Two of Trump's major regulatory efforts were recently thrown out by the D.C. Circuit. The liberal judges who wrote the opinions latched onto a conservative theory called textualism, which was most prominently advocated by Justice Antonin Scalia. While judges in an earlier era tried to interpret Congress's intent in writing a law, textualists focus solely on the words of a statute. In pursuit of the letter rather than the spirit of the law, they pointedly dismiss any consideration of a statutes's purpose.

One of the D.C. Circuit cases involved Trump's rollback of Obama's most important climate regulation, the Clean Power Plan. The Obama plan required states to consider a variety of ways to lower carbon emissions, including expanding renewable energy. The Trump Administration got rid of the Obama Plan based on a textualist argument that the language of the Clean Air Act only allowed consideration of emissions reductions at coal-fired power plants themselves, as opposed to reductions made by use of renewable energy. This also formed the basis for Trump's replacement rule, which turned out to require only token emissions cuts.

The court's opinion is lengthy, but a key section argued that the Trump folks had misread the statute. The statute calls for the "application" of the best system of emissions reduction. Trump's EPA argued that "application" requires an indirect object. If you've forgotten your high school grammar, "Jim" is the indirect object in the sentence "Bill threw Jim the ball." The next part of the argument was that the unstated indirect object had to be the emission sources, such as coal-fired power plants. Thus, the Trump EPA said, it could only take into account emission reductions that could be implemented at an emission source, not those like renewable energy that would take place elsewhere.

The court said, however, that the grammar of the sentence did not require an indirect object. First, the court said, the Trump EPA argued that "apply" requires an indirect object, but that wasn't the word Congress used:

> *Congress did not use the verb "apply," but rather the noun "application." The EPA acknowledges this distinction in passing in the ACE Rule, but dismisses it without discussion, offering only that "'application' is derived from the verb 'to apply[.]'" That is, of course, true, as far as it goes. The phrase "application of the best system of emission reduction" is what is called a nominalization, a "result of forming a noun or noun phrase from a clause or a verb." Grammar assigns direct or indirect objects only to verbs—not nouns. No objects are*

> *needed to grammatically complete the actual statutory phrase. So much for the grammatical imperative.*

Second, the court added, even the word "apply" doesn't require an indirect object. Here, the court cited a linguistic authority:

> *The EPA is incorrect to insist that the verb "apply" requires an indirect object. There is nothing ungrammatical about the sentence "In its effort to reduce emissions, the EPA applied the best system of emission reduction." The verb "apply," like its nominalization, may properly be used in a sentence with or without an explicit indirect object. See Apply, THOMAS HERBST ET AL., A VALENCY DICTIONARY OF ENGLISH 41–42 (Ian F. Roe et al. eds., 2004) (listing examples of grammatically correct uses with and without direct and indirect objects).*

Surely Justice Scalia would be proud of how much these judges had taken textualism to heart. Who even knew there was a reference book on what verbs take indirect objects?

The other case involved ozone pollution. Under certain circumstances, the Clean Air Act requires a new emissions source like a factory to offset any new emissions by reducing pollution from elsewhere. Offsets can be created, for example, if another company closes its own factory. For many pollutants, the concept is pretty straightforward. Ozone is an unusual pollutant, however. Power plants and factories don't directly emit ozone. Instead, they emit substances — mostly nitrogen oxides and volatile organic chemicals — that combine in the atmosphere to produce ozone on sunny days. The issue in the case was whether an emitter could offset an increase in volatile organics with a decrease in nitric oxides.

The D.C. Circuit ruled that the decrease had to involve the same kind of precursor chemical. Thus, if a factory produced volatile organics, the offset also had to be volatile organics. Again, this came down to a grammar issue. The key statutory language referred to "the ratio of total emission reductions of volatile organic compounds to total increased emissions of such air pollutant." The court said that "such air pollutant" had to refer back to the "volatile organic compounds," not to ozone. Here's the explanation:

> *In general, "the adjective 'such' means 'of the kind or degree already described or implied.'" Culbertson v. Berryhill, 139 S. Ct. 517, 522 (2019)*

> *(quoting H. Fowler & F. Fowler, Concise Oxford Dictionary of Current English 1289 (5th ed. 1964)). The closest potential "air pollutant" preceding the "such air pollutant" language is "volatile organic compounds," which appears in the very same sentence just five words earlier. See 42 U.S.C. §§ 7511a(a)(4), (b)(5), (c)(10), (d)(2), (e)(1). By contrast, the word "ozone," which EPA interprets "such air pollutant" to mean, last appears five subsections above the first precursor offset provision and 334 words before the phrase "such air pollutant."*

Since the challenge was brought by the Sierra Club to this Trump Administration rule, I assume that the result of the court's decision is good for the environment. Since the court is preoccupied with issues of grammar and word usage, however, we never really find out why anyone, including Congress, would care about the issue. I can't help but think Congress might have had some reason for picking this language, but no one seems terribly interested in what Congress was trying to achieve.

There are two explanations for the textualist fervor of these liberal judges. One is that the Trump Administration relied on textualist arguments, so it was natural for the court to respond in kind. Another is that textualist arguments might defuse the desire of the Supreme Court's conservative textualists to intervene. "You like textualism, OK, we'll give you textualism! See how you like it." Or, I suppose, maybe the judges were finally convinced by Scalia's arguments— but it's hard to see why those arguments would suddenly seem more appealing than in the past. Whatever the reason, the textualist tenor of the opinions is obvious.

How some grammar guide parses the verb "apply" doesn't strike me as a great reason for a major judicial ruling. I guess that's why I'm not a textualist. But we do have a textualist Supreme Court.

"When in Rome, do as the Romans do." Especially if you're not actually a Roman — or in this case, a textualist.