RESTORING STATES' RIGHTS & ADHERING TO COOPERATIVE FEDERALISM IN ENVIRONMENTAL POLICY

SENATOR KEVIN CRAMER[1]

For Attorney General Wayne Stenehjem: On Friday, January 28, 2022, North Dakota and our nation lost a patriot who fought for the cause of states' rights and cooperative federalism. His work in the courtroom and on North Dakota's Industrial Commission was monumental in positioning the state to be an energy powerhouse while being a steward of the environment. Wayne was also instrumental in procuring the historic stay of the Clean Power Plan from the U.S. Supreme Court. He leaves behind an incredible legacy as the state's longest-serving attorney general and a roadmap for cooperative federalism in environmental policy. Attorney General Stenehjem's servant leadership over the past four decades is woven into the battles, triumphs, and solutions discussed in this piece. God bless his memory.

Our Founders created the Model Republic—steeped in the foundation of a government of the people, by the people, and for the people. Many herald the importance of three co-equal branches

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of government, which cannot be understated. But the brilliance lies in the limited federal government, whose sole powers were enumerated in the Constitution, leaving all else to the people and the states as formalized in the Ninth and Tenth Amendments.

Tension between the States and the federal government has existed since the beginning. However, recent Democrat political leadership has trended toward federal dominion well outside the bounds of the law. Nowhere is this more evident than environmental legal battles, where the federal government has pursued full authority and jurisdiction to "save" the nation from the pesky states who have not signed onto their agenda. In my ten years as a state regulator, six years as a U.S. House member, and now three years as a U.S. Senator, I have seen time and again the imposition of the federal government's mediocrity on North Dakota's excellence. Centralized government policies and hostility towards the states have essentially been normalized.

So, where did we go wrong? A multitude of efforts aided the erosion of states' rights, notably, lazy legislating, judicial activism, citizen suits, and an unchecked Department of Justice (DOJ). Our ongoing dysfunction in the Legislative Branch is certainly not helpful either. While the House and Senate squabble, the Executive Branch rules by fiat in the form of executive orders, regulations, and guidance. This was perhaps best articulated by President Barack Obama during his second term in office when he famously stated, "I am . . . going to act on my own if Congress is deadlocked. I've got a pen to take executive actions where Congress won't, and I've got a telephone to rally folks around the country on this mission."[2] Unfortunately, many of his efforts are with us today, aided in no small part by judicial rulings empowered by the *Chevron* doctrine

[2] Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR, (Jan. 20, 2014, 3:36 AM), https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone [https://perma.cc/KVJ5-VJB7].

giving deference to the Executive Branch.[3] The bottom line is the People's House and the Upper Chamber need to get their acts in order.

However, one should not solely blame the Courts. Congress bears responsibility for enabling the growth of the Washington bureaucracy. Vague authorship from the House and Senate empowers not only the Executive Branch bureaucracy but also the political whims of presidential administrations. Lazy legislating makes what was once a co-equal branch of government, the Executive Branch, the arbiter of congressional intent. This has most conspicuously appeared in federal environmental policy, a challenge the Left has exacerbated for political gain. Notable legislation includes the Clean Air Act (enacted 1963),[4] the Clean Water Act (1972),[5] the Endangered Species Act (1973),[6] the Safe Drinking Water Act (1974),[7] the Resource Conservation and Recovery Act (1976),[8] the Surface Mine Control and Reclamation Act (1977),[9] and the Comprehensive Environmental Response, Compensation, and Liability Act (1980).[10] These laws were passed during predominantly Democratic control of Congress, and they had strong bonds to state governments in the form of state primacy for implementation. But these laws have been distorted to achieve total consolidation of power under the federal government.

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[3] *See* Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984) (setting forth a regime of judicial deference to administrative agencies' interpretations of ambiguous statutory provisions). I am optimistic that the United States Supreme Court will seriously curtail agency deference when it rules on *American Hospital Association v. Becerra*. *See* Am. Hosp. Ass'n v. Azar, 967 F.3d 818 (D.C. Cir. 2020), *cert. granted*, *sub nom* Am. Hosp. Ass'n v. Becerra, 141 S. Ct. 2883 (2021).

[4] 42 U.S.C. §§ 7401-7671q.

[5] 33 U.S.C. §§ 1151, 1251-1387.

[6] 16 U.S.C. § 1531.

[7] 42 U.S.C. § 300f.

[8] 42 U.S.C. § 6901.

[9] 42 U.S.C. §1201.

[10] 42 U.S.C. § 9601.

Clean Air Act

Look no further than the Clean Air Act and specifically Section 111(d).[11] The Executive Branch (in this case, the Environmental Protection Agency (EPA) under President Obama) relied heavily on an overly broad interpretation of its authority. The EPA took advantage of Legislative Branch dysfunction and crafted the Clean Power Plan—an excessively burdensome, sector-wide regulation to force states to direct their electricity source away from coal under the disguise of regulating carbon dioxide. It was a direct assault on the reliability and affordability of energy generation, but more importantly, it was a blatant attack on the authority of states to set their own power generation decisions. Congress is given the authority of the pen and it makes no sense to pass authorship off to those charged with implementation, especially without the involvement of states. It is a recipe for continued litigation and conflict, rather than sound and resilient policy. Thankfully, North Dakota, alongside allied states and stakeholders, was able to receive an unprecedented stay from the U.S. Supreme Court in February of 2016,[12] perhaps speaking volumes about its illegality.

The merits of the Clean Power Plan were under review by the U.S. Supreme Court in *West Virginia v. Environmental Protection Agency*.[13] The Supreme Court ruled, "It is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[14] In a concurring opinion, Justice Gorsuch took matters further writing, "When Congress seems slow to solve problems, it may be only natural that

[11] 42 U.S.C. § 7411(d).

[12] *See* West Virginia v. EPA, 577 U.S. 1126 (2016).

[13] 142 S. Ct. 420 (2021).

[14] West Virginia v. EPA, No. 20–1530, slip op. at 31 (U.S. June 30, 2022).

those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives."[15] In an *amicus curiae* brief I signed along with 91 House and Senate colleagues,[16] we noted the complete lack of congressional intent to regulate greenhouse gas emissions. The Clean Air Act requires the EPA to set National Ambient Air Quality Standards (NAAQS) for six criteria air pollutants: carbon monoxide, ground-level ozone, lead, nitrogen dioxide, particulate matter, and sulfur dioxide. Carbon dioxide is not expressly included in this list. Unfortunately, in *Massachusetts v. Environmental Protection Agency*,[17] the Supreme Court stepped outside the textual bounds of the Clean Air Act and opened the door to regulating vehicular carbon dioxide emissions under the guise of an endangered public. In contrast, the brief we submitted states, "In recent years, . . . Congress has addressed major policy questions concerning greenhouse gas emissions by enacting legislation, signed into law by the President, that provides explicit and specific direction to administrative agencies."[18] For example, in the 115th Congress, I co-sponsored H.R. 3761,[19] the Carbon Capture Act, which was legislation to enhance the federal tax credit for carbon dioxide sequestration. Related provisions were later enacted as part of the Bipartisan Budget Act of 2018 (P.L. 115-123).[20] Clearly, the congressional intent of this bill was to accelerate the deployment of technology to reduce greenhouse gas emissions from a broad range of industries.

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[15] West Virginia v. EPA, No. 20–1530, slip op. at 19 (U.S. June 30, 2022) (Gorsuch, J., concurring).

[16] *See* Brief of 91 Members of Congress as Amici Curiae in Support of Petitioners, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 6118331.

[17] 549 U.S. 497 (2007).

[18] Brief of 91 Members of Congress as Amici Curiae in Support of Petitioners at 7, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 6118331.

[19] H.R. 3761, 115th Cong. (2017).

[20] 42 U.S.C. § 1305.

The brief also succinctly states,

> Decisions regarding greenhouse gas emissions and the power sector are major policy questions with vast economic and political significance. Only elected members of Congress, representing the will of the people, may decide these questions. The EPA's attempt to issue expansive regulations cannot stand in the absence of clear congressional authorization.[21]

The Obama Administration's sweeping regulation was a major shift in policy with significant implications. A plain reading of Clean Air Act Section 111(d), or any other kind of reading, does not give the EPA the authority to singlehandedly restructure the entire energy sector of our economy. These decisions are best left to states, which are better situated to understand their own energy needs and resources than is the federal government. They are also closer to the people they serve in both proximity and accountability. This was upheld in the *West Virginia v. Environmental Protection Agency* Majority Opinion. Chief Justice Roberts wrote "We declined to uphold EPA's claim of 'unheralded' regulatory power over 'a significant portion of the American economy.' … Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d)."

North Dakota was also a party in *West Virginia v. Environmental Protection Agency*. An *amicus curiae* brief filed with the Supreme Court by North Dakota Attorney General Stenehjem hails "the delicate balance of cooperative federalism established by Congress in Section 111 of the Clean Air Act which gives the States the primary role establishing standards of performance for existing sources of air emissions."[22] Unique to the proceedings, Attorney General Stenehjem rightly notes cooperative federalism is expressly written

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[21] Brief of 91 Members of Congress as Amicus Curiae in Support of Petitioners, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 6118331.

[22] Merits Brief of Petitioner, The State of North Dakota, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 5982770.

into the Clean Air Act as it relates to regulating emissions from existing sources. Clean Air Act Section 111(d)(2) outlines the process for the EPA to step in and establish performance standards if, and only if, a state fails to do so. The reality is the statute already strikes an appropriate balance in which states are the lead regulators and the federal government acts as a backstop.

Federal overreach, combined with statutory language ripe for bureaucratic mischief, landed the EPA before the Supreme Court for more than a decade. While the Clean Air Act could have been written better, it is clear Congress never intended to overrule state authority.

Clean Water Act

The Clean Water Act has faced a fate similar to that of the Clean Air Act. The law abides by the tenets of cooperative federalism by recognizing the responsibility of states to address water pollution. States are tasked with primary enforcement responsibility. Where the law fails miserably, however, is the ability of the EPA and the Army Corps of Engineers (Army Corps) to define their own jurisdiction. This has created a regulatory nightmare and a never-ending cycle of litigation over the nearly fifty years the statute has been in place. Under the law, federal regulatory agencies are responsible for defining what is and what is not a Water of the U.S. (WOTUS). In other words, unelected bureaucrats determine what is or what is not navigable water. Cooperative federalism was clearly top of mind as navigable bodies of water fall under federal jurisdiction and all other waters fall under state jurisdiction. But, in practice, leaving agencies to define navigable water has allowed for unabashed federal power grabs under the guise of environmental protection.

In 2006, Justice Scalia, in the *Rapanos* plurality opinion joined by Chief Justice Roberts and Justices Thomas and Alito, spoke to the

"immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."[23] Justice Scalia set the standard for continuous surface water connection to relatively permanent bodies of water, emphasizing the Clean Water Act was intended to deal with navigable waters or "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[24] However, interpreting the same statute, Justice Kennedy wrote a separate concurring opinion specifying that a WOTUS only needs a "significant nexus" or a substantial impact on the quality of a navigable body of water.[25] For those who operate on common sense, it is clear ditches, puddles, prairie potholes, and seasonal trickles are not and never will be navigable. Nevertheless, under Justice Kennedy's determination, federal bureaucrats have been given free rein to determine whether these water features have any connection to large bodies of water—never mind the term "significant nexus" is nowhere to be found in the underlying statute. Legislators' lack of clear definitions and intent led two Supreme Court Justices to two disparate interpretations.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They would have granted *Chevron* deference to the Army Corps' interpretation of "navigable waters" and upheld the Sixth Circuit's ruling.[26] This further displays how lazy legislating has allowed the Clean Water Act to be abused by an emboldened Executive Branch and its respective agencies.

Neither the plurality nor the dissent commanded a majority. Justice Kennedy's concurrence argued wetlands do not need to

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[23] Rapanos v. United States, 547 U.S. 715, 722 (2006).

[24] *Id.* at 739 (alterations in original).

[25] *Id.* at 779 (Kennedy, J., concurring).

[26] *Id.* at 787–810 (Stevens, J., dissenting).

have a continuous surface connection to a continuously flowing body of water to be covered under the Clean Water Act, but adjacency to a WOTUS is not sufficient to constitute a determination of a WOTUS. Instead, he decided wetlands not adjacent to navigable water must have a "significant nexus" to a WOTUS.[27] This has taken many forms over the years. The 2015 WOTUS Rule[28] defined "significant nexus" to mean water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affecting the chemical, physical, or biological integrity of a "jurisdictional by rule" water. For an effect to be "significant" it must have been "more than speculative or insubstantial" and the term "in the region" meant "the watershed that drains to the nearest" primary water.[29] This definition was different from the test articulated by the agencies in their 2008 *Rapanos* Guidance.[30] The 2015 guidance interpreted "similarly situated" to include all wetlands (not waters) adjacent to the same tributary.

Additionally, under the 2015 Rule, regulators had to consider nine functions, including sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions to determine whether water had a significant nexus to a WOTUS.[31] If any single function performed by the water, alone or together with similarly situated waters in the region, contributed significantly to the chemical, physical, or biological integrity of the nearest "jurisdictional by rule" water, the water was deemed to have a significant

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[27] *Id.* at 779.

[28] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054, 37091 (June 29, 2015), https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states [https://perma.cc/TG7D-52NL].

[29] *Id.*

[30] *See* Env't Prot. Agency, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* 8 (Dec. 2, 2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf [https://perma.cc/A6ZC-35D5].

[31] *See* Clean Water Rule for Engineers Corps and Environmental Protection Agency, 80 Fed. Reg. 37053, 37067 (published on June 29, 2015) (effective on Aug. 28, 2015).

nexus. Altogether, the nine significant nexus functions and the expanded guidance of "similarly situated waters in the region" in the 2015 Rule meant the majority of water features in the U.S. could come under federal jurisdiction. This is the textbook definition of overreach. It was a total affront to states who have a vested interest in protecting the water sources within their borders.

This is what made the Obama Administration's 2015 rulemaking particularly pernicious for North Dakota, as we are the heart of the Prairie Pothole Region with numerous ephemeral streams. Prairie Potholes are shallow wetlands scattered across the upper Midwest. Some are permanent. Some are mere puddles, only filling with water during the spring. Under the 2015 Rule, more than 80 percent of North Dakota's landmass would be under federal jurisdiction in large part because of the vast presence of prairie potholes, ephemeral streams, and an arbitrary 4,000-foot buffer from an ordinary high watermark.[32] Before the Senate Environment and Public Works Committee on June 12, 2019,[33] North Dakota Agriculture Commissioner Doug Goehring testified the 2015 Rule would have expanded federal authority to cover 85,604 linear miles in North Dakota. This would amount to an increase of 80,504 linear miles[34] from the 5,100 linear miles under federal jurisdiction in the pre–2015 Rule.

The 2015 Rule fully displayed the growing disregard for cooperative federalism when the Executive Branch completely ignored the important fact that water not included within the definition of a WOTUS does not mean it lacked adequate environmental protection. For example, the North Dakota legislature already tasks the state Department of Environmental Quality (DEQ, previously the

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[32] *See* A Review of Waters of the U.S. Regulations: Their Impact on States and the American People: Hearing Before the Subcomm. on Fisheries, Water, and Wildlife of the S. Comm. on Env't and Pub. Works, 116th Cong. 1–2 (2019) (statement of Doug Goehring, Agriculture Commissioner, North Dakota).

[33] *Id.*

[34] *Id.*

Department of Health) with regulating all waters within the state, regardless of whether they fall within federal jurisdiction.[35] Accordingly, our state law places additional protections on those waters. The North Dakota DEQ goes above and beyond the federal baseline standards and actively works to prevent pollution. This includes subjecting violators to legal action. Nothing in the Clean Water Act has precluded states from similar policies. All of these points were submitted via written comment by North Dakota officials for the EPA's proposed Definition of Waters of the United States docket, published on April 21, 2014.[36] The federal government is either oblivious or actively ignoring state-level protection.

In response to this blatant disregard for the state's role in protecting its environment, several states—including North Dakota—took to the courts for resolution, with some success. In 2015, North Dakota and eleven other states filed a successful lawsuit in federal district court in North Dakota asking the court to vacate the 2015 Rule and bar the EPA and Army Corps from enforcing the new definition.[37] North Dakota argued the Obama Administration's WOTUS regulation unlawfully expanded federal jurisdiction over state land and water resources beyond the intent of Congress.[38] In response, North Dakota U.S. District Judge Ralph Erickson issued a temporary injunction on the 2015 Rule. Judge Erickson wrote in his ruling that "the States will lose their sovereignty over intrastate

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[35] *See* N.D. Cent. Code § 61-28-01, [https://perma.cc/6M37-LXR4].

[36] Governor Jack Dalrymple, Comment on the Proposed Definition of Waters of the United States (Nov. 24, 2014), https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-15365 [https://perma.cc/4L82-FPUX].

[37] *See* Press Release, Drew H. Wrigley, Attorney General, North Dakota, US District Court Sides with North Dakota in WOTUS Decision (Mar. 23, 2018), [https://perma.cc/6HXK-SGPR].

[38] *See* Mike Nowatzki, *North Dakota takes lead in lawsuit against EPA over WOTUS rule*, The Jamestown Sun (June 30, 2015, 10:26 AM), https://www.jamestownsun.com/news/north-dakota-takes-lead-in-lawsuit-against-epa-over-wotus-rule [https://perma.cc/K23P-97BJ].

waters"[39] and the EPA "violated its congressional grant of authority in its promulgation of the rule."[40]

States, farmers, ranchers, and landowners have endured decades of regulatory change in the WOTUS definition from administration to administration without an end in sight. As the Biden Administration rewrites WOTUS, the U.S. Supreme Court will review the scope of the Clean Water Act in *Sackett v. Environmental Protection Agency* during the upcoming term.[41] EPA has indicated this will be different from the Obama Administration's 2015 Rule.[42] Any new definition of WOTUS, like the Trump Administration's Navigable Waters Protection Rule, needs to respect the role of states, which have primacy for a multitude of Clean Water Act programs. As with 111(d), a decision from U.S. Supreme Court on *Sackett v. Environmental Protection Agency* may finally provide much-needed clarity and, hopefully, the appropriate guardrails for an ever-expanding bureaucracy.

Water Supply Rule

Federal water policy outside of the Clean Water Act has experienced similar sagas. The Flood Control Act of 1944 and the Water Supply Act of 1958 were clearly established with cooperative federalism in mind. Under these statutes, "water surplus" was never

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[39] North Dakota v. EPA, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015).

[40] *Id.* at 1051.

[41] Greg Stohr, *Supreme Court Will Consider Limiting Reach of Clean Water Act*, BLOOMBERG L. (Jan. 24, 2022, 9:34 AM), https://news.bloomberglaw.com/environment-and-energy/supreme-court-will-consider-limiting-reach-of-clean-water-act [https://perma.cc/2PS6-37JW].

[42] Bobby Magill, *EPA to Rewrite Trump-Era Waters Rule That Boosted Builders*, BLOOMBERG L. (June 9, 2021, 4:40 PM), https://news.bloomberglaw.com/environment-and-energy/biden-administration-to-redefine-waters-of-the-united-states [https://perma.cc/9Q9Q-2M97].

defined and courts and Congress gave clear and consistent deference to states, localities, and tribes for water surrounded by Army Corps property. In the Flood Control Act of 1944, Congress wrote,

> it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers.[43]

The law expressly recognized the preeminent role of states concerning water rights.

In 2008, however, the Army Corps issued the Real Estate Policy Guidance Letter No. 26, which inhibited state water rights and access.[44] At the very end of the Obama Administration, the Army Corps published a Notice of Proposed Rulemaking entitled "Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal, and Industrial Water Supply" (Water Supply Rule)[45] to codify the 2008 guidance and other partisan priorities. In this proposal, it defined key terms in the Flood Control Act of 1944 and the Water Supply Act of 1958 in an attempt to federalize water authority specifically reserved for the states.

During the development of the proposed rule, the Army Corps failed to meaningfully consult with states and tribes. The Obama Water Supply Rule ignored longstanding congressional intent and practices to restrict critical access to water. Historically, the Army

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[43] The Flood Control Act of 1944, 33 U.S.C. § 701 (2018).

[44] U.S. Army Corps of Eng'rs, Real Estate Policy Guidance Letter No. 26 (June 10, 2008), https://www.publications.usace.army.mil/Portals/76/Users/182/86/2486/PGL%2026.pdf?ver=HnFqKuFLeG9yRyhG69V-ew%3d%3d [https://perma.cc/5PN8-74BR].

[45] Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply, 81 Fed. Reg. 91556 (proposed Dec. 16, 2016) (to be codified at 33 C.F.R. pt. 209).

Corps did not require a water supply contract as a prerequisite to granting water users access to their reservoirs in arid Western states.

Since Real Estate Policy Guidance Letter No. 26 was signed in 2008, North Dakota's access to water in the Missouri River was restricted by approximately 75 percent, according to Attorney General Stenehjem. The new policy also blocked all access to water on the Mandan, Hidatsa, and Arikara Nation or Three Affiliated Tribes and Standing Rock reservations.[46] The proposal wholly contradicts "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control"[47] as prescribed by Congress.

In 2020, the Trump Administration and the Army Corps took a step in a positive direction when they withdrew the Water Supply Rule.[48] This action recognized the legitimate right of states, tribes, and localities to access water flows within their boundaries. They took a step further in December 2020 when they rescinded guidance on surplus water agreements and released instructions aimed at

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[46] *See* Press Release, Wayne Stenehjem, Attorney General, North Dakota, Stenehjem Applauds Corps of Engineers' Policy Change (Dec. 4, 2020), https://attorneygeneral.nd.gov/news/stenehjem-applauds-corps-engineers%E2%80%99-policy-change.

[47] The Flood Control Act of 1944, 33 U.S.C. § 701 (2018).

[48] *See* Press Release, U.S. Army, U.S. Army Withdraws Water Supply Rule (Jan. 21, 2020), https://www.army.mil/article/231866/u_s_army_withdraws_water_supply_rule#:~:text=%22In%20coordination%20with%20the%20administration,supply%20rule%2C%22%20James%20said [https://perma.cc/DQZ6-EP5W]; *see also* Press Release, Senator Kevin Cramer, Sen. Cramer: President Trump Withdraws Water Supply Rule (Jan. 21, 2020), https://www.cramer.senate.gov/news/press-releases/sen-cramer-president-trump-withdraws-water-supply-rule-sen-cramer-led-effort-halt-rule-better-0 [https://perma.cc/EZH9-RTUF].

improving internal processes for reviewing requests for water supply withdrawals.[49] These actions further limited the federal government's control of local water issues and streamlined the permitting process. With nothing more than a change in administration, however, states, localities, and tribes may once again be subject to a game of regulatory ping pong. With a new Notice of Proposed Rulemaking, the Army Corps can grow the size, influence, authority, and footprint of the bureaucracy, ignore judicial precedent, override congressional intent, and trample cooperative federalism.

Lazy Legislating

As evidenced by the examples outlined thus far, lazy legislating and a power-hungry bureaucracy have given too much power to the Executive Branch and the Judiciary, neither of which are able to properly reflect the will of the people. Ambiguity in lawmaking from Congress has paved the way for regulatory whiplash, which only serves to embolden unelected bureaucrats in the swamp of Washington, D.C. A change in administration every four to eight years brings with it a change in interpretation of federal statutes, often without any input from states like North Dakota.

The role of the federal government therefore must always be measured. And what better way to achieve an optimum result than by an empowered state government? A government that is not too large for it to fail to reflect the values of its constituents, and not too small (and numerous) to be drowned out by its peers. Federal legislators should defer to states when possible and provide clear, un-

[49] *See* Press Release, Senator Kevin Cramer, Army Corps Rescinds Certain Water Supply Guidance, Lessens the Federal Role in Water Supply Withdrawal Process (Dec. 4, 2020), https://www.cramer.senate.gov/news/press-releases/sen-cramer-army-corps-rescinds-certain-water-supply-guidance-lessens-the-federal-role-in-water-supply-withdrawal-process [https://perma.cc/X7ZN-N46J].

ambiguous definitions to reduce regulatory mischief and uncertainty. This remains a personal mission of mine in the halls of Congress.

REGROW Act of 2021

I authored and introduced the Revive Economic Growth and Reclaim Orphaned Wells (REGROW) Act of 2021[50] with my colleague Senator Ben Ray Luján (a Democrat from New Mexico) to intentionally include prescriptive language to protect against the ability of federal bureaucrats to take advantage of lazy legislating. Signed into law on November 15, 2021,[51] as part of the bipartisan Infrastructure Investment and Jobs Act, it commits nearly $4.7 billion to plug and remediate orphaned oil and gas wells across the country.[52] Throughout the bill writing process, one of my main priorities was to confine the administration and bureaucracy by clearly stating our intent in the definition section so we did not defer to bureaucrats charged with implementation. Previous drafts of this bill empowered the agency to determine definitions through the rulemaking process. The law now explicitly defines an orphaned well and stipulates deference to a state's definition of an orphaned oil well. The law states,

> ORPHANED WELL The term 'orphaned well'— (A) with respect to Federal land or Tribal land, means a well— (i) that is not used for an authorized purpose, such as production, injection, or

[50] *See* Press Release, Senator Kevin Cramer, Senate Passes Sen. Cramer's Bipartisan Bill to Plug and Remediate Nation's Orphaned Wells (Aug. 11, 2021), https://www.cramer.senate.gov/news/press-releases/senate-passes-sen-cramers-bipartisan-bill-to-plug-and-remediate-nations-orphaned-wells [https://perma.cc/L4SP-JYCW].

[51] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 40601 (2021) (enacted).

[52] *See* Press Release, Senator Kevin Cramer, House Passes Infrastructure Package, including $413.5 Billion for Road, Bridge and Highway Projects (Nov. 6, 2021), https://www.cramer.senate.gov/news/press-releases/sen-cramer-house-passes-infrastructure-package-not-build-back-better-package [https://perma.cc/6WY2-G639].

> monitoring; and (ii)(I) for which no operator can be located; or (II) the operator of which is unable— (aa) to plug the well; and (bb) to remediate and reclaim the well site; and (B) with respect to State or private land— (i) has the meaning given the term by the applicable State; or (ii) if that State uses different terminology, has the meaning given another term used by the State to describe a well eligible for plugging, remediation, and reclamation by the State.[53]

This definition eliminates any possible confusion or empowerment of the bureaucracy to shape the law for its own purposes. By using direct language spelling out deference to existing state policy, future administrations and unelected career bureaucrats, regardless of the political party, do not have the authority to set parameters on what constitutes an orphaned well. This clarity was also necessary to expedite implementation of the program by circumventing the administrative rulemaking processes to put unemployed oilfield workers back to work and remediate the land faster. In the end, we produced results more quickly and reduced the opportunity for bureaucratic overreach or favoritism throughout the implementation process.

Consolidation of Litigation Power

Perhaps just as important as thoughtful and intentional legislating is overturning the consolidation of litigation power among the Executive Branch to the DOJ. Public Law No. 89-554 consolidated litigation authority under the DOJ, subject to certain exceptions. Though various Executive Branch agencies enjoy varying levels of independence from the DOJ, unfortunately, it is not the case for the most prominent matters I express in this Essay.

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[53] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 40601 (2021) (enacted).

As Kirti Datla and Richard L. Revesz aptly wrote in a recent article, "centralized litigation control [under the DOJ] increases agency independence from Congress but decreases agency independence from the Executive."[54] Hypothetically, politics is divorced from consideration—and any and all litigation is motivated by the DOJ's self-defined legal doctrine. They note, "While most policymaking does not occur in litigation, control over positions taken in litigation and litigation decisions results in a degree of control over substantive enforcement decisions."[55] In the real world, this end result usually erodes states' rights and is unquestionably awful for North Dakota. It also removes the impact of congressional intent and the ability of Congress to conduct oversight.

In practice, this consolidation leads to Executive Branch agencies being subordinate to the DOJ. It enables the DOJ to ignore the spirit of the law as it is not tasked with implementation or oversight. It is merely interested in the outcome of the case and its goal is always to protect the federal interest. Other Executive Branch agencies, however, must incorporate the outcome of litigation into their everyday practice, which consists of frequent, if not daily, interactions with states and the American people. There is no agency more tone-deaf and unresponsive than the DOJ, and its litigation strategies reflect this.

Fundamentally one must ask—what motivation does the federal government have to share power rather than centralize it? Very little. Compound this inherent drive with endless resources controlled by an army of elite career lawyers who have a deep disgust for any power not solely residing within the federal government. The end result is a passive-aggressive DOJ which only begrudgingly works with the states in the rare cases when a like-minded President takes notice.

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[54] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 801 (2013).

[55] *Id.* at 802.

One such example is the ongoing Federal Tort Claims Act (FTCA) litigation between North Dakota and the U.S. relating to the over-$38 million dollars in damages incurred from the Dakota Access Pipeline (DAPL) protests. Negligence from the Obama White House, Army Corps, and Department of the Interior facilitated the DAPL riots, upheaval, and illegal activity which resulted in an environmental disaster on the shores of the Missouri River.[56] Since the 2016 protests, there has been continued resistance from the federal government to assist with the cost of cleanup, enforcement, and policing in any way.

On August 4, 2020, during a Senate Armed Services nomination hearing[57] for Michele Pearce to serve as General Counsel of the Department of the Army (Army), Ms. Pearce stated, "It is my understanding, after thoroughly reviewing all of the pleadings, there were absolutely missed opportunities to reach a settlement. As you are well aware, based on the fact that this case is in litigation, the decision moving forward is out of my hands."[58] We can reasonably conclude the Army, and the Army Corps by extension, have an incentive to cooperate with the State of North Dakota on FTCA claims relating to DAPL protests for the very reason the agency works with the state on a consistent basis on water resource projects in the state. However, the desire to be responsive has been thwarted by

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[56] *See* Press Release, Senator Kevin Cramer, North Dakota Delegation Urges DOJ and DOD to Assist in DAPL Settlement Case (June 10, 2019), https://www.cramer.senate.gov/news/press-releases/north-dakota-delegation-urges-doj-and-dod-to-assist-in-dapl-settlement-case [https://perma.cc/3JZ2-QCV5].

[57] *Nominations—Whitley—Manasco—Pearce—Hardy*, S. COMM. ON ARMED SERVS. (Aug. 4, 2020), https://www.armed-services.senate.gov/hearings/20-08-04-nominations_whitley--manasco--pearce--hardy [https://perma.cc/TM4L-LTTA].

[58] Press Release, Senator Kevin Cramer, North Dakota Delegation Urges DOJ and DOD to Assist in DAPL Settlement Case (June 10, 2019), https://www.cramer.senate.gov/news/press-releases/north-dakota-delegation-urges-doj-and-dod-to-assist-in-dapl-settlement-case [https://perma.cc/3JZ2-QCV5].

the heavy hand of the DOJ, which has no impetus for or interest in being responsive to the state.

Following this interaction, in September 2020, the Army formally recommended the DOJ enter into settlement negotiations "[t]o avoid protracted and costly litigation, particularly in light of the harm that occurred in this case."[59] Despite these public statements, to date, no settlement has been reached and a trial is set for May 2, 2023.

Cooperative federalism would be better served if Executive Branch agencies were to litigate their own issues. Each agency has not only the best understanding of the statutes in question but also both self-interest and a stake in the case. Under our cooperative federalism model, states are partners, if not leaders, when it comes to environmental statutes. Agencies are thus tasked to work with states, which have primary enforcement responsibility for federal statutes and have a vested interest in representing themselves in court. In this case, the Army Corps would best represent itself in the DAPL FTCA matter as it has a vested interest in the management of the Missouri River Basin and its relationship with the State of North Dakota. The DOJ, however, has no such obligations or interests.

A Path Forward

Many like to quote Justice Brandeis' phrase "laboratories of democracy,"[60] but this distorts the very principle of cooperative federalism. While this rightly recognizes state sovereignty and individuality, it ignores the fact that the federal government is a

[59] Press Release, Senator Kevin Cramer, Sen. Cramer: Army Recommends DOJ Settle with ND over DAPL Protest Costs (Sept. 1, 2020), https://www.cramer.senate.gov/news/press-releases/sen-cramer-army-recommends-doj-settle-with-nd-over-dapl-protest-costs [https://perma.cc/9HJD-9SUL].

[60] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

product of the states. A state government is subject to a central government, of course, but a central government should be deferential to the sum of its parts: states. Over the years, cooperative federalism has been understood as the relationship between the states and the federal government, with heavy deference towards the latter. Common sense would infer this to mean states should cooperate with the federal government when in reality the foundation of federalism is the exact opposite.

In theory, cooperative federalism and environmental policy should peacefully and easily coexist. Landmark legislation like the Clean Air Act, Clean Water Act, and other statutes which guide the EPA's mission of protecting human health and the environment—all of which passed with bipartisan support in Congress—are dependent on state enforcement for results. We know this can work. I saw near-perfect execution of cooperative federalism and environmental policy when I was a Public Service Commissioner. Since 1980, North Dakota has had primacy under the Surface Mine Control and Reclamation Act, the primary statute governing the regulation of active coal mines and reclamation of abandoned mine lands. This is a partnership where North Dakota, via the Public Service Commission, is responsible for the implementation of the statute and the federal government is responsible for oversight. Over the last 41 years, North Dakota has been a responsible steward of the program permitting energy development and remediating land across the state.

Primary enforcement authority for the underground injection control (UIC) of Class VI wells, wells used for the geologic sequestration of carbon,[61] is another example of successful cooperative federalism. North Dakota is one of only two states to have Class VI

[61] Class VI - Wells used for Geologic Sequestration of Carbon Dioxide, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/uic/class-vi-wells-used-geologic-sequestration-carbon-dioxide [https://perma.cc/2T7H-NG2Q].

primacy. Granted primacy by the EPA in April 2018,[62] North Dakota has already permitted two high-profile carbon capture projects: Project Tundra[63] and Red Trail Energy.[64]

Success at the federal level is wholly dependent on the work of states, as states have received delegated authority to regulate and enforce these regulatory programs, while the federal government provides technical assistance and oversight. A framework so perfectly set up to carry out cooperative federalism, in practice, is a much different story. Environmental statutes have been repeatedly used by administrations to federalize natural resources policy. This enables not-so-thinly-veiled federal power grabs under the guise of protecting the environment.

Restoring the rightful place of cooperative federalism requires a major re-prioritization of responsibilities of the Legislative and Executive Branches. Legislators must be tasked with more prescriptive lawmaking to precisely define congressional intent. This, in turn, will provide better direction to Executive Branch agencies to execute their mission in the absence of an emboldened bureaucracy. Realigning litigation responsibilities from the DOJ to Executive Branch agencies would better encompass the reality that cooperative federalism depends on the federal government cooperating with states, not the other way around. Our country works best this way.

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[62] State of North Dakota Underground Injection Control Program; Class VI Primacy Approval, Federal Register (Apr. 24, 2018), https://www.federalregister.gov/documents/2018/04/24/2018-08425/state-of-north-dakota-underground-injection-control-program-class-vi-primacy-approval [https://perma.cc/8EX6-9Y2F].

[63] Press Release, Industrial Commission of North Dakota, World's Largest Carbon Capture Facility—Project Tundra—Receives North Dakota Industrial Commission Approvals (Jan. 21, 2022), https://www.nd.gov/ndic/ic-press/News-DMR220121Minnkota.pdf [https://perma.cc/QL2Y-CE5G].

[64] *Red Trail Energy CCS*, ENERGY & ENV'T RSCH. CTR., https://undeerc.org/research/projects/redtrailenergyccs.html [https://perma.cc/8QUJ-8XQZ].