

Three Letters Define The Enemy Within

By Jay Ambrose
Tribune News Service
January 2, 2017

WASHINGTON: It is the enemy within, made up of powerful Americans atop the federal government pretending to respect American principles even as they say go away, Congress, leave us alone, courts, we are everything. They make most of the rules, they judge them, they execute them and they've had it with all the whining about liberty, democratic fundamentals, legislative rights and constitutional safeguards.

Various names are given to this mushrooming, revolutionary phenomenon. It is called the administrative state, unilateral rule, the executive branch gone awry or, more imaginatively, the federal bureaucracy on amphetamines.

One way to describe it is a government relying ever more on barely inhibited regulatory overkill to make everything run right while actually causing everything to quit running. There is also a handy way to illustrate the worst of it with just three words or even just three letters. The three words are Environmental Protection Agency, and the three letters are EPA.

It is a 1970s creation born of a growing awareness of ways in which our industrial society was doing battle with the glory of nature, sustainable resources and human health. Along with states and localities, it did enormous good, especially in cleaning up air and water. But it also came to assume a religiously dogmatic demeanor in which it was mostly answerable only to itself.

It figured its cause was so sacred it was allowed to cheat, connive, bully and play games with science.

Now there's a solution. His name Scott Pruitt. He is Oklahoma's attorney general, a brilliant lawyer and President-elect Donald Trump's nominee to head the EPA. The greenie extremists are shaking like leaves in a hurricane because he is a states' rights kind of guy and has fought powerfully against EPA overreaching. He put together a coalition of other state attorneys general, and he got the Supreme Court to say nothing doing to pushing ahead with the controversial, Obama-backed Clean Power Plan until courts had reviewed it.

The plan will likely not stand. Based on obvious bureaucratic misinterpretations of existing law, it would unconstitutionally wipe out state laws, legal experts say. It would also spread EPA authority to nitpicking with private citizens and destroying jobs by the thousands.

If by some mishap the courts do not act, Pruitt could.

By the way, he does not say there is no global warming, no matter what propaganda you have read lately. He says scientists disagree about "the degree and extent" of it, and they do. He is off-base on granting too little to human causes, but most scientists agree with him that the consumer-clobbering Clean Power Plan by itself would reduce warming by next to nothing by century's end.

EPA sins do not stop there. Review various informed critics and you note how, in one instance, the EPA neglected its obligation to assess what turned out to be \$9.6 billion in costs to industry and consumers with a regulation that would accomplish very little. In another instance, it decided to stop dangerous mining in Alaska before any scientific demonstration it was dangerous. The agency was also among the negligent in the water crisis in Flint, Mich.

If certain rules on gasoline usage undergo no change, all new cars are eventually going to have to be electric, it is estimated. Some say the EPA makes demands that no current technology can address. Not a few say the EPA has colluded with environmental groups behind the scenes when it was not supposed to. Some argue that, in presenting issues for public comment, the EPA often describes them in misleading ways likely to engender support for a regulatory slugfest.

The EPA itself once caused a toxic flash flood in Colorado, making you wonder if we need a higher EPA to regulate the EPA. The answer is no. We need Pruitt, and, for the global warming issue, we need ideas better than a Clean Power Plan that would do nothing. Trump actually has some. Let's see what happens.

Professor Bill Jordan, University of Akron Law School:
Response to Ambrose Op Ed – January, 7 2017, Akron Beacon Journal

The grotesque distortions in the Ambrose Op Ed of January 4, 2017, demand a response. Ambrose says EPA and other federal agencies engage in “unilateral rule,” demanding that Congress and the courts leave them alone. He complains that federal agencies pursue “regulatory overkill” and that EPA has been “allowed to cheat, connive, bully, and play games with science.” He calls federal agencies and their employees “the enemy within,” harkening back to the fear mongering of the McCarthy era.

Nothing could be farther from the truth. No federal agency makes unilateral decisions in adopting regulations. Quite the contrary, they are all part of a complex structure that implements congressional directives for the benefit of the American people.

Here’s what actually happens. First, Congress enacts a statute. For example, in the Clean Air Act Congress mandated pollution control standards “requisite to protect the public health.” Congress delegates the development of the details and the enforcement of these mandates to the appropriate expert federal agency, EPA in the case of the Clean Air Act.

Why doesn’t Congress decide the details itself? Members of Congress do not have the necessary expertise, and they do not have time to legislate at this level of detail. That is particularly true now, when they must spend most of their time raising money, and they work on legislative matters no more than three days a week.

At EPA, the Administrator appointed by the President and confirmed by the Senate relies upon a staff of scientists, economists, and other experts to develop pollution control standards, including the Clean Power Plan to address global warming. In developing these standards, EPA must seek public comment. Industry typically addresses every aspect of a proposed standard in great detail. When it ultimately issues a standard, EPA must explain how science supports its conclusion that a certain limit on pollution is “requisite to protect the public health.” It must also respond to the comments, explaining why it did not accept or agree with any critiques.

Far from a unilateral act within EPA, any rule is reviewed carefully by the Office of Management and Budget on behalf of the President. OMB assures coordination with other agencies and insists upon resolution of any disagreements. It also assures that the benefits of any new rule outweigh its costs.

Rules that make it through OMB review must also pass muster in the courts. Ambrose says agencies tell courts to “leave us alone.” Far from it. Agencies welcome review of rules such as the Clean Power Plan. The fact that the independent judiciary, with judges from both parties, upholds agency rules roughly 80% of the time strongly supports the legitimacy of agency decisions.

Courts review the three key aspects of agency decisions, typically in three-judge panels. First, they determine whether the decision complies with the applicable statute. If the statute is ambiguous, courts determine whether the agency interpretation is at least reasonable. Second, they examine the facts, particularly the science, to assure they support the decision. Third, they review the ultimate decision (such as the level of pollution control set to protect the public health) to assure that the agency has adequately explained how it is supported by the statute and the factual record. No rule survives unless at least two (and frequently all three) independent judges determines that the agency position is reasonable and adequately explained.

This is a process of which we can be proud. It assures that regulations are rationally based on the factual record and the statutory mandate. It has brought us clean water, cleaner air, safer cars, safer workplaces, and protection from toxic pollution. And the Clean Power Plan that Ambrose attacks is a strong first step to protect our children and grandchildren from the ravages of global warming.