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Clean Air, Congress and the Constitution: Why The Delegation Ruling Was Correct

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On May 14, 1999, in *American Trucking Associations v. United States Environmental Protection Agency*, the U.S. Court of Appeals in Washington, D.C., invoked the “non-delegation doctrine” to strike down new air pollution rules for ozone and particulate matter.² This decision has been attacked in some quarters as resurrecting an outdated legal doctrine and dealing a setback to public health. In fact, the court’s ruling is an extremely welcome development.

The non-delegation doctrine enforces the first sentence of Article I of the Constitution: “All legislative Powers herein granted shall be vested in a Congress . . .” This clause is the cornerstone of American democracy because it requires the most politically accountable officials to take direct responsibility for the scope of government – in particular, for the imposition of new taxes and new regulations. For the first century of the Constitution, courts and commentators agreed that this clause meant that Congress itself must set the legal standards and may not delegate that job to executive branch agencies. Starting around 1900, however, a budding hope that experts would save the people from themselves resulted in the courts increasingly allowing Congress to delegate legislative power to agencies. The showdown came in the 1930s after the Supreme Court invalidated important New Deal legislation. President Franklin Roosevelt used the threat of his “court-packing plan” to cow the Supreme Court into upholding his later programs.

Since then, the Court has invoked the non-delegation doctrine only selectively. In a 1980 action known as the *Benzene Case*³, the Court considered the secretary of labor’s claim that a statute allowed him to regulate workplace air quality without regard to the significance of the risk. The Court, in an opinion by Justice John Paul Stevens, found that the secretary’s interpretation might well result in an unconstitutional delegation. To avoid this, the Court interpreted the statute to allow the agency to regulate only significant risks. Although this remedy has its virtues, the Court was supplying the standard that Congress should have provided in the first place. Most recently, in a 1998 opinion by Justice Stevens, the Court invalidated the Line Item Veto Act because, in essence, Congress had delegated its responsibility for setting budget priorities to the President.⁴

This month’s *American Trucking* case involved a challenge to the EPA’s stringent 1997 ozone and particulate standards by an array of industry groups and state and local governments. EPA contended that the Clean Air Act gave it nearly unbounded discretion to set any standard that it deemed

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² No. 97-1440 (D.C. Cir.).

³ *Industrial Union Department, AFL-CIO, v. American Petroleum Institute*, 448 U.S. 607 (1980).

⁴ *Clinton v. City of New York*, 524 U.S. 417 (1998).

protective of public health. Judge Stephen Williams held that this interpretation resulted in an unconstitutional delegation of legislative authority; like the labor secretary's interpretation of his authority to issue workplace regulations, under EPA's approach there is no standard for determining the extent to which health must be protected. The lack of such a standard is critical because, for most pollutants, there are conceivable, though relatively minor, health consequences down to zero emissions. Without some statutory standard of decision, EPA can regulate according to whim and politics. The court's remedy, set forth in a 2-1 panel decision, is that EPA and not the court must interpret the statute to provide a meaningful standard.

This judicially self-effacing remedy looks paltry at first blush, but it at long last puts in jeopardy EPA's standard-less interpretation of its authority. This interpretation (for which I must admit to having argued as a lawyer for the Natural Resources Defense Council in the 1970s) has allowed EPA to duck the scientific difficulties in its own health rationales for new pollution regulations.

EPA could take the case to the Supreme Court, but the Court is unlikely to accept the case at this stage. A second option is to ask Congress to enact EPA's new rules. That would honor the Constitution by having Congress take direct responsibility. What we have now is quite the reverse: unelected bureaucrats act to increase government control unless our elected politicians stick their necks out to stop them. Because EPA likes its power, it will avoid this second option.

The agency's third and final option is to come up with a meaningful standard to guide its rulemaking. This is not an impossible task. Indeed, in a previous set of cases dealing with occupational health, Judge Williams imposed a similar requirement on the labor secretary; when his agency complied, the court affirmed its action⁵.

While this third option would be good for the republic, it would have consequences that EPA would prefer to avoid. By interpreting the statute to provide a standard for protecting health, the agency would force itself to face the difficult scientific questions that its standard-less approach allowed it to duck. The Court of Appeals would then have a meaningful record to review. In addition, by interpreting the statute so as to confront, rather than avoid, the very real questions of degree regarding the extent to which health should be protected, EPA could no longer posture itself as standing solely for health, nor portray its critics as standing for greed.

The ultimate purpose of the non-delegation doctrine is to force our elected representatives in Congress to take responsibility for the scope of government. The public supports this concept overwhelmingly; according to a recent CEI poll on environmental issues, over 75 percent of the public favor requiring Congress to approve new regulations before they go into effect.⁶ The consequences of *American Trucking*, good as they are, do not yet serve this ultimate purpose, as Judge Williams himself acknowledges. But if EPA does as Judge Williams mandates, it will at least make manifest the extent to which Congress has ducked its own responsibility. The stage will then be set for the Supreme Court to do more to protect the Constitution from politicians seeking to dilute their accountability to the electorate.

⁵ *International Union, UAW v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994).

⁶ *National Environmental Survey*, prepared by the polling company for the Competitive Enterprise Institute (Jan, 1999).