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Trump's EPA Cuts: An Invitation to Litigation

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The bullseye of President Trump's budget cuts is now clear. Unless Congress asserts itself, the budget of the EPA will be slashed thirty-one percent, more than any other agency. The budgets of the National Oceanographic and Atmospheric Administration and climate change programs within NASA will be similarly decimated.

These cuts should not come as a shock. During the campaign, President Trump reportedly said he's like to abolish the EPA or "leave a little bit." And he has famously asserted that "the concept of global warming was created by and for the Chinese in order to make U.S. manufacturing noncompetitive."

Unfortunately, this was not mere campaign rhetoric. On March 9, newly appointed EPA Administrator Scott Pruitt explicitly stated that he could not agree that human activity is a "primary contributor to the global warming we see." Pruitt's statement flies in the face of the EPA's own conclusions as well as those of the National Oceanic and Atmospheric Administration and NASA - not to mention international scientific consensus. As the *Washington Post* bluntly characterized the issue in an editorial on March 10, 2017, "Accepting the expert consensus is *a matter of reason vs. unreason.*"

Here's some friendly advice to U.S. business leaders who may be cheering these proposed cuts. Be careful what you wish for.

Not only will many Americans view such a rollback as radical, but it's also likely to provoke a torrent of lawsuits - tempting federal and state courts to step into the policy vacuum created by a weakened regulatory regime.

Martha Coakley, the former Democratic Attorney General of Massachusetts, predicts that even Republican state attorneys general will consider pairing with private plaintiffs' attorneys to file tort actions to protect the environment in the absence of viable federal regulation. A new spate of public nuisance litigation - the tort du jour for environmental activists seeking

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"regulation through litigation" - would likely result in a far more draconian and unstable set of environmental rules than what's currently on the books.

After all, most in Congress - with some exceptions on the extremes - have implicitly accepted the broad objective of protecting the environment while limiting economic disruption. No one wants to return to the era when the Cuyahoga River in Cleveland burst into flames.

It is tempting for the business community and their representatives in Congress to jump on the anti-regulatory bandwagon for obvious short-term, bottom-line reasons. But they ought to ask themselves whether kicking environmental regulation into the courts is really preferable to the status quo.

During the past 40 years, a select group of plaintiffs' attorneys have campaigned to reinvent the ancient tort of public nuisance. Standing to profit enormously from successful public nuisance lawsuits filed on behalf of state and local governments, they convinced government officials and public interest advocates that litigation was a direct way to tackle environmental and public health problems, including global climate change, PCB contamination of coastal waters, childhood lead poisoning, and tobacco-related diseases. With the rarest of exceptions, these efforts have been unsuccessful.

Courts have generally held that administrative agencies are the more constitutionally appropriate and institutionally competent bodies to address such harms. In *American Electric Power Co. v. Connecticut*, the Supreme Court, without dissent, rejected a federal common law nuisance claim and agreed with Congress's conclusion that the EPA, an "expert agency[,] is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions."

Such judicial restraint may not survive a wholesale assault on environmental regulation by the Trump administration. Historically, the scope of public nuisance liability has expanded when legislatures and administrative agencies failed to provide meaningful safeguards against environment harms. For example, public nuisance claims succeeded in cases involving water and air pollution in the 19th century when agencies protecting the environment did not yet exist[1].

Most judges - whether progressive or conservative, Republican or Democratic - do not favor abrupt changes in the law. To a greater or lesser extent, they are inclined to defer to the politically accountable branches of government, except when officials of the legislative and executive branches act outside the bounds of what have been generally recognized norms—in this case, the fundamental acceptance of a primary federal role in environmental protection. Inherent in the judicial process is a preference for reason over "unreason" and the willingness to be persuaded by overwhelming empirical evidence, including that from scientific experts.

Most aspects of public nuisance law and other tort law remain state, not federal, law. The most influential common law tort decisions typically come from the state courts of highly populated jurisdictions such as California, New York, and New Jersey—states where most people (and

1 See Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. CIN. L. REV. 741, 802 (2003).

presumably most judges) do not share President Trump's and Mr. Pruitt's rejection of science. The U.S. Supreme Court can affect the application of public nuisance and other state common law tort actions through preemption and standing doctrines, even in cases controlled by state substantive law. In most instances, though, state tort law remains free from the control of either the federal executive or judicial branches.

If the state and federal judiciaries view the EPA as failing to address climate change or other environmental concerns, they will be less likely to defer to the decisions of the EPA than they were before the gutting of the EPA began. Because much of the law of public nuisance is vague and perceived as malleable, the courts can use an expanded interpretation of the tort to fill the void.

The end result could well be multiple judicial orders, inconsistent with one another, seeking to regulate greenhouse gas emissions, PCB-contaminated coastal waters, and other environmental harms. The consequences of this approach for many in the business community would be far worse than the relatively consistent regulation (at least as contrasted with that from common law courts) from the EPA, a single source of comprehensive regulation where representatives of affected businesses play significant roles in influencing regulation. Even more important, regulation through the EPA is forward-looking and enables businesses to manage their legal exposure as they order their operations. In contrast, common law liability is backward-looking, particularly in newly expansive public nuisance litigation. These retrospective suits often seek huge financial penalties for economic activity that was fully lawful at the time it was conducted and for which future liability was not foreseeable.

It is not necessary for those representing business interests to roll over and accept the many pro-environmental regulatory changes of the past eight years. For nearly a half-century, environmental regulation has ebbed and flowed with changes in administrations. It is within the long-standing and generally accepted framework for environmental regulation where the battles over the scope and intensity of federal environmental regulation have been and should continue to be fought.

Pro-business leaders and representatives in Congress should reject the invitation to fundamentally alter or even dismantle the environmental regulatory framework of the past half-century. Any victory in this battle would be worse than merely pyrrhic. Judges - some of them progressive and most committed to what seems to them to be a fundamentally sound regulatory regime - would strike back, using expanded understandings of the public nuisance and other common law torts that would be genuinely dangerous to the stable rule of law in which free enterprise thrives best.

How can business leaders and their counsel avoid this trap and prevent the surge of judicial activism that would likely accompany a dysfunctional environmental administration under the leadership of a president distrusted by a majority of the American people? Just as common law courts should change the principles of the common law only cautiously and incrementally during more normal times, members of the Senate and Congress would be well advised to exercise restraint in altering

the basic framework of federal environmental regulation.

The ambiguity of the 2016 election results does not indicate that the American people support the rejection of science and the fundamental environmental changes espoused by this president.

More important, dismantling federal environmental protection in such fundamental ways will not serve the interests of the business community; the courts will undoubtedly respond with tort decisions designed to protect the environment but be harmful to business. My advice to business leaders echoes what a conservative economist colleague and friend once recommended to me on the topic of personal investing. By analogy, his words seem to apply perfectly to the choice the American business community faces as it decides whether to climb aboard the Trump agenda to gut environmental regulation as we have known it in a short-sighted effort to seek a more favorable business climate: "You can make money as a bull. You can make money as a bear. But you can't make money as a pig."

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