

C O M M E N T S

TIME HAS COME TODAY FOR ENVIRONMENTAL AND CLIMATE JUSTICE LEGISLATION

by Barry E. Hill

Barry E. Hill is a Visiting Scholar at the Environmental Law Institute and Adjunct Professor at Vermont Law School. He served as Director of the U.S. Environmental Protection Agency's Office of Environmental Justice from 1998-2007.

The Stock Market Crash of 1929, and the Great Depression that followed from August 1929-March 1933, shook the foundation of America to its core. During a July 24, 1933, radio address, President Franklin D. Roosevelt (D) coined the phrase “the first 100 days,”¹ specifically referring to the period of time in which a new administration’s success in strategically launching and securing its bold initiatives is measured. President Roosevelt sought to squarely address the effects of the Great Depression by jawboning the U.S. Congress to enact 15 major regulatory statutes that concentrated on, among other significant initiatives, getting hundreds of thousands of unemployed people to work in the newly established Civilian Conservation Corps; getting the nation’s agricultural sector back on its feet through the Agricultural Adjustment Administration; and rebuilding the nation’s battered economy through the National Industrial Recovery Act of 1933.

This was the New Deal, a series of programs, civil engineering public works projects, financial reforms, and regulations that President Roosevelt instituted between 1933 and 1939. In his March 4, 1933, inaugural address, he had declared: “I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require.”² June 11 was the 100th day of Roosevelt’s presidency and, at his urging, Congress passed a considerable amount of legislation during that crucial period to reshape the federal government’s role in the American economy.

President Roosevelt inherited the Great Depression from the hapless President Herbert Hoover (R): whereas President Joseph Biden (D) inherits from the feckless President Donald Trump (R) the raging novel coronavirus pandemic, with its soaring numbers of new cases, new hospitalizations, and new deaths. President Biden has also inherited a troubled economy, with millions of people unemployed and waiting for hours in food lines for the bare necessities of life. Food and housing insecurity have soared. He inherited the existential threat of climate change and the adverse effects of global warming. Finally, he inherited worsening instances of climate injustice and environmental injustice throughout the nation. All of these issues, it must be noted, disproportionately impact Black and Brown people, and the poor.

To illustrate, in “Sea Level Rise and Coastal Flooding Threaten Affordable Housing,”³ the first nationwide study on the topic, researchers examined the frequency of coastal floods around the country over the past few decades. They concluded that residents of low-lying affordable housing, who tended to be low-income, disadvantaged, and people of color living in old and poor-quality structures, were especially vulnerable. The researchers stated:

Residents of affordable housing also face high socioeconomic vulnerability due to the fact that they are predominantly low-income and more likely to be disabled, single parents, seniors, minorities, and/or lacking stable employment than the general population. Socially disadvantaged communities are more likely to be adversely impacted by natural hazards such as flooding because they have fewer financial resources, less political influence, and receive less information about financial aid to support recovery.⁴

1. Kenneth T. Walsh, *The First 100 Days: Franklin Roosevelt Pioneered the 100-Day Concept*, U.S. NEWS & WORLD REP., Feb. 12, 2009, <https://www.usnews.com/news/history/articles/2009/02/12/the-first-100-days-franklin-roosevelt-pioneered-the-100-day-concept>.
2. JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* (2007), <https://www.simonandschuster.com/books/The-Defining-Moment/Jonathan-Alter/9780743246019>.

3. Maya K. Buchanan et al., *Sea Level Rise and Coastal Flooding Threaten Affordable Housing*, 15 ENV'T RES. LETTERS 124020 (2020), available at <https://iopscience.iop.org/article/10.1088/1748-9326/abb266>.
4. *Id.* (references omitted).

This research, conducted by Climate Central, a New Jersey-based science organization, concluded that the amount of affordable housing in this country was vulnerable to coastal flooding and was set to triple by 2050, and that this reality escalated the current hardships faced by those communities in this still-unraveling climate crisis. Based upon this research, it appears that “[a]ffordable housing in New York, Massachusetts, New Jersey and California is at particular risk of flooding from worsening storms or even high tides pushed on by rising sea levels.”⁵ Moreover:

Among the study’s more striking findings are that half of New Jersey’s “large stock of exposed affordable housing units could flood at least four times per year” by 2050. Four New Jersey cities—Atlantic City, Camden, Penns Grove and Salem—are of particular concern, researchers found, as they are among the poorest in the country, with an average median household income of under \$29,000 per year.⁶

Thus, the equity implications of sea-level rise are, indeed, high.

Further, at the American Geophysical Union’s annual meeting in December 2020, three studies were presented by researchers who each concluded that “[l]ower-income residents and people of color are more likely to live in the hottest neighborhoods in cities across the country, putting them at greater risk of heat-related illnesses and death.”⁷ The lead author of one of the studies, Prof. Angel Hsu, an environmental policy expert at the University of North Carolina, Chapel Hill, categorically stated:

Disparities in urban heat exposure as a direct result of urban planning and design, environmental racism, and the policies such as redlining . . . do in fact exist. . . . And now we have the evidence and the quantitative data to show that these patterns are not isolated to case studies or *ad hoc* anecdotal evidence, but actually they’re widespread, pervasive and consistent.⁸

Faced with these interconnected crises—affordable housing, and environmental and climate injustice—in low-income, disadvantaged, and Black and Brown communities, should President Biden adopt the same or similar approach of President Roosevelt, and challenge Congress to enact sweeping environmental and climate justice legislation in the first 100 days? The answer, in my view, is a resounding “Yes.”

Part I of this Comment sets forth President Biden’s campaign plan on environmental and climate justice. Part II

examines briefly the history of environmental and climate justice legislation in Congress. Part III explains why it is now time to move forward on such legislation. Part IV offers some conclusions.

I. President Biden’s Campaign Plan—To Secure Environmental Justice and Climate Justice for All Americans

President Biden has stated that environmental justice and climate justice policy will be a focus of his Administration. During the campaign, in fact, he issued “The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity.”⁹ Among other things, with respect to environmental justice, he plans “to revise and reinvigorate” President Bill Clinton’s 1994 Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, with the following concerted actions:

- **“Establish an Environmental and Climate Justice Division within the U.S. Department of Justice”** to complement the work of the Environment and Natural Resources Division, and to “implement, to the extent possible by executive action, [New Jersey] Senator [Cory] Booker’s Environmental Justice Act of 2019.”
- **“Elevate environmental justice in the federal government and modernize the all-of-government approach”** by reestablishing “the White House Environmental Justice Advisory Council and the White House Environmental Justice Interagency Council, both reporting directly to the Chair of the White House Council on Environmental Quality.” According to the plan, these two councils will be charged with revising Executive Order No. 12898.
- **“Overhaul the [U.S. Environmental Protection Agency (EPA)] External Civil Rights Compliance Office”** by conducting “a rulemaking and open[ing] a public comment process to seek Americans’ input on agency guidance for investigating Title VI [of the Civil Rights Act of 1964] Administrative complaints.” And, importantly, to “work with Congress to empower communities to bring these cases themselves, by reinstating a private right of action to sue [under] Title VI, which was written out in the [U.S.] Supreme Court’s 2001 decision in *Alexander v. Sandoval*.”

Further, in order to ensure fair treatment and meaningful involvement of communities in the government’s decisionmaking processes, President Biden plans to:

5. Oliver Milman, *Climate Crisis to Triple Flooding Threat for Low-Income US Homes by 2050*, GUARDIAN, Dec. 1, 2020, <https://www.theguardian.com/environment/2020/dec/01/climate-crisis-triple-flooding-threat-low-income-us-homes-by-2050>.

6. Daniel Cusick, *Low-Income Homes to Face Triple Flood Risks by 2050—Study*, E&E NEWS, Dec. 1, 2020, <https://www.eenews.net/climatewire/stories/1063719523>.

7. Chelsea Harvey, *Climate Racism Is Real. Researchers Found It in U.S. Cities*, E&E NEWS, Dec. 10, 2020, <https://www.eenews.net/stories/1063720333>.

8. *Id.*

9. Biden for President, *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, <https://joebiden.com/environmental-justice-plan/> (last visited Dec. 21, 2020).

- **“Mandate new monitoring in frontline and fenceline communities”** by recommending “that each state adequately monitors environmental pollution, including emissions, criteria pollutants, and toxics, in frontline and fenceline communities,” and by “installing new monitors where they are lacking to provide [state regulators and communities] accurate and publicly-available real-time data.”
- **“Require community notification”** by directing “EPA to create a community notification program requiring ‘industries producing hazardous and toxic chemicals to engage directly with the community where they are located to ensure residents have real-time knowledge of any toxic release and ensure that communities are engaged in the subsequent remediation plan.’”
- **“Establish interagency teams to address targeted issues and partner directly with communities”** by establishing “an Interagency Climate Equity Task Force to directly work to resolve the most challenging and persistent existing pockets of climate inequity in frontline vulnerable communities and tribal nations.”

With respect to climate justice, President Biden intends to assess and address public health risks to communities by taking the following executive actions:

- **“Create a National Crisis Strategy to address climate disasters that prioritizes equitable disaster risk reduction and response”** by “[b]uilding on [Massachusetts] Senator [Edward] Markey’s Climate Change Health Protection and Promotion Act, [by which] Biden will use a whole-of-government approach to develop a national climate crisis strategy for each type of climate disaster that the National Climate Assessment warns will put Americans at risk (e.g., heat waves, sea level rise, wildfire[s], air pollution, infectious disease[s], hurricane[s], and floods).”
- **“Establish a Task Force to Decrease Risk of Climate Change to Children, the Elderly, People With Disabilities, and the Vulnerable”** in order to “identify the health impacts of climate change that will pose the largest risk to the most vulnerable populations and work across the Department [of Health and Human Services (HHS)] with other agencies to use a whole-of-government approach to decrease those risks, including baseline health inequities.”
- **“Establish an Office of Climate Change and Health Equity at HHS and Launch an Infectious Disease Defense Initiative”** in order to “invest in surveillance, early-warning systems, and research to decrease climate change and health equity risks.”
- **“Improve the resilience of the nation’s health care system and workers in the face of natural disasters”** by establishing “a biennial Health Care System

Readiness Task Force, a public-private task force to assess the current state of the nation’s health care system resilience to natural disasters and recommend strategies and investments to improve it.”

II. Looking Back—A Brief History of Environmental and Climate Justice Legislation in Congress

In every “American government and politics” political science undergraduate course, we learned of the principles of separation of powers, and the beauty of the system of checks and balances of America’s form of constitutional democracy. And in law school, we learned in the “administrative law” course:

The first three articles of the [U.S.] Constitution provide not only for three *distinct* branches of the federal government, but also for three *distinctive* institutions that the framers specifically designed to handle their assigned powers. Congress is the framers’ optimal lawmaker. It is the largest, the most representative, and thus the most democratic of the three branches. At the same time, its bicameral organization tempers democratic responsiveness by fostering deliberation, compromise, and moderation in the legislative process. The president is the framers’ optimal [chief executive officer] CEO. Because the president is selected by a national election, he or she is accountable to all the people of the United States for administration of the federal government. The framers reinforced that accountability by placing the executive power in a unitary office, which discourages buck-passing for decisions that go awry. They also believed that a unitary executive would foster strength, energy, and decisiveness in the execution of federal law and in government administration. Finally, an unelected, life-tenured judiciary promises an independent and principled exercise of the judicial power, which the framers believed was necessary for protecting individual rights and for holding government officials within the rule of law.¹⁰

With respect to environmental justice legislation at the federal level, unfortunately, there has been little to no “deliberation, compromise, and moderation in the legislative process” between Republicans and Democrats. Little has been done legislatively, due largely to the fact that, according to environmental justice activists and advocates, the Republican party has been in control of Congress from time to time, and has not introduced or cosponsored any such legislation. Meanwhile, the Democratic party has been unable to move proposed environmental justice legislation out of committee for decades.

In the 102nd Congress (1991-1992), the late civil rights icon and the unquestioned “Conscience of Congress,” Rep. John Lewis (D-Ga.), introduced the Environmental Justice Act of 1992 (H.R. 2105), which was the first piece of

10. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW (CONCISE HORNBOOK SERIES) 37 (2d ed. 2014).

legislation dedicated to addressing racial discrimination in how environmental laws were enforced, and how environmental policy was developed and implemented. Then-Sen. Albert Gore Jr. (D-Tenn.) introduced the companion bill in the Senate (S. 2806). From the 102d Congress through the 115th Congress (2017-2018), there have been more than 40 environmental justice bills or community environmental equity bills introduced in the U.S. House of Representatives and/or the U.S. Senate. All of the bills died in committee.

In the 116th Congress (2019-2020), the pattern continued for environmental justice bills or community environmental equity bills to be introduced and referred to committee where the bills would die, except for congressional resolutions. For example, then-Sen. Kamala Harris (D-Cal.) introduced the Environmental Justice For All Act (S. 4401) with 13 Democrats and one Independent as cosponsors. And Rep. Raúl Grijalva (D-Ariz.), chair of the House Natural Resources Committee, introduced the companion bill in the House (H.R. 5986) with 74 Democrats as cosponsors. In order to promote this environmental justice legislation, Chairman Grijalva, because of the coronavirus pandemic, conducted through December 2020 virtual “environmental justice tours,” which included Appalachia, Houston, Los Angeles, Louisiana, and New Mexico.¹¹ Both bills died in committee.

Further, Sen. Cory Booker (D-N.J.) introduced the Environmental Justice Act of 2017 (S. 1996), and Rep. Raul Ruiz (D-Cal.) introduced the companion bill (H.R. 4144) in the House in the 115th Congress, which would (1) require federal agencies to address the disproportionate impact of environmental and human health hazards on communities of color and low-income communities; (2) require consideration of cumulative impacts in certain permitting decisions; (3) require federal agencies to consider and mitigate environmental justice impacts of federal agency actions; and (4) strengthen legal protections for those affected by environmental injustices. Both bills died in committee.

In the 116th Congress, however, Senator Booker introduced the Environmental Justice Act of 2019 (S. 2236) with 12 Democrats and one Independent as cosponsors in July 2019, and the bill was referred to the Senate Committee on the Environment and Public Works.¹² And Representative Ruiz introduced the companion bill (H.R. 3923) with three Democrats as cosponsors in August 2019, and the bill was referred to several House committees and one subcommittee.¹³ No further actions have been taken on these stand-alone bills.

But H.R. 3923 was added to the Clean Economy Jobs and Innovation Act (H.R. 4447) as its Title XI.¹⁴ There

were four roll call votes on H.R. 4447, which passed the House on September 24, 2020.¹⁵ On October 1, 2020, on the House floor, Representative Ruiz stated:

Let me be clear: Having clean water to drink and clean air to breathe is not a privilege just for the affluent few—it is a right and common good for everyone. That’s why I am glad my bill, H.R. 3923[,] the Environmental Justice Act of 2019, is passing the House this week as part of the Clean Economy Jobs and Innovation Act. My bill will strengthen protections for vulnerable populations, give impacted communities the ability to hold big corporations and government accountable, and provide needed funds to mitigate and prevent future instances of environmental injustice.¹⁶

On that same day, Senator Booker stated:

We cannot achieve economic justice or social justice in this country without simultaneously addressing environmental justice. . . . Clean air and clean water shouldn’t be luxuries for the privileged, yet every day, communities of color, low-income communities, and indigenous communities disproportionately face environmental hazards and harmful pollutants. This reality has largely been ignored and the affected communities have been left without the legal tools to protect their rights. The Environmental Justice Act of 2019 is an important first step in returning power to these communities.¹⁷

H.R. 4447 was received in the Senate on October 19, 2020, and referred to the Senate Committee on Energy and Natural Resources. This bill needed to pass the Senate before the end of the 116th Congress on January 3, 2021, in order to have become law. Otherwise, it will have to be introduced in the 117th Congress, and begin the legislative process anew.

In the meantime, since Representative Lewis’ and Senator Gore’s environmental justice bills were introduced in 1992, generations of Black and Brown people, and poor people, continue to be disproportionately exposed to environmental harms and risks as compared to other communities.

With respect to climate justice in the 116th Congress, then-Senator Harris introduced in August 2020 the Climate Equity Act of 2020 (S. 4513), which was referred to the Senate Committee on Homeland Security and Governmental Affairs.¹⁸ Rep. Alexandria Ocasio-Cortez (D-N.Y.) introduced in August 2020 the companion bill

11. James Marshall, *Dems Set Appalachia Environmental Justice Forum*, E&E News, Dec. 8, 2020, <https://www.eenews.net/eedaily/2020/12/08/stories/1063720127>.

12. See S. 2236, 116th Cong. (2019), available at <https://www.congress.gov/bill/116th-congress/senate-bill/2236>.

13. See H.R. 3923, 116th Cong. (2019), available at <https://www.congress.gov/bill/116th-congress/house-bill/3923>.

14. See H.R. 4447, 116th Cong. (2019), available at <https://www.congress.gov/bill/116th-congress/house-bill/4447>.

15. See Congress.gov, *H.R. 4447—Clean Economy Jobs and Innovation Act—All Actions*, <https://www.congress.gov/bill/116th-congress/house-bill/4447/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D> (last visited Dec. 21, 2020).

16. Press Release, Office of Rep. Raul Ruiz, House Passes Dr. Ruiz’s Legislation to Promote Environmental Justice (Oct. 1, 2020), <https://ruiz.house.gov/media-center/press-releases/house-passes-dr-ruiz-s-legislation-promote-environmental-justice>.

17. *Id.*

18. See S. 4513, 116th Cong. (2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/4513>.

(H.R. 8091) in the House, which was referred to several committees.¹⁹ Both bills died in committee.

Arguably, it was a propitious time for the House to finally act as a legislative body on the environmental justice bill. Now, pressure must be directed toward the House and Senate so as to ensure that “Congress is [in fact] the framers’ optimal lawmaker . . . [and] its bicameral organization tempers democratic responsiveness by fostering deliberation, compromise, and moderation in the legislative process.”

III. Moving Forward on Environmental and Climate Justice Legislation

Just as President Roosevelt placed considerable pressure on Congress to pass major legislation that was needed to support the New Deal, President Biden must put pressure on this Congress to pass environmental and climate justice legislation in his first 100 days. As a member of the Senate for 36 years, he can surely appreciate the essential role of legislation, which is one of the most important instruments of government in protecting citizens since it determines the rights and responsibilities of individuals and the authorities to whom the legislation applies.

Moreover, laws and their implementing regulations provide tools for policy development and implementation, backed by enforcement by the executive and judicial branches. As the Rev. Dr. Martin Luther King Jr. so aptly stated: “Let us not succumb to the temptation of believing that legislation and judicial decrees play only minor roles in solving the problem. Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless.”²⁰

In his campaign’s environmental justice plan, President Biden specifically mentioned Senator Booker’s Environmental Justice Act of 2019. That proposed legislation was comprehensive and forward-looking. President Biden, however, must not be relegated, as he stated, to “implementation, to the extent possible by executive action,” such proposed legislation. President Biden must not work at the margins to address the significant public policy issues of environmental and climate justice. It is Congress’ responsibility, as a key branch of government, to create new legislation as a means of addressing major environmental and public health problems that existing legislation like the Clean Air Act (CAA) or Title VI of the Civil Rights Act of 1964, and institutions like EPA, have been unable to resolve for decades. President Biden must act as “the framers’ optimal CEO” like President Roosevelt with the New Deal, and Congress must act now as “the framers’ optimal lawmaker.”

President Biden can vividly recall that the Barack Obama/Biden Administration, in spite of its lofty and ambitious goals, could accomplish only so much because of

the lack of environmental justice legislation. For example, as Prof. Alice Kaswan has pointed out²¹:

Lisa Jackson, EPA’s Administrator during President Obama’s first term, has made environmental justice a key agency priority. The agency developed Plan EJ 2014 to guide the agency’s achievement of environmental justice. The strategy is designed to better protect overburdened communities, empower those communities in environmental decision-making, and to establish stronger partnerships with the many governmental entities that likewise shape environmental outcomes, including tribal, state, and local governments. Substantively, the Plan encourages agencies to further integrate environmental justice in their rulemaking, permitting, compliance, and support for community-based programs. The Plan recognizes that achieving environmental justice depends upon improving available tools, encouraging the development of scientific, legal, and information resources to support environmental justice outcomes, and fostering the development of mechanisms to channel those resources to disadvantaged communities. By encouraging all appropriate EPA programs to adopt an environmental justice initiative, the Plan also works to ensure that environmental justice is addressed throughout the agency.²²

Plan EJ 2014²³ was Administrator Jackson’s guidance to Agency employees regarding her expectations and priorities as their supervisor. But unfortunately, as guidance, it was not legally binding. There were no enforceable legal obligations. Thus, no community-based organization could sue the Trump Administration for compliance or noncompliance with Plan EJ 2014.

President Biden also stated that he planned “to revise and reinvigorate” President Clinton’s 1994 Executive Order No. 12898. Basically, Executive Orders are orders produced by the president, as head of the executive branch, that are directed to, and govern actions by, federal government officials and agencies. They are issued in relation to a law passed by Congress or based on powers granted to the president in the Constitution, and must be consistent with those authorities. In §6-608 of Executive Order No. 12898, for example, it states, “Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.” However, Executive Orders are also not legally binding, and have no enforceable legal obligations.

In fact, §6-609 of Executive Order No. 12898 specifically states:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers,

19. See H.R. 8019, 116th Cong. (2020), available at <https://www.congress.gov/bills/116th-congress/house-bill/8019>.

20. MARTIN LUTHER KING JR., STRENGTH TO LOVE (2010).

21. Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENV’T L. REV. 140 (2017).

22. *Id.* at 154.

23. U.S. EPA, *Plan EJ 2014*, <https://www.epa.gov/environmentaljustice/plan-ej-2014> (last updated Mar. 13, 2017).

or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its officers, or any other person with this order.

Thus, as Professor Kaswan stated: “The Executive Order [12898] instantiated environmental justice as an important federal policy and prompted important assessment and planning initiatives, but it does not create any new substantive legal authority for achieving environmental justice or legally enforceable requirements.”²⁴

IV. Conclusion

The COVID-19 data reveal that Black and Brown people and the poor are experiencing more new cases, that they are being hospitalized and dying in greater numbers, and that workers are continuing to experience higher unemployment rates than their white counterparts. Researchers have also demonstrated that affordable housing continues to be a major issue, that rising sea levels are and will be exacerbating this problem for decades to come, and that lower-income residents and people of color are more likely to live in the hottest neighborhoods in cities across the country, putting them at greater risk of heat-related illnesses and death. Moreover, instances of environmental and climate injustices have worsened. Although President Biden’s plan for addressing environmental and climate justice is commendable, much bolder action is needed at this time—Congress must finally pass environmental and climate justice legislation.

Every member of Congress should be asked simply: “Who, in today’s Congress, is *for* environmental and climate injustices to continue unabated in this country?” Put another way: “Who, in this Congress, is *against* environmental and climate justice for all Americans, regardless of race, color, or socioeconomic status?” They should also be asked: “Are the lives of tens of millions of Black and Brown people, and poor people expendable now and in the foreseeable future?”

Like President Roosevelt with his jawboning approach to the New Deal, President Biden needs to be bold and prepared, under his constitutional duty, to recommend an audacious legislative measure to Congress that a stricken segment of our nation—tens of millions of Black and Brown, and low-income citizens—is currently facing and will be exacerbated in the foreseeable future if nothing legislatively is done. President Biden must use his political capital to challenge Congress to act since systemic reform in environmental protection is needed now. President Biden’s power to potentially enact sweeping legislation was strengthened with the election to the Senate of Jon Ossoff (D-Ga.), and the Rev. Raphael Warnock (D-Ga.). The Senate’s party split will be 50-50, and, as one of the Senate’s constitutional officers, Vice President Harris has the authority to cast a tie-breaking vote under the Consti-

tution.²⁵ Moreover, Sen. Chuck Schumer (D-N.Y.) is now Senate Majority Leader replacing Sen. Mitch McConnell (R-Ky.).

Lessons learned from the 116th Congress can prove to be helpful. First, the Biden Administration should review the objectives outlined in the bill introduced by then-Senator Harris—the Environmental Justice For All Act (S. 4401), and the companion bill (H.R. 5986) introduced by Representative Grijalva in the House. The bills should be reintroduced immediately in the Senate and the House once more cosponsors can be identified. As the new vice president, Kamala Harris should be tasked with shepherding this reintroduced bill through the legislative process from the White House. Vice President Harris should also ensure that the language of her bill, the Climate Equity Act of 2020 (S. 4513), be incorporated into the new Environmental Justice For All bill. It should be noted that Vice President Harris cannot vote in the Senate, except to break a tie, nor may she formally address the Senate. Her role as President of the Senate is limited in the legislative process.

Second, once the stand-alone bills have been reintroduced in the House and Senate, the challenge is to attach the bills to a must-pass piece of legislation (even an appropriation bill through the budget reconciliation process). H.R. 3923, Representative Ruiz’s Environmental Justice Act of 2019, is a case in point. It was added to the Clean Economy Jobs and Innovation Act (H.R. 4447) as its Title XI. There were four roll call votes on H.R. 4447, which passed the House on September 24, 2020.

Third, greater visible support from grassroots community-based groups needs to be garnered. Recall that in order to promote his Environmental Justice For All legislation, Chairman Grijalva, because of the coronavirus pandemic, conducted through December 2020 virtual “environmental justice tours” that included Appalachia, Houston, Los Angeles, Louisiana, and New Mexico. These tours need to be expanded to encompass other communities across this country. Arguably, those other communities should include so-called Red State communities to put pressure on Republicans who for decades have not introduced or cosponsored any environmental justice legislation. Most assuredly, some of the citizens that they represent invariably include Black, Brown, indigenous, and poor white communities that have environmental and climate justice concerns.

As Professor Kaswan pointed out:

[T]he environmental justice movement has had limited substantive influence because the environmental justice paradigm is in tension with the structure of the dominant paradigm for environmental regulation. . . . This utilitarian perspective (greatest good for the greatest number) contrasts with the environmental justice paradigm’s emphasis on the rights of minorities rather than the interests of majorities.²⁶

24. Kaswan, *supra* note 21, at 155.

25. U.S. Const. art. I, §3.

26. *Id.* at 158.

Therefore, from a strategic point of view, there must be a concerted effort to include Republican districts as part of the “environmental justice tours” at this point, since the proposed legislation speaks in terms of environmental justice for all.

Fourth, support for a national environmental justice law must be secured from state officials who enacted environmental justice legislation in the past year. For example, on January 1, 2020, New York added a new Article 48 to the Environmental Conservation Law, which established a permanent environmental justice advisory group.²⁷ Importantly, the law²⁸ declared that it is now state policy that “all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment.” Moreover, it is now state policy that “no group of people, including a racial, ethnic or socioeconomic group of people, should be disproportionately exposed to pollution or bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal or commercial operations, or the execution of federal, state, local, and tribal programs and policies.”

On September 18, 2020, moreover, New Jersey enacted landmark environmental justice legislation into law.²⁹ The new law requires the New Jersey Department of Environmental Protection to identify the state’s “overburdened communities,” which are defined as any community where 35% of the households qualify as low-income according to

the U.S. Census; 40% of households are minority; or 40% of households have limited English proficiency. Further, the law requires that the Department only grant or renew permits for “covered facilities” after determining that there are no disproportionate, cumulative environmental impacts on those communities. Covered facilities include facilities that are major sources of air pollution, as defined under the CAA (i.e., gas-fired power plants and cogeneration facilities); resource recovery facilities or incinerators; sludge processing facilities; sewage treatment plants with a capacity of more than 50 million gallons per day; transfer stations or solid waste facilities; recycling facilities that receive at least 100 tons of recyclable material per day; scrap metal facilities; landfills; or medical waste incinerators, except those attendant to hospitals or universities.

Although these state environmental justice laws are indeed groundbreaking, it has been said that “even when activists make progress at the municipal and state level, their efforts can be stymied in cases where the federal Environmental Protection Agency (EPA) has the final say, such as in the oversight of contaminated Superfund sites.”³⁰

In conclusion, in the immortal words of the title of the 1967 hit song by The Chambers Brothers, “The Time Has Come Today” for Congress finally to pass environmental justice and climate justice legislation. Too many people are suffering and dying, and will continue to do so if nothing is done legislatively. As the Rev. Dr. Martin Luther King, Jr., said in his 1965 Oberlin College commencement speech: “The time is always right to do what is right.”³¹

27. An act to amend the environmental conservation law, in relation to establishing a permanent environmental justice advisory group and an environmental justice interagency coordinating council, A. 1564/S. 2385, 2019-2020 Reg. Sess. (N.Y. 2019), available at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01564&term=2019&Summary=Y&Text=Y.

28. N.Y. ENVTL. CONSERV. LAW §§48-0101 to 48-0113.

29. The law requires the Department of Environmental Protection to evaluate environmental and public health stressors of certain facilities on overburdened communities when reviewing certain permit applications. S. 232, 2020-2021 Reg. Sess. (N.J. 2020), available at <https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S232>.

30. Yvette Cabrera & Angely Mercado, *Here's What It Will Take for Biden and Harris to Deliver on Environmental Justice*, GRIST, Nov. 11, 2020, <https://grist.org/justice/heres-what-it-will-take-for-joe-biden-and-kamala-harris-to-deliver-on-environmental-justice/>.

31. Rev. Dr. Martin Luther King, Jr., Commencement Address for Oberlin College, June 1965, available at <https://www2.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html>.