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COURTS QUESTION CONSTITUTIONALITY OF FEDERAL ENVIRONMENTAL LAWS

by

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For the first time since the enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980, a federal District Court has declared the statute unconstitutional as applied to the facts alleged in the federal government's complaint. While dozens if not hundreds of claims of both facial and as-applied unconstitutionality have been raised in the preceding 16 years, the court in *United States v. Olin Corp*, No. 95-0526-BH-S (S.D. Ala. May 20, 1996) is the first court to find a constitutional violation. This decision, along with a recent federal appellate court ruling on the Safe Drinking Water Act, may indicate that courts are becoming more willing to closely scrutinize environmental laws for potential constitutional infirmities.

In *Olin*, the court found that, because the plants at the site in question had not operated since 1982, it was doubtful that the environmental contamination at issue could be considered an "economic activity" that would have a "substantial effect" on interstate commerce, as the U.S. Supreme Court required in its reinvigoration of the U.S. Constitution's Commerce Clause in *United States v. Lopez*, 115 S. Ct. 1624 (1995). The district court also held that, as required by *Lopez*, the CERCLA statute lacked jurisdictional elements that would ensure, through a case-by-case inquiry, that interstate commerce was involved. But the court determined that even if the statute did provide for the inquiry, in the case before it, such an inquiry would demonstrate that the activity at issue had virtually no effect on interstate commerce.

The path-breaking *Olin* court further held, again for the first time, that Congress did not intend to apply CERCLA liability retroactively. The court again based its ruling on a relatively recent U.S. Supreme Court ruling, *Landgraph v. USI Film Prods.*, 114 S. Ct. 1483 (1994), which the judge believed demolished the "interpretive premises of prior cases that concluded that CERCLA is retroactive."

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A vigorous appeal by the Department of Justice of the eighty-page ruling is certain in this case, as the ruling, if followed by other courts, would bring CERCLA enforcement activity virtually to a halt. This would happen because the majority of CERCLA sites involve disposal activities which occurred prior to the 1980 enactment of the statute, and thus parties responsible for these pre-1980 disposal activities would no longer incur CERCLA liability under the reasoning in *Olin*. Of the 1,300 sites on the National Priority List (NPL) alone, over half involve pre-1980 disposal. The number of businesses, local governmental entities, and individuals connected to these sites is staggering: the General Accounting Office recently estimated that there were over 40,000 potentially responsible parties at mixed municipal/industrial landfills alone, and over 25,000 de minimis parties at the 175 sites which have companies who sent small quantities of waste as a Potentially Responsible Parties category. In addition to the NPL of the most severally contaminated sites, there are thousands of other CERCLA sites for which EPA can order one or more parties to take investigatory and/or removal actions, or reimburse EPA for the same.

The Justice Department on appeal will surely point out that Congress enacted Superfund to deal with Love Canal, Valley of the Drums, and other existing sites documented in Congressman Eckhardt's report, most of which involved historical rather than on-going disposal; the Resource Conservation and Recovery Act was enacted to deal with the latter. The *Olin* court dealt with this aspect of Congressional intent issue by suggesting that Superfund monies, rather than private liability, could be used to deal with these existing sites; that, however, may not be an adequate judicial response to the congressional intent issue. The retroactivity of CERCLA as applied to many instances may well violate the due process clause, but that issue was not reached in Judge Hand's opinion.

Alternatively, the appellate court could uphold CERCLA by construing it as the courts cited by Judge Hand in footnote 27 of the *Olin* opinion — by indicating that CERCLA was not retroactive, but applied to "continuing releases" (which will be present at most NPL cites); along the same lines, the early DOJ analysis (footnote 55 in *Olin*) may prevail — that "legislation designed to alleviate a continuing public nuisance does not act retroactively;" *citing* the Justice Department's position in *Ohio v. Georgeoff*, 562 F. Supp. 1300, 1304 (N.D. Ohio 1983).

Even more than with its retroactivity holding, Senior District Judge Hand's scholarly Commerce Clause analysis in *Olin* has the potential to significantly reign in the congressionally-authorized regulatory excesses which have become central to the modern administrative state since the New Deal. *Olin* is the first post-*Lopez* decision to invalidate an environmental statute under the Commerce Clause. A similar effort failed in *Cargill, Inc. v. United States*, where only Justice Thomas, the author of a strong concurring opinion in *Lopez*, would have granted *certiorari* to decide whether Clean Water Act jurisdiction over wetlands based solely on interstate flight by migratory birds, could be sustained under the Commerce Clause. 116 S. Ct. 407 (1995) (dissenting from denial of *cert*). The U.S. Court of Appeals for the Seventh Circuit had once taken the position that such jurisdiction could not be supported, in *Hoffman Holmes v. EPA*, 961 F.2d 1310 (7th Cir 1992), but later reversed itself and withdrew the prior opinion, 999 F. 2d 256 (7th Cir. 1993).

Judge Hand's Commerce Clause analysis traces the history of both the negative (dormant) commerce clause, as well as the authorizing commerce clause, from *McCulloch v. Maryland*, 17 U.S. 316 (1819), to *Lopez*. The court, however, recognized that the effect of *Lopez* on subsequent lower court review of challenges to federal statutes under the commerce clause is uncertain, given that the

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concurring justices were divided as to whether "great restraint," or a "reconsideration of our substantial effects test" should guide future courts. The *Olin* court noted, however, that while the *Lopez* "opinion may represent a moderate position among the Justices in the majority, the dissenters consider the decision 'radical.'" *Olin*, slip. op. at 70.

The *Olin* court concluded that a fair application of *Lopez* leads to the conclusion that "CERCLA generally represents an example of the kind of National Police Power rejected by *Lopez*." *Id.* at 78. Judge Hand, however, also indicated that, even on a narrow reading of *Lopez*, its application to the facts (involving a closed plant), demonstrated that "EPA's attempt in this case to apply CERCLA liability against the defendant would exceed the power of Congress under the commerce clause." *Id.* at 79. The court noted that an inquiry based on the Remedial Investigation report revealed no evidence that the contaminants in question at Olin's site would ever travel across state lines, even though an aquifer was contaminated. Thus, while the government may argue that the court's conclusion that CERCLA is constitutionally infirm on its face under *Lopez* is dicta, the court's holding as to CERCLA's application to the site in question clearly establishes a rule of law that, if followed, would severely proscribe the efforts of EPA and the Department of Justice to expand the reach of this and other environmental statutes to every purely local nook and cranny of our land.

While less momentous than *Olin*, another court, in *ACORN v. Edwards*, 81 F.3d. 1387 (5th Cir. Apr. 22, 1996), found another federal environmental statute to be constitutionally deficient. Most federal environmental programs involve some form of delegation to state governments to implement the mandates of the federal legislation within the state boundaries, through the operation of state programs subject to EPA initial authorization and continuing oversight; EPA refers to this relationship as "partnering," although the states may not feel they are full partners. States are subject to financial incentives, including conditional grants, as well as to various forms of sanctions for failure to properly carry out the federal mandate. For the first time, however, a federal appellate court has held that an environmental program violates the rights reserved to the states under the Tenth Amendment to the U.S. Constitution.

In *ACORN*, the court held that the Lead Contamination Control Act of 1988 amendments to the Safe Drinking Water Act, 42 U.S.C. § 300j-24(b), which require each state to establish a program, consistent with the federal statute, to assist local educational agencies, schools, and day care centers in remedying potential lead contamination from drinking water systems, violated the Tenth Amendment. The Fifth Circuit panel relied heavily upon the Supreme Court's decision in *New York v. United States*, 112 S. Ct. 2408 (1992).

The Court in *New York* had struck down the Low-level Radioactive Waste Policy Amendments, 42 U.S.C. § 2021(b) *et seq.*, in so far as that statute required states to take title to radioactive waste generated within their borders, with the liability attendant therefore, if the states had not developed a federally-approved disposal plan for the wastes by a date certain. The act provided various incentives for the states to develop a plan, but it was only the mandatory take-title provision that the Supreme Court held unconstitutional, because it forced the states to either accept ownership and liability for wastes, or to regulate the wastes' disposal according to congressional instruction. The act thereby commandeered the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program, an outcome the Supreme Court held to violate the Tenth Amendment. Justice O'Connor therein noticed that "states are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the

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federal government." *Id.* at 2434.

The Fifth Circuit in *ACORN* seized upon the *New York* decision and held that "few congressional enactments fall as squarely within the ambit of *New York* as does the Lead Contamination Control Act." The court specifically found that the failure or refusal of the states to establish the federally mandated program subjects the states to civil enforcement proceedings, 42 U.S.C. § 300j-8(a)(1). That provision, part of the original Safe Drinking Water Act, provides for citizens suits in federal district court against any entity, including a state (to the extent permitted by the Eleventh Amendment), which is in violation of any requirement of the Act. Presumably this includes the later-added Lead Contamination in School Drinking Water Amendments, which do not contain their own citizen enforcement provisions.

A public interest group had sued the Governor of Louisiana and his environmental officials, alleging that the officials, although they had taken the steps set forth in the statute to disseminate information regarding lead contamination in water coolers, had failed to establish a remedial action program to correct or remove the lead water coolers, and requested declaratory and injunctive relief. Although the state answered, inter alia, that ACORN's claims were barred by the Eleventh Amendment, the appellate court's opinion only addressed the Tenth Amendment claim. This is ironic, given that the Supreme Court had only a month previously expanded the protection given states under the Eleventh Amendment against such citizen suits in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

The decisions in *Olin* and *ACORN* signal a new willingness on the part of the federal judiciary to seriously reconsider the constitutional underpinnings of environmental statutes, particularly as they have been implemented by the federal bureaucracy, and to carefully consider Congressional intent, so that the bureaucracy does not expand and distort otherwise well-intentioned programs. Such scrutiny is critical, because these laws have had a profound effect on our nation's economy, as well as on the rights of individuals and businesses. Moreover, to the extent the two cases rest on recent Supreme Court decisions not heretofore considered by the lower courts, the viability of the cases on appeal, as well as their persuasive authority in other jurisdictions, is strong, even in the face of the overwhelming prior acquiescence of the lower courts to EPA's positions.

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