

CONSTITUTIONAL CHALLENGE TO SUPERFUND IMPLICATES LIMITS ON FEDERAL AGENCIES' POWER

by

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The General Electric Company has raised two noteworthy constitutional challenges to the so-called “unilateral orders regime” that the Environmental Protection Agency (“EPA”) has formulated under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). In a complaint filed at the end of November 2000 in the federal district court in Washington, D.C., *General Electric Company v. Browner, Administrator* (D.D.C. No. 1:00 CV 2855), GE contends that this regime violates both the Due Process Clause and the Non-Delegation Doctrine implied under Article I of the Constitution, because the agency engages in standardless decision-making about issuing costly remedial orders without providing any fair opportunity for pre-issuance hearings or prompt post-issuance review.

General Electric’s challenge focuses on CERCLA § 106 and related statutory provisions that empower EPA to issue “such orders as may be necessary” upon a finding that “there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.” As GE summarizes its grievance in its complaint:

Under these provisions of CERCLA, EPA can and does issue unilateral orders compelling massive and onerous remediations of merely potential environmental hazards. Even though EPA concedes there is no emergency in these situations, a person subject to such unilateral orders does not receive any prior hearing before the order becomes effective. On the contrary, EPA makes its decision on a record it controls without granting any right to any person to present evidence, examine witnesses or obtain

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impartial review. A person, such as GE, risks exposure to enormous daily fines, and treble damages should it fail to comply with these orders – even though the party has no timely or meaningful opportunity to have the validity of the order reviewed judicially. This coercive and fundamentally unfair regime deprives persons of the ability to challenge the propriety of a unilateral order; instead, there is no practical choice but to comply.

The company declares that its latest complaint does not challenge any “specific order pursuant to the unilateral orders provision.” In an effort to establish standing, however, the company alleges that EPA has used its authority under Section 106 to issue unilateral orders directing GE to demolish a factory building and provide temporary housing at a former GE site in New Jersey, and is poised to issue similar orders requiring GE to implement massive cleanup remedies at GE’s Hudson River Site in New York and its Fletcher Paint Works Site in New Hampshire. GE claims that EPA’s exercise of its powers in this manner violates both the Fifth Amendment Due Process Clause and Article I, §§ 1 and 8 of the federal Constitution. This LEGAL BACKGROUNDER discusses both of these constitutional theories in turn.

Due Process Challenge. First, GE claims that CERCLA’s unilateral orders regime unconstitutionally deprives persons of their fundamental right to liberty and property without due process, because it fails to provide those subject to EPA’s unilateral orders with meaningful or prompt hearings or judicial review. This argument rests on the provision in CERCLA § 106(b)(2) which sharply curtails the opportunity for administrative reconsideration of a unilateral order:

“any person who receives *and complies* with the terms of any order issued under subsection (a) of this section may, *within 60 days after completion of the required action*, petition [EPA] for reimbursement from the Fund . . .” on the ground that the unilateral order was invalid (emphasis added).

Because EPA need entertain such petitions only after the company has fully completed the work mandated by the unilateral order, and because EPA itself makes the decision whether the company has fully completed the work, GE maintains that this provision fails to guarantee prompt, meaningful post-order review, even by the agency itself. Specifically, GE complains that under CERCLA § 106: (1) those subject to unilateral orders receive no prior hearing before the order becomes effective; (2) compliance with EPA unilateral orders is virtually mandatory, since target companies are subject to substantial daily fines (of up to \$25,000 per day) and to treble damages if they fail, “without sufficient cause,” to follow EPA’s directives; and (3) even when a company does comply with an EPA order, it is not guaranteed a prompt post-order hearing, but rather, is subject to EPA’s “sole” and “arbitrary” discretion to decide when the hearing will take place.

Furthermore, GE also complains that CERCLA shackles parties facing such orders who want timely judicial review. Section 113(h), as GE puts it, “flatly prohibits immediate judicial review of specific unilateral orders.” There are thus only two paths to court. In the first option, the company must *refuse* to do the ordered work, accruing exposure to massive daily penalties and treble damages and then defend against the order when EPA goes into the district court to petition for enforcement of the order and collection of the penalties and damages. In the second option, the company must *complete* the work, apply to EPA for reimbursement of the clean-up expenses on the ground that the original order was invalid, and then sue in the district court if EPA refuses to grant relief, bound exclusively by the record EPA unilaterally chose to compile.

GE’s grievances on their face appear to have substantial force, because the statutory system so clearly stacks the deck in favor of the EPA’s exercise of nearly unbridled discretionary power. Unfortunately, courts faced with these arguments generally have sided with EPA. The first two of GE’s due-process arguments are similar to challenges before numerous district and appellate courts that EPA

has successfully defended against in the past. The courts have concluded that: (1) due process does not require pre-enforcement hearings or immediate judicial review of EPA orders, so long as there is an opportunity for judicial review at *some* stage; and (2) the availability of the “sufficient cause” defense against non-compliance penalties provides adequate procedural protection to companies who legitimately fail to comply with EPA orders. *See, e.g., United States v. Cohen*, 914 F. Supp. 252 (N.D. Ill. 1996); *United States v. Valentine*, 856 F. Supp. 621 (D. Wyo. 1994); *Employers Ins. of Wausau v. Browner*, 848 F. Supp. 1369 (N.D. Ill. 1994); *Dico, Inc. v. Diamond*, 821 F. Supp. 562, 568-69 (S.D. Iowa 1993), overruled on other grounds by *Dico v. Diamond*, 35 F.3d 348 (8th Cir. 1994); *see also Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986).

The courts have not squarely contemplated the third due-process argument raised by GE — that EPA’s functional control over the timing of any post-remediation review is unconstitutional. But the tenor of the precedents suggests that, so long as CERCLA provides for *some* judicial review at *some* point in time, the courts will be reluctant to invalidate the statute on due process grounds. Over many years, the courts have adhered, with frustrating consistency, to the notion that Congress enjoys great flexibility in deciding whether and when to authorize judicial review of agency action. To prevail, GE and its legal team — led by Harvard Law School Professor Laurence Tribe — will have to convince the courts in Washington, or eventually the Supreme Court, to reverse course rather fundamentally or at least to demonstrate that the EPA/CERCLA regime is just too far beyond the pale. Against this backdrop, GE faces a steep challenge in convincing the courts in Washington to create a circuit split on the due process attack. GE is apparently banking on the hope that federal courts in the nation’s capital have shown themselves more willing to strike down congressional enactments and to invalidate agency procedures than have courts elsewhere.

Non-delegation Challenge. More interesting is GE’s argument that CERCLA § 106 violates Article I of the United States Constitution by effecting an unconstitutional delegation of legislative powers to the Executive. The basis for this argument is the non-delegation doctrine, a separation of powers corollary that prevents Congress from “delegating” to coordinate branch entities — such as administrative agencies — those powers or responsibilities that the Constitution vests in the Legislative Branch. In practice, the Supreme Court has interpreted this to mean that Congress, in enacting federal statutes, must provide “intelligible principles” to guide the exercise of administrative discretion in fashioning regulatory policies. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 398 (1935).

Following its apex in the early 1930s, however, when the Supreme Court famously used it to strike down New Deal legislation, the non-delegation doctrine had become a virtual dead letter. Recent years, however, have seen its resurrection, at least in a similar form, to invalidate the legislative and line-item vetoes in *INS v. Chadha*, 462 U.S. 919 (1983), and *Clinton v. New York*, 524 U.S. 417 (1998) respectively.¹ Moreover, further explaining GE’s forum selection for its current attacks on the “unilateral orders” regime, the Court of Appeals for the District of Columbia Circuit, in *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), recently used the non-delegation doctrine to strike down an EPA implementation of the Clean Air Act. The provision at issue empowered the agency to establish air quality standards guided only by the directive to set them at a level “requisite to protect the public health” and with “an adequate margin of safety.” The D.C. Circuit held that Congress had simply gone too far in ceding its regulatory power to an Executive Branch agency.

Focusing on CERCLA language that authorizes EPA to “issu[e] such orders as *may* be necessary” whenever EPA determines that “there *may* be an imminent and substantial endangerment” to

¹ It should be noted that it was the District Court for the District of Columbia, (Hogan, J.) that used the non-delegation doctrine as a basis for invalidating the Line Item Veto Act; the United States Supreme Court never reached the non-delegation issue, resting its decision instead on a determination that the Act violated the Presentment Clause of Article I, § 7.

public health (emphasis added), GE's complaint charges that: "CERCLA authorizes EPA to decide for itself what constitutes an 'endangerment,' in what situations to invoke its unilateral orders powers, how to exercise those powers, what penalties to threaten, and when and how to allow judicial review of such orders [and that] these judgments are all made without any intelligible standards to limit and guide EPA's actions and without any meaningful opportunity for judicial review."

Before the D.C. Circuit's decision in *American Trucking Ass'n*, it was doubtful that the courts would have given much credence to GE's non-delegation challenge. For more than sixty years, the courts have allowed Congress to entrust to administrative agencies massively sweeping powers to regulate all kinds of economic and business activity with only the vaguest statutory benchmarks. The line between intelligible and unintelligible standards is difficult to draw, and any resurgence of the non-delegation doctrine would have enormous ramifications for governmental regulation in every sector. Hard-edged application of the doctrine would significantly alter the rather sloppy and cavalier way Congress sidesteps many hard choices, simply bucking them to the administrative bureaucracies to resolve.

Therefore, EPA has pointed out that a decision in favor of the American Trucking Association would severely limit the government's ability to regulate in numerous areas and could lead to invalidating numerous existing regulatory structures. Of course, similar concerns failed to deter the Supreme Court from striking down the legislative veto in *Chadha* eighteen years ago, which nullified scores of similar congressional schemes.

Unfortunately for GE, this effort to dust off the non-delegation doctrine may have died a quick death. The EPA asked the Supreme Court to review the D.C. Circuit's decision, and the Court granted certiorari. GE recognized that a decision in the *American Trucking Ass'n* case would probably determine whether its non-delegation argument would even survive a motion to dismiss. GE filed an *amicus* brief advancing an argument paralleling the one it is trying to make in the unilateral orders case. Oral argument took place on November 7, 2000. On February 27, 2001, the Supreme Court unanimously rejected the non-delegation argument. *Whitman, Administrator, EPA v. American Trucking Ass'n*, 69 U.S.L.W. 4136.

Justice Scalia's opinion for the Court leaves regrettably little room for a winning non-delegation argument, either in GE's case or others that regulated companies may want to bring. His opinion offers a nod of encouragement by reiterating that Congress must provide an "intelligible principle" to guide an administrative agency's regulatory decisions, when Congress confers regulatory power. But the opinion notes, without any discomfort or embarrassment, that only twice in history — in 1935 — has the Court applied this principle to strike down a delegation and that those were instances in which Congress had "provided literally no guidance for the exercise of discretion" By contrast, Justice Scalia catalogued the prior Court rulings in which the Court upheld seemingly vague and imprecise standards, including something as spongy and subjective as "the public interest."

Since GE is well-counseled, its lawyers may be able to find some solace in the Court's comment that Congress "must provide substantial guidance on setting air standards that affect the national economy." The statutory provision that GE is challenging relates to case-specific orders rather than sweeping national regulations. Nevertheless, GE may be able to fashion an argument that the scope of the delegated authority is so broad that it too requires more "substantial" definitional guidance than Congress has provided. But this will be hard argument to craft in the face of a unanimous Supreme Court decision declining the invitation to breathe new life into two hoary New Deal cases.

The only thing that is certain, though, is that GE's case will be one to watch for businesses nationwide. It just might turn out to be the case that forces the courts to confront the outer limits of permissible abdication of congressional responsibility for defining what American companies are obliged to do.