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The Supreme Court Upholds EPA Standard-Setting Under the Clean Air Act: *Whitman v. American Trucking Ass'ns*

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Summary

On February 27, 2001, the Supreme Court handed down its decision in *Whitman v. American Trucking Associations*, a challenge to EPA's promulgation in 1997 of revised national ambient air quality standards for ozone and particulates under the Clean Air Act. On the broader issues, the Court ruled that (1) the Act's provisions governing the setting of primary (health-protective) ambient standards did not transgress the "nondelegation doctrine," a moribund constitutional principle that the court below had resurrected, and (2) the Act bars EPA from considering implementation costs when it sets primary national ambient standards. On a narrow issue, the Court held that EPA had not been justified, in promulgating its ozone implementation plan, in applying only the Act's nonattainment-area subpart of general application, rather than a subpart specific to ozone nonattainment. As a result, the Court charged the agency with developing a "reasonable interpretation" accommodating both subparts. Such accommodation is likely to prove a difficult task, however, and almost certainly once adopted will generate further legal challenges.

On February 27, 2001, the Supreme Court handed down its eagerly awaited decision in *Whitman v. American Trucking Associations*.[1] The case stems from EPA's controversial promulgation in 1997 of revised national ambient air quality standards (NAAQSs) for ozone and particulates, under the Clean Air Act (CAA). More fundamentally, the legal theories in the case raise basic questions about standard-setting

[1] 121 S. Ct. 903 (2001). The decision adjudicated both EPA's petition (No 99-1257) from the decision below, and an industry cross-petition (No. 99-1426).

under the Clean Air Act and the constitutional limits on congressional delegation to agencies of standard-setting authority.

Background

NAAQSs lie at the very heart of the Clean Air Act. These standards prescribe maximum pollutant concentrations for ground-level, outdoor air, and have been promulgated by EPA for six pollutants,[2] including ozone and particulates. The NAAQSs determine the stringency of emission limits that each state must impose on individual stationary sources of the six pollutants, to achieve the NAAQSs within its borders. NAAQSs come in two forms: "primary NAAQSs" protect the public health, while "secondary NAAQSs" protect the public "welfare" (non-public health effects).[3] Once a NAAQS has been promulgated, EPA must review it (and the "criteria documents" on which it is based) every 5 years, and make such revisions "as may be appropriate."[4]

In 1997, EPA revised the NAAQSs for ozone and particulate matter, making them stricter. Given the perceived impact of these more stringent standards on the economy, it was unsurprising that numerous legal challenges were brought – with two members of Congress (Rep. Bliley and Sen. Hatch) filing as amici on the side of the challengers. Pursuant to CAA requirement, the suit was filed in the U.S. Court of Appeals for the District of Columbia Circuit.

In May, 1999, the D.C. Circuit ruled 2-1 that various deficiencies in EPA's promulgation of the two NAAQSs required that they be sent back to EPA for further consideration.[5] Among other things, the two-judge majority held that EPA's reading of the CAA section governing the setting of primary NAAQSs gave the agency too much discretion, and thus violated the constitutional "nondelegation doctrine." It also rejected industry's position that EPA, in arriving at primary NAAQSs, may consider the costs of implementation. Finally, it ruled that EPA could not enforce its revised primary NAAQS for ozone, owing to its being an eight-hour standard, rather than the one-hour standard envisioned by CAA nonattainment-area provisions added to the Act in 1990 (see further discussion on page 4). Five months later, the three-judge panel made minor modifications in its opinion, but the full court refused to grant rehearing *en banc* (all the judges of the court sitting).[6] In May, 2000, the Supreme Court took the case.[7]

What the Supreme Court Said

The Supreme Court in *American Trucking* gave EPA a unanimous victory on the two major issues in the case: consideration of costs, and nondelegation doctrine. Justice Scalia

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[2] 40 C.F.R. §§ 50.4-50.12.

[3] CAA § 109(b); 42 U.S.C. § 7409(b).

[4] CAA § 109(d)(1); 42 U.S.C. § 7409(d)(1).

[5] 175 F.3d 1027 (D.C. Cir. 1999).

[6] 195 F.3d 4 (D.C. Cir. 1999).

[7] 120 S. Ct. 2003 (petition of EPA, granted May 23, 2000); 120 S. Ct. 2193 (petition of American Trucking Ass'ns, granted May 30, 2000).

authored the opinion of the Court, with various justices writing separate concurrences to note differences as to rationale, but not as to holding.

Consideration of costs. The Court affirmed the D.C. Circuit decision (which, in turn, had endorsed existing case law of the circuit) in holding that when promulgating primary NAAQSs, or *revised* primary NAAQSs, EPA may not consider the costs of implementing the new standard. Health impacts, and health impacts alone, are to be the touchstone. The governing standard in the statute, the Court said, made this clear: section 109(b)(1) instructs EPA to set primary NAAQSs "the attainment and maintenance of which ... are requisite to protect the public health" with an "adequate margin of safety."[8]

Industry's arguments that considerations other than the health impacts of pollutants were cognizable could not overcome the directness of the above statutory text. For example, industry contended that a very stringent NAAQS might close down whole industries, thereby impoverishing the workers dependent on that industry and, in turn, reducing their health. A health-based standard such as the primary NAAQS should include these indirect impacts, industry asserted. The Court, however, pointed to numerous other CAA sections where Congress had explicitly allowed consideration of economic factors, concluding that had it intended to allow such factors under section 109(b)(1), it would have been more forthright – particularly given the centrality of the NAAQS concept to the CAA's regulatory scheme. Looking for such a forthright "textual commitment" of authority for EPA to consider costs, the Court found none. Its conclusion: section 109(b)(1) "unambiguously bars cost considerations from the NAAQS-setting process."

Nondelegation doctrine. The most controversial portion of the D.C. Circuit's majority opinion was its embrace of a long-moribund constitutional principle known as the "nondelegation doctrine." This separation-of-powers doctrine derives from Article I of the Constitution, which vests "[a]ll legislative Powers" in Congress. Not surprisingly, the Supreme Court reads this vesting provision loosely, recognizing that Congress routinely delegates quasi-legislative powers to non-Article I bodies. In particular, Congress frequently commits to the specialized expertise of executive-branch agencies the task of rulemaking in technical areas — such as air pollution control. The nondelegation doctrine says that such delegations pass constitutional muster only if Congress gives the agency an *intelligible principle* to guide its exercise of that authority.

The majority opinion below found that EPA had construed CAA section 109 so loosely as to render it an unconstitutional delegation. The court agreed with the *factors* used by the agency to assess the public health threat posed by air pollutants. But, it said, EPA had articulated no intelligible principle for translating the factors into a particular NAAQS, nor is one apparent from the statute. Given that both ozone and particulates are non-threshold pollutants (adverse health effects occur at any concentration above zero), *some* public health threat has to be tolerated if EPA is to avoid shutting down entire industries. The agency, in the court's view, had articulated no standard for determining *how much*.

In invoking the nondelegation doctrine, the D.C. Circuit drew considerable attention. It was the first time in 65 years that the nondelegation doctrine had been successfully used,

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[8] 42 U.S.C. § 7409(b)(1).

and raised serious implications for how Congress delegates standard-setting authority to agencies generally. Commentators pointed to other federal statutes – such as the Corps of Engineers wetlands permitting program under the Clean Water Act, and the rulemaking authority conferred by the Occupational Safety and Health Act – as vulnerable to nondelegation-doctrine challenge, should the D.C. Circuit be affirmed on appeal.

The Supreme Court, however, reversed. The scope of discretion allowed by section 109(b)(1), the Court said, is "well within the outer limits of our nondelegation precedents." Under section 109(b)(1), primary NAAQSs are to set at levels "requisite" to protect public health – "requisite" being argued by the United States, and accepted by the Court, as meaning "sufficient, but not more than necessary." To be sure, acknowledged the Court, more guidance must be furnished the agency when the agency action is to have broad scope – as here, where the revised NAAQSs affect the entire U.S. economy. But even for sweeping regulatory schemes, the Court disclaimed any demand that statutes provide a "determinate criterion" for saying precisely how much of the regulated harm is too much. EPA may therefore be allowed discretion to determine how much of a public health threat from ozone and particulates (recall, they are non-threshold pollutants) it will tolerate at non-zero levels.[9]

Issues involving implementation of the revised ozone NAAQS. EPA lost, again unanimously, on two issues arising from its policy for implementing the revised ozone NAAQS in non-attainment areas. First, the Court rejected EPA's argument that the policy did not constitute final agency action ripe for review.

The Court then proceeded to the second issue: which CAA provisions govern the ozone nonattainment-area implementation policy. This calls for some background. The CAA imposes restrictions on nonattainment areas over and above those that the Act imposes generally. These additional nonattainment-area restrictions are found in Title I, Part D of the statute. Subpart 1 of Title D contains general nonattainment regulations that apply to every pollutant for which a NAAQS exists. Subpart 2 of Part D addresses ozone in particular. The dispute before the Court was whether Subpart 1 alone, or rather Subpart 2 or some combination of Subparts 1 and 2, controls the implementation of the revised ozone NAAQS in nonattainment areas. EPA, in its implementation policy, took the former, Subpart-1-only course. The problem it faced was that Subpart 2 contemplated a 1-hour ozone NAAQS, reflecting the ozone standard existing when Subpart 2 was enacted in 1990. The revised ozone NAAQS, however, embodied an 8-hour standard. Thus, some Subpart 2 provisions – in particular, the nonattainment-area classification scheme that identified the requirements to be imposed depending on an area's degree of nonattainment – did not fit the new ozone NAAQS.

The Court found that EPA could not ignore Subpart 2 entirely, as it had done. Whatever awkwardness of fit results from applying Subpart 2 to the new ozone standard, it cannot, said the Court, justify "render[ing] Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory once a new standard has been promulgated ...." One example of the discretion-limiting nature of Subpart 2: under Subpart 1, EPA may extend

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[9] The Supreme Court also soundly rejected the D.C. Circuit's view that an unconstitutionally standardless delegation of power can be remedied by the agency's adoption of an interpretation confining its own discretion. *Congress*, it said, must lay down the intelligible principle.

attainment dates for as long as 12 years; under Subpart 2, only 2 years (though Subpart 2's attainment deadlines stretch from 3 to 20 years depending on the severity of an area's ozone pollution). The Court left it to EPA "to develop a reasonable interpretation of the [CAA's] nonattainment implementation provisions" for the revised ozone NAAQS.

Legal Commentary

As to the nondelegation issue in *American Trucking*, EPA had gone to the Supreme Court with the stronger arguments. It was not a foregone conclusion, however, that EPA would win unanimously, as it did, even though the Court had on many occasions sustained federal statutes containing standards as loose as, or looser than, that in the CAA governing NAAQS setting. A few justices voting for at least some resuscitation of the nondelegation doctrine was widely deemed a possibility on the ground that the Court in other areas recently has revealed an interest in cabining congressional power and discretion – and not only when the federal-state balance is implicated. Though it has been 66 years since the last successful nondelegation-doctrine challenge, the Court has not hesitated to reverse longstanding patterns in its constitutional jurisprudence when doing so furthered the agenda of a contingent of the justices. Very likely, the Court's refusal to bring back the nondelegation doctrine stemmed in part from the Court's view that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[10] Moreover, the task of rewriting federal statutes necessitated by a reinvigorated nondelegation doctrine might be one of daunting magnitude. From the environmental area to antitrust to civil rights, federal laws abound that give agencies only the broadest of guidance.

Likewise, EPA had the better argument when it came to inclusion of costs in the setting of NAAQSs. As a critic of using legislative history to divine the meaning of statutes, Justice Scalia restricted his analysis for the Court to examination of the statutory text itself. But the concurrence by Justice Breyer reveals a legislative history from the enactment of the 1970 CAA that sides unambiguously with EPA's keep-costs-out position.

For the foregoing issues then, the *American Trucking* decision largely restores the status quo ante. As before the filing of this case, a lax jurisprudence under the nondelegation doctrine and the impermissibility of considering costs in setting NAAQSs are once again regarded as relatively settled law. Some commentators have noted the Court's refusal in *American Trucking* to defer to EPA's interpretation of the CAA on ozone standard implementation, and speculated that the legacy of the decision may lie in its signalling a desire by the Court to lessen the degree of judicial deference to agency decisionmaking. But it is premature as yet to draw this conclusion.

Remaining Issues

The Court's decision in *Whitman v. American Trucking* is not the end of court proceedings in the case. Numerous issues remain before the D.C. Circuit, and EPA's next attempt at an implementation plan may also be subject to court challenge.

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[10] Mistretta v. United States, 488 U.S. 361, 372 (1989).

Developing an implementation plan that embodies a "reasonable interpretation" of the Act's nonattainment implementation provisions for the revised ozone NAAQS, as the Court mandated, is not an easy task. EPA has said that an 8-hour standard of 0.09 ppm would have "generally represent[ed] the continuation of the [old] level of protection,"[11] but the new standard is, in fact, set at a more stringent level of 0.08 ppm. Thus, the statute's classification system contains a gap that does not address areas with readings of 0.08 - 0.09 ppm.

A second problem relates to the setting of attainment dates. In the 1990 amendments, Congress was specific in setting dates of attainment that ranged from 3-20 years from the date of enactment, depending on the severity of an area's ozone pollution. The Court read this specificity as denying EPA its previous broad discretion in setting attainment dates. But three of the Act's deadlines (for Marginal, Moderate, and Serious ozone nonattainment areas) have already passed. How EPA is to respond to this is unclear. The Court itself noted that the Act's method for calculating attainment dates "seems to make no sense for areas that are first classified under a new standard after November 15, 1990."[12]

In these circumstances, it would seem likely that whatever approach EPA may take will be subject to challenge by parties opposed to the new standards, with the potential for several additional years of litigation before the issues are resolved. Whether Congress should intervene to settle these matters is a possibility that few have discussed. While logical in many respects, such a legislative clarification would open a number of issues regarding the level of the new standards, the implementation measures to be required, and the nature of EPA's standard-setting authority that interested parties may not wish to have legislated.

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[11] National Ambient Air Quality Standards for Ozone; Final Rule, 62 Fed. Reg. 38,856, 38,858 (1997), quoted in *Whitman* at 121 S. Ct. 903, 918.

[12] 121 S. Ct. 903, 918.