On November 8, 2016, the citizens of the United States elected not just a new government, but a very different government. With the election of Donald Trump as the 45th president of the United States and the results in the many contested congressional races, the pendulum of politics swung, perhaps harder than it has swung in at least several decades.

Although the last president was also elected on a platform of change, our newest president has promised even greater change, and in an entirely different direction.

NEW GOVERNMENT, SAME CONSTITUTION

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Under the Constitution, each president must appoint the leaders of the administrative bureaucracy tasked with implementing the laws of Congress, among them the administrator of the US Environmental Protection Agency (EPA). As part of the executive branch, the EPA and its administrator do not make laws, but rather implement and enforce them according to the will of the legislative branch, as your sixth-grade teacher would tell you.

Still, the EPA administrator has significant power because, where Congress leaves a gap in a statute—some intentional or unintentional ambiguity that must be resolved—the EPA may fill that gap with the necessary details to accomplish the ultimate goal. Filling such gaps seems much like law-making power in many cases, particularly when the agency develops creative new solutions to the problems Congress sought to address. On the other hand, where Congress has been clear, there is no gap to fill, and the EPA’s creativity must be restrained. In addition, the EPA cannot be so creative as to fill a gap with something so truly significant that Congress would have done it expressly, if that had really been its intent. Stated another way, the EPA cannot invent and then fill a gap that Congress would never have intended to leave.

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Of course, deciding when Congress has been clear or not, or should have been clear, is the rub. That knot becomes all the more difficult and controversial to untangle for statutes—like the Clean Air Act and the Clean Water Act—that not only establish broad powers to regulate, but also divide those powers between the federal and state governments. In fact, both the Clean Air Act and the Clean Water Act begin with general policy statements that unambiguously recognize that state governments, not the federal government, are supposed to protect the environment.1 Odd though it may seem to have the federal EPA administer a federal statute that begins by recognizing the states are in charge,
that “cooperative federalism” approach is precisely what Congress expressly intended.

Enter our newest EPA administrator: Oklahoma Attorney General Scott Pruitt, who was confirmed by the Senate on February 17. Much of the media, and all of the environmental interest groups, have painted him as a perennial challenger of the EPA’s actions over the last eight years. That much is true.

He was not fighting for a dirty environment. He was simply fighting for indisputable principles.

But any suggestion that those challenges make him unfit to lead the EPA fails to recognize what he was actually fighting for in those cases. A review of the issues in the lawsuits that Attorney General Pruitt filed against the EPA confirms he was not fighting for a dirty environment. He was simply fighting for the indisputable principles mentioned above (which many of us probably ignored in sixth grade).

**OKLAHOMA V. EPA**

No better example exists than one of Pruitt’s first EPA challenges, *Oklahoma v. EPA*, over the EPA’s decision to reject his state’s “regional haze” plan and impose a “federal implementation plan.” The statutory authority the EPA relied upon in rejecting and rewriting Oklahoma’s haze plan clearly says the states shall determine which industrial facilities to regulate and how to regulate them, so long as the states weigh certain factors. However, Oklahoma’s weighing of those factors was not to the EPA’s liking, so the EPA wrote a new, much more expensive plan for Oklahoma.

Pruitt challenged the EPA’s action in federal court before a three-judge panel of the US Court of Appeals for the 10th Circuit. At first, the judges were wary of the EPA’s action, and thus issued a stay of the EPA’s challenged action, an initial victory for Pruitt and his team.

On the merits, Pruitt also convinced one of the judges, using the plain language of the Clean Air Act (the law the EPA must follow), that the EPA does not have the authority to overrule a state that follows the proper planning process. That judge determined that the EPA should have deferred to the state’s reasonable planning decisions. But two judges agreed with the EPA’s argument that a failure to follow what the EPA admitted to be “nonbinding” guidance was a sufficient basis for the EPA to reject and replace the state’s plan. Even those judges admitted that it was a “close case,” but sided with the EPA because, in court battles of this type, a tie always goes to the EPA.

To be clear, the case was not about whether Oklahoma should have clean air. Neither the state plan nor the federal plan would have left Oklahoma with air that was unsafe to breathe. Oklahoma was at the time, and actually always has been, in full attainment of all of the EPA’s health-based air quality standards. No, the only additional benefit sought by the federal government’s plan over the state’s plan was visibility in national parks—how far a visitor to a national park can see. Visibility is certainly a laudable goal, but the EPA’s plan gave those visitors the exact same view as the state plan because the difference in visibility improvement was a fraction of what humans can actually discern.

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On the other hand, the difference in cost was dramatic. Despite its lack of any meaningful benefit to visitors of national parks in the area, it cost $1.2 billion more, which would have been enough to accomplish much greater progress in addressing other, far more significant environmental concerns, including those that could potentially impact the actual health of Oklahomans or the citizens of neighboring states. Thus, Pruitt was fighting for the right of his state, reserved by Congress, to decide that $1.2 billion would be better spent on something other than what no one could ever possibly notice.

Similar circumstances can be found in many of the other cases Pruitt filed against the EPA.

**PRUITT’S OTHER STATES’ RIGHTS ENVIRONMENTAL CASES**

In the ozone case, in which Pruitt was joined by several other western states, Pruitt challenged the EPA’s decision to adopt a standard at or below “background” concentrations,
which could only be met by the elimination of all man-made emissions (and perhaps even the extraction of uncontrollable emissions from the atmosphere). Imposing an impossible target on states does not clean the air, but the EPA intentionally ignored background in setting the level of its new standard, and then only later began new efforts to fully study background ozone. That case remains pending before the US Court of Appeals for the DC Circuit, with oral argument currently scheduled for April 19.

Imposing an impossible target on states does not clean the air.

In the startup, shutdown, and malfunction case,\(^5\) this time joined by 19 states, Pruitt and others challenged the EPA’s authority to tell states how to handle “unavoidable” emissions. Again, asking for the impossible does not clean the air, and the EPA made absolutely no attempt whatsoever to claim that its rule would have any environmental benefits. Instead, the EPA claimed it was not required to show any real benefit before telling states what their regulations can and cannot say regarding higher emissions that may unavoidably occur during the inevitable startups, shutdowns, or malfunctions of industrial equipment. Like the ozone case, the “SSM” case remains pending before the DC Circuit, with oral arguments currently scheduled for May 8.

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Pruitt also joined 27 states and literally hundreds of other challengers in a lawsuit against the EPA’s Clean Power Plan.\(^6\) One of the key issues in that behemoth case is whether Congress truly intended to authorize the EPA’s highly creative approach to regulating greenhouse gas emissions from power plants. The EPA itself has pointed out that the Clean Power Plan authorizes a program much like the “Acid Rain Program,” for which Congress wrote an entirely new Title IV of the Clean Air Act.

But the EPA’s Clean Power Plan is not based on such clear authority as that, and in fact Congress has steadfastly refused to adopt a similar program for carbon every year for several decades (despite repeated efforts and many changes in political leadership). Instead, the EPA’s Clean Power Plan is a creative reinterpretation of just three sentences of one section of the Act that do not mention greenhouse gases at all. What those sentences do say is that states should decide how to regulate, not the EPA. Nevertheless, the EPA’s plan, though marketed as highly flexible, in reality leaves states with little choice but to employ a carbon dioxide trading program.

The Clean Power Plan case has already been fully argued before a full en banc bench of ten DC Circuit judges in a nearly seven-hour marathon argument held last September, during which many issues were raised. However, one issue not raised was whether the Clean Power Plan would actually reduce the concentration of carbon dioxide in the atmosphere because the EPA never even attempted to answer that question. Thus, like many of the other cases above, the EPA refused to fully evaluate whether the program would actually achieve any of the environmental goals for which it was designed.

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And Pruitt also joined the 31-state coalition—nearly enough states to pass a constitutional amendment—challenging the EPA’s new “waters of the United States” rule.\(^7\) Branded by the EPA as the “Clean Water Rule,” but better known by the acronym “WOTUS,” the rule decides which water bodies in the country are subject to federal jurisdiction and which are not (and thus subject to state and not federal jurisdiction). Most agree that some clarity to the awkward term “WOTUS” is needed because the last Supreme Court decision on the issue was highly fractured, failed to gain a majority opinion, and did not provide any real bright lines. However, Pruitt and a majority of the states saw the EPA’s new WOTUS rule as a significant power grab by
the federal government that was never contemplated, much less intended, by Congress.

One of President Trump’s first environment-related acts in office was to direct Pruitt to initiate proceedings to reconsider the WOTUS rule, a request he implemented almost immediately.

**PRUITT’S PERSPECTIVE**

These examples illustrate that Pruitt is not a threat to the environment, but rather a threat to those who would prefer the federal government take greater control over environmental protection. He is also a threat to those who would rather ignore the limits that Congress expressly placed on the EPA’s authority.

Recognizing the limits of the EPA’s authority is a difficult but necessary part of the EPA administrator’s job description. While no leader naturally wants to recognize the limits of his or her authority, that is what our system of laws demands. Supreme Court Justice nominee Neil Gorsuch recently remarked that any judge who likes every one of his or her decisions is likely allowing personal feelings to make him or her a “bad judge” of what the law actually is. In similar principle, any EPA administrator who is 100 percent happy with the authority he or she claims to have is likely missing the true calling of service within the executive branch (and perhaps should instead run for Congress).

Scott Pruitt’s respect for the limits of his agency was recently demonstrated by his answers to two different questions—one prior to his confirmation as EPA administrator and one after his confirmation—that some have claimed to be inconsistent. Before confirmation, when asked whether he would carry out the law in regulating greenhouse gases, Pruitt answered yes. After confirmation, when asked whether the EPA has the legal tools necessary to address climate change, Pruitt answered “maybe not.”

Those answers are not inconsistent, but precisely the way a good administrator should respond when there is some limited, but likely insufficient, authority to address a problem; that is, with a commitment to do what is legal and legally required, but with a clear-eyed view of the boundaries established by law. In the climate change context specifically, Pruitt’s answers also respect the limits inherent in using national laws to fix a problem that could only have a global solution. In that sense, his perspective echoes the conclusion reached by the EPA’s last administrator before President Obama took office—Stephen Johnson. In the EPA’s very first and only exhaustive review of the authority of the Clean Air Act to regulate greenhouse gases, Administrator Johnson concluded that the act “is ill-suited for the task of regulating global greenhouse gases.” With that same understanding, Pruitt has committed to do what he can, but also recognized he cannot change the law. His answers were thus honesty, not deception; they showed integrity, not fraud.

“EPA must not only enforce the law, it must obey it.”

That mindset, of recognizing that hard questions often have unsatisfying answers, makes Attorney General Pruitt highly qualified to determine what our laws actually authorize the EPA to do, and then faithfully carry them out. As one federal judge recently put it, “It is time for the EPA to recognize that Congress makes the law, and EPA must not only enforce the law, it must obey it.”

**NOTES**

1. Clean Air Act, 42 U.S.C. § 7401 (“air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”); Clean Water Act, 33 U.S.C. § 1251 (“Congressional recognition, preservation, and protection of primary responsibilities and rights of States.”).
2. Oklahoma v. EPA, 723 F.3d 1201 (10th Cir. 2013).
7. A number of suits were filed in various federal district and appellate courts over the Clean Water Rule. Oklahoma’s challenges to the rule took place in Oklahoma district court, as well as in the Sixth Circuit. See State of Oklahoma, et al v. EPA, No. 15-381 (N.D. Okla., filed July 8, 2015); Murray Energy, et al v. EPA, No. 15-3751 (6th Cir. 2015).