Chlorpyrifos is one of the most widely used pesticides in America, although it has been banned in the EU. Last week, the Ninth Circuit took the extraordinary step of ordering EPA pointblank to ban or reduce traces of chlorpyrifos in food. A dissenter accused the majority of misreading the statute in question and abusing its discretion by limiting EPA's options so drastically and giving it only sixty days to act. Warning: The majority and dissenting opinions cover 116 pages, so I'll necessarily be leaving out a lot of details and nuances.

Who is right depends partly on how you read the statute and partly on whether EPA was acting in good faith. Judge Bybee thought that EPA had acted in good faith, while the majority clearly thought EPA had been intentionally dragging its feet for fourteen years to avoid implementing its statutory mandate.

Given Chlorpyrifos' widespread use, it is economically very important. That also means it is likely to be present in many foods. That's a big worry, since there's evidence that exposure to chlorpyrifos before birth can cause neurological problems in children, including lower IQ and tremors. In 2007, after studies began providing evidence of harmful effects from exposure on children, an NGO petitioned EPA to ban all traces of the substance in foods.

Despite preliminary findings that chlorpyrifos is unsafe, and despite repeated judicial demands that it move more quickly, EPA took more than a decade to get around to ruling on the petition. Under Obama, EPA seemed to be moving toward a ban, but then . . . Trump. The Trump EPA finally rejected the NGO petition after the court issued an ultimatum demanding a decision. The current Ninth Circuit ruling concerned that denial.

The statute governing permissible food levels for pesticide traces (called "tolerances") contains two sentences telling EPA what to do about pesticide risks in food:

> "The Administrator [of EPA] may establish or leave in effect an exemption from the requirement for a tolerance for a pesticide chemical residue in or on food only if the Administrator determines that the exemption is safe. The Administrator shall modify or revoke an exemption if the Administrator determines it is not safe."

EPA said it was unsure whether the pesticide was safe in food at currently permitted levels. The Ninth Circuit majority said that, since EPA could not determine the pesticide was safe, it could not “leave in effect” the current exemption. Instead, according to the majority, the second sentence requires it to modify or revoke the exemption.

The dissenter read the two sentences to apply in different circumstances: the first sentence when EPA is acting on a statutory schedule, the second sentence between scheduled safety evaluations. That’s not an impossible reading of the statute. Still, if that’s what Congress was trying to say, it certainly chose to do so obliquely. In the absence of any legislative history supporting the dissenter’s theory, it seems more clever than sound.

The other issue is what to do. Under the majority’s reading of the statute, given that EPA could not make an affirmative finding of safety, it had no choice but to either revoke or modify the tolerances for chlorpyrifos. Under normal circumstances, the sixty-day deadline would be entirely inappropriate. The fact that the majority imposed this deadline was surely a product of its impatience with what it considered to be willful refusal by EPA to protect public health.

Given that by 2007 the evidence suggested a possible serious risk to children from a very widely used chemical, EPA seems not to have prioritized the issue. The agency’s dilatory pace seems explicable only by the economic impact of banning chlorpyrifos. Under the statute, however, public health is supposed to be the only consideration. Even so, by giving EPA so little time to craft a decision, the court may have overreacted. It remains to be seen how the Biden Administration will respond to the order.