent of the Tea Party, the risk of losing a “safe” seat is apparently greater to Republican representatives. Republican representatives who decline to participate in the extortion may find themselves “primaried” in the next election.

301. See Bloch, *supra* note 265, at 113 (“[T]he use of appropriation riders to enact substantive provisions arguably undercuts the ability of the President to participate in the policymaking process.”); LeBoeuf, *supra* note 270, at 475.

302. Rosalind S. Helderman & Peyton M. Craighill, *Capital Ill*, WASH. POST, Aug. 11, 2011, at C1.

identify good reasons to limit such riders or ban them altogether, it is far more difficult to come up with effective ways to accomplish that end. For example, one frequently-suggested solution to the rider problem is to give the President the power to exercise a “line item” veto, thereby preventing riders from going into effect.<sup>303</sup> But the Supreme Court in 1998 held that a general law giving the president line item veto authority was unconstitutional.<sup>304</sup> The statute at issue in that case empowered the President to cancel an “item of new direct spending” and a “limited tax benefit,”<sup>305</sup> and provided that such cancellation prevented the cancelled provision from “having legal force or effect.”<sup>306</sup> The Court held that this action effectively repealed the cancelled statutory provisions and, as such, constituted a unilateral amendment of a statute by the President in violation of the Presentment Clause, which requires both houses of Congress to pass legislation and then present it to the President.<sup>307</sup>

Since both legislative and limitation riders are provisions of duly enacted legislation, the Court would almost certainly find a narrow statute permitting the president to cancel nongermane riders to suffer from the same constitutional infirmity.

### A. Constitutional Amendment

Congress could tie itself to the mast by passing legislation initiating the process of amending the Constitution to prohibit nongermane riders. A constitutional ban on riders would still leave open the question of who would have standing to enforce the ban. Congress could partially solve that problem by adding to the proposed amendment a line item presidential veto. The amendment could automatically ban nongermane riders and allow the President to exercise his or her discretion to enforce the ban. This would at least allow an official with a national constituency to veto riders that were generated by companies or trade associations advancing narrow economic interests.<sup>308</sup>

Given the highly partisan atmosphere in Washington, D.C., a constitutional amendment of any sort is highly unlikely, and an amendment that empowers the President and disempowers lobbyists for special interests who are also large campaign contributors is especially quixotic. Quite apart from the political difficulties that proponents of such an amendment would

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303. See Zellmer, *supra* note 54, at 511–12.

304. *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

305. 2 U.S.C. § 691(a) (Supp. II 1997), *declared unconstitutional* by *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

306. *Id.* § 691e(4)(B)–(C).

307. See *Clinton*, 524 U.S. at 421, 448–49.

308. See generally Zellmer, *supra* note 54, at 518–34.

face in persuading members of Congress to vote for a measure that would so clearly limit their discretion to please powerful constituents, the difficulties that they would encounter in persuading the legislatures (or ratifying conventions) of three-quarters of the states to ratify an amendment on such a controversial topic would probably prove insurmountable.

### B. Change the Rules

In a thoughtful article on environmental riders, Professor Richard Lazarus suggests that Congress should put its house in order by enacting legislation to discourage riders.<sup>309</sup> Specifically, he suggests that the legislation should make it more difficult for the rules committees to grant waivers from the already existing proscriptions on attaching legislative riders to appropriation bills.<sup>310</sup> To ensure special interests do not attach riders to other legislation like continuing resolutions, debt ceiling bills, and reauthorization bills, the legislation could go further to prohibit nongermane riders to all forms of legislation.

A strict prohibition would, however, forego the benefits riders provide in overcoming the effective sixty-vote majority required to pass controversial legislation in the Senate and in limiting Executive Branch discretion. One might conclude that the demonstrated disadvantages of riders are so detrimental to the political system that eliminating riders is worth the sacrifice. Alternatively, Congress could require a supermajority in either house to add a nongermane rider to a bill.

In these highly partisan times, it may be difficult to enact legislation limiting riders. They are clearly advantageous to the political party that controls at least one house of Congress. The Republican Party made good use of deregulatory riders during the Clinton years, and there is every reason to expect that it will achieve at least some success in employing the rider strategy in the 112th Congress.

Yet there are reasons to believe that the prospects for legislation limiting riders may not be as unrealistic as efforts to pass a constitutional amendment. During the 1990s and 2000s, Congress tolerated an extreme form of logrolling called “earmarks,” under which an appropriation bill or the report accompanying the bill directs an executive branch agency to expend appropriated funds on specific organizations or projects favored by one or more members of Congress.<sup>311</sup> Earmarks often circumvent statutes or regulations articulating merit-based criteria for selecting the recipients

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309. Lazarus, *supra* note 11, at 678–79.

310. *Id.*

311. See Cong. Research Serv., Memorandum, Earmarks in Appropriation Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005, at 2–3 (Jan. 26, 2006), available at <http://www.fas.org/sgp/crs/misc/m012606.pdf>.

of the funds.<sup>312</sup> But in 2008, the House of Representatives and the Senate adopted rules requiring sponsors of earmarks to provide specific information concerning their purpose and recipients to the relevant authorizing committee, which, in turn, was responsible for compiling lists of requested earmarks and making them available to the public.<sup>313</sup> In early 2010, the House Republican caucus agreed to swear off all earmarks for both profit-making and nonprofit entities.<sup>314</sup> Immediately following the 2010 elections, the caucus announced a policy that prohibited earmarks.<sup>315</sup> House leadership then adopted a policy prohibiting earmarks for the 112th Congress.<sup>316</sup> After President Obama announced that he would not sign a bill containing earmarks, the chairman of the Senate Appropriations Committee, Senator Daniel Inouye (D-Haw.), agreed to ban earmarks from appropriation bills during the 112th Congress.<sup>317</sup> The fact that the full House and the Senate Appropriations Committee have placed limitations on earmarks suggests that limitations on riders, which can be equally abusive, are not beyond the realm of possibility.

### C. Public Disapproval

As the national media shined a spotlight on earmarking in the late 2000s, it became painfully apparent to the public that the unsavory practice advantaged tiny, favored constituencies at the expense of all taxpayers for no good public policy reason. Public opinion across the political spectrum ultimately turned strongly against the practice.<sup>318</sup>

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312. *Id.* at 29; see also *Earmarks*, OFFICE OF MGMT. & BUDGET, <http://earmarks.omb.gov/earmarks-public/> (last updated Jun. 14, 2011) (providing access to earmarks from recent years).

313. See generally MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., RS22866, *EARMARK DISCLOSURE RULES IN THE HOUSE: MEMBER AND COMMITTEE REQUIREMENTS* (2008); MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., RS22867, *EARMARK DISCLOSURE RULES IN THE SENATE: MEMBER AND COMMITTEE REQUIREMENTS* (2008).

314. Eric Lichtblau, *New Earmark Rules Have Lobbyists Scrambling*, N.Y. TIMES, Mar. 12, 2010, at A13.

315. Carl Hulse, *With Tea Party in Mind, Republicans Have Change of Heart About Earmarks*, N.Y. TIMES, Nov. 16, 2010, at A19.

316. John Stanton, *Panel Lays Down Law: Earmarks Are Over*, ROLL CALL (May 2, 2011, 12:00 AM), [http://www.rollcall.com/issues/56\\_114/House-Earmarks-Are-Over-205213-1.html](http://www.rollcall.com/issues/56_114/House-Earmarks-Are-Over-205213-1.html).

317. Carl Hulse, *Senate Spending Panel Bans Earmarks for Two Years*, N.Y. TIMES, Feb. 2, 2011, at A16.

318. See, e.g., Eric Lichtblau, *Rivals Reach Consensus on New Earmark Rules*, N.Y. TIMES, Sept. 29, 2010, at A19. For an example of criticism of the earmark process, see RONALD D. UTT, HERITAGE FOUND., *HOW CONGRESSIONAL EARMARKS AND PORK-BARREL SPENDING UNDERMINE STATE AND LOCAL DECISIONMAKING* (1999), available at <http://www.heritage.org/research/reports/1999/04/congressional-earmarks-and-spending-undermine-decisionmaking>.

Virtually all of the environmental and financial riders that were introduced in the 104th and 112th Congresses came at the behest of companies and trade associations with strong economic interests in changing the applicable laws and regulations. But such special interest riders are indistinguishable from earmarks that appropriate monies for specific “pork barrel” projects in the districts of the sponsoring congresspersons. Earmarks provide targeted funds to particular projects, while the deregulatory riders typically provide targeted regulatory relief for particular industries. Indeed, from a policy-making perspective, deregulatory riders can be more troubling than earmarks. Earmarks bestow public largess on a favored constituency. Deregulatory riders force the targeted agencies to take action, or refrain from taking action, in ways that would otherwise be inconsistent with their authorizing statutes.<sup>319</sup> The result can be ad hoc policymaking that not only advantages a single favored industry or company, but also “circumvent[s] long-standing . . . policies.”<sup>320</sup>

The “Pledge to America” upon which Republican candidates ran for the House of Representatives went beyond earmarks. Among other things, the pledge committed the candidates to “end[ing] the practice of packaging unpopular bills with ‘must-pass’ legislation” and to “advanc[ing] major legislation one issue at a time”—presumably a reference to riders.<sup>321</sup> But apparently, the pledge did not include deregulatory riders. As we have seen, riders aimed at hampering environmental and financial regulation were rampant during the first session of the 112th Congress. The public recently received a strong dose of media exposure to riders during the attempts by conservative Republicans to extort concessions from the Obama administration in the unseemly battles over the debt ceiling. At the end of that debacle, public approval of Congress sank to a modern-day low of just fourteen percent, and only seventeen percent of Americans thought their representative should be re-elected in 2012.<sup>322</sup> Federal Reserve Board Chairman Ben S. Bernanke concluded that “the country would be well served by a better process for making fiscal decisions.”<sup>323</sup> The same members of Congress who attempted to extort concessions from the administration are attempting to impose deregulatory riders on the Senate and the President during the remainder of the 112th Congress. The media should now focus its attention on these unsavory riders. A strong public

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319. Zellmer, *supra* note 54, at 500.

320. *Id.* at 457; see also Lazarus, *supra* note 11, at 632 (complaining of “ad hoc, incoherent lawmaking resulting from closed-door appropriations deal-making that is of questionable efficacy for any area of law”)

321. A PLEDGE TO AMERICA, *supra* note 221, at 33.

322. Helderman & Craighill, *supra* note 302.

323. Bernanke, *supra* note 9, at 12.

reaction against deregulatory riders could induce the leaders of both parties to prohibit them.

## CONCLUSION

The 112th Congress has witnessed a re-emergence of the deregulatory riders that characterized the battles between the Republican-controlled 104th Congress and the Clinton administration. That confrontation resulted in the longest government shutdown in the history of the United States.<sup>324</sup> Although the public reacted strongly against the efforts by the supporters of the riders to extort deregulatory concessions from the Clinton administration, the FY 1996 appropriation legislation that Congress enacted and the President signed contained several riders that advanced the narrow economic interests of a few favored constituencies. For instance, the legacy of the notorious salvage timber rider that survived the battles over the FY 1995 continuing resolution included extensive and environmentally-destructive logging “subsidized by the taxpayers.”<sup>325</sup> But the experience did not dissuade the Republican leadership from attaching similar riders to appropriation bills during the remainder of the Clinton years.

Unlike the Republican leaders of the 104th Congress, who gained very little in their confrontation with President Clinton, Speaker of the House John Boehner and Senate Minority Leader Mitch McConnell saw themselves as the winners in the confrontation with President Obama over the debt ceiling in July 2011.<sup>326</sup> Senator McConnell has already promised that more riders will be attached to the debt ceiling bill when it comes up in early 2013 (assuming that President Obama is re-elected and that the Republicans retain control of at least one house of Congress).<sup>327</sup> Despite their considerable costs to society, deregulatory riders will be proposed for attachment to appropriation bills and other must-pass legislation as long as divided government persists. Unless Congress takes steps to put its own house in order by limiting the extortionate use of riders to advance the narrow interests of a few over the interest of the broader public, the practice will continue to pose a serious threat to public respect for Congress as an institution.

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324. CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 2 (2011).

325. Goldman & Boyles, *supra* note 66, at 1058.

326. See Davis & Garrett, *supra* note 11, at 30.

327. See Schlesinger, *supra* note 5.

