Last Thursday, the Ninth Circuit ruled that Scott Pruitt had no justification for allowing even the tiniest traces of a pesticide called chlorpyrifos (also called Lorsban and Dursban) on food. This is yet another judicial slap against lawlessness by the current Administration.

Chlorpyrifos was originally invented as a nerve gas, but it turns out that it kills insects quite satisfactorily. (I remember ads for "Big Foot Lorsban" from back when I lived in downstate Illinois, many years ago. As I recall, the ad showed Lorsban stomping out insects in a farmer's field.) In the past EPA had set a maximum level of pesticide residue on foods, which the statute allows only if there's no substantial doubt about safety at that level. But there's now a lot of evidence that even trace amounts chlorpyrifos can harm babies and children. Despite the evidence, EPA stalled for years on making a ruling; when finally forced to do so, Pruitt sided with industry and said he would allow its continued use on food crops. His explanation was that there was uncertainty about the risk and that EPA was "returning to using sound science in decision-making — rather than predetermined results." The court said no to this.

This case was the end – at least for now – of a series of back-and-forth exchanges between Pruitt and the Ninth Circuit, which had tried to get a ruling from EPA following ten years of delay by the agency. Probably, in order to accommodate farmers and avoid a backlash, the agency was reluctant to ban a pesticide that was in widespread use on apples, oranges, strawberries and broccoli. (So you see, your kids may have been right to turn up their noses at broccoli!) Under judicial pressure to act, the Obama Administration proposed banning the pesticide in 2015, but EPA waited as long as possible to finalize the rule. Then Pruitt decided in favor of the pesticide makers to allow continued use of the pesticide. Finally. the court had had enough. In a 2-1 ruling, the Court said that "[i]f Congress's statutory mandates are to mean anything, the time has come to put a stop to this patent evasion." As I'll explain, there was no way that Pruitt's decision could satisfy the statutory standard.

Before it could reach the merits of the case, the court had to surmount a procedural argument. The most difficult issue before the Court involved a fine point of administrative law. (Feel free to skip the rest of this paragraph if you're not interested in this procedural issue.) The plaintiffs had filed objections to Pruitt's action in the agency. A provision in the statute says that denial of such an objection is reviewable in court, but does not mention review of the agency's initial action. The government argued that the provision deprived the courts of jurisdiction to review an EPA decision on pesticide tolerances until any objections filed with the agency had been resolved (which in this case was likely to mean "never").If a statutory requirement like filing objections before review is jurisdictional, courts have no power to hear a case under any circumstances. Non-jurisdictional requirements are more flexible. Relying on a Supreme Court case that requires a clear statement by Congress in

order to make a restriction jurisdictional, the majority held that exhausting administrative remedies was not a jurisdictional requirement. That meant the court had discretion to excuse exhaustion – or in other words, to allow the appeal now rather than waiting until some unknown future day when EPA got around to deciding about the objections. The court had no hesitation about exercising that discretion in favor of the plaintiffs, given that the agency had stalled so long and that every day of delay was another day in which kids would be exposed to risk.

The government had not even bothered trying to defend the actual legality of Pruitt's decision. It was a blatant violation of law. Under the statute, EPA is allowed to provide a "tolerance" setting a permissible level of pesticide residue on food, but only if "there is a reasonable certainty that no harm will result from all anticipated dietary exposures." Pruitt could not possibly have found a reasonable certainty of safety, because EPA's own Science Advisory Board had found that the pesticide was unsafe on food. Pruitt simply had things backwards: even if there *was* significant uncertainty, which is dubious, he would have had to rule against the industry. Even the judge who dissented on the jurisdictional point opined that the court's analysis of the merits "does have some persuasive value."

This is a revealing case in several respects. First, it shows that courts are becoming impatient with foot-dragging by regulatory agencies. This problem isn't unique to the Trump Administration, but it's gotten much worse. Second, Pruitt's invocation of "sound science" as a way of ignoring all the scientific evidence shows the hollowness of that anti-regulatory buzz phrase. And finally, it shows once again that courts won't put up with blatantly illegal conduct by this Administration.